

***Patent Remedies in Your Face***

John M. Golden<sup>1</sup>

Once a joint domain of inertia and arcana, questions of patent remedies now generate heated public debate. A recent Supreme Court decision<sup>2</sup> has spawned conflicting answers from lower courts<sup>3</sup> and a host of academic commentators<sup>4</sup> about when injunctions should issue. On Capitol Hill, Orwellian-named entities such as a pro-reform “Coalition for Patent Fairness” and a substantially anti-reform “Coalition for 21st Century Patent Reform” have poured millions into

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<sup>1</sup> Assistant Professor, University of Texas School of Law. I give credit for the title of this paper to a lecture by Sidney Coleman entitled *Quantum Mechanics in Your Face*.

<sup>2</sup> *eBay Inc. v. MercExchange, L.L.C.*, 545 U.S. 388 (2006).

<sup>3</sup> See John M. Golden, *The Supreme Court as “Prime Percolator”: A Prescription for Appellate Review of Questions in Patent Law*, 56 UCLA L. REV. (forthcoming 2009) (observing disagreement among lower courts about when to apply a presumption of irreparable harm that would favor issuing an injunction).

<sup>4</sup> See, e.g., Thomas F. Cotter, *Patent Holdup, Patent Remedies, and Antitrust Responses*, University of Minnesota Law School Legal Studies Research Paper No. 08-39, at 32 (2008) (suggesting that denial of injunctive relief may be specially justified in situations involving “a nonmanufacturing patentee”), at <http://ssrn.com/abstract=1273293>; Einer Elhauge, *Do Patent Holdup and Royalty Stacking Lead to Systematically Excessive Royalties?*, 4 J. COMPETITION L. & ECON. 535, 537 (2008) (providing reasons “not to shift from injunctive relief to damages”); Damien Geradin, Anne Layne-Farrar & A. Jorge Padilla, *The Complements Problem Within Standard Setting: Assessing the Evidence on Royalty Stacking*, 14 B.U. J. SCI. & TECH. L. 144, 174-75 (2008) (criticizing proposals to limit injunctive relief for categories of patent holders); John M. Golden, *“Patent Trolls” and Patent Remedies*, 85 TEX. L. REV. 2111, 2148-49 (2007) (suggesting that “[c]ourts could apply a rebuttable presumption of injunctive relief to all patent holders and still either stay an injunction ... or otherwise deny an injunction when, for example, it would inflict ‘undue hardship’ on the adjudged infringer or implicate special concerns of the public interest”); Paul J. Heald, *Optimal Remedies for Patent Infringement: A Transactional Model* 36 (concluding that injunctive relief should “depend on several factors, including the infringer’s knowledge and intent, and whether the infringer conducted a reasonable search”) (2008), at <http://ssrn.com/abstract=1278062>; Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 2036 (2007) (favoring restrictions on injunctions for patent holders that do not compete with an adjudged infringer or have not exclusively licensed the invention to an entity that does); J. Gregory Sidak, *Holdup, Royalty Stacking, and the Presumption of Injunctive Relief for Patent Infringement: A Reply to Lemley and Shapiro*, 92 MINN. L. REV. 714, 747 (2008) (characterizing Lemley and Shapiro’s proposal for “staying injunctive relief” as a “remedy prescribed for a problem whose existence and severity are preordained by the assumptions of the Lemley-Shapiro model”).

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Date: November 13, 2008

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lobbying to advance or to thwart new patent legislation.<sup>5</sup> A major point of contention has been legislative language intended to limit damage awards for infringement.<sup>6</sup>

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<sup>5</sup> Robert Pear, *Patent Bill Is Bonanza to Lobbyists*, N.Y. TIMES, Apr. 30, 2008, at C1 (“In 15 months, two dueling business coalitions have spent \$4.3 million lobbying on the legislation, which calls for the biggest changes in United States patent law in more than 50 years.”). Pushing for reform has been a “Coalition for Patent Fairness” including information technology, semiconductor, computer, and financial services titans such as Citigroup, Goldman Sachs, Time Warner, Apple, Microsoft, HP, Dell, Google, and Intel. Coalition for Patent Fairness, *Our Members*, [http://www.patentfairness.org/about\\_the\\_coalition/our\\_members.cfm](http://www.patentfairness.org/about_the_coalition/our_members.cfm) (last visited on Nov. 7, 2008) (providing access to lists of coalition members). Opposing existing reform bills, a “Coalition for 21st Century Patent Reform” has counted as members pharmaceutical, biotechnology, and chemical companies such as Merck, Genzyme, and DuPont; more traditional manufacturers such as 3M, General Electric, and Caterpillar; and a mélange of other entities including PepsiCo, CheckFree, and the American Intellectual Property Law Association. Coalition for 21st Century Patent Reform, *About Us*, <http://www.patentsmatter.com/about/coalition.php> (visited on Nov. 7, 2008) (listing coalition members). Further opposition has come from universities, labor unions, and an “Innovation Alliance” including independent inventors, communications giant Qualcomm, and smaller technology and patent holding companies. See David W. Opderbeck, *Patent Damages Reform and the Shape of Patent Law*, Seton Hall University School of Law Legal Studies Research Paper Series 7 (2008) (observing opposition to reform proposals from “many small and mid-size technology companies,” “academic research institutions, labor unions, the pharmaceutical and biotechnology industries, and the American Bar Association’s Section on Intellectual Property Law”), at <http://ssrn.com/abstract=1213160>; Paul Marks, *Inventors cry foul over patent law reform: Changes to US patent legislation designed to cut down on overly-broad patents could deny inventors the fruits of their ideas*, NEW SCIENTIST, Nov. 24, 2007, at 28 (“430 organisations, including biotech, nanotech, pharmaceuticals, transport, mobile telephony and chemicals firms, and universities, have joined ... independent inventors in an umbrella group called the Innovation Alliance.”). Compare Innovation Alliance, *Our Members*, <http://www.innovationalliance.net/about-us/our-members> (visited on Nov. 7, 2008) (listing a sampling of members), with Fortune, *Fortune 500*: 297. Qualcomm, <http://money.cnn.com/magazines/fortune/fortune500/2008/snapshots/10570.html> (visited on Nov. 7, 2008).

<sup>6</sup> See Opderbeck, *supra* note 5, at 1 (“Surprisingly ..., a key pressure point, which threatens to explode Congressional reform efforts, is found deep in the arcana of how damages are calculated for infringement.”); Tom Abate, *Tech titans, biotech firms wrangle over patent reform; Administration sides with biotech over awarding of damages; Senate to vote*, S.F. CHRON., Feb. 5, 2008, at C1 (reporting that the Bush administration’s opposition to a damages reform provision “puts the administration at odds with big technology firms like Intel, IBM, Apple, Google, Cisco and Hewlett-Packard ..., and squarely on the side of the biotech and venture capital industries”); John Markoff, *Two Views of Innovation, Colliding in Washington*, N.Y.

The dust kicked up by legislative, academic, and courtroom battles has made one fact all too clear. We really have little specific sense of what the value of remedies for patent infringement generally is or should be. And it seems unlikely that we will develop a precise idea anytime soon.

Until just a few years ago, decisionmakers tended to skate around this chasm of ignorance, generally trusting that the availability of injunctive relief for infringement would encourage or force private settlements that would bridge the gap. In accordance with this belief in the salving power of private settlement, even a patent skeptic such as Justice Douglas accepted the proposition that “[a] patent empowers the owner to exact royalties as high as he can negotiate with the leverage of that monopoly.”<sup>7</sup>

But the Supreme Court’s 2006 decision in *eBay Inc. v. MercExchange, L.L.C.*<sup>8</sup> has shaken confidence in the propriety of pushing patent leverage to its limit. Further, a smattering of court awards of a hundred million dollars or more has stoked cries to rein in patent damages. The search is on for more finely tuned remedies.

The hunt for a satisfactory remedial balance is likely to be a long one. It has already been profoundly unsettling. With a patentee’s ability to invoke the threat of an injunction in doubt, we can no longer duck the question of what a patent should be worth. Once the injunction backstop is removed, a patent license becomes all too clearly a contract to avoid the costs and uncertainty of litigation, rather than a contract for technology transfer. Rather than directly reflecting assessments of technological worth, supposed marketplace values may primarily reflect predictions of the damages a court would award and the litigation and other costs that would be required to obtain a court decision. Consequently, when the judicial system looks to the marketplace to assess patent value, it may find itself looking in a mirror.<sup>9</sup>

Commentators have not always appreciated the degree to which current debates demand deep rethinking. In an oft-cited article on patent remedies, Mark Lemley and Carl Shapiro call for reform but nonetheless suggest that patent law should not “displace the workings of the market” and “distor[t] the market allocation of resources.”<sup>10</sup> But once one abandons any sense

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TIMES, Jan. 13, 2008, at 33 (“As it now stands, the bill would shift the balance of power in the legal quarrels between patent holders and possible infringers by significantly limiting damage awards.”).

<sup>7</sup> *Brulotte v. Thys Co.*, 379 U.S. 29, 33 (1965).

<sup>8</sup> 545 U.S. 388 (2006).

<sup>9</sup> See Lemley & Shapiro, *supra* note 4, at 2021 (“While an effort by courts to mimic the market seems unexceptional, in fact reliance on private license deals involves a degree of circularity because the royalty rates in those deals are themselves set as a function of what patentees could get if they went to court.”).

<sup>10</sup> *Id.* at 2000 (disclaiming an intention to have patent law “displace the workings of the market” and “distor[t] the market allocation of resources”).

of a natural entitlement to patent rights or injunctions to enforce them, the latter suggestion is a non sequitur. The whole point of the patent system is to introduce market distortions by providing legal rights that induce changes in resource allocations.

Hence, if we are to have a patent system at all, the goal cannot be to avoid altering market behavior. More plausibly, we might seek, to the extent possible, to produce only the market distortions we want. Of course, designing a system of patent remedies that achieves this is hard. Fundamental problems of patent remedies are now very much in our face.

How then should we determine patent remedies' proper nature and scope? Unless we rely on a purely natural rights theory of patent law,<sup>11</sup> the answer seems destined to be primarily functional. As long as we understand patent law as government intervention justified as a means to one or more ends, we need to consider these ends to determine what the remedies for patent infringement should be.<sup>12</sup>

One could have any number of goals in mind. Rewarding favorites,<sup>13</sup> promoting technological progress,<sup>14</sup> maximizing social wealth,<sup>15</sup> stimulating individual creativity,<sup>16</sup> and generating a more "just and attractive culture"<sup>17</sup> all plausibly describe either past or potential aims of patent rights. To limit the current project's unwieldiness, however, I generally assume a goal for patent law that has become standard in modern accounts: the patent system should act to

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<sup>11</sup> See William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168, 170 (Stephen R. Munzer ed., 2001) (describing justification of intellectual property on the ground that an individual "has a natural property right to the fruits of his or her efforts").

<sup>12</sup> Cf. Heald, *supra* note 4, at 13 ("The goal of remedies for patent infringement should be to provide incentives for efficient transactions to occur ....").

<sup>13</sup> See ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, *PATENT LAW AND POLICY: CASES AND MATERIALS* (4th ed. 2007) ("With the accession of James I of England in the early seventeenth century, patents became less an incentive for new arts and more a royal favor to be dispensed to well-placed courtiers.").

<sup>14</sup> See U.S. Const. art. I, § 8, cl. 8 (granting Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

<sup>15</sup> See Fisher, *supra* note 11, at 169 (noting "the familiar utilitarian guideline that lawmakers' beacon when shaping property rights should be the maximization of net social welfare").

<sup>16</sup> See *id.* at 171 (describing justification for intellectual property rights "on the ground that they shield from appropriation or modification artifacts through which authors and artists have expressed their 'wills' ... or on the ground that they create social and economic conditions conducive to creative intellectual activity").

<sup>17</sup> *Id.* at 172.

promote the development, disclosure, and use of new technologies, ideally in a way that maximizes social welfare.<sup>18</sup> For purposes of further simplicity, social welfare will frequently be assumed to be at least approximately represented by the long-term sum of the consumer and producer welfare associated with goods or services that incorporate a patented invention. This is another quite standard assumption.<sup>19</sup>

A default focus on such a goal of economic efficiency does more than simplify the analysis. Nor is this focus merely justified by some combination of convenience plus patent law's underlying constitutional charge “[t]o promote the Progress of Science and useful Arts.”<sup>20</sup> This focus both facilitates a certain degree of analytic precision and also enables substantial reference to an existing body of economic literature. The insights that result can sharpen our intuition about how to advance any of a number of potential goals.<sup>21</sup>

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<sup>18</sup> See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 4 (2003) (“Today it is acknowledged that analysis and evaluation of intellectual property law are appropriately conducted within an economic framework that seeks to align that law with the dictates of economic efficiency.”); STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 139 (2004) (“Information should be created if and only if its development cost is lower than its optimal social value.”); see also Richard S. Markovits, *On the Economic Efficiency of Using Law to Increase Research and Development: A Critique of Various Tax, Antitrust, Intellectual Property, and Tort Law Rules and Policy Proposals*, 39 HARV. J. ON LEGIS. 63, 118 (2002) (“Recent scholarship suggests that judicial determinations of the breadth of patent and copyright protection have been substantially influenced by the judges’ conclusions about the allocative efficiency of broadening the protection given.”).

<sup>19</sup> See, e.g., WILLIAM D. NORDHAUS, *INVENTION, GROWTH, AND WELFARE: A THEORETICAL TREATMENT OF TECHNOLOGICAL CHANGE* 76 (1969) (developing an approach to calculating optimal patent life based on maximizing “net surplus (consumers’ plus producers’ surplus less resource cost)”). Of course, restriction of attention to the sum of consumer and producer surplus is likely to ignore effects such as positive and negative “spillovers” to members of society who are neither paying consumers nor producers of the products or services considered. Cf. Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 258 (2007) (“Spillovers—uncompensated benefits that one person’s activity provides to another—are everywhere.”).

<sup>20</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>21</sup> This seems especially true given that many proposed goals, such as promoting technological progress or stimulating creativity, appear to be distinct but not orthogonal to a goal of maximizing the long-term sum of consumer and producer welfare. In certain respects, the interests of various candidate goals are likely to be aligned. In additional respects, aspects of analyses of how to promote those goals are likely to be at least qualitatively similar. Thus, learning how to promote a goal of economic efficiency is likely to provide insight on how to

In any event, even when we limit our field of vision as described, the task of designing patent remedies is hard enough. And this difficulty is a central, if not the central, theme of this paper. Allowing for the possibility of different and often more diffusely defined goals is likely only to further complicate the task. Thus, I suspect that many of the conclusions of this paper are robust across a wide spectrum of justifications for patent law.

Why is the task of designing patent remedies so hard? One of the major reasons is that there are a host of different behaviors that we would like to optimize. On the part of patent holders, these behaviors include (1) creation of inventions; (2) disclosure of inventions; (3) provision of notice of the scope of patent rights claimed; and (4) action to promote inventions' further development, improvement, dissemination, or commercialization. Relevant behaviors of potential patent infringers are similarly numerous. They include (1) use, dissemination, improvement, and commercialization of new technologies; (2) assessment of the scope and validity of others' patent rights; (3) licensing or purchase of patent rights; (4) challenges to patent claims of questionable validity or breadth; and (5) design of new, non-infringing technologies that compete with already patented technologies.

The result is a complex situation for which it is difficult, if not impossible, to draft judicially administrable rules that provide optimal incentives for all behaviors.<sup>22</sup> Real-world systems for promoting invention and its use are likely to be “frustrated”—perhaps having one or more generally preferred forms but lacking any state in which all interests are simultaneously satisfied.<sup>23</sup>

Moreover, the prospects for optimal policymaking are even bleaker than the number of relevant behaviors suggests. This is because, even under a given set of legal rules, the actual cost-benefit balance for a particular behavioral choice is often unclear or, at least, highly context-dependent. For starters, even when perfect compliance with patent law is assumed, what a patentee extracts from a market can depend significantly on external circumstances that have little to do with the invention and over which the patentee has little control. For example, a non-manufacturing patentee licensing an invention to a competitive market will often be expected to obtain significantly more revenue and a larger share of the invention's realized value than if the

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promote other interests that similarly rely on the interaction between legal rules, collective and individual propensities, and social institutions.

<sup>22</sup> Cf. Lucian Arye Bebchuk, *Property Rights and Liability Rules: The Ex Ante View of the Cathedral*, 100 MICH. L. REV. 601, 632 (2001) (finding that none of an array of potential legal rules would provide optimal incentives for both of two parties because none would “enable both parties to capture the full social benefits produced by their respective investments in harm reduction”).

<sup>23</sup> See P.M. CHAIKIN & T.C. LUBENSKY, *PRINCIPLES OF CONDENSED MATTER PHYSICS* 670 (1995) (defining “frustration” as “[t]he inability of a model system to satisfy all of its bonds, usually because of topological constraints”).

market is dominated by a monopolist.<sup>24</sup> But of course, whether the market for commercialization is competitive or monopolistic frequently has nothing to do with the invention's technological merit.

Further, typical costs and benefits of inventions and their commercialization can depend enormously on the particular technology or patent at issue. The costs and benefits of developing and commercializing a better mousetrap are likely to differ substantially from those of developing and commercializing a new pharmaceutical. Indeed, even within a particular class of technology, variety and variance can make the task of policymakers exceptionally hard, in part because the realized market values for inventive activity commonly follow a skew distribution that defies conventional statistical treatment according to the "law of large numbers."<sup>25</sup> Perhaps unsurprisingly therefore, existing economic literature suggests that the optimal shape of any strategy for promoting technological progress depends strongly on context.

Another fact often less considered by economists is that the ease of providing effective patent notice can similarly vary widely across technologies. As James Bessen and Michael Meurer argue, patents for new chemical entities, for which descriptive language has become fairly standard and concrete, tend naturally to provide much better notice of patent scope than patents for computer-based applications of new algorithms, for which descriptive language is often idiosyncratic or abstract.<sup>26</sup>

Such complexity and contingency might seem destined to foil any efforts to develop general principles for patent remedies. I contend, however, that the condition of complexity and

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<sup>24</sup> See Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in NATIONAL BUREAU OF ECONOMIC RESEARCH, THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609, 620-21 (1962) (showing that, at least under a substantial range of conditions, the inventor's royalties when licensing to a competitive market exceed a monopolist's gain from use of the invention); cf. LYNNE PEPALL, DANIEL J. RICHARDS & GEORGE NORMAN, INDUSTRIAL ORGANIZATION: CONTEMPORARY THEORY AND PRACTICE 594 (1999) ("The competitive firms value the innovation more than the monopolist, but both undervalue the innovation relative to the social planner." (emphasis omitted))

<sup>25</sup> See NORDHAUS, *supra* note 19, at 56 (observing that prior work indicated that patent values are distributed in such a way that "[d]ispersion or risk increases as the number of projects increases because the law of large numbers does not hold" (emphasis omitted)); cf. JAMES BESSEN & MICHAEL J. MEURER, PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK 100 (2008) ("The distribution of patent values is quite 'skewed'; that is, most patents have little value, but a small number are very valuable.").

<sup>26</sup> Compare BESSEN & MEURER, *supra* note 25, at 152 ("It is straightforward to compare a patented molecule to the structure of a prospective infringing molecule."), *with id.* at 201 ("We argue that the abstractness of software technology inherently makes it more difficult to place limits on abstract claims in software patents.").

contingency itself suggests five general principles that should inform any system of patent remedies and, indeed, any system for rewarding invention or innovation:

- *Nondiscrimination* : In the absence of agreement that only one specific class of business models generally best promotes technological progress, the patent system should try to avoid, or at least to limit its contribution to, loading of the societal dice in favor of a particular business model for invention or its commercialization. Thus, to the extent reasonably possible, the patent system should not systematically favor one degree of vertical or horizontal integration over another. Some de facto discrimination is all but inevitable: at some level, the mere existence of costs for obtaining and enforcing patent rights will likely disfavor individuals or entities lacking ready access to capital. But such de facto discrimination can often be mollified. Further, de jure discrimination, such as a rule disallowing injunctive relief for any patentee who is not in sales competition with the infringer, can often be avoided entirely.
- *Nonabsolutism*: A certain flexibility in the formulation or application of legal doctrine seems recommended by the strong context dependence of any rule set's effectiveness in promoting optimal development and use of invention. As Ian Ayres and Paul Klemperer have shown, basic assumptions of profit-maximizing behavior provide substantial grounds for incorporating flex in the patent system: under a wide range of circumstances, the last ounce of value squeezed from patent rights is likely to be the least profitable for the patent holder and the most costly for society.<sup>27</sup> Some flexibility and even a marginal degree of uncertainty in the application of patent doctrine can help limit a patent holder's desire or capacity to seize that last ounce, as well as providing a more general check against strategic behavior or abuse.
- *Administrability*: In any attempt to design an optimal system of patent remedies, there will be a temptation to go too far in a Sisyphean effort to account for complexity and contingency. But even if a comprehensively optimal system could be drafted on paper, it would almost certainly be practically unadministrable as conceived. Moreover, after a certain level of detail is reached, additional improvements may have only marginal effects. Under typical conditions of complexity and contingency, private actors will generally have to allocate resources on the basis of only rough judgments. A remedies regime operating at a substantially finer level of granularity will likely waste effort on details that offer little social benefit.
- *Devolution*: Given the government's limited ability to assess how best to advance a wide range of technologies in variable market conditions, patent law should

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<sup>27</sup> See Ian Ayres & Paul Klemperer, *Limiting Patentees' Market Power Without Reducing Innovation Incentives: The Perverse Benefits of Uncertainty and Non-Injunctive Remedies*, 97 MICH. L. REV. 985, 987 (1999) ("The last bit of monopoly pricing produces large amounts of deadweight loss for a relatively small amount of patentee profit.").

incorporate a principle of devolution, a principle of permitting and encouraging private parties to develop institutions and patterns of behavior that further technologies' generation, dissemination, and use. Private parties may often possess better knowledge than government actors about the relative worth of technological prospects and the most effective ways to exploit them. Further, even if private parties lack better initial knowledge, they may do a better job exploring options, thereby producing more optimal results through a distributed process of trial and error. A system of patent remedies that seeks to be too finely tuned may encourage socially excessive reliance on government actors, while increasing rent seeking to boot.

- *Learning*: Uncertainty about how best to promote invention, its dissemination, and its productive use suggests that patent law should be designed in a way that permits and encourages learning and adaptation. Fidelity to a principle of non-absolutism already tends to foster information gathering and adaptation in cases where existing legal doctrine leaves room for argument or exception. But even clear default rules can promote better information generation, preservation, and use. For example, clear assignments of burdens of proof to “cheapest information providers” can improve the information made available to courts and other decisionmakers.<sup>28</sup>

Of course, the preceding principles are not exclusive and do not necessarily point to a single policy solution. Indeed, in any given policy debate, such precise determinism is unlikely. Even in the absence of additional factors to consider, the five principles may be under-determinative or even at odds.

Nonetheless, the five principles can provide substantial guidance. At the very least, they can help to set the terms of debate, providing a framework for assessing a policy proposal's relative merits and suggesting how burdens of production and persuasion should be assigned. Further, the five principles can more generally aid identification of the shortcomings and strengths of a proposal, and may suggest ways in which a proposal can be improved.

This article's argument for the desirability and utility of the five principles proceeds as follows. Part I describes the nature of patent rights, their potential purposes, and the role of patent remedies in determining patent value. Part II discusses empirical and theoretical work relating to the benefits, costs, and value of patent rights. A key lesson from this work is that patents' benefits, costs, and value depend significantly on exogenous factors that often have little to do with any intrinsic worth of the patented technology. Likewise, the relative worth to private parties or society of different strategies for creating an invention or realizing its value can depend strongly on extrinsic context. Part III articulates the five guiding principles suggested by the complexity and contingency that Part II describes. Part IV then applies these principles to contemporary debates about the availability of injunctive relief, the provision of court-ordered

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<sup>28</sup> See Glen O. Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713, 733-34 (1982) (discussing reasons for “placing the burden [of proof] on the cheapest information-provider”).

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compulsory licenses, measures of damages, and the possibility of an exemption from patent remedies for prior users or independent creators of a patented invention.