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"Justifying" The Public Interest in Patent Litigation

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“Justifying” the Public Interest in Patent Litigation

SCOTT A. ALLEN*

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INTRODUCTION

The U.S. International Trade Commission (“ITC” or “Commission”) is a unique administrative law venue, one that in recent years has become a hotspot for enforcing intellectual property rights.¹ Section 337 of the Smoot-Hawley Tariff Act of 1930 (“Section 337”) grants the Commission a powerful tool and broad discretion: the authority to enjoin parties from importing articles that infringe U.S. intellectual property rights.² In a little over a decade, the number of Section 337 cases ballooned from only twenty-five in 2000³ to “a record high of 103” in 2010.⁴ The significant increase in patent-related Section 337 investigations “suggest[s] that, contrary to congressional intent, the ITC has become a general forum for

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1. Thomas A. Broughan, III, *Modernizing § 337’s Domestic Industry Requirement for the Global Economy*, 19 FED. CIRCUIT B.J. 41, 41 (2009) (“The [ITC] is an increasingly popular venue for entities seeking to enforce their patent rights.”).

2. 19 U.S.C. § 1337 (2006); see also John C. Evans, Note, *Addressing Default Trends in Patent-Based Section 337 Proceedings in the United States International Trade Commission*, 106 MICH. L. REV. 745, 749–50 (2008).

3. U.S. INT’L TRADE COMM’N, YEAR IN REVIEW: FISCAL YEAR 2000 16 (2000), available at http://www.usitc.gov/publications/year_in_review/PUB3445.pdf.

4. U.S. INT’L TRADE COMM’N, YEAR IN REVIEW: FISCAL YEAR 2010 14 (2010), available at http://www.usitc.gov/publications/year_in_review/pub4212.pdf.

enforcing patent rights rather than a forum for protecting domestic companies.”⁵ The trend is so pronounced that the U.S. Court of Appeals for the Federal Circuit, which has appellate jurisdiction over the ITC,⁶ recently found itself in disagreement about the nature of the forum and whether it is “charged . . . with administering a statute having a *primary purpose* of enforcing valid intellectual property rights.”⁷

Unlike the Patent Act,⁸ which provides the statutory authority to bring an action for patent infringement in federal district court, the statutory provisions that govern Section 337 actions expressly mandate consideration of the public interest when determining a remedy for patent infringement.⁹ The statute provides that “[i]f the Commission determines . . . that there is a violation of [the] section, it shall direct that the articles concerned . . . be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare . . . it finds that such articles should not be excluded from entry.”¹⁰

While there is no analogous statutory provision in the Patent Act, consideration of the public interest is part of the common law applicable to remedies for patent infringement. Historically, only in very “rare instances”¹¹ were patentees denied injunctions in the name of the “public interest”—mostly regarding the public health.¹² The Supreme Court’s decision in *eBay Inc. v. MercExchange, LLC*,¹³ however, articulated a rule for granting injunctions that firmly embedded in the common law a public interest consideration similar to that implemented by the ITC.¹⁴ In *eBay*, the Court rejected the Federal Circuit’s “general rule” that “a permanent injunction will issue once infringement and validity have been adjudged.”¹⁵ The Court instead implemented what is called “the traditional four-factor test [for injunctions],”¹⁶ one factor of which requires the patentee to affirmatively show whether “the public interest would . . . be [served or] disserved by a permanent injunction.”¹⁷

5. Broughan, *supra* note 1, at 43.

6. See 28 U.S.C. § 1295(a)(6) (2006 & Supp. 2011).

7. *John Mezzalingua Assocs. v. Int’l Trade Comm’n*, 660 F.3d 1322, 1339 (Fed. Cir. 2011) (Reyna, J., dissenting in part) (emphasis added) (objecting to the majority’s characterization of the ITC as “fundamentally a trade forum, not an intellectual property forum”).

8. 35 U.S.C. §§ 1–376 (2006).

9. See 19 U.S.C. § 1337(d)(1) (2006).

10. *Id.*

11. *Rite-Hite Corp. v. Kelley Co., Inc.*, 56 F.3d 1538, 1547 (Fed. Cir. 1984).

12. See, e.g., *Vitamin Technologists, Inc. v. Wisconsin Alumni Research Found.*, 146 F.2d 941 (9th Cir. 1945) (public interest warranted refusal of injunction on irradiation of oleomargarine); *City of Milwaukee v. Activated Sludge, Inc.*, 69 F.2d 577 (7th Cir. 1934) (injunction refused against city operation of sewage disposal plant because of public health danger).

13. 547 U.S. 388 (2006).

14. *Id.* at 393–94.

15. *Id.* (citing *MercExchange, LLC v. eBay, Inc.*, 401 F.3d 1323, 1338 (Fed. Cir. 2005)).

16. *Id.* at 393.

17. *Id.* at 391.

The Federal Circuit confronted the similarity between the two public interest doctrines—the ITC and the common law—in *Spansion, Inc. v. International Trade Commission*,¹⁸ holding that the two do not necessarily inform one another.¹⁹ The Federal Circuit held that “[t]he difference between exclusion orders granted under Section 337 and injunctions granted under the Patent Act . . . follows the long-standing principle that importation is treated differently than domestic activity.”²⁰ Yet, that holding is unfulfilling; one cannot help but compare and contrast the two.²¹ In either scenario, the public interest is positioned to trump an intellectual property owner’s fundamental ability to exclude others.²²

There is every indication that the “public interest” is poised to take a more prominent role in patent litigation.²³ In fact, the ITC recently finalized a rule that

18. 629 F.3d 1331, 1359 (Fed. Cir. 2010).

19. *Id.*; *id.* at 1357 (addressing whether “the public interest inquiry in this context is similar to the traditional test for injunctive relief that district courts apply under [*eBay*]”).

20. *Id.* at 1359 (internal quotation marks omitted) (citing *In re Certain Baseband Processor Chips and Chipsets, Transmitter and Receiver (Radio) Chips, Power Control Chips, and Products Containing Same, Including Cellular Telephone Handsets*, Inv. No. 337-TA-543, 2007 ITC LEXIS 621, *102 n.230 (USITC June 19, 2007)); *see also* United States v. 12 200-ft. Reels of Super 8mm. Film, 413 U.S. 123, 125 (1973).

21. Litigants that have been attracted to the ITC because it is perceived as an easier forum to seek injunctive relief after *eBay* certainly might weigh the differences between the “public interest factors” of each forum. *See, e.g.*, Broughan, *supra* note 1, at 73–74 (comparing and contrasting the *eBay* factors with the public interest factors used in Section 337 investigations, stating: “The equitable discretion available to the ITC differs from the discretion granted to district courts when evaluating a permanent injunction; however, it is more than adequate to address the problems with [non-practicing entities].” (citations omitted)); Robert J. Walters & Christopher G. Paulraj, *Is a Revival of the “Public Interest” Factors in the Works by the ITC?*, PAT. TRADEMARK & COPYRIGHT L. DAILY (Oct. 14, 2011), <http://news.bna.com/ptdm> (“Another benefit recognized by complainants in ITC investigations is that the ITC is not bound by the Supreme Court’s decision in *eBay Inc. v. MercExchange, LLC*, which limited the availability of injunctive relief in district court civil actions. Nonetheless, it may come as a surprise that the ITC is not necessarily *required* to issue a remedial order” (emphasis in original)); *see also* Rules of Adjudication and Enforcement, 76 Fed. Reg. 64,803, 64,806 (Oct. 19, 2011) (to be codified at 19 C.F.R. pt. 210) (discussing whether the Commission should adopt the standard for obtaining a permanent injunction set forth in *eBay*).

22. *See, e.g.*, Michael W. McConnell, *Contract Rights and Property Rights*, in LIBERTY, PROPERTY, AND THE FOUNDATION OF THE AMERICAN CONSTITUTION 156 (Ellen Frankel Paul & Howard Dickman eds., 1989) (“The Madisonian explanation gains force when contract and property rights are distinguished not on the conventional ground but on a more sophisticated legal basis expounded by Professor Wesley Hohfeld. Under his analysis, the distinctive feature of property is that it is a right ‘good against the world,’ while contract is a right good only against determinate persons”); Richard B. Klar, *Ebay Inc. v. MercExchange, L.L.C.: The Right to Exclude Under U.S. Patent Law and the Public Interest*, 88 J. PAT. & TRADEMARK OFF. SOC’Y 852, 858 (2006) (“The constitution provides for the framework for a patent owner to have exclusive rights within the system. The right to exclude is of primary importance in order to encourage inventors to share their technology with the public in exchange for a limited (by time) monopoly.”).

23. Broughan, *supra* note 1, at 73 (“Thus, it is no longer proper to categorically assume

will allow the agency to gather more information on the potential public interest issues resulting from a Section 337 investigation.²⁴ The new rule requires complainants seeking to block allegedly infringing goods from the United States to file a separate statement, concurrently with a complaint, discussing the “public interest[s]” involved.²⁵ This move shifts the consideration of the public interest from the background, a final safety valve, to the very forefront of an investigation.²⁶

At the same time, both patent law commentators and the Federal Circuit have signaled that it is important to refocus on intellectual property as a fundamental property right. For example, in the Federal Circuit’s recent opinion in *Robert Bosch LLC v. Pylon Manufacturing Corp.*, Judge O’Malley commented on patent rights in the post-*eBay* era: “[E]ven though a successful patent infringement plaintiff can no longer rely on presumptions or other short-cuts to support a request for a permanent injunction, it does not follow that courts should entirely ignore *the fundamental nature of patents as property rights granting the owner the right to exclude.*”²⁷ In his recent book, *Justifying Intellectual Property*,²⁸ Professor Robert Merges makes the observation that “courts often wind up talking about IP rights *as rights*,” but are often too busy “to notice the significance of this move.”²⁹

In response, Merges makes it the purpose of *Justifying Intellectual Property* to “notice” the shift from regarding intellectual property as a system of social utility to one of fundamental rights, noting that “the hallmark of a right is that social utility alone is not reason enough to override it.”³⁰ Merges develops a framework for

in every case that the public interest favors injunctive relief in patent infringement cases without balancing the interest in IP protection with the public’s countervailing interests.”); *see also* Dennis Crouch, *Injunctive Relief and the Public Interest at the ITC*, PATENTLYO L. BLOG (Dec. 21, 2011), <http://www.patentlyo.com/patent/2011/12/injunctive-relief-and-the-public-interest-at-the-itc.html>.

24. Jacqueline Bell, *ITC Adopts New Public Interest Rule for Patent Cases*, LAW 360 (Oct. 19, 2011, 5:22 PM), <http://www.law360.com/articles/279045>; Rossella Brevetti, *ITC Amends Rules to Get More Info on Public Interest in Section 337 Cases*, PAT. TRADEMARK & COPYRIGHT L. DAILY (Oct. 25, 2011), <http://news.bna.com/ptdm>.

25. Rules of Adjudication and Enforcement, 76 Fed. Reg. at 64,803. The notice states that the new regulations are slightly different from the proposed rules which “require that the complainant provide in its complaint specific information regarding how issuance of an exclusion order and/or a cease and desist order in an investigation could affect the public health and welfare in the United States.” *Id.* at 64,804. The new rules provide that, “instead of including public interest information in the complaint, complainants will be required to file a separate statement of public interest concurrently with the filing of the complaint.” *Id.* at 64,805. The final regulations contained eleven changes from the proposed rules, published in 75 Fed. Reg. 60,671 (Oct. 1, 2010), which were available to the public for comment. Rules of Adjudication and Enforcement, 76 Fed. Reg. at 64,804.

26. *See* Bell, *supra* note 24.

27. 659 F.3d 1142, 1149 (Fed. Cir. 2011) (emphasis added); *see also* *Zoltek Corp. v. United States*, 464 F.3d 1335, 1336 (Fed. Cir. 2006) (Newman, J., dissenting) (“My concern with my colleagues’ position starts with their apparent rejection of the premise that patents are property and subject to the Fifth Amendment.”).

28. ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* (2011).

29. *Id.* at 3 (emphasis in original).

30. *Id.*; *see also id.* at 302 (“I have tried not to even talk about balance, but instead to *show what it looks like*, in detail.” (emphasis in original)).

justifying intellectual property as "a right first" using the philosophical cannons of John Locke, Immanuel Kant, and John Rawls.³¹ Necessarily, Merges also discusses instances when it is permissible to *exempt* infringement of intellectual property.

Along a similar, but more narrow vein, this Comment utilizes Merges's model to explore the justifiability of using public interest factors—particularly in the ITC—to strip a patent owner of his or her right to exclude and assesses the effectiveness of public interest considerations in patent forums. Part I explores the development of public interest factors in both federal district court and ITC patent litigation. This Part will explore the rare, anomalous cases where the public interest has successfully prevailed over an exclusion order and survey several cases where public interest was overcome. Part II explores and extracts the relevant portions of Professor Merges's framework for justifying intellectual property, reconciling his theories with other theories of property along the way. Part III tests the fact patterns of several of the example cases against Merges's philosophical framework. Finally, Part IV assesses the effectiveness of the public interest consideration and suggests how litigation arising under the Patent Act might borrow from the experiences of the ITC. Part IV proposes that developing and/or codifying a doctrine of compulsory licensing in one or both forums might best implement a Merges-type framework. It concludes that, contrary to the Federal Circuit's comments in *Spansion*, the two forums might indeed "inform" one another.³²

I. PUBLIC INTEREST IN THE PATENT LAWS

While elementary in nature, this discussion must begin with a basic premise: a patent is intellectual property and intellectual property is a form of personal property.³³ By definition, an element of property is the right to exclude others³⁴—it

31. *Id.* at 305 ("I moved from a conventional utilitarian understanding of IP rights to something else, something based on the nonutilitarian philosophical ideas of Locke, Kant, and Rawls.").

32. *Spansion, Inc. v. Int'l Trade Comm'n*, 629 F.3d 1331, 1359 (Fed. Cir. 2010); see also Sapna Kumar, *The Other Patent Agency: Congressional Regulation of the ITC*, 61 FLA. L. REV. 529, 533 (2009) (proposing that "Congress amend § 337 to harmonize ITC patent law with the Patent Act").

33. See, e.g., Patricia L. Farnese, *Patently Unreasonable: Reconsidering the Responsibility of Patentees in Today's Inventive Climate*, 6 TUL. J. TECH. & INTELL. PROP. 1, 4 (2004) ("A patent is a property right. Most people associate property rights with ownership.").

34. The right to exclude is statutorily recognized under the Patent Act. 35 U.S.C. § 154(a)(1) (2006). There is a voluminous literature discussing the in rem nature of a property right. See, e.g., DAVID D. FRIEDMAN, *LAW'S ORDER* 109 (2000) (stating that "[t]he most striking difference between contract law and property law is that while a contract right is good only against the other party to the contract, a property right is good against the world"); WERNER Z. HIRSCH, *LAW AND ECONOMICS* 18 (1979) ("The right to property is the power to exclude others from or give them access to a benefit or use of the particular object."); Farnese, *supra* note 33, at 4 ("[Patent] ownership is associated with exclusive possession, control and enjoyment of a specific res, by a particular person."); Oliver Hart & John Moore, *Property Rights and the Nature of the Firm*, 98 J. POL. ECON. 1119, 1121 (1990) (defining property as the "right . . . to exclude others from the use of [an] asset").

is often said that it is a right good against the world.³⁵ That right is not unbounded, however: “Because property (like all rights) permits private individuals to bring the power of the state to bear against other citizens, the conditions surrounding the use of this power are always relevant, always of interest to the legal system.”³⁶ One way the fundamental right of a patent owner to exclude others is bounded is by consideration of the “public interest.” While the invocation of the public interest as a way to circumvent the right to exclude may be considered a “rarity”³⁷ due to its historically infrequent success, it is a consideration provided for in actions arising under the Patent Act and in ITC investigations. Going forward, litigating and adjudicating public interest factors will likely become much more common.³⁸

A. The Public Interest in the Patent Act

There is no statutory basis for federal district courts to invoke public interest to deny a permanent injunction to a litigant who successfully establishes infringement of a valid patent. Rather, public interest enters the scene by way of the common law governing remedies. For many years, however, not even the common law allowed much equitable discretion over the grant of injunctions. The Federal Circuit, established in 1982³⁹ with exclusive appellate jurisdiction over causes of action arising under the Patent Act,⁴⁰ established a historical precedent of essentially granting injunctions automatically once infringement was found.⁴¹

Historically, the Federal Circuit only denied permanent injunctions in extremely “rare instances” where a patentee’s decision not to practice the patent “frustrate[d] an important public need for the invention.”⁴² The Federal Circuit’s preference to grant permanent injunction “stems from a belief that once infringement has been

35. For example, William Blackstone once defined property as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.” 2 WILLIAM BLACKSTONE, COMMENTARIES *2; see also Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 358 (2001) (stating that one conception of property is that “property is a distinctive type of right to a thing, good against the world”).

36. MERGES, *supra* note 28, at 12.

37. See Walters & Paulraj, *supra* note 21 (noting that the “ITC has only rarely considered these public interest factors to be dispositive in its determination”); *Certain Home Vacuum Packaging Prods., Inv. No. 337-TA-496, USITC 3681*, at 3–4 (Mar. 1, 2004) (Final); see also Kumar, *supra* note 32, at 567 (stating that “[i]f the ITC finds that an imported article infringes a patent, then the default presumption under § 337 is that it will award an exclusion order” and that “denials of injunctive relief after a finding of infringement are extremely uncommon”).

38. See, e.g., Walters & Paulraj, *supra* note 21.

39. See 28 U.S.C. § 1295 (2006). The Federal Circuit was established under Ronald Reagan’s Federal Courts Improvement Act of 1982 and charged with creating uniformity amongst the patent laws. Pub. L. No. 97-164, 96 Stat. 25 (1982).

40. 28 U.S.C. § 1295(a)(1).

41. See, e.g., *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1246–47 (Fed. Cir. 1989); *W.L. Gore & Assocs., Inc. v. Garlock, Inc.*, 842 F.2d 1275, 1281 (Fed. Cir. 1988).

42. *Rite-Hite Corp. v. Kelley Co., Inc.*, 56 F.3d 1538, 1547 (Fed. Cir. 1995).

established denying a patentee the right to exclude is contrary to the laws of property.”⁴³ Before 2006, the case law regarding the public interest in patent infringement litigation over permanent injunctions was sparse. Most cases containing any relevant discussions about the public interest only did so in the context of preliminary injunctions, before a patent was found to be valid and infringed.⁴⁴

It was not until the Supreme Court’s decision in *eBay Inc. v. MercExchange LLC*⁴⁵ that district courts were given, in a practical sense, equitable discretion over injunctions in patent infringement cases.⁴⁶ The Court chastised the Federal Circuit for its rigid application of injunctions upon a showing of liability—its “automatic rule”—and instead implemented what is described as “the traditional four-factor test for injunctions.”⁴⁷ The Supreme Court took issue with the Federal Circuit’s comment that “[i]f the injunction gives the patentee additional leverage in licensing, that is a natural consequence of the right to exclude and not an inappropriate reward to a party that does not intend to compete in the marketplace with potential infringers.”⁴⁸ Overruling the Federal Circuit, the Court articulated a balancing test:

According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that *the public interest would not be disserved by a permanent injunction*.⁴⁹

Although the Court repeatedly stated that neither of the lower court decisions applied what it called the “traditional four-factor framework,” remedies scholars have pointed out that there is no such thing as “the *traditional* test.”⁵⁰ Before *eBay*, “[r]emedies specialists had never heard of the four-point test.”⁵¹ Neither of the

43. See Klar, *supra* note 22, at 855 (citing 35 U.S.C. § 154 and Honeywell Int’l, Inc. v. Universal Sys. Corp., 347 F. Supp. 2d 114 (D. Del. 2004)).

44. See, e.g., Hybritech Inc. v. Abbott Labs., 849 F.2d 1446, 1458 (Fed. Cir. 1988) (stating that “the district court’s public interest analysis should be whether there exists some critical public interest that would be injured by the grant of preliminary relief”); Ethicon Endo-Surgery v. United States Surgical Corp., 855 F. Supp. 1500, 1517 (S.D. Ohio 1994).

45. 547 U.S. 388 (2006).

46. See *id.* at 391.

47. See *id.* at 393–94.

48. MercExchange, LLC v. eBay, Inc., 401 F.3d 1323, 1339 (Fed. Cir. 2005).

49. *eBay*, 547 U.S. at 391 (emphasis added) (citing Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542 (1987) and Weinberger v. Romero-Barcelo, 456 U.S. 305, 311–13 (1982)).

50. DOUGLAS LAYLOCK, MODERN AMERICAN REMEDIES 426 (4th ed. 2010) (“But there was no ‘traditional’ four-part test.”).

51. Doug Rendleman, *The Trial Judge’s Equitable Discretion Following eBay v. MercExchange*, 27 REV. LITIG. 63, 76 n.71 (2007); see also John M. Golden, *The Supreme*

cases cited by the Court included a four-factor test for permanent injunctions: in *Amoco*, the injunction at issue was a *preliminary* injunction,⁵² and in *Romero-Barcelo*, while the injunction at issue was granted at the end of a complete trial, it was only preliminary in nature.⁵³ Indeed, while “[e]Bay and many of its amici, and the U.S. Solicitor General, who was supporting MercExchange, all referred to some version of four traditional considerations . . . [t]hey did not all cite the same four factors, and none of the lead briefs offered anything so flat footed as the Court’s formulation.”⁵⁴ At least one commentator has gone as far as saying that the “Court’s traditional four-factor test appears to have been something of a hoax.”⁵⁵

Nevertheless, with respect to the public interest consideration, after *eBay* a plaintiff is now required to affirmatively demonstrate each of the four factors, meaning a plaintiff must raise and negate public interest concerns. Regardless of whether it is a new factor required for permanent injunctions or possibly a restatement of a traditional consideration, the public interest will clearly be a concern going forward. In fact, following the *eBay* decision, district courts have declined to issue injunctive relief in approximately one out of every four cases where infringement has been shown.⁵⁶ Left with little guidance by the Court on how to apply this “new” factor, the application of public interest will certainly be explored by academics and practitioners. There remains the question of when, if ever, the public interest is sufficient to deny a patent owner its right to exclude.

B. The Public Interest in Section 337 Patent Investigations at the ITC

1. Statutory Background of the “Public Interest” Considerations

19 U.S.C. § 1337(d)(1) provides that

[i]f the Commission determines . . . that there is a violation of [the] section, it shall direct that the articles concerned . . . be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare . . . it finds that such articles should not be excluded from entry.

Besides the broad and all-encompassing “public welfare,” the statute enumerates three other, more specific, considerations: (1) “competitive conditions in the United

Court as a “Prime Percolator”: A Prescription for Appellate Review of Questions in Patent Law, 56 UCLA L. REV. 657, 695 (2009) (“According to at least two experts in remedies law, there was no widespread tradition of such a test for permanent injunctions.”).

52. See *Amoco Prod. Co.*, 480 U.S. at 542.

53. See *Romero-Barcelo*, 456 U.S. at 311–13.

54. LAYLOCK, *supra* note 50, at 427.

55. Golden, *supra* note 51, at 695 (discussing what Golden terms “the four-factor mess”).

56. See Ernest Grumbles III, Rachel C. Hughey & Susan Perera, *The Three Year Anniversary of eBay v. MercExchange: A Statistical Analysis of Permanent Injunctions*, INTELL. PROP. TODAY, Nov. 2009, at 26, available at <http://www.iptoday.com/issues/2009/11/articles/three-year-anniversary-eBay-MercExchange.asp>.

States economy," (2) "the production of like or directly competitive articles in the United States," and (3) the "United States consumers."⁵⁷

While the Section 337 investigation originated with the Smoot-Hawley Tariff Act of 1930, the public interest factors were not included until the passage of the Trade Act of 1974.⁵⁸ At the time, the addition was "[p]erhaps the most novel amendment" and "require[d] the Commission, after it has determined that a violation does or may exist, to weigh the effect of its actions 'upon the public health and welfare.'"⁵⁹ Discussing the inclusion of the public interest consideration during Section 337 investigations, the Senate Committee reported:

During its investigations under section 337, the Commission would be directed to consult with the Departments of Justice, Health, Education, and Welfare, the Federal Trade Commission, and other government agencies when appropriate. In making its determinations . . . the Commission would be required to take into consideration . . . the effect which such action would have on the general health and welfare, on competitive conditions in the economy, on the production of like or competitive merchandise in the United States, and on consumers. *These considerations could be overriding.*⁶⁰

Using similarly superlative language, the Committee further noted that it "believe[d] that the public health and welfare and the assurance of competitive conditions in the United States economy must be the overriding considerations in the administration of [the] statute."⁶¹ It stated that an exclusion order should not be issued "in cases where there is any evidence of price gouging or monopolistic practices in the domestic industry."⁶²

Since the amendment added by the Trade Act of 1974, the language of the statute has changed very little. The Commission, however, has recently approved new regulations governing the public interest factor of 19 U.S.C. § 1337(d)(1).⁶³

57. 19 U.S.C. § 1337(d)(1) (2006); *see also* Spansion, Inc. v. Int'l Trade Comm'n, 629 F.3d 1331, 1358 (Fed. Cir. 2010).

58. Compare Smoot-Hawley Tariff Act of 1930, Pub. L. No. 71-361, § 337, 46 Stat. 590, 703, with Trade Act of 1974, Pub. L. No. 93-618, § 341, 88 Stat. 1978, 2053 (1975), and 19 U.S.C. § 1337(d) (Supp. 1975). *See also* Harvey Kaye & Paul Plaia, Jr., *Developments in Unfair Trade Practices in International Trade: A Review of the Third and Fourth Years Under Section 337 as Amended by the Trade Act of 1974*, 61 J. PAT. OFF. SOC'Y 115 (1979).

59. Will E. Leonard & F. David Foster, *The Metamorphosis of the U.S. International Trade Commission Under the Trade Act of 1974*, 16 VA. J. INT'L L. 719, 754-55 (1976) (noting that "[i]t is difficult to assess the significance of this factor").

60. S. REP. NO. 93-1298, at 35 (1974) (emphasis added). Section 341 of the Trade Act of 1974 amended Section 337 of the Tariff Act of 1930. A major component of the amendments was to give the Commission itself the authority to grant exclusion orders instead of the President. The amendment gave the Commission final authority, subject to judicial review. § 341, 88 Stat. at 2053.

61. S. REP. NO. 93-1298, at 197; *see also id.* at 193 ("The Committee feels that the *public interest* must be paramount in the administration of this statute." (emphasis added)).

62. *Id.* at 197.

63. *See* Rules of Adjudication and Enforcement, 76 Fed. Reg. 64,803 (Oct. 19, 2011) (to

The amendments have transitioned the consideration of the public interest from a final, ancillary step of a Section 337 investigation to a prominent, first step in commencing an investigation.⁶⁴ The new regulations require that complainants file, “concurrently with the complaint, a separate statement of public interest.”⁶⁵ The regulations also specify what the submission must address: (1) how the articles are used; (2) the public health, safety, or welfare concerns; (3) the directly competitive articles that could replace the subject articles; (4) the capacity to replace the volume of articles subject to the requested remedial orders; and (5) the impact of exclusion on U.S. consumers.⁶⁶ Without expanding on all the changes implemented by the new regulations, suffice it to say that 19 C.F.R. § 210 has been retooled to magnify the scrutiny on the public interest factors under 19 U.S.C. § 1337(d)(1). Practitioners and academics have taken notice.⁶⁷

2. Case Examples: Four Successes, Multiple Failures

Despite the Senate Committee’s statement that the public interest “must be the overriding consideration[] in the administration of [the] statute,”⁶⁸ the ITC has been extremely conservative in its use. In fact, the Commission has clearly stated that “the public interest favors the protection of U.S. intellectual property rights by excluding infringing imports”⁶⁹ and has only in “rare instances declined to issue permanent relief when the adverse effect on the public interest was greater [than] the interest in protecting *rights* secured by valid patents.”⁷⁰ Since the public interest consideration was mandated in 1974, there have been only four instances where the Commission found that the public interest required denial of an injunctive remedy. Those cases are worth exploring to determine the outer contours of the public interest exception as the patent bar moves forward with public interest in the spotlight.

In *Certain Automatic Crankpin Grinders*,⁷¹ an investigation involving the importation of proprietary automotive crankpin grinding machines, the Commission announced that, for “the first time,” it had “determined that the public interest factors preclude[d] imposition of a remedy [sic].”⁷² After reciting the relevant legislative history, the Commission discussed how “the availability of crankpin grinders to Ford is a critical element in Ford’s program to meet the fuel

be codified at 19 C.F.R. pt. 210).

64. See 19 C.F.R. § 210.8(b) (2012).

65. *Id.*

66. *See id.*

67. *See, e.g.,* Walters & Paulraj, *supra* note 21; *see also* Rules of Adjudication and Enforcement, 76 Fed. Reg. at 64,803–05 (discussing the comments received by the Notice of Proposed Rule under 75 Fed. Reg. 60671 (Oct. 1, 2010)).

68. S. REP. NO. 93-1298, at 197 (1974).

69. *Certain Two-Handle Centerset Faucets and Escutcheons, and Components Thereof*, Inv. No. 337-TA-422, USITC Pub. 3332, at 9 (July 2000) (Final).

70. *Certain Home Vacuum Packaging Prods.*, Inv. No. 337-TA-496, USITC Pub. 3681, at 3–4 (Mar. 1, 2004) (Final) (emphasis added) (internal punctuation omitted).

71. *Certain Automatic Crankpin Grinders*, Inv. No. 337-TA-60, USITC Pub. 1022 (Dec. 1979) (Final).

72. *Id.* at 18.

economy standards mandated by Congress.”⁷³ A crankpin is a pivotal component in converting linear motion from the piston into rotary motion. The crankpin grinder is a piece of large industrial machinery, weighing nearly twenty tons, that shapes the pins to the correct diameter and finish.⁷⁴

Significantly, *Certain Automatic Crankpin Grinders* was filed amidst the energy crisis of 1979—a result of the Iranian Revolution.⁷⁵ Oil production had been disrupted in the Middle East, and U.S. consumers, with fresh memories of the energy crisis of 1973,⁷⁶ began to buy gasoline in a panic and prepare for gasoline rationing.⁷⁷ The court was swayed by “the fact that Congress and the President . . . established a policy requiring automotive companies to increase . . . fuel economy . . . and that some of these companies [were] encountering difficulties in obtaining automatic crankpin grinders on a timely basis.”⁷⁸ Without taking the next logical step and establishing a direct correlation between crankpin grinders and the ultimate, laudable goal of high fuel economy, the ITC found “that the public interest considerations . . . are stronger than complainant’s rights to enforcement of its patent monopoly.”⁷⁹

Interestingly, however, “[d]espite the gas lines and the president’s warnings, most Americans remain[ed] doubtful that there [was] a ‘real’ oil shortage stemming from a genuine depletion of oil resources.”⁸⁰ In fact, the actual oil production

73. *Id.* Congress had mandated higher efficiency cars under the Corporate Average Fuel Economy (CAFE) standards of 1975, and it was the first time fuel economy regulations were imposed on passenger cars—for example, 18.0 miles per gallon by 1978. *See* Energy Policy and Conservation Act of 1975, Pub. L. 94-163, 89 Stat. 871 (establishing the CAFE standards); *see also, e.g.*, Roger H. Bezdek & Robert M. Wendling, *Fuel Efficiency and the Economy*, 93 AM. SCIENTIST 132, 132 (2005).

74. *Certain Automatic Crankpin Grinders*, Inv. No. 337-TA-60, USITC Pub. 1022, at 6, 15 (Dec. 1979) (Final).

75. *See* JOHN D. STEMPEL, *INSIDE THE IRANIAN REVOLUTION* 165–94, 317–18 (1981); HEATHER LEHR WAGNER, *MILESTONES IN MODERN WORLD HISTORY: THE IRANIAN REVOLUTION* 63–75 (2010) (“By December 1978, the violence in Iran seemed out of control.”).

76. ENERGY INFO. ADMIN., 25TH ANNIVERSARY OF THE 1973 OIL EMBARGO: ENERGY TRENDS SINCE THE FIRST MAJOR U.S. ENERGY CRISIS 1 (1998) (stating that “[t]he 1973 Arab Oil Embargo was the first oil supply disruption to cause major price increases and a worldwide energy crisis” and that “[v]irtually all spare oil production capacity was in the Middle East when the Arab Oil Embargo began in October 1973” while also providing excellent graphical representations of energy trends over the past several decades); *see also* ROBERT E. HUNTER, *THE ENERGY ‘CRISIS’ AND U.S. FOREIGN POLICY* 3 (1973) (“Since 1972, concern has been growing . . . about an impending energy ‘crisis.’ This concern was dramatized by the shortage of fuel oil in the Eastern and Middle Western states during the winter of 1972-73 . . .”).

77. *See, e.g.*, DAVID T. HARTGEN, ALFRED J. NEVEU, JOANNA M. BRUNSO, JOHN S. BANAS & JEANMARIE MILLER, *CHANGES IN TRAVEL IN RESPONSE TO THE 1979 ENERGY CRISIS* (1979).

78. *Certain Automatic Crankpin Grinders*, Inv. No. 337-TA-60, USITC Pub. 1022, at 20 (Dec. 1979) (Final).

79. *Id.* at 20–21.

80. Al Richman, *The Polls: Public Attitudes Toward the Energy Crisis*, 43 PUB. OPINION Q. 576, 576 (1979); *see also* Peter Deutsch, *The Phony Oil Crisis*, 228 NATION 423 (1979);

statistics show that much of the crisis was really just an “onslaught of crisis propaganda manufactured by the Department of Energy in order to make way for oil price decontrol and relaxation of environmental protections laws”⁸¹ that allegedly served to benefit mainly large oil corporations like Exxon Corporation.⁸² The “Big Three” American car manufacturers were, in reality, struggling to compete in a market with new compact Japanese and Chinese cars.⁸³ American car manufacturers like Ford and General Motors were in a crisis of their own, failing to produce profitable cars on a timely basis—a problem separate from their ability to meet congressional demands on fuel efficiency.⁸⁴ The true public interest may very well have been the value of having successful (that is, profitable) American car manufacturers and American oil companies, not the public’s interest in fuel-efficient cars.⁸⁵ As one dissenting commissioner stated, the case was not one of price gouging or monopolistic prices, as discussed by Congress in the legislative history of the Trade Act of 1974.⁸⁶ In fact, the complainant’s prices were actually lower than the prices of the imported grinder.⁸⁷

David Popp, *Induced Innovation and Energy Prices*, 92 AM. ECON. REV. 160 (2002); Philip K. Verleger, Jr., *The U.S. Petroleum Crisis of 1979*, 1979 BROOKINGS PAPERS ON ECON. ACTIVITY 463.

81. Deutsch, *supra* note 80, at 423; *see also* ANTONY C. SUTTON, ENERGY: THE CREATED CRISIS 119, 137, 145–47 (1979) (arguing that the energy crisis was a “delusion” manufactured by Washington bureaucrats and that the framework for the “created crisis” was established long before 1979).

82. Deutsch, *supra* note 80, at 425. “Once again it appears that there is no significant shortage and that the oil companies and the Energy Department are working together to take full advantage of a *political situation*.” *Id.* at 426 (emphasis added); *see also* SUTTON, *supra* note 81.

83. *See* Howard Geller, Philip Harrington, Arthur H. Rosenfeld, Satoshi Tanishima & Fridtjof Unander, *Policies for Increasing Energy Efficiency: Thirty Years of Experience in OECD Countries*, 34 ENERGY POL’Y 556, 561 (2006) (discussing how the Japanese, among other Asian nations, had instituted energy-efficient research and development schemes and legal policies in the early 1970s); Young-suk Hyun & Jinjoo Lee, *Can Hyundai Go It Alone?*, 22 LONG RANGE PLAN. 63 (1989).

84. *See* Carol A. MacLennan, *Political Response to Economic Loss: The Automotive Crisis Of 1979-1982*, 14 URB. ANTHROPOLOGY & STUD. CULTURAL SYS. & WORLD ECON. DEV. 21, 25–27 (1985) (discussing the economic turmoil of domestic auto manufacturers); *see also* ALAN ALTSHULER, MARTIN ANDERSON, DANIEL JONES, DANIEL ROOS & JAMES WOMACK, THE FUTURE OF THE AUTOMOBILE: THE REPORT OF MIT’S INTERNAL AUTOMOBILE PROGRAM vii (1986) (“[T]he world economy was entering the worst economic downturn since the Great Depression, and the auto industry was among the hardest-hit sectors.”).

85. Interestingly, only four parties even filed statements weighing in on the public interest factors prior to the October 29, 1979 hearing: two government agencies (which had no advice), General Motors Corporation, and Caterpillar Tractor Company. *See* Certain Automatic Crankpin Grinders, Inv. No. 337-TA-60, USITC Pub. 1022, at 4–5 (Dec. 1979) (Final).

86. *See id.* at 1 (Comm. Moore’s supplemental views); S. REP. NO. 93-1298, at 21 (1974).

87. *See* Certain Automatic Crankpin Grinders, Inv. No. 337-TA-60, USITC Pub. 1022, at 1 (Dec. 1979) (Final) (Comm. Moore’s supplemental views) (warning that “[a] patent is a constitutionally granted monopoly”).

One year after *Certain Automatic Crankpin Grinders*, the Commission once again found that public interest factors trumped the property right of a patent holder in *Certain Inclined-Field Acceleration Tubes*.⁸⁸ The infringing accelerator tubes were being used by several universities to study nuclear structure and were allegedly "greatly superior in performance" to others in the market.⁸⁹ The Commission found "that basic scientific research, such as . . . nuclear structure research . . . is precisely the kind of activity intended by Congress to be included when it required the Commission to consider . . . the public health and welfare."⁹⁰ Like *Certain Automatic Crankpin Grinders*, this case arose against a unique political backdrop: the Cold War⁹¹ and the Soviet invasion of Afghanistan.⁹² In 1979, the United States was re-engaged in a nuclear arms race, stationing intermediate range nuclear weapons in Europe⁹³ and developing a confrontational policy that later became known as the Strategic Defense Initiative.⁹⁴

The Commission performed a balancing test that weighed the "impact of a remedy on users of the imported device versus the impact of the violation on the owner of the patent."⁹⁵ Without significant justification, the Commission stated that it believed that researchers "are not motivated solely by expectation of a profit in the way that holders of more conventional product and process patents are."⁹⁶ The Commission insinuated that the property right conferred by a patent is merely a conduit for profit and that where profits are not a motivation, the patent right is otherwise free to be derogated. It stated that its determination "denies part of the rewards of having conducted that research in the past, but broadens the benefit to the public now by permitting research with a wider range of devices."⁹⁷ Under such logic, any patent right that could be useful to basic research, if left unenforced, might fail the public interest balancing test.

88. *Certain Inclined-Field Acceleration Tubes and Components Thereof*, Inv. No. 337-TA-67, USITC Pub. 1119 (Dec. 1980) (Final).

89. *Id.* at 27.

90. *Id.* at 22.

91. See generally MATTHEW FARISH, *THE CONTOURS OF AMERICA'S COLD WAR* (2010); RICHARD SMOKE, *NATIONAL SECURITY AND THE NUCLEAR DILEMMA: AN INTRODUCTION TO THE AMERICAN EXPERIENCE IN THE COLD WAR* (3d ed. 1993).

92. See M. HASSAN KAKAR, *AFGHANISTAN: THE SOVIET INVASION AND THE AFGHAN RESPONSE, 1979-1982*, at 1-17 (1995).

93. SMOKE, *supra* note 91.

94. The Initiative was prompted by President Ronald Reagan's 1979 visit to the NORAD command base under Cheyenne Mountain and new developments in nuclear weaponry, such as the x-ray laser invented by the fabled "O Group." See, e.g., REBECCA S. BJORK, *THE STRATEGIC DEFENSE INITIATIVE: THE SYMBOLIC CONTAINMENT OF THE NUCLEAR THREAT* 12-17 (1992); JOHN A. JUNGERMAN, *UNIV. CAL. INST. ON GLOBAL CONFLICT & COOPERATION, THE STRATEGIC DEFENSE INITIATIVE: A PRIMER AND CRITIQUE* (1998).

95. *Certain Inclined-Field Acceleration Tubes*, Inv. No. 337-TA-67, USITC Pub. 1119, at 29 (Dec. 1980) (Final).

96. *Id.* at 31.

97. *Id.*

Four years later, the Commission again denied relief in light of the public interest in a case captioned *Certain Fluidized Supporting Apparatus*.⁹⁸ The Commission determined it was not in the public interest to exclude the importation of specialized hospital beds for burn patients where the complainant could not meet the demand and where no comparable substitute was available.⁹⁹ In its brief opinion, the Commission focused on the ability of the complainant to meet the production and distribution needs of the public in the “expanding market” for specialized burn beds.¹⁰⁰ The Commission ultimately agreed with the administrative law judge that “if a temporary exclusion order were issued some patients might not have access to burn beds at all in the interim period.”¹⁰¹ In other words, because the complainant’s own industry and invention, leading to its grant of a patent, created a successful and expanding market where there had once been none, the public interest now trumped the exclusionary rights responsible for the market in the first place. The opinion provides an unsatisfying and circular justification for eviscerating a constitutionally granted property right, even if only dealing with a temporary exclusion order.

In 2011, the Commission issued a fourth opinion in which it found that the public interest demanded that certain infringing 3G handheld wireless communication devices, such as mobile phones and PDAs, that were “previously imported” were exempt from the exclusion order.¹⁰² In *Certain Baseband Processor Chips*,¹⁰³ Broadcomm sued Qualcomm for importing patent-infringing wireless communication device patents that had implications for the 3G networks throughout the entire country.¹⁰⁴ In particular, “first responders”¹⁰⁵ throughout the nation testified to the adverse effect that exclusion would have on their ability to protect the public in case of an emergency because they relied heavily on GPS positioning systems and the ED-VO infrastructure generally.¹⁰⁶

Artfully noting that “we do not accept the general proposition that, if the infringing activity is great enough, the public interest forbids a remedy,” the Commission structured relief that “ha[d] a much more limited impact on availability of 3G-capable handsets, and thus a lesser impact on the public interest.”¹⁰⁷ Unlike the earlier cases, the Commission developed a detailed opinion

98. *Certain Fluidized Supporting Apparatus and Components Thereof*, Inv. No. 337-TA-182/188, USITC Pub. 1667 (Oct. 1984) (Final).

99. *Id.* at 23.

100. *Id.* at 20.

101. *Id.* at 23.

102. *Certain Baseband Processor Chips and Chipsets, Transmitter and Receiver (Radio) Chips, Power Control Chips, and Prods. Containing Same, Including Cellular Telephone Handsets*, Inv. No. 337-TA-543, USITC Pub. 4258, at 3 (Oct. 2011) (Final). [hereinafter “*Certain Baseband Processor Chips*”].

103. *Id.*

104. *Id.*

105. *Id.* “First responders” refers to emergency personnel who arrive first at the scene of an accident and those in the first response chain of information, such as dispatchers.

106. *Id.* ED-VO is a complex telecommunications standard for wireless data transmissions through radio signals that involves multiplexing techniques to optimize data throughput.

107. *Id.* at 153 (structuring a “grandfathering” exception for those devices that had

and recognized Senate testimony regarding the fundamental nature of patent rights¹⁰⁸ that had become oft-cited rhetoric in ITC opinions.¹⁰⁹ When deciding to limit Broadcomm's relief, the Commission in *Certain Baseband Processor Chips* at least outwardly recognized that "[t]he importation of any infringing merchandise derogates from the statutory right, diminishes the value of the intellectual property, and thus indirectly harms the public interest."¹¹⁰ Presumably, the Commission also internalized¹¹¹ the fundamental nature of patents as a property right articulated in its opinion.

Apart from these four examples, in the vast majority of cases, the public interest was either not considered or found not to trump the interest of having strong intellectual property rights. In particular, and notably, the Commission has repeatedly found that evidence that an exclusion order could lead to higher prices is not dispositive of the public interest.¹¹² This was true even in *Certain Crystalline Cefadroxil Monohydrate*,¹¹³ where a pharmaceutical grade oral antibiotic was in dispute.¹¹⁴ The Commission held the public interest did not support denying an exclusion order that would lead to higher pharmaceutical drug prices.¹¹⁵

already been imported).

108. The Senate stated:

The owner of intellectual property has been granted a temporary statutory right to exclude others from making, using or selling the protected property. The purpose of such temporary protection, which is provided for in Article I, Section 8, Clause 8 of the United States Constitution, is "to promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Rights to their respective Writings and Discoveries." In return for temporary protection, the owner agrees to make public the intellectual property in question. This trade-off creates a public interest in the enforcement of protected intellectual property rights. Any sale in the United States of a product covered by an intellectual property right is a sale that rightfully belongs only to the holder or licensee of that property. The importation of any infringing merchandise derogates from the statutory *right*, diminishes the value of the intellectual property, and thus indirectly harms the public interest.

S. REP. NO. 100-71 at 128-29 (1987) (emphasis added).

109. *See, e.g.*, *Certain Elec. Connectors and Prods. Containing Same*, Inv. No. 337-TA-374, USITC Pub. 2981, at 19 (July 1996) ("First, the public interest favors the protection of U.S. intellectual property rights."); *Certain Power Supply Controllers and Prods. Containing Same*, Inv. No. 337-TA-541, USITC Pub. 3993, at 10 (May 2008) (Final).

110. *Certain Baseband Processor Chips*, No. 337-TA-543, USITC Pub. 4258, at 64 n.231 (Oct. 2011) (Final) (quoting S. REP. NO. 100-71 at 128-29 (1987)).

111. "Internalization" here refers to the sociological and psychological meaning of the term regarding the process of accepting norms, instead of the economic meaning.

112. *See, e.g.*, *Certain Auto. Parts*, Inv. No. 337-TA-557, USITC Pub. 4012, (June 2008) (Final).

113. Inv. No. 337-TA-293, USITC Pub. 2391 (June 1991).

114. *Id.* (finding that the public interest did not support denying an exclusion order that would lead to higher drug prices for the oral antibiotic in dispute).

115. *Id.*

II. JUSTIFYING PATENTS AS RIGHTS

In his most recent book, Professor Robert Merges points out the need to “notice” the shift from regarding intellectual property as a system of social utility to one of fundamental rights.¹¹⁶ He makes an astute observation that is easily overlooked—that “courts often wind up talking about IP rights *as* rights,” but are often too busy “to notice the significance of this move.”¹¹⁷ The truth of Merges’s observation can be seen in the U.S. Court of Appeals for the Federal Circuit’s recent opinion in *Robert Bosch LLC v. Pylon Manufacturing Corp.*¹¹⁸ Judge O’Malley, discussing post-*eBay* injunctions, wrote: “[E]ven though a successful patent infringement plaintiff can no longer rely on presumptions or other short-cuts to support a request for a permanent injunction, it does not follow that courts should entirely ignore the fundamental nature of patents as property rights granting the owner the right to exclude.”¹¹⁹ In other words, the courts once again spoke directly about intellectual property as a fundamental right—a genuine right to exclude—but left the reader without any substantive guidance about the true foundation or implications of such a statement.

The same is true for cases at the ITC. As can be seen from the four cases in which the use of “public interest” factors were found to outweigh the exclusion privileges conferred by a valid patent to its owner, the ITC often uses the term “patent right” in the same offhand manner that concerned Merges about intellectual property generally. For example, in *Certain Home Vacuum Packing Products*, a case where public interest did not prevail over the patent, the Commission stated simply that there is an “interest in protecting *rights* secured by valid patents”¹²⁰ and in *Certain Automatic Crankpin Grinders*, a case where public interest won out, the Commission again merely tossed out the notion of a “complainant’s rights to enforcement.”¹²¹ More recently, the Commission has relied on language from Congress discussing a patentee’s “temporary statutory right to exclude others” in regards to the Intellectual Property Clause.¹²²

In light of the development of the ITC as an intellectual property forum¹²³ and the obvious implications of new rules regarding the public interest consideration of Section 337,¹²⁴ it is helpful to use Merges’s framework as a set of directional

116. MERGES, *supra* note 28, at 3.

117. *Id.* (emphasis in original).

118. 659 F.3d 1142 (Fed. Cir. 2011).

119. *Id.* at 1149 (emphasis added).

120. Inv. No. 337-TA-496, USITC Pub. No. 3681, at 17 (Mar. 2004) (Final) (emphasis added).

121. Inv. No. 337-TA-60, USITC Pub. No. 1022, at 21 (Dec. 1979) (Final).

122. *See* *Certain Baseband Processor Chips*, Inv. No. 337-TA-543, USITC Pub. No. 4258, at 65 (Oct. 2011) (citing S. REP. NO. 100-71, at 128–29 (1987)) (“The purpose of such temporary protection, which is provided for in Article I, Section 8, Clause 8 of the United States Constitution, is ‘to promote the Progress of Science and Useful Arts, by securing for limited Time to Authors and Inventors the exclusive Rights to their respective Writings and Discoveries.’”).

123. *See supra* notes 1–6 and accompanying text.

124. *See, e.g.,* Bell, *supra* note 24; Brevetti, *supra* note 24.

beacons where “public interest” can too easily become victim to subjective applications.¹²⁵ Since Merges states that “theory at this [high] level can only point us to general considerations, [and] can only help restructure the issues in a way that gives us some insight into the deeper principles at stake in a specific dispute,” it is valuable to focus it and compress it further.¹²⁶

A. The Justifying Intellectual Property Foundational Framework

Merges’s foundational framework for justifying intellectual property is based on the blended philosophical theories of John Locke, Immanuel Kant, and John Rawls.¹²⁷ These three philosophers espouse beliefs that seek to explain the nature and utility of property conventions. Professor Merges argues that a new framework of justification is needed because the “[c]urrent convention . . . that IP law seeks to maximize the net social benefit of the practices it regulates” is “[i]mpossibly complex” and “will always be at best aspirational.”¹²⁸ Utilitarian formulation, from Merges’s perspective, will never provide a “lock-solid, airtight case, a case we can confidently take to an unbiased jury of hardheaded social scientists.”¹²⁹ Instead, Merges advocates a theory of intellectual property derived from “a much richer, more complex, at times more confounding understanding of what property is all about.”¹³⁰ Particularly relevant to the idea of public interest in patent law is that this theory would replace the always-subjective utilitarian balancing factors with nonutilitarian normative conceptions of patent law—fundamentally changing the analysis of when public interest trumps a patent, as a *right*.

1. John Locke

There is an expansive body of work directed to the works of John Locke. Lockean principles are many; they are widely known, and they are the subject of voluminous commentary. The notion that Merges’s theory is extensive enough to encapsulate and utilize the entire labyrinth of Locke’s work would be foolish; more importantly, it would be entirely unhelpful to the pursuit of justifying a system of intellectual property using nonutilitarian foundations because it would be unworkable. Much of the value in Merges’s work lies in what he chooses to emphasize. In a similar fashion, Merges’s entire discussion of Lockean principles would not be helpful to the question of using the public interest as a way to deny

125. See Italo H. Ablondi & H. Henning Vent, *Section 337 Import Investigations—Unfair Import Practices*, 4 LOY. L.A. INT’L & COMP. L.J. 27, 35 n.57 (1981) (“One issue raised is the extent to which the Commission’s consideration of public policy factors should reflect a developed adjudicative record at the risk of being found arbitrary.”).

126. MERGES, *supra* note 28, at 308.

127. *Id.* at 305.

128. *Id.* at 2–3 (“Estimating costs and benefits, modeling them over time, projecting what would happen under counterfactuals (such as how many novels or pop songs really would be written in the absence of copyright protection, and who would benefit from such a situation)—these are all overwhelmingly complicated tasks.”).

129. *Id.* at 3 (emphasis omitted).

130. *Id.* at 13.

patent owners the ability to exclude others from making, using, or selling their patent property. As such, this Article will reflect upon only the essentials of the discussion.

Merges starts with Locke's "labor theory" of appropriation: labor as a justification for property rights. The theory is derived from Section 27 of Locke's Second Treatise on Government, which now enjoys fabled notoriety.¹³¹ The operative phrase from the lengthy passage is "[w]hatsoever then he removes out of the State that Nature hath provided . . . he hath mixed his Labour with, and joynd to it something that is his own, and thereby makes it his Property."¹³² From this phrase the notion of mixing one's labor with things from nature to create dominion over the thing is derived. Merges seems to avoid the notion of mixing, however, instead focusing on the expenditure of effort: "individual appropriation comes about through effort."¹³³ This type of appropriation is appropriate, in Locke's view, under both theological (i.e., divine directives) and a mix of nontheological reasoning.¹³⁴

Locke's theory of "one-to-one mapping between individual people and discrete economic resources"¹³⁵ is directly applicable to intellectual property, and particularly applicable for patents. From this Author's perspective, Locke's notion of nature as an enormous realm of common resources parallels the idea of the universe of prior art¹³⁶ often utilized by patent scholars. One way to determine obviousness¹³⁷ in patent law is to think of the person having ordinary skill in the art¹³⁸ ("PHOSITA") standing in a workshop with the entire relevant prior art before him and then to decide whether it would have been obvious for the PHOSITA to create the claimed invention. From such a specific patent law example, not considered directly by Merges, it is easy to expand on Merges's belief that "[t]he

131. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287–88 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

132. *Id.* at 288.

133. MERGES, *supra* note 28, at 35.

134. *Id.* at 34.

135. *Id.*

136. Prior art is defined by 35 U.S.C. § 102(a)–(b) (2006) as inventions "known or used by others in this country, or patented or described in a printed publication in this or a foreign country" and things "described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States." Prior art is considered to be art that is contained in the public domain and accessible. *See, e.g., In re Hall*, 781 F.2d 897, 899 (Fed. Cir. 1986) ("'[P]ublic accessibility' . . . [is] the touchstone in determining whether a reference constitutes a 'printed publication' under 35 U.S.C. § 102(b).").

137. 35 U.S.C. § 103(a) (2006) ("A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.").

138. *See* MANUAL OF PATENT EXAMINING PROCEDURE § 2141.03 (8th ed. 2001, rev. vol. 2012) ("The person of ordinary skill in the art is a hypothetical person who is presumed to have known the relevant art at the time of the invention.").

stock of public domain information, from which individual creators draw, fits closely with Locke’s conception of a vast realm of common resources.”¹³⁹

Running with the idea of the “universe of prior art” and an obviousness determination discussed above, Locke’s theory of labor being mixed with nature also matches well with intellectual types of property—specifically with patents. For example, discussing intellectual property rights generally, Merges states that “some well-known doctrines in IP law provide that ‘mere’ labor (or hard work) is not always enough to establish an IPR, nontrivial creations presumably requiring significant effort are often said to be at the heart of IP law.”¹⁴⁰ While not specifically mentioned, Section 103 obviousness is an example of one such intellectual property doctrine. The obviousness doctrine is, in some regards, a measure of expenditure of labor or ingenuity; the patent laws do not reward merely trivial or obvious progression in the arts and sciences. Merges teases from Locke’s works a similar “proportionality principle”¹⁴¹ that correlates the effort expended in labor with the bounds of property rights.¹⁴²

An important aspect of Locke’s philosophy that Merges adopts is that of “human prospering through individual appropriation.”¹⁴³ In Locke’s world, “the passion for material appropriation is viewed as fundamental, even primary, in motivating the creation acts of the individual.”¹⁴⁴ Or, as Merges phrases it: “Few would bother laboring to recast, reshape, or improve [materials they find in their environment] if that work had to be shared with all comers.”¹⁴⁵ Merges’s framework, at its heart, requires a belief that endeavoring to create and to make

139. MERGES, *supra* note 28, at 33.

140. *Id.*

141. *See id.* at 159–91. In chapter six of *Justifying Intellectual Property*, Merges explores what he terms “The Proportionality Principle” and emphasizes its importance above other principles that he espouses throughout the book. *Id.* at 159. In that chapter the *eBay* case is discussed at length and the concept of undue leverage plays prominently. *See id.* at 165–91.

142. Locke also directly states: “The same Law of Nature, that does by this means give us Property, does also bound that Property too.” JAMES TULLY, A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES 121 (1980) (emphasis in original) (quoting LOCKE, *supra* note 131, at 290); *see also* KIRSTIE M. MCCLURE, JUDGING RIGHTS: LOCKEAN POLITICS AND THE LIMITS OF CONSENT 87 (1996) (“In most of his treatment of the property right appropriate to human agents in the state of nature, Locke continues to articulate this harmonious relationship between law and rights in constructions that consistently imply the boundedness of property right by considerations of proper use.”).

143. MERGES, *supra* note 28, at 38. Merges focuses on the idea that “[t]he need to survive and thrive . . . justifies removal from nature.” *Id.* at 41. It is also the focus on labor as an “extra force” or an “external manifestation of a person’s self” that separates and clarifies Merges’s framework from a plain reading of Locke’s “mixing” metaphor that might allow claims to property where Merges would find such claims undeserving. *Id.* at 42–44; *see also id.* at 46 (discussing the Nozick-Waldron hypothetical stating that “[t]hey take us away from the things Locke was centrally concerned with, human flourishing and the role of labor”).

144. ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY 25 (2010) (quoting Sibyl Schwarzenbach, *Locke’s Two Conceptions of Property*, 14 SOC. THEORY & PRAC. 141, 157 (1988)).

145. MERGES, *supra* note 28, at 37.

useful things is fundamental to the purpose of life, similar to Locke's divine directive,¹⁴⁶ and that such a quest requires labor.¹⁴⁷

To Merges, as important as Locke's "labor theory" of appropriation or initial grant of property are three of Locke's so-called "provisos." Merges perceives the provisos as "limiting, cabining elements even *within* [Locke's] theory of initial appropriation."¹⁴⁸ In that regard, the provisos are vital to an understanding of how public interest factors may be used in patent litigation to justly limit a patent owner's right to exclude. The three provisos are (1) the sufficiency proviso,¹⁴⁹ (2) the spoliation or waste proviso,¹⁵⁰ and (3) the charity proviso.¹⁵¹

Unlike some other scholars,¹⁵² Merges views the sufficiency proviso and the spoliation proviso as two separate requirements. Where others might view the spoliation requirement as subsumed in the sufficiency proviso, under Merges's framework it is possible to "take objects from the common[s], leaving 'enough, and as good' for others, and yet allow those objects to spoil" or go to waste.¹⁵³ While logic might suggest that the type of appropriation that meets the sufficiency condition is necessarily modest and, therefore, not wasteful, Merges believes that Locke would have seen any spoilage as an "intrinsic affront to nature" even where the appropriator was mindful of others.¹⁵⁴ Thus, under this model, one may not have a justifiable, legitimate claim of appropriation without avoiding both the spoilage and sufficiency conditions. These conditions play prominently in an understanding of when, under a nonutilitarian model for intellectual property such as Merges's, the public interest overcomes an alleged property right.

Merges provides a few helpful insights into what situations might constitute a violation of the provisos—including several that bear directly on fact patterns found in the ITC cases where public interests overcame patent rights.¹⁵⁵ First, with

146. Usefulness is a critical aspect for Merges. *See id.* at 47.

147. *Id.*

148. *Id.* at 48.

149. *See* LOCKE, *supra* note 131, at 288 ("For this *Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joynd to, at least where *there is enough, and as good left in common for others.*" (second emphasis added)).

150. *See* LOCKE, *supra* note 131, at 290 ("But how far has he given it us? To *enjoy.* As much as any one can make use of to any advantage of life before it spoils; so much he may by his labour fix a Property in. Whatever is beyond this, is more than his share, and belongs to others. *Nothing was made by God for man to spoil or destroy.*" (second emphasis added)).

151. *See* LOCKE, *supra* note 131, at 170 ("God the Lord and Father of all, has given no one of his Children such a Property, in his peculiar Portion of the things of this World, but that he has given his needy Brother a Right to the Surplusage of his Goods; so that it cannot justly be denied him, when his pressing Wants call for it. And therefore no Man could ever have a just Power over the Life of another by Right of property in Land or Possessions; since [it would] always be a Sin in any Man of Estate, *to let his Brother perish for want of affording him Relief out of his Plenty.*" (emphasis added)).

152. *See, e.g.,* Jeremy Waldron, *Enough and as Good Left for Others*, 29 PHIL. Q. 319 (1979).

153. MERGES, *supra* note 28, at 51.

154. *Id.*

155. *See supra* Part I.B.2.

regard to sufficiency, is the problem of reliance. Discussing the scholarship of Wendy Gordon, Merges notes that "[a]n original creator can add something that others come to depend on in an important way" and that "if that creator tries to remove what he or she has added, people may experience an important loss."¹⁵⁶ Merges recognizes the merit of Gordon's reliance arguments; he is aware that it is possible to make people worse off by exposing them to a massive influx of culture, only to have it removed by expansive intellectual property rights. Importantly, however, under his framework it is ultimately recognized that "[m]ost contributions to culture are . . . like isolated drops in [a] lake" and removing them "would barely cause a ripple."¹⁵⁷ It is truly the rare, canonical invention that changes the baseline¹⁵⁸—most everything in the realm of intellectual property usually meets the sufficiency condition.¹⁵⁹ Additionally, the reliance aspect of the sufficiency proviso comes into play at the postgrant stage of property rights, and seems to fit better with Merges's conception of proportionality, discussed below.

Second, with regards to spoliation, Merges takes a strict view on what constitutes spoliation. Merges interprets Locke as requiring appropriation followed by no productive use at all—"not unsatisfied demand."¹⁶⁰ Merges goes further, stating: "It follows that only someone who never embodies it in any tangible medium at all, or who embodies a rough version of it in a single prototype and just lets it sit somewhere, unused, has engaged in Lockean spoliation."¹⁶¹ Simply put: a very difficult standard to achieve.

Finally, with regard to the third proviso, the charity proviso, Merges calls particular attention to the literal language of Locke's *First Treatise*.¹⁶² The relevant passage states that "no Man could ever have a just Power over the Life of another, by Right of property" and that no man is "to let his Brother perish for want of affording him Relief out of his Plenty."¹⁶³ Like the spoilage proviso, this too is strictly construed by Merges. Essentially, Merges draws a line between "basic human sustenance," those things that might otherwise literally lead "to let [a] brother perish," like life-saving drugs, and "cultural development," those things that simply lead to types of "human flourishing and development."¹⁶⁴ Under his

156. MERGES, *supra* note 28, at 52; see also Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1567 (1993) ("[O]nce a creator exposes her intellectual property to the public, and that product influences the stream of culture and events, excluding the public from access to it can harm."). "The creator's contribution adds so significantly to what was there that it is wrong to permit the creator to pull back what he or she contributed, to remove it from circulation." MERGES, *supra* note 28, at 53.

157. MERGES, *supra* note 28, at 55.

158. *Id.* at 52–53.

159. *Id.* at 55 ("First Amendment principles, IP doctrine, self-interest, and enforcement costs all conspire to make it difficult and unprofitable to overenforce IP rights, thereby pulling a protected work back from public accessibility.")

160. *Id.* at 57 (emphasis added).

161. *Id.* at 58; see also *id.* at 61 ("Locke [was] concerned with abject waste.")

162. LOCKE, *supra* note 131.

163. *Id.* at 170.

164. MERGES, *supra* note 28, at 64–65 ("[I]n my view IP rights are limited only in actual cases where IP is enforced in a way that interferes with sustenance or survival." (emphasis

framework, only where intellectual property enforcement practices actually lead to situations of life and death would the charity proviso come into play with regard to patent rights.¹⁶⁵

In summary, Merges's framework utilizes notions of Lockean appropriation wherein things are “pluck[ed] . . . out of the found environment and [brought] . . . into a more personal zone, where they can be of use to the individual” in a manner that required expenditure of labor.¹⁶⁶ This is the basis of the initial appropriation of an intellectual property right, but Merges also recognizes that the rights of the appropriator are not unbounded and turns to three provisos for those limits.¹⁶⁷ While the provisos might be read broadly by some, under Merges’s model they “lead a mostly closeted existence” with regards to intellectual property and are not often justifiably invoked.¹⁶⁸

2. Immanuel Kant

Departing from seventeenth century theories of natural law, Merges brings into his framework the observational moral philosophy of Immanuel Kant on property.¹⁶⁹ With Kant, the focus is on the individual, on autonomy: “To make full use of things, to impose their will on things and thereby do the sorts of projects they need to do, people must be free to use all sorts of objects in all sorts of ways.”¹⁷⁰ It is morally justifiable, in the abstract, for individuals to control objects that further their plans, goals, and free will. Unlike his contemporaries, Kant’s conception of a property system starts with the individual—an individual’s need to control and impart his or her own free will is the impetus for the need for a system of property.¹⁷¹ In other words, it is the individual’s act of free will that leads to social institutions that follow, not the other way around.¹⁷² From Kant’s perspective, in order to expand their range of freedom—that is, their autonomy—people eventually agree to what Merges calls a system of “Mine and Yours.”¹⁷³

added)).

165. Merges, however, remarks how well Locke’s charity proviso maps onto contemporary policy debates, and in particular patents on life-saving pharmaceutical patents. *Id.* at 65, 67.

166. *Id.* at 67.

167. *Id.*; see also *supra* text accompanying note 148.

168. MERGES, *supra* note 28, at 66 (“Like a rare comet, they will be sighted every now and again, but they are not a steady and constant feature of the legal constellation.”).

169. See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (1797), reprinted in *IMMANUEL KANT: PRACTICAL PHILOSOPHY* (Mary J. Gregor, ed., trans., 1996); see also Brian Tierney, *Permissive Natural Law and Property: Gratian to Kant*, 62 *J. HIST. IDEAS* 381 (2001).

170. MERGES, *supra* note 28, at 70.

171. *Id.* at 71.

172. *Id.*

173. *Id.* at 72; see also KANT, *supra* note 169, at 401 (“That is *rightfully mine* (*meum iuris*) with which I am so connected that another’s use of it without my consent would wrong me.”) (emphasis in original); B. SHARON BYRD & JOACHIM HRUSCHKA, *KANT’S DOCTRINE OF RIGHT: A COMMENTARY* 94 (2010) (“The basis for extending our external freedom to include what Kant calls the ‘external mine and thine’ is the permissive law of practical reason.”).

Merges points out that Kant’s conceptualization is uniquely applicable to intellectual property and is just the sort of formulation that, in regards to intellectual property, sweeps up what Locke may have left behind. Because Kant focuses on the individual, “[t]he medium is *not* the message.”¹⁷⁴ Merges argues that by departing from a central focus on the object, Kant’s formulation more satisfactorily justifies possession of intangible media—property of the digital age.¹⁷⁵ This change in perspective, which stands in contrast to Locke’s and economics’ theory of property, acts as an excellent supplemental layer to the understanding of what is appropriately acquired *ab initio*:

The principle of external Acquisition, then, may be expressed thus: “Whatever I bring under my power according to the Law of external Freedom, of which as an object of my free activity of Will I have the capability of making use according to the Postulate of the Practical Reason, and which I will to become mine in conformity with the Idea of a possible united common Will, *is mine*.”¹⁷⁶

This formulation, from Merges’s perspective, “gives human will the broadest possible canvas on which to operate.”¹⁷⁷ Furthermore, and important to Merges, is that this open notion of property based on autonomy interests extends to things like plans to make a living and reputation. Kant’s system of property encourages “an expansive sense of the creator’s autonomy.”¹⁷⁸

As one might predict, to be a workable theory of property rights, Kant’s philosophy, like Locke’s, is also bounded. The doctrines that limit Kant’s expansive canvas are where the value of his philosophy lies with regard to thinking about the public interest factors in patent law. There are two doctrines that Merges explores that are particularly relevant. First is the notion of waiver, or the process wherein an appropriator of an object disclaims his or her individual possessory rights. Second, and most importantly, is Kant’s famous Universal Principle of Right (UPR).¹⁷⁹

Merges describes “waiver” as “the right to voluntarily surrender . . . property rights in something one owns.”¹⁸⁰ Without the concept of waiver, a property right necessarily carries with it a duty to maximally enforce the rights—an obligation to improve oneself via the object of the appropriation. The key concept for Kant—and

174. MERGES, *supra* note 28, at 74 (emphasis in original).

175. *Id.* at 76–77 (“Property is not just a matter of physical contact between person and object; it describes a relationship that is deeper and goes well beyond the basic acts of grasping and holding.”).

176. IMMANUEL KANT, *THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT* 82 (W. Hastie Trans., 1887) (emphasis in original) (citation omitted).

177. MERGES, *supra* note 28, at 80.

178. *Id.* at 81.

179. KANT, *supra* note 176, at 46 (Chapter entitled “*Universal Principle of Right*”) (“The universal Law of Right may then be expressed, thus: ‘Act externally in such a manner that the free exercise of thy Will may be able to co-exist with the Freedom of all others, according to a universal Law.’”).

180. MERGES, *supra* note 28, at 84.

Merges—is that the grant of a property right is *separate* from enforcement of that right: “Enforcement is a matter to be decided not by the state but by individual rightholders.”¹⁸¹ Waiver is important conceptually because it gives property owners an important option *not* to enforce their rights and therefore share with others the stepping-stones of their autonomous plan to “do the sorts of projects they need to do.”¹⁸²

This doctrine aligns well with American patent law’s development of patent rights without a duty to work the patented invention.¹⁸³ Like Merges’s interpretation of Kant’s conception, the U.S. Supreme Court in *Continental Paper Bag Co. v. Eastern Paper Bag Co.*¹⁸⁴ “rejected the argument that a patent should be unenforceable because the patentee was not using the patented [technology] and was also continuing to exclude competitors from using the [technology].”¹⁸⁵ The Court held that “such exclusion may be said to have been of the very essence of the right conferred by the patent” and that “it is the privilege of any owner of property to use or not to use it, without question of motive.”¹⁸⁶ As Merges’s philosophical framework adopts Kant’s notion of waiver, it supports the direction of American patent law and represents another key element to understanding when the public interest is or is not justifiable. As with waiver, it is up to the individual property owner to give up his or her rights, not the state.¹⁸⁷

The UPR, the true limiting principle of Kant’s theory on property rights, states that “rightful individual action must accord with rational, universal principles of right and wrong.”¹⁸⁸ Merges’s interpretation of the UPR is that “property rights must be granted, because they are necessary to enhance human freedom,” but the rights are constrained and “must not be so broad that they interfere with the freedom of fellow citizens.”¹⁸⁹ More so than Locke’s provisos, Kant’s UPR is broad and encompassing—it contemplates a much larger universe of constraints and brings in notions of equality and justice.¹⁹⁰

181. *Id.* at 85.

182. *Id.* at 70.

183. See Kurt M. Saunders, *Patent Nonuse and the Role of Public Interest as a Deterrent to Technology Suppression*, 15 HARV. J.L. & TECH. 389, 398 (2002) (“Consistent with historical antecedents that the patentee must work the patent to maintain its validity, in a few early decisions, federal courts attempted to precondition an infringement remedy on the patentee’s use of the patent.”) (footnote omitted) (citing Adam Mosoff, *Rethinking the Development of Patents: An Intellectual History, 1550-1800*, 52 HASTINGS L.J. 1255, 1278 (2001)).

184. 210 U.S. 405 (1908).

185. ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, *PATENT LAW AND POLICY: CASES AND MATERIALS* 1260 (5th ed. 2011) (discussing *Continental Paper Bag*).

186. *Continental Paper Bag*, 210 U.S. at 429; see also MERGES, *supra* note 28, at 87 (“But waiver ought to be a strictly voluntary measure.”).

187. MERGES, *supra* note 28, at 87 (“Autonomy has to include the right to enforce one’s rights, or it is just a sham.”).

188. *Id.* at 89.

189. *Id.* at 90 (“[P]roperty . . . is both necessary and necessarily restricted.”).

190. See *id.* (“This is because Locke would limit appropriation only when it affects others’ opportunities for appropriation.”).

Merges is attracted to Kant’s restrictions because they straddle a world of conventional natural law, where intellectual property rights precede the formation of civil society or state, and conventional utilitarian calculus, where intellectual property rights are mere creatures of state discretion. The UPR is brilliant as applied to intellectual property because it allows intellectual property rights to remain fundamental rights while simultaneously allowing for state discretion to impose limits (as long as it does not derogate the fundamental right *to* appropriate intellectual property). This is because, in Kant’s conception of the property right, the state institutions that implement a property regime come after the individual’s need to appropriate (i.e., Kant’s progression: (1) the individual’s need, (2) the state institutions, and (3) the existence of property as a right). Kant’s logic allows state intermingling because it is not until the state acts that the system of property rights comes into existence. As Merges states, “IP rights are fundamental, but . . . they also of necessity must account for the needs and rights of others, because they are the *product of an idealized set of social conventions.*”¹⁹¹

Summarizing, the major contribution from Kantian philosophy to Merges’s framework for justifying intellectual property is the conceptualization of intellectual property as a fundamental right. This move allows Merges to keep Lockean understandings of appropriation through labor—a meatier, more comprehensible vehicle for understanding the initial property grant—but to discard some of the Lockean notions of pure natural right, absent government. In turn, the UPR then softens the hard edges of the Lockean provisos, providing a more expansive, cushioned safety net for notions of equality and justice that Locke’s model does not quite adopt.

3. John Rawls

The third and final component of Merges’s foundation of his framework is John Rawls’s distributive justice theories, which clarify many of the Kantian notions of equality and justice and launch them into the twentieth century.¹⁹² The most important aspect of adding distributive justice models to the framework is to push the limits on property rights a little further past the boundaries established by the Lockean provisos and Kant’s UPR. The transition from Locke and Kant into a world of distributive justice, however, is far from smooth and, in the Author’s view, fundamentally clashes with the framework’s reliance on intellectual property as a fundamental right. In Rawls’s world, egalitarian fairness is of first priority and any system of property right is merely residue.¹⁹³ Nonetheless, it is important to the viability of Merges’s framework to at least attempt to traverse the question of whether property in and of itself is fair. As Merges puts it: “the relevant question . . . is whether IP rights have a place in a society that aspires to a fair distribution of wealth.”¹⁹⁴

191. *Id.* at 96 (emphasis added).

192. *Id.* at 101, 104.

193. *Id.* at 107.

194. *Id.* at 103.

Rawls presents two principles of justice that help determine whether society is fair and just. In relevant portion, Rawls states that: (1) “[e]ach person [should] have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all,” and (2) “economic inequalities [should] be arranged . . . to the greatest benefit of the least advantaged.”¹⁹⁵ Looking to the fairness of *property* specifically, Rawls, unlike Locke and Kant, defines personal property narrowly and constrictively. Rawls includes only those things that are absolutely essential to an “effective private, personal sphere”¹⁹⁶:

[A]mong the basic liberties of the person is the right to hold and to have the exclusive use of personal property. The role of this liberty is to allow a sufficient material basis for a sense of personal independence and self-respect, both of which are essential for the development and exercise of the moral powers.¹⁹⁷

Rawls goes on to specifically warn against a Lockean conception of property where basic rights include ownership over “means of production and natural resources” and also against other “wider conceptions.”¹⁹⁸ Wider conceptions of property rights, Rawls argues, are not workable in a distributive model because such rights are decided after “society’s circumstances and historical traditions [are] available.”¹⁹⁹

Rawls’s mention of “society’s circumstances and historical traditions” is a reference to his overarching theory of political liberalism in which all societal choices must be made in an “original position,”²⁰⁰ where no one knows how life’s dice will be cast. That is, in Rawls’s hypothetical “original position,” all decisions about how a society should be structured and how it should function are made in a vacuum or a “veil of ignorance”²⁰¹—one in which those deciding don’t know anything about their future cultural or societal status. Therefore, in order for intellectual property to be considered a right in Rawls’s perspective, Merges must “show that reasonable people who were setting up a social and economic system would agree to establish an intellectual property system as a matter of *right*.”²⁰² In a world where intellectual property ownership likely benefits only a small, specialized group of individuals, Merges’s task is daunting.

Merges traverses this problem by pivoting and presenting a system of property rights to those in the original position that *inherently* includes limiting principles such as Kant’s UPR. Merges’s framework incorporates the idea that “provision[s]

195. JOHN RAWLS, A THEORY OF JUSTICE 302 (1971).

196. MERGES, *supra* note 28, at 105.

197. JOHN RAWLS, POLITICAL LIBERALISM 298 (1993).

198. *Id.* One other, wider conception is a socialistic model of private property as opposed to the individualistic model of private property.

199. *Id.*

200. RAWLS, *supra* note 195, at 136–42.

201. *Id.* at 136–37.

202. MERGES, *supra* note 28, at 109 (emphasis added); *see also* RAWLS, *supra* note 195, at 136–42 (discussing the original position).

for the destitute and other social needs²⁰³ are “baked in,”²⁰⁴ or inseparable from, property rights. Merges recognizes that “[s]ocial influences go into the making of creative works, so societal claims deserve to be thought of as integral to the rights that cover those works.”²⁰⁵ In that way, Merges softens the binary notions that there are either intellectual property rights that are not arranged “to the greatest benefit to the least advantaged,”²⁰⁶ as required by Rawls’s First Principle, or that there simply are no intellectual property rights. Merges shades Rawls’s black and white world with some hues of gray—enough gray area that those in the original position might reasonably agree to a system of property that is part of a set of basic liberties.²⁰⁷

If those in the “original position” would ultimately agree to include intellectual property as a “basic liberty”—not a small assumption, to say the least²⁰⁸—the specifics of how Merges’s framework operates can be explored. It is at this point that Merges’s framework begins to truly come together and becomes a powerful analytical prism to explore intellectual property rights without having to speak directly about utilitarian justifications for the property right in the first place. The framework rests on the theories of Locke and Kant to justify and conceptualize the initial property grant. The Lockean provisos and Kant’s UPR limit the initial grant based on the needs of others (but, remember that these limits tend to “lead a mostly closeted existence”²⁰⁹). Only after intellectual property is fundamentally rooted as an individual right or a “basic liberty,” providing its owners with the Kantian autonomy to thrive and prosper, do distributive theories come into play.

Distributive theories curtail only “the way an IP right is *deployed*,” not the way they are granted.²¹⁰ Because “[r]ights that are fair when granted may turn out to harm third parties,” the framework provides “a second opportunity to assess the distributional impacts of IP law.”²¹¹ The assessment, in Merges’s model, can be best conceptualized by envisioning the intellectual property right having “two separate components: [a core] inviolable individual contribution . . . and a

203. MERGES, *supra* note 28, at 110.

204. *Id.* at 123.

205. *Id.* at 122. We are all influenced by our surroundings and our society, through education and parenting, for example, and we all, therefore, owe some part of any creative endeavor to society.

206. RAWLS, *supra* note 195, at 302.

207. *Cf., e.g.*, JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 274 (1988). Waldron, like Rawls, draws bright lines.

208. *See, e.g.*, RAWLS, *supra* note 197, at 338 (“[E]ven if by some convincing philosophical argument—at least convincing to us and a few like-minded others—we could trace the right of private or social ownership back to first principles or to basic rights, there is a good reason for working out a conception of justice which does *not* do this.” (emphasis added)); *see also id.* at 339. Merges does not reconcile Rawls’s qualms, but Merges does acknowledge that he may be unable to because of the extreme position that Rawls’s theory represents.

209. *See supra* note 168 and accompanying text (discussing the seldom use of the three Lockean provisos in his framework).

210. MERGES, *supra* note 28, at 129 (emphasis in original).

211. *Id.*; *see also id.* at 184 (“It is not possible, in a complex field such as IP, that all third-party effects of a given appropriation of resources can be foreseen at the time of initial appropriation.”).

component . . . owing its origins to social forces and factors.”²¹² This second component, “the periphery,”²¹³ symbolizes that “society retains a stake in every work” because, in almost every imaginable case, “forces beyond an individual creator go into . . . creative work[s].”²¹⁴ In that way, distributive justice is internal to any property rights and a balance must be maintained. In most cases, time limitations on rights that make sure intellectual property is eventually placed in the public domain²¹⁵ and taxation²¹⁶ are the primary—and sufficient—vehicles for effectuating distributional justice under Merges’s model. Thus, the framework, fully assembled, satisfies the two Rawlsian principles of justice;²¹⁷ the first is overlapped by the consideration of the Lockean provisos, particularly Kant’s UPR, and the second is satisfied because intellectual property benefits the worst off because its special rewards have a “net positive distributional effect” via taxation and time-limits.²¹⁸

B. Other Justifying Intellectual Property Considerations and Principles

After setting up the foundational layers of his framework, Merges moves on to discuss the so-called midlevel principles and other highly specific issues that complete the model. Merges espouses four midlevel principles, or “concepts that run through and tie together disparate doctrines and practices, and that provide a common policy vocabulary that bridges different foundational viewpoints.”²¹⁹ All four principles²²⁰ are important to understanding Merges’s framework, but only one, proportionality, has major implications on the use of public interest in Section 337 investigations at the ITC and in federal district court patent litigation.

For Merges, proportionality is the principle that supports the proposition that “[t]he size or scope of an IP right ought to be proportional to the value or significance of the work covered by the right.”²²¹ It is in this principle that Merges explores *eBay*²²² and, tangentially, the issues of denying permanent injunctions—a result that he considers “a serious inroad on one of the classic appurtenances of a property right.”²²³ Under a normative understanding of intellectual property as a fundamental right, one would agree with the Federal Circuit’s historical “automatic

212. *Id.* at 121.

213. *Id.*

214. *Id.* at 122–23; *see also id.* at 308 (“Rawls gives us a philosophy that systematically and broadly shows how to value each individual.”).

215. *Id.* at 130.

216. *Id.* at 132–33; *see also id.* at 308 (“[B]uild in limits on these claims, and allow society its own claim to some of the proceeds from property, in the form of taxation.”).

217. *See supra* note 195 and accompanying text.

218. MERGES, *supra* note 28, at 136.

219. *Id.* at 139.

220. The four midlevel principles are non-removal, efficiency, dignity, and proportionality. *Id.*

221. *Id.* at 150.

222. “Proportionality is the principle behind the *eBay* case in patent law.” *Id.* at 165; *see also eBay v. MercExchange, LLC*, 547 U.S. 388 (2006).

223. MERGES, *supra* note 28, at 150.

injunction rule," where a party successfully shown to infringe a patent would be enjoined from making, using, or selling the infringing product, method, etc. Indeed, from a high-level prospective, it is difficult to reconcile how any other rule would not totally undermine the classic appurtenance of a property owner's basic ability to exclude others. Merges explains that where there is "undue leverage" or "economic power beyond what is legitimate," a notion of proportionality prevents an injunction where it would not serve the public interest.²²⁴

Merges only sees this function of the proportionality principle as proper where there is clearly "undue leverage" or, in other words, "[w]here the unregulated market price of a property right moves radically out of alignment with underlying social utility, an institutional response is called for."²²⁵ Unlike strict libertarian theorists, Merges argues that "if there is a pervasive understanding that property rights can be adjusted after the fact and at the margin to take account of changed circumstances or urgent social needs, this understanding will naturally be incorporated into the settled expectations of all property holders."²²⁶ Occasional rebalances would, therefore, not disrupt the settled expectations of property holders.²²⁷ This notion of correction for social imbalances aligns with Merges's conception of Rawlsian distributive justice: because society, at least in "the periphery,"²²⁸ contributes to the value of any piece of intellectual property,²²⁹ rebalancing the reward between the owner and society is justifiable and a matter of appropriate fairness.²³⁰ As can be seen from Merges's choice of language, however, the adjustments that he contemplates as being governed by an ex post proportionality principle are those that are "radical imbalances"²³¹ and "urgent social needs."²³² It is an "[i]mportant, but [m]odest, [p]rinciple": "[the] business of court intervention into private market ordering is and should be a highly unusual event."²³³

III. APPLYING THE MERGES FRAMEWORK

Understanding Merges's foundational framework, which is based on a combination of Locke's provisos and his labor theory of appropriation, Kant's UPR, and Rawls's distributive justice—as well as Merges's midlevel proportionality principle—allows one to think about specific applications of the framework. Merges tackles many specific issues as a final feature of his book, but he does not address the use of the public interest factors in Section 337 ITC investigations. The Commission's broad authority to deny exclusion orders based

224. *Id.* at 166; *see also eBay*, 547 U.S. at 396–97 (Kennedy, J., concurring).

225. MERGES, *supra* note 28, at 181.

226. *Id.* at 183.

227. *Id.* at 184.

228. *Id.* at 121–22.

229. *See supra* text accompanying note 205.

230. MERGES, *supra* note 28, at 189 (noting that it is appropriate "to intervene when fundamental fairness demands it").

231. *Id.* at 184.

232. *Id.* at 183.

233. *Id.* at 189.

on the public interest raises serious questions about the justifiability of doing so. And, while actions at the ITC may indeed be fundamentally different from civil actions under the “the long-standing principle that importation is treated differently than domestic activity,”²³⁴ Section 337 investigations provide a unique look at public interest considerations. The only remedies available at the ITC are injunctive remedies—the ITC cannot award money damages.²³⁵ By studying cases where the possibility of monetary remedies as a way to balance the harms²³⁶ is removed, we can eliminate variables and isolate the binary decision to derogate a patent owner’s right to exclude or not.

Applying the Merges framework to the three instances at the ITC, where permanent exclusion orders were denied to complainants in light of the public interest, helps illuminate the justifiability of doing so.

A. *Certain Automatic Crankpin Grinders*

In *Crankpin Grinders*, the patent at issue, U.S. Patent No. 3,118,258 (the ‘258 patent), claimed a machine that automatically grinded crankpins for use in internal combustion engines in passenger cars. The invention, and true intellectual property, was in the fact that the machine required no human intervention to perform the rotary indexing of the crankpin grinder from one pin to another.²³⁷ In other words,

234. See *supra* note 18 and accompanying text (discussing and quoting *Spanion, Inc. v. Int’l Trade Comm’n*, 629 F.3d 1331, 1359 (Fed. Cir. 2010)).

235. See *Evans, supra* note 2, at 750 (“The ITC cannot award money damages, but it can issue three forms of injunctive remedy: limited exclusion orders, general exclusion orders, and cease and desist orders.” (footnotes omitted)).

236. When there are multiple forms of remedies available, the courts are able to balance the various remedies. One commentator, discussing *eBay*, has discussed such a balance act as a “three bears” reasoning:

Justice Thomas utilized Three Bears reasoning again, this time writing for the Court, in *eBay, Inc. v. MercExchange, L.L.C.* In *eBay*, the Court overturned a permanent injunction issued by the Federal Circuit to protect a business-method patent that defendant, eBay, had infringed upon its successful auction website. The Court was concerned that each party sought extreme positions as plaintiffs argued patentees were always entitled to equitable relief in addition to damages, and defendants argued injunctions were never appropriate. Thomas criticized the appellate court for granting too much relief by establishing a categorical rule under which patent holders were always entitled to an injunction. He also chastised the district court for erring “in the opposite direction” by awarding too little relief by holding that business method patentees never need an injunction because they could always remedy their loss with damages. The Supreme Court in *eBay* thus eschewed the “broad classifications” and “expansive principles” at the far ends of the remedial spectrum, reiterating the importance of balance between interests as necessary to determining the remedy that is just right in each case.

Tracy A. Thomas, *Proportionality and the Supreme Court’s Jurisprudence of Remedies*, 59 HASTINGS L.J. 73, 85 (2007) (footnotes omitted).

237. See U.S. Patent No. 3,118,258 col.1 (filed March 3, 1961).

the machine could automatically index in order to grind *all* of the various pins on the crankshaft without human intervention.

Starting with the initial consideration of appropriation, using Merges’s articulation of Lockean labor theory, the inventors, Ralph Price and Harold Balsiger,²³⁸ expended effort to develop and appropriate the grinding technology.²³⁹ By mixing their labor with the universe of prior art (similar to the realm of nature, as discussed above²⁴⁰), the inventors have valid dominion over the technology. The inventors’ labor was not merely a trivial step or obvious progression in the art—the technology was the result of labor plus ingenuity. In fact, the invention was declared non-obvious and useful²⁴¹ by the U.S. Patent and Trademark Office (USPTO) upon its initial grant. Similarly, under Kantian notions of initial appropriation, Price and Balsiger “imposed their will on things”²⁴² in order to further their individual plans, objects, and goals—their appropriation of automatic crankpin grinding technology helped to expand their free will (or, at least the free will of the Landis Tool Corporation, the assignee of the patent²⁴³). Initial appropriation is justifiable because it is essential to the creators’ autonomy.

Under Merges’s framework, initial appropriation may be limited or bounded, even if such rights are rarely bounded from the outset. Looking at the Lockean provisos,²⁴⁴ it is clear that there was no issue with the sufficiency proviso. The inventors appropriated a right to a technology that does not raise concerns about leaving “enough, and as good”²⁴⁵ for others—there is still room in the field for others to operate as can be seen from four patents issued over the span of a few decades referencing the ’258 patent.²⁴⁶ “Reliance” arguments under the sufficiency proviso are only appealing at first glance. Because it is easy to image that automobile manufacturers came to rely on automatic crankpin grinders in an important way, so much so that removing access to them would work a significant harm, it is tempting to grasp onto reliance as justifying a limitation. Reliance, however, is reserved for nearly earth shattering movements in culture—for example, the Internet or the car as a means for transportation—whereas “[m]ost contributions to culture are more like isolated drops in a lake.”²⁴⁷ Automatic crankpin grinders cannot reasonably constitute an example of such a movement.

238. *Id.*

239. *See supra* text accompanying note 133.

240. *See supra* notes 133–38 and accompanying text.

241. Utility and novelty are two of three principal criteria for a valid patent. *See* FRANK H. FOSTER & ROBERT L. SHOOK, PATENTS, COPYRIGHTS, AND TRADEMARKS 32 (2d ed. 1993). Patents are presumed valid after the USPTO examines and grants the inventors the certificate of issuance. *See* 35 U.S.C. § 282 (2006).

242. *See* MERGES, *supra* note 28, at 70; *see also supra* note 170 and accompanying text.

243. ’258 Patent.

244. *See supra* Part.II.A.1.

245. *See supra* text accompanying note 153.

246. *See* U.S. Patent No. 3,935,675 (filed Aug. 16, 1974); U.S. Patent No. 4,023,937 (filed Apr. 10, 1973); U.S. Patent No. 4,337,011 (filed Apr. 16, 1980); U.S. Patent No. 4,693,038 (filed Apr. 4, 1986).

247. *See* MERGES, *supra* note 28, at 55; *see also supra* text accompanying note 157–59.

Similarly, the spoliatio proviso does not limit the right because Landis Tool Corporation was working the patent, producing crankpin grinders. Recall that, under Merges's conception, spoliatio does not refer to unsatisfied market demand.²⁴⁸ While the Commission insinuated that the unsatisfied demand in the marketplace was a significant reason behind denying an injunction,²⁴⁹ using spoliatio as a valid justification would require that Landis put their crankpin grinder technology to absolutely no productive use.²⁵⁰ Locke's third proviso, the charity proviso, is not invoked because Landis is in no way letting its brothers "perish for want" by enforcing their patent claims to automatic crankpin grinding technology.²⁵¹ Even if the relevant perspective was stretched to include the long-term implications of not using cars with lower fuel efficiency,²⁵² which might impinge on the human race's ability to prosper and flourish,²⁵³ it likely would still not invoke the proviso under Merges's framework without bearing down on true and measurable life-or-death matters.

Kant's UPR²⁵⁴ should also be considered in evaluating the initial property grant. The broad and malleable nature of the UPR focuses the inquiry on the question of whether the right "interfere[s] with the freedom of [other] citizens."²⁵⁵ Under Kantian theory, the state is permitted to limit the scope of the right, but since the appropriation of the technology here does not create a *prima facie* case of interference with the freedom of other citizens, the right is not justifiably limited from the outset. Rather, the appropriation here is exactly the type of permissible control that Kant envisions—it is crucial to the development of Landis, Price, and Balsiger's goals, and to their autonomy. It simply does not raise the fundamental moral concerns that the UPR stands to protect.

After examining the pregrant considerations of intellectual property rights, it is clear that if the derogation or limitation of a right is to be justifiable in light of "public interest," it must be justified according to the postgrant doctrines. In Merges's view, this makes perfect sense because "[t]he dynamic nature of IP in practice makes the postgrant stage the crucial time for bringing balance to the IP

248. *See supra* text accompanying note 160.

249. *Certain Automatic Crankpin Grinders*, Inv. No. 337-TA-60, USITC Pub. 1022, at 8 (Dec. 1979) (Final); *see also Spansion, Inc. v. Int'l Trade Comm'n*, 629 F.3d 1331, 1360 (Fed. Cir. 2010) ("Moreover . . . the exclusion order was denied because inadequate supply within the United States—by both the patentee and domestic licensees—meant that an exclusion order would deprive the public of products necessary for some important health or welfare need: energy efficient automobiles, basic scientific research, or hospital equipment.").

250. *See supra* note 161 and accompanying text (discussing how Locke was only concerned with truly abject waste).

251. *See supra* note 163 and accompanying text.

252. Long-term implications might include, for example, depleting the ozone layer, global warming, and other side effects from greenhouse gases.

253. *See MERGES, supra* note 28, at 40–41, 62.

254. *See supra* Part II.A.2.

255. *MERGES, supra* note 28, at 90; *see also KANT, supra* note 176, at 45 ("Every Action is *right* which in itself, or in the maxim on which it proceeds, is such that it can co-exist along with the Freedom of the Will of each and all in action, according to a universal Law."); *supra* note 189 and accompanying text.

system.”²⁵⁶ It does not make logical sense, given the incentives created by a system of intellectual property rights, to limit intellectual property based on merely speculative concerns at the time of the initial appropriation, but rather to wait until more information about the distributive fairness of the property right is in hand.

In *Certain Automatic Crankpin Grinders*, the Commission majority stated that “[t]he public as a whole has an interest in conserving fuel through the provision of energy efficient alternatives represented in this case by automobiles.”²⁵⁷ The independent government agencies best positioned to provide an objective statement of the balance between the “core” and “periphery” of the property right²⁵⁸ stated that they had “no comment to make on the certain automatic crankpin grinder investigation.”²⁵⁹ Instead, information about the public’s stake in the periphery of the patent claims was provided by General Motors Corporation and Caterpillar Tractor Company—parties with biased interests.²⁶⁰ For example, Caterpillar alleged that there was a “direct relationship between excluding importation of machines and the ability of U.S. engine manufacturers to extend or refine engine manufacturing capabilities.”²⁶¹ From the record, it was clear that Landis was not able to deliver new automatic crankpin grinders in a “commercially reasonable length of time.”²⁶² As such, the public, at least under the perspective of the Respondents, General Motors and Caterpillar, indeed had a stake in periphery of the intellectual property right that was positioned to be undermined by excluding importation.

What is not clear is whether it was the *public* that the interested parties were truly concerned about—companies like Ford and GM were struggling to profitably compete with foreign automobile manufacturers and were struggling to survive during a recession that struck hardest on the automobile manufacturing industry.²⁶³ It is also not clear that the public was at significant risk of not having fuel-efficient cars during a limited time of a supposed energy crisis, as foreign manufactures may have been able to supply the market. Under Rawlsian distributive justice, Landis’s ownership of the intellectual property at issue was not disrupting each person’s right to the most extensive total system of basic liberties²⁶⁴ or disrupting the “greatest benefit of the least advantaged.”²⁶⁵ While it may be that Ford and GM could ultimately provide cheaper fuel-efficient cars to the public without having to worry about the property rights of Landis, Merges has shown how that position, by

256. MERGES, *supra* note 28, at 303.

257. *Certain Automatic Crankpin Grinders*, Inv. No. 337-TA-60, USITC Pub. 1022, at 20 (Dec. 1979) (Final).

258. *See supra* notes 212–13 and accompanying text.

259. *Certain Automatic Crankpin Grinders*, Inv. No. 337-TA-60, USITC Pub. 1022, at 4 (Dec. 1979) (discussing that the Federal Trade Commission and the Department of Health, Education and Welfare filed statements that each had no advice or information with respect to “public health”).

260. *Id.* at 4–5.

261. *Id.* at 5.

262. *Id.* at 18.

263. *See supra* notes 75–77, 83 and accompanying text.

264. *See RAWLS, supra* note 195, at 302 (referring to Rawls’s first principle).

265. *Id.*

itself, would make a mere sham of property rights. It will almost always be the case that open-access to property in technology would lead to cheaper goods, but the true social and systemic costs quickly outweigh that myopic, short-term goal.

Looking to the proportionality principle for further clarification of the balance between the core and periphery of Landis's intellectual property right, the principle reaffirms that the alleged harm was not one that disrupted the equality and justice owed to the public. Analyzing whether the size of the intellectual property right is commensurate with the value of the work shows that Landis's enforcement was well within the appropriate bounds. The technology was developed with ingenuity over time²⁶⁶ and resulted in a machine that could automatically grind all of the crankpins on a crankshaft. The efficiencies that resulted were tremendous and commanded a market value of over \$250,000. At the same time, Landis's "prices were lower than the prices of the imported grinders" and Landis had "licensed its patent to another domestic producer as well as on a spot basis to a foreign producer."²⁶⁷ In other words, as the dissenting commissioners implied, Landis in no way wielded "economic power beyond what is legitimate"²⁶⁸—the facts show a dearth of "undue leverage."²⁶⁹ There is no "radical imbalance" present,²⁷⁰ and there is no proof of a nexus between GM and Ford's need for automatic crankpin grinders to compete in the market place and the ongoing "energy crisis" that may have perhaps constituted an "urgent social need."²⁷¹ Technology developments or components other than a machine that automatically indexed the diameter of various crankpins could have allowed GM and Ford to meet fuel efficiency goals. Automatically grinded crankpins were likely but a very small contributor to the goal of fuel efficient automobiles.

B. Certain Inclined-Field Acceleration Tubes

Like *Certain Automatic Crankpin Grinders*, the facts of *Certain Inclined-Field Acceleration Tubes* are not ripe for addressing the question of limits on the initial appropriation of rights. True, it is tempting to use the facts surrounding *Certain Inclined-Field Acceleration Tubes* as an example of when no property rights should initially be conferred because of the sense that nuclear development is a societal, national-security issue. Merges's framework, however, demands that the inquiry focus on "property, but": "The result . . . is to reject both the 'property first' and 'property last' approaches. Instead [to] advocate something closer to 'property, but.'"²⁷² Limitations based on the Lockean provisos are not warranted, and Kant's UPR does not run afoul when the property claims do not affect societal equality

266. The '258 patent crossed referenced four prior patents that issued from 1953 to 1959 as sources of prior art that lead to the understanding and development of the claimed technology. See '258 Patent.

267. *Certain Automatic Crankpin Grinders*, Inv. No. 337-TA-60, USITC Pub. 1022, at 1–2 (Dec. 17, 1979) (Final) (Comm. Moore's supplemental views).

268. See *supra* text accompanying note 224.

269. See *supra* text accompanying note 225.

270. See *supra* text accompanying note 231.

271. See *supra* note 226 and accompanying text.

272. MERGES, *supra* note 28, at 308.

and justice from the outset. Under Kantian theory, it may be permissible for the state to decide that patent claims that bear on issues of national defense should not be conferred. And, in fact, the United States already has such a provision, but decided not to use it when issuing U.S. Patent No 3,308,323 (the '323 patent). Under 35 U.S.C. § 181, the Commission of Patents has the responsibility to limit property grants that have national security implications:

Whenever the publication or disclosure of an invention by the publication of an application or by the granting of a patent . . . might . . . be detrimental to the national security, he shall make the application for patent in which such invention is disclosed available for inspection to the Atomic Energy Commission, the Secretary of Defense, and the chief officer of any other department or agency of the Government designated by the President as a defense agency of the United States.²⁷³

No such detriment was found for the '323 patent, so it can be fairly assumed that the claimed tube technology was considered by the state to have no prima facie national security implications. As such, limits on initial appropriation continue their mostly "closeted existence."²⁷⁴

Limitations to consider, therefore, come by way of postgrant doctrines. Similar to *Certain Automatic Crankpin Grinders*, the government agencies that were positioned to best determine whether the public had a sufficient enough stake in the "periphery" of the intellectual property right to justify denying an exclusion order declined to file statements of the public interest during the investigation.²⁷⁵ However, the National Science Foundation, an independent government agency, filed a statement opposing an exclusion order. While the Commission partially justified the denial of an exclusion order on its notion "that basic scientific research, such as the nuclear structure research . . . is precisely the kind of activity intended by Congress to be included when it required the Commission to consider . . . the public health and welfare," it readily admits that the "benefits to public health and welfare of pure research are indirect and perhaps more difficult to demonstrate."²⁷⁶ The Commission awkwardly discussed the "patent monopoly" as a way to "recover research and development expense and provide a financial reward,"²⁷⁷ as if the property right in patents is merely a conduit for financial gain,²⁷⁸ carelessly brushing aside the fundamental ownership of the property. The

273. 35 U.S.C. § 181 (2006); see also MANUAL OF PATENT EXAMINING PROCEDURE, *supra* note 138, at § 115.

274. See *supra* note 168 and accompanying text.

275. *Certain Inclined-Field Acceleration Tubes and Components Thereof*, Inv. No. 337-TA-67, USITC Pub. 1119 (Dec. 29, 1980) (Final).

276. *Id.* at 22–23.

277. *Id.* at 26.

278. See *contra, e.g.*, *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 510–11 (1917) ("Since . . . 1829 this court has consistently held that the *primary purpose* of our patent laws is not the creation of private fortunes for the owners of patents but is 'to promote the progress of science and useful arts.'" (emphasis added)).

Commission, sensing an inequality and injustice, blundered through its analysis but ultimately reached the correct outcome.

The ITC's analysis would greatly benefit from an understanding of Merges's framework. The Commission had all of the right facts to deny the remedy, without any of the coherent logic. The focus should have been on the "undue leverage" created by the facts of the case in conjunction with the public's extra strong stake in the property claim. The Commission correctly pointed out that the property owners' property was subsidized by society—more so than what normally occurs—because of the government's infusion of money into this particular research industry. Here the "core" and "periphery" of the right are different from what is typical: the periphery is much larger. That aspect of proportionality is coupled with another aspect: the property right was creating more economic leverage in favor of HVEC than it deserved, commensurate with its ownership in the "core" of the right. First, the imported tubes were not interchangeable with the claimed tubes. The imported Dowlish tubes had different geometries that allowed for "greater performance per dollar."²⁷⁹ While there was testimony to contradict the performance claims, the fact remained that unless an exclusion order was denied, many research institutes would have to pause research, incur large retrofitting expenses, or close facilities outright. At a time when society and the state had overriding needs—maybe even "urgent needs"—in light of nuclear arms development, and also had an abnormally large periphery ownership in development of an intellectual property right, the state properly denied the "core" property owner its right to exclude in this limited instance.

C. *Certain Baseband Processor Chips*

As with the two previous fact patterns, the initial appropriation of the inventions claimed in U.S. Patent Nos. 6,374,311; 6,714,983; 5,682,379; 6,359,872, and 6,583,675, all of which relate to cellular device microchips and cellular telephone handsets, was valid and justifiable under Lockean and Kantian theory, as adopted by Merges. This case, however, represents another situation where, because of changes in the marketplace, the patentee arguably garnered undue economic leverage. Interestingly, however, the facts and timing of *Certain Baseband Processor Chips* provide a great case study for the rarely seen "reliance" aspect of the proportionality principle and Lockean sufficiency proviso.²⁸⁰

While the complainant, Broadcom, only named one respondent, Qualcomm, the true international scale and implications of the investigation was evident from the intervening parties: Cellco d/b/a Verizon Wireless, LG Electronics Mobilecomm, Motorola, Kyocera, Sprint Nextel Corporation, Samsung Electronics,²⁸¹ and eventually nonparty intervenors T-Mobile and AT&T Mobility.²⁸² The intervenors were permitted to submit evidence and statements regarding the remedy and

279. *Certain Inclined-Field Acceleration Tubes*, Inv. No. 337-TA-67, USITC Pub. 1119, at 26 (Dec. 29, 1980) (Final).

280. *See supra* notes 141–42 and accompanying text.

281. *Certain Baseband Processor Chips*, Inv. No. 337-TA-543, USITC Pub. 4258 (Oct. 2011) (Final).

282. *Id.*

bonding phase of the investigation—the public interest. In other words, the exclusion of Qualcomm chips in light of Broadcom’s patented property affected nearly every major cellular mobile service provider and manufacturer in the world. At the time of the investigation there were approximately 215 million cell phone users in the United States,²⁸³ roughly 70 percent of the entire resident population.²⁸⁴

As Wendy Gordon might argue, the introduction, or really the tidal wave, of mobile devices with the feature claimed in the disputed patents shifted the cultural “baseline.”²⁸⁵ The original creator, Broadcom, added something to the culture of society that society came to depend on so heavily that removing access to that something would actually injure society. The importance of Broadcom’s technology in relation to the nation’s reliance on mobile networks and particularly the speed of 3G broadband services is enormous—the reliance ranges from individual citizens to large-scale societal security.²⁸⁶ While Broadcom was not trying to outright exclude any public access to their microchip technology, Gordon and Merges might still agree that the practical effects of an exclusion order against Qualcomm would be close enough to an outright exclusion to work a similar public harm. And, even if the reliance aspect of the proportionality argument is not sufficient to justify derogating Broadcom’s fundamental right to the intellectual property it appropriated, other notions of undue leverage fit in seamlessly to reinforce the proportionality arguments. Namely, due to the “standards-type”²⁸⁷ nature of the microchips and a lack of satisfactory non-infringing alternatives, Broadcom wielded too much economic force over the marketplace. This is true even if Broadcom did not lay in wait like the “bad-actors” or nonpracticing entities discussed or addressed in *eBay*.²⁸⁸

The Commission, not able to articulate a reliance argument like that of Gordon’s, and without the philosophical framework to appreciate the undue-leverage aspect of proportionality, grasped at national-security type justification for limiting the general exclusion order.²⁸⁹ The Commission stated that “public safety officials appear to be increasingly relying on the data capabilities of 3G telecommunications networks in carrying out their functions, and anticipate that

283. *Id.* at 13.

284. The U.S. population in 2011 was approximately 310 million people. See UNITED STATES CENSUS BUREAU, USA QUICK FACTS, available at <http://quickfacts.census.gov/qfd/states/00000.html>.

285. Gordon, *supra* note 156, at 1567 (“[O]nce a creator exposes her intellectual product to the public, and that product influences the stream of culture and events, excluding the public from access to it can harm.”).

286. Certain Baseband Processor Chips, Inv. No. 337-TA-543, USITC Pub. 4258 (Oct. 2011) (Final).

287. The FCC regulated the telecommunication industry using a flexible licensing program instead of a strict standards-type approach. Regardless, the same interoperability concerns abound. *Id.*

288. *Id.* at 140–141 (For example, “Qualcomm points out that the record shows that secure high-speed wireless telecommunication through EV-DO networks is essential to ensuring public safety and welfare and to national security” going on to state that such networks “allow first responders to receive messages and videos while simultaneously on a call, such as a 911 call.”).

289. *Id.* at 24.

this reliance will greatly increase in the near future.”²⁹⁰ The Commission also considered the domestic economy and individual citizen’s access to the technology in constructing an order but never quite pulled it all together. Nevertheless, the Commission fashioned a wise and thoughtfully balanced remedy. The Commission, in full recognition of the fundamental nature of the property, studied its fully developed record to find where the least injury would be worked on society, the owners of the “periphery,” and Broadcom, the owner of the “core.” The Commission allowed some already imported chips and handsets to be exempt from the exclusion order (that is, those devices which the public and the market had already come to rely on), while excluding the majority of future imports.²⁹¹

IV. ADOPTING A FRAMEWORK

Areas of success and failure within the Commission’s analysis can be identified by examining the ITC cases in which general exclusion orders were denied. For example, as discussed above, the dissenting commissioner’s views in *Certain Automatic Crankpin Grinders* provided a close example of a philosophically and morally justifiable approach to addressing the public interest in patent litigation. That commissioner was correct in first identifying the patent as a fundamental property right.²⁹² Also, that commissioner, when stating that “Congress was particularly concerned about price gouging or monopolistic practices,”²⁹³ was resonating notions of undue leverage. In comparison, the majority in *Certain Automatic Crankpin Grinders* lost focus of what was truly the public interest comparison. In another example, the Commission in *Certain Baseband Processor Chips* developed a very robust record that explored the public interest implications from a variety of facets and always kept a focus on the patent *right* and not just the *interests* in the patent claims. The Commission was able to construct a remedy that was neatly tailored and commensurate with ownership stakes in the core and periphery, given the reliance and undue leverage involved.

What is most evident from examining the ITC cases, however, is that the Commission lacked a framework for its analysis. Left stranded with only the mere phrase “the effect of such an exclusion upon the public health and welfare” to grasp onto, the Commission was free to stumble towards its own subjective conclusions about when it is appropriate to derogate a property owner’s right to exclude. It is at this juncture that the cases from the ITC begin to spill their lessons over to patent cases that arise in federal district courts under the Patent Act. Regardless of whether there is a “long-standing principle that importation is treated differently than domestic activity,”²⁹⁴ the two forums can learn from one another to better

290. *Id.* at 148.

291. *Id.* at 160.

292. *Certain Automatic Crankpin Grinders*, Inv. No. 337-TA-60, USITC Pub. 1022, at 1 (Dec. 17, 1979) (Final) (Comm. Moore’s supplemental views) (“A patent is a constitutionally granted monopoly.”); *see also* S. REP. NO. 93-1298, at 21 (1974).

293. *Certain Automatic Crankpin Grinders*, Inv. No. 337-TA-60, USITC Pub., 1022, at 2 (Dec. 17, 1979) (Final) (Comm. Moore’s supplemental views).

294. *See supra* text accompanying notes 19–20 (discussing and quoting *Spansion, Inc. v. Int’l Trade Comm’n*, 629 F.3d 1331, 1359 (Fed. Cir. 2010)).

understand when the public interest can justifiably be used to trump a property right. In fact, one commentator has already argued that the “biggest and most unique advantage of the § 337 litigation—exclusion orders—could be brought in under the Patent Act.”²⁹⁵ Professor Dennis Crouch has commented that “[i]f the ITC continues to give more weight to the public interest factor, the result is that ITC exclusion orders may begin to parallel the injunction that a court would have ordered under *eBay*.”²⁹⁶ Both forums would benefit from guidance, factors, or waypoints to assist when those forums are called upon to venture past the patent as a property right and right to exclude that it confers. This is especially true going forward as the public interest factors take a front seat in litigation and as “the remarkable ongoing expansion of the subject matter covered by various intellectual property rights” continues.²⁹⁷

In that regard, implementing a new doctrine of patent misuse that clearly adopts a “property, but” approach to deciding when exclusion orders should or should not be granted might be a satisfactory means of providing a guiding framework. A new patent misuse doctrine could be fashioned to heed Judge O’Malley’s call from *Robert Bosch LLC v. Pylon Manufacturing Corporation* that “even though a successful patent infringement plaintiff can no longer rely on presumptions or other short-cuts to support a request for a permanent injunction, it does not follow that courts should entirely ignore *the fundamental nature of patents as property rights granting the owner the right to exclude*,”²⁹⁸ and to also coherently verbalize the notions of “undue leverage” that can be distilled from the statements of the Court in *eBay*.²⁹⁹

A patent misuse doctrine aligns well with the direction of Merges’s framework. Specifically, after carefully working through the philosophical and moral justifications for property as a fundamental right, Merges realizes that limits to rights are most justifiable at a postgrant stage. Most commonly, it is only after first recognizing property as a fundamental, constitutionally empowered right, derived from organic U.S. law as a form of private property,³⁰⁰ that it is appropriate to consider limits on those rights as proportionality and distributive fairness demand. Moreover, as Merges states, “[t]he dynamic nature of IP in practice makes the postgrant stage the crucial time for bringing balance to the IP system.”³⁰¹

Such a doctrine will be important not only in light of the increased awareness of the public interest factors, but also in light of new technologies that in recent years have been brought about through scientific endeavor. For example, with modern advances in genetics, and with cases like *Association for Molecular Pathology v.*

295. Kumar, *supra* note 32, at 579.

296. Crouch, *supra* note 23.

297. Oren Bracha, *The Commodification of Patents 1600–1836: How Patents Became Rights and Why We Should Care*, 38 LOY. L.A. L. REV. 177, 178 (2004) (citing William W. Fisher III, *The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States 1–10* (1999), available at <http://cyber.law.harvard.edu/people/ffisher/iphistory.pdf>).

298. 659 F.3d 1142, 1149 (Fed. Cir. 2011) (emphasis added).

299. 547 U.S. 388, 396 (2006) (Kennedy, J., concurring).

300. See generally Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. Rev. 689 (2007).

301. MERGES, *supra* note 28, at 303.

U.S. Patent & Trademark Office (“Myriad”)³⁰² taking the limelight in patent litigation, some believe that patents concerning genetic engineering and designer babies are possibly not far away. One commentator has noted that the “[US]PTO inevitably will grant patents on biological discoveries with such eugenic potential.”³⁰³

Modern medicine currently has the ability to regenerate full fingers from certain cellular matrices and to grow completely new livers from a combination of fetal cells and cadaver organs,³⁰⁴ and the future will only bring about more options. Such new, culturally divisive technologies will raise important questions about the justifiability of both the initial property grant and the postgrant restrictions. It is in those moments of divisiveness that a strong, philosophically sound framework for the understanding of patents as rights will be of most value. New technologies have the potential to direct discordant results in different jurisdictions across the United States without a patent misuse doctrine that commands some uniformity.

Currently, the doctrine of patent misuse is limited statutorily by 35 U.S.C. § 271. The statute is written in the negative stating first that “[n]o patent owner otherwise entitled to relief for infringement . . . shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following”³⁰⁵ and then enumerating scenarios. The proscribed scenarios, such as “refus[ing] to license or use any rights to the patent,”³⁰⁶ helps ensure that the ownership rights that the patent confers are not arbitrarily diminished. It also tries to recognize distributive inequality through economic anticompetitiveness such as when it states that it is not misuse to condition the license of a patent “on the acquisition of a license to rights in another patent . . . unless . . . the patent owner has market power in the relevant market.”³⁰⁷

302. 702 F. Supp. 2d 181 (S.D.N.Y. 2010), *rev'd in part sub nom.* U.S. Patent & Trademark Office v. Myriad Genetics, Inc., 653 F.3d 1329 (Fed. Cir. 2011) (reversing the district court’s grant of summary judgment with regard to Myriad’s composition claims to isolated DNA), *vacated sub nom.* Ass’n for Molecular Pathology v. Myriad Genetics, Inc., 132 S. Ct. 1794 (remanding for reconsideration in light of Mayo Collaborative Servs. v. Prometheus Labs., Inc., 132 S. Ct. 1289 (2012)), *op. on remand* 689 F.3d 1303 (Fed. Cir. 2012), *cert. granted* 133 S. Ct. 694 (2012). Commentators strongly suggested that the Supreme Court would hear the case on certiorari. See, e.g., Dennis Crouch & Jason Rantanen, *Patentable Subject Matter and the Supreme Court Myriad Preview*, PATENTLYO L. BLOG (Aug. 3, 2011, 8:24 AM), <http://www.patentlyo.com/patent/2011/08/patentable-subject-matter.html>. Oral arguments will be heard before the Supreme Court on April 15, 2013.

303. Timothy R. Holbrook, *The Expressive Impact of Patents*, 84 WASH. U. L. REV. 573, 578 (2006).

304. See Daniel J. DeNoon, *First Human Liver Grown in Lab*, WEBMD HEALTH NEWS (Oct. 29, 2010), <http://www.webmd.com/news/20101029/first-human-liver-grown-in-lab> (“The organs are grown on ‘scaffolds’ created from cadaver organs. . . . When fetal cells from the appropriate organ are pumped into the scaffold, they hone in on the appropriate location and begin to grow.”).

305. 35 U.S.C. § 271(d) (2006).

306. *Id.*

307. *Id.* (emphasis added).

The current patent misuse doctrine, however, only goes halfway. It does not clearly articulate the philosophically justifiable notions it tries to protect or, at best, does so in a nonsequential order. A new patent misuse doctrine that borrows from the conclusions utilized in Merges's framework could help guide both courts and litigants who face issues of public interest. A clear articulation of a "property, but" formula would provide a philosophically justifiable roadmap for an analysis. Ultimately, such a use of the framework is likely what Merges had in mind as he tried to create a justification for intellectual property that is a "lock-solid, airtight case, a case we can confidently take to an unbiased jury of hardheaded social scientists."³⁰⁸

CONCLUSION

This Article posits that "public interest" factors are likely to take a more prominent role in patent litigation arising under the Patent Act in federal district courts and under Section 337 investigations at the ITC. At the ITC, with the recent changes in the rules governing the statutory public interest factors in Section 337 forcing litigants to make public interest statements at the onset, parties will be spending more time and resources on public interest arguments.³⁰⁹ In the district court, the transition from the "automatic rule," where injunctions were denied in only "rare instances," to a post-*eBay* world, where in one in four cases an injunction is denied, the "public interest" prong of the four factor test is now positioned front-and-center.³¹⁰ Moreover, with new developments in the sciences that have spawned the "pervasive creep of technology into formerly sacrosanct areas of life," the public interest component will likely be a tool used to resist that progression.³¹¹

Since "[a] patent is a property right" and "[m]ost people associate property rights with ownership" or the right to exclude,³¹² using the public interest to derogate that right is a step that should not be lightly taken. Careful consideration is necessary before denying a patent owner's ability to exclude, since it has the potential not only to disrupt the delicate balance of incentives that the patent system provides, but to undermine the philosophical and fundamental rights inherent in our society. Professor Robert Merges has recognized the value of such careful consideration. The purpose of Merges's book, *Justifying Intellectual Property*, was to provide an analytical framework, rooted in the pillars of philosophy that acknowledges intellectual property as a fundamental right foremost. This Comment has distilled Merges's framework into a form applicable to studying several cases in which the public interest was found by the ITC to overcome the patent owner's right to exclude. In that way, this Comment has attempted to "justify" the public interest.

308. MERGES, *supra* note 28, at 3 (emphasis omitted).

309. Rules of Adjudication and Enforcement, 76 Fed. Reg. 64,803 (Oct. 19, 2011) (to be codified at 19 C.F.R. pt. 210); *see also* Bell, *supra* note 24.

310. *See supra* Part I.A.

311. Dana Remus Irwin, *Paradise Lost in the Patent Law? Changing Visions of Technology in the Subject Matter Inquiry*, 60 FLA. L. REV. 775, 815 (2008).

312. Farnese, *supra* note 33, at 4.

Applying Merges's framework, based on Lockean appropriations, Kantian Universal Rights, and Rawlsian ideas of distributive justice, this Comment has shown that in "public interest" cases thus far, the ITC has lacked consistency and coherency in its rationale. In the future, there will be a need for a patent misuse doctrine that codifies a clear framework for derogating property rights in the name of public interest. Without a flexible, but clear, framework, both the ITC and Article III federal courts will be free to subjectively interpret the public interest as they see fit. The discordant results would be counter to the patent law uniformity that was expressly mandated by Congress when it formed of the Court of Appeals for the Federal Circuit.