

## Patents as Property: Rethinking the Exclusive Right in Patent Law

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Scholars today maintain that patents secure solely the right to exclude, and thus this legal entitlement confers none of the “substantive rights” that traditional, tangible property entitlements secure to their owners—the rights of acquisition, use and disposal. Although courts ostensibly agree, they consistently protect patentees’ substantive rights in commercially exploiting their patented inventions. In sum, courts secure to patentees their substantive use-rights in their property. What is driving courts to define patents as property in a way that is unaccounted for by modern patent theory?

My thesis is that courts secure a patentee’s rights in commercially exploiting an invention because it is in these cases that patents are defined as “property” in a traditional manner associated with natural-rights property theory. In commercial contexts, patentees look to myriad patent doctrines defining their rights in their property, namely, the first-sale (exhaustion) doctrine, patent misuse doctrine, and use-rights framed by the broader context of antitrust law. Perhaps unsurprisingly, it is in these areas that courts find labor-reward and dynamic efficiency policies most salient in securing to patentees their expectations in using their property. Accordingly, they secure to patentees the substantive use-rights to their inventions.

This insight suggests that modern patent scholarship, which focuses on the right to exclude as the sole right secured by a patent, is too under-theorized to explain or justify patents as property. Interpretatively, modern patent theory cannot explain as well as traditional, natural-rights property theory why certain doctrines exist in patent law. Many patent doctrines first evolved in the nineteenth century, a time period in which the classification of a legal right as “property” was influenced by the natural-rights theory that property-owners should have the fruits of their labors secured to them by exclusively protecting their rights to acquire, use and dispose of their possessions. As I have explained elsewhere, nineteenth-century courts concomitantly secured many patent rights under this natural-rights theory of property, see *Who Cares What Thomas Jefferson Thought About Patents?*, 92 Cornell Law Review (forthcoming 2007).

Substantively, modern patent theory begs important normative questions about what rights should be exclusionary in a patent. Although the substantive conception of property neither explains nor justifies all patent doctrines, it does reveal that in a certain class of cases, courts are motivated by the same policies that lead antebellum courts to provide similar protections to tangible-property owners. In essence, courts develop strong doctrinal presumptions favoring property owners in the use of their property where there is little empirical data on the impact of changes in legal doctrine. These presumptions secure a property-owner’s liberty in exploiting the use-rights inherent in property, promoting further the policy that the law should secure to property-owners the fruits of their labors. In looking at historical cases, it is evident that courts extended this widely recognized justification for tangible property rights to patents. Of course, history as such does not validate patent rights today, but these long-standing doctrines and their continuing application today suggests how these natural-rights policies remain a viable justification for securing patents as property.