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Response

Meaning is in the Mind of the Reader: A Rejoinder to Burk, Cotter, and Lemley

Ted Sichelman*

I. Introduction

As beauty is in the eye of the beholder, meaning is in the mind of the reader.¹ In three responses to my article, *Purging Patent Law of “Private Law” Remedies*,² Dan Burk,³ Tom Cotter,⁴ and Mark Lemley⁵ offer three distinct readings and, hence, attribute three distinct meanings. In this rejoinder to Burk, Cotter, and Lemley, I endeavor to convey to the reader my intended meaning by pointing out what I believe are mischaracterizations of

* Professor, University of San Diego School of Law.

1. Although I initially thought I coined this clever twist on the hackneyed aphorism, “beauty is in the eye of the beholder,” a quick Google search shows that there is ample “invalidating prior art.” See, e.g., Annalee Newitz, *Where Memes Really Come From*, 109 (Jan. 23, 2013, 1:58 PM), <http://io9.com/5978399/where-memes-really-come-from>, archived at <http://perma.cc/9NGP-KUUF> (“Like many philosophers of his time, Barthes insisted that cultural texts — whether books or sporting events — always have many meanings. This is partly because textual *meaning is in the mind of the reader*, and it’s partly because language itself works by implication and suggestion.”) (emphasis added). Nonetheless, the twist is sufficiently obscure (only 18 instances of the phrase appear on Google) and apropos to justify its use as the title of this Response. See GOOGLE, https://www.google.com/?gws_rd=ssl#q=meaning+is+in+the+mind+of+the+reader, archived at <http://perma.cc/T8SW-5DVB> (search of the phrase “meaning is in the mind of the reader”).

2. Ted Sichelman, *Purging Patent Law of “Private Law” Remedies*, 92 TEXAS L. REV. 517 (2014).

3. Dan L. Burk, *Means and Meaning in Patent Remedies*, 92 TEXAS L. REV. SEE ALSO 13 (2014).

4. Thomas F. Cotter, *Make No Little Plans: Response to Ted Sichelman*, *Purging Patent Law of “Private Law” Remedies*, 92 TEXAS L. REV. SEE ALSO 25 (2014).

5. Mark A. Lemley, *Taking the Regulatory Nature of IP Seriously*, 92 TEXAS L. REV. SEE ALSO 107 (2014).

my original article in Burk's and Lemley's responses. Additionally, I rebut various criticisms in all of the responses and stake out areas of consensus.

II. "Through Green Spectacles"⁶

The German poet Heinrich von Kleist once wrote to his fiancée:

If everybody had green spectacles instead of eyes, then they would have to judge the objects they say through them to be green—and they would never be able to decide whether their eyes showed them things as they are, or whether they were not adding something, that did not belong to them, but to their eyes. So it is with our understanding.⁷

As Kleist implies, every person's understanding is cast through a shade of mental spectacle. And that shade can be quite dark when a scholar has developed a large body of work on a particular subject—here, patent law remedies.

Burk, Cotter, and Lemley have all written extensively on patent remedies. Thus, it is not surprising they bring years of priors—and, hence, "green spectacles" of sorts—to their critique of my work. In some cases, the spectacles merely lead to disagreement regarding the premises underlying my thesis (Cotter); in other cases, they lead to what I view as misconstrual of my premises and arguments *per se* (Burk and Lemley). In this Part, I focus on this latter concern in order to eliminate proverbial "straw men" that may have been unintentionally erected through Burk's and Lemley's misinterpretations. (And, in that regard, I think the "green spectacles" critique is wholly justified as Cotter, unlike Burk and Lemley, accurately captured the meaning and import of my analysis and proposals.)

A. *Lemley's Conflation of Private Law "Frameworks" and Private Law "Remedies"*

Lemley remarks that my proposal counsels that we "purge all tort remedies from IP law."⁸ Quite to the contrary, I recommend that because of the difficulties involved with judges implementing a pure regulatory approach to remedies, that "a default rule of injunctive relief and make-whole damages [would be] more appropriate."⁹ Indeed, even in my proposed pure regulatory approach—in which judges act as Dworkinian–Herculean

6. Letter from Heinrich von Kleist to his Fiancée (Mar. 22, 1801), *translated in* LILIAN R. FURST, *THROUGH THE LENS OF THE READER: EXPLORATIONS OF EUROPEAN NARRATIVE* 51 (1992).

7. *Id.*

8. Lemley, *supra* note 5, at 111 (emphasis added).

9. Sichelman, *supra* note 2, at 566.

omniscient “superjudges” fashioning customized remedies on a case-by-case basis¹⁰—injunctions should issue when they promote the “public interest”: here, innovation.¹¹ Moreover, nothing in my proposal necessarily precludes Lemley’s premise that “market exclusivity” in the form of lost profits could theoretically be the optimal amount to incentivize innovation in a specific case.¹² (In the next Part, I explain why I disagree with this premise—for now, I merely continue explaining how Lemley mischaracterizes my primary thesis.)

Rather than suggesting that “we purge all tort *remedies* from IP law,”¹³ as Lemley reads my article, I propose that “tort law *principles* should be excised from patent law.”¹⁴ Specifically, I contend that we should jettison the notion that patentees should be entitled *as a matter of course* to be returned to the status quo *ante* in the event of infringement.¹⁵ Although Lemley recognizes my rejection of this tort-based principle, he wrongly infers that rejecting this principle necessarily means rejecting each particular remedy that flows from this principle.¹⁶ Such logic is akin to saying that a

10. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 105–06 (1978) (positing Hercules, “a lawyer of superhuman skill, learning, patience, and acumen . . . [who] is a judge of some representative American jurisdiction”).

11. Sichelman, *supra* note 2, at 568 (“Ultimately, injunctions should turn only on an analysis that solely concerns the public interest—and not just the interest of the public in using the invention but also its interest in the creation and commercialization of the invention.”); *see also id.* at 564 (“[I]njunctions (i.e., property rules) are more optimal than damages (i.e., liability rules) when the marginal judicial costs of determining damages and the error costs from wrong determinations exceed the marginal costs of granting an injunction (relative to awarding damages).”).

12. *See id.* at 554–58 (setting forth several situations when lost profits over- or under-compensate patentees but never arguing that these remedies are always inappropriate).

13. Lemley, *supra* note 5, at 111 (emphasis added). Besides the remedy–principle distinction, Lemley also appears to read my article as applying to all IP law. *See id.* Although I generally believe there is substantial merit to my arguments outside of patent law, nonutilitarian, deontological interests present in copyright and trade secret law may counsel for a somewhat modified version of what I propose for patent law. *See* Robert G. Bone, *The (Still) Shaky Foundations of Trade Secret Law*, 92 TEXAS L. REV. 1803, 1838 (2014) (“[T]rade secret law emerged in a formalistic world of natural property rights and has never managed entirely to escape its roots.”); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1535 (1993) (discussing natural right approaches to copyright law); Sichelman, *supra* note 2, at 530–32 nn.57–59 (arguing that patent law primarily rests on a utilitarian basis). As such, my critique solely concerns patent law. *See generally id.* (nowhere contending that copyright, trademark, or trade secret law should be “purged” of “private law remedies”).

14. Sichelman, *supra* note 2, at 554. Granted, simply reading my title—*Purging Patent Law of “Private Law” Remedies*—one might think otherwise, but a perusal of merely the introduction belies such a facile interpretation. *See id.* at 528–29 (listing a handful of circumstances in which traditional remedies are suboptimal but never arguing that they are suboptimal in every case).

15. *Id.* at 554 (“In sum, the premise of promoting the *status quo ante* should be jettisoned as a fundamental tenet of patent law remedies.”).

16. Indeed, my project is merely the natural extension of Lemley’s article, *Property, Intellectual Property, and Free Riding*, in which he rejected the “real property” foundation of

rejection of free-market libertarianism necessarily implies a wholesale rejection of “free markets” as a mode of economic ordering.¹⁷ Rather, a decidedly utilitarian approach, which is largely agnostic to particular modes of social organization¹⁸—like the one I adopt in my article—may very well yield free markets as optimal solutions for certain classes of economic behavior.¹⁹ Given that I recommend some of the same remedies as are found in private law regimes, Lemley’s charge that my model leads to the “purg[ing] of all tort remedies from IP law”²⁰ rings hollow.

B. Burk’s Conflation of Private Law “Scholarship” and Private Law “Remedies”

Mainly orthogonal to Lemley’s view, Burk criticizes my article because in his opinion it fails to appreciate that “[t]ort law is now generally seen as a complement or an alternative to other public systems such as nationalized

“intellectual property.” Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEXAS L. REV. 1031 (2005) [hereinafter Lemley, *Property*]. Although Lemley desires to eliminate IP as a species of real property, presumably he would not go so far so to remove all aspects of “real property” from IP, such as alienability and destructibility (in IP, abandonment). Cf. Stacey L. Dogan & Mark A. Lemley, *A Search-Costs Theory of Limiting Doctrines in Trademark Law*, 97 TRADEMARK REP. 1223, 1239 (2007) (“[P]atents . . . have the alienability attributes of real property.”). The same reasoning holds for my article, but with respect to aspects of tort law in IP remedies. See Sichelman, *supra* note 2, at 564–68.

17. For example, Lemley claims that “technologies flourish where market entry is free” and that “we don’t want a ‘Mother, may I?’ regulatory regime for innovation,” advocating an effectively “free market” baseline when it comes to governments restricting entry to innovation markets. Mark A. Lemley, *The Regulatory Turn in IP*, 36 HARV. J.L. & PUB. POL’Y 109, 109–10 (2012) [hereinafter Lemley, *The Regulatory Turn*]. In other situations, Lemley prefers regulatory approaches. See, e.g., Mark A. Lemley, *The Law and Economics of Internet Norms*, 73 CHI.-KENT L. REV. 1257, 1261 (1998) (offering a skeptical analysis that private ordering on the Internet is optimal); Lemley, *Property*, *supra* note 16, at 1038 (“Regulation of pollution is justified because pollution imposes costs on others . . .”). Rather, like a good utilitarian—at least in IP law—Lemley typically espouses whatever solution in his view maximizes utility, regardless of a priori principles of social organization. My approach to patent law remedies offers the same sort of flexibility.

18. See, e.g., ANNE MARIE SMITH, LACLAU AND MOUFFE: THE RADICAL DEMOCRATIC IMAGINARY 116 (1998) (critiquing “[u]tilitarianism’s agnostic approach”). Granted, utilitarianism assumes the centrality of the individual as the measure of overall “utility,” and a host of other potentially questionable assumptions (e.g., the measurability of “utility,” general equality of utility functions across geography and time, inability to fully capture distributional concerns, constraint problems, failure to fully capture non-human utility, etc.). See generally Bernard Williams, *A Critique of Utilitarianism*, in UTILITARIANISM FOR & AGAINST 77–150 (J.J.C. Smart & Bernard Williams eds., 1973). However, when utilitarianism is applied to patent law, it usually does not succumb to these potential shortfalls given patent law’s central aim of promoting innovation. See Ted Sichelman, *Commercializing Patents*, 62 STAN. L. REV. 341, 378–80 (2010). *But cf. id.* at 385–88 (arguing for the importance of distributive values in patent law).

19. See, e.g., Lemley, *The Regulatory Turn*, *supra* note 17 (offering a skeptical view of governmental erection of barriers to entry in innovation markets).

20. Lemley, *supra* note 5, at 111.

health insurance or worker's compensation."²¹ On this ground, Burk contends my "characterization of tort as addressing 'private' wrongs" is not particularly "meaningful," and my aim to "purge" patent law remedies of tort-law principles is reminiscent of "ethnic cleansing or medieval medical treatment"²² and ultimately unnecessary to "effectuate . . . public welfare goals."²²

As I noted in my article, it is *traditional* tort law principles—as well as traditional real property principles—that pervade remedies doctrine and patent law more generally.²³ As I explained, "At least historically, the vindication . . . of private law rights protected *individual* interests, and these rights grew out of a common law tradition not so much concerned with utilitarian values, but instead personal autonomy and liberty."²⁴ Moreover, I recognized—contrary to Burk's indication otherwise in his response—that "[m]ore recently, private law scholars have embraced more public-oriented, utilitarian approaches to contract, property, and tort law, particularly in the field of law and economics."²⁵

Notably, application of these modern approaches to private law, especially to patent law remedies, have largely appeared in *law reviews*—not legal opinions (other than those by former academics, like Judges Guido Calabresi and Richard Posner, and just a few other very forward-thinking judges).²⁶ In other words, Burk's assertion that the "discourse on torts has largely been couched in terms of public welfare"²⁷ in recent times is simply wrong when it comes to most *judicial* discourse,²⁸ particularly judicial

21. Burk, *supra* note 3, at 14.

22. *Id.* at 14–15.

23. Sichelman, *supra* note 2, at 531–33.

24. *Id.* at 531 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *139 ("So great . . . is the regard of the law for private property, that it will not authorise the least violation of it . . . not even for the general good of the whole community.")).

25. *Id.* at 532.

26. See Peter Gable, *What it Really Means to Say "Law is Politics": Political History and Legal Argument in Bush v. Gore*, 67 BROOK. L. REV. 1141, 1151 (2002) ("[I]n its technical aspects the Law and Economics movement has had only a limited direct effect on the discourse of judicial opinions (with notable exceptions such as Judge Richard Posner of the Seventh Circuit), [but] it has become the dominant ideology in American law schools.").

27. Burk, *supra* note 3, at 15.

28. See RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 18 (2d ed. 1977) [hereinafter POSNER, ECONOMIC ANALYSIS] ("Few legal opinions . . . contain explicit references to economic concepts, and few judges have a substantial background in economics."); Richard A. Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281, 292 (1979) [hereinafter Posner, *Some Uses*] (acknowledging "the prevalence of noneconomic rhetoric in judicial decisions"). Of course, certain areas of tort law, such as workers' compensation, sound in public welfare principles, but the bulk of tort law is rooted in the common law, and in these areas the discourse is still largely couched in terms of traditional, private interests. See Jody S. Kraus, *Legal Determinacy and Moral Justification*, 48 WM. & MARY L. REV. 1773, 1783 (2007) ("The deontic theories of contract and

discourse regarding patent remedies.²⁹ Thus, it is no coincidence that Burk solely cites Judge Calabresi's, Judge Posner's, and other academics' works as examples of tort law as a "public welfare" regime.³⁰ Nonetheless, at the end of my article—and consistent with Burk's theoretical position—I draw upon the work of David Rosenberg, known for his "public law vision" of tort law, to suggest that a public, regulatory model of patent law is more advantageous for promoting innovation than one centered in *traditional* private law principles.³¹

As such, like Lemley's mischaracterization of my article as eschewing private law remedies rather than private law principles, Burk mischaracterizes my reliance on tort law as one grounded in modern tort law *scholarship* rather than tort law *doctrine*.³² Such a misconstrual is not merely terminological, because Burk takes the further step of arguing that "there is certainly no particular need to purge torts or property of their private remedies in order to effectuate . . . public welfare goals Nor is it clear that there is a need to purge patent law in order to effectuate *its* public welfare goals."³³

tort purport to justify those bodies of law by establishing the normative credentials of the reasoning evidenced in the express explanatory language of judicial opinions, treatises, and restatements.").

Similarly, patent law—despite nominally being subject to a "Patent Act"—largely derives from an agglomeration of precedents built up in a mainly common law method of adjudication, which has primarily enlisted real property and tort principles as its conceptual foundation. *See* Sichelman, *Purging Patent Law*, *supra* note 2, at 531–35. Nonetheless, to the extent that Burk is claiming that public welfare *principles* have animated judicial opinions more so in modern times, I generally agree. *Cf.* POSNER, *ECONOMIC ANALYSIS supra*, at 25 ("[T]he true grounds of legal decision are often concealed rather than illuminated by the characteristic rhetoric of opinions . . ."). However, such public-oriented principles appear to play a nebulous role in most judicial decisions, especially in patent law. *See* David O. Taylor, *Formalism and Antiformalism in Patent Law Adjudication: Precedent and Policy*, 66 SMU L. REV. 633 (2013) (containing a section entitled "Academic Criticism of the Federal Circuit's Failure to Articulate Policy-Based Justifications in its Opinions"); *see also* Peter Lee, *Patent Law and the Two Cultures*, 120 YALE L.J. 2 (2010); John R. Thomas, *Formalism at the Federal Circuit*, 52 AM. U. L. REV. 771 (2003). In any event, subtextual animation and nominal reliance are quite different concepts, and my view is that it is not only beneficial but also necessary to "purge" patent remedies doctrine of private law rhetoric to effectuate meaningful change. *Cf.* Richard A. Posner, *Judges' Writing Styles (and Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1446 (1995) ("I want now to consider whether a judicial writing style—which might be adopted for reasons independent of one's jurisprudential stance (because one could not write any other way, because of one's aesthetic principles, or because a particular style was in fashion)—can affect content. I think it can . . .").

29. Sichelman, *supra* note 2, at 534 & nn.79–81.

30. Burk, *supra* note 3, at 14.

31. Sichelman, *supra* note 2, at 569 (citing David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984)).

32. *See* Burk, *supra* note 3, at 14 ("One is immediately tempted to at least quibble with this characterization of patent-as-tort in terms of public and private wrongs Since at least the publication of Calabresi's *The Costs of Accidents*, if not before, the American discourse on torts has been largely couched in terms of public welfare.").

33. *Id.* at 15 (emphasis added).

Quite to the contrary, it is precisely because patent law remedies doctrine largely clings to the traditional notion of private law tort remedies of returning the aggrieved party to the status quo *ante*—rather than adopting the public welfare, utilitarian approaches of modern tort law scholarship—that patent law remedies need to be “purged.” Beyond patent law, other than the areas in which tort and property law remedies overlap with the favored approach of law and economics scholars (who often contort their analyses to provide dubious “just so” stories on why the common law was at root utilitarian in approach),³⁴ tort and property law themselves may very well need to be “purged” of private law principles to the extent we aim to implement public welfare concerns in those doctrines.³⁵ In sum, Burk’s *theoretical* view of patent law remedies falters precisely because he conflates the realm of private law scholarship with that of private law doctrine—though, as I explain in the next Part, we are in agreement that, regardless of the theoretical justification, patent remedies *doctrine* should be driven by public-oriented goals.

III. Can Judges “Regulate”?

In this Part, I address Burk’s, Cotter’s, and Lemley’s substantive criticisms, which largely turn on the question of whether judges have the institutional wherewithal and the statutory authority to engage in regulatory approaches to devising patent law remedies. I begin with the latter issue, which dovetails with the immediately previous discussion of Burk’s view that judges can do so without any “purging,” then turn to the competence question.

34. See generally Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559, 587 (2002) (“The tendency of rational choice analysis to indulge in Just So Stories about real-world phenomena is well understood.”).

35. See Rosenberg, *supra* note 31, at 900–05 (recommending that courts discard traditional “private law” processes for adjudicating mass torts in order for the judicial system to achieve public welfare benefits). However, like the distinction between principles and remedies I drew in my response to Lemley’s critique, private law remedies—and, for that matter, private law concepts—may still serve as useful intermediaries in achieving public-oriented aims. See Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 386–96 (2001) (suggesting “areas of inquiry where a more explicit focus on the in rem dimension of property might yield insights that have so far largely eluded law and economics”). Moreover, unlike patent law, tort law and real property law—like copyright law—serve important private interests, which should be retained in the decisional calculus. See Sichelman, *supra* note 2, at 571; cf. Roscoe Pound, *Do We Need a Philosophy of Law?*, 5 COLUM. L. REV. 339, 346 (1905) (“We no longer hold that society exists entirely for the sake of the individual. . . . The common law, however, is concerned . . . with individual rights.”).

A. *The “Public Interest” in Patent Law*

Burk, Cotter, Lemley, and I all agree that the “public interest”—broadly writ—should drive not only patent remedies but also the general substance of patent law. As such, I applaud Burk for extending my analysis to include “exotic” (in the financial sense)³⁶ remedies instruments such as put-option buyouts of the infringer by the patentholder.³⁷ I wholeheartedly agree with Burk that by expanding the domain of remedies options, we can better achieve optimal remedies in specific cases.³⁸

However, I mainly disagree with Burk that the current statutory and doctrinal framework can properly yield such exotic reforms. Specifically, Burk argues that “the metric of ‘making whole,’ . . . is never fixed, and instead shifts with judicial purpose.”³⁹ In his view, “[t]he status quo is never a settled point in time, but rather a hypothetical supposition with parameters that fluctuate doctrinally, procedurally, and situationally.”⁴⁰ Although I agree with Burk there is uncertainty in determining precisely what the status quo *ante* entails in the law of patent remedies, such uncertainty is not without bounds.

For instance, for a patentee seeking to enjoin a competitor’s sales of a product that contains one patented feature, in terms of money damages,⁴¹ the status quo *ante* would precisely be the amount of money the patentee would have made had no infringement occurred.⁴² Although the vagaries of patent

36. See, e.g., NASSIM TALEB, DYNAMIC HEDGING: MANAGING VANILLA AND EXOTIC OPTIONS 38 (1997) (“Most traders distinguish between vanilla and exotic options. The vanilla option and vanilla forward are easily priced in the market and benefit from liquid markets. A nonconventional structure would then be called exotic.”).

37. Burk, *supra* note 3, at 21–23.

38. Indeed, I positively referenced Burk’s put-option solution in my original article. Sichelman, *supra* note 2, at 555 n.182 (“For instance, Burk describes a sort of ‘put’ rule Such a rule potentially presents a more beneficial alternative than merely denying injunctive relief or awarding less than lost profits. However, in order to simplify the exposition here, I leave such considerations for future work.”).

39. Burk, *supra* note 3, at 15.

40. *Id.* at 16.

41. For past infringement, the status quo *ante* has never required, as Burk suggests, the return of all infringing products from end customers not called into suit. Nor would that further the status quo *ante* remedy, which is imposed on the specific legal actors hailed into court. Thus, if a competitor is sued under a status quo *ante* theory, the patentee generally seeks past damages for sales it would have made, plus the damages for any diminution of the price of products it sold. See, e.g., *Lam, Inc. v. Johns-Manville Corp.*, 718 F.2d 1056, 1067 (Fed. Cir. 1983) (awarding lost profits due to lost sales and forced price reductions for past infringement).

42. See Roger D. Blair & Thomas F. Cotter, *Rethinking Patent Damages*, 10 TEX. INTELL. PROP. L.J. 1, 49 (2001) (“As the preceding section suggests, a but-for rule requires the court to restore the patentee to the position she would have occupied had the infringement never occurred. This restoration requires, most obviously, an accurate calculation of either lost profits or lost royalties, with lost profits defined as the difference between the profits the patentee actually earned and the amount that she would have earned but for the infringement”); Mark A. Lemley, *Distinguishing Lost Profits from Reasonable Royalties*, 51 WM. & MARY L. REV. 655, 657 (2009)

damages doctrine often yield somewhat unpredictable results regarding the appropriate level of damages, they are not entirely “plastic,” as Burk contends.⁴³ Thus, when the entire market value rule applies, a court or jury could not legitimately “apportion” lost profits damages to reflect solely the actual economic value of an infringing component or feature under the status quo *ante* approach to damages, at least when the unpatented component or feature is not an entirely separate *and* unrelated product.⁴⁴ Sure, some judges—such as the maverick Judge Posner—have fashioned more economically driven measures of damages.⁴⁵ However, most judges still believe in the rule of law and, in the very least, care about being reversed.⁴⁶ Thus, Burk’s reliance on judges flouting doctrine via essentially legislative

(“The traditional conception of patent protection is to give patent owners a means of excluding competitors from selling the patented product. . . . Lost profits fit logically within this traditional conception. Giving patentees the profits they would have made absent the infringement effectively puts them in the same position as if they had had an injunction in place all along.”).

43. See Burk, *supra* note 3, at 16 (“This same type of subjunctive plasticity is found not only when determining injunctive relief, but is manifest in the damages options articulated within the patent statute.”).

44. See *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1546 (Fed. Cir. 1995) (awarding “but for” damages for patentee’s products not falling within the ambit of the asserted patent when lost sales of those products were “reasonably foreseeable”). Cotter would go so far to argue that even when a product is separable and unrelated to the patent claims at issue, lost profits should still lie as long as the patentee loses sales “but for” the infringement. Specifically, he states:

Our theory also departs from the more traditional view that, in a lost profits case, courts should apportion the amount of the patentee’s lost profits that are attributable to the patented feature from the amount that is attributable to other features of the products that the patentee did not sell as a consequence of the infringement, and that courts should award lost profits on entire unsold products only when the “entire market value” of those products is attributable to the patented feature. . . . In our view, however, if the patentee can prove that the defendant’s infringement caused it to lose sales, Principle 3 [namely, taking substantive patent law as a given] requires that the patentee recover the profits it would have earned on those lost sales; any other rule renders the patentee worse off as a result of the infringement. By contrast, an infringing sale that does not displace a sale on the part of the patentee entitles the patentee only to a reasonable royalty.

Thomas F. Cotter, *Patent Holdup, Patent Remedies, and Antitrust Responses*, 34 J. CORP. L. 1151, 1178 n.137 (2009). This “purist” view is certainly correct as a matter of principle. In any event, the distinction between Cotter’s view and the slightly modified approach of courts today is minor when compared with a case-by-case, innovation-centric approach to remedies.

45. See *Apple, Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901, 917 (N.D. Ill. 2012) (denying Apple injunctive relief because “it would be likely to impose costs on the alleged infringer disproportionate both to the benefits to it of having infringed and to the harm to the victim of infringement”), *rev’d on other grounds* 757 F.3d 1286, 1332 (Fed. Cir. 2014).

46. See, e.g., Stephen J. Choi, Mitu Gulati & Eric A. Posner, *What Do Federal District Judges Want? An Analysis of Publications, Citations, and Reversals*, 28 J.L. ECON. & ORG. 518, 518 (2011) (finding that “district judges in circuits with politically diverse circuit judges are less able to predict the preferences of the reviewing circuit court panel, leading district judges to publish fewer but higher-quality opinions in an effort to maximize their affirmance rate”).

“policy levers” would generally be insufficient to yield substantially beneficial changes in damages law.

Nor does the law of injunctions fare much better. Although Burk properly recognizes that the four-factor equitable test for injunctions contains a “public interest” prong that can be leveraged to diverge from the status quo *ante* remedy, again, the lever has been quite parsimonious in yielding divergent results. Contrary Burk’s broad claim that the factor “must mean ‘otherwise unaccounted public interest that is neither effectuated by respecting the exclusive rights of the patent holder, nor by limiting the application of the exclusive right to the defendant,’”⁴⁷ courts have generally relied on the public interest prong to deny injunctive relief only in cases involving a narrow class of inventions necessary to promote public health and safety.⁴⁸

In sum, Burk and I disagree on the means to achieve public-spirited goals in the doctrine of patent remedies. Nonetheless, despite Burk’s and my disagreement on this issue, we agree—along with Cotter and Lemley—that patent remedies doctrine should be aligned with social, not private, interests. However, such a starting point can yield quite divergent proposals.

Nowhere is this divergence more clear than Lemley’s supposition that “market exclusivity” should guide patent remedies for practicing entities absent some substantial justification otherwise.⁴⁹ Indeed, the remedies that

47. Moreover, as I argued in my original article, the prong should not merely encompass the “interest of the public in using the invention” but also “the creation and commercialization of the invention” that extends beyond the private incentives afforded by traditional remedies. Sichelman, *supra* note 2, at 568.

48. See Sarah R. Wasserman Rajec, *Tailoring Remedies to Spur Innovation*, 61 AM. U. L. REV. 733, 773–74 (2012) (“In weighing the appropriateness of an injunction, however, the public interest factor is currently a simple check that public health is not endangered by entry of an injunction.”). To be certain, in *Apple Inc. v. Samsung Elecs. Co.* (“*Apple v. Samsung II*”), the Federal Circuit panel stated, “We see no problem with the district court’s decision, in determining whether an injunction would disserve the public interest, to consider the scope of [the] requested injunction relative to the scope of the patented features and the prospect that an injunction would have the effect of depriving the public of access to a large number of non-infringing features.” 735 F.3d 1352, 1364–65, 1371–75 (Fed. Cir. 2013). Taken at face value, such an approach would diverge sharply from the historically narrow scope of the public interest prong. However, the Federal Circuit offered this side comment in view of its newly adopted “causal nexus” rule, which requires that “evidence that directly ties consumer demand for the [infringing product] to its allegedly infringing feature” for an injunction to issue. *Apple Inc. v. Samsung Elecs. Co.*, 695 F.3d 1370, 1375 (Fed. Cir. 2012) (“*Apple v. Samsung I*”). As I stated in my original article, the causal nexus rule does not diverge from the status quo *ante* approach because “essentially the same number of infringing products would have been sold [by the patentee] even if the [infringing] product had not incorporated the infringing component.” Sichelman, *supra* note 2, at 561 n.212. Thus, the Federal Circuit’s statement in *Apple v. Samsung II* cannot be relied upon to substantially expand the “public interest” prong of the *eBay* test.

49. See Lemley, *supra* note 5, at 111–12 (“If we decide we want to give market exclusivity to a patentee, an injunction plus lost profits for pre-injunction sales is the logical way to do so. . . . To the contrary, practicing entities will sometimes need an injunction to achieve market exclusivity; trolls never will.”).

flow from market exclusivity—like injunctions and damages unbound to the value of the invention—are the precise ones Lemley rails against in much of his other remedies work (albeit mainly in the context of non-practicing entities (NPEs)).⁵⁰ Nonetheless, instead of jettisoning market exclusivity as the theoretical organizing principle of patent remedies, Lemley (as well as Cotter) suggests we simply perturb the existing framework whenever the circumstances justify it (e.g., for trolls and FRAND patents).⁵¹ In this sense, Lemley’s (and Cotter’s) approach is reminiscent of the quixotic attempts to save the Earth-centered view of the solar system by adding more and more epicycles to the planetary orbits, resulting in a needlessly complex and, ultimately, unworkable theory as the proverbial exceptions swallow the rule.⁵² Rather, the most effective organizing principle is simply that of incentivizing innovation. With that said—and as I made clear in my original article—the transition to such a principle may justify Lemley’s and Cotter’s approach in the short-term as a practical matter, but that is certainly no reason to ossify the relic of the status quo *ante* and its corollary of market exclusivity into the theory and doctrine undergirding remedies law.⁵³

B. Judicial “Agencies”

Perhaps more poignantly, despite one’s theoretical and doctrinal inclination, there is the final question of whether judges and juries can competently implement more refined remedies schemes. Burk and I are fairly optimistic on this point,⁵⁴ and indeed it’s somewhat surprising that

50. See Mark A. Lemley, *Distinguishing Lost Profits From Reasonable Royalties*, 51 WM. & MARY L. REV. 655 (2009); Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEXAS L. REV. 1991 (2007); Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEXAS L. REV. 783 (2007); Mark A. Lemley, *Ten Things to Do About Patent Holdup of Standards (and One Not to)*, 48 B.C. L. REV. 149 (2007).

51. See Thomas F. Cotter, *Reining in Remedies in Patent Litigation: Three (Increasingly Immodest) Proposals*, 30 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1 (2013); Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CALIF. L. REV. 1889 (2002); Lemley & Shapiro, *supra* note 50. However, in an earlier work, Lemley advocated the following:

The question is whether an extension of intellectual property rights is necessary to permit intellectual property owners to cover their average fixed costs. If so, it is probably a good idea. If not, it is not necessary, and the likelihood that it will impose costs on competition or future innovation should incline us to oppose it.

Lemley, *Property*, *supra* note 16, at 1068. Lemley’s more recent suggestion that “market exclusivity” and traditional reasonable royalty principles should guide patent remedies is in uneasy tension with his earlier position.

52. See generally THOMAS S. KUHN, *THE COPERNICAN REVOLUTION: PLANETARY ASTRONOMY IN THE DEVELOPMENT OF WESTERN THOUGHT* (1957).

53. See Sichelman, *supra* note 2, at 565–66.

54. See Burk, *supra* note 3, at 18 (lamenting the dearth of patent remedy configurations available to judges); Sichelman, *supra* note 2, at 528 (advocating expanding judicial discretion to allow judges more flexibility in fashioning remedies).

Lemley is so skeptical⁵⁵ given his and Burk's proposal to judicially tailor patent law by industry⁵⁶ and Lemley and Shapiro's proposal to award NPEs forward-looking royalties in lieu of injunctions in the face of patent holdup.⁵⁷ Both of those proposals demand more than a modicum of competence on the part of judges and juries to avoid substantial distortions in innovation markets.

Nonetheless, Lemley remarks that although my approach "is a perfectly correct statement of aspirations . . . [it is] nothing that could ever be operationalized without perfect knowledge. How are we to know how much incentive a patentee would require to invent? We could ask them, I suppose, but that doesn't seem calculated to produce an accurate number."⁵⁸ Yet, similar arguments have been leveled at Lemley's own, just-mentioned proposals on multiple occasions.⁵⁹ Indeed, Lemley's previous responses to his critics are more than adequate to dispel his own criticisms of my work. Specifically, Lemley counters that "in some cases . . . even an imperfect license arrangement set by a court is superior to a 'market' arrangement born of a holdup scenario."⁶⁰ Lemley should not be able to simultaneously tolerate "imperfect[ion]" from himself yet demand "perfect[ion]" from others—rather, the quality of a proposal is always, as Lemley recognizes, a relative game.⁶¹ As such, contrary to Lemley's contention, "perfect knowledge" is not required to "operationalize[]" my proposal.⁶² Rather, as long as courts can roughly determine the type and amount of remedies to optimize innovation incentives—at least to the extent that error costs of those remedies are less than social costs from sub-optimal, market-based remedies—then my proposal is sound.

Of course, whether courts can achieve even this less ambitious level of competence is debatable. Cotter is skeptical and believes "[p]atent law is

55. See Lemley, *supra* note 3, at 112 ("I am skeptical that Sichelman's theoretical model could ever be implemented in practice.")

56. See DAN L. BURK & MARK A. LEMLEY, *THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT* 109 (2009) (arguing courts should employ flexible approaches to avoid excessive rewards and to calibrate innovation incentives).

57. Lemley & Shapiro, *supra* note 50, at 2044.

58. Lemley, *supra* note 5, at 112.

59. See, e.g., F. Scott Kieff & Henry E. Smith, *How Not to Invent a Patent Crisis*, in *REACTING TO THE SPENDING SPREE: POLICY CHANGES WE CAN AFFORD* 67–69 (Terry L. Anderson & Richard Sousa eds., 2009) ("[A]n injunction forces the infringer to stop and enforces the delegation of valuation questions to patentees and their contractual partners, with a view toward markets for inputs and products, rather than officials, courts, and experts for hire."); F. Scott Kieff, *Removing Property from Intellectual Property and (Intended?) Pernicious Impacts on Innovation and Competition*, 19 *SUP. CT. ECON. REV.* 25, 41 (2011).

60. Lemley & Weiser, *supra* note 50, at 840.

61. Sichelman, *supra* note 2, at 562 ("[U]ncertainty is relative and the costs it creates must be measured against the costs avoided by affording courts the leeway to fashion economically sensible remedies.")

62. Lemley, *supra* note 5, at 112.

complicated and expensive as it is; anything that makes it even more complex and expensive is likely to generate additional consequences that may be difficult to foresee.”⁶³ I fully agree with Cotter’s statement; nonetheless, as I explained in my original article, the current reasonable royalties and lost profits calculations are quite complex themselves, and it is unclear to me why an approach centered on innovation incentives would be any more complex, at least to the extent that its benefits (net of any error costs) outweighed the costs of traditional relief.⁶⁴ In any event, Cotter agrees with me that courts should generally not award injunctions to NPEs and practicing entities alike where the risk of patent holdup is high or FRAND patents are involved; that supracompensatory damages may be appropriate when infringement is difficult to detect; and that high-transaction cost, low-value uses should lead to a sort of patent “fair use” principle.⁶⁵ As such, Cotter in part deviates from the status quo *ante* organizing principle and merely differs from me in how far we can realistically go down that path.

In that regard, despite the differences among all of us, none of us appears to believe that today’s judiciary would be sufficiently competent to implement a case-by-case remedies regime centered on fine-tuning innovation incentives. However, in the not-too-distant future, I believe the judiciary will transform itself from a system of judges employing a few to a handful of clerks—many of them temporary and just out of law school—who perform basic factual and legal research to a structure that I term a “judicial agency.” Judicial agencies will be modeled after executive agencies, employing hosts of experts in specific areas of law, economics, business, technology, medicine, and so forth, which judges will routinely draw upon in making decisions in specific cases. Although the constitutionality and the political likelihood of judicial agencies is well beyond the scope of this article, assuming that the judiciary will be reconstituted as such, it is not a large step to infer that the judiciary at such a point would be substantially more competent in tailoring remedies on a case-by-case basis.

In the meantime, the more modest, short-term proposal I originally made in my article seems much in line with the practical suggestions of all of my critics—namely, courts should not adhere to the status quo *ante* approach when otherwise doing so would “lead to drastically suboptimal outcomes. These scenarios include component patents involving high switching costs

63. Cotter, *supra* note 4, at 31–32; see also David O. Taylor, *Using Reasonable Royalties to Value Patented Technology* 49 GA. L. REV. (forthcoming 2014–15), available at <http://ssrn.com/abstract=2420636>, archived at <http://perma.cc/5XT4-H56U> (“[R]ather than seeking to identify what a reasonable return just above marginal costs required to create patented technology is—a rather uncertain and unpredictable quest—the better approach may be to seek to identify the marginal incremental profit associated with the use of the patented technology.”).

64. See Sichelman, *supra* note 2, at 553, 562–66.

65. See Cotter, *supra* note 4, at 39–42.

[for practicing and non-practicing entities alike]; high transaction cost, low value inventions; and low R&D cost, low commercialization cost, low risk industries.⁶⁶

IV. Conclusion

To return to Kleist's aphorism, our "green spectacles" not only shade our understanding but also can lead to vigorous dissension over appropriate organizing *principles* and *theories* even when there is substantial underlying agreement on appropriate *practices*. So much seems to be the case when it comes to patent remedies. Here, I have endeavored to elucidate the causes of this theoretical friction yet settle on a practical approach to patent remedies that would substantially improve outcomes regardless of one's principles.

66. Sichelman, *supra* note 2, at 565–66.