

Why do we recognize some things as “property” and what does it mean to do so? A hugely influential law review article, published over forty years ago, made a valiant attempt to clarify the nature of property law. Looking back on the article and at developments since then, however, only makes it clearer that “property rights” are not nearly as absolute as people often assume.

The article, *Property Rules, Liability Rules, and Inalienability: Another View of the Cathedral*, is on the short list for “Most Significant Law Review Article of All Time.” It was published forty years ago but remains hugely influential today. At the core of the article was a distinction based on the remedy for invasion of a legal entitlement: “liability rules” provide only after-the-fact damages, while “property rules” result in an injunction. For present purposes, the more profound aspects of the article are less relevant than the common-sense link between injunctions and “property.” Simply speaking, the assumption is that having a property right means you can actually stop people from violating it, not just that you can sue them later for damages.

This is surely an assumption shared by many people. However, it’s an assumption that the Supreme Court has decisively rejected. Under current law, a court may deliberately allow ongoing violations of a property right, leaving the owner with only whatever damages can be proved. The effect of this ruling is to allow the forced transfer of an easement or servitude (in the case of land) or a license (in the case of IP), at a price to be set by the court in the form of damages. Lest you think this was a liberal assault on property rights, the opinion was written by Justice Thomas.

The property right in question was a patent, but the Court’s ruling was much broader. Under [eBay Inc. v. MercExchange](#), an injunction always requires much more than an impending or on-going invasion of the plaintiff’s legal rights. The injunction is available if and only if a four-part test is satisfied: 1) the plaintiff has suffered an irreparable injury; (2) damages are inadequate to compensate for that injury; (3) the balance of hardships between the plaintiff and defendant, warrants an injunction; and (4) an injunction wouldn’t harm the public interest. Thus, there is no automatic link between the invasion of a property right and the availability of an injunction.

Even if the plaintiff is suffering irreparable harm that can’t be compensated by money damages, the court will still allow the legal violation to continue if an injunction would be too harsh or would violate the public interest. Thus, fairness and the public interest can sometimes outweigh the plaintiff’s property rights,

essentially leaving the plaintiff without an effective remedy. In short, the court could well authorize a continuing violation of property rights if the defendant has a sufficiently appealing case.

Like the power of eminent domain, the *eBay* rule is a reminder that property rights are far from absolute. They can be tempered when needed to provide a reasonable accommodation between the parties or when required by the public interest. One way of doing so is to provide only damages when we consider a continued invasion of property rights to be justifiable, as a compromise between full enforcing the property right and eliminating it entirely. This may be a very rare occurrence in some contexts, but it still sheds significance light on how we conceptualize property rights.

*eBay* is just an example of how there is “play in the joints” in property rights to provide the flexibility society needs. The law is replete with other examples such as zoning, pollution regulations, the Endangered Species Act, and the public trust doctrine. Like *eBay*, all of these are part of the ongoing effort to balance the benefits of property ownership with other social values. Property rights are very real, but they are far from absolute.