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## Make No Little Plans: Response to Ted Sichelman, Purging Patent Law of Private Law Remedies

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# Texas Law Review

## *See Also*

Volume 92

### Response

#### Make No Little Plans: Response to Ted Sichelman, *Purging Patent Law of “Private Law” Remedies*

Thomas F. Cotter\*

*Make no little plans; they have no magic to stir men’s blood and probably themselves will not be realized. Make big plans; aim high in hope and work, remembering that a noble, logical diagram once recorded will never die, but long after we are gone will be a living thing, asserting itself with ever-growing insistency.*

—Attributed to Daniel H. Burnham (1846–1912)<sup>1</sup>

#### I. Introduction

I’d like to think that Daniel Burnham—were he still alive at the ripe old age of 167 and at all interested in patent law—would admire Ted Sichelman’s paper *Purging Patent Law of “Private Law” Remedies*,<sup>2</sup> which argues that courts should abandon the conventional view of patents as private rights for which private-law remedies are appropriate, and instead should award damages and injunctions only when, and to the extent that, doing so

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1. See 2 CHARLES MOORE, DANIEL H. BURNHAM, ARCHITECT, PLANNER OF CITIES 147 (1921) (attributing the above quotation to Burnham). But see Phil Rosenthal, *Economic Plans Show Burnham’s Point Not Lost on Chicago*, CHI. TRIB., Mar. 7, 2012, [http://articles.chicagotribune.com/2012-03-07/business/ct-biz-0307-phil-20120307\\_1\\_comprehensive-plan-small-plans-big-plans](http://articles.chicagotribune.com/2012-03-07/business/ct-biz-0307-phil-20120307_1_comprehensive-plan-small-plans-big-plans) (noting some debate as to whether Burnham “ever actually uttered” the quotation). As recounted in, among many other sources, Erik Larson’s bestselling *The Devil in the White City: Murder, Magic, and Madness at the Fair that Changed America* (2004), Burnham was a renowned architect, urban planner, and director of works for the 1893 World’s Columbian Exposition in Chicago.

2. 92 TEXAS L. REV. 517 (2014).

serves the public interest for which patents are granted in the first place. At first blush, this may not seem such a radical thesis, given the widespread view that patents derive their justification not from some basis in natural law or morality but rather from the desire to promote social welfare by encouraging investment in innovation.<sup>3</sup> And in some ways it isn't, as I will argue below; some of Sichelman's specific recommendations are well within the mainstream of contemporary patent scholarship, even if the courts have yet to completely catch up. Taken to its logical conclusion, however, Sichelman's thesis suggests that (at least in an ideal world) courts should award monetary relief for patent infringement so as to align *ex ante* incentives with *ex post* rewards; this could mean awarding either more or less than would be necessary to restore the patentee to the position it would have occupied but for the infringement (the traditional benchmark for compensatory damages). Although I remain skeptical that such a system could ever work in the real world, Sichelman defends his thesis with aplomb—and recognizes its practical infeasibility in the near term.<sup>4</sup> Nevertheless, his analysis suggests that at least in industries in which patents are unlikely to play a major role in inducing invention, disclosure, or commercialization, efforts to ensure that defendants restore patentees to the position they would have occupied but for the infringement may not be worth the candle; some risk of undercompensation may be more tolerable than is commonly assumed.<sup>5</sup> I will suggest that this implication, if valid, possibly could have some practical payoff even in the short run.

Part II summarizes a framework for patent remedies that I have developed, partly in conjunction with Roger Blair, in previous work. Part III focuses on the areas over which Sichelman and I are in agreement and Part IV on the areas of disagreement. Notwithstanding the latter, I find Sichelman's analysis insightful and thought provoking—even for those of us who are content to occupy ourselves with somewhat “littler” plans.

## II. A Framework for Patent Remedies

Because I've written more about patent remedies than any other subject,<sup>6</sup> I think it best initially to summarize my views so that my areas of agreement and disagreement with Sichelman will be clearer.

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3. See, e.g., *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The copyright law, like the patent statutes, makes reward to the owner a secondary consideration.” (quoting *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948) (internal quotation marks omitted))); Thomas F. Cotter, *Legal Pragmatism and Intellectual Property Law*, in *INTELLECTUAL PROPERTY AND THE COMMON LAW* 211, 217 (Shyamkrishna Balganesh ed., forthcoming 2013).

4. Sichelman, *supra* note 2, at 555–64.

5. *Id.* at 523–24.

6. See ROGER D. BLAIR & THOMAS F. COTTER, *INTELLECTUAL PROPERTY: ECONOMIC AND LEGAL DIMENSIONS OF RIGHTS AND REMEDIES* (2005); THOMAS F. COTTER, *COMPARATIVE PATENT REMEDIES: A LEGAL AND ECONOMIC ANALYSIS* (2013) [hereinafter COTTER,

First, with regard to the choice between awarding injunctions or prospective damages for patent infringement, I have argued that in general injunctive relief is preferable because the parties (patentee and infringer/user) are likely to have better information than a court concerning the patent's economic value (that is, the patent's ability to reduce costs or increase profits in comparison with the next-best available noninfringing alternative).<sup>7</sup> Put another way, the interest in reducing information, error, and adjudicative costs counsels in favor of a general rule that courts award the prevailing patentee a permanent injunction.<sup>8</sup> Nevertheless, there may be cases in which the sum of these expected costs is less than the social cost of awarding an injunction. In particular, where the social costs of denying access to the patented invention are very high (as may be the case, for example, when the patent reads on an essential medicine), or when the conditions giving rise to patent holdup are present (e.g., when the patent reads on a component of a multicomponent device, the *ex ante* value of the patent is substantially less than the *ex post* cost of designing around it, and the infringement is inadvertent), the general preference in favor of injunctive relief arguably should give way and the court should award damages, in the form of a prospective (ongoing) royalty, instead.<sup>9</sup>

Second, with regard to damages (either for past infringement or, in a case in which the court denies a permanent injunction, for future use as well), at least as a first approximation, the guiding principle should be to render the patentee no worse off and the infringer no better off than either would have been absent the infringement.<sup>10</sup> In practice, this means awarding the patentee the greater of its own lost profit, if any, resulting from the infringement or the royalty the parties would have negotiated *ex ante* had they believed the

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COMPARATIVE PATENT REMEDIES]; Roger D. Blair & Thomas F. Cotter, *An Economic Analysis of Damages Rules in Intellectual Property Law*, 39 WM. & MARY L. REV. 1585 (1998) [hereinafter Blair & Cotter, *IP Damages*]; Roger D. Blair & Thomas F. Cotter, *Rethinking Patent Damages*, 10 TEX. INTELL. PROP. L.J. 1 (2001); Thomas F. Cotter, *An Economic Analysis of Enhanced Damages and Attorney's Fees for Willful Patent Infringement*, 14 FED. CIR. B.J. 291 (2005); Thomas F. Cotter, *Four Principles for Calculating Reasonable Royalties in Patent Infringement Litigation*, 27 SANTA CLARA COMPUTER & HIGH TECH. L.J. 725 (2011); Thomas F. Cotter, *The International Trade Commission: Reform or Abolition? A Comment on Colleen V. Chien & Mark A. Lemley, Patent Holdup, the ITC, and the Public Interest*, 98 CORNELL L. REV. ONLINE 43 (2013); Thomas F. Cotter, *Patent Remedies and Practical Reason*, 88 TEXAS L. REV. SEE ALSO 125 (2009); Thomas F. Cotter, *Reining in Remedies in Patent Litigation: Three (Increasingly Immodest) Proposals*, 30 SANTA CLARA COMPUTER & HIGH TECH. L.J. (forthcoming 2013) [hereinafter Cotter, *Reining In*], available at <http://ssrn.com/abstract=2235769>. To avoid an excess of citations in the following footnotes, wherever possible I will cite only to my most recent comprehensive work on remedies—COTTER, COMPARATIVE PATENT REMEDIES, *supra*—rather than to the other works listed above.

7. See, e.g., Blair & Cotter, *IP Damages*, *supra* note 6, at 1589, 1615–16 (concluding that intellectual property rights are more efficiently protected in a property rules regime where parties may negotiate directly, as opposed to a liability rules regime where a court sets damages).

8. See, e.g., COTTER, COMPARATIVE PATENT REMEDIES, *supra* note 6, at 53–55.

9. See *id.* at 55–62.

10. See *id.* at 63.

patent to be both valid and infringed.<sup>11</sup> The rationale is that this principle preserves the patent incentive by restoring the patentee to the position it would have occupied had the infringer either avoided infringement or obtained a license.<sup>12</sup> (Whether preserving the patent incentive is such a great idea is another matter, but I have argued that in awarding damages courts should take the desirability of preserving the patent incentive as a given.<sup>13</sup> I'll return to this point in Part IV below.) In response to the argument that such a rule may encourage infringement by sometimes rendering the infringer no worse off for having infringed—and thus may discourage the *ex ante* licensing negotiations that would conserve on information, error, and adjudicative costs—I would note that (1) the infringer is generally worse off for having to defend itself in a patent infringement lawsuit rather than negotiating a license *ex ante*, and (2) courts can ensure that the infringer is at least marginally worse off by (a) enhancing damages in an appropriate amount or (b) requiring the infringer to pay the prevailing patentee some portion of the latter's attorneys' fees.<sup>14</sup> With respect to damages enhancements in particular, however, courts also need to avoid the risk of *overdeterrence*: that is, if the penalty for infringing is too high, manufacturers may steer farther than is really necessary to avoid any risk of infringement, the result being that patent scope is *de facto* enlarged.<sup>15</sup> Thus, as a general rule, I have argued that courts should award damages enhancements only when necessary to achieve optimal deterrence. For example, if the probability of a certain type of infringement being detected is only 1/3, an award of treble damages will provide the correct incentive for similarly-situated defendants to avoid infringing.<sup>16</sup>

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11. *See id.* at 63–64.

12. *See id.* at 64–65.

13. *See id.* at 49–50.

14. *See id.* at 69, 72–73, 145–48. In the United States, the general rule is that each party bears its own attorneys' fees absent exceptional circumstances (such as willful infringement). *Id.* at 147. Most other countries generally award the prevailing party some or all of its attorneys' fees as a matter of course. *Id.* As for enhanced damages, U.S. courts are authorized to award enhancements up to three times the actual damages sustained, but again only in cases of willful infringement. *Id.* at 140. Except for Australia and Canada, most other countries do not permit enhanced or punitive damages in patent cases, although some do permit moderate damages increases to make up for the fact that the infringer avoids some of the costs and risks that willing licensees typically incur. *See id.* at 209–11, 269–70, 275–76, 327–28, 360, 370–72.

15. *See id.* at 64–65.

16. *See id.* at 72–73. In reality, the probability of detection cannot easily be quantified, but courts applying the above rule may decide to enhance damages in cases in which, for example, the defendant took pains to conceal its infringement.

### III. Where Sichelman and I Agree

With the above framework in mind, it appears that Sichelman and I agree more than we disagree on the features that would comprise an optimal system of patent remedies. In particular:

1. We both agree that courts should not award permanent injunctions where the risk of patent holdup is high, and that that risk may be present whether the patentee is a manufacturing or a nonmanufacturing patent owner.<sup>17</sup> My only caveat is that we shouldn't lose sight of the economic rationale for (ordinarily) preferring injunctive relief: that it conserves on information, error, and adjudication costs by leaving it to the parties, rather than a court, to determine how much the patent is worth. The point is simply that sometimes that rationale should give way to other, stronger countervailing concerns (i.e., holdup). The ultimate decision should be a matter of economics and not (as Sichelman rightly notes)<sup>18</sup> blind adherence to tort- or property-law models.
2. We both agree that supracompensatory damages may be optimal where detection is difficult, and that (contrary to current law) an award of supracompensatory damages therefore should not be premised on a finding of willfulness.<sup>19</sup>
3. Sichelman also proposes that where the transaction costs of licensing are higher than the value of a proposed use, that use should not result in an award of injunctive relief.<sup>20</sup> I have no quarrel with this principle, which sounds very much like one of the leading rationales for the fair use doctrine in copyright.<sup>21</sup> Indeed, I have suggested in other work<sup>22</sup> that it may be a good idea for patent law to adopt some sort of fair use doctrine, as Maureen O'Rourke proposed several years ago<sup>23</sup> (and Katherine Strandburg more recently,<sup>24</sup> as Sichelman acknowledges).<sup>25</sup> Whether such a doctrine, if premised only on a transaction-cost-reduction

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17. See Sichelman, *supra* note 2, at 522–23, 541–54.

18. See *id.* at 536–39.

19. See *id.* at 525–26, 558.

20. See *id.* at 556.

21. See Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982); see also Thomas F. Cotter, *Fair Use and Copyright Overenforcement*, 93 IOWA L. REV. 1271, 1277–78 (2008).

22. Indeed, I have previously suggested that adopting some sort of fair use doctrine in patent law, along the lines that other scholars have advocated, may well have merit. *E.g.*, Thomas F. Cotter, *Four Questionable Rationales for the Patent Misuse Doctrine*, 12 MINN. J.L. SCI. & TECH. 457, 468–69 (2011).

23. See Maureen A. O'Rourke, *Toward a Doctrine of Fair Use in Patent Law*, 100 COLUM. L. REV. 1177 (2000) (proposing a patent fair use doctrine that would require potential users to pay a royalty rather than, as in copyright, avoiding liability altogether).

24. See Katherine J. Strandburg, *Patent Fair Use 2.0*, 1 U.C. IRVINE L. REV. 265 (2011).

25. See Sichelman, *supra* note 2, at 558 n.200.

rationale, would have more than limited applicability in practice nevertheless is an open question.

4. Finally—and most significantly for the following part—I agree that market rewards are not always proportionate to investments in research and development (R&D).<sup>26</sup> The question is what, if anything, to do with this insight in practice.

#### IV. Where We Differ

The main point on which we differ is Sichelman's most provocative, namely his suggestion that courts sometimes should modify damages awards to better align the costs and benefits of patent protection.<sup>27</sup> To his credit, Sichelman recognizes some problems with this recommendation, among

26. *See id.* at 523–24.

27. *See id.* at 557 (“[W]hen R & D costs and risks are low and deadweight losses and rent-seeking costs are high—injunctions should be routinely denied and damages reduced when the potential error costs of doing so are low.”). I have a few other minor quibbles, which I may as well note here. First, at page 550–51, Sichelman presents a hypothetical in which the damages a licensing patentee would recover against an infringer are smaller than the damages a manufacturing patentee would recover for the very same act of infringement. Sichelman suggests that the disparity in recovery makes no sense, but in my view, one would expect the patentee (*ex ante*) to take the path that promised the higher return—licensing or manufacturing—and to recover accordingly. In other words, a patentee who chose to license rather than manufacture presumably didn't have the capacity to manufacture at a scale that would have earned him higher profits than he would have earned from licensing. *See generally* COTTER, *COMPARATIVE PATENT REMEDIES*, *supra* note 6, at 44–45, 63–64. In addition, at page 555–56, Sichelman presents a hypothetical in which the patented invention increases marginal profit from \$2 to \$3 per article. If I understand this hypothetical correctly, \$2 per article is the upper limit of the normal rate of return on capital, since “competitors could earn slightly less than 2% profit margins by making other products.” *Id.* at 555. The *economic* profit, therefore, prior to introduction of the patent, is only incrementally above zero. *See, e.g.*, Michael Abramowicz, *An Industrial Organization Approach to Copyright Law*, 46 WM. & MARY L. REV. 33, 51 & n.48 (2004) (noting that “[z]ero economic profit corresponds to a normal rate of return on investments of capital and labor,” because “‘economic profit’ is [t]he amount by which total revenues exceed total opportunity cost”) (quoting ROBERT B. EKELUND, JR. & ROBERT D. TOLLISON, *ECONOMICS G-6* (4th ed. 1994)). Prior to introduction of the patent, there were ten competitors each selling 100,000 articles at a price of \$100. The patentee can exclude its nine competitors by pricing at just below \$100. Then it can sell a million units (the patentee must have had a lot of excess capacity!) and earn a profit of \$3 million. If the nine competitors infringed and each sold 100,000 units at (just under?) \$100, the patentee could sue and recover, in the aggregate, just under \$2,700,000. Sichelman views this recovery as excessive, since the value of the infringing component was only \$100,000 per competitor (not \$300,000). His broader point, again if I understand correctly, is that courts should (but don't) reduce the patentee's lost profit by the amount the patentee earned or could have earned on capital that was not used to produce patented articles but that would have been so used but for the infringement. *See* COTTER, *COMPARATIVE PATENT REMEDIES*, *supra* note 6, at 110 n.139 (discussing my views on an earlier version of Sichelman's argument). I'm not sure this is such a damning point, however. First, it's not entirely clear to me that a court would be averse to making an appropriate deduction if the defendant properly raised this argument and presented evidence to substantiate it. Second, whatever the theoretical merits of Sichelman's argument may be, I question whether taking this additional nuance into account, in what is already a very complex undertaking, would be worth the additional adjudicative cost. *See id.*

them that it might seem to violate separation-of-power principles by authorizing courts effectively to underenforce patents, and that courts will lack perfect information from which to determine if R&D costs and rewards are properly aligned.<sup>28</sup> He suggests that the first problem (one that I have noted in my scholarship as well<sup>29</sup>) could be overcome if Congress explicitly “provide[d] the courts with such discretion,”<sup>30</sup> which I suppose is right—though I wouldn’t recommend holding one’s breath until that eventuality arises. As for the second problem, Sichelman’s main point, as I understand it, is that the *ex post* nature of the inquiry makes it somewhat easier for a court to compare R&D costs with social benefits than for the Patent Office (or other actors) to do so *ex ante*.<sup>31</sup> Tailoring remedies *ex post*, in other words, might be easier than tailoring rights *ex ante*.<sup>32</sup> In any event, in the short term all that Sichelman proposes is that courts

can arguably determine at least when the social costs from injunctions and make-whole damages are *substantial* compared with the social benefits of the invention. For instance, courts can hear evidence on R&D, testing, and commercialization costs (including the cost of failures); technological and market risk; increased profits vs. baseline profits; the value of other patented components; the value of non-infringing alternatives, and so forth, in order to determine when injunctions and make-whole damages might lead to grossly excessive awards.<sup>33</sup>

In the longer run, however, Sichelman believes that courts might be able to develop workable standards for determining damages that are proportionate to R&D costs in a wider range of cases.<sup>34</sup>

Maybe so—but I remain unconvinced. (For similar reasons, I also doubt the practicality of Sichelman’s related recommendation that, in an ideal world, courts would award supracompensatory damages, payable by the government, in cases in which compensatory damages understimulate invention.<sup>35</sup>) Patent law is complicated and expensive as it is; anything that

28. See Sichelman, *supra* note 2, at 560. Sichelman also notes that his proposal would increase uncertainty, but adds that (1) even under the current system, “awarding remedies is anything but an exact science” and (2) uncertainty would be limited if any deviation from make-whole remedies is limited to cases in which those remedies “are clearly economically inferior . . .” *Id.* at 562.

29. See COTTER, COMPARATIVE PATENT REMEDIES, *supra* note 6, at 49–51.

30. Sichelman, *supra* note 2, at 562.

31. Cf. *id.* at 565 (explaining how courts can, upon hearing evidence on, *inter alia*, R&D and the social benefits of an invention, find the appropriate remedy “without too much labor or error”).

32. See *id.* at 526 (“When the cost of particularized substantive rulemaking is high, as in the case of patent law, particularized enforcement, procedure, and remedies may provide a better route for achieving optimal outcomes.”).

33. *Id.* at 565.

34. See *id.* at 565–69.

35. See *id.* at 526, 559. This proposal calls to mind another proposal made recently in Anup Malani & Jonathan S. Masur, *Raising the Stakes in Patent Cases*, 101 GEO. L.J. (forthcoming



makes it even more complex and expensive is likely to generate additional consequences that may be difficult to foresee.<sup>36</sup> Would the wealthier party to a patent dispute have an even greater advantage than is currently the case if courts were to incorporate this additional level of analysis into the law of remedies? Would the system be susceptible to gaming? Would juries be expected to make these sorts of determinations—and if not, is there a way around the Seventh Amendment?<sup>37</sup> With so many problems besetting the current patent system, is it prudent to devote precious political capital to a reform of this nature? And if we were to develop confidence, over time, that certain classes of inventions rarely if ever need much in the way of R&D recoupment, why not simply eliminate them from the scope of patentable subject matter (or make use of other doctrinal tools, such as reducing the patent term) and be done with it?<sup>38</sup>

Sichelman's analysis nevertheless might suggest that courts need not always overexert themselves to restore the status quo ante as accurately as possible. In cases involving standard-essential patents, for example, one might conclude that widespread adoption and use may be sufficient to ensure the patentee a reward adequate to cover R&D—without the need for courts to perfectly estimate the amount necessary to restore the status quo ante or to be overly worried about the possible negative consequences of denying injunctive relief.<sup>39</sup> (I have previously made an analogous observation about

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2013), available at <http://ssrn.com/abstract=2216948>. Malani and Masur argue, among other things, that patentees who survive validity challenges should receive an additional reward, either in terms of a monetary recovery payable by the government or a patent term extension. *Id.* (manuscript at 39–44). (Analogously, prevailing challengers should recover a multiple of their own attorneys' fees.) *See id.* (manuscript at 44–45). In Malani and Masur's model, raising the stakes of litigation in this manner would encourage patent owners to file suit only in meritorious cases. *Id.* (manuscript at 31). As Norman Siebrasse has pointed out to me, however, determining the correct amount by which to multiply the prevailing patentee's reward depends crucially on the rate of judicial error. *See id.* (manuscript at 42). Faced with the difficulty of estimating what this rate is, Malani and Masur respond that one could set the amount legislatively, *see id.* (manuscript at 42 n.121), or rely upon panels of experts to review random samples of patent cases, *see id.* (manuscript at 57). Like Professor Siebrasse, I find this latter suggestion unrealistic.

36. *See* AM. INTELL. PROP. LAW ASS'N, REPORT OF THE ECONOMIC SURVEY 35 (2011) (reporting that the median cost of litigating a patent infringement suit with less than \$1 million at risk through to judgment as of 2011 is estimated to be \$650,000; for a suit with up to \$25 million at risk, \$2.5 million; and for a suit with over \$25 million at risk, \$5 million).

37. Maybe. For a discussion, see Cotter, *Reining In*, *supra* note 6 (manuscript at 119–27).

38. Though I suppose TRIPs could make this option difficult, depending on what counts as a "field of technology." *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 27(1), Apr. 15, 1994, 108 Stat. 4814, 1869 U.N.T.S. 299 (stating that, in general, "patents shall be available for any inventions, whether products or processes, in all fields of technology," and that "patents shall be available and patent rights enjoyable without discrimination as to . . . the field of technology"); *id.* art. 33 ("The term of protection available shall not end before the expiration of a period of twenty years counted from the filing date.").

39. *See* Cotter, *Reining In*, *supra* note 6 (manuscript at 111).

IP rights that generate substantial network effects.<sup>40</sup>) Put another way, the law of patent remedies is, in my view, all about tradeoffs: specifically, the tradeoff between accuracy (quantifying the patent owner's injury as accurately as possible) and adjudicative costs.<sup>41</sup> Perhaps in cases involving standard-essential patents or patents enabling network effects, courts could conserve on adjudicative costs and preserve an adequate incentive by adopting relatively simple rules that err, if at all, on the side of undercompensation. I admit that this is all a bit speculative, though, and upon further consideration any such proposal might still give rise to separation-of-powers or rule-of-law critiques. But in spirit it is not altogether foreign to the more far-reaching proposal Sichelman advances in his paper.

## V. Conclusion

In the spirit of Daniel Burnham, Sichelman makes no little plans, and for this he is to be commended. Sichelman has produced an intriguing and thought-provoking paper, much of which I find quite persuasive. Our principal disagreement rests on our respective assessments of the magnitude of the practical problems that the more creative aspects of Sichelman's scheme would generate. I hope that Sichelman and I will continue a fruitful dialogue on the relative merits of various adjustments to the law of patent remedies in future work, and that courts and other policymakers will give consideration to his thoughtful analysis.

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40. See Thomas F. Cotter, *The Procompetitive Interest in Intellectual Property Law*, 48 WM. & MARY L. REV. 483, 530 (2006).

41. See COTTER, *COMPARATIVE PATENT REMEDIES*, *supra* note 6, at 37–38, 65.