

# Realizing Engineering, Science, and Technology Opportunities by Restoring Exclusive (RESTORE) Patent Rights Act of 2024

## *Why the RESTORE Patent Rights Act?*

- The Constitution is explicit: Patent protection is intended to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors *the exclusive Right* to their respective Writings and Discoveries.”<sup>1</sup> As the Founders recognized, the right to exclude is a fundamental basis of a stable system to incentivize the creation of inventions and invest in their further development. But this exclusivity is meaningless if courts do not enforce it.
- For more than two centuries, courts *did* enforce this exclusivity of patent rights. It was during this period that the U.S. became the undisputed world leader in innovation. Courts generally found that, absent exceptional circumstances, a patent owner that won a final judgment of infringement was entitled to a permanent injunction to stop an infringer from making, using, selling, or importing technology and products incorporating the invention.<sup>2</sup>
- That changed in 2006, when the Supreme Court issued a decision in *eBay v. MercExchange* holding that courts must apply a four-factor test to determine whether a permanent injunction is warranted in infringement cases. That test requires the aggrieved patent owner to prove that it has suffered an irreparable injury; that the law does not provide adequate remedies to compensate the injury; that the balance of hardships to the parties weighs in favor of the patent owner; and that an injunction would not harm the public interest.<sup>3</sup>
- Since *eBay*, it has become increasingly difficult for patent owners to get permanent injunctions after a court finds that their property rights are being infringed. Indeed, a recent study shows that *eBay* significantly reduced both requests for and grants of permanent injunctions. Post-*eBay* requests for permanent injunctions in patent cases fell by 65% for companies that use their patented technology to manufacture a product and grants of permanent injunctions to those companies also fell by more than 65%. Decreases in requests and grants for licensing patent owners, like universities and research clinics, were even more dramatic—requests fell by 85% and grants fell by 90%.<sup>4</sup>
- Today, most inventors and startups cannot stop infringers from using their patented inventions even though a court has said that the infringer is using the invention without the inventor’s permission. This has incentivized a widespread practice of *predatory infringement* by large, multinational companies because it is cheaper for them to steal technologies than to license them. Predatory infringers often refuse even to negotiate. Individual inventors, universities, startups, and small or

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<sup>1</sup> Art. I, § 8, cl. 8 (emphasis added).

<sup>2</sup> See generally Adam Mossoff, *Injunctions for Patent Infringement: Historical Equity Practice Between 1790-1882* (June 14, 2024), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4870351](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4870351).

<sup>3</sup> 547 U.S. 388 (2006).

<sup>4</sup> Kristina M.L. Aciri née Lybecker, *Injunctive Relief in Patent Cases: the Impact of eBay* (June 14, 2024), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4866108](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4866108).

medium-sized enterprises are especially vulnerable to predatory infringement tactics because they lack the resources to fight back.

- A lack of injunctions has also made litigation more expensive and protracted, burdening parties and the courts. Infringers have no incentive to do the right thing—stop infringing or take a license—if the worst outcome they might face from losing the case is a royalty that they would have had to pay originally.
- Predatory infringement and the lack of an appropriate remedy harms the U.S. innovation economy by undermining venture capital investing, licensing, and other commercial activities. When innovators and startups cannot safeguard their rights, investors are reluctant to fund the research and development of new, cutting-edge technologies, such as artificial intelligence, quantum computing, and 6G.
- Devaluing patents discourages innovation and has significant economic and geopolitical consequences. Startups and small companies are a major source of economic growth, and they rely on patents to secure financing and to negotiate commercial deals. Patent-intensive industries create high-paying jobs that have a wage premium of 74%, and the U.S. had a trade surplus of about \$73 billion due to the licensing of IP rights. If patents are no longer reliably protected rights, the United States risks losing its global technological leadership.

## ***What Can We Do?***

### ***Enact legislative reform to help RESTORE the world's gold-standard patent system***

- A single-sentence bill restores the legal right of patent owners to a rebuttable presumption that an injunction is warranted after a court makes a final ruling that their rights are being infringed—detering predatory infringers.
- This rebuttable presumption properly places the burden on the infringer to show that a permanent injunction is not warranted. For example, the infringer can rebut the presumption in a particular case by showing that an injunction would harm the public.