

# CONGRESS SHOULD ADOPT THE STRONGER PATENTS ACT TO HELP ENSURE THAT INTELLECTUAL PROPERTY IS NOT STOLEN

For decades, federal courts adhered to a well-established rule that in the vast majority of patent cases, the owner of a valid and infringed patent was entitled to an injunction—a court order that prohibits an infringer from stealing the patented invention. A patent grants its owner a constitutionally recognized “right to exclude others” from making, using, or selling an invention so a patent owner whose rights have been violated is entitled to a court order stopping the violation. Today in the United States, despite this constitutional mandate, patent holders no longer have exclusive rights to their inventions.

The Supreme Court’s 2006 decision in *eBay Inc. v. MercExchange, L.L.C.* upended this longstanding rule. It held that courts should not *automatically* issue injunctions in patent cases and clarified that courts must apply a four-part test to determine whether an injunction should be granted in patent cases. Unfortunately, in the years since *eBay*, federal courts have misapplied the decision and adopted a nearly categorical rule *against* issuing injunctions to stop patent infringement. Individual inventors and small businesses, in particular, have been harmed by this interpretation, as large companies face significantly reduced risk when using others’ unlicensed intellectual property.

The STRONGER Patents Act would correct the courts’ misunderstanding of *eBay* by requiring courts to fully and fairly analyze the factors for granting injunctive relief to determine on a case-by-case basis whether an injunction should be granted, rather than misapply the test to categorically deny relief. The patent “right to exclude” is meaningless without the possibility of injunctive relief, because an infringer can continue to infringe with impunity so long as they pay a royalty set by the court.

## ***eBay* Held that the Supreme Court’s Longstanding Four-Factor Test for Obtaining Injunctive Relief Applies in Patent Infringement Cases**

- The Supreme Court in *eBay* decided that patent holders seeking a permanent injunction against continued infringement need to satisfy the traditional four-factor test: (1) that the patent holder has suffered an irreparable injury that requires an injunction to stop; (2) that monetary damages and similar remedies are not enough to compensate the patent holder for the harms suffered; (3) that, balancing the interests of the parties, an injunction is warranted; and (4) that an injunction is not against the public interest.
- The Court’s unanimous opinion rejected categorical rules about whether an injunction should be granted. The Court specifically clarified that inventors that license their patents, rather than manufacture the invention, may obtain an injunction if the four-part test is met.

## **The Lower Federal Courts Have Misapplied *eBay*, Categorically Denying Patent Owners Injunctive Relief Against Infringement**

- Unfortunately, the lower courts have misapplied *eBay* and effectively imposed a categorical rule against granting injunctions to inventors that license their patents.
- Since *eBay*, lower courts have consistently misapplied both the first and second prongs of the *eBay* test by assuming monetary damages are adequate to compensate patent owners for use of their intellectual property, and that as a result, further infringement of the patent could not cause irreparable injury. They routinely deny injunctions based on these flawed assumptions.

## **The Misinterpretation of *eBay* Enables Large Companies to Infringe Patents with Impunity**

- Since *eBay*, courts have granted injunctions at a rate of 16% or less for patentees who license their patents. Prior to *eBay*, injunctions were granted in the vast majority of cases where valid patents were infringed.

- The unavailability of injunctions for patent infringement has permitted patent users—companies that incorporate others’ patented inventions into their products—to pursue a strategy of “efficient infringement.” This means that because patent owners cannot obtain a court order to stop infringement, the infringing user of a patent has no real incentive to stop infringing. Without an injunction, the worst-case scenario for an accused infringer is that a court will order them to pay money damages, and then only if the patent owner pursues lengthy and costly district court litigation to obtain those damages.
- At the same time, the inability to stop infringement—that is, to enforce the right to exclude—decreases the value of the patent right itself. In *eBay*, Chief Justice Roberts, Justice Scalia, and Justice Ginsburg wrote a concurring opinion explaining that the longstanding practice of granting injunctions in patent cases should inform the *eBay* analysis, specifically because it is very difficult to enforce a “right to exclude” with money damages alone.
- The practical impact is that often patent owners will simply give up or succumb to an artificially low license fee to avoid the substantial expense of litigating and defending against *inter partes* review petitions before the Patent Trial and Appeal Board at the U.S. Patent and Trademark Office.
- This is especially true for individuals and small businesses that lack the resources to bring lawsuits against large corporations. Although the Supreme Court recognized in *eBay* that “some patent holders, such as university researchers or self-made inventors, might reasonably prefer to license their patents, rather than undertake efforts to secure the financing necessary to bring their works to market themselves,” the inability to obtain an injunction eliminates the incentive for would-be licensees, especially large incumbents, to negotiate in good faith without the threat of an injunction for infringement.
- *eBay* thus puts established companies with products that are on the market at a significant advantage. Small inventors, startups, and universities that rely on licensing to fund R&D and other expenses are the ones who most need the ability to get an injunction, yet are least likely to receive one.

### **The Inability to Obtain Injunctions in the United States Undermines Competitiveness with Other Industrial Countries that Routinely Grant Injunctions Against Patent Infringement**

- Patent holders are routinely able to secure injunctions against patent infringement overseas, even as U.S. courts continue to deny them.
- Many European countries—including Germany, the Netherlands, France, Italy, Spain, Austria, Sweden, and Switzerland—have rules providing for near-automatic injunctions against infringement, as do Asian countries like Thailand, South Korea, and Japan. And even Chinese courts have only limited authority to deny an injunction.
- This disparity in patent enforcement undermines U.S. competitiveness. While the home countries of virtually all U.S. trading competitors would automatically enjoin infringement against a U.S. innovator that infringes in that country, U.S. courts would deny relief to U.S. companies while allowing foreign businesses to continue selling infringing products in the United States. As a result, innovative companies in the U.S. and around the world have an incentive to conduct innovative R&D and patent inventions outside the U.S.