CONGRESS SHOULD STRENGTHEN PATENT PROTECTIONS TO STOP INTELLECTUAL PROPERTY THEFT

Deliberate theft of patented inventions is a disturbing new trend among certain large companies. These large companies are purposefully using patented technology in their products without paying the inventors, knowing that the only penalty, if any, may be to pay a court-ordered royalty many years down the road that will likely be lower than the proper licensing fees and offset by the expense of litigation.

As the CEO of the audio technology company Sonos recently testified at a House Judiciary Committee hearing: "dominant companies disregard inventors' patents because they are so powerful and they are doing the cost-benefit analysis of infringing now and paying later once they have achieved dominance and moved past the point where they have to worry about competition in that market. They are exploiting today's system of enforcement to extend their dominance from one market to the next."

This outright theft of patented inventions, an approach some have called "efficient infringement," is exacerbated by recent changes in the law. Since the nation's founding, the Constitution has ensured inventors that their investment of time and resources will be rewarded by granting them patents with the "right to exclude others" from making, using, or selling their inventions without a license. If another entity uses their patents without taking a license, patent owners can seek injunctions—enforceable court orders—to stop infringement. Litigation is generally their only recourse because no law enforcement agency is empowered to act on their behalf. But in the last 15 years, federal court decisions have curtailed patent owners' ability to obtain injunctions against unlicensed use of their inventions, making it almost impossible for inventors to stop infringers from stealing their inventions.

How Patent Theft Works

The patent theft strategy is simple:

1. First, a large company knowingly uses patented technology without taking a license, sometimes stringing along a patent owner for years in licensing negotiations the company knows will lead nowhere.
2. If the patent owner sues to defend its intellectual property rights, the infringer challenges the patent before the U.S. Patent and Trademark Office's Patent Trial and Appeal Board (PTAB) claiming that the patent was invalid in the first place.
3. If the patent is upheld, the infringer then claims in trial court that it was not using the invention.
4. If the infringer loses again, it files an appeal that could take years to resolve.

5. Only after all appeals are resolved does the infringing company pay—but even then, the royalty is determined by the court rather than through market negotiations.

When an infringer steals patented technology without the possibility of an injunction, the patent owner's exclusive rights are nullified: The patent owner is deprived of royalties for licensed use of their inventions for many years, as well as forced to incur significant legal fees to defend their constitutionally-guaranteed patent rights, all while losing market share to the infringer. This theft scheme undercuts the basic fundamental protections of the patent system and jeopardizes many smaller businesses that rely on their patents to recoup their significant R&D investments in innovation. Congress should enact the STRONGER Patents Act to prevent these unlawful, exploitative tactics and restore protections for hard-earned intellectual property rights.

Current Law Fails to Protect Inventors and Patent Owners from Infringement

- Traditionally, patent owners could secure injunctions to stop companies from infringing on their patents. The potential to lose access to a patented technology was a powerful incentive for companies to seek a properly valued lawful license from the patent owner.

- But in 2006, the Supreme Court's decision in *eBay v. MercExchange* adopted a new interpretation of a long-standing four-part test to determine when patent owners may obtain an injunction. Lower federal courts have misconstrued the decision and have applied the test too narrowly, leading to a significant drop in the rate at which lower courts grant injunctions following the *eBay* decision, and as one study found, chilling inventors and patent owners from seeking injunctions in the first place.[1] Under the new test, courts are ignoring that a patent is the "right to exclude" and simply assume that money damages are usually sufficient to compensate patent owners.

- As a result, money damages are commonly the only remedy available to patent owners when another person or business steals their patented technology. But this remedy is insufficient. As Chief Justice Roberts, joined by Justices Scalia and Ginsburg, explained in a concurring opinion in *eBay*, courts had for centuries "granted injunctive relief upon a finding of infringement in the vast majority of patent cases . . . given the difficulty of protecting a right to exclude through monetary remedies that allow an infringer to use an invention against the patentee's wishes." Injunctive relief is essential for many patent owners like universities and small inventors who rely on patents to protect their right to choose who can use their patented technology, not just to collect on royalties. Moreover, obtaining royalties through the litigation process for infringed patents can take years, and cost a fortune, all while the infringer continues to reap the benefit of their theft.

- Nor is the judicially determined amount guaranteed to properly compensate the patent owner even for the licensing fees it would have otherwise received. As a federal court observed, an "injunction creates a property right and leads to negotiations between the parties. A private outcome of these negotiations—whether they end in a license at a particular royalty or in the exclusion of an infringer from the market—is much preferable to a judicial guesstimate about what

[1] Kirti Gupta & Jay Kesan, Studying the Impact of *eBay* on Injunctive Relief in Patent Cases, Hoover Institution Working Paper Series No. 17004, Jan. 2017, at 13–15, *available at* https://hooverip2.org/wp-content/uploads/ip2-wp17004-paper.pdf.

a royalty should be. The actual market beats judicial attempts to mimic the market every time, making injunctions the normal and preferred remedy."

- Congress tipped the scale even further against patent owners in 2011 by enacting the America Invents Act, which made it easier to challenge the validity of patents. Infringing companies that can afford to go to court can bring multiple challenges to a patent: a separate lawsuit challenging the validity of the patent itself, a defense of invalidity in the infringement lawsuit, and a proceeding to invalidate the patent before the PTAB. This forces patent owners to defend their patents multiple times in multiple venues, first defending the validity of their patents and then seeking relief for infringement. The infringing companies know that these expenses may be too much for many patent owners, who may relent and drop further efforts to defend their patents.

Large Companies Deliberately Infringe on Patents Because They Can Outspend Patent Owners and Have Nothing to Lose

- Aware of the minimal risk of a court stopping them from stealing patented technology, certain large companies simply adopt a practice of "infringe now, pay later." Because the cost of infringing is so low, the court process is so slow, and they have another bite at the apple at the PTAB, they rely on their financial advantage over smaller patent owners by waging a war of attrition, outspending them in court, litigating the validity of the owners' patent in court and challenging the patent's validity at the PTAB, and defending against infringing on the patent. If they win just once, the patent owner's claim is gone. If they lose in all of these proceedings, they then resort to tying up the case in appeals. They know that even if the patent is ultimately proven to be valid and infringed and they lose the legal battle, they have gained years of free use of the patented invention, and may only have to pay a fraction of what they would have paid in licensing fees over the years spent stealing instead. A former patent chief of a large technology company went so far as to remark that engaging in this theft scheme could be viewed as a "fiduciary responsibility" for cash-rich firms that can afford prolonged litigation.

- For example, in 2015, the Wisconsin Alumni Research Foundation won a jury verdict for $234 million against a major tech company that refused to pay for using the Foundation's technology to increase the processing speed of mobile devices. Although the jury found in the Foundation's favor, the company was able to use the technology in the meantime, force the Foundation to incur millions of dollars in legal fees, and overturn the verdict on appeal to avoid paying a sum that ultimately may, in any case, have been insignificant relative to the value of the stolen technology.

Congress Should Protect Innovators by Strengthening the Power of Courts to Stop Patent Theft

- Just as monetary relief often cannot fully compensate for the violation of real property rights, such as trespassing, monetary relief cannot make an inventor whole when his or her intellectual property is stolen. Congress should enact the STRONGER Patents Act to restore patent protections by requiring courts to fully and fairly analyze the factors for granting injunctive relief and ensure inventors and patent owners are protected from patent theft.