

Restoring the American Innovation Engine: Congress Should Consider Enacting the RESTORE Patent Rights Act

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KEY TAKEAWAYS

The loss of injunctive remedies for patent infringement threatens U.S. technological and economic leadership as the U.S. faces new competitors including China.

The RESTORE Patent Rights Act would redress the serious legal and economic ills created by the Supreme Court in its *eBay* decision in 2006.

The effect of the RESTORE Patent Rights Act would be to return the U.S. innovation engine to its efficient operation in law and commerce.

Introduction

The American innovation engine is broken. As a result, the continued success of America's innovation economy is threatened, and America risks losing its long-standing global technological leadership against new competitive threats in the 21st century, such as China.¹ This broken engine of innovation is the United States patent system.

The need for reform is pressing. For the past two decades, American innovators have been victims of overreaching regulatory restrictions that have hampered their ability to create and to commercialize their inventions in the marketplace.² Numerous Supreme Court decisions have limited or eliminated the protections provided by patents.³ An administrative tribunal at the U.S. Patent and Trademark Office (USPTO) cancels massive numbers of patents in service of Big Tech's strategies of outright invention theft through predatory infringement.⁴

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Thankfully, Congress has heeded the call for reform. Several bipartisan bills have been introduced in the past several years that would bring much-needed reform to the U.S. patent system. The most recent patent reform bill is the Realizing Engineering, Science, and Technology Opportunities by Restoring Exclusive (RESTORE) Patent Rights Act of 2024, introduced on July 29, 2024, by Senators Chris Coons (D–DE) and Tom Cotton (R–AR) and by Representatives Nathaniel Moran (R–TX) and Madeleine Dean (D–PA.), joined by co-sponsors Hank Johnson (D–GA), Deborah Ross (D–NC), and Chip Roy (R–TX) in the House.

In both its form and its substance, the RESTORE Patent Rights Act is the most important patent reform bill that Congress could enact today. The bill is a single-sentence amendment to the patent laws—proof that Congress can write clear and simple legislation. It is a simple and easy proverbial cleaning out of the sand clogging the gears of the U.S. innovation engine.

In substance, the RESTORE Patent Rights Act reinstates the long-standing protection of patents as property rights that has existed under U.S. law for the past two centuries. It specifically restores the legal presumption applied by U.S. courts for more than two hundred years—from 1790 until 2006—that patent owners can obtain an injunction to stop infringement of their property rights just as all other property owners can. The Supreme Court of the United States wrongly threw out this presumption in 2006 in a misguided and mistaken interpretation of the patent laws previously enacted by Congress. Thus, the RESTORE Patent Rights Act is a proper act by Congress: It would annul the Supreme Court’s 2006 mistaken decision and reestablish reliable and effective property rights for all American innovators. It would reestablish the vital property rights secured to famous American innovators—Samuel Morse, Charles Goodyear, Isaac Singer, Thomas Edison, Alexander Graham Bell, the Wright Brothers, Nikola Tesla, and Henry Ford, among countless others—who radically changed the world for the better.

This *Legal Memorandum* explains why the RESTORE Patent Rights Act is an important reform law that Congress should consider enacting. Specifically:

- It explains the American Founders’ historically unique approach to securing patents as property rights.
- It briefly summarizes how property rights function as drivers of economic activity and growth by securing *exclusive* rights in assets, whether homes or inventions. Injunctions—the remedy that secures

an exclusive right by stopping continuing violations of this property right by trespassers—are the means by which third parties are compelled to negotiate with property owners to enter into contracts to pay for the use or purchase of property.

- It details how innovators have lost injunctive remedies since 2006 and how this has led to the widespread practice of predatory infringement of their patent rights.
- It explains how the RESTORE Patent Rights Act would abrogate the Supreme Court’s mistaken 2006 decision and restore traditional and historical doctrine so that patent owners can secure injunctions for violations of their property rights.

Patents Are Property Rights

Property rights are the bedrock of a free society, a free market, and a flourishing economy. As American Revolutionary Arthur Lee wrote, “Property rights are the guardian of every other right: without them, there is no certainty of individual, political and economic liberties.”⁵ The Founders recognized that governments should be instituted to protect the rights of life, liberty, and property, and they ingeniously secured these rights in all of their new state and federal constitutions.⁶

The Founders also recognized that the law should secure for inventors the fruits of their productive labors just as much as it secured the fruits of the productive labors of farmers, laborers, and manufacturers. In addition to their many political and legal innovations in the design and function of our governments, the Founders provided in the Constitution that Congress shall have the power to secure to inventors an “exclusive right” in their discoveries for limited times.⁷ This exclusive right is a *patent*. The power to secure patents is on par in the Constitution with Congress’s expressly granted powers to declare war, coin money, create courts, and create an army and a navy, among others in Article I, Section 8.

This was the first time that the government’s power to secure property rights in inventions—patents—was set forth in a country’s founding charter. It is also the only place in the original Constitution drafted at the Constitutional Convention in 1787 in which one finds the word “right.” Congress has the power to secure to an inventor an “exclusive right”—a *property right*.

The Father of the Constitution, James Madison, did not think this power to secure property rights in the fruits of inventive labors needed much justification.

He wrote in *The Federalist* No. 48 that the “utility of this power will scarcely be questioned.” He explained that the “copyright of authors has been solemnly adjudged in Great Britain to be a right at common law” and that the “right to useful inventions seems with equal reason to belong to the inventors.” Since property rights in inventions are the same as other common law property rights, Madison concluded his succinct justification of patent rights by observing that patents achieve the same goals that all other property rights achieve: “The public good fully coincides...with the claims of individuals.”

In his first address to Congress, President George Washington specifically called on Congress to enact a patent law. Congress acted immediately: The Patent Act of 1790 was one of the first laws enacted by the First Congress. Many Founders were in the First Congress, including James Madison, who understood exactly what President Washington had asked Congress to do.

As the saying goes, the rest is history. The explosive growth of the Industrial Revolution was driven by the inventions secured by patents. The technological and economic revolutions in the biopharmaceutical and high-tech sectors of the modern U.S. innovation economy were similarly powered by this key engine of growth—the patent system.

How Property Rights Work

Property rights are the launchpad for economic development—serving as the legal foundation for economic growth, jobs, and ultimately a flourishing society with high standards of living and longer lifespans. Property rights serve this economic function through the exclusive right to use and transfer something, whether a car, a laptop, a lake, a hunting territory, animals such as cattle, corporate stock, land, or some other valued asset like an invention. A property right secures a domain of liberty in which one can choose how one possesses, uses, sells, or transfers to others the subject matter of one’s property right free from interference from anyone else.

Sir William Blackstone, a preeminent English judge and legal scholar, famously wrote in his *Commentaries on the Laws of England* that the right of property is a “sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”⁸ Blackstone’s *Commentaries*, and specifically his writings on property rights in this treatise, have been cited and quoted often by American judges and scholars since the early days of the American Republic. In the early years of the Republic, the scholar Thomas Rutherford stated in an influential legal treatise that the right of property in something is a “right to use it to any purpose and to dispose of it at pleasure.”⁹

American courts were of the same mind. In 1856, the New York Court of Appeals stated that “[p]roperty is the right of any person to possess, use, enjoy and dispose of a thing.”¹⁰ In 1858, the California Supreme Court similarly defined the right of property as “the exclusive right of possessing, enjoying, and disposing of a thing.”¹¹

It is this *exclusive control* of a valued asset that a property right secures to an owner that makes possible exchanges in the free market and the setting of market prices through “arm’s length transactions” via negotiated contracts. It is the power of an owner to say “no” to someone who wants to acquire or use one’s property, such as when someone wishes to buy one’s home or perhaps rent a room in this home, that compels this person to offer a price. People cannot just invade your home and occupy it. If they do, they are illegal “squatters.” You can sue them for trespass, and a court will order their eviction from your home.

The legal term for this court order removing a trespasser or squatter who is possessing or using one’s property without permission is “injunction.” The injunction is the legal mechanism by which the law *exclusively* secures “the right of any person to possess, use, enjoy, and dispose of a thing.”¹² Anyone who wants to use your laptop, even if temporarily, or acquire your home must do so with your permission and pay the price that you ask of that person. One federal court made this point concisely in 1866: “[I]f the defendants are using the complainants’ property, they ought not to use it, either in law or in morals, without compensation and without their consent.”¹³

In sum, the injunction is what prompts an arm’s length negotiation. It is the backstop for the property owner to ensure that a market price is paid by the purchaser. If the would-be purchaser cannot reach an agreement with the seller, the seller always knows that an injunction will prevent the ersatz purchaser from just invading one’s home or stealing one’s goods.

Securing Patents as Property Rights with Injunctions

Patents are property rights—the “exclusive right” that Congress is authorized to secure to inventors—and federal judges thus recognized that “[a]n inventor holds a property in his invention by as good a title as the farmer holds his farm and flock.”¹⁴ In 1845, Justice Levi Woodbury presided over a patent infringement trial and instructed the jury as follows: “[W]e protect intellectual property, the labors of the mind, productions and interests as much a man’s own, and as much the fruit of his honest industry, as the wheat he cultivates, or the flocks he rears.”¹⁵ (Until 1891, Supreme Court Justices were assigned to preside over federal trials and initial appeals from trials in

specific areas of the country labeled as “circuits.” Since this required them to ride on horseback to preside over trials and first-level appeals, this was known as “circuit riding.”¹⁶⁾

Federal courts thus recognized that the unauthorized production and sale of a patented invention, such as Samuel Morse’s telegraph or Thomas Edison’s lightbulb, were as much a trespass that justified the issuance of an injunction as was trespass of a landowner’s property. Federal judges traditionally called patent infringement a “trespass” and also used stronger property-based terms and rhetoric, such as referring to infringers as “pirates.”¹⁷ An injunction is the only legal mechanism to stop pirates from trespassing on the rights of innovators; if they wish to make and sell the invention, they must offer the patent owner a price for the use of the property.

In 1861, Justice Robert Cooper Grier presided over a patent infringement trial in which he recognized that “injunctions are now more liberally granted” for patent infringement because it is the “only efficient remedy to protect the patentee, and prevent continuing trespasses on his rights.”¹⁸ In 1845, Justice John McLean explained in another patent infringement trial that in “an ordinary case of infringement...an absolute injunction is the only adequate relief.”¹⁹

The reason was clear: Without an injunction as the court-ordered remedy for infringement of a patent, as another federal judge explained in 1875, patent owners would “be compelled, against their will, to permit the defendant to use their invention.”²⁰ The patent owner would no longer have an *exclusive* right to the use and enjoyment of his property, and like a homeowner unable to eject a squatter or someone unable to obtain the return of a stolen laptop, he would no longer have the ownership that compels people to *pay* for the purchase or use of his property. People would just invade and occupy others’ homes or steal patents as they saw fit.

To stop this, a property owner must have a “remedy for invasion of his right.”²¹ “He may have an injunction upon the wrong doer,” wrote Justice Henry Baldwin, “which will prevent the unauthorized use of his invention, and put it in his power to compel the invader either to abandon it or make him a just compensation for the use of it.”²²

The courts thus applied to patents the same legal rules and doctrines that they applied to homes and other property rights. If a patent owner proved that the defendant was infringing a valid patent by the unauthorized production and sale of an invention, then the patent owner was presumed to have a right to an injunction. This was no different from the right of a homeowner to obtain an injunction to remove an illegal squatter from his home.

This *presumptive right* to an injunction could be rebutted by a defendant with counterarguments, such as arguing classic equitable defenses like estoppel.²³ At this stage of the court case, however, the judge had already found the defendant liable for violating another person’s property right—the patent. Defendants rarely raised such defenses, and when they did raise these arguments, they almost always lost. Courts viewed a defendant’s arguments seeking to rebut the presumptive right to the injunction as akin to those of a child caught red-handed with his hand in the cookie jar: The wrongdoers will say anything or make any excuse to escape the consequences of their malfeasance. In an 1857 patent case in which the court found that the infringement by the defendant was “clear” and the “rights of the plaintiff are manifest,” the court concluded that “consideration of either public or private convenience should have little weight.”²⁴ The court thus ordered an injunction against the defendant for infringing the plaintiff’s patent.

The number of patent infringement cases in which defendants carried their burden in rebutting the plaintiff’s presumptive right to an injunction was exceedingly small. In an empirical study of all the federal court decisions in patent infringement cases reported in the *Federal Cases* reporter that were filed between 1790 and 1880, I found that patent owners who requested injunctions received this remedy in 91.2 percent of these court decisions.²⁵ In 1908, the Supreme Court stated that an injunctive remedy for “trespasses and continuing wrongs” in the infringement of a patent was so well established that “a citation of cases is unnecessary.”²⁶

Supreme Court Upends Injunctive Remedies for Patent Infringement

In 2006, the Supreme Court upended the protection of patents as property rights in its decision in *eBay v. MercExchange*.²⁷ In this case, the Court announced that issuing an injunction to stop patent infringement must be done according to a “four-factor test historically employed by courts.”²⁸ In this four-factor test, (1) the plaintiff must suffer an irreparable injury; (2) a legal remedy, such as damages, must be inadequate; (3) the balance of the hardships between the defendant and plaintiff must weigh in favor of the plaintiff; and (4) an injunction must not be against the public interest.²⁹

The *eBay* Court asserted that this four-factor test represented a “long tradition” and “well-established principles” in court decisions reaching back hundreds of years that “a plaintiff seeking a permanent injunction must satisfy a four-factor test.”³⁰ In saying this, though, the Court cited only two

late-20th-century cases as authority.³¹ Nonetheless, this historical claim was the *eBay* Court’s sole justification for the four-factor test for injunctions.

The problem is that there was no four-factor test in the “long tradition” of court decisions in issuing injunctions to stop the infringement of a patent. Legal scholars who specialize in remedies law responded critically to the *eBay* Court’s decision. One prominent legal scholar, Doug Rendleman, wrote one year after the Supreme Court’s decision in *eBay v. MercExchange* that “[r]emedies specialists had never heard of the four-point test.”³² Another scholar who specializes in injunctions and other legal remedies wrote that the *eBay* decision is “a spectacular example of the confusion that can result from litigating a remedies issue without a remedies specialist.”³³

My own empirical study of patent decisions between 1790 and 1880 confirms that the *eBay* Court is wrong. In fact, it is spectacularly wrong. In the *Federal Cases* reporter, I found 604 court decisions in which patent owners requested an injunction to stop infringement of their patents by the defendant. The number of times a court applied a four-factor test: zero.³⁴

Change in the Law Leads to Massive Drop in Injunctions to Stop Patent Infringement

After the *eBay* decision, judges looked at the “long tradition” of historical cases for guidance in applying the *eBay* four-factor test and found nothing. Instead of the *eBay* four-factor test, trial and appeals court judges found opinions by courts in which judges found infringement of a valid patent and then a presumptive right to an injunction—the same presumptive right to an injunction that applied to repeat trespassers or illegal squatters of homes. This explains my finding that courts issued permanent injunctions to patent owners in 91.2 percent of the court cases in which a court found a defendant liable for infringement.

Given this absence of any purported historical legal precedent, judges understandably looked for guidance in how to apply the *eBay* four-factor test in the policy arguments found in Justice Anthony Kennedy’s concurring opinion in *eBay*. In his concurrence, Justice Kennedy expressed profound skepticism about patents, accusing patent owners of abusing injunctions for purposes of legal extortion.³⁵ Justice Kennedy had many factually inaccurate claims in his concurrence, such as his claim that patent licensing business models are entirely new.³⁶ Nonetheless, he made substantive policy claims that provided at least some guidance on how to apply the new four-factor test created by the *eBay* Court. As confirmed by then-Professor (now Judge) Ryan Holte in an empirical study of patent cases following the

eBay decision, trial courts soon began to cite Justice Kennedy’s concurring opinion, which eventually assumed precedential status as the *de facto* majority opinion.³⁷ The shift to Justice Kennedy’s concurrence as the ersatz *eBay* decision, imbued as it was with deep policy skepticism about patents, resulted in judges crafting new requirements and legal burdens for patent owners to prove why they should receive an injunction after a defendant has been found by a court to infringe a valid patent.

The result has been a massive drop in the rate of injunctions issued for infringement of valid patents. Whereas patent owners received injunctions for infringement of their patents in 91.2 percent of the cases between 1790 and 1880, Dr. Kristina Acri found the exact opposite result for patent infringement cases between 2000 and 2023.³⁸ For patent owners who license their property for manufacture by others, courts denied their requests for injunctions in 91.2 percent of cases of patent infringement.³⁹ Patent owners who manufactured their patented inventions were denied injunctions in 66.7 percent of cases.⁴⁰ Dr. Acri’s study is consistent with an earlier study of post-*eBay* cases of patent infringement between 2007 and 2015 in which scholars found a reduction in the issuance of injunctions for licensing entities of 86 percent and a reduction for manufacturers of 52 percent.⁴¹

The Rise of Predatory Infringement

Since injunctions are a backstop to all market-based negotiations involving the sale or use of property, the loss of injunctions to protect patents against infringement has prevented these property rights from serving as a platform for commercial activities in the innovation economy. Patents have been devalued as an asset class. The right of patent owners to negotiate market prices, such as royalties in licenses, has been replaced by court-ordered “compulsory licensing” schemes. Courts now require a patent owner to accept a court-ordered “reasonable royalty” as payment for the defendant’s continuing unauthorized use of the patented invention.

Normally, if someone invades your home and takes up residence in your spare bedroom, you can sue this person for trespass and receive an injunction to eject the squatter. Now imagine that someone invades your home and illegally squats in your spare bedroom, but you cannot obtain an injunction. Although a court easily concludes that the miscreant is trespassing, it refuses to issue an injunction ordering that he be ejected from your home. Thus, the squatter can stay in your spare bedroom. The judge orders only the payment of “damages” by this squatter for his continuing

occupation of your spare bedroom; you do not get your bedroom back, but instead receive only court-ordered “reasonable rent” for the unauthorized possession and use of this portion of your home. In such a case, you have a “compulsory renter” in your home. This is the same legal and commercial situation that now exists for patent owners after *eBay* who only receive reasonable royalties in court-ordered compulsory licenses.

Since patent owners can no longer receive injunctions to stop unauthorized theft and use of their property, large companies increasingly engage in a practice known as “predatory infringement” (called “efficient infringement” by policy wonks).⁴² Predatory infringement occurs when a company decides that it “economically gains from deliberately infringing [a] patent” because it knows the patent owner will not receive an injunction and, thus it will pay less in legal fees and in a court-ordered reasonable royalty than it would have paid in a license freely negotiated with the patent owner.⁴³ The predatory infringer is the equivalent of the squatter in your spare bedroom, whom you cannot eject from your home and who knows that he will pay less in court-ordered “reasonable rent” than you would have charged in a properly negotiated lease agreement.

Big Tech companies are often accused of practicing predatory infringement. For example, in its patent infringement lawsuits against Apple—a multi-year, worldwide legal dispute that spanned numerous court cases—Qualcomm claimed in late 2018 that Apple was in arrears for as much as \$7 billion (and counting) for refusing to make royalty payments under its previous licensing agreements for use of the 4G digital transmission technologies invented at Qualcomm.⁴⁴ In April 2019, the two companies settled their worldwide litigation with Apple, paying an undisclosed sum and entering into a new license to use Qualcomm’s next-generation 5G technologies in future iPhones.⁴⁵

By itself, the refusal to pay royalties might not fall within the scope of strategic behavior known as predatory infringement, but internal corporate documents disclosed in one of these lawsuits confirmed that Apple engaged in a deliberate legal campaign for the sole purpose of devaluing Qualcomm’s patents so that it could convince a court to order a lower reasonable royalty than it had previously agreed to pay in licenses that Apple had negotiated freely with Qualcomm in the past.⁴⁶ If Apple had not been compelled to reveal its internal policy documents during discovery, it might have succeeded, but Apple settled with Qualcomm before the conclusion of the trial in which these internal documents were disclosed to the jury.

There is more evidence from other patent infringement lawsuits that Apple has a corporate policy of predatory infringement. In another case, the

patent owner uncovered through discovery another internal policy document that described Apple’s corporate policy of entering only into a “license as adjudicated” by a court.⁴⁷ This means that Apple does not freely negotiate licenses with patent owners; it simply steals the patented technologies and then pays only what a court orders as a reasonable royalty after a lengthy trial—exactly what the squatter in the home does if a homeowner cannot obtain an injunction.

Negative Effects of Predatory Infringement

The practice of predatory infringement by corporate defendants is consistent with economic analyses of what happens when injunctions are no longer available as a remedy for infringement of property rights. The loss of injunctions incentivizes users of patented technologies not to enter into licenses agreed to through commercial negotiations, but instead to steal the invention immediately and then “hold out” for as long as possible through a lengthy trial.⁴⁸ The infringer benefits from the use of the patented technology; the patent owner receives nothing in payments during this time; and at the end of the day, the infringer pays only a court-ordered reasonable royalty for the continued use of this patented technology. The “mischief of holding out” is a problem that even European courts have acknowledged exists when patent owners are prevented from obtaining injunctions as a presumptive remedy against infringers of their property rights.⁴⁹

The negative impact of predatory infringement is easily grasped in the context of the homeowner who is unable to eject the squatter who has invaded his spare bedroom. In addition to the compulsory rental imposed on the homeowner by the court-ordered payment of a reasonable rent payment that is below market rates, the home is now worth less in the housing market. The homeowner has a compulsory tenant living in his home and thus has lost his *exclusive property right* in his home. If he later tries to sell or rent his home, the market price will be decreased given this loss of exclusivity in one’s home. One does not need a Ph.D. in economics to understand this point: A home *without* a court-ordered compulsory renter living in one of the bedrooms is worth more on the housing market than a home *with* this unwanted squatter.

This is precisely the situation in which patent owners find themselves today. Predatory infringement exists because companies that use technologies created by others know that injunctions are no longer available to patent owners to stop their infringement. Thus, according to the classic cliché, they simply “raid the cookie jar” because it doesn’t matter anymore

whether they are caught red-handed. The infringer will not be ordered to stop and, at worst, will pay only a court-ordered reasonable royalty in a compulsory license.

As with the scenario of a compulsory renter in a home, patents are devalued as an asset class in the U.S. innovation economy. Royalty rates in licenses are depressed because they are being set by judges, not by individuals and companies in the marketplace. Judges often set lower rates because they are susceptible to “public interest” arguments or other types of appeals to “social justice” or “social welfare” by defendants in the crucible of the courtroom with the litigants battling over what the legal remedy of a reasonable royalty should be. But even when some companies are willing to enter into licenses without engaging in predatory infringement, they still pay *less* for the use of the patented technologies because the patent owner cannot promise them exclusive rights.⁵⁰ Just as the home is sold at a lower price because it comes with a current or potentially future compulsory renter, patent rights sold today in markets for technology are discounted given current or future compulsory licensees of these patents.

Property rights spur economic growth. This is a truism in economics, and it applies with equal force to the property rights secured in inventions. Patent systems that secure reliable and effective property rights consistently and strongly correlate with successful innovation economies—from the Industrial Revolution to the high-tech revolution of the late 20th century.⁵¹ The property rights in patents that were secured by presumptive rights to injunctions against all infringers between 1790 and 2006 served this economic function well, contributing to the economic version of the shining city on a hill that the U.S. represented to the world. The loss of injunctions and the rise of court-ordered royalties for the unauthorized use of patents portend darkly for America’s continued global technological leadership, especially against 21st-century global competitors like China.

RESTORE Patent Rights Act Would End Predatory Infringement

The RESTORE Patent Rights Act would end predatory infringement by restoring reliable and effective property rights in new technologies. It is a simple, single-sentence bill that would restore the law or remedies for patent infringement that existed between 1790 and 2006. During these two centuries, patent owners had the same presumptive right to an injunction to stop the violation of their property rights that a homeowner whose rights were infringed by an illegal squatter had.

The RESTORE Patent Rights Act amends the provision of the Patent Act governing the issuance of injunctions for infringement by adding a single sentence: “If, in a case under this title, the court enters a final judgment finding infringement of a right secured by patent, the patent owner shall be entitled to a rebuttable presumption that the court should grant a permanent injunction with respect to that infringing conduct.” This single sentence abrogates the four-factor test for injunctions created by the *eBay* decision in 2006. It does so by explicitly reestablishing the original injunctions doctrine that was applied by all courts for violations of all property rights and was displaced by the *eBay* four-factor test in 2006 for the violation of patent rights.

Judges today who may have lost their way in the 18 years since the *eBay* decision and thus are unable to make sense of the plain meaning of the RESTORE Patent Rights Act will easily find 218 years of court decisions in which federal judges applied this doctrine in issuing injunctions, including decisions by highly esteemed Supreme Court Justices such as Joseph Story. These judges would also find an overwhelming amount of precedent in the 91.2 percent of all patent infringement cases during the first 90 years of the U.S. patent system in which patent owners received injunctions.

Unlike the complete absence of any historical precedent for the four-factor test created in the *eBay* decision, the historical precedents applying the presumptive right to an injunction for infringement are overwhelming. Federal judges know how to follow these controlling court precedents and apply legal doctrines like rebuttable presumptions, which all law students learn beginning in their first year of law school. Judges also know how to interpret and apply the historical cases that *stare decisis* compels them to follow and apply in decisions today. This is especially true given the Supreme Court’s emphasis now on textualism in the interpretation of statutes and originalism in employing the interpretative tools of history and tradition in ascertaining the public meaning of the Constitution. In sum, both ample precedent and authoritative sources of public meaning are available to explain how to secure the “exclusive right” that Congress is empowered to protect under the Constitution’s Copyright and Patent Clause.

For any judges or Justices who still might be confused about the nature and function of the presumptive right to an injunction that traditionally has been secured to all property owners, whether homeowners or patent owners, the RESTORE Patent Rights Act has a fail-safe to redress this confusion. The bill contains express legal and factual congressional findings to address any confusion by courts in interpreting and applying the presumptive right to an injunction against infringers. These findings preempt judges from

having to invoke or rely on legislative history or general policy arguments if they deem a law to be ambiguous; as Judge Harold Leventhal famously said, the use of legislative history is “the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one’s friends.”⁵²

The RESTORE Patent Rights Act thus explicitly specifies the relevant facts and controlling laws that a judge must use in interpreting this statute. These express findings state, among other things, that the Constitution authorizes Congress to secure an “exclusive right;” that patents have been and continue to be secured under U.S. law as property rights; that the *eBay* four-factor test is incorrect and historically unprecedented; and that, contrary to the long-standing protection of patents as property rights under U.S. law, the *eBay* four-factor test has wrongly led to the loss of injunctive remedies for patent owners and the practice of predatory infringement.

Of course, the plain language in the single-sentence amendment to the patent statute in the RESTORE Patent Rights Act is clear as a matter of remedies law, as confirmed by the long-standing and historical doctrines applied by federal courts reaching back to the early years of the Republic. If a judge is tempted to head down the garden path of denying injunctions given sophisticated arguments by a predatory infringer seeking to escape the consequences of its infringement, the express findings by Congress impose guardrails to ensure that the judge remains focused properly on the plain meaning and historical case law that the judge is supposed to apply.

Congress can and should seriously consider enacting clear legislation like the RESTORE Patent Rights Act that achieves effective reform by correcting a misinterpretation of its statutes by the Supreme Court. This is an exemplar of the separation of powers at work. When the Supreme Court misconstrues a statute duly enacted by Congress according to an express delegation of power in the Constitution, it is the duty of Congress to exercise its check on this improper exercise of the judicial power by abrogating the Supreme Court’s decision and reasserting the original public meaning of the law it first enacted. Based on the history and tradition of the protection of patents as property rights with a presumptive right of an injunction, the RESTORE Patent Rights Act returns the “exclusive right” promised to innovators in the Constitution.

Conclusion

In its 2006 decision in *eBay v. MercExchange*, the Supreme Court radically changed the law that had long been used by courts in issuing injunctions to stop infringement of a valid patent. The *eBay* decision has

thus resulted in a significant change in legal practice in the patent system. Historically, patents were secured by a presumptive remedy of an injunction when they faced trespasses of their rights, just as all property owners receive injunctions to stop continuing trespasses of their rights. Courts secured a patent owner against infringement in the same way they secured a homeowner against a trespasser squatting in one's bedroom. But *eBay* displaced this long-standing doctrine with a new four-factor test that has resulted in significantly lower rates of injunctions being issued as a remedy for patent infringement, driven by modern policy arguments unmoored from the historical facts and traditional legal practices in U.S. patent law.

The inability of patent owners to obtain injunctions—courts now refuse to issue injunctions to stop infringements in more than 90 percent of some patent owners' cases—has incentivized the practice of predatory infringement. Defendants now know they do not have to negotiate license agreements to gain access to new technologies because they will not be ordered to stop infringement if they simply steal the invention. For the same reason that a squatter will trespass if he knows that a homeowner cannot obtain an injunction to eject him from a house, the company that engages in predatory infringement knows that it cannot be stopped and understandably predicts that it will pay less in a court-ordered reasonable royalty payment than it would have paid in a freely negotiated license in the marketplace. The result is that patents are *devalued* as technological assets driving economic growth in the U.S. innovation economy.

The loss of reliable and effective patent rights subverts the key role of property rights both in encouraging investment in research and development of new technologies and in facilitating the efficient commercialization of new technologies in the marketplace through commercial transactions like exclusive licenses. The loss of injunctive remedies for patent infringement has thrown sand into the gears of the engine that has powered the explosive growth in the U.S. innovation economy for the past two centuries—from the Industrial Revolution to the computer revolution. This also threatens U.S. technological and economic leadership at a time when new 21st century competitors such as China are striving to displace the U.S. with their own innovation economies.

Congress should seriously consider enacting the RESTORE Patent Rights Act as necessary legislative reform to redress the serious legal and economic ills created in 2006 by the Supreme Court in its *eBay* decision. This bill would abrogate the Supreme Court's mistaken interpretation of the patent laws that historically and traditionally have secured property rights in inventions. It would achieve this goal through a simple and

straightforward amendment that is clear and concise for any judge or lawyer in applying historical remedy doctrines like injunctions. It contains explicit factual and legal congressional findings that could serve as a fail-safe to ensure that, if judges or lawyers commit an error, they will be disabused of this mistake. In sum, the RESTORE Patent Rights Act would return the U.S. innovation engine back to its efficient operation in law and commerce.

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Endnotes

1. See Adam Mossoff, *China Ignores Rule of Law to Dominate Global Telecommunications*, REALCLEARPOLICY (Mar. 25, 2022), https://www.realclearpolicy.com/articles/2022/03/24/china_ignores_rule_of_law_to_dominate_global_telecommunications_823355.html.
2. See Adam Mossoff & Richard A. Epstein, *FTC Enforcement Stifles Biotech Innovation*, N.Y. DAILY NEWS (Jan. 30, 2022), <https://www.nydailynews.com/opinion/ny-oped-ftc-enforcement-stifles-biotech-innovation-20220130-mxwvc6gixdfvud54yl42sa-story.html>; Adam Mossoff, *The FTC Joins Huawei on a Misguided Troll Hunt*, WALL ST. J. (Jan. 27, 2019), <https://www.wsj.com/articles/the-ftc-joins-huawei-on-a-misguided-troll-hunt-11548624270>.
3. See Adam Mossoff, *The Supreme Court or Congress Must Restore Injunctions for Patent Owners*, HERITAGE FOUND. LEGAL MEMORANDUM No. 267 (June 25, 2020); Adam Mossoff, *Congress Should Reform Patent Eligibility Doctrine to Preserve the U.S. Innovation Economy*, HERITAGE FOUND. LEGAL MEMORANDUM No. 257 (Jan. 8, 2020).
4. See Adam Mossoff, *Big Tech's Abuse of Patent Owners in the PTAB Must End*, HERITAGE FOUND. LEGAL MEMORANDUM No. 336 (June 29, 2023); Adam Mossoff & David Lund, *The Problems with the PTAB*, IAM (Nov.-Dec. 2017).
5. JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 26 (2d ed. 1998) (quoting Arthur Lee). Arthur Lee was the brother of Richard Henry Lee, who introduced the resolution in the Second Continental Congress that became the Declaration of Independence in 1776.
6. See, e.g., Virginia Declaration of Rights, § 1 (1776) (“That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”). The Virginia Declaration of Rights directly influenced the Declaration of Independence, the federal Bill of Rights, and numerous state constitutions. See, e.g., ROBERT ALLEN RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS, 1776–1791* at 48 (1955) (stating that “it is hardly remarkable that in the bills of rights adopted in Pennsylvania, Delaware, Maryland, North Carolina, Vermont, Massachusetts, and New Hampshire, there are provisions that carry either the import or the verbatim language of articles in the Virginia declaration.”).
7. See U.S. Const. art I, § 8, cl. 8.
8. 2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 2 (1766).
9. THOMAS RUTHERFORTH, *INSTITUTES OF NATURAL LAW* 34–35 (2d ed., 1832).
10. *Wynehamer v. People*, 13 N.Y. 378, 433 (1856).
11. *McKeon v. Bisbee*, 9 Cal. 137, 142 (1858).
12. *Eaton v. Boston C. & M. R.R.*, 51 N.H. 504, 511 (1872).
13. *Potter v. Schenck*, 19 F. Cas. 1182, 1184 (C.C.N.D. Ill. 1866).
14. *Hovey v. Henry*, 12 F. Cas. 603, 604 (C.C.D. Mass. 1846).
15. *Davoll v. Brown*, 7 F. Cas. 197, 199 (C.C.D. Mass. 1845).
16. Jennifer L. Behrens, *The Empty Chair: Reflections on an Absent Justice*, 10 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP 241, 250 (2020) (“In addition to the relentless caseload in Washington, justices faced the further strain of ‘riding circuit’ to hear cases in their assigned regions of the country.”).
17. See Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent “Privilege” in Historical Context*, 92 CORNELL L. REV. 993–994, n.192–193 (2007) (identifying older court opinions in patent infringement cases using “trespass” and “piracy”).
18. *Sanders v. Logan*, 21 F. Cas. 321, 323 (C.C.W.D. Pa. 1861).
19. *Brooks v. Stolley*, 4 F. Cas. 302, 304 (C.C.D. Ohio 1845).
20. *Gilbert & Barker Mfg. Co. v. Bussing*, 10 F. Cas. 348 (C.C.S.D.N.Y. 1875).
21. *Whitney v. Emmett*, 29 F. Cas. 1074, 1086 (C.C.E.D. Pa. 1831).
22. *Id.*
23. Estoppel is one of many “affirmative defenses” in the legal system. These are also known as “equitable defenses” because they arose in the special courts in England known as equity courts, in which the person raising the defense argued that he was harmed in some special way by a plaintiff acting wrongly and that this harm outweighed the harm caused by the defendant’s violation of the plaintiff’s rights. A classic example of estoppel occurs when a plaintiff had earlier told the defendant that he could do something, such as giving permission to use one’s property even if one did not have permission originally, and then later changes his mind and sues the defendant after the defendant had incurred significant liability for damages. In such a case, the plaintiff is “estopped” (stopped in Latin) from pursuing a lawsuit given his own inequitable conduct that harmed the defendant.
24. *Sickels v. Tileston*, 22 F. Cas. 77, 78 (C.C.S.D.N.Y. 1857).
25. See Adam Mossoff, *Injunctions for Patent Infringement: Historical Equity Practice Between 1790–1882*, 38 HARVARD J. L. & TECH. ____ (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4870351.

26. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U.S. 405, 430 (1908).
27. eBay, Inc. v. MercExchange, LLC, 547 U.S. 388 (2006).
28. *Id.* at 390.
29. *Id.* at 391.
30. *Id.*
31. *Id.* (citing Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) and Amoco Production Co. v. Village of Gambell, AK, 480 U.S. 531 (1987)).
32. Doug Rendleman, *The Trial Judge's Equitable Discretion Following eBay v. MercExchange*, 27 REV. LITIG. 63, 76 n.71 (2007).
33. Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 168 (2008).
34. See Mossoff, *supra* note 25.
35. *eBay*, 547 U.S. at 395–97 (Kennedy, J., concurring).
36. See, e.g., Jonathan M. Barnett, *Has the Academy Led Patent Law Astray?*, 32 BERKELEY TECH. L.J. 1313 (2017); Alexander Galetovic, Stephen H. Haber & Ross Levine, *An Empirical Examination of Patent Holdup*, 11 J. COMP. L. & ECON. 549 (2015); Adam Mossoff, *Patent Licensing and Secondary Markets in the Nineteenth Century*, 22 GEO. MASON L. REV. 959 (2015); B. Zorina Khan, *Trolls and Other Patent Inventions: Economic History and the Patent Controversy in the Twenty-First Century*, 21 GEO. MASON L. REV. 825 (2014).
37. See Hon. Ryan T. Holte, *The Misinterpretation of eBay v. MercExchange and Why: An Analysis of the Case History, Precedent, and Parties*, 18 CHAPMAN L. REV. 677, 721–23 (2015).
38. See Kristina M.L. Aciri, *Injunctive Relief in Patent Cases: The Impact of eBay*, 38 HARVARD J. L. & TECH. ___ (forthcoming 2025), <https://papers.ssrn.com/abstract=4866108>.
39. *Id.*
40. *Id.*
41. Kirti Gupta & Jay P. Kesan, *Studying the Impact of eBay on Injunctive Relief in Patent Cases* (2016), <https://ssrn.com/abstract=2816701>.
42. See Adam Mossoff & Bhamati Viswanathan, *Explaining Efficient Infringement* (May 11, 2017), <https://cip2.gmu.edu/2017/05/11/explaining-efficient-infringement/#:~:text=In%20a%20nutshell%2C%20efficient%20infringement%20occurs%20when%20a,it%20is%20cheaper%20than%20to%20license%20the%20patent.>
43. *Id.*
44. See Reuters, *Apple Reported to Be \$7 Billion Behind in Patent Royalty Payments by Qualcomm*, TECH2 (Oct. 27, 2018, 10:05 AM), <https://www.firstpost.com/tech/news-analysis/apple-reported-to-be-7-billion-behind-in-patent-royalty-payments-by-qualcomm-5456151.html>. One analyst estimated that Apple paid \$5 billion to \$6 billion in its settlement with Qualcomm, which indirectly confirms the amount claimed in arrears. See Kif Leswing, *Apple Paid Up to \$6 billion to Settle with Qualcomm, UBS Estimates*, CNBC (Apr. 18, 2019, 11:49 AM), <https://www.cnbc.com/2019/04/18/apple-paid-5-billion-to-6-billion-to-settle-with-qualcomm-ubs.html>.
45. See Don Clark & Daisuke Wakabayashi, *Apple and Qualcomm Settle All Disputes Worldwide*, N.Y. TIMES (Apr. 16, 2019), <https://www.nytimes.com/2019/04/16/technology/apple-qualcomm-settle.html>.
46. See Reed Albergotti, *Apple Said Qualcomm's Tech Was No Good. But in Private Communications, It Was "the Best,"* WASH. POST (Apr. 19, 2019), <https://www.washingtonpost.com/technology/2019/04/19/apple-said-qualcomms-tech-was-no-good-private-communications-it-was-best>.
47. Trial Transcript, *Optis v. Apple*, Case No. 19-cv-00066, 221:9-23 (E.D. Tex. Aug. 12, 2020) (No. Dkt. 490) (“This is another element of Apple’s strategy. This is, once again, from an internal Apple document. Apple talks about a range of approaches, and one of the approaches it likes to use is called license as adjudicated. This is the plans [sic] of Apple’s lawyers. And why do they want to say license as adjudicated? Well, that’s a funny word for, let someone sue us. Now, why in the world would you want to wait for someone to sue you for patent infringement? Well, we actually know the answer to that, because it’s in their internal documents. The reason for it is because they want to delay payments. They want to avoid having paid the money for as long as possible.”); see also *Optis Cellular Tech. L.L.C., Optis Wireless Tech. L.L.C. & Unwired Planet Int’l Ltd. v Apple Inc.*, [2022] EWCA Civ 1411 (Oct. 27, 2022), at ¶ 115 (“Apple’s behaviour in declining to commit to take a Court-Determined Licence once they had been found to infringe...and their pursuit of their appeal, could well be argued to constitute a form of hold out....”).
48. See Richard A. Epstein & Kayvan B. Noroozi, *Why Incentives for “Patent Holdout” Threaten to Dismantle FRAND, and Why It Matters*, 32 BERKELEY TECH. L. J. 1381, 1414–15 (2017).
49. *Unwired Planet International Ltd v. Huawei Technologies Co. Ltd*, UKSC 37, 26 Aug. 2020, ¶ 10.
50. Some licensing data have confirmed a relative drop in exclusive licenses compared to nonexclusive licenses in the years following the *eBay* decision. Exclusive licenses are more valuable than nonexclusive licenses because the sale price of total *market exclusivity* by the patent owner is higher than the price of a license in which the licensee will be facing competitors in the marketplace. In other words, the bundle of rights transferred in a nonexclusive license is less than the bundle of rights transferred in an exclusive license, so the royalties charged for nonexclusive licenses are

necessarily lower than the royalties charged in an exclusive license. See Kristen Jakobsen Osenga, *The Loss of Injunctions Under eBay: Evidence of the Negative Impact on the Innovation Economy*, HUDSON INSTITUTE POLICY MEMO, Feb. 2024), https://s3.amazonaws.com/media.hudson.org/022624_Osenga_No_Injunctions_Memo_v2.pdf.

51. See, e.g., Stephen Haber, *Patents and the Wealth of Nations*, 23 GEO. MASON L. REV. 811 (2016); Jonathan M. Barnett, *Patent Tigers: The New Geography of Global Innovation*, 2 CRITERION J. INNOVATION 429 (2017).
52. *Conroy v. Aniskoff*, 113 S. Ct. 1562, 1567 (1993) (Scalia, J., concurring).