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by Nick Match, opinion contributor - 08/29/24 12:30 PM ET

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This Feb. 25, 2011 file photo shows the U.S. Patent and Trademark Office in Alexandria, Va. (AP Photo/Alex Brandon)

The “right to useful inventions ... belong[s] to the inventors.”

James Madison articulated this core principle in the Federalist Papers and embedded it into our Constitution more than two centuries ago. In the years since, the U.S. patent system has been a driving force behind continued economic growth and innovation.

Today, however, that system is under threat. Fortunately, Congress is responding with a bipartisan bill aimed at restoring that right — and boosting our economy in the process.

The essence of James Madison's idea was that if those using a patented invention without permission should have to stop. This principle guided patent law for most of American history. But in 2006, following the Supreme Court's decision in eBay v. MercExchange, that began to change.

Lower courts focused on a three-paragraph concurrency in that case by then-Justice Anthony Kennedy, which suggested that monetary compensation should suffice for many patent holders. As a result, even when a patent holder proves infringement and successfully defends the validity of his or her patent in court, the infringer is often allowed to continue utilizing the patented invention, with only a "reasonable" payment ordered.

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This approach is a radical departure from both history and ordinary legal principles. Courts don't usually let polluters keep polluting or trespassers keep trespassing in exchange for a payment. Typically, wrongdoers pay a fine or provide compensation for past misconduct but also are not allowed to continue their harmful actions.

For almost all of American history, courts routinely issue anti-infringement orders after trial. The eBay decision effectively defied this precedent, posing a significant risk to small innovators and startups.

The result has been the rise of "efficient infringement," where infringers see no downside to infringing and no upside to negotiating a license with the patent holder.

A simple analogy illustrates the problem: Imagine a hotel owner discovers someone occupying a room without checking in or paying. In a normal situation, the court would promptly evict the squatter. But if eviction isn't an option, the squatter gets to stay, and the court — not the hotel — decides what a "reasonable" price is for the room.

If this were how the law worked for hotels, trespassers would get free rooms any time they could avoid detection. Even if caught, they might get a better deal than if they had paid at the front desk. Pursuing squatters in court is expensive, and the court-ordered "reasonable" payment might be less than the hotel's standard rates.

Some hotel owners might accept lower payments to avoid litigation costs and hassle. Others might leave the business altogether, leaving honest travelers with fewer options.

A similar dynamic is plaguing America's technology economy. Large tech companies may see this as an opportunity to ignore the patent rights of smaller inventors. If they are never sued for infringement, the large companies could continue illegally using their rival's invention for free.

But even if they are sued, it may not be much of a problem. If the legal costs don't drive the patent owner out of business or the courtroom, the infringer will likely only have to pay a "reasonable" price to its exhausted adversary.

The eBay decision contributed to the decades-long dominance of a few tech giants. A “reasonable” payment cannot account for the full extent of the profits a company will earn on an infringed technology. And when small companies and startups struggle to protect their innovations against infringement by larger, better-resourced companies, they will find it difficult to carve out a place in the market.

Fortunately, members of Congress just proposed a timely solution. A bipartisan group of legislators led by Sens. Chris Coons (D-Del.) and Tom Cotton (R-Ark.) recently introduced a new bill called the RESTORE Patent Rights Act, which would reestablish injunctive relief as the default remedy for patent infringement.

If this bill becomes law, inventors will once again have full ownership of their creations, and patent infringers will no longer be able to steal technology with impunity.

Congress should pass the RESTORE Act to deliver justice to inventors and reinvigorate American innovation.

Nick Matich, a patent litigator in private practice, served as acting general counsel at the U.S. Patent and Trademark Office.

Tags Anthony Kennedy eBay v. MercExchange Federalist Papers James Madison James Madison Justice Kennedy Patent infringement Patent law Politics of the United States restore patent rights act Startups Supreme Court
