Congress Must Restore IP Protection To Drive US Innovation

By Paul Michel · *Listen to article*

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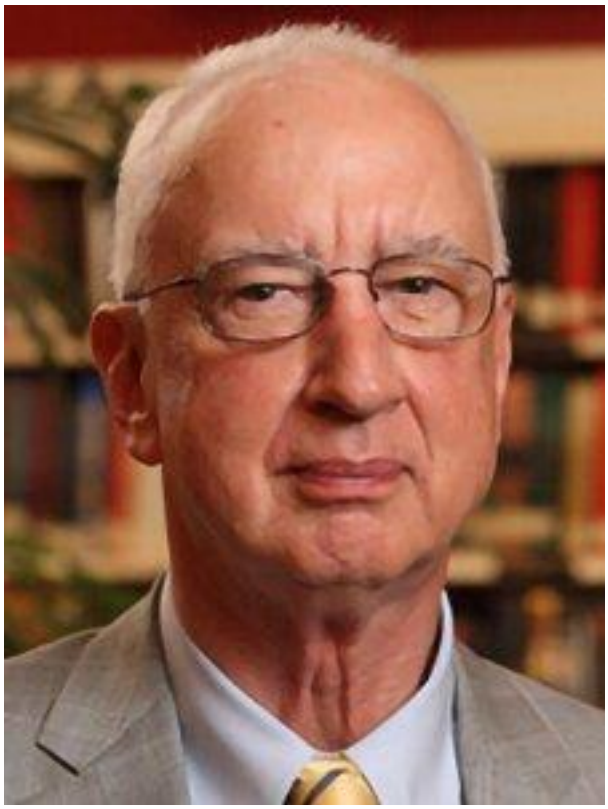

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Founding a successful startup has never been easy, but a little-known U.S. Supreme Court ruling has made it even more difficult in recent years by enabling corporations that use startups' patented technology without permission to get off nearly scot-free.

Now, Congress has a chance to set things right. On Feb. 25, Sens. Chris Coons, D-Del., and Tom Cotton, R-Ark., reintroduced the Realizing Engineering, Science, and Technology Opportunities by Restoring Exclusive, or RESTORE, Patent Rights Act, a bipartisan bill that would enable startups and other patent holders to block infringers from unlawfully exploiting their patented technology.

By deterring patent copying or outright theft, the legislation would attract capital and enhance America's global competitiveness.

For nearly all of our country's history, an injunction — a court order stopping infringers from continuing to use and sell technology without permission — was the standard remedy for patent infringement.

By enforcing exclusive rights as articulated in the U.S. Constitution and patent law, courts upheld the principle that inventors, not usurpers, should control how their technology is used and marketed. It incentivized investment in high-cost, high-risk, high-reward research, and provided startups and small businesses with a fighting chance against entrenched companies, including industry giants.

But the Supreme Court's 2006 decision in eBay Inc. v. MercExchange LLC upended this long-standing principle. The ruling imposed a multifactor balancing test that made it significantly harder, if not impossible, for many inventors and patent holders to obtain an injunction and block unauthorized use, even after proving infringement.

Former Justice Anthony Kennedy's concurrence in the eBay decision further muddied the waters. He suggested that, in certain cases, monetary awards could be "sufficient to compensate for the infringement." Lower courts seized this reasoning about edge cases and applied it broadly, often in ways that disregarded the practical realities facing small inventors.

The simple truth is that monetary compensation alone is frequently insufficient — it cannot adequately compensate a patent holder who wants to be in sole control of the advancement of his or her patented invention, rather than have another company develop and market it.

Since the eBay decision, injunction grants in patent infringement cases dropped by more than 65% for operating companies and over 90% for startups, research institutions, or others that do not manufacture products that incorporate the patented technologies. The result is that proven infringers now often face no penalty other than a court-imposed royalty, which is supposed to be the equivalent of a license that the infringer should have gotten up front from the patent holder.

Patent owners have functionally lost control over the patented innovations they own. The eBay ruling effectively legalized forced patent licensing, stripping inventors of their exclusive rights while letting industry titans and other infringers profit from copied or stolen innovation.

This erosion of patent rights is undermining America's innovation economy. IP-intensive industries contribute over 40% of U.S. GDP and support tens of millions of jobs, according to U.S. Patent and Trademark Office data from 2019. But as patent protections weaken,

investment in cutting-edge research slows. Venture capitalists become increasingly hesitant to fund startups and small companies when patents can no longer provide meaningful protection.

A weakened U.S. patent system makes it harder for American firms to out-innovate and out-compete foreign competitors — particularly Chinese ones — in critical fields. If Congress fails to act fairly soon, we will cede the technological high ground to our rivals.

The RESTORE Patent Rights Act would fix the problem.

The bill would reestablish injunctions as the default remedy for proven patent infringement, just as they were prior to the eBay decision. Opponents claim this would result in automatic injunctions, but that is simply not true. Courts would retain discretion regarding injunctions, allowing defendants to present reasons against them.

By passing the RESTORE Patent Rights Act, Congress would create real consequences for patent copying, deterring large corporate infringers that currently see litigation as just another cost of doing business. The bill would restore confidence in the U.S. patent system, giving startups and inventors the protection they need to take risks and drive technological progress. And it would keep America economically competitive in the race for next-generation technologies.

For nearly two decades, the eBay decision has distorted our innovation ecosystem, rewarding copying over creation and corporate might over individual ingenuity. The RESTORE Patent Rights Act offers an opportunity to correct the course we are on. Congress should not hesitate to take it.

Paul Michel is a retired U.S. circuit judge of the U.S. Court of Appeals for the Federal Circuit. He was the court's chief judge from 2004 to 2010.