

Restore Injunctive Relief to Keep American Innovation Alive

By

What if you won in court, but the judge ruled that you couldn't stop the thief from continuing to use your ATM card he stole? You had to share your ATM card's usage with the law breaker.

Patents are supposed to secure exclusive rights to one's intellectual property. Exclusivity is crucial to preserving the incentives that drive innovation. For two centuries, innovation, powered by robust patent protection, led to America's global innovation leadership. This U.S. leadership is faltering because of judges' rulings that allow infringers to continue to benefit commercially from purloined inventions, a new study confirms.

In the past, patent owners could take instances of infringement to court, where they stood a good chance of being granted an injunction, permanently excluding the infringer from using the patented technology in the market.

Today, however, injunctive relief is less frequently sought and rarely granted. That's because a 2006 Supreme Court decision turned basic property law as it relates to patents on its head. In [eBay v. MercExchange](#), the Supreme Court unanimously affirmed a four-part test requiring a plaintiff seeking a permanent injunction to demonstrate "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate for that injury; (3) that considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction."

The problem arises from Justice Anthony Kennedy's concurring opinion, which became the lower courts' de facto rule that undermines the four-part test. Kennedy fretted over unfounded assumptions, such as supposed vagueness in certain tech patents and patent licensing practices. This erected a judicial wall against granting patentees injunctions.

Today, proven infringers no longer face injunctions. For all practical purposes, patent owners lost their right to exclude infringers from using their product in the market. Instead, courts compel patent violators to pay the innovator royalty fees for continued use at a rate the court sets. In some cases, there is no payment at all.

This perversely flipped the incentives, leading many companies to conclude that predatory infringement represents an attractive business model. In most scenarios, they face no recrimination. In the worst-case scenario, they pay what amounts to a cut-rate licensing fee. Astoundingly, injunctions remain readily available for other forms of IP, such as copyright and trademark.

The negative impact of the *eBay* case on innovation continues to reverberate through the marketplace.

While the number of U.S. patents granted has continued to rise year-over-year, a newly released study from

Marcum LLP reveals that the overall number of patent infringement lawsuits has taken a downhill trajectory, dropping from 6,497 cases filed in FY 2013, to just 3,639 cases filed in FY 2022. This represents a nearly 44 percent decrease.

Alarming, the study finds that the number of permanent injunctions granted (excluding default judgments) has tumbled precipitously in the post-*eBay* era, falling from a peak of 80 to 36 over the past 15 years, a drop of 55 percent.

The Marcum report data confirms [previous research](#) that concludes the *eBay* decision has dramatically reduced the volume of patent cases in which injunctive relief is sought as well as the rate at which it is granted.

With injunctive relief effectively denied as a barrier to patent theft, distortions affect marketplace efficiency. For example, offerings of exclusive licenses to potential licensees – absent the ability to protect exclusive licenses via injunction – have fallen post-*eBay*, an [empirical study by AUTM](#) has found. Conversely, nonexclusive licenses have increased. Thus, the double-whammy of the *eBay* decision is that it has not only encouraged wholesale theft of inventions, but it has decreased the general value proposition of patents.

We live at a time when our ability to meet the challenges of competing in the world economy, promoting our future prosperity, and securing our national defense depends on America's innovative genius. In that context, reexamining our laws as they relate to intellectual property should be a national priority.

We must take immediate legislative steps to firm up patent protections. That starts with restoring injunctive relief against patent infringement and rectifying *eBay v. MercExchange*.

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