

SPARK Opposes the RESTORE Patents Act without Amendment

Injunctions are vital to a functioning patent system, barring infringers from making, using, offering to sell, or selling patented inventions. This protection drives investment in early-stage startups by securing the value of their innovations. Without the strong likelihood of courts issuing injunctions, predatory corporations—both domestic and foreign—can steal patented technologies unchecked. Such theft devalues inventors' efforts, threatens early-stage investments, and stifles U.S. innovation at its most critical beginnings.

In the United States, 200 years of precedent was "a permanent injunction will issue once infringement and validity have been adjudged". However, the U.S. Supreme Court's 2006 ruling in *eBay v. MercExchange* (*eBay*) significantly changed the approach to injunctions in patent infringement cases. Rather than routinely granting injunctions, courts must now apply a four-factor test called the *eBay Factors*, making it harder for patent holders to stop infringers from using their inventions. In contrast, injunctions remain a standard remedy in other jurisdictions, such as the Unified Patent Court in Europe and courts in China, where they are routinely issued.

eBay imposed self-inflicted damage to U.S. innovation in ways that most other countries do not, and this damage enabled China to take the global lead in technologies critical to our economic and national security.

The Realizing Engineering Science and Technology Opportunities by Restoring Exclusive Patent Rights Act of 2025 (**RESTORE**) was introduced in the Senate by Senators Coons and Cotton. An identical companion bill by the same name was introduced in the House by Representatives Nathaniel Moran, Deborah Ross, Hank Johnson, Chip Roy, Madeliene Dean and Scott Peters.

RESTORE does not properly restore injunctions and will leave U.S. innovation constrained in relation to other countries. We therefore oppose RESTORE unless it is properly amended.

***eBay vs. MercExchange* Harmed U.S. Innovation**

The Supreme Court in *eBay v. MercExchange* (*eBay*) inflicted harm on U.S. innovation by making it exceedingly difficult for startups, entrepreneurs, and inventors to obtain an injunction. The Supreme Court ratified (i) a novel four-factor test (*eBay Factors*) employed by the district court for determining whether to grant injunctive relief upon the finding of patent infringement, and (ii) it also placed the burden on the patent owner to show how it survives the *eBay Factors*. These two issues are distinct and must both be addressed to properly restore injunctions.

eBay is a substantial rewrite of the law of injunctive relief. In ratifying the *eBay Factors*, the categorical rule with over two centuries of historical precedent that "a permanent injunction will issue once infringement and validity have been adjudged" was eliminated.

The *eBay Factors*:

"That test requires a plaintiff to demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law are inadequate to compensate 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 decision to grant or deny such relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion."

The *eBay Factors* effectively mean if the patent owner does not have a commercial product on the market, it will not be able to stop an infringer. If an incumbent is big enough to steal a patented

invention and flood the market running the startup out of business, they keep the invention and the market it created.

With no reasonable threat of an injunction, massive predatory infringement of patents owned by U.S. startups, entrepreneurs, and inventors arose by huge multinational corporations, including Chinese Communist Party (CCP) controlled multinationals.

eBay's harm was exacerbated by subsequent attacks on U.S. innovation such as (i) the unconscionably high patent kill rate of 84% at the Patent Trial and Appeal Board (PTAB); (ii) judicial exceptions to patent-eligible subject matter including abstract ideas; and (iii) the highly subjective judge-made test for obviousness.

The Law of Injunctions Before *eBay*

An injunction is the very essence of a personal property right. Injunctions for patent infringement on a valid patent predate the country and are codified in our founding documents. The Constitution constructs a patent as nothing but an “*exclusive Right*.” The key component of the associated bundle of private property rights is the right to exclude. And Congress codified that a patent “shall have the attributes of personal property.”

Adam Mossoff, Professor of Law at Antonin Scalia Law School, George Mason University, recently published a paper entitled “*Injunctions for Patent Infringement: Historical Equity Practice Between 1790 – 1882*” (Mossoff Paper). In it, Mossoff presents the law on injunctions prior to *eBay* on page 2: “*In the 899 opinions in Federal Cases by federal courts sitting in equity in lawsuits filed between 1790 and 1880, no judge applied a four-factor test for issuing an injunction, either for a permanent or a preliminary injunction. [...] Courts awarded permanent injunctions in 91% of the cases in which the defendant was found to infringe a patent that it failed to invalidate. Courts granted these injunctions by applying the same legal doctrines they applied when redressing continuing trespasses of real property, protecting patents as much as they protected real estate and other property interests.*”

Prior to the *eBay* ruling, courts following the law granted injunctive relief in over 90% of cases where patent owners successfully proved infringement and upheld the validity of their patents. This strong enforcement prompted potential infringers to adopt various strategies to mitigate the risk of legal action. These strategies included:

- Acquiring startups and patents to secure their own intellectual property.
- Licensing existing patents to gain lawful access to protected technologies.
- Designing around patented inventions to avoid infringement altogether.
- Forming partnerships and co-development opportunities with patent holders to collaborate rather than compete.

As a result, injunctions played a dual role. They spurred innovation by encouraging creative solutions and technological advancements, while also serving as an anti-monopoly mechanism. By enabling new competitors to enter markets dominated by established incumbents, injunctions fostered greater competition and diversified markets.

Investment in Early-Stage Startups Requires Injunctions

Early-stage investment into patented technology provides U.S. innovation its most important fuel. The spark of an invention coupled with the fuel of investment ignites the engine that brings new products to market.

The *eBay Factors* are targeted at patent owners who do not have a product on the market. Under *eBay Factor (1)*, a patent owner must demonstrate *irreparable harm* to obtain an injunction. However, courts often rule that if a patent owner lacks a commercial product, *irreparable harm* does not exist because monetary damages are deemed sufficient to compensate for infringement.

This perspective is hostile to the secondary market for patent assets, which plays a crucial role in driving investment into startups. This economic system relies on three primary actors: startup inventors and executives who develop new technologies, early-stage investors who fund innovation, and non-practicing entities (NPEs) that aggregate patents and license them.

A patent serves as a property right that can be collateralized to attract early-stage investment. If a startup fails, its investors gain control of the patent and can either enforce it against infringers or sell it to a NPE to recover their investment. NPEs often bundle acquired patents into larger portfolios, strengthening their enforcement efforts and creating judicial efficiency by consolidating the assertion of multiple patents into a single suit and patent license.

Each participant in this economic system plays a vital role—inventors focus on innovation and launching startups, early-stage investors specialize in identifying promising ventures, and NPEs excel at licensing and enforcing patents, ensuring that intellectual property retains its value in the marketplace.

This denial of injunctions has undermined this critical economic model that startups depend on to attract early-stage investment by encouraging predatory infringement. Large corporations recognize that if they flood the market with infringing products and drive a startup out of business, the startup's investors will take control of its patents. However, since these investors lack a commercial product, they cannot obtain an injunction, making enforcement far less effective.

The cost of infringement is far less than the value of a market an invention creates. So, a corporation large enough to rapidly commercialize a stolen invention is incited by *eBay* to steal inventions because it can dominate the market the stolen invention creates at a much lower cost.

Early-stage investors recognize this risk and are increasingly reluctant to fund startups that commercialize disruptive technologies in markets dominated by large incumbents. This hesitation is especially pronounced in critical technology sectors like AI, communications, cybersecurity, fintech, enterprise systems, quantum computing, and many other critical emerging technologies in which China now leads.

NPE licensing business models have been a fundamental part of the U.S. patent system since the very first U.S. patent on potash processing. Many inventors, universities, and research institutions choose to license their inventions rather than commercialize them directly. This is often because they lack the infrastructure to bring their innovations to market; prefer research over business leadership; require the resources of a larger company to scale their technology; or are simply better positioned to license their patents rather than manage commercialization themselves.

The secondary market's division of labor between researchers and inventors, and those who invest in and commercialize inventions, is a crucial driver of innovation. It enables groundbreaking ideas to reach the market and thrive—something that is only possible with effective licensing business models that bridge the gap between invention and commercialization.

After *eBay*, court-ordered injunctions dropped by as much as 91.2% for NPEs and 66.7% for operating companies, drastically weakening patent enforcement. The *eBay Factors* have been particularly destructive to the startup ecosystem, especially for those commercializing critical emerging technologies.

Ultimately, *eBay* harms U.S. innovation by reducing the incentive to innovate, slowing the development of breakthrough technologies, and leading to less competition and higher prices for consumers. As a result, other countries—most notably China—have been able to surpass the U.S. in global leadership in key emerging technologies.

RESTORE Abrogates *eBay*'s Burden Shift

RESTORE introduces a rebuttable presumption that a court *should* grant a permanent injunction in patent cases. This eliminates the burden-shifting issue created by *eBay*, making it easier for patent holders to secure injunctions. However, RESTORE does not address the underlying *eBay Factors*, which continue to disadvantage patent owners—particularly those without a commercial product—when seeking injunctive relief.

RESTORE's operative language:

"REBUTTABLE PRESUMPTION. — 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."

RESTORE Does Not Abrogate the *eBay Factors*

Since *eBay*, courts are mandated to evaluate injunctive relief under the *eBay Factors*.

Proponents of RESTORE claim that it "explicitly abrogates" the *eBay Factors*. However, because the *eBay Factors* are not mentioned or described anywhere in RESTORE, they cannot be explicitly abrogated.

Nevertheless, RESTORE's supporters argue that explicitly naming *eBay* is unnecessary for it to be effectively overturned. They draw a comparison to the 1952 Patent Act, which added the sentence "Patentability shall not be negated by the manner in which the invention was made" to Section 103. This change effectively abrogated the *flash of genius* doctrine from Cuno Engineering v. Automatic Devices (Cuno) without directly naming the case. Since the *flash of genius* test fell under the "manner in which the invention was made," it could no longer be used to negate patentability, effectively nullifying Cuno.

For RESTORE to similarly abrogate *eBay*, its language must explicitly prevent courts from applying the *eBay Factors* when deciding whether to grant an injunction, which RESTORE does not do.

RESTORE Effectively Codifies the *eBay Factors*

Proponents of RESTORE assert a second way in which it abrogates the *eBay Factors*—through the Findings section. They argue that if a court is uncertain about the meaning of RESTORE's operative language, it will refer to the Findings, which they claim effectively nullify the *eBay Factors*.

RESTORE's first four Findings have nothing to do with the *eBay Factors*.

According to scholarly research by Professor Mossoff, prior to *eBay* the courts granted an injunction if infringement was proven on a not invalid patent; *irreparable harm* was never considered prior to the *eBay Factors*.

Nevertheless, RESTORE Finding (5) brings *eBay Factor (1)*, *irreparable harm*, into US injunction law for the first time:

"(5) Given the irreparable harm that is caused by multiple acts of infringement or willful infringement of a patent, courts historically presumed that an injunction should be granted to

prevent such acts, with a burden on defendants to rebut such a presumption with standard equitable defenses.

(6) Recently, courts have ended the approach described in paragraph (5), which contradicts the traditional, historical practice governing the equitable remedy described in that paragraph.”

It is important to note that *eBay Factors* are mandated by the Supreme Court as *standard equitable defenses* in patent cases.

Under *eBay*, when seeking an injunction, the patent owner must overcome the *eBay Factors* including *eBay Factor* (1), whether it has suffered an *irreparable harm*. The adjudged infringer then counters the patent owner’s arguments using the *eBay Factors*.

RESTORE reverses the burden with its rebuttable presumption. That means a patent owner just asks the court for an injunction without having to justify it because the patent owner is presumed to be *irreparably harmed*. To overcome the rebuttable presumption, the adjudged infringer must argue at least that the patent owner is not *irreparably harmed*, which is *eBay Factor* (1). This carries through at least this *eBay Factor*.

RESTORE is silent on the remaining *eBay Factors*, but nothing in RESTORE abrogates the *eBay Factors* or the Supreme Court’s mandate to use the *eBay Factors* as *standard equitable defenses*.

Further reinforcing that the *eBay Factors* are codified, RESTORE’s Finding (7) specifically states that the sole source of eBay’s damage is burden shifting. This suggests that the core issue of eBay lies in the way the burden of proof is allocated, rather than addressing the *eBay Factors* themselves. By doing so, RESTORE essentially ignores the broader implications of the *eBay Factors*, which continue to shape how courts assess *irreparable harm*, adequate remedies at law, and public interest in patent cases:

“(7) Eliminating the traditional, historical equitable practice of applying a rebuttable presumption of injunctive relief in the case of continuing acts of infringement or willful infringement of a patent has—

(A) substantially reduced the ability of patent owners to obtain injunctions to stop continuing or willful infringement of patents; and

(B) created incentives for large, multinational companies to commit predatory acts of infringement, especially with respect to patents owned by undercapitalized entities, such as individual inventors, institutions of higher education, startups, and small or medium-sized enterprises.”

The simple fact is that RESTORE’s Findings explicitly codify *eBay Factor* (1)—*irreparable harm*. However, due to its silence on the remaining *eBay Factors* and *eBay’s* mandate that courts must consider them, RESTORE intends the *eBay Factors* to persist as the *standard equitable defenses* that courts apply when deciding whether to grant an injunction.

Despite RESTORE’s efforts, the full set of *eBay Factors* will likely remain integral to the judicial process for determining injunctive relief.

RESTORE Does Not Return the Law Injunctions to Pre-*eBay*

The Supreme Court in *eBay* confirms the Federal Circuit 200-year historical precedent “*that a permanent injunction will issue once infringement and validity have been adjudged.*”

RESTORE cannot return the law of injunctive relief to its state prior to *eBay* because RESTORE codifies the *eBay Factors*, which did not exist prior to *eBay*.

RESTORE Must Be Amended

It is essential to restore injunctions to the pre-*eBay* state if the U.S. is going to retake China's technological lead.

The following language, intended to replace RESTORE as written, fully abrogates the *eBay Factors*, restoring the U.S. patent system to a state on par with other countries, as it was prior to *eBay*. This shift would eliminate the burden on patent owners to prove irreparable harm and streamline the process for securing injunctive relief, aligning the U.S. with patent systems that favor patent holders and encourage innovation.

SECTION 2. FINDINGS.

Congress finds the following:

(1) The United States Government exists to secure certain unalienable rights such as life, liberty, and property, wherein property includes intellectual property.

(2) The Constitution of the United States empowers Congress to secure inventors' "exclusive Right" to their inventions in order to "promote the Progress of Science and the useful Arts".

(3) The right to prevent others from making, using, offering to sell, selling, or importing a patented invention, without authority from the inventor, is essential to ensure that an inventor enjoys, for a limited time, the exclusive right to the invention.

(4) Given the irreparable harm that is caused by multiple acts of infringement or willful infringement of a patent, Congress and the courts of the United States have historically secured the constitutionally protected patent right through the traditional equitable remedy of a permanent or preliminary injunction.

(5) The historical approach to injunctive relief was not to apply a four-factor test, but a two-step inquiry based on the plaintiff's ability to (i) prove infringement and (ii) rebut any patent validity challenges wherein said two-step inquiry resulted in an injunction being granted nearly 94% of the time.

(6) Recently, courts have ended the approach described in paragraph (5) and had been employed by the Federal Circuit, which contradicts the traditional, historical practice governing the equitable remedy described in that paragraph.

(7) Historically, courts did not distinguish between permanent and preliminary injunctions when it came to the substantive doctrines they employed or their analyses thereof pointing out that only that, since defendants could potentially be restrained before their rightful day in court, a preliminary injunction was discretionary.

(8) Eliminating the traditional, historical practice of granting injunctive relief upon finding a patent infringed and not invalid has created incentives for large, multinational companies to commit predatory acts of infringement, especially with respect to patents owned by undercapitalized entities, such as individual inventors, institutions of higher education, startups, and small or medium-sized enterprises.

(9) Securing effective and reliable patent protection for new technologies by, inter alia, returning to the approach described in paragraph (5) is critical to maintaining the United States as the leader in the global innovation economy.

SECTION 3. INJUNCTIVE RELIEF IS A PROPER REMEDY

Section 283 of title 35, United States Code, is replaced with the following—

(a) **PERMANENT INJUNCTION.** — *If, in a case under this title, a court finds a patent to be infringed and not invalid, the court shall issue a permanent injunction and may decline to do so only in exceptional circumstances.*

(1) **SENSE OF CONGRESS.** — *It is the sense of Congress that this subsection abrogates the Supreme Court’s ruling in and subsequent lower court interpretations of eBay v. MercExchange, 547 U.S. 388 (2006) and codifies the Federal Circuit’s general rule that constituted the law of prior to the Supreme Court’s eBay decision.*

(b) **PRELIMINARY INJUNCTION.** — *A plaintiff seeking a preliminary injunction or a temporary restraining order shall be entitled to a rebuttable presumption of irreparable harm upon a finding of likelihood of success on the merits for a violation identified in this subsection in the case of a motion for a preliminary injunction or temporary restraining order.*

About SPARK US Innovation

SPARK US Innovation is dedicated to advancing the future of startups, entrepreneurs, and inventors through effective policy reform in the United States. We strive to create a policy environment where the conception, protection, and commercialization of technologies critical to American economic and national security prosper thereby enabling the United States to take back the global technological lead from China.