

The Supreme Court or Congress Must Restore Injunctions for Patent Owners

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KEY TAKEAWAYS

Property rights are a pillar of a free society and a free market because they secure a domain of liberty for individuals to freely use the fruits of their labors.

The inability of patent owners to obtain injunctions is wreaking havoc in the U.S. innovation economy by creating disincentives for inventors and investors.

The Supreme Court or Congress must act to re-establish the historical right of patent owners to a presumptive remedy of an injunction for a patent violation.

Property rights are essential to a free market, a growing innovation economy, and a flourishing society. The Founders recognized this basic truth and created the political and legal institutions necessary to restrain governmental power and protect the rights of life, liberty, and property. James Madison, for instance, wrote that “Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions.... Government is instituted to protect property of every sort.”¹ In *The Federalist No. 43*, Madison applied this insight to the protection of the property rights represented by patents and copyrights: “The utility of this power [delegated to Congress to protect patents and copyrights] will scarcely be questioned.... The public good fully coincides in both cases with the claims of individuals.”²

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Courts secure property rights, whether in land or in inventions, by doing more than ordering the payment of any damages caused by ongoing violations or willful infringement of the property. They also issue an injunction—an order backed by the coercive power of the state—that the defendant must stop committing the wrong. This remedy is necessary to secure the liberty interests of property owners in the free use of their property. It is also essential in ensuring that individuals will transact in the marketplace, as an injunction is the backstop to any negotiation. The power of a property owner to say “no” is the genesis of a negotiation in which individuals reach a meeting of the minds in exchanging goods and services at a freely negotiated market price.

None of this holds true anymore for patent owners—owners of property rights in inventions. In 2006 in *eBay v. MercExchange*, the United States Supreme Court announced a four-factor test for determining when an injunction should issue for an ongoing violation of a valid patent. Thereafter, courts have applied this four-factor test in regularly denying injunctions to patent owners.³ All patent owners—manufacturers and licensing companies—are increasingly denied the remedy of a permanent injunction when defendants are found liable for the ongoing infringement of their valid patents.⁴

Since courts refuse to end ongoing patent infringement, patent owners are forced into what intellectual property lawyers call “compulsory licensing.” This is the intellectual property equivalent of government-set prices by state officials. Many people are aware of such statist, command-and-control market controls when they are exercised by regulatory agencies (such as when the Interstate Commerce Commission controlled everything from the routes trucking companies could take, to the cities they were allowed to service, to the prices they could charge).⁵ The prices paid for the use of patents—royalties—are not set by officials in such obvious ways. For patents, government-controlled prices are set by judges, who order the patent owner to be paid a “reasonable royalty” by the infringer for ongoing use of the patented invention.

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This is wreaking havoc in the U.S. innovation economy. As with all interventions in market transactions, “reasonable royalties” do not reflect

actual market prices.⁶ Patents have become devalued as an asset class, which undermines the function of the patent system to incentivize innovators to create new inventions and to bring these innovations to consumers in the marketplace. The denial of injunctions also incentivizes large companies to deliberately ignore and ultimately infringe patents, since these companies know they will pay less via a judge-ordered “reasonable royalty” than what they would have paid in a properly negotiated license agreement in the free market. This is identified today by lawyers and policy wonks as “efficient infringement.”⁷ This business decision to engage in deliberate invention theft is better known by what courts and commentators used to call it: piracy.⁸ This growing commercial practice of invention theft or piracy was highlighted recently in the patent infringement lawsuit filed by Sonos against Google.⁹ As prominent commentators observed shortly after Sonos filed its complaint, even if Sonos technically wins its lawsuit, it will still lose.¹⁰

To rectify this growing policy and economic problem, the Supreme Court should reverse its *eBay* decision, or at least revisit the case to explain why courts have perhaps misconstrued what the *eBay* Court was trying to achieve in its decision in 2006. If the Court refuses to do this, then Congress should abrogate *eBay* and restore injunctions as essential remedies for ongoing and willful infringement of valid patents. In patent law, the Court is only construing the laws enacted by Congress pursuant to its constitutional authority to secure patents with federal legislation.¹¹ Thus Congress can, as it has in the past, abrogate Court decisions that misconstrue the meaning of the Patent Act.¹² Recently introduced bills, such as the Support Technology and Research for Our Nation’s Growth and Economic Resilience (STRONGER) Patents Act and the Restoring America’s Leadership in Innovation (RALI) Act, propose to do just this.¹³ Congress should enact these important pieces of legislation to restore injunctive remedies to patent owners.

This *Legal Memorandum* explains why the Court or Congress should abrogate *eBay*. It first explains why injunctions are proper remedies to rectify the wrongs of ongoing violations of property rights. It then explains the *eBay* decision and what followed as a result of this decision. The Supreme Court created a new test for issuing injunctions, despite its assertion that it was applying a “longstanding” and “historical” test, and lower federal courts, perhaps lacking controlling precedent with a novel legal test, have radically altered historical practices in remedies for patent infringement by no longer granting injunctions to stop violations of patent rights. Last, it explains the economic function of injunctions, which are a vital backstop to all commercial transactions in the free market.

The Nature of Property and the Necessity of Injunctions

Property rights are a key pillar of a free society and a free market because they secure a domain of liberty for individuals to freely use the fruits of their productive labors.¹⁴ This domain of liberty is a sphere of action in which one is free to act so long as one does not violate the rights of others. This is what Sir William Blackstone, the famous 18th-century legal scholar who heavily influenced the Founders and legal elites in the early American Republic, referred to as the “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.”¹⁵

As Blackstone made clear, the law secures property to its owner by making it exclusive of all others in society. The law achieves this goal through a legal remedy known as an *injunction*. If someone is repeatedly or willfully violating a valid property right, such as a trespasser deliberately driving a car across a farmer’s field of crops or a squatter occupying a building, a court will not just order payment of damages. A court will also issue an order that the defendant must stop doing what he is doing—an injunction. In this way, the farmer is left free to decide how and in what way crops may be grown on his land, and the building owner is left free to decide how to use her building, whether as a home, apartment building, office building, or some other use.

Property rights make it possible for people to live flourishing lives according to their own life plans—free from coercive interference from other people.¹⁶ This is also why property rights are a necessary foundation for a free market, as economists have long recognized. It is the ability of a property owner to say, “You must negotiate with me to use my property,” that makes it possible for individuals to negotiate a market price for any product or service. It is the injunction, as opposed to merely an order to pay damages for unauthorized trespasses or uses of property, that makes this demand possible. Without the ability to say, “no,” backed up by an injunction, anyone could arbitrarily choose to use another’s property and merely pay the cost of the damage. There would be no free market in which contracts are negotiated.

This is why Arthur Lee of Virginia famously stated in 1775 that property is “the guardian of every other right.”¹⁷ It is logically connected with the right to liberty, as property, according to James Madison, “embraces everything to which a man may attach a value and have a right,” including “the safety and liberty of his person,” and thus “that alone is a *just* government, which *impartially* secures to every man, whatever is his.”¹⁸ Lee himself recognized this same logical connection that “to deprive a people of

[property], is in fact to deprive them of their liberty.”¹⁹ Property is also logically connected with the right of contract, as property is the subject matter of contracts, and thus it is the basis for the specialization and division of labor that Adam Smith recognized in the *Wealth of Nations* as the key to a flourishing free market and growing innovation economy.

These classic Lockean principles were applied by the Founding Fathers. They created the political and legal institutions necessary to secure the rights to life, liberty, and property, including authorizing the federal government to protect new forms of property coming into existence in the 18th and 19th centuries, such as patents and copyrights. Courts thus protect property rights with injunctions, securing the liberty interests and commercial interests represented by the domain of exclusive use in acquiring, using, and disposing of the fruits of one’s productive labors.

eBay and Its Aftermath

Patents are property rights, as first set forth by courts in the early American Republic and eventually codified by Congress in the 1952 Patent Act.²⁰ The Patent Act thus defines the test for patent infringement in terms that are familiar with how all property rights are secured against any unauthorized acquisition, use, or disposal by a third party. The patent statute states simply that any unauthorized access or use of a patented invention is an infringement.²¹ The statutes similarly provide in equally simple terms for remedies on a finding of infringement of a valid patent. Patent owners may receive damages for past infringements, an injunction to stop ongoing infringement or acts of willful infringement, or both.²²

Any unauthorized access or use of a patented invention is an infringement.

The *eBay* case did not challenge any of these legal principles about patents as property rights. Rather, the question presented in *eBay* was the framing of the proper legal rule for how courts determine when an injunction should issue for ongoing or willful infringement of a valid patent. At the time, the Court of Appeals for the Federal Circuit had developed the “general rule” that injunctions should always issue on a finding of infringement of a valid patent.²³ This was, in fact, what happened as a matter of course in such cases.

This general rule was challenged as not reflecting the proper nature of an “equitable” remedy: Injunctions historically were issued in England and in the early United States by equity courts, as distinguished from law courts. The argument was that the doctrine for issuing or denying injunctions was supposed to be a context-specific, equitable-type inquiry that assessed each case on its own terms.

Notably, the *eBay* Court affirmed its earlier 1908 decision in *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, in which the Court held that all patent owners, including patent owners who were not currently using their property, were entitled to an injunction to stop ongoing infringements of their property rights.²⁴ The *Continental Paper Bag* Court explained that “trespasses and continuing wrongs...are well-respected grounds of equity jurisdiction, especially in patent cases.”²⁵

The *eBay* Court thus affirmed the right of all patent owners to obtain injunctions against infringers, but it rejected the categorical or rule-based approach in favor of an allegedly “historical” four-factor test for deciding whether to issue an injunction: (1) the plaintiff must suffer an irreparable injury; (2) legal remedies 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.²⁶

Although the majority opinion in *eBay* intimated that its “four-factor test” should be applied neutrally, it has been neither interpreted nor applied neutrally by courts. After the *eBay* decision, lower courts shifted their legal analyses of injunctions and began treating different types of patent owners differently in determining whether to issue injunctions. In particular, courts started looking askance at owners who license their patents (identified as non-practicing entities or by the rhetorical and disparaging epithet, “patent trolls”).²⁷ Both requests for and the issuance of injunctions have reduced significantly, and patent licensors who are plaintiffs in infringement lawsuits are now opting not to seek injunctions at significantly higher rates than in the past.²⁸

This may not have been the intent of the Supreme Court in *eBay*, just as it was not the intent of Congress to create “death squads” for patents at the Patent Trial and Appeal Board (PTAB) when it created the PTAB in 2011.²⁹ Nonetheless, it is the undeniable doctrinal and practical result of *eBay*. This unfortunate state of affairs likely came about for a couple reasons.

***eBay* Changed the Law for an Injunctive Remedy for Patent Infringement.** In overruling the Federal Circuit, the *eBay* Court fundamentally altered the historical doctrine governing the remedies that patent owners had received for ongoing infringement of their valid patents.

Contrary to the claim in *eBay* that the Supreme Court was re-establishing a historical legal test, there was, in fact, no historical four-factor test. Remedies scholars with no dog in the patent policy fights have consistently pointed out that the *eBay* Court pulled out of thin air its claims that “[o]rdinarily, a federal court...applies the four-factor test historically employed by courts of equity,” and that “[a]ccording to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test.”³⁰ Professor Doug Rendelman has bluntly stated: “Remedies specialists had never heard of the four-point test.”³¹

There was no historical four-factor test for issuing injunctions as a remedy for patent infringement, but there also was no historical rule mandating injunctions. Since the United States was the first country to define patents as private property rights,³² federal courts applied to patents the same legal doctrines governing the issuance of injunctive remedies as they applied to all other property rights.³³ In sum, courts applied a *presumptive remedy* of an injunction.

A “presumptive remedy” is a term of art in remedies law. In the context of patent litigation, it meant that, following a trial in which the owner proved both the validity of the patent and ongoing infringement of this valid property right, an injunction issued presumptively.³⁴ As a presumptive remedy, an injunction was not automatically guaranteed for a patent owner—nor for any property owner—as it could be rebutted by a defendant.³⁵

A defendant could defeat an injunction by proving that the patent was invalid or that the defendant did not infringe it. Alternatively, a defendant found liable for ongoing infringement of a valid patent could still defeat an injunction by proving classic counter-claims in equity for why an injunction should not issue, such as unreasonable delay that prejudiced the defendant (called “laches”),³⁶ classic “public interest” concerns of threats to public health and safety,³⁷ a cloud on the title,³⁸ or other long-standing equitable defenses.

As a general matter of patent litigation, courts usually found in favor of the patent owners,³⁹ not as a matter of automatic right, but simply because they applied to patents the same doctrinal rules governing remedies for all property rights. As a court explained in *Green v. French* in 1870 in the context of issuing a preliminary injunction: “[T]he court has no discretion, but is bound to grant a preliminary injunction where the validity of the complainant’s patent has been established by protracted and expensive litigation, and the proof of infringement is clear.”⁴⁰ Courts sometimes spoke in terms that may have confused modern courts about whether the injunctive remedy was presumptive or automatic, such as when a court

in 1866 stated, “As a general rule, if the plaintiff has made out a clear title, and the question of infringement presents no difficulties, an injunction will be granted.”⁴¹

But this does not justify changing the law further by creating out of whole cloth a new multi-factor test. The Supreme Court sowed confusion in *eBay* in claiming it was merely applying a long-standing, historical legal test. Even worse, since the *eBay* four-factor test was a new legal test, it lacked controlling precedent to guide court decisions after 2006. This contributed to a second development that has resulted in a change in patent owners receiving the long-standing presumptive remedy for ongoing infringement of their property rights.

***eBay* Changed Judicial Practice in Issuing Injunctions for Patent Infringement.** Chief Justice John Roberts observed in a concurring opinion in *eBay*, “From at least the early 19th century, courts have granted injunctive relief upon a finding of infringement in the vast majority of patent cases.”⁴² Chief Justice Roberts cautioned that courts should remain cognizant of this fact in continuing to issue remedies for patent infringement. His words fell on deaf ears.

Within a few years after *eBay* was decided in 2006, courts responded to the decision by altering their practice of issuing injunctions on a finding of infringement of a valid patent. Perhaps lacking controlling precedent in guiding their decisions—searching in vain among historical cases for the allegedly long-standing, historical four-factor test—and lacking any guidance from the truncated *eBay* majority opinion itself, which runs only a few pages in length, lower courts turned to Justice Anthony Kennedy’s more policy-laden concurring opinion in *eBay*.⁴³ By 2010, courts were regularly citing to Kennedy’s concurrence rather than the majority opinion when referencing the *eBay* decision by the Supreme Court.

In his concurring opinion, Justice Kennedy argued that a new business model had arisen in recent years in which companies sought only “licensing fees” for the patents they owned, as opposed to manufacturing their patented inventions. He argued as a policy matter that patent-licensing companies should not be permitted to threaten manufacturing companies with an injunction if they do not take a license.⁴⁴ He decried that injunctions, or at least the threat of an injunction, permitted licensors to “charge exorbitant fees.”⁴⁵ Similar to the rhetorically charged and empirically questionable “patent troll” rhetoric, the practice Justice Kennedy described in his *eBay* concurrence now goes by the name “patent holdup.”⁴⁶

Just as the *eBay* majority was wrong in asserting that there was a historical four-factor test, Justice Kennedy was equally wrong in saying that

patent licensing is a new business model, as economists and historians have recognized.⁴⁷ As Justice Kennedy’s policy-laden concurring opinion came to represent the *eBay* holding in the minds of many lawyers, judges, and commentators, it fed a growing moral panic in D.C. and in the lower courts in the past decade about the role of patent-licensing specifically—and patents generally—in the U.S. innovation economy.⁴⁸ This was represented by the “patent troll” narrative and the use of this epithet to attack any patent owner who licenses his or her patent rights instead of manufacturing products or services, including inventors, startups, universities, and major companies that succeeded with licensing as a business model.⁴⁹

In fact, patent licensing has long been a central feature in the vibrant and growing U.S. innovation economy since the early 19th century.⁵⁰ But Justice Kennedy’s mistaken and unproven policy concerns in his *eBay* concurrence came to dominate patent policy generally, and thus courts began to worry about “patent holdup” via injunctions. The arguments about “patent holdup” were both theoretically flawed and empirically mistaken, but this did not prevent courts from changing their legal practice.⁵¹ The result has been a substantial reduction in the ability of patent owners to be awarded injunctions for ongoing infringement of their valid patents.⁵²

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Misunderstanding the Commercial Function of Injunctions for Patent Infringement

Feeding the misplaced and unverified arguments about “patent holdup” is a widespread misunderstanding about the function of injunctions in securing property rights and as a driver of economic activity in the U.S. innovation economy. Although some companies internalize many aspects of research and development, manufacturing, and commercializing products and services in their business models, most companies do not do this. Businesspersons regularly create innovative economic arrangements to efficiently produce new products and services, such as creating disaggregated

supply chains among different companies distributed throughout the global economy, franchise business models formed around licenses of a portfolio of intellectual property rights, portfolio licensing of patents, and patent pools, among many others.⁵³ The ability of inventors, businesspersons, and ultimately consumers to reap the benefits of these innovative markets is dependent on the ability of patent owners and businesspersons to transact freely in the marketplace.

The setting of the market value in products and services comes about through freely negotiated contracts, which themselves are dependent on the exercise of exclusive control of property rights. This is why all property rights, including intellectual property rights, are a platform for commercial activities in which market participants benefit from specialization and division of labor in maximizing value creation, which leads to economic growth and a flourishing society.⁵⁴ This key economic principle was first formulated by Adam Smith in *The Wealth of Nations* in 1776, and it is widely accepted as a foundational principle in economics today.⁵⁵

Even more important, specialization and division of labor via market transactions is what makes possible value creation by undercapitalized innovators, such as independent inventors, startups, universities, and research companies. These individuals and corporate entities do not have the labor and capital necessary to establish their own manufacturing facilities, but they can license their patent rights and contract with other companies and entities who do have these capabilities to achieve efficiencies in the marketplace in producing and distributing new products and services to consumers. Professor Zorina Khan, an award-winning economist, has recognized that this was a fundamental economic byproduct of the historically unique American approach in securing patents as property rights in the nineteenth century:

[P]atents and...intellectual property rights facilitated market exchange, a process that assigned value, helped to mobilize capital, and improved the allocation of resources.... Extensive markets in patent rights allowed inventors to extract returns from their activities through licensing and assigning or selling their rights.⁵⁶

This key economic function of property rights only works when owners have reliable and effective control over their property. If anyone can violate a property right by trespassing, and the only consequence they suffer is that they must pay the property owner some form of monetary compensation at an amount or rate set by a government official, then property owners can no longer determine how best to use their property in the marketplace.

This is the legal and economic function of injunctions. Continuing wrongs—ongoing violations of property rights—harm owners (and ultimately society) in ways that are not compensable merely by a government award of damages for the trespass. When a willful trespasser wantonly crosses a farmer’s field, the harm to the owner is not fungible with the \$1 in compensatory damages for the trodden grass.⁵⁷ The value to the farmer of the private property is not \$1. If the trespasser wished to access and use the land, this person should have negotiated with the farmer and paid the market price of this access right based on what he was willing to pay and what the farmer was willing to accept, assuming they could agree on an amount that was mutually acceptable. The injunction secures this capacity of the farmer to require this negotiation by the would-be trespasser.

Continental Airlines v. Intra Brokers. This economic principle—injunctions facilitate market transactions by securing a property owner’s right to decide how it will use its assets and sell its products and services in the marketplace—is well recognized by courts in non-intellectual property cases. In *Continental Airlines v. Intra Brokers*,⁵⁸ for example, the trial court granted Continental’s request for an injunction to stop Intra Broker reselling Continental’s discount airfare coupons, and Intra Brokers appealed.⁵⁹ Intra Brokers argued that, even if it was liable for its resale of the coupons, the value of the coupons was easily measured by the face value of each coupon, and thus Intra Brokers maintained that Continental failed to prove that it suffered an irreparable injury justifying an injunction. Continental, Intra Brokers argued, deserved only a payment of damages as its remedy.

The 9th Circuit decisively rejected Intra Brokers’ argument, stating, “Continental was entitled to control whether its coupons were transferred.” The court held that Continental had proven irreparable injury because the “harm to Continental was to its power, not its purse. [Regardless w]hether Continental is right or wrong about the effect of coupon brokering on its profits...it is entitled to its own decisions about whether to give out discount coupons, and whether to make them transferrable or nontransferable. *Neither Intra nor the courts are entitled to substitute their business judgment for Continental’s.*”⁶⁰

Historical Jurisprudence. In a famous case from 1911, the West Virginia Supreme Court of Appeals held that a trespasser who cut down the trees of the landowner could not simply elect to pay the landowner damages representing the fair market value of the trees.⁶¹ Although it was possible to identify and measure the monetary value of the trees, this *economic* fact did not make the *legal* injury to the landowner complete as a matter of law. The court recognized that the key legal and policy concern for “all forms

of property either real or personal” is that courts “guarantee to the owner of property the right, not only to possession thereof and dominion over it, but also its immunity from injury.”⁶² The court further recognized that real estate is truly unique because “no two pieces of land are alike in all respects,” and thus courts cannot assume as a default rule that fair market value (money) is entirely fungible with the value of a parcel of real estate to its owner.⁶³

In securing these control rights over property, courts protect the freedom to make commercial decisions that make possible private ordering in business models and market exchanges. They also secure the liberty interest in how people may choose to live their lives,⁶⁴ secure their privacy rights,⁶⁵ and create their own business models and develop corporate goodwill with a reputation as innovative companies.⁶⁶ As the Wisconsin Supreme Court recognized in a famous trespass case, in these situations, “the actual harm is not in the damage done to the land...but in the loss of the individual’s right to exclude others from his or her property.”⁶⁷

Historically, courts applied these same principles in presumptively securing the exclusive control rights in property rights in inventions.⁶⁸ These principles are particularly salient for patented innovations because the patent laws require a valid patent to be unique—novel and nonobvious—just like a parcel of real estate. In *Gilbert & Barker Manufacturing Co. v. Bussing*, for example, the court denied the patent owner’s request for a preliminary injunction, but expressly noted that patent owners could not be subjected to compulsory licensing through denials of a final injunction after finding a defendant liable for ongoing infringement of a valid patent.⁶⁹ The court stated bluntly: “The complainants cannot be compelled, against their will, to permit the defendant to use their invention.”⁷⁰ As Circuit Justice McLean explained in another patent case in 1845: In “an ordinary case of infringement...an absolute injunction is the only adequate relief.”⁷¹ As noted earlier, the Supreme Court recognized in 1908 in *Continental Paper Bag Co. v. Eastern Paper Bag Co.* that all patent owners had a presumptive right to receive an injunction for ongoing violations of their valid property rights.⁷²

In applying these principles in the increasingly uncommon cases today in which injunctions are affirmed or denials of injunctions by trial courts are reversed, the Court of Appeals for the Federal Circuit has recognized that “exclusivity is closely related to the fundamental nature of patents as property rights. It is an intangible asset that is part of the company’s reputation.”⁷³ Courts have also recognized that patent infringement causes innumerable harms that are very difficult to identify, quantify, and measure in a way that affords complete relief with only monetary damages. These

harms include “price erosion, loss of goodwill, damage to reputation, and loss of business opportunities” in the marketplace, which the Federal Circuit rightly recognized as “all valid grounds for finding irreparable harm.”⁷⁴

The ability to secure personal values and commercial decisions in the use of one’s own property is an essential foundation of both a liberal political order and a free market.

These policy and economic concerns in patent law reflect the same concerns about loss of control rights over the use of real property. In both cases of patents and real property, long-standing legal doctrine recognizes that, even if monetary damages can be measured and awarded by a court, this does not put a property owner in the position the owner would have been but for the wrongful violation of one’s property right. The ability to secure personal values and commercial decisions in the use of one’s own property is an essential foundation of both a liberal political order and a free market. This principle applies to all forms of property, whether real estate or patents—as courts historically recognized.

The STRONGER Patents Act and the RALI Act

If the Supreme Court fails to reverse its anachronistic and ill-conceived decision in *eBay*, two bills have been introduced in Congress that would restore injunctive remedies to patent owners: the STRONGER Patents Act and the RALI Act.⁷⁵ The *eBay* decision merely interpreted and applied § 283 of the Patent Act, which was enacted by Congress pursuant to its authority in the Constitution to create a patent system.⁷⁶ Thus, Congress has the authority to abrogate misinterpretations of its statutes by the Supreme Court by enacting new legislation to restore its original legal rules, as it has done many times in the past in enacting patent statutes.⁷⁷ Barring appropriate action by the Supreme Court, Congress should enact these important pieces of legislation in restoring injunctive remedies to patent owners.

The STRONGER Patents Act expressly reestablishes the historical legal test applied by federal courts for over 200 years in awarding an injunction on a finding of continuing or willful infringement of a valid patent—an

injunction is presumptively the proper remedy.⁷⁸ To make clear what this legal remedy achieves for patent owners, the title of this section in the STRONGER Patents Act is “Restoration of Patents as Property Rights.”⁷⁹

The RALI Act similarly reestablishes the historical legal rule that an injunction is the presumptive remedy for continuing or willful infringement of a valid patent.⁸⁰ It goes further than the STRONGER Patents Act by requiring that a defendant can rebut this presumption only with clear and convincing evidence, and it expressly restates the long-standing legal rule that all patent owners, regardless of whether they license, manufacture, or do not currently use a patent, should receive an injunction as a remedy for righting the wrong of a trespass on their rights.⁸¹

The RALI Act goes even further than the STRONGER Patents Act in reaffirming the long-standing jurisprudence in the U.S. that patents are private property rights. In a section titled, “Private Property Patent Right,” the RALI Act amends § 261 of the Patent Act to provide that “patents shall be recognized as private property rights.” In addition to reinforcing the injunctive remedy secured under § 283, this amendment to § 261 also would reestablish for patent owners the freedom of contract in the marketplace that is exercised by all property owners.⁸²

These two bills would restore the complete legal protection of patents as private property rights. This legal reform is necessary for patents to serve their long-standing function as platforms for commercial activities in the innovation economy. This includes patents serving as collateral for venture capital financing, as the assets exchanged between different companies in creating innovative commercial arrangements in global value chains, and as the basis for all other contracts made possible by the exclusive control rights secured to property owners.

In sum, a patent owner’s ability to receive an injunction to stop infringement of one’s property is an essential feature of a flourishing free market and a growing innovation economy in the U.S. The STRONGER Patents Act or the RALI Act would restore, in the words of David Kappos, the former Director of the U.S. Patent and Trademark Office, “the greatest innovation engine the world has ever known.”⁸³

Conclusion

Combined with other judicial decisions, legislation, and regulatory actions during the past decade,⁸⁴ the inability to obtain injunctions has contributed to the weakening of patents. This has degraded this essential platform for creating new inventions and for spurring innovative economic

activities in the free market. Without effective legal security against infringement, innovators would be unwilling to invest billions of dollars to create and bring to market new innovations such as 5G, drug treatments for cancer, or vaccines. Venture capitalists and other investors are also unable to rely on patents as reliable property rights that can serve as stable sources of collateral to fund new innovations—what people witness in *Shark Tank* episodes every week.

The Supreme Court should reconsider its ahistorical *eBay* decision and reestablish the long-standing, historical right of patent owners, like all property owners, to a presumptive remedy of an injunction for an ongoing violation of a valid patent. If the Supreme Court does not do this, then Congress should abrogate the *eBay* decision and reestablish this traditional legal remedy by enacting either the STRONGER Patents Act or the RALI Act. This is necessary reform that will bring back balance to the U.S. patent system as the historical “gold standard” patent system—securing reliable and effective property rights in next-generation technologies, such as light-bulbs and telegraphs in the 19th century, chemotherapy and antibiotics in the 20th century, and AI, the Internet of Things, 5G, and personalized medical treatments in the 21st century.

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Endnotes

1. James Madison, *Property*, National Gazette (Mar. 29, 1792), reprinted in JAMES MADISON, WRITINGS 515–517 (Jack N. Rakove ed., 1999).
2. *The Federalist No. 43*, at 271–72 (James Madison) (Clinton Rossiter ed., 1961).
3. See *eBay Inc. v. MercExchange L.L.C.*, 547 U.S. 388 (2006).
4. See Kirti Gupta & Jay P. Kesan, *Studying the Impact of eBay on Injunctive Relief in Patent Cases* 38 (2016), <https://ssrn.com/abstract=2816701> (“We find that both for preliminary and permanent injunctions, [patent licensing companies] are less likely to obtain an injunction, after controlling for patent characteristics and the length of the case (from filing to termination) throughout the 2000–2012 time period. We also find that the *eBay* ruling reduced the likelihood of all firms [including manufacturers] receiving either preliminary or permanent injunctions.”).
5. This is described in excellent detail in Chapter 3 in Marc Levinson, *The Box: How the Shipping Container Made the World Smaller and the World Economy Bigger* (2008). The Interstate Commerce Commission, established in 1887, was the first federal regulatory agency, and it was formally abolished in 1995 after Congress began in 1980 to eliminate or transfer its powers under the deregulatory program initiated by President Ronald Reagan.
6. In determining “reasonable royalties,” courts have lowered the baseline for assessing damages using a legal standard that does not match, and is lower than, the market-based royalty rates for patent licenses. See Jonathan D. Putnam & Tim A. Williams, *The Smallest Salable Patent-Practicing Unit (SSPPU): Theory and Evidence* 12 (Sep. 8, 2016) (unpublished manuscript), <https://ssrn.com/abstract=2835617>.
7. See Adam Mossoff & Bhamati Viswanathan, *Explaining Efficient Infringement* (May 11, 2017), <https://cpip.gmu.edu/2017/05/11/explaining-efficient-infringement/>.
8. See Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent “Privilege” in Historical Context*, 92 CORNELL L. REV. 953, 993 (2007).
9. See Jack Nicas & Daisuke Wakabayashi, *Sonos, Squeezed by the Tech Giants, Sues Google*, N.Y. TIMES (Jan. 7, 2020), <https://www.nytimes.com/2020/01/07/technology/sonos-sues-google.html>.
10. See Joe Nocera & Daniel Niemi, *Why Sonos Has Already Lost Its Patent Suit Against Google*, BLOOMBERG LAW (Jan. 10, 2020), <https://news.bloomberglaw.com/ip-law/opinion-even-if-sonos-wins-its-google-patent-suit-it-loses>.
11. See U.S. Const. art 1, § 8, cl 8 (“The Congress shall have Power...To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).
12. See Adam Mossoff, *Statutes, Common Law Rights, and the Mistaken Classification of Patents as Public Rights*, 104 IOWA L. REV. 2591, 2614 (2019) (identifying examples in the 1952 Patent Act in which Congress abrogated Supreme Court decisions under the previously enacted 1870 Patent Act).
13. See STRONGER Patents Act, S. 1390, 115th Cong. (2018); Restoring America’s Leadership In Innovation Act, H.R. 6264, 115th Cong. (2018).
14. See *Patent Injunctions, Economics, and Rights*, 49 J. LEGAL STUD. ____ (forthcoming 2020), <https://ssrn.com/abstract=3197275>.
15. Sir William Blackstone, *Commentaries on the Laws of England*, vol. 2, at 2 (1765).
16. See James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (2d ed. 1998).
17. *Id.*, at 26 (quoting Arthur Lee).
18. Madison, *supra* note 1 (original emphases).
19. Ely, *supra* note 16, at 26 (quoting Arthur Lee).
20. See 35 U.S.C. § 261; Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 BOSTON UNIVERSITY L. REV. 689, 700–11 (2007) (surveying early case law).
21. See 35 U.S.C. § 271 (prohibiting unauthorized making, using, selling, or offering to sell the invention).
22. See 35 U.S.C. § 284 (damages) & § 283 (injunctions).
23. *eBay*, 547 U.S. at 392.
24. *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405 (1908).
25. *Id.* at 430.
26. See *eBay*, 547 U.S. at 391.
27. See 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 (2015).
28. See Gupta & Kesan, *supra* note 4.
29. See Alden Abbott et al., *Crippling the Innovation Economy: Regulatory Overreach at the Patent Office* (Aug. 14, 2017), released by the Regulatory Transparency Project of the Federalist Society, <https://regproject.org/wp-content/uploads/RTP-Intellectual-Property-Working-Group-Paper.pdf>.

30. *eBay*, 547 U.S. at 390 & 391.
31. Doug Rendleman, *The Trial Judge's Equitable Discretion Following eBay v. MercExchange*, 27 REV. LITIG. 63, 76 n.71 (2007). It appears the *eBay* Court was confused between the test for permanent injunctions and the modern test for a preliminary injunction, as there is no “historical” four-factor test for issuance of permanent injunctions, but there is a modern four-factor test for preliminary injunctions. See DOUG LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 444 (4th ed. 2010) (observing that the four-factor test for preliminary injunctions was what “the Court tried to transfer to permanent injunctions in *eBay*”).
32. See Adam Mossoff, *Institutional Design in Patent Law: Private Property Rights or Regulatory Entitlements*, 92 SO. CALIF. L. REV. 921 (2019) (identifying licensing and injunctions as two key legal indicators of the unique U.S. approach to securing patents as private property rights).
33. See, e.g., *Cook v. Ernest*, 6 F. Cas. 385, 391 (C.C.D. La. 1872) (“If the rights of property so invaded were rights to land or other tangible estate, no court would hesitate for a moment to restrain the wrong-doer by injunction. The property in a patent is just as much under the protection of the law as property in land. The owner has the same right to invoke the protection of the courts, and when he has made good his claim to his patent, and shown an infringement of it, it is the duty of the courts to give him the same relief meted out to suitors in other cases.”).
34. See, e.g., *Conover v. Mers*, 6 F. Cas. 322, 323 (1868) (“[W]here, as here, the patent has been sustained on full hearing, and the infringement is clear...the complainant is entitled to have his rights promptly protected by injunction.”).
35. See, e.g., *Batchelder v. Moulton*, 2 F. Cas. 307, 310 (C.C.S.D.N.Y. 1873) (“The plaintiff’s title and the validity of his claims are free of doubt, and have been established, and the infringement by the defendants’ machine is clear. An injunction must issue on all the claims.”); *Day v. New England Car Co.*, 7 F. Cas. 248, 248–49 (1854) (“Under the rules of equity pleading...The defendants must disprove the invention, or the right of the plaintiff as assignee, or the infringement of the patent...Otherwise, the plaintiff will be entitled to an injunction on the proofs.”);
36. See, e.g., *Goodyear v. Honsinger*, 10 F. Cas. 692, 695 (1867) (considering laches argument by defendant but ultimately issuing preliminary injunction for patent owner); *Cooper v. Mattheys*, 6 F. Cas. 482 (1842) (denying an injunction given evidence of laches by the plaintiff patent owner).
37. See, e.g., *Bliss v. City of Brooklyn*, 3 F. Cas. 706 (1871) (denying injunction for infringement of a patent on fire hoses used by city fire department on public interest grounds of threat to public health and safety in the city).
38. See, e.g., *Isaacs v. Cooper*, 13 F. Cas. 153, 153–154 (C.C.D. Pa. 1821) (“If the bill states an exclusive possession of the invention, or discovery for which the plaintiff has obtained a patent, an injunction is granted, although the court may feel doubts as to the validity of the patent. But if the defects in the patents, or specification, are so glaring that the court can entertain no doubt as to that point, it would be most unjust to restrain the defendant...”).
39. See *eBay*, 547 U.S. at 395 (Roberts, C.J., concurring).
40. *Green v. French*, 10 F. Cas. 1107, 1109 (1870).
41. *Potter v. Whitney*, 19 F. Cas. 1191, 1192 (C.C.D. Mass. 1866).
42. *Id.* at 395 (Roberts, C.J., concurring). Of course, there are always outlier decisions in the common-law-style evolution of Anglo-American jurisprudence that lawyers are wont to find in diligent legal research on behalf of clients. See, e.g., *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 426 n.3 (1908). It is undeniable that the vast weight of legal authority applied the rule that an injunction was a presumptive remedy for an ongoing infringement of a valid patent.
43. See *Holte*, *supra* note 27, at 721–22.
44. *eBay*, 547 U.S. at 396–97 (Kennedy, J., concurring).
45. *Id.*
46. See Alexander Galetovic & Stephen Haber, *The Fallacies of Patent-Holdup Theory*, 13 J. COMP. L. & ECON. 1 (2017), <https://doi.org/10.1093/joclec/nhx006>.
47. See, e.g., 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); Naomi R. Lamoreaux, et al., *Patent Alchemy: The Market for Technology in U.S. History*, 87 BUS. HIST. REV. 3 (2013).
48. See Adam Mossoff, *Weighing the Patent System: It Is Time to Confront the Bias Against Patent Owners in Patent “Reform” Legislation*, WASH. TIMES (Mar. 24, 2016), <https://www.washingtontimes.com/news/2016/mar/24/adam-mossoff-weighting-the-patent-system/>.
49. See Adam Mossoff, *Repetition of Junk Science and Epithets Does Not Make Them True*, IPWatchdog.com (Nov. 19, 2015), <https://www.ipwatchdog.com/2015/11/19/repetition-of-make-them-true/>.
50. See *supra* note 47.
51. See Galetovic & Haber, *supra* note 46 (criticizing the concept of “patent holdup” as vague and indeterminate given multiple, contradictory senses given to this term in the policy debates); Letter from Thirteen Law Professors, Economists, and Former Government Officials to Assistant Attorney Gen. Makan Delrahim (Feb. 13, 2018), <https://cpip.gmu.edu/wp-content/uploads/sites/31/2018/02/Letter-to-DOJ-Supporting-Evidence-Based-Approach-to-Antitrust-Enforcement-of-IP.pdf> (“It bears emphasizing that no empirical study has demonstrated that a patent-owner’s request for injunctive relief after a finding of a defendant’s infringement of its property rights has ever resulted either in consumer harm or in slowing down the pace of technological innovation.”).
52. See Gupta & Kesan, *supra* note 4.

53. See, e.g., Jonathan M. Barnett, *From Patent Thickets to Patent Networks: The Legal Infrastructure of the Digital Economy*, 55 JURIMETRICS J. 1 (2014); Jonathan M. Barnett, *Intellectual Property as a Law of Organization*, 84 So. CALIF. L. REV. 785 (2011).
54. See, e.g., Jonathan M. Barnett, *Patent Tigers: The New Geography of Global Innovation*, 2 CRITERION J. INNOVATION 429 (2017); Jonathan M. Barnett, “*Patent Tigers*” and *Global Innovation (2020 Update)*, 42 REGULATION 14 (Winter 2019–2020).
55. See, e.g., Stephen Haber, *Patents and the Wealth of Nations*, 23 GEO. MASON L. REV. 811, 811 (2016) (“There is abundant evidence from economics and history that the world’s wealthy countries grew rich because they had well-developed systems of private property. Clearly defined and impartially enforced property rights were crucial to economic development....”); HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 83 (2000) (“[P]eople who could not operate within the law also could not hold property efficiently or enforce contracts through the courts Being unable to raise money for investment, they could not achieve economies of scale or protect their innovations through royalties and patents.”); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AMERICAN ECON. REV. 347 (1967) (noting that “an owner of a private right to use land acts as a broker” in facilitating efficient uses of the land).
56. B. ZORINA KHAN, *THE DEMOCRATIZATION OF INVENTION: PATENTS AND COPYRIGHTS IN AMERICAN ECONOMIC DEVELOPMENT, 1790–1920*, at 9–10 (2005).
57. See, e.g., *Jacque v. Steenberg Homes*, 563 N.W.2d 154 (Wis. 1997) (upholding massive punitive damages award on the basis of a \$1 compensatory damages for a willful trespass given the personal and societal values undermined by intentional trespasses of private property).
58. *Continental Airlines, Inc. v. Intra Brokers, Inc.*, 24 F.3d 1099 (9th Cir. 1994).
59. *Id.* at 1105.
60. *Id.* at 1105 (emphasis added).
61. See *Pardee v. Camden Lumber Co.*, 73 S.E. 82 (W. Va. 1911).
62. *Id.* at 84.
63. *Id.*
64. See Adam Mossoff & Eric Claeys, *Patent Injunctions, Economics, and Rights*, 49 J. LEGAL STUD. ___ (forthcoming 2020), <https://ssrn.com/abstract=3197275> (identifying how natural rights theory justifies injunctive remedies for all property owners, including patent owners, on an ethical theory that this promotes human flourishing).
65. See *Jacque*, 563 N.W.2d at 159 (identifying privacy interests as nonfungible interests secured by real property).
66. See *Douglas Dynamics v. Buyers Prods. Co.*, 717 F.3d 1336 (Fed. Cir. 2013) (identifying many different types of losses resulting from patent infringement that are often difficult to quantify, such as the patent owner’s lost sales, erosion of its reputation, and loss of its brand distinction).
67. *Jacque*, 563 N.W.2d at 159.
68. See *Cook v. Ernest*, 6 F. Cas. 385, 391 (C.C.D. La. 1872) (“If the rights of property so invaded were rights to land or other tangible estate, no court would hesitate for a moment to restrain the wrong-doer by injunction. The property in a patent is just as much under the protection of the law as property in land. The owner has the same right to invoke the protection of the courts, and when he has made good his claim to his patent, and shown an infringement of it, it is the duty of the courts to give him the same relief meted out to suitors in other cases.”).
69. *Gilbert & Barker Mfg. Co. v. Bussing*, 10 F. Cas. 348 (1875).
70. *Id.* at 349.
71. *Brooks v. Stolley*, 4 F. Cas. 302, 305 (C.C.D. Ohio 1845) (No. 1,962) (McLean, Circuit Justice).
72. *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 430 (1908).
73. *Douglas Dynamics*, 717 F.3d at 1345.
74. *Aria Diagnostics, Inc. v. Sequenom, Inc.*, 726 F.3d 1296, 1304 (Fed. Cir. 2013) (quoting *Celsis in Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012)).
75. See STRONGER Patents Act, S. 1390, 115th Cong. (2018); Restoring America’s Leadership In Innovation Act, H.R. 6264, 115th Cong. (2018).
76. See U.S. Const. art. I, § 8, cl. 8 (“The Congress shall have power . . . To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”)
77. See Mossoff, *supra* note 12.
78. See STRONGER Patents Act, S. 1390, § 106.
79. *Id.*
80. See RALI Act, H.R. 6264, § 12.
81. *Id.* (“The patent owner is not required to make or sell a product covered by the patent to show irreparable harm.”). See also *Continental Paper Bag*, 210 U.S. at 430.
82. *Id.*, § 106.

83. Innovation Act of 2013: Hearing on H.R. 3309 Before the Comm. on the Judiciary, 113th Cong. (Oct. 29, 2013) (statement of David J. Kappos, Partner, Cravath, Swaine & Moore LLP), at 2.
84. See, e.g., Adam Mossoff, *Congress Should Reform Patent Eligibility Doctrine to Preserve the U.S. Innovation Economy*, Heritage Legal Memorandum (Jan. 2020), <https://www.heritage.org/economic-and-property-rights/report/congress-should-reform-patent-eligibility-doctrine-preserve-the>; Alden Abbott et al., *Crippling the Innovation Economy: Regulatory Overreach at the Patent Office* (Aug. 14, 2017), released by the Regulatory Transparency Project of the Federalist Society, <https://regproject.org/wp-content/uploads/RTP-Intellectual-Property-Working-Group-Paper.pdf>.