

What Congress and the Trump administration must do to defend patent rights

By KRISTEN OSENGA

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American innovation is under attack. Across the country, it's increasingly difficult for startups and inventors to protect their inventions from large companies that want to steal them.

The problem is that major corporations are choosing to bypass legal licensing channels and instead misappropriate technologies from smaller rivals. Though unethical and illegal, the big companies view this approach as entirely logical from a business perspective, because if they're challenged in court, they can use their deep pockets to prevail. It's up to the US Congress and new administration to fix the situation – which will go a long way to achieving the president's goal of boosting America's global competitiveness.

Currently, for small businesses and startups, justice in a court of law isn't always the norm. For starters, pursuing a patent case can cost millions of dollars. Smaller companies often can't afford the lengthy legal battle, leaving them with no choice but to accept their losses or settle for a fraction of what their patents are worth. The practice of "steal now, pay later" – often dubbed "efficient" infringement, but we think it's predatory – has become common as courts have steadily stripped away inventors' ability to protect their rights through injunctions.

The crisis traces back to 2006, when the Supreme Court's decision in *eBay v MercExchange* drastically altered patent law. Before *eBay*, courts granted injunctions to stop patent infringement in 94% to 100% of cases in which infringement was found. By 2013, that number fell to 72.5%.

Today, many patent holders don't even request injunctions, knowing the courts will likely allow the theft to continue with the requirement that

the violator pay royalties. It would be as though squatters broke into someone's house and refused to leave – but instead of throwing them out, the courts allowed them to stay as long as they paid rent.

That would be outrageous. Yet it's exactly what our courts tell patent holders: watch as larger competitors use your technology without permission, then hope you can afford the years of litigation necessary to win some compensation.

It's time to restore the IP rights that drove two centuries of American innovation — and with them, our nation's place as the world's technological trailblazer.

The damage extends far beyond individual cases of theft. When inventors lose the ability to say "no" to unauthorized use of their technology, it distorts the entire market for innovation. Recent data from AUTM (formerly the Association of University Technology Managers) shows a troubling trend: since the courts began weakening IP protection, the number of exclusive licences granted by companies has barely grown, while the number of much-less valuable non-exclusive licences has risen considerably. This shift reflects a fundamental devaluation of patent rights.

The impact falls heaviest on America's groundbreaking small businesses and startups. These pioneers, who receive more patents per employee than large corporations, rarely have the resources for drawn-out legal battles. Without the credible threat of an injunction to stop infringement, they struggle to negotiate fair terms with deeper-pocketed competitors. Many find themselves forced to accept whatever terms the infringer

offers or face years of costly litigation with no guarantee of relief.

As American courts have dismantled our patent system's fundamental promise – that inventors deserve enforceable IP rights – innovation has, not surprisingly, fallen off. The broader results are highly concerning. China has now surpassed the United States in the development of 37 out of 44 critical technologies, from artificial intelligence to quantum computing.

Now some in Congress want to make it even harder for small businesses to defend their IP rights. Representative Darrell Issa, a Republican from California, has introduced the misleadingly named Litigation Transparency Act, which would require patent holders to disclose detailed information about how they fund their litigation.

The bill might sound innocuous, but it's a tactical weapon aimed at small inventors. Since patent litigation is extraordinarily expensive, startups rely on external funding arrangements to help them defend their patent rights against deep-pocketed infringers.

The proposed mandatory disclosure requirements would severely compromise these funding relationships. By forcing inventors to reveal detailed information about their financial backing and litigation strategies, the act would expose both patent holders and their funders to intimidation tactics. It would make the funders more reluctant to back patent cases, effectively closing the courthouse doors to many small companies.

The Trump administration clearly wants to strengthen American innovation and global leadership. It can achieve these goals with better IP protections. As a first step, the White House should work with Congress to defeat

misguided proposals like the Litigation Transparency Act, which would disproportionately harm small businesses while doing nothing to address the crisis in patent protection.

Second, we need legislation to strengthen entrepreneurs' ability to enforce their IP rights in court. To do this, lawmakers need to pass the RESTORE Patent Rights Act. This bipartisan legislation would reestablish the presumption that injunctive relief will be granted in cases of proven infringement

while preserving judicial discretion for truly exceptional circumstances.

These two changes would align perfectly with the new administration's broader agenda. Strong patent rights help small businesses compete against large corporations. They protect US intellectual property from foreign theft. Perhaps most importantly, they're essential to regaining and maintaining America's technological edge over China. Technological leadership is crucial not just to economic

prosperity, but increasingly to national security. We can't afford to have a patent system that disadvantages our most innovative companies.

It's time to restore the IP rights that drove two centuries of American innovation — and with them, our nation's place as the world's technological trailblazer.

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