The Growing Threat of "Predatory" Infringement

Right now, small firms and individual inventors in every industry face an existential threat — larger, entrenched companies are stealing their patented designs and technologies.

And when inventors sue for patent infringement, the bigger corporations use their vast financial resources to drag out lawsuits, in the hopes of wearing down their victims and making them settle for pennies on the dollar. Patent litigation is a time-consuming and expensive process, costing millions of dollars per case, on average.

This predatory strategy, known as "efficient infringement," threatens inventors' rights and discourages the innovation that drives economic growth and enriches society as a whole.

Loss of Injunctive Relief in *eBay v. MercExchange*

In 2006, the Supreme Court's *eBay v. MercExchange* ruling dramatically reduced inventors' ability to hold patent infringers accountable.

Prior to that decision, courts frequently issued "injunctions" in patent infringement cases. These court orders legally barred infringers from using or selling the stolen, patented inventions and technologies.

Injunctions prevent infringers from gaining an unfair market advantage. Without injunctive relief, infringers could continue to use patented inventions while legal battles drag on, allowing them to capture market share at the expense of the original inventors.

Unfortunately, the *eBay* ruling made it far harder for inventors to obtain injunctive relief. Courts granted permanent injunctions in nearly 100% of cases where infringement was found before 2006. Following the *eBay* decision, courts granted permanent injunctions in just under 73% of relevant cases between 2006 and 2013.

As injunctive relief grant rates declined after 2006, so did the rate at which patent owners even sought it. Of the 2,494 patent cases filed in 2005, 34 of those cases had motions for permanent injunctions. Of the 2,827 patent cases filed in 2023, however, not a single one had a motion for permanent injunction.

The Importance of Financial Partnerships

Because it's increasingly difficult to secure injunctions, inventors' only way to obtain justice is to beat infringers decisively in court and win significant damages that actually compensate for some of the lost market share and opportunity costs.

But drawn out lawsuits are expensive — which is why many inventors are increasingly turning to third-party financial partners to level the playing field. Financial arrangements like litigation funding and

equity partnerships allow inventors to cover the high costs of defending their intellectual property all while continuing to innovate.

Third-party financial partnerships ensure that patent disputes are decided on the merits of the case, not the financial strength of the parties involved. They empower inventors to protect their intellectual property against corporate infringers who would otherwise leverage their financial advantages to avoid accountability. In return, third-party investors may earn money if the inventors are successful in court, just like lawyers who've taken a case on contingency receive a cut of any damages awarded.

These partnerships ensure that the justice system doesn't inadvertently discriminate against small but innovative companies.

Fighting Against Efforts to Block Financial Partnerships

Threatened by the rise of these financing arrangements, infringers are working to restrict inventors' access to third-party funding. Through lobbying efforts in Congress and state legislatures, they aim to pass laws that limit financial partnerships — yet their arguments are founded upon several false and misleading claims.

For one, critics argue that third-party funding leads to an increase in frivolous patent litigation.

This is empirically false. Patent lawsuits have declined over the past decade, even as the number of patents granted has steadily increased. And this should come as no surprise: third-party financiers have a vested interest in backing only strong cases and avoiding speculative ones, because their financial return depends on a favorable verdict or settlement.

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Critics also claim that foreign governments or corporations could fund patent lawsuits to gain access to confidential information or harm American competitors.

These concerns are both unfounded and unrealistic. U.S. law already contains safeguards that protect sensitive data from being disclosed in patent litigation, including protective orders and restrictions on sharing confidential information. Additionally, bodies like the Committee on Foreign Investment in the United States (CFIUS) exist to guard against foreign investments that could threaten national security.

Far from being a boon to countries like China, third-party funding enables U.S. inventors to better pursue infringement claims against large infringers based overseas. It's vital to helping American innovators take on multinational corporations and secure justice.

In order to combat the perceived problems with third-party funding, some policymakers have proposed new requirements that would force inventors to disclose their financial backers. However, both the Supreme Court and the Administrative Office of the U.S. Courts have consistently rejected such measures — for good reason. These mandates would result in the exposure of confidential legal strategies, financial information, and other details that could disadvantage inventors in court.

Moreover, disclosure requirements would add unnecessary layers of bureaucracy and expose investors to harassment from competitors, creating additional costs that could deter potential partnerships. As one former Senior Judge of the U.S. District Court for the Southern District of Florida notes, "There are all kinds of things that go on in the world that have some influences on lawyers and clients and judges' cases, to think that disclosure is going to solve that problem is nonsense."

Disclosure requirements offer no real benefits and would only make it more difficult for inventors to defend their patents. They also divert attention toward lawsuits' funders and away from the legal merits of the case.

The Road Ahead

Third-party funding agreements are an invaluable lifeline for countless inventors across America. Banning or limiting this funding would not only further advantage wealthy corporations at the expense of ordinary Americans, but it would also jeopardize our nation's continued prosperity.

Already, China leads the United States in 37 out of 44 critical and emerging technologies. We cannot afford to cede anymore ground in our innovation ecosystem.

At a time when the United States is facing unprecedented challenges from abroad, we need the support of all of our legislators to ensure that inventors and small businesses continue to have access to this critical resource.

ABOUT THE INVENTORS DEFENSE ALLIANCE

The Inventors Defense Alliance is a nonpartisan, nonprofit, 501(c)(4) advocacy organization that works to build support for inventors' rights, safeguard justice, and protect access to capital. Learn more at www.InventorsDefense.org.