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Intellectual Property Alert

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RESTORE Patent Rights Act aims to strengthen patent holders

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The Realizing Engineering, Science, and Technology Opportunities by Restoring Exclusive (RESTORE) Patent Rights Act of 2024, if passed, will drastically change the landscape by which patent holders enforce their patents.



What's the impact?

- A patent owner would be entitled to a rebuttable presumption of a permanent injunction upon the patent owner prevailing on its claim of patent infringement.
- If passed, the Act could significantly strengthen the position of patent holders in litigation and licensing negotiations, but the proposed changes could raise concerns among companies that are often targeted by non-practicing entities.
- Companies should review their patent strategies and prepare for a potential shift in the litigation landscape.

On July 30, 2024, Senators Chris Coons (D-DE) and Tom Cotton (R-AR) introduced the RESTORE Patent Rights Act, a bill that could significantly alter the landscape of patent litigation in the

United States by increasing the likelihood that a patent holder secures a permanent injunction upon prevailing on a claim of infringement. The bill aims to address what its proponents see as a weakening of patent rights following the Supreme Court's 2006 decision in *eBay v. MercExchange*.

***eBay v. MercExchange*—impact on the likelihood of a permanent injunction**

The *eBay* decision marked a significant shift in patent jurisprudence. Prior to 2006, courts generally presumed that a permanent injunction should be granted upon a patent owner prevailing on its claim of patent infringement. However, the *eBay* ruling established that the traditional four-factor test that courts applied to award permanent injunctive relief in equity would apply to disputes arising under the Patent Act. A presumption of a permanent injunction was abolished, making the process, some argue, more difficult for patent holders to enforce their patents.

In the years since *eBay*, critics have argued that this change has weakened the patent system, particularly for certain types of patent holders such as universities, individual inventors, and small businesses. They contend that the current system has made it easier for large companies to engage in what they term "predatory infringement," finding it more cost-effective to infringe patents and risk litigation rather than negotiate licenses upfront.

What's in the RESTORE Patent Rights Act?

The bill amends Section 283 by creating a rebuttable presumption that a permanent injunction applies:

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.¹

Although this amendment does not automatically guarantee an injunction in every case of infringement, it shifts the burden onto the defendant to demonstrate why a permanent injunction should not be granted.

¹ *Restore Act*, Section 3.

Will the RESTORE Patent Rights Act be passed?

While the RESTORE Patent Rights Act has bipartisan support, its path to becoming law remains uncertain. The bill faces potential opposition from large technology companies and other industries concerned about the impact of more readily available injunctions. Additionally, as we approach a major election, the legislative calendar may present challenges for the bill's progression.

The House companion bill introduced by Representatives Nathaniel Moran (R-TX) and Madeleine Dean (D-PA), with additional co-sponsors, indicates broader support for the measure.

Recommendations for patent holders and litigants

REVIEW PATENT PORTFOLIOS

Assess how the potential changes could affect the value and enforceability of your existing patent portfolio. The presumption in favor of permanent injunctions could enhance the probability of obtaining this powerful remedy, increasing the leverage of patent holders in licensing negotiations. The increase in leverage is likely to elevate the value of your existing patent portfolio, potentially stimulating additional investment in filing new patent applications by offering greater assurance of returns on related R&D expenditures.

ADAPT LITIGATION STRATEGIES

Defendants in patent litigation cases must prepare to counter the presumption of permanent injunctive relief, leading to more resources being devoted to defending a patent infringement suit. Non-practicing entities may find their position strengthened as obtaining permanent injunctions could become more prevalent in contrast to the current, post-*eBay* environment where courts are inclined to deny injunctive relief for non-practicing entities.

OTHER CONSIDERATIONS

Larger technology companies, often defendants in patent litigation, will likely raise concerns that they face heightened operational risks if permanent injunctions become more readily available. Conversely, universities and other entities primarily engaged in patent licensing could stand to gain substantial leverage in negotiations.

Nixon Peabody's [intellectual property lawyers](#) will continue to track this bill. Our experienced team helps patent owners gain and maintain a competitive advantage while minimizing exposure. For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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