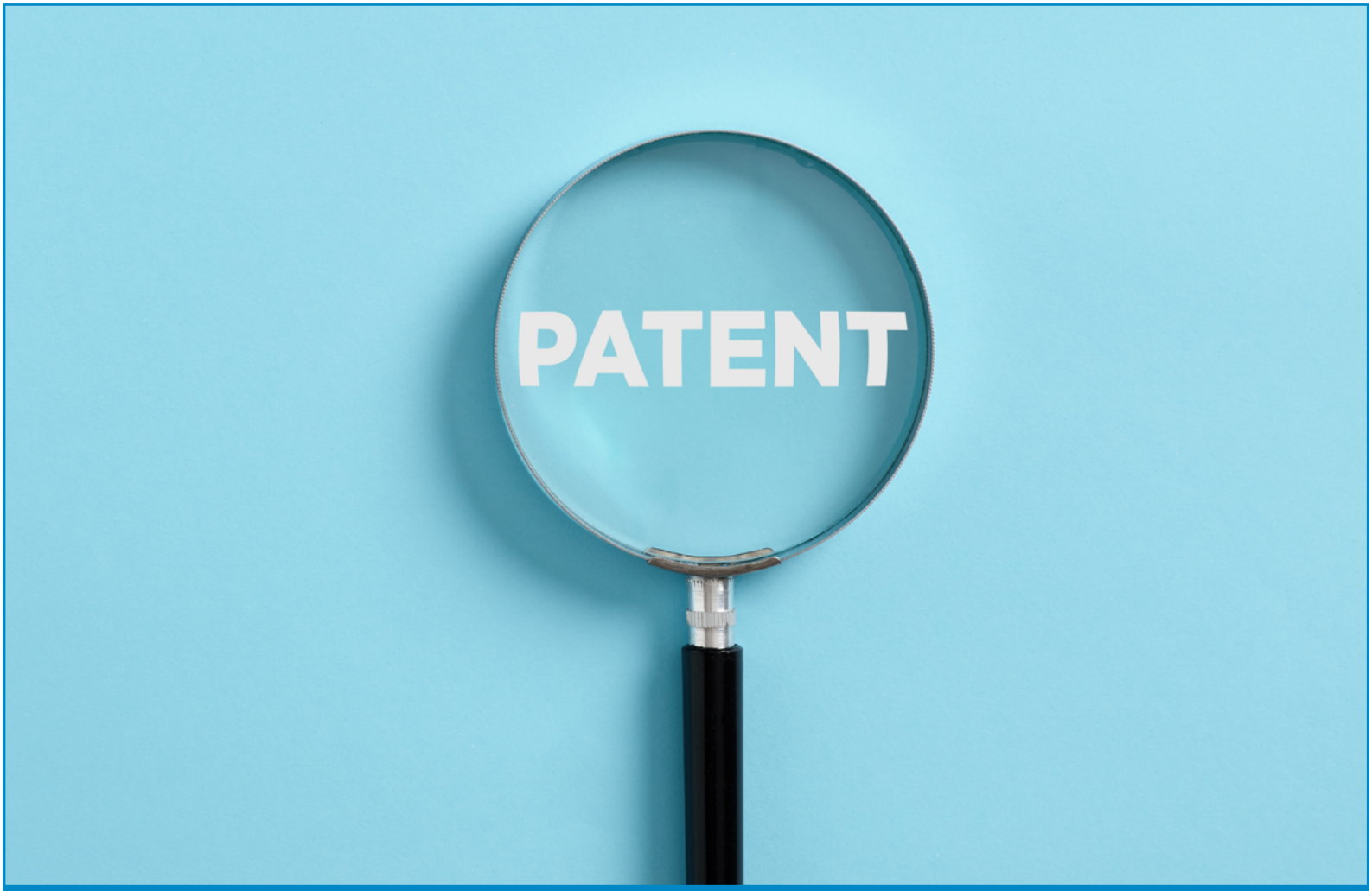
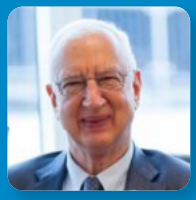


PATENT PROTECTION: A CRUCIAL ANTITRUST TOOL FOR INCREASING INNOVATION



BY HON. PAUL R. MICHEL (RET.)

& MATTHEW J. DOWD

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PATENT PROTECTION: A CRUCIAL ANTITRUST TOOL FOR INCREASING INNOVATION

By Hon. Paul R. Michel (ret.) & Matthew J. Dowd

This article showcases why the patent system's oft-overlooked role as a promotive tool of innovative SMEs must receive more attention, including in the antitrust context. Patents are frequently touted as detrimental to competition, but that perspective overlooks a more comprehensive view of competition in an innovation economy. We also briefly describe the less fortified U.S. patent — a result of almost twenty years of adverse judicial decisions and system deters competition and creates a David-versus-Goliath situation for smaller start-ups. Larger, entrenched corporations disproportionately benefit from weaker patents, leaving innovative startups with a mountain to climb. Recognizing this adverse trend, several key Congress members have introduced important legislation that would amend the Supreme Court's past missteps. While no bill is without shortcomings, the pending legislation would restore a more equitable competition environment and steer the American focus back to innovation.

In a little under two years, the United States will celebrate the Semiquincentennial, 250 years from the signing of the Declaration of Independence. Over those two and a half centuries, the world witnessed an upstart, nascent group of thirteen colonies grew into one of the most innovative nations in history. The United States became the leading creator of life-changing inventions, producing far more Nobel laureates than any country. A quarter-way through the 21st century, the United States is still leading in many technological areas, but remaining competitive, particularly in critical technologies, is becoming increasingly difficult in the global arena, especially in areas of artificial intelligence, personalized medicine, and next-generation communications technologies.

Most discussion about improving the innovation ecosystem centers on the patent system, and for good reason. No other legal regime has proven to be as effective at incentivizing innovation as the patent system, and until recently, the U.S. patent system was the long-accepted gold standard. It established a reasonable balance of the *quid pro quo*: Granting a limited exclusive right in exchange for disclosing the invention and making it publicly available (in contrast to trade-secret protection, which would keep innovation details hidden from the public).

An equally important — if not more important — role of the patent system is to facilitate investment and commercial transactions for smaller and mid-sized innovation-focused firms. Rather than simply providing an incentive to innovate in the first place, patent protection provides the needed legal and economic structures that enable smaller innovation-focused firms to obtain the necessary financial investments and to enter into transactions with larger firms that may be less focused on innovation but better equipped to commercialize innovation.

By facilitating these investment and commercial transactions, patents should be an effective antitrust tool, available to competitors to ensure that the established, market-dominant companies do not monopolize markets. Unfortunately, during the last almost twenty years, we have witnessed a significant weakening of the U.S. patent system, through Supreme Court decisions, flawed legislation that created the Patent Trial and Appeal Board ("PTAB"), and continued lobbying by entrenched, market-dominant corporations that want to maintain their dominance by weakening the patent system, thereby making it more difficult for upstart innovators to break into established markets.

In this brief essay, we highlight how the patent system's underappreciated role of facilitating investment, licensing, manufacturing, and commercial transactions for innovation-focused small and medium-sized enterprises ("SMEs") can and should be better recognized as a key benefit of patents, as well as an important tool in antitrust policy considerations. Patents are too often viewed myopically as detriments to competition, but that erroneous view fails to consider competition more holistically, beyond the near term. We also briefly describe how the weakening of the U.S. patent system impedes competition and puts smaller startups at a competitive disadvantage. Weaker patents make it more difficult for innovative startups to disrupt large, market-dominant corporations. We also highlight recent legislative efforts to fix many of the problems imposed on the patent system. While no legislation is perfect, several pending bills in the U.S. Congress would restore the competitive balance and improve the innovation ecosystem.

01

INNOVATION IS BECOMING INCREASINGLY EXPENSIVE IN CRITICAL TECHNOLOGIES

Innovating has always been an expensive and risky endeavor. Modern technologies now ubiquitous, with some obsolete, were the result of earlier cutting-edge research that was made possible only by innovators and their financial supporters willing to devote time, money, and other resources, and usually with no guarantee of any financial return.

The risk-reward calculus has only become starker in the 21st century when it comes to contemporary critical technologies. According to one report, "[o]ver the past decade, the average cost to bring a new innovation to market has increased by 67%."[2]

Take as one example research and development in artificial intelligence. Private sectors will need to invest hundreds of millions of dollars in the development of AI tech-

2 Gary Drenik, *How AI is Accelerating Innovation In Research and Development*, Forbes (July 18) https://www.forbes.com/sites/garydrenik/2024/06/18/how-ai-is-accelerating-innovation-in-research-and-development/.

nologies.[3] Some of this will come in the form of developing new advanced chips and processors. Other R&D will focus on AI training models, such as neural networks or support vector machines. Expensive R&D is not limited to the private sector. AI R&D investments by U.S. federal entities have grown from $560 million in 2018 to approximately $2.9 billion in each of 2022 and 2023, with it expected to exceed $3 billion in 2024.[4] Similar amounts are being invested by non-U.S. governments, including China and European countries.[5]

R&D in other critical technologies exhibits a similar demand for capital-intensive support. The costs to develop personalized medicines for devastating cancers and other diseases can easily run into the hundreds of millions of dollars, if not more.[6] Gene-editing-based treatments will be able to treat previously untreatable genetic-based conditions, such as sickle cell anemia, which disproportionately affects individuals of African descent.[7] But those treatments are extraordinarily expensive to develop and implement, and innovators and their investors need to recoup a reasonable return on their investments so that they can then continue their innovative contributions.

In a similar vein, U.S. national security is increasingly dependent on employing the most cutting-edge technologies. Those technologies must be developed by companies that can provide stable, secure support to the U.S. government. And again, those companies must be permitted to earn a reasonable profit in order to support the necessary R&D.

As R&D becomes more expensive, investors will naturally assess whether to invest in companies involved in the riskier areas, as opposed to investing in less risky options. Capital investments can be moved to less risky domestic options, such as entertainment and retail opportunities. Investors could also choose to move their capital to non-U.S. investments, to countries that provide innovation ecosystems that are friendlier to startups. Policy makers should want to avoid that outcome and should do everything reasonably possible to promote the progress of entrepreneurial firms.

02

PATENTS FACILITATE CAPITALIZATION AND COMMERCIALIZATION, PARTICULARLY FOR INNOVATION-FOCUSED STARTUPS AND MARKET DISRUPTERS

The conventional view of patents is that they create an incentive to invent and an incentive to disclose. That view is well-known and remains valid, but more importantly patents facilitate capitalization and commercialization, particularly for SME entrepreneurial firms. Fortunately, we are seeing a renewed recognition of a patent's important role in post-

3 See Dylan Thomas, Maira Imtiaz & Annie Sabater, *Private Equity-backed Investment Surge in Generative AI Defies 2023 Deal Slump*, S&P GLOBAL (Mar. 2024) (noting that private equity-backed investment in generative AI was $927.7 million in Q3 2023), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/private-equity-backed-investment-surge-in-generative-ai-defies-2023-deal-slump-80625128; see also Ana Swanson & Erin Griffith, *American Firms Invested $1 Billion in Chinese Chips, Lawmakers Find*, New York Times (Feb. 2024), https://www.nytimes.com/2024/02/08/business/economy/china-chips-house-select-committee.html.

4 Artificial Intelligence Research and Development Interagency Working Group, *2020-2024 Progress Report: Advancing Trustworthy Artificial Intelligence Research and Development* (July 2024), https://www.nitrd.gov/pubs/AI-Research-and-Development-Progress-Report-2020-2024.pdf.

5 Thomas Colvin, et al., *A Brief Examination of Chinese Government Expenditures on Artificial Intelligence R&D*, Science & Technology Policy Institute (February 2020), https://cdn01.dailycaller.com/wp-content/uploads/2020/02/IDA-Document-Under-Embargo.pdf.

6 Vinay Prasad & Sham Mailankody, *Research and Development Spending to Bring a Single Cancer Drug to Market and Revenues After Approval*, 177 JAMA Internal Med. 1569 (Sept. 2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5710275/; see also Michael Schlander, et al., *How Much Does It Cost to Research and Develop a New Drug? A Systematic Review and Assessment*, 39 Pharmacoeconomics 1243 (2021) ("Estimates of total average capitalized pre-launch R&D costs varied widely, ranging from $161 million to $4.54 billion (2019 US$). Therapeutic area-specific estimates were highest for anticancer drugs (between $944 million and $4.54 billion)."), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8516790/.

7 U.S. Food & Drug Administration, *FDA Approves First Gene Therapies to Treat Patients with Sickle Cell Disease*, FDA (Dec. 8, 2023), https://www.fda.gov/news-events/press-announcements/fda-approves-first-gene-therapies-treat-patients-sickle-cell-disease.

grant capitalization, licensing, manufacturing, and commercialization activities.[8]

To begin, patents can reduce transaction costs between entrepreneurial SMEs and larger established corporations. Robust, reliable patent grants enable innovative SMEs to share their innovations (through licensing) with more established companies that are better structured to commercialize the innovations. The patents provide reasonable assurance to the innovative SME that the large corporations who want to expropriate the SME's innovations will pay a fair price. As the certainty in patent protection decreases, however, the transaction costs for innovative SMEs increase because they need to be more cautious with disclosing their innovation.

Second, patent protection also reduces financing costs for innovative SMEs. As detailed by Professor Jonathan Barnett, "IP rights can reduce financing costs incurred by an entrepreneurial firm that wishes to integrate forward into some or all commercialization functions without relying on the infrastructures, reputational capital, and scale economics of an existing dominant firm."[9] In other words, even after the innovation is created and disclosed in a patent, IP rights enable SMEs to grow into larger, more integrated companies with commercialization and/or manufacturing capabilities.

When patents are understood to be a tool for facilitating licensing, manufacturing, and other commercialization activities, it is easier to understand why larger, more established companies in many industries no longer favor strong patent protection. In many industries (even many technology-intensive industries, with the pharmaceutical and biotech industries being notable exceptions), "larger firms tend to have lower-cost access to non-patent mechanisms for extracting returns from innovations."[10] In other words, larger corporations — think Cisco, Google, Apple, and the like — can rely on their market dominance and vertically integrated structures to ensure reasonable financial returns on their R&D efforts.

Moreover, larger firms do not need to rely on IP's roles of facilitating capitalization and commercialization. They already have ready access to the capital markets, usually through public stock markets. They also typically have internal means of commercializing their products (unlike SMEs), through vertical integration of manufacturing, retail, marketing, and other commercialization capabilities.

When viewed this way, patents are easily seen as an effective antitrust tool.[11] Reliable patent protection can allow startups to enter markets and disrupt entrenched firms. If, however, patent protection is unreliable and there is no reasonable chance of enjoining infringing activity, the market-dominant companies will remain emboldened to continue their predatory-infringement practices.[12] Large, market-dominant companies that engage in predatory infringement can do so with little risk of near-term liability, as courts are unlikely to stop infringing activity and any order to pay monetary damages is years down the road, which allows the large companies to take more market share using expropriated technologies.

03

THE WEAKENING OF A CRUCIAL ANTITRUST TOOL

Despite the common objectives of patent and antitrust law to increase innovation and increase consumer welfare, we have seen a continued weakening of patent rights spanning almost the past two decades. We have documented this trend elsewhere, as have others.[13] We provide a brief overview here.

8 See generally Jonathan M. Barnett, Innovators, Firms, and Markets: The Organizational Logic Of Intellectual Property (2021); see also Randall R. Rader & Benjamin J. Christoff, Patent Law In a Nutshell 10-11 (3d ed. 2018) ("The incentives of patent law do some of their best work after invention, disclosure, and issuance of a patent. At that point, the patent system enables an inventor to raise capital to market and manufacture the invention.").

9 Barnett, *supra*, at 38.

10 Barnett, *supra*, at 139.

11 See e.g. Greg Dolin, *Resolving the Patent-Antitrust Paradox: Promoting Consumer Welfare Through Innovation* (May 2013) ("Whereas antitrust law seeks to promote competition mostly on price, patents promote competition by incentivizing new innovation, product differentiation, manufacturing and process innovations, and influencing consumer tastes."), https://cip2.gmu.edu/wp-content/uploads/sites/31/2013/08/Dolin-Patent-Antitrust-Paradox.pdf.

12 See e.g. Kristen Jakobsen Osenga, *"Efficient" Infringement and Other Lies*, 52 Seton Hall L. Rev. 1085 (2022).

13 See Paul R. Michel & Matthew J. Dowd, *From a Strong Property Right to a Fickle Government Franchise: The Transformation of the U.S. Patent System in 15 Years*, 69 Drake L. Rev. 1 (2021); see also Paul R. Michel & Matthew J. Dowd, *The Need for "Innovation Certainty" at the Crossroads of Patent and Antitrust Law*, CPI Antitrust Chronicle (Apr. 2017), https://www.competitionpolicyinternational.com/wp-content/uploads/2017/04/CPI-Michel-Dowd.pdf; Gene Quinn, *The Supreme Crusade to Weaken Patent Rights in America*, IP Watchdog (July 16, 2018).

A. The Supreme Court Overlooks the Pro-Competition Role of Patents by Repeatedly Weakening Patent Rights

The Supreme Court's rewriting of modern patent law's basic doctrines began with its 2006 *eBay v. MercExchange*[14] decision that drastically limited the availability of injunctions for patent infringement. That change was followed a year later by *KSR v. Teleflex*,[15] which rejected the Federal Circuit's test for obviousness. Those two decisions destabilized the innovation ecosystem and enabled entrenched market-dominant companies to adopt a more dismissive approach to the patent rights of smaller, innovative companies looking to either enter the market or obtain a reasonable recoupment of their R&D investment.

The Court's *eBay* decision effectively rejected the "exclusive" right set forth in the U.S. constitution. Subsequent research has exposed the flaw with the Court's basic holding as well as the subsequent application of *eBay* by district courts.[16] Availability of injunctions for owners successful in infringement suits declined, gradually but steadily, particularly from 2012 onward.[17] The Court's decision — and particularly Justice Kennedy's concurrence — gradually gained traction in the district courts. The end result was that largely only directly competing product producers can expect permanent injunctions.

In one of the most recent comprehensive studies, it was shown that "the *eBay* ruling reduced the annual percent of patent cases in which a motion for an injunction was sought."[18] The same study also shows that, post-*eBay*, district courts discriminate against certain patent owners, such as licensing entities. "Moreover, not only did the *eBay* decision result in operating companies scaling back their requests for permanent injunctions, but they are also shown to have scaled back the requests for preliminary injunctions."[19]

"In one of the most recent comprehensive studies, it was shown that "the eBay ruling reduced the annual percent of patent cases in which a motion for an injunction was sought."

Further, patent owners who actively license their IP, such as universities and research clinics, largely stopped asking for injunctions, with their requests decreasing by 85 percent.[20] The decimation of injunctive relief has undermined the ability of entrepreneurial SMEs from participating in the licensing and commercialization markets. Without a reliable right to prevent a large corporation from expropriating innovation and know-how, smaller and more innovative SMEs must be more cautious when disclosing their intellectual property.

The Supreme Court's *KSR* decision similarly changed the innovation landscape. District courts and the USPTO have applied *KSR* broadly, raising the bar for showing that inventions are nonobvious and creating massive uncertainty for thousands and thousands of already-issued patents.

Next came the Supreme Court's perhaps most disruptive intervention. In 2010-2014, four cases — *Bilski*,[21] *Mayo*,[22] *Myriad*,[23] and *Alice*[24] — added confusion and uncertainty to patent-eligibility jurisprudence under 35 U.S.C. § 101. The Court's decisions made vast swaths of innovation — including life-saving medical diagnostics — now ineligible for patent protection, regardless of how novel or nonobvious the technology was. Many of those same inventions remain eligible in all of Europe and most of Asia, including China.

14 See *eBay Inc. v. MercExchange, L.L.C.,* 547 U.S. 388 (2006).

15 See *KSR International Co., v. Teleflex Inc.,* 550 U.S. 398 (2007).

16 Adam Mossoff, *Injunctions for Patent Infringement: Historical Equity Practice Between 1790 - 1882* (June 14, 2024), forthcoming in the Harvard Journal of Law & Technology (2025), https://ssrn.com/abstract=4870351; Hon. Paul R. Michel & Matthew J. Dowd, *Understanding the Errors of eBay*, The Criterion Journal on Innovation (Feb. 2017).

17 Christopher B. Seaman, *Permanent Injunctions in Patent Litigation After eBay: An Empirical Study*, 101 Iowa L. Rev. 1949 (2016).

18 Kristina M.L. Acri née Lybecker, *Injunctive Relief in Patent Cases: The Impact of eBay,* Colorado College Working Paper 2024-01 (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4866108.

19 *Id.* at 24.

20 *Id* at 10.

21 *Bilski v. Kappos,* 561 U.S. 593 (2010).

22 *Mayo Collaborative Services v. Prometheus Laboratories, Inc.,* 566 U.S. 66 (2012).

23 *Association for Molecular Pathology, v. Myriad Genetics, Inc.,* 569 U.S. 576 (2013).

24 *Alice Corporation Pty. Ltd., v. CLS Bank International,* 573 U.S. 208 (2014).

Examples illustrating the § 101 problem abound, but two recent Federal Circuit decisions underscore the confusion, with the court reaching conflicting results about whether a digital camera constitutes patentable subject matter under § 101. In 2021, the court ruled that a claimed digital camera was not patentable subject matter, despite the claim being plainly directed to tangible digital camera.[25] Only three years later, in a different case, the court held that a "portable point of view digital video camera" did satisfy § 101.[26] Those two decisions are irreconcilable and epitomize the uncertainty created by the Supreme Court's recent foray into § 101 law.

The current Supreme Court has disappointingly exhibited the same patent-skeptical approach. The most notable example is *Amgen v. Sanofi*, decided in 2023.[27] The opinion completely overlooks how broad disclosures in patents can spur innovation and enable innovators to license those rights as needed.[28]

B. The America Invents Act of 2011 and the Creation of the PTAB

In 2011, the U.S. innovation ecosystem underwent a seismic shift when Congress passed the America Invents Act, which created the PTAB. Thirty years after it created the Federal Circuit, Congress enacted a law that effectively undid its earlier efforts of increasing certainty and predictability in national patent law.

The PTAB has upended the IP transactional environment, whether it involves licensing, enforcement, development, or commercialization. AIA proceedings challenging a patent frequently run in parallel with district court suits, adding expense, distraction, and delay for patent owners. Unsurprisingly, invalidation rates at the PTAB have been significantly higher than in the courts. The AIA yielded patent-skeptical PTAB reviews, a weakened presumption of validity, an easier path for infringers to invalidate valuable patents, and erased the standing requirement. One-way estoppel provisions let court judgments be erased by later PTAB decisions.

Again, it is intriguing to compare Congress's apparent disparate treatment of patents compared to other IP. With the PTAB, Congress created a forum whose sole mandate is to invalidate patents. In contrast, for copyrights, Congress created the Copyright Claims Board ("CCB"), a three-member tribunal within the Copyright Office that provides an efficient option for copyright owners to resolve claims up to $30,000.[29] Thus, in contrast to its creation of the PTAB, Congress created a forum for copyright owners to facilitate copyright's objective "To promote the Progress of Science," *i.e.*, the creative arts.

C. The "Patent Troll" Myth that Won't Go Away

In 2002, Peter Detkin, then an attorney at Intel, is said to have coined the "patent troll" term to describe patent owners who don't practice the inventions in the patents. Amazingly, more than twenty years later, lobbyists and advocates are still invoking this myth, despite much research showing that it isn't the case. Of course, we know that some of the greatest innovators in history — including university researchers — could be called a "patent troll."

A good part of the "patent troll" myth stems from the early 2000s when the Federal Trade Commission and the National Research Council weighed in with notably anti-patent views.[30] The takeaway from these reports was generally that the Federal Circuit was supposedly hampering and stifling competition. Move forward twenty years, and the myth-based campaigns continue today. Big tech mega-giants (sometimes referred to as FAANGS[31]) picked up support from large banks, retailers, and automotive companies. Similarly, standard-essential patent owners are accused of being patent "hold-outs," even though this academic theory was refuted by actual experience.

"Again, it is intriguing to compare Congress's apparent disparate treatment of patents compared to other IP. With the PTAB, Congress created a forum whose sole mandate is to invalidate patents"

25 *Yu v. Apple Inc.*, 1 F.4th 1040, 1041-46 (Fed. Cir. 2021).

26 *Contour IP Holding LLC v. GoPro, Inc.*, No. 22-1654 (Fed. Cir. Sept. 9, 2024).

27 *Amgen Inc. v. Sanofi,* 143 S. Ct. 1243 (2023).

28 On a related point, it is curious how the Supreme Court can be consistently critical of patent rights while at the same time be far more generous to trademark and copyright owners. See e.g. *Jack Daniel's Properties, Inc. v. VIP Products, LLC*, 143 S. Ct. 1578 (2023); *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023).

29 Copyright Alternative in Small-Claims Enforcement Act of 2020 ("CASE Act of 2020"), H.R. 2426, 116th Cong. §1 (2020).

30 Federal Trade Commission, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* (Oct. 2003), https://www.ftc.gov/reports/promote-innovation-proper-balance-competition-patent-law-policy.

31 FAANG stands for the five major tech companies: Facebook, Amazon, Apple, Netflix, and Google.

Of course, asserting a patent against an infringer or refusing to capitulate to an infringer's licensing demands should hardly warrant pejorative labels, such as "troll" or "hold-out." It is simply protecting a presumptively valid property right, in the face of infringement — and too often predatory infringement.

D. Other Narratives Seek to Weaken Patents, to the Benefit of Entrenched Market-Dominant Companies

Beyond the above issues, advocates seeking to further devalue patent protection continue to push narratives that will only strengthen the dominance of the larger, more established companies at the expense of more innovative SME firms. Such an outcome should concern anyone who is troubled by large corporations' monopolistic tendencies. These narratives will also damage the longer-term innovation ecosystem, as it becomes less hospitable for the innovative SMEs that produce the majority of U.S. innovation.

For instance, the current Biden-Harris administration is aggressively pushing for an unprecedented and controversial implementation of march-in rights under the Bayh-Dole Act.[32] As experienced commentators have observed, "[u]nder the Administration's property confiscation proposal, unelected, unaccountable, bureaucrats in government will be allowed to seize a company's intellectual property if they decided, for whatever reason is politically popular at the time, that they do not like how a company is using that property."[33] This radical approach will devastate the IP licensing environment, particularly given that "universities create, on average, three new start-ups that produce two new products every day."[34]

Standard essential patents ("SEPs") and the right-to-repair doctrine are two additional areas where certain groups are working to advance their "weak patents" agenda. SEPs have long been a target, with the misguided belief that an owner of an SEP should never be granted injunctive relief. In June 2022, the USPTO, the National Institute of Standards and Technology, and the U.S. Department of Justice disappointingly withdrew the *2019 Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments*,[35] which offered an extremely reasonable approach to FRAND licensing of SEPs and the availability of injunctions for SEP owners.

On the right-to-repair doctrine, consumer-rights advocates have pushed legislation that could require open access to proprietary tools and technology, in view of electronics and software systems being more integrated into consumer products, such as automobiles and farming equipment.[36] No doubt balance is needed in these contexts, but it is alarming, though not surprising, that the large, entrenched players continue their predictable campaign to weaken IP rights.

Finally, a few academics have recently advanced the entirely unsupported argument that the International Trade Commission ("ITC") is an unnecessary forum for patent enforcement. This argument is plainly a solution in search of a problem. The ITC is the one forum that offers at least some patent and IP owners a fast and thorough option for enforcing their rights.

"Standard essential patents ("SEPs") and the right-to-repair doctrine are two additional areas where certain groups are working to advance their "weak patents" agenda"

32 Request for Information Regarding the Draft Interagency Guidance Framework for Considering the Exercise of March-In Rights, 88 Fed. Reg. 85,593 (Dec. 8, 2023).

33 Brad Watts & Matt Furlow, *Biden's March-In Rights Proposal Risks CHIPS Investments,* U.S. Chamber of Commerce (July 2024), https://www.uschamber.com/intellectual-property/bidens-march-in-rights-proposal-risks-chips-investments.

34 *Id.*; see also Hideki Tomoshige & Sujai Shivakumar, Center For Strategic & International Studies, *The Use of March-In Rights Could Undermine Innovation and National Security* (May 23, 2024) ("[E]mploying march-in rights as a means of price control creates an uncertain environment surrounding the commercialization of university research, given the lack of clear guidelines for federal officials when it comes to determining whether the market price of an innovation is 'unreasonable' or 'extreme and unjustified.'"), https://www.csis.org/analysis/use-march-rights-could-undermine-innovation-and-national-security.

35 https://www.justice.gov/opa/pr/justice-department-us-patent-and-trademark-office-and-national-institute-standards-and.

36 Sarah Kulik, Brian H. Pandya, & Joseph Robert Welsh, *Illinois Federal Court Clears Hurdles of Aftermarket Right-to-Repair Class Action*, American Bar Association (July 29, 2024), https://www.americanbar.org/groups/antitrust_law/resources/newsletters/federal-court-clears-hurdles-right-to-repair/.

04

IMPROVEMENTS TO PATENT LAW WILL REVITALIZE INVESTMENT, INNOVATION, AND COMPETITION

As each year passes, the U.S. innovation economy is increasingly dependent on intellectual property, especially IP developed by SMEs. According to the USPTO, in 2019, IP-intensive industries generated $7.8 trillion in U.S. GDP and supported over one in three U.S. jobs.[37] Action is therefore needed to ensure that the innovation ecosystem is restored to a status where innovative SMEs can thrive and not be overwhelmed by the large, market-dominant corporations that view strong IP as a hindrance to their desired market domination.

Fortunately, we are seeing increased support for innovative SMEs and for improving the innovation ecosystem. The U.S. Chamber of Commerce and the Council for Innovation Promotion ("C4IP") are both advocating for re-adjusting policy in favor of reliable and valuable patents.[38] So have other organizations, including the Association of University Technology Managers, the Licensing Executives Society, and the Heritage Foundation. They augment on-going work of the Innovation Alliance, the Coalition for 21st Century Patent Reform, the National Security Commission on AI, and the Center for Strategic and International Studies. Additionally, the recently formed Inventors Defense Alliance should bolster the effort to improve the U.S. innovation ecosystem.[39]

As for proposed legislative fixes, several Congress members have taken the laboring oar and introduced proposed legislation that would restore reliability to U.S. patent protection. Senators Coons and Tillis introduced the Patent Eligibility Restoration Act ("PERA") to "restore patent eligibility to important inventions across many fields, while also resolving legitimate concerns over the patenting of mere ideas, the mere discovery of what already exists in nature, and social and cultural content that everyone agrees is beyond the scope of the patent system."[40] Senators Coons and Tillis also introduced the PREVAIL Act, which seeks to correct numerous design defects in the post-grant provisions of the America Invents Act.[41]

More recently, in July 2024, Senators Coons and Cotton introduced the Realizing Engineering, Science, and Technology Opportunities by Restoring Exclusive (RESTORE) Patent Rights Act of 2024, "a bipartisan, bicameral bill that would restore the presumption that courts will issue an injunction to stop patent infringers, strengthening protections for U.S. inventors, entrepreneurs, universities, and startups."[42] The House companion bill was introduced by Representatives Moran and Dean.

> ***"Fortunately, we are seeing increased support for innovative SMEs and for improving the innovation ecosystem"***

37 https://www.uspto.gov/sites/default/files/documents/uspto-ip-us-economy-third-edition.pdf.

38 C4IP's advisory board includes former Chief Judge Paul R. Michel and former Judge Kathleen O'Malley.

39 http://inventorsdefense.org.

40 https://www.tillis.senate.gov/2023/6/tillis-coons-introduce-landmark-legislation-to-restore-american-innovation.

41 Promoting and Respecting Economically Vital American Innovation Leadership Act, S. 2220; see also https://www.coons.senate.gov/imo/media/doc/prevail_act_fact_sheet.pdf.

42 https://www.coons.senate.gov/news/press-releases/senator-coons-colleagues-introduce-bipartisan-bicameral-bill-to-restore-injunctive-relief-for-patent-infringement.

Representative Massie has introduced H.R. 8134, Restoring America's Leadership in Innovation Act of 2024 ("RALIA").[43] His bill is more aggressive in that it "allows inventors to get injunctions again against intellectual property thieves, restores inventors' rights to defend their inventions in court by abolishing the Patent Trial and Appeal Board, and ends the automatic publication of patent applications unless a patent is granted."[44]

No legislation is perfect, but it is clearly time to modernize the Patent Act — to catch up with developments in technology, to modify judge-made doctrines that conflict with the intent of Congress, and to implement sound patent policy for our national economy and global leadership in technology. Strengthening patent protection will improve the innovation ecosystem and will provide a natural countermeasure to business practices that become anticompetitive.

"Representative Massie has introduced H.R. 8134, Restoring America's Leadership in Innovation Act of 2024 ("RALIA")"

43 https://massie.house.gov/news/documentsingle.aspx?DocumentID=395632.

44 *Id.*

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