


Congress Must Support Small Business Through Patent Law



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Patents play a much larger role in the life of small businesses than you might expect. Roughly [50 percent of the most highly cited patents are held by small businesses](#), and patents underpin the products, services, and platforms that empower small companies to meet their customers' needs. They need strong patent protections to successfully manage their intellectual property (IP). In addition to holding their own patents, many business owners license patents from other companies and use them to build their innovations. Congress must support strong protections for patents while not retreading failed avenues for policies. Recently, several bills that would threaten the current balance of patent law have been considered. We oppose these bills, any of which would bring significant harm to businesses looking to license patents or trying to protect their own intellectual property, opening them up to frivolous lawsuits. We outline our concerns about these bills, as well as any legislation like them, below. We urge Congress to work with the U.S. Patent and Trademark Office (USPTO) to promote innovation, protect intellectual property rights, and advance entrepreneurship.

The Patent Eligibility Restoration Act


In the 118th Congress, the Senate considered S. 2140, the Patent Eligibility Restoration Act (PERA). This bill would dramatically alter the patent law environment by expanding patent eligibility in a way that floods an already-strained system with frivolous patents. Current patent law excludes three broad categories from patentability: physical phenomena, abstract ideas, and the laws of nature. However, a legal precedent has been established that using software and computers for routine company operations does not qualify as patentable. PERA would undo this precedent and provide that “any process that cannot be practically performed without the use of machine (including a computer) or manufacture shall be eligible for patent coverage,” with only narrow exceptions. This definition would include accounting software and e-commerce platforms, which have never been eligible for patent coverage.

PERA, if passed, would come at the cost of stifling innovative activity in software-driven products and services. It would do this by prioritizing broader IP protection of processes, which could lead to the resurgence of bad business method patents (BMPs).

The small business members of the App Association have experienced assertions of these and other overly broad patents. The last thing they, or any startup, want to see is another door opened for the sue-and-settle business model that comes with poorly defined patents and tends to single out small businesses.

The Promoting and Respecting Economically Vital American Innovation Leadership Act

Both the House and the Senate saw versions of S. 2220/H.R. 4730, the Promoting and Respecting Economically Vital American Innovation Leadership (PREVAIL) Act, in the 118th Congress. This bill seeks to reform rules and procedures at the Patent Trial and Appeal Board (PTAB). Unfortunately, this proposed bill strengthens the ability of foreign competitors and patent assertion entities (PAEs) to profit from the assertion of invalid patents. The PREVAIL Act will harm U.S. businesses and consumers. This includes harms like instituting one-sided rules that benefit invalid patent owners, preventing the USPTO from correcting its own mistakes, prohibiting consideration of prior art that was never evaluated by the USPTO, and creating arbitrary limitations that affect the effectiveness of review.



Congress established the PTAB to help provide a lower-cost solution for removing invalid patents from the system. While the PTAB is not perfect, it has largely worked as intended and has reduced unnecessary litigation, saving \$2.3 billion in its first five years. Proponents of the bill state that an issue with the U.S. patent system is that anyone can challenge a U.S. patent at the PTAB, but this is actually a solution to a larger problem: NPEs and foreign entities abuse the courts' deference to patent issuance to coerce good faith innovators into unfair agreements and siphon money from them. The PTAB provides recourse to this issue by allowing those who have not been sued yet to seek recourse before having to officially be sued.

If PREVAIL passes, NPEs and foreign entities will gain another advantage in efforts to target small businesses, which would have no viable recourse through PTAB proceedings.

The Realizing Engineering, Science, and Technology Opportunities by Restoring Exclusive (RESTORE) Patent Rights Act

S. 4840/H.R. 9221, the RESTORE Patent Rights Act, seeks to override the Supreme Court's unanimous 2006 *eBay* decision, which limits the availability of injunctive relief in patent cases where damages are more appropriate remedies for infringement. The bill would allow patent owners to block sales and shut down production without proving irreparable harm. The earlier U.S. Patent Acts deliberately separate legal and equitable remedies, requiring equitable remedies (like injunctions) to only be assessed after legal remedies have been exhausted. These laws were put in place because of a fear that equitable remedies could be misused and provide federal courts with more power than they should have.

On the issue of whether injunctions became too inaccessible after the *eBay* decision, the RESTORE Patent Rights Act sponsors' own data shows that for operating companies that actively manufacture / make products, the success rate was almost exactly the same post-*eBay*. For NPEs, the success rate decreased substantially. This evidence shows that small inventors were not affected, but aggressive licensors that exist only to maximize patent license fees were appropriately curtailed.

Some argue that small businesses have been harmed by *eBay*. This is false. In fact, the threat of injunction is used against small businesses to coerce them into unfavorable deals that set their business back, scare off investors, and, at times, force them to leave the market. Congress must not pass this bill and must support fair patent rights for inventors.