



CONGRESSIONAL INVENTIONS PROJECT

Patent Policy Primer



EXPLORING THE FOUNDATIONS
AND IMPACT OF U.S. PATENT LAW

JULY 2025

Throughout American history, patents and intellectual property have played a vital role in incentivizing innovation, growing our economy, and improving the quality of life and health of our citizens—indeed, for the whole world.

The American patent system proceeds from Article I, Section 8, Clause 8 of the U.S. Constitution. The Founders distinguished American patenting from the Old World by democratizing patents and granting them based on technological merit, rather than the inventor’s political or socioeconomic status. That is, Americans with ingenuity could obtain a patent on their inventions, whatever their walk of life. That included women before they had the right to vote and free blacks before slavery was ended.

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The Congressional Inventions Project (CIP) is a nonprofit dedicated to educating lawmakers, their staffs, and the public on issues related to invention, creators, inventors, and intellectual property.

Learn more at www.congressionalinventionsproject.org.

Patent Basics

A patent is essentially a deed on specific, newly invented property. The patent office examines a patent and determines if the subject matter is eligible for a patent and, if so, whether the invention is novel, useful, and “nonobvious.” If each of these criteria is met, then a patent also functions as an intangible asset. For instance, a patent can be used to secure private investment for its commercialization.

Patents secure rights of exclusivity over one’s invention or discovery for a limited time. This fulfills the Constitution’s purpose statement of “promot[ing] the progress of science and useful arts.”

Applying for a patent involves submitting a patent application, comprised of a description of the invention and the prior art, specific claims regarding the invention’s features and functionality, and its scope. The submitted patent application undergoes examination by a U.S. Patent and Trademark Office (PTO) examiner, who is skilled in the invention’s field of technology.

If granted, the patent owner has the right to exclude all others from using, making, selling, or importing their patent-protected invention. Meanwhile, others learn the details of the invention or discovery when the application is published. This disclosure enables others skilled in its useful art to invent around the patented invention.

This “patent bargain” allows the patent owner to reap commercial and other fruits and get a head start in developing a market before others can use it. And those learning from the patent can make technological improvements to the invention or create something that advances the state of the art.

When patent disputes arise, federal courts have been the primary forum for settling those disputes. Historically, courts treated patents and IP the same as other forms of property, including with Seventh Amendment rights to a jury trial and non-deferential appellate review.

Judicial rulings on upholding validity often gave patent owners quiet title to their inventions, which facilitates commercializing an invention and raising capital investment.

What can be patented?

Section 101 of the patent statute (Title 35 of the U.S. Code) is a threshold question regarding what constitutes subject matter that's eligible for a patent. The law says any new and useful machine, process, manufacture, composition of matter, or an improvement is subject matter eligible for a patent. (It must then meet the other criteria for patent protection to be granted a patent.)



How do patents protect inventions from infringement?

A patent owner may seek recourse for patent infringement through civil litigation in Federal Court should someone other than the patent owner make, use, sell, offer to sell or import into the U.S. the patented invention. It is through litigation that the court or jury determines whether the patent involved is valid and whether the patent owner has satisfactorily proven that the defendant has infringed the valid patent. Infringers who do so with knowledge can be deemed willful infringers.

For most of American history, proving patent infringement often led to a court issuing an injunction against the infringer, in addition to awarding other damages. Money compensates the patent owner for economic damages and, in the case of willful infringement, awards heightened damages. An injunction halts the proven infringer from continuing commercial activity, which would otherwise yield the proven infringer benefits from the ongoing use of the patented invention.

Thus, injunctions halt accrual of ill-gotten gains from the sale of knockoff products. They motivate an enjoined infringer to come to the negotiating table. There, the patent owner can pursue negotiation of royalties, licenses, etc., and the infringer is more likely to be eager to reach agreement quickly. Thus, the availability of injunctions levels the playing field and fosters fair dealings and royalty rates. This is especially so in asymmetric instances, where a big, deep-pocketed infringer is infringing a small or early-stage firm's patented invention. Secure, enforceable patent rights give meaning to the rights of patent exclusivity.



→ ***Narrowed patent eligibility***

In the past two decades, courts have created exceptions to the intentionally broad categories cited in section 101. Judicially created exceptions to patent eligibility have introduced great uncertainty as to what is and what is not patent-eligible. Eligibility of computer-enabled inventions and medical diagnostics are especially harmed.

PTO Director Andrei Iancu developed guidance to improve PTO's application of the mess from judicial rulings. In 2019, Senators Thom Tillis and Chris Coons, the leaders of the U.S. Senate Intellectual Property Subcommittee, convened extensive hearings on the crisis in patent eligibility jurisprudence and conducted stakeholder negotiations for several years to develop legislation.

→ ***Administrative patent validity challenges***

The 2011 America Invents Act (AIA) made a number of significant changes that have weakened patent reliability and patent rights. For the first time ever, the AIA injected into the American patent system adversarial, quasijudicial administrative proceedings at the PTO for challenging patent validity. The Patent Trial and Appeal Board (PTAB) conducts these proceedings, known as inter partes review and post grant review. Re-examination, which preexisted PTAB, remains a patent office process for amending issued patents.

The flaws and concerns of PTAB are too many to detail here, but the nature of the problems PTAB has caused are reflected in two contrasting statistics: Federal district court, where patent cases weigh patent validity under standard judicial rules of impartiality, due process, and fairness, invalidate around 40% of the patent claims challenged in court; PTAB proceedings invalidate 84% of the patent claims challenged and addressed there and a majority of the time, PTAB cancels all challenged claims in a patent. PTAB has fostered serial, parallel, and repeated challenges on the same patents by multiple parties potentially throughout the patent term. This prevents quiet title and enables gamesmanship by patent infringers and their allies.



→ ***Less likelihood of enjoining proven infringers***

Since 2006, following the U.S. Supreme Court's eBay v. MercExchange ruling, courts began to apply eBay based on Justice Kennedy's concurrence. eBay jurisprudence poses a high hurdle to obtaining injunction in patent infringement cases. This has resulted in a "categorical rule" of denying injunctive relief. The inability to effectively enforce one's patent rights benefits infringers while tying the hands of patent owners.

The much-reduced access to injunctions against proven infringers has facilitated the development of "efficient infringement," also called "predatory infringement." Coupled with PTAB's additional opportunities for pursuing challenges of issued patents' validity has led to multilayered, complex litigation strategies against patents. The practice has become common: infringe first, litigate ad nauseum, pay up later if you have to.

→ ***Nature of patent rights in question***

In 2018, the U.S. Supreme Court decided a landmark patent case, Oil States Energy Services v. Greene's Energy Group. In ruling that PTAB is constitutional, the court in the process threw the historical private property nature of patents into question. The Oil States court likened patents to a "public franchise."



→ ***IP and trade***

The United States leads the way promoting strong global IP protections. The World Trade Organization's (WTO) Trade-Related Aspects of Intellectual Property Rights (TRIPS) was a major achievement in strengthening global IP protection and enforcement by creating an international minimum standard for IP protection. The United States and other countries historically have promoted, implemented, and built on the global minimum standards of protection provided by TRIPS. However, contrary with global, regional, and bilateral agreements, many U.S. trading partners maintain significant barriers that harm American innovators.

For example, China requires foreign companies to transfer their technology and IP, partner with Chinese firms, etc. as conditions for market access. The European Union is finalizing legislation that would condition biopharmaceutical IP rights on market access factors. India maintains significant barriers to securing and enforcing IP. Many countries maintain localization policies to compel the manufacturing of patented products in that nation or compulsory licensing authorities to tilt the scales in favor of domestic firms. Other economies are plagued by regulatory backlogs that create very short patent terms. These and other foreign IP barriers unfairly limit U.S. exports of IP-intensive goods.

As the U.S. Government engages with its trading partners, including as part of any trade negotiations, urgent action is needed to address IP barriers hurting American innovators.

CURRENT PATENT ISSUES

→ *IP and antitrust*

Antitrust policy and patent law can bump heads. Antitrust promotes competition in static markets and on consumer welfare, while patents' exclusive rights promote dynamic competition by injecting disruptive technological advancements and creating new markets. Also, innovation's benefits serve consumer welfare. Generally speaking, antitrust poses an asymmetric hammer to nascent innovation that typically depends on patent and IP exclusivity. When antitrust becomes too strong or is misused against exclusive IP rights, the result is innovation, dynamic competition, and benefits to consumers and the economy being diminished.

Courts have begun adopting "New Madison Approach" (NMA) principles, particularly following the unanimous Ninth Circuit Court of Appeals ruling for Qualcomm against the Federal Trade Commission in 2019. NMA strikes a balance between these two areas of law. It recognizes that exercising IP rights is not per se anticompetitive conduct, that innovation spurs dynamic competition, that licensing terms and standards development are primarily contractual matters, and that antitrust enforcement shouldn't advantage technology implementers, who bore no up-front risk themselves in inventing the new technology, as the risk-taking innovators have.

ADDITIONAL RESOURCES

Articles, op-eds, and reports:

[Anything Under the Sun Made by Humans: Patent Law Doctrines As Endogenous Institutions for Commercializing Innovation](#)

[The U.S. Founders' Inventive Constitutional Brilliance](#)

[CRS: Patent-Eligible Subject Matter Reform: Background and Issues for Congress](#)

[When Apple Comes Calling, 'It's the Kiss of Death'](#)

[Why Big Tech Likes Weak IP](#)

[Infographic: Big Tech Companies Are Biggest Users of PTAB, 2012-2024](#)

[USIJ White Paper Shows How High-Profile PTAB Cases Could Have Panned Out Under PREVAIL Act](#)

[eBay, Its Effects, and the RESTORE Patent Rights Act](#)

[Understanding the Errors of eBay](#)

[Obtaining Injunctions Under eBay Versus at the International Trade Commission](#)

[A Look Into the Growing Reluctance to Fund Startups](#)

[AUTM & BIO: Economic Contributions of University/Nonprofit Inventions in the United States: 1996 – 2020](#)

[The Legacy of Bayh-Dole's Success on U.S. Global Competitiveness Today](#)

[Driving the Innovation Economy: Academic Technology Transfer In Numbers](#)

[NIST REPORT: A New "Great Game?": China's Role in International Standards for Emerging Technologies](#)

[Dave Kappos Authors Article on National Security and Intellectual Property Reform for the New York Law Journal](#)

[Property Rights: The Key to National Wealth and National Security; Restoring "Morning in America" to Regain Industrial Competitiveness](#)

[Statement of Professor Adam Mossoff on Oil States v. Greene's Energy](#)

[WTO Announces COVID Vaccine Waiver Deal That Virtually No One Wants](#)

[How Skeptics Misconstrue the Link Between Drug Prices and Innovation](#)

[U.S. Biomedical Leadership Threatened By NIH Licensing Guidelines](#)

[The History of Patent Licensing and Secondary Markets in Patents: An Antidote to False Rhetoric](#)

[What CFIUS Has Done the FTC Might Undo](#)

[Box Score on the New Madison Approach to Antitrust and Patents](#)

ADDITIONAL RESOURCES

Books:

Jonathan M. Barnett, *The Big Steal: Ideology, Interest, and the Undoing of Intellectual Property* (Oxford Univ., 2024).

Pat Choate, *Hot Property: The Stealing of Ideas in an Age of Globalization* (Alfred A. Knopf, 2005).

James R. Edwards Jr., *To Invent Is Divine: Creativity and Ownership* (Fidelis Publishing, 2025).

Stephen H. Haber and Naomi R. Lamoreaux, eds., *The Battle over Patents: History and Politics of Innovation* (Oxford Univ., 2021).

Zorina B. Khan, *The Democratization of Invention: Patents and Copyrights in American Economic Development* (Cambridge Univ., 2005).

