

Do injunctions for patents promote or impede innovation?

August 2020

tl;dr

Over the past 15 years, court decisions have weakened patent protections in the US. While some academics support such weakening, the evidence suggests that it may be having a detrimental effect on innovation.

The Debate:

Some academics argue that patent holders tend to charge excessive license fees to firms that implement their inventions, thereby impeding downstream innovation. The courts have responded by weakening the enforcement of patents in various ways, including by denying patent holders permanent injunctions.

But... by making it more difficult for patent holders to obtain injunctions, courts have effectively reduced the incentive for firms to invest in primary inventions. This has arguably had a stronger negative effect on overall rates of innovation.

KEY TAKEAWAYS

ECONOMISTS TEND TO VIEW STRONG PATENT PROTECTION AS AN IMPORTANT CONTRIBUTOR TO INNOVATION

Economists have for decades researched the role of patents. The mainstream view, based on both theory and evidence, is that for products and processes that are easily and inexpensively copied, the brief period of exclusively established by a patent enables innovators to reap a return on their investment that otherwise would not be possible.

BUT SOME ECONOMISTS HAVE RAISED CONCERNS ABOUT PATENTS ON TECHNOLOGIES THAT ARE ESSENTIAL TO STANDARDS

Some economists have argued that patents confer too much power, especially when those patents are essential to a technical standard (like WiFi or Bluetooth). In such circumstances, these critics assert, patent holders may “[hold up](#)” implementers by charging excessive license fees, especially when there are multiple patents involved (which allegedly leads to the related problem of “royalty stacking”). The critics specifically point to the awarding of permanent injunctions to patent holders as a driver of this problem.

NEVERTHELESS, INJUNCTIONS ARE A KEY FACTOR IN PATENT ENFORCEMENT

If a patent owner obtains a permanent injunction against an implementer, that implementer is forbidden from producing technologies that incorporate the patent unless they make an agreement with the patent owner. Injunctions are preferable to damages because it is very difficult for courts to calculate the damages associated with ongoing patent infringement due to the unique nature of each patent.

THE COURTS IN THE U.S. HAVE WEAKENED PATENT ENFORCEMENT

Starting about 15 years ago, U.S. courts began to weaken enforcement of patents, seemingly in line with the arguments made by critics. Most notably, in the 2006 case *eBay Inc. v. MercExchange, LLC*, the Supreme Court significantly narrowed the circumstances under which a patent holder could obtain a permanent injunction. This led lower courts to grant fewer permanent injunctions in patent litigation suits.

BY WEAKENING PATENT ENFORCEABILITY, THESE DECISIONS HAVE LIKELY IMPEDED INNOVATION

This has actually inverted the power dynamic, contrary to what critics of patent enforcement may allege. Implementers now routinely refuse to license patents on the terms offered by patent holders. Instead, they “hold out” for a better deal and in the meantime incorporate the patented technology in their products without paying the patent holder. They do so knowing that the patent holder either will not engage in the lengthy, expensive and uncertain process of suing them, or, if they do, the courts will simply award monetary damages to compensate for lost revenue from failure to pay the license fee (and, in some cases, lost profits).

This hold out effect has the perverse consequence of reducing the incentives of upstream innovators to develop new standard-essential technologies.

COURTS SHOULD PAY MORE ATTENTION TO THE HOLD OUT PROBLEM CREATED BY WEAK ENFORCEMENT

While the empirical evidence [does not support](#) the holdup theory, there is increasing [support](#) for the existence of holdout, with its attendant problems. Hopefully, the courts will pay attention to this evidence and improve the enforcement of patents, including by broadening the circumstances under which injunctions are awarded.

For a fuller explanation of these and related issues, see [“The Deterioration of Appropriate Remedies in Patent Disputes”](#) and [“Governing the Patent Commons”](#), both by Dirk Auer and Julian Morris.

CONTACT US



Julian Morris
Senior Scholar
jmorris@laweconcenter.org



Dirk Auer
Senior Fellow,
Law & Economics
dauer@laweconcenter.org



International Center
for Law & Economics