

The Patent Industry Versus eBay

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Patent industry insiders are lobbying Congress to liberalize access to patent injunctions based on claims that the Supreme Court changed the law in *eBay Inc. v. MercExchange, L.L.C.* These claims are misleading, at best. Congress never authorized liberal or presumed access to injunctive relief for patent infringement. Instead, Congress denied patent injunctions for three decades before eventually permitting them in exceptional cases. The patent industry changed the law, however, by convincing sympathetic jurists to adopt new injunction standards favored by the patent bar. From this perspective, *eBay* merely restored statutory limitations on patent injunctions. Nonetheless, the anti-*eBay* movement has convinced several lawmakers to reject a unanimous Supreme Court and abandon centuries of congressional policy. How? The same way the patent industry convinced Congress to reverse other statutory limitations on patent remedies in 1819, 1870, and 1922. Although rarely admitted publicly, the American patent industry has influenced, controlled, and nullified legislative and judicial regulation of patent remedies for over two centuries. Thanks to this history, patent remedies and patent industry self-regulation are now inseparable topics. Every statute, every case, and every precept from the history of American patent remedies compels the same question: did regulatory capture prevail over legal authority? The anti-*eBay* movement avoids this question by paltering narratives about life before *eBay* without disclosing patent industry control over pre-*eBay* injunction policy. This Article reunites the history of American patent injunctions with the history of patent industry self-regulation to explain why *eBay* is both legally correct and the target of patent industry attacks.