
Make America Great Again? With Special Emphasis on Tariffs and IPR Issues

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The US is in conflict with China over various trade issues. Although both countries agreed to temporarily suspend tariffs for the next 90 days, this trend is expected to continue after then. New related to tariffs has been a daily occurrence in the first 100 days of the Trump presidency, and yet a gap remains between the US and China that is difficult to bridge. This seems to stem from the fact that President Trump wants to “Make America Great Again” with a vengeance. In addition to implementing a new tariff system, the US seems to be moving towards supporting “strong patents” to safeguard intellectual property rights. These policies will significantly impact both the US and other nations worldwide. This article explores the external developments in the aftermath of the US presidential election and reviews current issues related to intellectual property in the US, focusing on tariff imposition and the prevailing emphasis on strong patent rights.

Keywords

MAGA, Trump 2.0, Protectionism, Tariff War, IPRs, Stronger Patent

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All the websites cited in this article were last visited on May 8, 2025.

1. Introduction

More than 100 days have passed since Donald Trump began his second term as president. On Trump's first day, he issued dozens of executive orders on issues ranging from immigration to tariffs under his policy agenda of "Make America Great Again" (MAGA).¹ President Trump will likely continue to take an "America First" approach to foreign relations, as he did during his first presidency. In his most recent presidential campaign, Trump spoke out strongly against China's unfair trade practices, particularly targeting intellectual property infringement.² He threatened harsher public sanctions if re-elected, and he is now making good on those threats. Because national security is an important factor in the US trade policy, Trump is likely to return to a strategy that maximizes the US economic interests while pursuing interventionist policies.³

The Trump administration's signature slogan during its first presidency was "America First," indicating a policy approach that echoed the economic nationalism of the 1930s, when protectionism peaked just before World War II.⁴ This rhetoric is likely to be even more pronounced in the second Trump administration than in the first. This radical change in the US administration may significantly impact its allies. Countries with large trade surpluses with the US, including Japan, South Korea, Vietnam, etc. fear trade friction with the US. Especially regarding intellectual property rights, the US has traditionally maintained a strong policy stance, with China as the main target. In addition to China's unfair trade practices, intellectual property infringement has been a major reason for the US to impose tariffs. Although both countries agreed to temporarily suspend tariffs for the next 90 days, this trend is expected to continue after then.

Against this backdrop, this essay aims to discuss the state of intellectual property rights during the first 100 days of President Trump's second term. Making America "Great Again" involves not only trade measures such as tariffs, but also a renewed emphasis on the protection of intellectual property rights, implying a resurgence of

1 See *What executive orders did Trump sign on day one?*, GUARDIAN (Jan. 21, 2025), <https://www.theguardian.com/us-news/2025/jan/20/tump-executive-orders-list>.

2 Ana Swanson, *Trump Administration Tallies Trade Barriers That Could Prompt Tariffs*, N. Y. TIMES (Mar. 13, 2025), <https://www.nytimes.com/2025/03/31/business/economy/ustr-report-trade-barriers.html>.

3 Stuart Malawer, *Tariffs and Trade: Tension with China and the Run-Up to the 2024 US Presidential Election*, 17 J. EAST ASIA & INT'L L. 462 (2024).

4 Daniel Chow & Ian Sheldon, *Understanding the economic and political effects of Trump's China tariffs*, 12 WM. & MARY BUS. L. REV. 285 (2021).

strong patent rights. Therefore, the manuscript examines how Trump administration's commitment to a "Great America" is manifested in the realm of intellectual property rights.

2. Recent Hardline of the US Tariff Policy

Since his inauguration, President Trump has tried to correct unfair practices in the trading of goods. He announced plans to impose a 25% tariff on all goods entering the US from Mexico and Canada, as well as an additional 10% tariff on Chinese imports.⁵ He also tweeted that a new External Revenue Service would be established to collect all revenues, including tariffs.⁶ In addition, President Trump has stated that he would consider using military force to bring Greenland US control and proposed renaming the Gulf of Mexico to the Gulf of America, demonstrating his American-centeredness.⁷

Recently, the Trump administration announced that 145% tariffs would be imposed on Chinese exports to the US.⁸ Later, the administration said it was considering regarding some of the tariffs by more than half. However, it has maintained a hardline stance, stating that it will not lift tariffs unless China opens its markets.⁹

In its first term, the Trump administration imposed a 25% tariff on Chinese steel

5 Donald J. Trump (@realDonaldTrump) | Truth Social (Feb. 2, 2025).

"Today, I have implemented a 25% Tariff on Imports from Mexico and Canada (10% on Canadian Energy), and a 10% additional Tariff on China. This was done through the International Emergency Economic Powers Act (IEEPA) because of the major threat of illegal aliens and deadly drugs killing our Citizens, including fentanyl. We need to protect Americans, and it is my duty as President to ensure the safety of all. I made a promise on my Campaign to stop the flood of illegal aliens and drugs from pouring across our Borders, and Americans overwhelmingly voted in favor of it."

6 Donald J. Trump (@realDonaldTrump) | Truth Social (Jan. 15, 2025).

"For far too long, we have relied on taxing our Great People using the Internal Revenue Service (IRS). Through soft and pathetically weak Trade agreements, the American Economy has delivered growth and prosperity to the World, while taxing ourselves. It is time for that to change. I am today announcing that I will create the EXTERNAL REVENUE SERVICE to collect our Tariffs, Duties, and all Revenue that come from Foreign sources. We will begin charging those that make money off of us with Trade, and they will start paying, FINALLY, their fair share. January 20, 2025, will be the birth date of the External Revenue Service. MAKE AMERICA GREAT AGAIN!"

7 *The world faces its worst trade wars since the 1930s*, ECONOMIST (Nov. 7, 2024), <https://www.economist.com/international/2024/11/07/the-world-faces-its-worst-trade-wars-since-the-1930s>. ("history shows many examples of protectionists causing economic chaos.").

8 Jennifer Clarke, *What are tariffs and why is Trump using them?*, BBC NEWS (Apr. 23, 2025), <https://www.bbc.com/news/articles/cn93e12ryppo>.

9 Meridith McGraw, *Trump Wants Something 'Substantial' From China to Lower Tariffs*, WALL ST. J. (Apr. 25, 2025), <https://www.wsj.com/livecoverage/trump-tariffs-stock-market-trade-war-04-25-2025/card/trump-wants-something-substantial-from-china-to-lower-tariffs49UsBBf6TyFv2UpDR8E>.

and a 10% tariff on aluminum, citing trade imbalances as the rationale. While this triggered domestic controversy over protectionist policies, it ultimately did not lead to a full-fledged trade war.¹⁰ However, the second Trump administration has taken a more aggressive approach to tariffs.¹¹ The US claims that these measures are aimed at directly addressing trade deficits rather than simply correcting trade imbalances.¹² The US tariff war with China and other countries has caused serious conflicts between the parties.

In President Trump's first term, the US also imposed tariffs on imports from China and other countries, but the legal basis for such measures differs from that of the current context. In his first term, he used Section 301 of the Trade Act of 1974 and Section 232 of the Trade Expansion Act of 1962 to impose sweeping tariffs on Chinese goods, as well as on steel and aluminum products. This time, however, tariffs were implemented as a response to a "national emergency" under the International Emergency Economic Powers Act (IEEPA), which was passed in 1977.¹³ Naturally, this gives rise to questions about legal elements and authority regarding what constitutes a national emergency under which the President may impose such tariffs.

Trump invoked the IEEPA to impose the tariffs, but the legality of this action is debatable. The IEEPA allows the president to declare a "national emergency" when he determines that "any unusual and extraordinary threat" originating outside the US affects national security, foreign policy, or the economy. Congress and the courts are the only branches of the agreement that can stop the president's executive orders. However, Congress is unlikely to do so, given the current Republican majority in both houses and Trump's high approval ratings. In addition, the courts have refrained from judicial review of actions under the IEEPA because they are "highly political acts of the president."¹⁴ Therefore, domestically stopping the tariffs is difficult. The Trump administration's choice to declare a "national emergency" and impose sweeping

10 Wyatt Grantham-Philips, *Trump's tariffs have launched global trade wars. Here's a timeline of how we got here*, AP NEWS (Apr. 30, 2025), <https://apnews.com/article/tariffs-timeline-trade-war-trump-canada-mexico-china-a9d714eca677488ef9397547d838dbd0>.

11 Anna Swanson, *Trump Has Added 145% Tariff to China, White House Clarifies*, N. Y. TIMES (Apr. 10, 2025), <https://www.nytimes.com/2025/04/10/business/economy/china-tariffs-145-percent.html>.

12 The White House, *Regulating Imports with a Reciprocal Tariff to Rectify Trade Practices that Contribute to Large and Persistent Annual United States Goods Trade Deficits* (Apr. 2, 2025), <https://www.whitehouse.gov/presidential-actions/2025/04/regulating-imports-with-a-reciprocal-tariff-to-rectify-trade-practices-that-contribute-to-large-and-persistent-annual-united-states-goods-trade-deficits>.

13 Christopher Yukins et al., *FEATURE COMMENT: President Trump and Tariffs-The Procurement Exception*, 67:7 Gov. CONTRACTOR 3 (Feb. 19, 2025), https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=3036&context=faculty_publications.

14 See, e.g., *Regan v. Wald*, 468 U.S. 222 (1984).

tariffs on all products without scrutiny from some countries is much simpler than imposing tariffs on specific industries or sectors based on evidence under the Section 301 of the Trade Act or Section 232 of the Trade Expansion Act of 1962.¹⁵

3. The US Position on Intellectual Property Rights

Intellectual property rights (IPRs) play a positive role in encouraging technological innovation. IPRs provide companies with incentives to invest in highly innovative R&D projects that are difficult and costly, such as medicines,¹⁶ and further require companies to be open about their patent applications in exchange for market exclusivity.¹⁷

The US has traditionally taken a strongly protective stance on IPRs to foster innovation and economic growth and to protect the rights of businesses and individual creators. For example, Section 301 of the US Trade Act of 1988 regulates the investigation and enforcement of IPRs.¹⁸ It authorizes the United States Trade Representative, at the direction of the President, to impose import restrictions such as tariffs or quotas in response to a foreign government's violation of a trade agreement or unfair, unjust, unreasonable, or discriminatory trade practices that burden or restrain US trade.

The first Trump administration imposed high tariffs under Section 301 of the Trade Act, citing China's a variety of unfair acts and unauthorized access to intellectual property rights as the justification.¹⁹ This is why IPR has been deeply embedded in the fabric of the US trade policy.²⁰ The America First policy is inconsistent with multilateralism.²¹ While the US-centric intellectual property policies help foster

15 Achyuth Anil, *Chaos theory: Assessing the legal validity of Trump's tariffs*, VOXEU COLUMN (Feb. 12, 2025), <https://cepr.org/voxeu/columns/chaos-theory-assessing-legal-validity-trumps-tariffs>.

16 Pedro Cunha Neves et al., *The link between intellectual property rights, innovation, and growth: A meta-analysis*, 97 ECON. MODELLING 196-209 (2021).

17 Kristina Acri & née Lybecker, *Economic Growth and Prosperity Stem from Effective Intellectual Property rights*, 24 GEO. MASON L. REV. 867 (2017).

18 USTR, 2024 Special 301 Report, <https://ustr.gov/sites/default/files/2024%20Special%20301%20Report.pdf>.

19 USTR, President Trump Announces Strong Actions to Address China's Unfair Trade (Mar. 22, 2018), <https://ustr.gov/about-us/policy-offices/press-office/pressreleases/2018/march/president-trump-announces-strong>.

20 Shayerah I. Akhtar and Liana Wong, Intellectual Property Rights (IPR) and U.S. Trade Policy (Jan. 17, 2025), CRS Reports, <https://www.congress.gov/crs-product/IF10033>.

21 Mireya Solís, 'America First' is a losing strategy on trade (Oct 24, 2017), Brookings Commentary, <https://www.brookings.edu/articles/america-first-is-a-losing-strategy-on-trade>.

domestic industries, they also offer a justification for imposing tariffs in response to foreign intellectual property infringements. However, there have been a series of events that have led to the erosion of patent holders' rights in the US.

A. Invalidation of Patents due to the Inter Partes Review Process

The American Invention Act introduced the Inter Partes Review (IPR) process as a procedure for invalidating patents.²² This IPR process has enabled the Patent Trial and Appeal Board (PTAB) to reexamine the validity of patents, leading many to be invalidated. IPRs, which can be filed by anyone, at any time, and for any amount of time after nine months of patent registration, have become a popular way for patent infringers to delay litigation and prevent the enforcement of patent rights by filing invalidity suits.²³

B. Restrictions on Granting Permanent Injunctions in Patent Infringement Cases

Prior to the US Supreme Court's 2006 decision in *eBay Inc. v. MercExchange*, the courts used to issue permanent injunctions almost automatically when a patent holder won a patent infringement lawsuit.²⁴ These injunctions prohibited the infringer from producing or selling its products or services.

After the eBay decision, even if a patent holder wins an infringement case, they are no longer automatically entitled to a permanent injunction. The Supreme Court ruled that even if infringement occurs: 1) the patent holder has suffered irreparable harm; 2) remedies at law, such as monetary damages, are inadequate to compensate the plaintiff for the harm; 3) an injunction is appropriate when the plaintiff's benefit from that is weighed against the defendant's harm; and 4) the effect of the injunction on the public interest must be considered.²⁵ This decision has increased the number of

22 An Inter Partes Review (IPR) is a US Patent and Trademark Office (USPTO) proceeding where a third party challenges the patentability of one or more claims in an issued patent, focusing on novelty (35 U.S.C. § 102) and/or obviousness (35 U.S.C. § 103) based on prior art in patents or printed publications. This process, established by the America Invents Act, provides an alternative to court litigation for patent validity challenges.

23 W. Michael Schuster, *Invalidity Assertion Entities and Inter Partes Review: Rent Seeking as a Tool to Discourage Patent Trolls*, 51 WAKE FOREST L. REV. 1772-4 (2016).

24 *eBay, Inc. v. MercExchange, LLC.*, 547 U.S. 388 (2006). The District Court denied respondent's motion for permanent injunctive relief. In reversing, the Federal Circuit applied its "general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances." The Supreme Court unanimously reversed the Federal Circuit, holding that there is no automatic right to a permanent injunction in patent cases.

25 Stacy Streur, *The eBay Effect: Tougher Standards but Courts Return to the Prior Practice of Granting Injunctions for Patent Infringement*, 8 NW. J. TECH. & INTELL. PROP. 72-3 (2009).

cases where infringers are allowed to continue selling their products, weakening the bargaining power of patent holders.

C. Uncertainty in Patent Eligibility Standards

Since the Supreme Court's 2014 decision in *Alice Corp. v. CLS Bank*,²⁶ the eligibility criteria for software and business method patents have become ambiguous. This decision has led to many patents being deemed "abstract ideas" and invalidated, raising concerns about stifling innovation. In *Alice*, the Supreme Court ruled that patent eligibility should be determined by whether a claim involves an abstract idea and whether it contains a sufficient "inventive concept" to be patentable.²⁷

This ruling established a stricter standard than before.

4. The US Shift towards "Stronger Patents"

In highly industrialized countries, robust intellectual property regimes and R&D investments tend to correlate positively. For example, a study examining the relationship between IP and economic growth by analyzing data from 60 countries between 1960 and 1990 concluded that IP "affects economic growth by stimulating the accumulation of factor inputs such as research and development capital and physical capital."²⁸ Trump 2.0 is expected to be more aggressive in protecting IP in the US. While IP regulations will be relaxed for domestic companies, a tougher stance will be taken against China's IP theft and infringement.

A. Strengthening Patent Rights in the US

Today, three bills aimed at strengthening the rights of patent holders are under consideration in Congress: (1) the Promoting and Respecting Economically Vital

26 *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014). The Supreme Court issued a unanimous decision in *Alice*, holding all claims in patents for a computer-implemented scheme for mitigating settlement risk invalid as drawn to an abstract idea, ineligible for patent protection under 35 U.S.C. §101.

27 Paul Gugliuzza, *The Procedure of Patent Eligibility*, 97 TEX. L. REV. 573 (2018); Hung H. Bui, *A Common Sense Approach to implement the supreme Court's Alice Two-Step Framework to Provide "Certainty" and "Predictability,"* 100 J. PAT. & TRADEMARK OFFICE SOC. 247-8 (2018).

28 Maureen Ohlhausen, *Strong Patent Rights, Strong Economy*, US Federal Trade Commission 11 (Oct. 13, 2017), https://www.ftc.gov/system/files/documents/public_statements/1264483/ohlhausen_-_hillsdale_speech_10-13-17.pdf.

American Innovation Leadership Act (PREVAIL); (2) the Realizing Engineering, Science, and Technology Opportunities by Restoring Exclusive Patent Rights Act (RESTORE); and (3) the Patent Eligibility Restoration Act (PERA).²⁹ If passed, these bills would further strengthen patent protection in the US.³⁰

1. PREVAIL³¹

PREVAIL aims to protect America's innovation environment and create a patent system that levels the playing field for small businesses and individual inventors.³² The bill strictly limits the eligibility and number of claims in IPR and post-grant review proceedings of patent invalidity reviews. PREVAIL stipulates that only those who have been warned of or sued for patent infringement can file an invalidation suit; an invalidity action cannot be brought before the federal district court or the International Trade Commission against a patent once the patent has been subjected to inter partes review; "exceptional circumstances" must be demonstrated to reuse evidence or arguments previously presented to the PTAB in an IPR; "clear and convincing evidence" rather than the "preponderance of evidence" must be demonstrated to prove patent invalidity; and fees collected by the United States Patent and Trademark Office (USPTO) must be exclusively used for the agency's activities.³³ Currently, patents are more likely to be invalidated in patent invalidation proceedings³⁴ because the standard of proof for patent invalidation is "preponderance of evidence," which is much lower than the "clear and convincing evidence" standard in federal courts. The

29 S. 2220 (118th): PREVAIL Act, <https://www.govtrack.us/congress/bills/118/s2220>; H.R. 9221 (118th): RESTORE Patent Rights Act of 2024, <https://www.govtrack.us/congress/bills/118/hr9221>; S. 2140 (118th): Patent Eligibility Restoration Act of 2023, <https://www.govtrack.us/congress/bills/118/s2140>. (as of May 3). Although the bills expired at the close of the 118th Congress, these bills are expected to be reconsidered during the 119th Congress. See, e.g., Senators Tillis, Coons and Others Reinroduce PERA and PREVAIL Act in Congress; Steve Brachmann, *Other Barks & Bites for Friday, May 2: PERA and PREVAIL Act Reintroduced in Congress*, IP WATCHDOG (May 2, 2025), <https://ipwatchdog.com/2025/05/02/barks-bites-ustr-moves-mexico-priority-watch-list-special-301-report-fourth-circuit-affirms-cafcsexclusiv/id=188629>.

30 Manny Caixeiro & Elizabeth Manno, *The Trump administration's approach to patent rights and enforcement comes into focus*, Venable LLP (Apr. 15, 2025), [https://today.westlaw.com/Document/Ida4e0a951a0d11f09e609104f45b2731/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0&firstPage=true&bhcp=1&CobaltRefresh=67394](https://today.westlaw.com/Document/Ida4e0a951a0d11f09e609104f45b2731/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0&firstPage=true&bhcp=1&CobaltRefresh=67394).

31 PREVAIL Act, https://www.coons.senate.gov/imo/media/doc/prevail_act_bill_text1.pdf.

32 The Prevail Act Will Help Ensure U.S. Global Technology Leadership and Protect Economic and National Security, https://www.coons.senate.gov/imo/media/doc/prevail_act_fact_sheet.pdf. ("China's extensive investments" in "strengthening its intellectual property" system has "enabled it to catch up to, and in some areas surpass, our capabilities in [AI] and other emerging technologies.")

33 PREVAIL Act, §§ 3-7.

34 Eighty percent of instituted PTAB proceedings that reach a final written decision result in the invalidation of at least one challenged patent claim, and two-thirds of those proceedings result in the invalidation of all challenged patent claims.

proposed bill would raise the burden of proof for patent invalidity.³⁵

2. RESTORE³⁶

For most of the American history, judgments of patent infringement have typically resulted in injunctions prohibiting continuous infringement. However, this prevailing approach was reversed by the US Supreme Court's 2006 decision in *eBay Inc. v. MercExchange*, which is considered the first major step in the erosion of patent holders' rights over the past two decades.³⁷ In this regard, the RESTORE Act is expected to restore the US patent system to the pre-eBay state.

RESTORE allows for a rebuttable injunction to be granted to a patentee upon a finding of patent infringement under the principles of equity. In other words, if a court issues a final judgment of patent infringement, the patentee is recognized as having a presumptive right to a permanent injunction against the defendant's infringing activities, which would give the patentee a powerful weapon to seek redress if their patent rights are infringed.³⁸

3. PERA³⁹

The legislation follows the US Supreme Court's pronouncements in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.* (2012)⁴⁰ and *Alice Corp. v. CLS Bank International* (2014).⁴¹ In these cases, the Supreme Court ruled that patents on software, biological discoveries, and other innovations had been severely restricted in the US, harming innovation and technological advancement.⁴² Currently,

35 Chris Borges & Alexander Kersten, *New Efforts to Promote US Innovation: The PERA and PREVAIL Act in Context*, CSIS (2023. 12. 11), <https://www.csis.org/analysis/new-efforts-promote-us-innovation-pera-and-prevail-act-context>.

36 H.R.1574 (119th): RESTORE Patent Rights Act of 2025, <http://www.congress.gov/bill/119th-congress/house-bill/1574/text>.

37 Elizabeth Millard, *Injunctive Relief in Patent Infringement Cases: Should Courts Apply a Rebuttable Presumption of Irreparable Harm after eBay Inc. v. Mercexchange, L.L.C?*, 52 ST. LOUIS U. L.J. 1023-4 (2008), <https://scholarship.law.slu.edu/cgi/viewcontent.cgi?article=1622&context=lj>.

38 Adam Mossoff, *Restoring the American Innovation Engine: Congress Should Consider Enacting the RESTORE Patent Rights Act*, 364 LEGAL MEMO. (Dec. 5, 2024), <https://www.heritage.org/economic-and-property-rights/report/restoring-the-american-innovation-engine-congress-should>.

39 S-1546: Patent Eligibility Restoration Act of 2025, <https://www.congress.gov/bill/119th-congress/senate-bill/1546/text/is?overview=closed&format=xml>.

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

41 *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014).

42 As with copyright law, patent law gradually expanded throughout the 19th and 20th centuries to encompass a broader range of inventions. For example, as technology evolved, the concept of invention came to include industrial designs, plant inventions, surgical procedures, and software. For details, see William Fisher, *The Growth of Intellectual Property: - A History of the Ownership of Ideas in the United States*, Berkman Klein Center, <https://cyber.harvard.edu/people/tfisher/iphistory.pdf>.

Section 101 of the US Patent Act allows anyone who invents or discovers any new and useful article of manufacture, machine, process, or composition of matter to obtain a patent. The USPTO's Manual of Patent Examination Procedure contains a judicial exception that excludes laws of nature, natural phenomena, and abstract ideas from patentability based on Supreme Court precedent.⁴³ Unfortunately, this exception has been criticized for being applied too strictly to software and biotechnology, stifling the development of artificial intelligence and new materials, and negatively impacting technological progress and innovation.⁴⁴

PERA eliminates exemptions of laws of nature, natural phenomena, and abstract ideas from patent eligibility and stipulates that any useful invention or discovery is patentable. However, it excludes from patent eligibility simple mathematical formulas not presented as part of a useful method, machine, article, or compound; mental processes that exist only in the human mind; unmodified genes in their natural forms in the human body; unmodified materials in their natural forms in nature; and business or artistic processes that can be implemented without the aid of a computer or other devices.⁴⁵

If enforced, PERA will significantly expand the scope of patent-eligible subject matter by removing exceptions that make patent protection challenging and granting patents that are currently patentable only under limited conditions. If implemented together with PREVAIL, which regulates patent invalidation proceedings, PERA will make invalidating patents more difficult, thereby providing patent holders with increased protection.⁴⁶

B. “New Madison Approach” with a Strong Property Rights Focus

When a patent holder with a standard-essential patent (SEP)⁴⁷ offers a license, it must be fair, reasonable, and non-discriminatory (FRAND). According to the so-called

43 USPTO's Manual of Patent Examination Procedure, 2106.04 Eligibility Step 2A: Whether a Claim is Directed to a Judicial Exception [R-07.2022], https://www.uspto.gov/web/offices/pac/mpep/s2106.html#ch2100_d29a1b_139db_e0.

44 Kevin Hickey, *Patent-Eligible Subject Matter Reform: Background and Issues for Congress*, CRS Report 45918 (Mar. 31, 2025), <https://www.congress.gov/crs-product/R45918>.

45 Patent Eligibility Restoration Act, § 2(5)(D).

46 Chris Borges & Alexander Kersten, *New Efforts to Promote U.S. Innovation: The PERA and PREVAIL Act in Context*, CSIS Report (Dec. 11, 2023), <https://www.csis.org/analysis/new-efforts-promote-us-innovation-pera-and-prevail-act-context>.

47 A Standard Essential Patent (SEP) aims to protect an invention essential to the implementation of a particular technology standard. These standards are critical for ensuring safety, interoperability and compatibility of different products and services made available by various companies, <https://www.wipo.int/en/web/patents/topics/sep>.

“New Madison Approach,”⁴⁸ the following principles are implied. First, it recognizes the injunctive rights of SEP holders, i.e., SEP holders can seek injunctions against patent infringement and should receive the same legal protection as other non-SEP holders. Second, it interprets the obligations under the FRAND principle narrowly. While SEP holders must adhere to the FRAND principle when offering licenses, the New Madison Approach interprets adherence in a way that does not limit the SEP holder’s right to refuse to license or to seek injunctions.⁴⁹

While the Obama Administration advocated a cautious approach to injunction requests by the SEP holders, as outlined in its Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments, the first Trump Administration issued guidance that followed the New Madison Approach. The Biden administration rescinded this guidance, but the second Trump administration is expected to reinstate.

C. Bayh-Dole March-in Rights under the Bayh-Dole Act⁵⁰

The Bayh-Dole Act allows non-profit organizations and small businesses to acquire and commercialize patent rights to technologies developed with “government funds” in the US.⁵¹ The first Trump administration focused on protecting patent holders’ property rights with the belief that government intervention in drug pricing or commercialization terms could stifle technology transfer and innovation.⁵² However, the Biden administration sought to balance public welfare with the goal of commercializing technology by strengthening consumer access and public interest considerations.⁵³ The current Trump administration is expected to revert to the status quo.

48 Makan Delrahim, Assistant Attorney Gen., Antitrust Div. of U.S. Dep’t of Justice, The “New Madison” Approach to Antitrust and Intellectual Property Law, Address before the University of Pennsylvania Law School (Mar. 16, 2018), <https://www.justice.gov/archives/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-university>.

49 J. Gregory Sidak, *The Meaning of Frand, Part II: Injunctions*, 11:1 J. COMPETITION L. & ECON. 215 (2015).

50 A&O Shearman, Election Results Are In-Here’s How IP Disputes Policy May Change, IP Litigation Blog (Nov. 12, 2024), <https://www.lexology.com/library/detail.aspx?g=5a2797dc-615d-4d14-9111-d00422dfd533>.

51 Irwin Aisenberg & Jerry Cohen, *Modern Patent Law Precedent*, 25th ed. (Dec. 2024 Update).

52 Christopher Rowland, *Trump gave drug companies a last-minute win on prescription prices. Democrats want Biden to roll it back*, WASH. POST (Mar. 31, 2021), <https://www.washingtonpost.com/business/2021/03/31/biden-drug-prices-trump/>.

53 The White House, Fact Sheet: Biden- Harris Administration Announces Commitments from Across Technology Ecosystem including Nearly \$100 Million to Advance Public Interest Technology (July 16, 2024), <https://bidenwhitehouse.archives.gov/ostp/news-updates/2024/07/16/fact-sheet-biden-harris-administration-announces-commitments-from-across-technology-ecosystem-including-nearly-100-million-to-advance-public-interest-technology>.

5. Conclusion

The US has a strongly domestic-centered trade order and intellectual property protection strategy. Consequently, the US is likely to push harder than ever to protect its own companies and technologies by imposing strong tariffs and granting strong patent rights to patent holders. In addition, the US is negotiating new trade deals with countries. However, the negotiations with Japan, for example, appear strained, with defense spending commitments being raised in discussing tariffs.⁵⁴ The US-China negotiations are facing difficulties.

As evident in his tariff policy, Trump is willing to bend the rules of morality and law to serve his country's interests. This willingness is likely to extend to efforts toward strengthening patent rights. The US's desire to maintain its technological leadership by securing its own technological advantages is likely to take on a stronger shape, especially in the face of China's technological development. However, stronger protection of patent rights may lead to an increase in patent infringement lawsuits and unnecessary friction with other countries. It remains to be seen how negotiations with China will unfold, which direction the US tariff policy will take toward other countries, and whether the policy of emphasizing IPRs as a way to "Make America Great Again" will persist.

Received: March 1, 2025

Modified: April 10, 2025

Accepted: May 1, 2025

54 Editorial, *Japan must continue facing up to Trump's wild distortions*, ASAHI SHIMBUN DAILY (Apr. 21, 2025), <https://www.asahi.com/ajw/articles/15718619>.