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Smartphone Wars: Emphasizing eBay’s First Two Factors in Smartphone Patent Injunctions

Christianna Edrington*

Six years ago, computers and mobile phones collided, creating smartphones, phones that act as minicomputers, allowing users to email and access the web straight from their mobile phones.¹ The \$200 billion smartphone industry creates a cutthroat dynamic for manufacturers, where each manufacturer is constantly striving to give themselves an edge over their competition.² Currently, smartphone manufacturers are engaged in heavy litigation, asserting their right to their innovations. Smartphone manufacturers are filing these lawsuits to keep their competitors from utilizing their technology, in an attempt to retain their edge.³ Steve Jobs, co-founder, former CEO and Chairman of Apple Inc. (“Apple”), is quoted as saying “I will spend my last dying breath if I need to, and I will spend every penny of Apple’s \$40 billion in the bank to right this wrong. I’m going to destroy Android, because it’s a stolen product. I’m willing to go thermonuclear war on this.”⁴

The competition is fierce for market share between smartphone manufacturers. The foundation of a smartphone is its operating platform.⁵ Smartphone platforms manage the hardware and software resources of the phone,⁶ making the technology user friendly. In 2013, for the first time in market history, it has been forecast that more smartphones will be shipped globally than feature

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¹ Ashby Jones & Jessica E. Vascellaro, *Smartphone Patents: The Never-Ending War*, WALL ST. J. (Apr. 12, 2012, 9:51 PM), <http://online.wsj.com/article/SB10001424052702303624004577339931560320116.html>.

² *Id.*

³ *Id.*

⁴ Erica Ogg, *Steve Jobs “Vowed” to Destroy Android*, GIGAOM (Oct. 21, 2011, 6:56 AM), <http://gigaom.com/2011/10/21/steve-jobs-vowed-to-destroy-android/>.

⁵ Dave Coustan & Jonathan Strickland, *How Smartphones Work*, HOW STUFF WORKS, <http://electronics.howstuffworks.com/smartphone2.htm> (last visited Apr. 8, 2013).

⁶ *Id.*

phones.⁷ Android and iOS combined for 91.1% of all smartphone shipments during the fourth quarter of 2012.⁸ The smartphone industry is at a critical juncture as more first time buyers are entering the market. Smartphone manufacturers are in a platform competition, with “winner-take-all” stakes.⁹ Developers focus their efforts on the platform with the most users, which is not necessarily the best platform, leaving the less popular platform to struggle.¹⁰

Smartphone war is the unofficial term for the immense patent litigation between smartphone manufacturers. In 2012 alone, Apple was a party to over 150 Intellectual Property lawsuits.¹¹ Since 2007, Apple has filed over 1,200 patents for their “hand-held radio telephone technologies.”¹² Strategy analytics have calculated that the iPhone alone has generated \$150 billion for Apple.¹³ “It is safe to say that the I[ntellectual] [Property] that makes such revenue possible is going to be protected by its owner and challenged by rivals.”¹⁴

The Constitution of the United States grants Intellectual Property rights to inventors. Article I, Section 8, Clause 8 of the United States Constitution provides that Congress shall have the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writing and Discoveries. . . .”¹⁵ The Patent Act of 1952 grants to the inventor “the right to exclude others from making, using, offering for

⁷ Press Release, International Data Corporation, Smartphones Expected to Outship Feature Phones for First Time in 2013, According to IDC (Mar. 4, 2013), available at <http://www.idc.com/getdoc.jsp?containerId=prUS23982813#UTe9paX1vTh> [hereinafter IDC Press Release on Smartphones].

⁸ Press Release, International Data Corporation, Android and iOS Combine for 91.1% of the Worldwide Smartphone OS Market in 4Q12 and 87.6% for the Year, According to IDC (Feb. 14, 2013), available at <http://www.idc.com/getdoc.jsp?containerId=prUS23946013#UTZI2aX1u4Y>.

⁹ Henry Blodget, *Android is Destroying Everyone, Especially RIM—iPhone Dead in Water*, BUS. INSIDER (Apr. 2, 2011, 1:04 PM), <http://www.businessinsider.com/android-iphone-market-share-2011-4>.

¹⁰ *Id.* (equating the software development battle between Windows and Apple to the current market share battle between iOS and Android).

¹¹ *Inside the iPhone Patent Portfolio: Data Offers Glimpse of Battery-Free Future, Insight into Smartphone ‘Patent Wars’*, THOMPSON REUTERS 7 (Sept. 2012), available at <http://ip-science.thomsonreuters.com/m/pdfs/iphone-report.pdf>.

¹² *Id.* at 4.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ U.S. CONST. art. I, § 8, cl. 8.

sale, or selling the invention throughout the United States or importing the invention into the United States. . . .”¹⁶

A permanent injunction is usually requested in patent infringement matters. The statutory authority to grant a permanent injunction arises out of 35 U.S.C. § 283 and states: “The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent and on such terms as the court deems reasonable.”¹⁷ Traditionally, in patent litigation, the patent gives the patent holder the right to exclude, which is protected with an injunction.¹⁸ Without this injunctive power, the purpose of the rights granted by the Constitution would be undermined.¹⁹ There was a presumption that absent outstanding circumstances, once infringement was found, an injunction would be granted.²⁰

However, in *eBay, Inc. v. MercExchange L.L.C.*, the U.S. Supreme Court changed the presumption that an injunction would follow a finding of infringement in patent litigation.²¹ The Court held that the traditional four-factor test that applies in permanent injunction matters, also applies to patents.²² Specifically, the Court held that a plaintiff seeking a permanent injunction must demonstrate:

(1) that it has suffered an irreparable harm; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.²³

After the landmark *eBay* case, there has been increased confusion among the district courts regarding interpretation of the four factors in patent infringement

¹⁶ 35 U.S.C. § 154(a)(1) (2006).

¹⁷ 35 U.S.C. § 283 (2006).

¹⁸ *Smith Int’l, Inc. v. Hughes Tool Co.*, 718 F.2d 1573, 1577–78 (Fed. Cir. 1983).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

²² *Id.* at 391–92.

²³ *Id.*

cases.²⁴ This article will explain why this confusion will impede innovation and why it needs to be rectified in order to better assist in current smartphone wars. Part I will discuss patents generally, and the way patent holders can protect their products through injunctive relief. Part II will examine the *eBay* case, which applied the four-factor test for a permanent injunction to patent infringement cases. Next, Part III will give an overview of the smartphone wars, focusing on the district court's denial of a permanent injunction in *Apple v. Samsung*. Finally, Part IV will discuss the reasons that the district court erred in denying a permanent injunction in *Apple v. Samsung*. Furthermore, there will be discussion regarding the benefits of reversing the district court's decision, not just for Apple's sake but also for the sake of the smartphone industry in general. It will be recommended that because of the current nature of the smartphone industry, the courts should place additional emphasis on the first two factors of the *eBay* test in smartphone patent litigation.

I. PATENT LAW AND PERMANENT INJUNCTIVE RELIEF

A. Patent Law

The United States Constitution gives Congress the power to give inventors, for a limited time, exclusive rights to their inventions.²⁵ The policy behind this grant was to promote the arts and sciences, and increase innovation.²⁶ Once the statutory requirements to obtain a patent have been fulfilled,²⁷ an inventor who believes that another has infringed his patent can file an injunction.²⁸ Section 283 gives district courts the jurisdiction to “grant an injunction in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.”²⁹

B. Permanent Injunction

Rule 65(d) of the Federal Rules of Civil Procedure specifies the contents and scope of injunctions issued by district courts: “Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the

²⁴ See generally Aurelia Hepburn-Briscoe, Comment, *Irreparable Harm in Patent, Copyright, and Trademark Cases After eBay v. MercExchange*, 55 HOW. L.J. 643 (2012).

²⁵ U.S. CONST. art. I, § 8, cl. 8.

²⁶ *Id.*

²⁷ See 35 U.S.C. § 154(a)(1) (2006).

²⁸ 35 U.S.C. § 283 (2006).

²⁹ *Id.*

complaint or other document, the act or acts sought to be restrained”³⁰ In agreement with Rule 65(d), the court will bar injunctions that “merely instruct the enjoined party not to violate a statute”³¹ or injunctions that simply prohibit future infringement of a patent.³²

Prior to *eBay*, there was a presumption that following a finding of infringement, a permanent injunction would follow, absent an exceptional case.³³ In *Smith International, Inc. v. Hughes Tool Co.*, the Federal Circuit Court of Appeals stated: “[w]ithout this injunctive power of the courts, the right to exclude granted by the patent would be diminished, and the express purpose of the Constitution and Congress, to promote the progress of the useful arts, would be seriously undermined.”³⁴

II. *EBAY V. MERCExchange*

The presumption that a permanent injunction would follow a court’s finding of patent infringement was seriously undermined in the 2006 Supreme Court decision of *eBay*.³⁵

MercExchange L.L.C. is the owner of a number of patents, “including a business method patent for an electronic market designed to facilitate the sale of goods between private individuals by establishing a central authority to promote trust among participants.”³⁶ MercExchange approached eBay and Half.com to allow eBay to license its product for its online marketplace, however they were never able to reach a deal.³⁷

Following their failure to license the product to eBay, MercExchange filed a patent infringement claim with the district court for the Eastern District of

³⁰ FED. R. CIV. P. 65(d).

³¹ *Int’l Rectifier Corp. v. IXYS Corp.*, 383 F.3d 1312, 1316 (Fed. Cir. 2004) (quoting *NLRB v. Express Pub. Co.*, 312 U.S. 426, 435–36 (1941)).

³² *Id.* (the reasoning behind denying broad or unclear permanent injunctions is to prohibit superfluous contempt proceedings and encourage judicial economy).

³³ *Hepburn-Briscoe*, *supra* note 24, at 650 (discussing how a permanent injunction would not be justified where the monetary damages collected had already made the plaintiff whole).

³⁴ *Smith Int’l, Inc. v. Hughes Tool Co.*, 718 F.2d 1573, 1577–78 (Fed. Cir. 1983).

³⁵ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

³⁶ *Id.* at 390 (*see* U.S. Patent No. 5,845,265 (filed Nov. 7, 1995)).

³⁷ *Id.*

SMARTPHONE WARS

Virginia.³⁸ The jury found that MercExchange’s business method patent was valid and that eBay had infringed that patent.³⁹ Despite the jury finding that MercExchange’s business method patent had been infringed, the district court denied MercExchange’s request for permanent injunctive relief.⁴⁰ MercExchange appealed the decision to the Court of Appeals for the Federal Circuit. The Federal Circuit reversed, citing the “general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances.”⁴¹

The Supreme Court reversed the Court of Appeals’ grant of a permanent injunction.⁴² The Supreme Court found that although there has been a recognized tradition of granting a permanent injunction following a finding of patent infringement, this was not Congress’ intent.⁴³ Section 283 of the Patent Act states: “the several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.”⁴⁴ The court placed emphasis on the “may” finding that there was no presumption of a permanent injunction being granted.⁴⁵ Instead, “in accordance with the principles of equity,” the Court must follow:

The well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Benjamin Petersen, *Injunctive Relief in the Post-eBay World*, 23 BERKELEY TECH. L.J. 193, 194 (2008).

⁴¹ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) (quoting *MercExchange, L.L.C. v. eBay, Inc.*, 401 F.3d 1323, 1339 (Fed. Cir. 2005)).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ 35 U.S.C. § 283 (2006).

⁴⁵ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391–92 (2006).

is warranted; and (4) that the public interest would not be disserved by a permanent injunction.⁴⁶

A. Chief Justice Roberts' Concurrence

In *eBay*, Chief Justice Roberts wrote a concurrence, joined by Justices Scalia and Ginsburg, emphasizing the traditional principles of equity in granting injunctions.⁴⁷ Chief Justice Roberts agreed with the majority's holding that "the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases"⁴⁸ Chief Justice Roberts noted that since the 19th century, courts have regularly granted injunctions upon a finding of infringement.⁴⁹ He stated that "[t]his long tradition of equity practice is not surprising, given the difficulty of protecting a right to exclude through monetary remedies that allow an infringer to use an invention against the patentee's wishes—a difficulty that often implicates the first two factors of the traditional four-factor test."⁵⁰ Chief Justice Roberts noted that while there should not be a general rule that a patent holder is entitled to an injunction upon a finding of infringement, the Court should still bear in mind the historical practice of exercising equitable discretion.⁵¹ "Thus, [Chief Justice] Roberts argued that 'limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike.'"⁵²

B. Justice Kennedy's Concurrence

Justice Kennedy also wrote a concurrence, which Justices Stevens, Souter and Breyer joined.⁵³ Justice Kennedy's concurrence distinguished between patent holders that practice their invention and those that do not.⁵⁴ Justice Kennedy wrote, "[a]n industry has developed in which firms use patents not as a basis for producing

⁴⁶ *Id.*

⁴⁷ *Id.* at 394–95 (Roberts, J., concurring).

⁴⁸ *Id.*

⁴⁹ *Id.* at 395.

⁵⁰ *Id.*

⁵¹ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 395 (2006).

⁵² Petersen, *supra* note 40, at 195–96 (quoting *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005)).

⁵³ *eBay Inc.*, 547 U.S. at 395 (Kennedy, J., concurring).

⁵⁴ *Id.* at 396.

and selling goods but, instead, primarily for obtaining licensing fees.”⁵⁵ Granting an injunction for patent holders that do not license their invention, but are seeking an injunction “as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice [a] patent” does not serve the public interest.⁵⁶ An injunction is unnecessary in such cases as a monetary award provides sufficient consideration.⁵⁷

III. SMARTPHONE WARS

There is a war going on between the smartphone manufacturers, “with patent infringement accusations being fired regularly at Apple, Samsung, Google Research in Motion, Microsoft, Nokia, Motorola, HTC, and others. Where there are accusations of infringement, there are lawsuits.”⁵⁸ Smartphones are a collection of patented features, and each patent holder has a financial stake in protecting their patent.⁵⁹

On April 15, 2011, Apple brought an infringement action against Samsung Electronics Co., alleging infringement on several patents belonging to Apple.⁶⁰ On August 21, 2012, the jury returned a verdict in Apple’s favor that 26 Samsung Products infringed Apple’s patents.⁶¹ The jury awarded Apple more than \$1 billion in damages.⁶²

After the jury returned its verdict, Apple requested a permanent injunction against Samsung, which was denied by the district court.⁶³ The district court considered each of the four factors in turn, and found that Apple had not met its burden of showing a “causal nexus” between Samsung’s infringement and the

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Jeffrey I.D. Lewis, *The Sky Is Not Falling: Navigating the Smartphone Patent Thicket*, WIPO MAG. (Feb. 2013), http://www.wipo.int/wipo_magazine/en/2013/01/article_0002.html.

⁵⁹ *Id.*

⁶⁰ *Apple, Inc. v. Samsung Elecs. Co. Ltd.*, No. 11-CV-01846-LHK, 2012 U.S. Dist. LEXIS 179532, at *27 (N.D. Cal. Dec. 17, 2012).

⁶¹ *Id.*

⁶² Nick Wingfield, *Jury Awards \$1 Billion to Apple in Samsung Patent Case*, N.Y. TIMES (Aug. 24, 2012), http://www.nytimes.com/2012/08/25/technology/jury-reaches-decision-in-apple-samsung-patent-trial.html?_r=0

⁶³ *Apple, Inc.*, 2012 U.S. Dist. LEXIS 179532, at *28.

“irreparable harm” that Apple had suffered.⁶⁴ The district court found that Apple had not satisfied its burden of proving that they had lost sales to Samsung *because* of the patented features that Samsung infringed upon.⁶⁵

A. Irreparable Harm

First, the district court looked at whether Apple had suffered irreparable harm.⁶⁶ The court began its analysis by stating that although the Federal Circuit has announced that there is no longer any presumption of irreparable harm, “it does not follow that courts should entirely ignore the fundamental nature of patents as property rights granting the owner the right to exclude.”⁶⁷ The district court then erroneously applied a two-part test for irreparable harm, stating that the “patentee must establish both of the following requirements: (1) that absent an injunction, it will suffer irreparable harm, and (2) that a sufficiently strong causal nexus relates the alleged harm to the alleged infringement.”⁶⁸ “This requires a showing that the consumer bought the infringing product ‘because it is equipped with the apparatus claimed in the patent,’ not just because it includes a feature of the type covered by the patent.”⁶⁹ The district court found that Apple did not prove a causal nexus between the irreparable harm and Samsung’s infringement of their patent.⁷⁰

Next, the district court looked at the harms that Apple alleged in its complaint: “(1) loss of market share; (2) loss of downstream and future sales.”⁷¹ Here, the district court agreed with Apple that there was a loss of market share and evidence that downstream sales would be affected.⁷² However, the district court

⁶⁴ *Id.* at *27.

⁶⁵ *Id.*

⁶⁶ *Id.* at *30.

⁶⁷ *Id.* (quoting *Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1149 (Fed. Cir. 2011)).

⁶⁸ *Id.* at *30–31 (quoting *Apple, Inc. v. Samsung Electronics Co., Ltd.*, 695 F.3d 1370, 1374 (Fed. Cir. 2012)) [hereinafter *Apple II*] (the Court of Appeals for the Federal Circuit held that the district court abused its discretion in granting Apple a preliminary injunction because Apple had failed to establish a causal nexus between Samsung’s irreparable harm and the patent infringement).

⁶⁹ *Apple, Inc. v. Samsung Elecs. Co. Ltd.*, No. 11-CV-01846-LHK, 2012 U.S. Dist. LEXIS 179532, at *31 (N.D. Cal. Dec. 17, 2012) (quoting *Apple II*, 695 F.3d at 1376).

⁷⁰ *Id.*

⁷¹ *Apple, Inc.*, 2012 U.S. Dist. LEXIS 1795322, at *34.

⁷² *Id.* at *34–49 (the court looked at evidence presented by Apple showing that since the introduction of Samsung’s infringing products in June of 2010 through the second quarter of 2012, Samsung’s market share had grown substantially at Apple’s expense. Additionally, the court found that due to brand loyalty “there was potentially long-term implications of an initial purchase, in the form of lost future sales of both future phone models and tag-along products like apps, desktop computers, laptops, and iPods.”).

held that despite these harms, this factor weighed in favor of Samsung because Apple had not proven a causal nexus between these harms and the infringing product.⁷³ Apple failed to establish that the consumers chose Samsung over Apple products specifically due to the infringed patents.⁷⁴

B. Inadequacy of Monetary Damages

The second factor in an *eBay* analysis involves the adequacy of monetary damages. Here, the district court analyzed the difficulty of calculating the downstream sales that Apple will lose with reasonable certainty.⁷⁵ Difficulty in calculating damages for future downstream sales is evidence that “remedies at law are inadequate.”⁷⁶ While Samsung argued that the \$1.05 billion Apple received in damages was proof that monetary damages were adequate, the district court found that the monetary award Apple received was for past sales lost to Samsung, and their future sales had not been calculated into that award.⁷⁷ However, the district court went on to state that because Apple had licensed their patents before, this showed that their patents were not “priceless,” weighing this factor in Samsung’s favor.⁷⁸

C. Balance of Hardships

Next, the district court looked at the effect of granting an injunction against the parties involved in the suit. The court found that in weighing the hardships to both parties,⁷⁹ the factor was neutral, and neither party was adversely harmed more than the other.⁸⁰

D. Public Interest

Finally, the court weighed the public interest in granting versus denying the injunction. Here, the court found that the injunction would prevent the sale of 26

⁷³ *Id.* at *50.

⁷⁴ *Id.*

⁷⁵ *Id.* at *58.

⁷⁶ *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2012 U.S. Dist. LEXIS 179532, at *58 (N.D. Cal. Dec. 17, 2012) (quoting *Broadcom Corp. v. Qualcomm Inc.*, 543 F.3d 683, 703–04 (Fed. Cir. 2008)).

⁷⁷ *Id.* at *59.

⁷⁸ *Id.* at *59–60.

⁷⁹ *Id.* at *62–65.

⁸⁰ *Id.* at *65.

infringing products, and any future products that infringe the patents.⁸¹ The court found this to be “extremely broad” and against the public interest.⁸² Additionally, the court found it against public interest to prevent the sale of the infringing product just because it consists of a few infringing patented features.⁸³ “The public interest does not support removing phones from the market when the infringing components constitute such limited parts of complex, multi-featured products.”⁸⁴

IV. RECOMMENDATIONS AND CONCLUSION

A. The District Court Erred in Denying Apple a Permanent Injunction

The district court in *Apple v. Samsung* erred in denying Apple’s motion for a permanent injunction. The district court added a “causal nexus” requirement that has never been required in a patent infringement case before.⁸⁵

The first factor in analyzing whether to grant a permanent injunction is whether the plaintiff has demonstrated “that it has suffered an irreparable injury.”⁸⁶ In *Apple v. Samsung*, the district court found that Apple had suffered an irreparable harm, including loss of market share and downstream sales, however the district court was not convinced because Apple had failed to prove a causal nexus between the harm suffered and the infringing product.⁸⁷

The Federal Circuit Court of Appeals has never required that a “causal nexus” be proven before weighing this first factor in the plaintiff’s favor. The Court of Appeals has previously held in *Robert Bosch LLC v. Pylon Mfg.* that “while the party seeking an injunction bears the burden of showing lost market share, this showing need not be made with direct evidence.”⁸⁸ In *i4i Ltd. Partnership v. Microsoft Corp.*, the Court of Appeals used circumstantial evidence to show irreparable harm stating, “i4i was not required to prove that its specific customers

⁸¹ *Id.* at *66.

⁸² *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2012 U.S. Dist. LEXIS 179532, at *66 (N.D. Cal. Dec. 17, 2012).

⁸³ *Id.* at *68–69.

⁸⁴ *Id.* at *69.

⁸⁵ *See generally supra* Section III.

⁸⁶ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

⁸⁷ *See generally Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2012 U.S. Dist. LEXIS 179532 (N.D. Cal. Dec. 17, 2012).

⁸⁸ *Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1154 (Fed. Cir. 2011).

stopped using i4i's products because they switched to the infringing Word products."⁸⁹

Essentially, the district court created a different standard for judging irreparable harm. Instead of circumstantial evidence establishing irreparable harm, the district court required direct evidence that the infringed patents caused Apple's customers to be attracted to Samsung products.⁹⁰ This creates a heavier burden on the plaintiff than the Supreme Court required in *eBay*.

The second factor: whether "remedies available at law, such as monetary damages, are inadequate to compensate for that injury,"⁹¹ was also found to be in Samsung's favor.⁹² Smartphone manufacturers are in direct competition with one another for market share. Requiring manufacturers to license their patents to a direct competitor even if they have previously licensed their product is against policy.⁹³ In winner take all markets, such as the smartphone market, the Court of Appeals favors a finding that monetary damages are inadequate.⁹⁴

In weighing each party's hardships, the district court found this factor to be neutral.⁹⁵ However, the district court erred by not placing enough emphasis on the harm Apple would suffer if the injunction were denied. The Court of Appeals does not place significance on the infringer's monetary expense if an injunction were granted because those who choose to base their business upon an infringing product cannot complain if an injunction against continued infringement damages that business.⁹⁶

The final factor "that the public interest would not be disserved by a permanent injunction,"⁹⁷ weighs in Apple's favor. The public has a right to innovation. A compulsory license to a direct competitor encourages infringement

⁸⁹ *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 862 (Fed. Cir. 2010).

⁹⁰ *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2012 U.S. Dist. LEXIS 179532, at *27, *50 (N.D. Cal. Dec. 17, 2012).

⁹¹ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

⁹² See generally *supra* Section III.

⁹³ *Broadcom Corp. v. Qualcomm Inc.*, 543 F.3d 683, 703–04 (Fed. Cir. 2008).

⁹⁴ *Id.*

⁹⁵ *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2012 U.S. Dist. LEXIS 179532, at *65 (N.D. Cal. Dec. 17, 2012).

⁹⁶ *Broadcom*, 543 F.3d at 704 (quoting *Windsurfing Int'l, Inc. v. AMF, Inc.*, 782 F.2d 995, 1003 n.12 (Fed. Cir. 1986)).

⁹⁷ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

not innovation. The public also has a strong interest in a strong patent system because in the absence of a patent system, innovation is further discouraged.

B. Recommendation

The Smartphone industry is in a critical period. In 2013, more smartphones will be purchased than traditional mobile phones for the first time in history.⁹⁸ Smartphone consumers are “sticky” because once they pick a smartphone platform, they will continue purchasing the same platform for each of their subsequent smartphones. This is a critical time in the market’s development. Market share, once lost, cannot be easily recouped.⁹⁹

For these reasons, it is essential that the Federal Circuit Court of Appeals reverse the district court’s denial of a permanent injunction. The district court’s opinion creates a more stringent test for proving irreparable harm than required by the Supreme Court in *eBay*. While district courts have discretion in interpreting the factors laid out in *eBay*, the Supreme Court stated that “discretion is not whim”¹⁰⁰ nor is it freedom to write “on an entirely clean slate.”¹⁰¹

Although *eBay* abolishes our general rule that an injunction normally will issue when a patent is found to have been valid and infringed, it does not swing the pendulum in the opposite direction . . . [I]t does not follow that courts should entirely ignore the fundamental nature of patents as property rights granting the owner the right to exclude.¹⁰²

The court has full discretion in weighing the multiple factors but it cannot write on a clean slate to place emphasis on certain factors.¹⁰³ I recommend that the courts in smartphone patent injunction cases emphasize the first two factors listed in *eBay*. The first factor, irreparable harm is especially important in smartphone infringement cases. Loss of market share, revenues and future losses for downstream customers could be devastating for a smartphone manufacturer, and

⁹⁸ IDC Press Release on Smartphones, *supra* note 7.

⁹⁹ *TiVo Inc. v. EchoStar Comm’n Corp.*, 446 F. Supp. 2d 664, 669–70 (E.D. Tex. 2006).

¹⁰⁰ *eBay Inc.*, 547 U.S. at 395 (Roberts, J., concurring).

¹⁰¹ *Id.*

¹⁰² *Robert Bosch, L.L.C. v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1149 (Fed. Cir. 2011).

¹⁰³ *eBay Inc.*, 547 U.S. at 395 (Roberts, J., concurring).

favors a finding for an injunction.¹⁰⁴ This first factor generally looks at what has occurred, while the second factor looks at future losses.¹⁰⁵ In the smartphone industry, the downstream market is especially important, and there is no conclusive way to calculate the damages sustained in downstream sales. For these reasons, the courts should place greater emphasis on the first two factors of the *eBay* test.

Patents are granted to encourage innovation and creativity. If a patent holder cannot assert his right to exclude, then the incentive to create and innovate diminishes, and furthermore, infringement is encouraged. Samsung has made an estimated \$7 billion off of the products found to have infringed Apple's patents,¹⁰⁶ minus the jury verdict of \$1.05 billion, which still results in a \$6 billion gain to Samsung. Such a profit reinforces infringing behavior instead of innovation.

¹⁰⁴ *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 861 (Fed. Cir. 2010).

¹⁰⁵ *Id.*

¹⁰⁶ Brief of Petitioner at 19, *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2012 U.S. Dist. LEXIS 179532, at *27, *50 (N.D. Cal. Dec. 17, 2012) (No. 13-1129), 2013 WL 680916 at *19.