

Fall 2009

The Effect: Tougher Standards but Courts Return to the Prior Practice of Granting Injunctions for Patent Infringement

Stacy Streur

Recommended Citation

Stacy Streur, *The Effect: Tougher Standards but Courts Return to the Prior Practice of Granting Injunctions for Patent Infringement*, 8 Nw. J. TECH. & INTELL. PROP. 67 (2009).
<https://scholarlycommons.law.northwestern.edu/njtip/vol8/iss1/4>

This Article is brought to you for free and open access by Northwestern Pritzker School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of Technology and Intellectual Property by an authorized editor of Northwestern Pritzker School of Law Scholarly Commons.

N O R T H W E S T E R N
JOURNAL OF TECHNOLOGY
AND
INTELLECTUAL PROPERTY

**The *eBay* Effect:
Tougher Standards but Courts Return to the Prior Practice of
Granting Injunctions for Patent Infringement**

Stacy Streur



The *eBay* Effect: Tougher Standards but Courts Return to the Prior Practice of Granting Injunctions for Patent Infringement

By Stacy Streur

¶1 The 2006 Supreme Court decision in *eBay Inc. v. MercExchange, L.L.C.*¹ marked a significant shift in how courts evaluate whether a patent holder, after proving infringement, is entitled to permanent injunctive relief. A close study of the cases, though, reveals that there has not been a corresponding shift in the outcome of those decisions. Prior to *eBay*, there was a *general rule* that upon proof of patent infringement, and “absent exceptional circumstances,”² a permanent injunction would issue. The *eBay* Court held that in patent cases, as in all other cases, an injunction should issue only after analyzing the facts of the case in light of the four-factor test for equitable relief.

¶2 In response to *eBay* there was an immediate spike in the number of decisions in which a patent holder’s request for permanent injunctive relief was denied. Since the essence of a patent holder’s rights is the *right to exclude*, commentators, at the time, expressed concern that the patent system’s ability to achieve its primary objective, *to promote innovation*, was in jeopardy.³ Others observed that “the power (and, therefore, value) of patents has been diminished.”⁴

¶3 Several years later, it is clear that injunctions are still granted in the majority of cases. In the three years since the *eBay* decision, there have been sixty-eight district court decisions considering whether permanent injunctive relief should be granted in a patent infringement action.⁵ In sixteen of those cases, the plaintiff’s request for an injunction was denied.⁶ In fifty-two of those cases the request for an injunction was granted.⁷ Insofar as the right to exclude is not fully protected without a corresponding

¹ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

² *Id.* at 391.

³ Andrew Beckerman-Rodau, *The Supreme Court Engages in Judicial Activism in Interpreting the Patent Law in eBay, Inc. v. MercExchange, L.L.C.*, 10 TUL. J. TECH. & INTELL. PROP. 165, 168 (2008) (“Removing the grant of property rights would not bring about an end to research and development activities. However, it would certainly reduce such activities. Investments in some research and development activities would decrease, particularly in technology areas such as pharmaceutical development, where large financial investments are required and the resulting product is incapable of being protected as a trade secret.”); Vincenzo Denicolò et al., *Revisiting Injunctive Relief: Interpreting eBay in High-Tech Industries with Non-Practicing Patent Holders*, at 7, Dec. 3, 2007, <http://ssrn.com/abstract=1019611> (“Certainly strategies deliberately aimed at creating holdup should not be tolerated. But in attempting to reduce what appears to be a fairly narrow problem we must be careful to avoid the very real danger of under-compensating innovation and, in the process, reducing the incentives to create more of it.”).

⁴ Douglas Ellis, *The Economic Implications (and Uncertainties) of Obtaining Permanent Injunctive Relief After eBay v. MercExchange*, 17 FED. CIR. B.J. 437, 439 (2008).

⁵ See Chart of Post-*eBay* Permanent Injunction Patent Cases, *infra*.

⁶ *Id.*

⁷ *Id.*

right to an injunction, the cases denying injunctions are significant and many articles have been written about those cases. Interestingly though, a lot can be learned about the scope of equitable relief by considering the cases in which injunctions have been granted.

¶4 In most of the post-*eBay* cases in which an injunction was granted, the court described the parties as competitors. In comparison, when the injunction was denied, the patent holder was described as a non-practicing entity instead of being described as a competitor. This pattern predominated despite the *eBay* court's warning against categorical rules.⁸

¶5 In an attempt to explain this trend of granting injunctions based on whether the parties were competitors, commentators theorized that rather than following the directive set out in the *eBay* majority opinion, courts were following the Kennedy concurrence.⁹ In 2007, John Golden described the decisions denying injunctive relief as being "in apparent lockstep [with] Justice Kennedy's concerns about trolls."¹⁰ But is that trend still true today? What are the implications of the district courts' (and Federal Circuit's) post-*eBay* decisions on the issue of injunctive relief? Is the "concern about trolls" directing the outcome of recent cases, or are other factors, like competition between the parties, driving the decisions on the issue of equitable relief? After *eBay*, was there an initial spike in favor of rulings denying injunctive relief in patent infringement cases followed by a slide back to the historic practice of granting injunctions?

¶6 In this article, I will evaluate the post-*eBay* patent cases,¹¹ with a dual focus on the issue of "competition between the parties" and the period of time after *eBay* in which the case was decided. This analysis demonstrates that, over time, there has been a progressively broader interpretation of what constitutes "competition between the parties" and a correspondingly broader view of what constitutes "irreparable harm" and "no adequate remedy at law."¹² I propose that the spike in post-*eBay* cases denying equitable relief based on the patent holder's failure to demonstrate irreparable harm was a

⁸ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 393 (2006). ("Most notably, [the district court] concluded that a plaintiff's willingness to license its patents and its lack of commercial activity in practicing the patents would be sufficient to establish that the patent holder would not suffer irreparable harm if an injunction did not issue. . . . But traditional equitable principles do not permit such broad classifications. . . . To the extent that the District Court adopted such a categorical rule, then, its analysis cannot be squared with the principles of equity adopted by Congress." (internal quotes and citations omitted)).

⁹ See Christopher A. Cotropia, *Compulsory Licensing Under TRIPS and the Supreme Court of the United States' Decision in eBay v. MercExchange*, in *COMPARATIVE PATENT LAW: A HANDBOOK OF CONTEMPORARY RESEARCH* (Toshiko Takenaka & Rainer Moufang eds., Edward Elgar 2008) (forthcoming 2008), available at <http://ssrn.com/abstract=1086142> ("The courts all go through the four-factor analysis in an attempt to stay true to the holding in *eBay*. But the practical effect is that this single fact—lack of commercialization—dictates the result in most cases. This demonstrates a heavy reliance on Justice Kennedy's concurrence and potentially ignores the specific instruction in the majority opinion that such facts should not, by themselves, control the discretionary inquiry."); see also Denicolò et al., *supra* note 3, at 3 ("Instead of following the majority prescription, however, many district courts faced with injunction decisions in the wake of *eBay* appear to be focused on the minority opinion of Justice Kennedy.").

¹⁰ John M. Golden, *Patent Trolls and Patent Remedies*, 85 TEX. L. REV. 2111, 2113 (2007).

¹¹ This review is limited to patent cases decided between May 2006 and August 2009 that cite the Supreme Court decision *eBay*, and in which the patent holder, after proving infringement, sought permanent injunctive relief.

¹² The cases are organized by the year that the decision on injunctive relief was issued. When there is both a district court decision and a Federal Circuit decision I used the date of the district court decision unless the Federal Circuit decision reversed the district court on the issue of injunctive relief, in which case, I used the date of the Federal Circuit decision.

blip, similar to the pattern of decisions issued after the Federal Circuit’s *Phillips*¹³ decision. Several years later, it appears that courts are returning to an interpretation of the law more consistent with the prior practice of generally granting injunctions once a patent holder proves infringement.

Part I describes the Supreme Court decision in *eBay Inc. v. MercExchange, L.L.C.*¹⁴ Part II discusses the term “competitor” in the context of patentees seeking injunctive relief. Part III describes the cases in which courts have granted injunctive relief, focusing on the time period when the case was decided and the issues of irreparable harm, inadequate remedy at law and competition between the parties. Part IV describes the cases denying injunctive relief, focusing on the time period in which it was decided and the court’s reasoning for denying equitable relief. Part V identifies and describes the current trend of generally granting injunctions once the patent holder proves infringement.

I. *EBAY V. MERCExchange* AND CRITERA FOR GRANTING PERMANENT INJUNCTIVE RELIEF

Prior to the Supreme Court decision in *eBay*,¹⁵ a finding of patent infringement routinely resulted in an award of permanent injunctive relief.¹⁶ The theory behind this practice was that the patent gave the holder a right to exclude; therefore, the only appropriate remedy was an injunction.¹⁷ In *eBay*, the Supreme Court rejected the implied assumption that patent cases should be treated differently than other cases and reaffirmed the general principle that an award of equitable relief in a patent case, as in any other, is subject to an analysis of the facts of the case in light of the elements of the traditional four-factor test:

According to 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 is warranted; and (4) that the public interest would not be disserved by a permanent injunction.¹⁸

In *eBay*, MercExchange owned various patents on methods for conducting on-line sales, including U.S. Patent No. 5,845,265 (“the ‘265 patent”). eBay operated (and still operates) a popular website for conducting on-line sales. MercExchange attempted to

¹³ *Phillips v. AWH. Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc); see R. Polk Wagner & Lee Petherbridge, *Did Phillips Change Anything? Empirical Analysis of the Federal Circuit’s Claim Construction Jurisprudence 19-22* (Apr. 3, 2008) (unpublished manuscript, on file with Journal).

¹⁴ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

¹⁵ *Id.*

¹⁶ Ellis, *supra* note 4, at 439.

¹⁷ George M. Newcombe et al., *Practitioner Note: Prospective Relief for Patent Infringement in a Post-eBay World*, 4 N.Y.U. J. L. & BUS. 549, 550 (2008). (“Because a patent offers its owner the right to exclude others from practicing a claimed invention, historically, a patentee received a permanent injunction as a matter of course when another party was found to infringe a valid patent.”).

¹⁸ *eBay*, 547 U.S. at 391.

negotiate a license with eBay for the use of its patented technology but the negotiations failed.¹⁹ Later, MercExchange sued eBay (and others) for patent infringement and the jury found the '265 patent valid and infringed by eBay.²⁰ The district court, after considering the four-factor test, denied injunctive relief.²¹ On appeal, the Federal Circuit reversed the district court decision, seeing “no reason to depart from the general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances.”²²

¶10 The Supreme Court reversed the Federal Circuit’s holding that injunctive relief should be granted as a general rule upon a finding of infringement.²³ The Court also rejected the District Court’s method of applying the traditional four-factor test:

Although the District Court recited the traditional four-factor test . . . it appeared to adopt certain expansive principles suggesting that injunctive relief could not issue in a broad swath of cases. Most notably, it concluded that a “plaintiff’s willingness to license its patents” and “its lack of commercial activity in practicing the patents” would be sufficient to establish that the patent holder would not suffer irreparable harm if an injunction did not issue. . . . But traditional equitable principles do not permit such broad classifications.²⁴

¶11 In addition to Justice Thomas’ majority opinion, there were two concurring opinions. Chief Justice Robert’s concurrence emphasized the historic practice of granting injunctions in the “vast majority of patent cases,”²⁵ and opined that courts today should continue to evaluate patent infringement cases in accordance with long established precedent.²⁶ Justice Kennedy’s concurrence²⁷ agreed that “history may be instructive,”²⁸ but raised the concerns that

[a]n industry has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees. . . . For these firms, an injunction, and the potentially serious sanctions arising from its violation, can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent. . . . When the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest.²⁹

¹⁹ *Id.* at 390.

²⁰ *Id.* at 390-91.

²¹ *Id.* at 391.

²² *MercExchange, L.L.C. v. eBay, Inc.*, 401 F.3d 1323, 1339 (Fed. Cir. 2005).

²³ *Id.*

²⁴ *eBay*, 547 U.S. at 393.

²⁵ *Id.* at 395 (Roberts, J., concurring).

²⁶ *Id.*

²⁷ *Id.* at 395-97.

²⁸ *Id.* at 396 (Kennedy, J., concurring).

²⁹ *Id.* at 396-97.

II. THE SIGNIFICANCE OF COMPETITION BETWEEN THE PARTIES

¶12 In evaluating the first two prongs of the four-factor test for equitable relief, whether the plaintiff will suffer irreparable harm if the injunction does not issue and whether there is an adequate remedy at law, the post-*eBay* courts have relied heavily on the degree of competition between the parties.³⁰ As stated in *TruePosition Inc. v. Andrew Corp.*,

The *eBay* court specifically cautioned against the application of categorical rules, classifications and assumptions in these analyses. . . . Nevertheless, courts, presumably struggling to balance the absence of a presumption of irreparable harm with a patentee’s right to exclude, have frequently focused upon the nature of the competition between plaintiff and defendant in the relevant market in the context of evaluating irreparable harm and the adequacy of money damages.³¹

If the parties can fairly be described as direct competitors, the first two factors will weigh heavily in favor of the plaintiff, and absent a compelling hardship or a public interest concern, an injunction will issue.³² According to one commentator, “the emerging general rule appears to be that a patentee who competes in the market with the adjudged infringer will likely be awarded a permanent injunction while a patentee who does not compete with the infringer, but merely licenses its intellectual property, will likely not be awarded a permanent injunction.”³³ The Federal Circuit has gone so far as to say that, “the essential attribute of a patent grant is that it provides *a right to exclude competitors* from infringing the patent.”³⁴ In fact, the patent statute explicitly confers on patent holders the right to exclude.³⁵

¶13 Some experts question the emphasis on whether the parties are competitors in the marketplace, and the view that injury to a competitor is irreparable. They ask why, for example, loss of market share is not quantifiable.³⁶ Since determining who qualifies for an injunction depends largely on how the court views the competitive relationship between the parties, defining the term *competitor* would add predictability to patent

³⁰ *TruePosition Inc. v. Andrew Corp.*, 568 F. Supp. 2d 500, 531 (D. Del. 2008) (permanent injunction granted).

³¹ *Id.*

³² *Id.* (“Courts awarding permanent injunctions typically do so under circumstances where plaintiff practices its invention and is a direct market competitor.”).

³³ Newcombe, *supra* note 17, at 559.

³⁴ *Acumed LLC v. Stryker Corp.*, 551 F.3d 1323, 1328 (Fed. Cir. 2008) (emphasis added). The court went on to note that “[i]n view of that right, infringement may cause a patentee irreparable harm not remediable by a reasonable royalty.” *Id.*

³⁵ 35 U.S.C. § 154(a)(1) (2006) (“Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, of the right to *exclude others* from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States.”) (emphasis added).

³⁶ Ellis, *supra* note 4, at 446 (“Normal business losses, however, are not *per se* incalculable. In fact, there is a whole industry of economists, financial analysts and accountants who regularly calculate damages associated with lost sales, loss of market share and lost profits, for example. And courts regularly accept these calculations. Many of these same calculations are used in the business world to forecast or predict various performance metrics and to value assets, liabilities, projects and other potential investment opportunities--billions of dollars are spent on the basis of these types of calculations. Done carefully, these calculations can be reliable. The fact that the impact of the loss of an asset may be challenging to estimate does not mean it is impossible.”).

litigation and clarify the scope of the injunctive relief. However, little discussion exists in the case law about what constitutes “competition between the parties.”

¶14 In an unusually explicit opinion, the court in *Broadcom Corp. v. Qualcomm Inc.*³⁷ expressly addressed the issue of competition and identified two distinct types of “competition between the parties.” With regard to certain infringed patents, Broadcom and Qualcomm both offered the products embodying the patent. Both shared the same customers, and thus were in direct competition (“product competition”). With regard to certain other infringed patents, Broadcom was not offering a product that embodied the patented technology, but the court nonetheless considered the parties competitors: “That Broadcom does not currently offer plug-for-plug replacements for Qualcomm’s CDMA chips may affect the degree of competition, but it does not change the fact that both firms compete in the same market”³⁸ (“market competition”).

¶15 In analyzing the issue of irreparable harm with regard to market competition, the court noted that “one need not necessarily be a direct competitor in order to secure an injunction. . . . In addition, there is injury to Broadcom’s right to enforce its exclusionary right to manage its patent portfolio in accordance with its chosen strategy.”³⁹

III. POST-*eBAY* CASES GRANTING INJUNCTIVE RELIEF BASED ON *IRREPARABLE INJURY* AND *NO ADEQUATE REMEDY AT LAW*

¶16 Prior to the decision in *eBay*, lower courts considering granting equitable relief often held that proof of infringement gave rise to a presumption of irreparable harm and no adequate remedy at law.⁴⁰ In fact, some courts believed that it was an irrebuttable presumption.⁴¹ The *eBay* decision requires that courts evaluating whether to grant a permanent injunction provide a factual and legal analysis for each of the prongs of the traditional four-factor test for equitable relief.⁴² Courts must separately analyze whether the plaintiff would suffer irreparable harm if the injunction did not issue, and whether an adequate remedy at law exists. Consequently, the opinions are detailed but, due to the inherent overlap between the facts that courts rely on to show irreparable harm and the

³⁷ *Broadcom Corp. v. Qualcomm Inc.*, No. SACV 05-467 JVS, 2007 U.S. Dist. LEXIS 97647, at *5-27 (C.D. Cal. Dec. 31, 2007) (granting permanent injunction), *aff’d in part, rev’d in part, remanded*, 543 F.3d 683 (Fed. Cir. 2008).

³⁸ *Id.* at *9.

³⁹ *Id.* at 16 (citing *Hybritech Inc. v. Abbott Labs.*, 849 F.2d 1446, 1456 (Fed. Cir. 1988); *MGM Well Servs., Inc. v. Mega Lift Systems, LLC*, 505 F. Supp. 2d 359, 378-79 (S.D. Tex. 2007); *Novozymes A/S v. Genencor Int’l, Inc.*, 474 F. Supp. 2d 592, 612 (D. Del. 2007)).

⁴⁰ *Trading Techs. Int’l, Inc. v. eSpeed, Inc.*, No. 04 C 5312, 2008 U.S. Dist. LEXIS 86953, at *2-14 (N.D. Ill. May 22, 2008) (“Before *eBay*, the irreparable injury prong of the four-factor test was ‘presumed’ to be met following a ‘clear showing’ of patent validity and infringement.”).

⁴¹ See Gretchen S. Sween, *Who’s Your Daddy? A Psychoanalytic Exegesis of the Supreme Court’s Recent Patent Jurisprudence*, 7 NW. J. TECH. & INTELL. PROP. 204, 209-10 (2009) (“In any event, the *eBay* petitioner and many *amici* who urged the Court to hear the appeal effectively characterized the case so as to arouse the Court’s ire against the Federal Circuit and the latter’s view that proving infringement created a virtually irrebuttable presumption that an injunction would issue. And the strategy worked.”).

⁴² *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006). *But see* *Rosco, Inc. v. Mirror Lite Co.*, No. CV-96-5658, 2006 U.S. Dist. LEXIS 73366 (E.D.N.Y. Sept. 28, 2006) (conducting cursory review of the four equitable factors, relying primarily on general notions of equity and fairness as well as the public interest in finding that an injunction should issue); *Mannatech, Inc. v. Glycoproducts Int’l, Inc.*, No. 3-06-CV-0471-BD, 2008 U.S. Dist. LEXIS 52537 (N.D. Tex. July 9, 2008) (injunctive relief summarily granted after defendant presented no opposition to request).

facts that courts rely on to show no adequate remedy at law, the decisions are sometimes awkward. Some district court judges have expressly acknowledged the overlap.⁴³ In *Smith & Nephew*⁴⁴ the court opined that “[a]lthough stated as two separate factors under *eBay*, the irreparable harm requirement contemplates the inadequacy of alternate remedies available to the plaintiff.”⁴⁵ Another district court noted that, “by definition irreparable injury is that for which compensatory damages are unsuitable.”⁴⁶ Thus, throughout this paper, the first and second factors of the four-factor test are frequently addressed together.

¶17 In the first twelve months after *eBay* (May 2006 through April 2007) there were twenty patent cases granting permanent injunctive relief.⁴⁷ In the second twelve months (May 2007 through April 2008), there were thirteen decisions granting permanent injunctive relief.⁴⁸ In the most recent twelve-month period (May 2008 through April

⁴³ *Funai Elec. Co., Ltd. v. Daewoo Elecs. Corp.*, 593 F. Supp. 2d 1088, 1111 (N.D. Cal. 2009) (“for the same reasons [that the plaintiff would suffer irreparable harm,] remedies available at law are not adequate to compensate Funai for Daewoo’s infringement”); *Trading Techs.*, 2008 U.S. Dist. LEXIS 86953, at *2-14 (“Consideration of [whether there is an adequate remedy at law] overlaps considerably with that of irreparable injury, in that an inadequate remedy at law can cause irreparable harm.”); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197, 1219 (2007) (“[T]he requisite analysis for the second factor of the four-factor test inevitably overlaps with that of the first.”).

⁴⁴ *Smith & Nephew, Inc. v. Synthes (U.S.A.)*, 466 F. Supp. 2d 978 (W.D. Tenn. 2006) (granting permanent injunction).

⁴⁵ *Id.* at 982-83.

⁴⁶ *Power-One, Inc. v. Artesyn Techs., Inc.*, No. 2:05-CV-463, 2008 U.S. Dist. LEXIS 30338, at *5 (E.D. Tex. Apr. 11, 2008) (quoting *Wildmon v. Berwick Universal Pictures*, 983 F.2d 21, 24 (5th Cir. 1992)).

⁴⁷ Cases granting injunctive relief between May 2006 and April 2007: *Wald v. Mudhopper Oilfield Servs.*, No. CIV-04-1693-C, 2006 U.S. Dist. LEXIS 51669 (W.D. Okla. July 27, 2006); *KEG Techs., Inc. v. Laimer*, 436 F. Supp. 2d 1364 (N.D. Ga. 2006); *Am. Seating Co. v. USSC Group, Inc.*, No. 01-00578, 2006 U.S. Dist. LEXIS 59212 (W.D. Mich. Aug. 22, 2006); *Floe Int’l, Inc. v. Newmans’ Mfg. Inc.*, No. 04-5120, 2006 U.S. Dist. LEXIS 59872 (D. Minn. Aug. 23, 2006); *Litecubes, L.L.C. v. N. Light Prods., Inc.*, No. 4:04CV00485, 2006 U.S. Dist. LEXIS 60575 (E.D. Mo. Aug. 25, 2006), *aff’d*, 523 F.3d 1353 (Fed. Cir. 2008); *TiVo Inc. v. EchoStar Commc’ns Corp.*, 446 F. Supp. 2d 664 (E.D. Tex. 2006), *aff’d in relevant part*, 516 F.3d 1290 (Fed. Cir. 2008); *Telequip Corp. v. Change Exch.*, No. 5:01-CV-1748, 2006 U.S. Dist. LEXIS 61469 (N.D.N.Y. Aug. 15, 2006); *3M Innovative Props. Co. v. Avery Dennison Corp.*, No. 01-1781, 2006 U.S. Dist. LEXIS 70263 (D. Minn. Sept. 25, 2006); *Rosco, Inc. v. Mirror Lite Co.*, No. CV-96-5658, 2006 U.S. Dist. LEXIS 73366 (E.D.N.Y. Sept. 28, 2006); *Smith & Nephew, Inc. v. Synthes (U.S.A.)*, 466 F. Supp. 2d 978 (W.D. Tenn. 2006), *appeal dismissed*, No. 2007-1048, 2008 U.S. App. LEXIS 4889 (Fed. Cir. Feb. 22, 2008); *Black & Decker Inc. v. Robert Bosch Tool Corp.*, No. 04 C 7955, 2006 U.S. Dist. LEXIS 86990 (N.D. Ill. Nov. 29, 2006), *aff’d in part, vacated in part, remanded*, 260 F. App’x 284 (Fed. Cir. 2008) (vacated and remanded on issue of claim construction); *Transocean Offshore Deepwater Drilling, Inc. v. GlobalSantaFe Corp.*, No. H-03-2910, 2006 U.S. Dist. LEXIS 93408 (S.D. Tex. Dec. 27, 2006); *Visto Corp. v. Seven Networks, Inc.*, No. 2:03-CV-333-TJW, 2006 U.S. Dist. LEXIS 91453 (E.D. Tex. Dec. 19, 2006); *MPT, Inc. v. Marathon Labels, Inc.*, 505 F. Supp. 2d 401 (N.D. Ohio 2007), *aff’d in part, rev’d in part, remanded*, 258 F. App’x 318 (Fed. Cir. 2007) (narrowing scope of injunction); *Atlanta Attachment Co. v. Leggett & Platt, Inc.*, No. 1:05-CV-1071-ODE, 2007 U.S. Dist. LEXIS 96872 (N.D. Ga. Feb. 23, 2007), *rev’d and remanded*, 516 F.3d 1361 (Fed. Cir. 2008) (remanded on issue of validity); *Novozymes A/S v. Genencor Int’l, Inc.*, 474 F. Supp. 2d 592 (D. Del. 2007); *O2 Micro Int’l Ltd. v. Beyond Innovation Tech. Co., Ltd.*, No. 2-04-CV-32, 2007 U.S. Dist. LEXIS 25948 (E.D. Tex. Mar. 21, 2007), *vacated and remanded*, 521 F.3d 1351 (Fed. Cir. 2008) (vacated and remanded on the issue of infringement); *Ortho-McNeil Pharm., Inc. v. Mylan Labs, Inc.*, Nos. 04-1689, 06-757, 06-5166, 2007 U.S. Dist. LEXIS 19494 (D.N.J. Mar. 20, 2007), *aff’d by*, 520 F.3d 1358 (Fed. Cir. 2008); *MGM Well Servs., Inc. v. Mega Lift Sys., LLC*, 505 F. Supp. 2d 359 (S.D. Tex. 2007), *aff’d*, 264 F. App’x 900 (Fed. Cir. 2008); *800 Adept, Inc. v. Murex Secs., Ltd.*, 505 F. Supp. 2d 1327 (M.D. Fla. 2007), *aff’d in part, rev’d in part, vacated in part*, 539 F.3d 1354 (Fed. Cir. 2008) (reversed on issue of infringement; injunction vacated).

⁴⁸ Cases granting injunctive relief between May 2007 and April 2008: *Commonwealth Scientific &*

2009), there were fifteen cases granting permanent injunctive relief.⁴⁹ In most of these post-*eBay* decisions granting injunctive relief, the parties were described as competitors, with the concept of *competition* growing broader over time.

¶18

In the first twelve months after *eBay*, courts relied heavily on direct competition between the parties in granting equitable relief.⁵⁰ The holding in *Visto Corp. v. Seven Networks, Inc.*⁵¹ is representative of those cases. In *Visto*, the parties were direct

Indus. Research Org. v. Buffalo Tech. Inc., 492 F. Supp. 2d 600 (E.D. Tex. 2007); *Brooktrout, Inc. v. Eicon Networks Corp.*, No. 2:03-CV-59, 2007 U.S. Dist. LEXIS 43107 (E.D. Tex. June 14, 2007); *Sanofi-Synthelabo v. Apotex Inc.*, 492 F. Supp. 2d 353 (S.D.N.Y. 2007), *aff'd*, 550 F.3d 1075 (Fed. Cir. 2008); *Muniauction, Inc. v. Thomson Corp.*, 502 F. Supp. 2d 477 (W.D. Pa. 2007), *rev'd, vacated*, 532 F.3d 1318 (Fed. Cir. 2008) (reversed and vacated on validity and infringement); *Johns Hopkins Univ. v. Datascope Corp.*, 513 F. Supp. 2d 578 (D. Md. 2007), *rev'd and remanded*, 543 F.3d 1342 (Fed. Cir. 2008) (reversed and remanded on issue of infringement); *Allan Block Corp. v. E. Dillon & Co.*, 509 F. Supp. 2d 795 (D. Minn. 2007); *Baden Sports, Inc. v. Kabushiki Kaisha Molten*, No. C06-210MJP, 2007 U.S. Dist. LEXIS 70776, at *2-10 (W.D. Wash. Sept. 25, 2007) (perm. inj. granted) *Fed. Cir. rev'd denial of def's. motion for new trial*, *Baden Sports, Inc. v. Molten USA, Inc.*, 556 F.3d 1300 (Fed. Cir. 2009); *Verizon Servs. Corp. v. Vonage Holdings Corp.*, 503 F.3d 1295, 1310-14 (Fed. Cir. 2007) (aff'g injunction as to certain claims and rev'g injunction as to certain claims); *Martek Biosciences Corp. v. Nutrinova Inc.*, 520 F. Supp. 2d 537 (D. Del. 2007) (perm. inj. granted); *Broadcom Corp. v. Qualcomm Inc.*, No. SACV 05-467 JVS (RNBx), 2007 U.S. Dist. LEXIS 97647, at *5-27 (C.D. Cal. Dec. 31, 2007) (district court's reasoning for granting permanent injunction); *Broadcom Corp. v. Qualcomm, Inc.*, No. SACV05-0467-JVS (RNBx), 2008 U.S. Dist. LEXIS 105232 (C.D. Cal. Mar. 24, 2008) (order entered permanent injunction), *aff'd in part, rev'd in part, remanded*, 543 F.3d 683, (Fed. Cir. 2008) (partially affirming permanent injunction); *Power-One, Inc. v. Artesyn Techs., Inc.*, 2008 U.S. Dist. LEXIS 30338, at *2-6 (E.D. Tex. Apr. 11, 2008) (perm. inj. granted); *Fresenius Med. Care Holdings, Inc. v. Baxter Int'l, Inc.*, No. C 03-1431 SBA, 2008 U.S. Dist. LEXIS 79689, at *5-21 (N.D. Cal. Mar. 21, 2008) (perm. inj. granted); *Acumed LLC v. Stryker, Corp.*, 551 F.3d 1323, 1327-31 (Fed. Cir. 2008), *aff'g*, *Acumed, LLC v. Stryker Corp.*, 04-CV-513-BR, 2007 U.S. Dist. LEXIS 86866, at *5-20 (D. Or. Nov. 20, 2007) (perm. inj. granted).

⁴⁹ Cases granting injunctive relief between May 2008 and April 2009: *Trading Techs. Int'l, Inc. v. eSpeed, Inc.*, No. 04 C 5312, 2008 U.S. Dist. LEXIS 86953 (N.D. Ill. May 22, 2008); *TruePosition Inc. v. Andrew Corp.*, 568 F. Supp. 2d 500 (D. Del. 2008), *amended by* 2009 U.S. Dist. LEXIS 9946 (D. Del. Jan. 26, 2009); *Emory Univ. v. Nova BioGenetics, Inc.*, No. 1:06-CV-0141-TWT, 2008 U.S. Dist. LEXIS 57642 (N.D. Ga. July 24, 2008); *Mannatech, Inc. v. Glycoproducts Int'l, Inc.*, NO. 3-06-CV-0471-BD, 2008 U.S. Dist. LEXIS 52537 (N.D. Tex. July 9, 2008); *Amgen, Inc. v. F. Hoffmann-La Roche Ltd.*, No. 05-12237-WGY, 2008 U.S. Dist. LEXIS 77343 (D. Mass. Oct. 2, 2008), *aff'd*, 296 F. App'x 69 (Fed. Cir. 2008); *Becton Dickinson & Co. v. Tyco Healthcare Group LP*, No. 02-1694 GMS, 2008 U.S. Dist. LEXIS 87623 (D. Del. Oct. 29, 2008); *Sensormatic Elecs. Corp. v. Tag Co. US, LLC*, No. 06-81105-CIV, 2008 U.S. Dist. LEXIS 102690 (S.D. Fla. Dec. 19, 2008); *Extreme Networks, Inc. v. Enterasys Networks, Inc.*, No. 07-cv-229-bbc, 2008 U.S. Dist. LEXIS 88540 (W.D. Wis. Oct. 28, 2008); *Callaway Golf Co. v. Acushnet Co.*, 585 F. Supp. 2d 600 (D. Del. 2008); *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, No. 04-1371-JJF, 2008 U.S. Dist. LEXIS 100539 (D. Del. Dec. 12, 2008); *U.S. Philips Corp. v. Iwasaki Elec. Co., Ltd.*, 607 F. Supp. 2d 470 (S.D.N.Y. 2009); *Funai Elec. Co., Ltd. v. Daewoo Elecs. Corp.*, 593 F. Supp. 2d 1088 (N.D. Cal. 2009); *Joyal Prods., Inc. v. Johnson Elec. N. Am., Inc.*, No. 04-5172, 2009 U.S. Dist. LEXIS 15531 (D.N.J. Feb. 26, 2009); *Kowalski v. Mommy Gina Tuna Res.*, Nos. 05-00679-BMK, 05-00787-BMK, 06-00182-BMK, 2009 U.S. Dist. LEXIS 26216 (D. Haw. Mar. 30, 2009); *Mass Engineered Design, Inc., v. Ergotron, Inc.*, No. 2:06 CV 272, 2009 U.S. Dist. LEXIS 34173 (E.D. Tex. Apr. 17, 2009).

⁵⁰ *See, e.g.*, *Floe Int'l, Inc. v. Newmans' Mfg. Inc.*, No. 04-5120, 2006 U.S. Dist. LEXIS 59872, at *1-27 (D. Minn. Aug. 23, 2006) (granting permanent injunction; parties were direct competitors in snowmobile trailer market); *Litecubes, L.L.C. v. N. Light Prods., Inc.*, No. 4:04CV00485 ERW, 2006 U.S. Dist. LEXIS 60575, at *30-33 (E.D. Mo. Aug. 25, 2006) (granting permanent injunction; irreparable injury because "potential customers in the United States were buying infringing devices sold and imported by defendant, instead of purchasing the products sold by plaintiffs"); *TiVo Inc. v. EchoStar Commc'ns Corp.*, 446 F. Supp. 2d 664, 671 (E.D. Tex. 2006) (granting permanent injunction; parties were direct competitors in the DVR market and plaintiff suffered loss of market share).

⁵¹ *Visto Corp. v. Seven Networks, Inc.*, No. 2:03-CV-333-TJW, 2006 U.S. Dist. LEXIS 91453 (E.D. Tex. Dec. 19, 2006) (granting permanent injunction).

competitors in the mobile email market. The *Visto* court, citing *Tivo*⁵² and finding irreparable injury, held, “[t]he parties to this case are direct competitors, and this fact weighs heavily in the court’s analysis. Intellectual property enjoys its highest value when it is asserted against a direct competitor in the plaintiff’s market.”⁵³ Judge Folsom found irreparable harm because “the availability of the infringing products leads to loss of market share for Plaintiff’s products.”⁵⁴ Additionally, during this period (May 2006 through April 2007), as reflected in *TransOcean*,⁵⁵ a finding of direct competition between the parties, in the form of shared customers,⁵⁶ generally resulted in an expansive definition of “inadequate remedy at law”: “The court is persuaded that if it does not enter a permanent injunction, it will force a compulsory license on Transocean that will not contain any of the commercial business terms typically used by a patent holder to control its technology or limit encroachment on its market share.”⁵⁷ Rejecting the defendant’s argument that the Kennedy concurrence in *eBay* should be interpreted to prohibit the issuance of an injunction, the court reasoned that the portion of the Kennedy concurrence relating to licensing and component parts is strictly limited to situations in which the plaintiff was willing to license *and* the technology was but a small component of the defendant’s product.⁵⁸ The *Visto* court offered a similarly broad reading of what constitutes lack of an adequate remedy at law when the parties are competing for the same customers:

Although future damages may compensate *Visto* for an *approximate* loss, that does not make them adequate in the sense that they are a suitable proxy for injunctive relief. What makes legal remedies inadequate under the circumstances of this case is the inability to calculate the plaintiff’s future losses with precision. An injunction against the continued use of the plaintiff’s intellectual property is the proper remedy to prevent future infringement.⁵⁹

¶19

Towards the end of the first twelve month period after *eBay*, the District of Delaware seemed to expand the definition of what constitutes “competition between the parties” when it granted injunctive relief in *Novozymes*.⁶⁰ In that case, the patentee had a non-exclusive license with one of its subsidiaries that was practicing the patent. The plaintiff sought to join its subsidiary as a co-plaintiff, but the court held that the subsidiary did not have standing because its license was non-exclusive. Nonetheless, the court held that *Novozymes*, the licensor/patent-holder, and defendant, the infringer, were “head-to-head competitors.”⁶¹ The court further commented that “even though

⁵² *TiVo Inc. v. EchoStar Commc’ns Corp.*, 446 F. Supp. 2d 664 (E.D. Tex. 2006) (granting permanent injunction), *aff’d in part, rev’d in part*, 516 F.3d 1290 (Fed. Cir. 2008) (injunction affirmed).

⁵³ *Visto Corp.*, 2006 U.S. Dist. LEXIS 91453, at *12 (citing *TiVo Inc.*, 446 F. Supp. 2d at 669).

⁵⁴ *Id.*

⁵⁵ *Transocean Offshore Deepwater Drilling, Inc. v. GlobalSantaFe Corp.*, No. H-03-2910, 2006 U.S. Dist. LEXIS 93408, at *3-26 (S.D. Tex. Dec. 27, 2006) (granting permanent injunction).

⁵⁶ *Id.* at *12 (injunction necessary because parties shared customers in the “deep water oil rig” market).

⁵⁷ *Id.* at *19.

⁵⁸ *Id.*

⁵⁹ *Visto Corp.*, 2006 U.S. Dist. LEXIS 91453, at *13 (emphasis in original).

⁶⁰ *Novozymes A/S v. Genencor Int’l, Inc.*, 474 F. Supp. 2d 592, 613 (D. Del. 2007) (granting permanent injunction).

⁶¹ *Id.* at 612.

Novozymes does not market the alpha-amylases itself, it has suffered harm beyond the reasonable royalty that it can recover from Defendants[, and] Novozymes will continue to suffer such irreparable harm if Defendants are not enjoined.”⁶² The court also noted that “Novozymes has a right, granted by Congress, not to assist its rival with the use of proprietary technology.”⁶³ The defendant argued that under *eBay*, the loss of the right to exclude could not be irreparable harm, but the court disagreed. It reasoned that “[c]ontrary to Genencor’s argument . . . the Supreme Court in *eBay* did not state that loss of the right to exclude could not be irreparable harm. Rather, the Court simply rejected the proposition that the patentee’s right to exclude should always lead to injunctive relief for patent infringement.”⁶⁴ In addition, toward the end of the first year post-*eBay*, the court in *MPT, Inc. v. Marathon Labels, Inc.*⁶⁵ felt that the public interest invariably supports an injunction.⁶⁶

¶20

Through the next twelve-month post-*eBay* period (May 2007 through April 2008), the courts’ views of what constituted sufficient evidence of irreparable harm expanded. However, *direct competition* between the parties remained the principle basis for granting injunctive relief. As the court noted in *Muniauction, Inc. v. Thomson Corp.*,⁶⁷ “[p]laintiff and defendants are direct competitors in a two-supplier market. If plaintiff cannot prevent its only competitor’s continued infringement of its patent, the patent is of little value.”⁶⁸ In *Johns Hopkins University v. Datascope Corp.*,⁶⁹ the court noted that the defendant’s product “competes directly with the Plaintiffs’ product.”⁷⁰ “In fact, it is the only competition and thus, its sale reduces the Plaintiffs’ market share. Continued sales by [the defendant] will irreparably harm the Plaintiffs.”⁷¹ In *Martek Biosciences Corp. v. Nutrinova Inc.*,⁷² the court concluded that “Lonza is Martek’s only competitor in the vegetarian DHA market for adult foods and beverages, and is targeting Martek’s customers in that industry [and] if Lonza is not enjoined from infringing the ‘594 and ‘281 patents, [Martek] is likely to lose market share that it may not be able to recapture.”⁷³ In *Brooktrout, Inc. v. Eicon Networks Corp.*,⁷⁴ U.S. District Judge T. John Ward concluded that the parties were direct competitors in the fax server board market and granted injunctive relief, citing the plaintiff’s loss of market share as a basis for finding irreparable harm:

⁶² *Id.*

⁶³ *Id.* at 613.

⁶⁴ *Id.* at 612.

⁶⁵ *MPT, Inc. v. Marathon Labels, Inc.*, 505 F. Supp. 2d 401 (N.D. Ohio 2007), *aff’d in part, rev’d in part, remanded*, Nos. 2007-1183, -1204, -1238, 258 F. App’x 318 (Fed. Cir. 2007).

⁶⁶ *Id.* at 420 (“There is a general public interest in favor of strong patent protection, except in cases where an obvious public interest such as public health and safety exists.”).

⁶⁷ *Muniauction, Inc. v. Thomson Corp.*, 502 F. Supp. 2d 477 (W.D. Pa. 2007) (granting permanent injunction), *vacated*, 532 F.3d 1318 (Fed. Cir. 2008) (reversing on validity and infringement).

⁶⁸ *Id.* at 482.

⁶⁹ *Johns Hopkins Univ. v. Datascope Corp.*, 513 F. Supp. 2d 578 (D. Md. 2007), *rev’d and remanded*, 543 F.3d 1342 (Fed. Cir. 2008) (reversed and remanded on issue of infringement).

⁷⁰ *Id.* at 586.

⁷¹ *Id.*

⁷² *Martek Biosciences Corp. v. Nutrinova Inc.*, 520 F. Supp. 2d 537 (D. Del. 2007) (granting permanent injunction).

⁷³ *Id.* at 558.

⁷⁴ *Brooktrout, Inc. v. Eicon Networks Corp.*, No. 2:03-CV-59, 2007 U.S. Dist. LEXIS 43107 (E.D. Tex. June 14, 2007).

Additionally, although future damages in lieu of an injunction may compensate Brooktrout for an *approximate* loss, that does not make future damages adequate in the sense that they are a suitable proxy for injunctive relief. The inability to calculate the plaintiff's future loss with reasonable precision makes legal remedies inadequate in this case. An injunction against future acts of inducement is the proper remedy to prevent future infringement.⁷⁵

For the same basic reasons, Judge Ward also found that there was no adequate remedy at law.⁷⁶

¶21 During this second year after *eBay* (May 2007 through April 2008), a district court granted the first post-*eBay* permanent injunction in favor of a non-practicing entity in *Commonwealth Scientific & Industrial Research Organisation*.⁷⁷ In that case, the plaintiff was described as the Australian equivalent of the National Institute of Health, and its activities included developing technology that could be used to create start-up companies and/or for licensing to firms to earn commercial royalties. The court stated that the parties were not competitors, but found that the plaintiff would suffer irreparable harm without an injunction. The court reasoned that the inability to enforce the patent against one infringer significantly increased the risk that other parties would be willing to risk infringing the patented technology. Discussing the Kennedy concurrence in *eBay*, the *Commonwealth Scientific* court specifically concluded that “[t]his case is not the situation that concerned Justice Kennedy; Buffalo’s infringing use of CSIRO’s technology is not limited to a minor component of the technology. The ‘069 patent is the core technology embodied in [patents].”⁷⁸

¶22 Nearly two years after *eBay* one district court further and expanded the post-*eBay* scope of irreparable harm. In *Fresenius Medical Care Holdings, Inc.*,⁷⁹ the plaintiff sued Baxter for declaratory judgment. The court acknowledged the economic value of the right to exclude and stated that “[w]ithout the right to obtain an injunction, the right to exclude granted to the patentee would have only a fraction of the value it was intended to have, and would no longer be as great an incentive to engage in the toils of scientific and technological research.”⁸⁰ The *Fresenius* court further stated that “the loss of goodwill, reputation for innovation, the legal right to exclude, including the right to control the terms of any licensing arrangement, are all forms of irreparable injury that cannot be easily and readily quantified through a simple monetary award.”⁸¹

¶23 During the most recent twelve-month post-*eBay* period, (May 2008 through April 2009) direct competition between the parties continued to be the principle basis for courts finding irreparable harm and no adequate remedy at law,⁸² but the scope of what qualified as “competition between the parties” and “irreparable harm” continued to grow.

⁷⁵ *Id.* at *4-5 (emphasis in original).

⁷⁶ *Id.* at *5.

⁷⁷ *Commonwealth Scientific & Indus. Research Org. v. Buffalo Tech. Inc.*, 492 F. Supp. 2d 600 (E.D. Tex. 2007) (granting permanent injunction).

⁷⁸ *Id.* at 606.

⁷⁹ *Fresenius Med. Care Holdings, Inc. v. Baxter Int’l, Inc.*, No. C 03-1431 SBA, 2008 U.S. Dist. LEXIS 79689 (N.D. Cal. Mar. 21, 2008) (granting permanent injunction).

⁸⁰ *Id.* at *8 (quoting *Smith Int’l, Inc. v. Hughes Tool Co.*, 718 F.2d 1573, 1578 (Fed. Cir. 1983)).

⁸¹ *Id.* at *13-14.

⁸² *See, e.g.*, *TruePosition Inc. v. Andrew Corp.*, 568 F. Supp. 2d 500 (D. Del. 2008) (granting permanent injunction because parties were direct competitors); *Amgen, Inc. v. F. Hoffmann-La Roche Ltd.*, No. 05-

¶24 In *Trading Technologies International, Inc.*,⁸³ the court explained why the loss of market share is an irreparable injury. According to the *Trading Technologies* court, market share is one of the patent holder's most valuable assets. "Erosion of this intangible asset would cause incalculable extraneous injury to [Trading Technologies'] business. Therefore, the continuing existence of eSpeed's infringing products in the same marketplace . . . poses a risk of irreparable harm to [Trading Technologies]."⁸⁴

¶25 In October 2008, the *Amgen*⁸⁵ court identified an injury not discussed in previous cases. The court concluded that without an injunction, the value of the Amgen's stock would be in jeopardy. According to the court, loss of value of its stock would result in loss of investment capital to pursue research and development.⁸⁶ In addition, the *Amgen* court recognized the risk that allowing the defendant to continue to infringe would invite other infringers and likely result in significant legal fees to enforce the patent.

¶26 In November 2008, the court in *Callaway Golf Co. v. Acushnet Co.*⁸⁷ further expanded the definition of "competition," and hence, the scope of granting injunctive relief. Despite the fact that there were multiple competitors in the three-layer golf ball market, the court found sufficient evidence that plaintiff suffered irreparable harm. According to the court, "[a] credible case can be made that, had defendant not launched the Pro V1® ball in late 2000, a large number of its tour players may have switched to the Rule 35® ball in January 2001."⁸⁸ In addition, the *Callaway* court rejected the notion that a party's willingness to license was a sufficient basis to prove that monetary damages would be an adequate remedy.⁸⁹ In *Callaway*, the plaintiff's golf ball, that embodied the patented technology, also contained a second patented technology owned by the defendant and licensed to plaintiff in a cross-licensing arrangement. The court held that monetary damages would not be an adequate remedy:

Although plaintiff's willingness to forgo its patent rights (generally) for compensation may be inconsistent with the notion that money damages are inadequate, it is certainly not a dispositive factor. . . . In this regard, of utmost

12237-WGY, 2008 U.S. Dist. LEXIS 77343 (D. Mass. Oct. 2, 2008), *aff'd*, 296 F. App'x 69 (Fed. Cir. 2008) (same); U.S. Philips Corp. v. Iwasaki Elec. Co., Ltd., 607 F. Supp. 2d 470 (S.D.N.Y. 2009) (same).

⁸³ *Trading Techs. Int'l, Inc. v. eSpeed, Inc.*, No. 04 C 5312, 2008 U.S. Dist. LEXIS 86953 (N.D. Ill. May 22, 2008).

⁸⁴ *Id.* at *7.

⁸⁵ *Amgen, Inc. v. F. Hoffmann-La Roche Ltd.*, No. 05-12237-WGY, 2008 U.S. Dist. LEXIS 77343 (D. Mass. Oct. 2, 2008) (granting permanent injunction), *aff'd*, 296 F. App'x 69 (Fed. Cir. 2008).

⁸⁶ *Id.* at *177-78 ("The Federal Circuit has long acknowledged the importance of the patent system in encouraging innovation. Indeed, the encouragement of investment-based risk is the fundamental purpose of the patent grant, and is based directly on the right to exclude. Importantly, the patent system provides incentive to the innovative drug companies to continue costly development efforts. The evidence in this case confirmed the Federal Circuit's evaluation of the importance of the right to exclude as an incentive for investment." (internal cites and quotations omitted)).

⁸⁷ *Callaway Golf Co. v. Acushnet Co.*, 585 F. Supp. 2d 600 (D. Del. 2008) (granting permanent injunction).

⁸⁸ *Id.* at 621 ("It is impossible to tell whether, absent the Pro V1® ball, plaintiff would have gained the momentum . . . to become the market leader itself, or merely gained a more favorable position than it presently has. . . . Plaintiff was already a market leader of golf equipment, and was poised to compete in the developing multi-layer ball market. History cannot be rewritten such that plaintiff expanded its customer base and improved its market position . . . and/or reaped the benefits of good will and reputation associated with manufacturing the leading golf ball during this critical time period.").

⁸⁹ *Id.* at 620.

import in the context of evaluating irreparable harm and the adequacy of money damages is the nature of the competition between plaintiff and defendant in the three-piece golf ball market.⁹⁰

In December 2008, the Federal Circuit offered its perspective on the issue of whether a patent holder's willingness to license could be a basis for concluding that monetary damages would be an adequate remedy:

The essential attribute of a patent grant is that it provides a right to exclude competitors from infringing the patent. 35 U.S.C. s 154(a)(1)(2000). In view of that right, infringement may cause a patentee irreparable harm not remediable by a reasonable royalty. While the fact that a patentee has previously chosen to license the patent may indicate that a reasonable royalty does compensate for an infringement, that is but one factor for the district court to consider. The fact of the grant of previous licenses, the identity of the past licensees, the experience in the market since the licenses were granted, and the identity of the new infringer all may affect the district court's discretionary decision concerning whether a reasonable royalty from an infringer constitutes damages adequate to compensate for the infringement.⁹¹

In February 2009, a district court in New Jersey gave "irreparable harm" and "competition between the parties" perhaps their most expansive reading to date.⁹² In *Joyal Products, Inc.*, the plaintiff was a defunct business in the process of liquidating its assets. It argued that the parties were competitors and that without an injunction against the defendant it would suffer irreparable harm because it would not be able to obtain the maximum value for the patented assets. In granting the permanent injunction, the court reasoned that anything less than a permanent injunction would damage the value of the patent since the "principal value of a patent is its statutory right to exclude."⁹³ The court went on to explain why there was no adequate remedy at law:

[A]s Joyal is no longer conducting business, it wishes to divest itself of this asset. It justifiably expects to be able to sell that asset for maximum value. Joyal's ability to obtain the maximum value from the sale - indeed, the very ability to sell the patent at all - will be materially impaired if Johnson is permitted to continue [to] produce and sell infringing products in the United States.⁹⁴

IV. POST-EBAY CASES DENYING INJUNCTIVE RELIEF BASED ON IRREPARABLE HARM AND NO ADEQUATE REMEDY AT LAW ARE DIMINISHING

¶27

In the first twelve months after *eBay* (May 2006 through April 2007), there were twenty-eight decisions addressing the issue of permanent injunctive relief. Of those, eight (or twenty-nine percent) resulted in a denial of an injunction based on the patent

⁹⁰ *Id.* at 620.

⁹¹ *Acumed LLC v. Stryker Corp.*, 551 F.3d 1323, 1328 (Fed. Cir. 2008).

⁹² *Joyal Prods., Inc. v. Johnson Elec. N. Am., Inc.*, No. 04-5172, 2009 U.S. Dist. LEXIS 15531 (D.N.J. Feb. 26, 2009) (granting permanent injunction).

⁹³ *Id.* at *31 (quoting *Polymer Techs., Inc. v. Bridwell*, 103 F.3d 970, 976 (Fed. Cir. 1996)).

⁹⁴ *Id.* at *32-33.

holders failure to demonstrate irreparable harm.⁹⁵ During the second twelve months (May 2007 through April 2008), there were sixteen decisions granting permanent injunctions with three resulting in denials, but none were based on the patent holders failure to demonstrate *irreparable harm* or *no adequate remedy at law*.⁹⁶ In the most recent twelve-month period after *eBay* (May 2008 through April 2009), there were twenty permanent injunction decisions with five denials, but only two of those denials were primarily based on the patent holders failure to demonstrate irreparable harm (ten percent).⁹⁷ The eight denial-of -injunction decisions from the first year post-*eBay* (May 15, 2006 to May 15, 2007) were all based on the plaintiff's failure to demonstrate that it would suffer irreparable harm in the event that an injunction did not issue.⁹⁸

One of the early post-*eBay* denial cases was *Paice LLC v. Toyota Motor Corporation*.⁹⁹ In that case, the patented technology was a hybrid electric vehicle train, a component of the hybrid automobile engine, and the defendant's hybrid automobile engine infringed. The district court applied the four-factor test and found that Paice failed to demonstrate irreparable harm.¹⁰⁰ After considering the parties' arguments, the district court decided that Toyota's continued sale of its hybrid automobile (the allegedly infringing product) would not negatively impact Paice's efforts to license its electric

⁹⁵ Eight denial-of -injunction decisions from the first year post-*eBay* (May 15, 2006 to May 15, 2007): *z4 Techs., Inc. v. Microsoft Corp.*, 434 F. Supp. 2d 437 (E.D. Tex. 2006), *aff'd*, 507 F.3d 1340 (Fed. Cir. 2007); *Finisar Corp. v. DirecTV Group, Inc.*, No. 1:05-CV-264, 2006 U.S. Dist. LEXIS 76380 (E.D. Tex. July 7, 2006) *aff'd in relevant part*, 523 F.3d 1323 (Fed. Cir. 2008); *Paice LLC v. Toyota Motor Corp.*, No. 2:04-CV-211-DF, 2006 U.S. Dist. LEXIS 61600 (E.D. Tex. Aug. 16, 2006), *aff'd in part, vacated in part*, 504 F.3d 1293 (Fed. Cir. 2007); *Voda v. Cordis Corp.*, No. CIV-03-1512-L, 2006 U.S. Dist. LEXIS 63623 (W.D. Okla. Sept. 5, 2006); *Sundance, Inc. v. DeMonte Fabricating Ltd.*, No. 02-73543, 2007 U.S. Dist. LEXIS 158 (E.D. Mich. Jan. 4, 2007) (denying permanent injunction), *rev'd*, 2007 U.S. Dist. LEXIS 77728 (E.D. Mich. Oct. 19, 2007), *rev'd on other grounds*, 550 F.3d 1356 (Fed. Cir. 2008); *IMX, Inc. v. Lendingtree, LLC*, 469 F. Supp. 2d 203 (D. Del. 2007); *Praxair, Inc. v. ATMI, Inc.*, 479 F. Supp. 2d 440 (D. Del. 2007), *aff'd in part, rev'd in part, remanded*, 543 F.3d 1306 (Fed. Cir. 2008) (patentee withdrew request for injunction); *Amado v. Microsoft Corp.*, No. 8:03-CV-242, 2007 U.S. Dist. LEXIS 96487 (C.D. Cal. Mar. 13, 2007) (dissolving permanent injunction), *aff'd in relevant part*, 517 F.3d 1353 (Fed. Cir. 2008).

⁹⁶ Three denial-of-injunction cases from second year post-*eBay* (May 2006 to April 2007) *Respirionics, Inc. v. Invacare Corp.*, No. 04-0336, 2008 U.S. Dist. LEXIS 1174 (W.D. Pa. Jan. 7, 2008); *Innogenetics, N.V. v. Abbott Labs.*, No. 05-C-0575-C, 2007 U.S. Dist. LEXIS 3148 (W.D. Wis. Jan. 12, 2007), *rev'd in relevant part*, 512 F.3d 1363 (Fed. Cir. 2008) (injunction vacated); *Nichia Corp. v. Seoul Semiconductor, Ltd.*, No. 06-0162 MMC, 2008 U.S. Dist. LEXIS 12183 (N.D. Cal. Feb. 7, 2008). Two of the three cases denying injunctive relief during this time period were based on the court's determination that there was no likelihood of future infringement (*Respirionics* and *Nichia*).

⁹⁷ Five denial-of-injunction cases from May 2008 through April 2009: *Advanced Cardiovascular Sys., Inc. v. Medtronic Vascular, Inc.*, 579 F. Supp. 2d 554 (D. Del. 2008); *Boston Scientific Corp. v. Johnson & Johnson*, No. C 02-0790 SI, 2008 U.S. Dist. LEXIS 98939 (N.D. Cal. Nov. 25, 2008); *Telcordia Techs., Inc. v. Cisco Sys., Inc.*, 592 F. Supp. 2d 727 (D. Del. 2009); *Hynix Semiconductor Inc. v. Rambus Inc.*, 609 F. Supp. 2d 951 (N.D. Cal. 2009); *Bard Peripheral Vascular, Inc. v. W.L. Gore & Associates, Inc.*, No. CV-03-0597-PHX-MHM, 2009 U.S. Dist. LEXIS 31328 (D. Ariz. Mar. 31, 2009). Two of the three cases denying injunctive relief during this time period were decisions from the District of Delaware.

⁹⁸ Two of those decisions were issued without prejudice. See *IMX, Inc. v. Lendingtree, LLC*, 469 F. Supp. 2d 203 (D. Del. 2007); *Praxair, Inc. v. ATMI, Inc.*, 479 F. Supp. 2d 440 (D. Del. 2007), *aff'd in part, rev'd in part, remanded*, 543 F.3d 1306 (Fed. Cir. 2008) (patentee withdrew request for injunction). But U.S. District Judge Robinson (the author of both decisions) later characterized those decisions as denials of injunction. See *TruePosition Inc. v. Andrew Corp.*, 568 F. Supp. 2d 500, 532 n.48 (D. Del. 2008) (describing *IMX* and *Praxair* as "declining to grant permanent injunction").

⁹⁹ *Paice LLC v. Toyota Motor Corp.*, No. 2:04-CV-211-DF, 2006 U.S. Dist. LEXIS 61600 (E.D. Tex. Aug. 16, 2006), *aff'd in part, vacated in part*, 504 F.3d 1293 (Fed. Cir. 2007).

¹⁰⁰ *Id.* at *12.

vehicle train. The court reasoned that since Paice does not manufacture automobiles, it was not at risk of losing name recognition or market share.¹⁰¹ The plaintiff (Paice) argued that without an injunction, it would suffer irreparable harm in that it would be unable successfully to license its patented technology. In support of this claim, the plaintiff offered evidence of its failure to license the technology thus far. The court rejected this argument, citing evidence in the record that plaintiff's failure to license its technology may have resulted from misrepresentations and improper business tactics.¹⁰²

¶29 As in *Paice*, the plaintiff in *z4 Technologies, Inc. v. Microsoft Corp.*¹⁰³ was a non-practicing entity and the patented technology was a component of the adjudged infringer's final product. Specifically, Microsoft's Office and Windows software programs infringed the plaintiff's product activation technology. The court nevertheless denied injunctive relief, concluding that "Microsoft's continued infringement does not inhibit z4's ability to market, sell, or license its patented technology. . . . Microsoft does not produce product activation software that it then individually sells, distributes, or licenses to other software manufacturers or consumers."¹⁰⁴ Here the plaintiff was a non-practicing entity, but the fact that the infringed technology was a component of the defendant's product was, again, arguably, equally significant.

¶30 A third decision, issued during the first year post-*eBay*, in which the patent holder was denied injunctive relief based on his failure to demonstrate irreparable harm, was *Amado v. Microsoft Corp.*¹⁰⁵ In *Amado*, the infringed patent was a point-and-click interface for linking database records and spreadsheets. Microsoft incorporated the patented technology into its software programs. That case was originally decided prior to *eBay* and the district court awarded Amado an injunction. After the *eBay* decision, Microsoft requested reconsideration of the injunction, and the District Court held that under the dictates of *eBay*, plaintiff had not met his burden for establishing irreparable harm. The permanent injunction was dissolved, with the court reasoning that:

Amado does not compete with Microsoft, does not sell a product covered by the patent and is no longer even attempting to commercialize or license the patent. Moreover, Amado's patent only covers a very small component of the infringing products - claim 21, the only claim that the jury found Microsoft Office and Access infringed, covers a single feature linking Access and Excel. . . . Thus, Amado's injury can be adequately compensated through monetary damages.¹⁰⁶

The *Amado* Court noted that the plaintiff was not in the business of selling a product covered by the patent, pointed out that the patent covered only a small component of the infringing product, and found that the plaintiff was not trying to license the patented technology.¹⁰⁷

¹⁰¹ *Id.* at *14.

¹⁰² *Id.* at *12-13.

¹⁰³ *z4 Techs., Inc. v. Microsoft Corp.*, 434 F. Supp. 2d 437 (E.D. Tex. 2006) (denying permanent injunction), *aff'd*, 507 F.3d 1340 (Fed. Cir. 2007).

¹⁰⁴ *Id.* at 440.

¹⁰⁵ *Amado v. Microsoft Corp.*, 517 F.3d 1353 (Fed. Cir. 2008).

¹⁰⁶ *Amado v. Microsoft Corp.*, No. 8:03-CV-242, 2007 U.S. Dist. LEXIS 96487, at *38-39 (C.D. Cal. Mar. 13, 2007).

¹⁰⁷ *Id.*

¶31 *Sundance, Inc. v. DeMonte Fabricating Ltd.*,¹⁰⁸ also decided during that first year post *e-Bay*, is notable because the court first denied an injunction, then granted it, leading some commentators to categorize this as an “injunction-granted” case.¹⁰⁹ *Sundance* is also interesting because its reasoning and holding conflict with those of a significant number of subsequent decisions. In *Sundance*, the patented technology was not a small component of the infringing product and the plaintiff argued that the infringing sales would damage his relationship with his licensees. The court rejected that argument:

[I]t cannot be said that Sundance’s licensees are losing sales to DeMonte expressly because of its infringement of the segmented cover. It is possible that lost sales are due to a desire for other features of the Quick Draw system or are sales lost to other competitors in the marketplace. Sundance simply cannot tie alleged lost sales to the nature of DeMonte’s infringement.¹¹⁰

Other district courts faced with similar facts have granted injunctive relief, finding that plaintiff and defendant were competitors with regard to the product or the market generally.¹¹¹ In November 2008, one court specifically rejected this strict requirement of proof, requiring only that the plaintiff demonstrate a “credible case” that there was irreparable injury and would continue to be.¹¹²

¶32 Discussing whether there was an adequate remedy at law, the court in *Sundance* noted that “Sundance licenses the ‘109 patent to others, and offered to license it to DeMonte prior to filing suit against it, thus demonstrating that money damages are adequate. Their conduct against DeMonte and others . . . indicates an interest only in obtaining money damages against accused infringers.”¹¹³ In other cases in which the plaintiff was willing to license, the court nonetheless held that money damages would not be an adequate remedy at law.¹¹⁴ Interestingly, on reconsideration, the court, granted the

¹⁰⁸ *Sundance, Inc. v. DeMonte Fabricating Ltd.*, No. 02-73543, 2007 U.S. Dist. LEXIS 158 (E.D. Mich. Jan. 4, 2007) (perm. inj. denied), *rev’d*, 2007 U.S. Dist. LEXIS 77728 (E.D. Mich. Oct. 19, 2007), *rev’d on other grounds*, 550 F.3d 1356 (Fed. Cir. 2008).

¹⁰⁹ *See, e.g.*, *Newcombe et al.*, *supra* note 17, at 557-59 (“Since *eBay*, at least 30 permanent injunctions have issued. In all but two of these cases, the infringer was a direct horizontal competitor plaintiff patentee [sic]. Conversely, in six of the seven cases where the patentee and infringer were not direct-horizontal competitors, the courts initially denied a permanent injunction. Thus, the emerging general rule appears to be that a patentee who competes in the market with the adjudged infringer will likely be awarded a permanent injunction while a patentee who does not compete with the infringer, but merely licenses its intellectual property, will likely not be awarded a permanent injunction.”).

¹¹⁰ *Sundance*, 2007 U.S. Dist. LEXIS 158, at *8-9.

¹¹¹ *See* *Baden Sports, Inc. v. Kabushiki Kaisha Molten*, No. C06-210MJP, 2007 U.S. Dist. LEXIS 70776, at *2-10 (W.D. Wash. Sept. 25, 2007) (other competitors in the sports ball industry and other features that may have influenced customers’ purchasing decisions); *Callaway Golf Co. v. Acushnet Co.*, 585 F. Supp. 2d 600 (D. Del. 2008) (other competitors in the three layer golf ball industry and other features that may have influenced customers’ purchasing decisions); *Broadcom Corp. v. Qualcomm Inc.*, No. SACV 05-467 JVS, 2007 U.S. Dist. LEXIS 97647, at *5-27 (C.D. Cal. Dec. 31, 2007) (granting permanent injunction because “one need not be a direct competitor to secure an injunction”), *aff’d in part, rev’d in part, remanded*, 543 F.3d 683 (Fed. Cir. 2008).

¹¹² *Callaway Golf*, 585 F. Supp. 2d at 620.

¹¹³ *Sundance*, 2007 U.S. Dist. LEXIS 158, at *9.

¹¹⁴ *See, e.g.*, *Novozymes A/S v. Genencor Int’l, Inc.*, 474 F. Supp. 2d 592, 612-13 (D. Del. 2007).

injunction; but rather than relying on irreparable harm, it relied on “changed circumstances,” which, according to the court, warranted the issuance of an injunction.¹¹⁵

¶33 Also during this first year post-*eBay*, the Western District of Oklahoma denied an injunction in *Voda v. Cordis Corp.*¹¹⁶ The plaintiff was a licensor of certain patents which described an angioplasty guide catheter and the inventive technique for using the catheter to perform angioplasty. According to the *Voda* court, “any harm would have been directed at plaintiff’s licensee, Scimed, not plaintiff.”¹¹⁷ “Moreover, other than the presumption of irreparable harm, plaintiff identifies no harm to himself; rather, he relies on alleged harm to a non-party, Scimed.”¹¹⁸ The court rejected plaintiff’s argument that its relationship with its exclusive licensee would be damaged: “[t]his argument . . . is simply the other side of the right-to-exclude coin and is not sufficient to justify granting injunctive relief.”¹¹⁹ This reasoning has been rejected by subsequent district court decisions.¹²⁰ Douglas Ellis aptly points out that prohibiting a patent holder, like the one in *Voda*, from obtaining an injunction unless its licensee joins the action

provides licensees with an opportunity to renegotiate their licensing terms if the terms of the initial deal were less favorable ex post than was expected ex ante. Simply put, if the terms turn out to be a favorable deal . . . then the licensee may join the patent holder in obtaining a permanent injunction against an infringer. . . . If, however, the licensing terms turn out to be unfavorable for the licensee . . . then the exclusive licensee may refuse to join the suit¹²¹

¶34 In the next year (May 2007 to May 2008), there were three cases denying injunctive relief. None of those denials was based on plaintiff’s failure to prove irreparable harm. In *Respironics*¹²² and *Nichia*,¹²³ the denials were based on plaintiff’s failure to prove a likelihood of future infringement. In *Innogenetic*,¹²⁴ the court’s denial was based on the fact that the jury awarded a royalty which included a market entry fee; therefore, the defendant was entitled to continue to practice the invention.

¶35 In the most recent year (May 2008 to April 2009), five cases denied injunctive relief: two from the District of Delaware, two from the Northern District of California, and one from Arizona.¹²⁵ Of those decisions, one was a case in which the patent holder

¹¹⁵ *Sundance*, 2007 U.S. Dist. LEXIS 158, at *4-9.

¹¹⁶ *Voda v. Cordis Corp.*, No. CIV-03-1512-L, 2006 U.S. Dist. LEXIS 63623, at *18-21 (W.D. Okla. Sept. 5, 2006).

¹¹⁷ *Id.* at *12.

¹¹⁸ *Id.*, at *18-19.

¹¹⁹ *Id.*, at *20.

¹²⁰ *Novozymes A/S v. Genencor Int’l Inc.*, 474 F. Supp. 2d 592, 612-613 (D. Del. 2007) (perm. inj. granted, plaintiff was licensor and subsidiary was non-exclusive licensee).

¹²¹ Ellis, *supra* note 4, at 460-61.

¹²² *Respironics, Inc. v. Invacare Corp.*, No. 04-0336, 2008 U.S. Dist. LEXIS 1174 (W.D. Pa. Jan. 7, 2008).

¹²³ *Nichia Corp. v. Seoul Semiconductor, Ltd.*, No. 06-0162 MMC, 2008 U.S. Dist. LEXIS 12183 (N.D. Cal. Feb. 7, 2008).

¹²⁴ *Innogenetics, N.V. v. Abbott Labs.*, No. 05-C-0575-C, 2007 U.S. Dist. LEXIS 3148 (W.D. Wis. Jan. 12, 2007), *rev’d in relevant part*, 512 F.3d 1363 (Fed. Cir. 2008) (injunction vacated).

¹²⁵ Five denials of injunction from May 2008 through April 2009: *Advanced Cardiovascular Sys., Inc. v. Medtronic Vascular, Inc.*, 579 F. Supp. 2d 554 (D. Del. 2008); *Boston Scientific Corp. v. Johnson & Johnson*, No. C 02-0790 SI, 2008 U.S. Dist. LEXIS 98939 (N.D. Cal. Nov. 25, 2008); *Telcordia Techs.*,

was seeking a compulsory license and not an injunction,¹²⁶ and two were cases involving medical technology in which the public interest was a significant factor in the decision.¹²⁷ In the remaining two cases, the district courts found that the plaintiffs failed to show irreparable harm.

¶36 In the court in *Advanced Cardiovascular Systems*¹²⁸ (ACS) held that denial of the injunction would not cause the plaintiff irreparable harm. After (1) scrutinizing the stent market, (2) detailing the relationship between the overall stent market, the bare metal stent market and the drug-eluting stent market, (3) discussing the role of other principal players in the stent market, and (4) citing Morgan Stanley's estimates regarding predicted changes in market share, the court concluded that "[t]hrough Medtronic appears to be gaining market momentum, it appears to be not only at the cost of ACS, clouding the relationship between Medtronic's infringement and ACS's losses."¹²⁹ Further, "ACS has[d]not identified any specific customers it has lost, or stands to lose, directly as a result of Medtronic's continued sales of infringing stents."¹³⁰ On this basis, the court concluded that the issue of irreparable harm favored the defendant. In reaching this conclusion, the court relied on *Praxair*¹³¹ and ignored other cases with multiple competitors in which the court found irreparable harm. With regard to the issue of whether there was an adequate remedy at law, the court noted that because the plaintiff was willing to license its patents in the past, money damages should be adequate: "Money damages are rarely inadequate in these circumstances; rather, permanent injunctions are typically granted in two-competitor situations where the patentee has demonstrated an unwillingness to part with the exclusive right."¹³² Again, this reasoning conflicts with the decisions of numerous other courts, which have held that future damages are difficult to quantify and therefore an injunction is the appropriate remedy.¹³³

¶37 Notably, in support of the argument that injunctions are granted in two competitor situations, the court cited *Novozymes*.¹³⁴ However, in *Novozymes*, the patent holder did not practice the patent but licensed it to a subsidiary as part of a non-exclusive license. While the court refused to allow the licensee to join the suit because of the non-exclusive nature of the license agreement, it characterized the licensor (patent holder) and the defendant (infringer) as "head-to-head" competitors.¹³⁵

Inc. v. Cisco Sys., Inc., 592 F. Supp. 2d 727 (D. Del. 2009); Hynix Semiconductor Inc. v. Rambus Inc., 609 F. Supp. 2d 951 (N.D. Cal. 2009); Bard Peripheral Vascular, Inc. v. W.L. Gore & Associates, Inc., No. CV-03-0597-PHX-MHM, 2009 U.S. Dist. LEXIS 31328 (D. Ariz. Mar. 31, 2009).

¹²⁶ *Boston Scientific Corp.*, 2008 U.S. Dist. LEXIS 98939.

¹²⁷ *Advanced Cardiovascular*, 579 F. Supp. 2d 554, 557-63; *Bard Peripheral Vascular, Inc.*, 2009 U.S. Dist. LEXIS 31328, at *15-31.

¹²⁸ *Advanced Cardiovascular*, 579 F. Supp. 2d 554.

¹²⁹ *Id.* at 559.

¹³⁰ *Id.* at 560.

¹³¹ *Praxair, Inc. v. ATMI, Inc.*, 479 F. Supp. 2d 440 (D. Del. 2007), *aff'd in part, rev'd in part, remanded*, 543 F.3d 1306 (Fed. Cir. 2008).

¹³² *Advanced Cardiovascular*, 579 F. Supp. 2d at 560.

¹³³ *See, e.g., Smith & Nephew, Inc. v. Synthes (U.S.A.)*, 466 F. Supp. 2d 978, 984 (W.D. Tenn. 2006) ("Monetary damages generally are not an adequate remedy against future infringement."), *appeal dismissed*, No. 2007-1048, 2008 U.S. App. LEXIS 4889 (Fed. Cir. Feb. 22, 2008).

¹³⁴ *Novozymes A/S v. Genencor Int'l Inc.*, 474 F. Supp. 2d 592 (D. Del. 2007).

¹³⁵ *Id.* at 613.

¶38 Although the ACS court made a finding that the patent holder failed to show that, absent an injunction, it would suffer irreparable harm, the public interest factor may explain the court’s analysis. According to the court, there is a strong public interest in maintaining diversity in the coronary stent market and there was evidence in the record that some physicians preferred the defendant’s stent.¹³⁶

¶39 *Telcordia Technologies, Inc. v. Cisco Systems, Inc.*¹³⁷ is one of four denial-of-injunction decisions issued by the District of Delaware since the decision in *eBay*.¹³⁸ The patented technology in that case related to telecommunications networks. The patentee-plaintiff derived revenue from licensing the technology and the court held that it failed to provide evidence of irreparable harm “such as lost sales, licensing, or research and development opportunities.”¹³⁹ The court stated that “[i]nfringing one’s right to exclude, alone, is insufficient to warrant injunctive relief.”¹⁴⁰ The court rejected Telcordia’s argument that its “leverage in the market will be harmed if it cannot advise potential licensees that infringement of its patents can result in a permanent injunction.”¹⁴¹ The court called that claim “nothing more than attorney argument.”¹⁴²

¶40 On February 23, 2009, the District Court for the Northern District of California denied equitable relief to a successful patent plaintiff in *Hynix Semiconductor*.¹⁴³ In that case, Rambus held a patent on certain dynamic random access memory (“DRAM”) interface technology. The patent was found valid and infringed so Rambus moved for injunctive relief. Hynix, the infringer, derived its revenue from the manufacture and sale of DRAM, not merely a small component of the patented technology. Rambus, however, derived its revenues solely from licensing DRAM. The court discussed at length a multitude of details regarding the nature of the patented technology. Ultimately, it concluded that Rambus failed to prove that it would suffer irreparable harm without the injunction.

¶41 Interestingly, the court began its analysis of the issue of equitable relief as follows: “Like cases should be decided alike, and centuries of equity practice shepherd this court’s exercise of its power to enjoin infringement.”¹⁴⁴ When it discussed the issue of irreparable harm, the court found that there was real future harm to Rambus in the battle over the next memory interface standard; however, the court found that the “weight of such harm is small.”¹⁴⁵ The court then asked whether that harm was compensable by money damages and concluded that it was not: “When Rambus loses a design win to an

¹³⁶ *Advanced Cardiovascular*, 579 F. Supp. 2d at 561 (“A strong public interest supports a broad choice of drug-eluting stents, even though no published study proves the superiority of either [of the available products].” (quoting *Cordis Corp. v. Boston Scientific Corp.*, 99 F. App’x 928, 935 (Fed. Cir. 2004))).

¹³⁷ *Telcordia Techs., Inc. v. Cisco Sys., Inc.*, 592 F. Supp. 2d 727 (D. Del. 2009) (denying permanent injunction).

¹³⁸ See *Telcordia Techs.*, 592 F. Supp. 2d 727 (injunction denied); *Advanced Cardiovascular Sys.*, 579 F. Supp. 2d 554 (injunction denied); *IMX, Inc. v. Lendingtree, LLC*, 469 F. Supp. 2d 203 (D. Del. 2007) (injunction denied); *Praxair, Inc. v. ATMI, Inc.*, 479 F. Supp. 2d 440 (D. Del. 2007) (injunction denied), *aff’d in part, rev’d in part, remanded*, 543 F.3d 1306 (Fed. Cir. 2008).

¹³⁹ *Telcordia Techs.*, 592 F. Supp. 2d at 747.

¹⁴⁰ *Id.* at 747-48 (quoting *IMX, Inc. v. Lendingtree, LLC*, 469 F. Supp. 2d 203, 225 (D. Del. 2007)).

¹⁴¹ *Id.* at 747.

¹⁴² *Id.* at 748.

¹⁴³ *Hynix Semiconductor Inc. v. Rambus Inc.*, 609 F. Supp. 2d 951 (N.D. Cal. 2009) (injunction denied).

¹⁴⁴ *Id.* at 966.

¹⁴⁵ *Id.* at 981.

infringing alternative, its realistic alternative is to license its patents to the users of the infringing standard. While Rambus may collect royalties from such licensing, Rambus is shut out of the ‘innovation loop.’”¹⁴⁶ Finally, discussing the issue of loss of market share, the court acknowledged that Rambus would suffer loss of goodwill in the event that an injunction did not issue. The court then discussed Rambus’s claim that it would also suffer irreparable harm in the form of diminished royalties, harm to research and development and damage to its image as an innovator. It acknowledged that “Rambus’s argument has initial appeal, and it was adopted to support an injunction in *Commonwealth Scientific*,”¹⁴⁷ but the court distinguished *Commonwealth Scientific* and *Broadcom* and ultimately concluded that no injunction should issue.¹⁴⁸

¶42 The key to this decision may be in the court’s analysis of the balance of hardships. “[B]y the time Hynix became aware of Rambus’s asserted patents, Rambus’s technologies were entrenched in the industry standard DRAM interface. . . . Th[is] lock-in resulted in large part because Rambus did not disclose and, in fact, did not obtain the patents in suit until its efforts to establish RDRAM as the industry standard faltered and the JEDEC standards had enjoyed nearly five years of success.”¹⁴⁹

V. MOST COURTS IN 2009, RELYING ON AN EXPANDING DEFINITION OF “COMPETITION BETWEEN THE PARTIES,” IMPOSE A PERMANENT INJUNCTION AGAINST PATENT INFRINGERS, SIGNALING A SHIFT BACK TO PRE-*eBAY* TREATMENT OF PERMANENT INJUNCTIONS IN PATENT INFRINGEMENT

¶43 Prior to the Supreme Court’s *eBay* decision there was a “general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances.”¹⁵⁰ With its *eBay* decision, the Supreme Court rejected that principle and held that the proper test for determining whether to impose an injunction against a patent infringer is the standard four-factor test for imposing equitable relief.

¶44 The result was an immediate spike in the number of patent cases in which requests for injunctive relief were denied. Those denials were frequently based on the patent holder’s inability to demonstrate the first two factors of the test, irreparable harm and no adequate remedy at law. Post-*eBay* courts, obligated to apply the four-factor test, often evaluated the first and second factors based on the nature of the competition between the parties. Despite the significance of inter-party competition on the outcome of post-*eBay* cases there is no universally accepted description of what constitutes “competition between the parties.”

¶45 In the first year following *eBay*, the definition of “competition between the parties” was narrow. Parties were described as competitors only when they were in direct competition (i.e., had the same customers and the sale of products to one party would have a negative impact on the sale of products to the other party).¹⁵¹ Evidence of

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 983.

¹⁴⁸ *Id.* at 969-70 (discussing *Broadcom Corp. v. Qualcomm Inc.*, 543 F.3d 683 (Fed. Cir. 2008)).

¹⁴⁹ *Hynix Semiconductor*, 609 F. Supp. 2d at 984-85.

¹⁵⁰ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

¹⁵¹ *See Smith & Nephew, Inc. v. Synthes (U.S.A.)*, 466 F. Supp. 2d 978 (W.D. Tenn. 2006) (injunction granted); *Black & Decker Inc. v. Robert Bosch Tool Corp.*, No. 04 C 7955, 2006 U.S. Dist. LEXIS 86990 (N.D. Ill. Nov. 29, 2006) (same) *aff’d in part, vacated in part*, 2008 U.S. App. LEXIS 207 (Fed. Cir. Jan. 7,

competition, and thereby irreparable harm, in those early cases was limited to loss of market share or the like: price erosion, lost profits, loss of brand name recognition, or loss of goodwill.¹⁵² Notably, when direct competition existed between the parties, courts gave the inadequate remedies at law prong an expansive scope, including the loss of the right to exclude and the inability to calculate future profits.¹⁵³

¶46 Since the first year post-*eBay* the scope of what constitutes competition between the parties has expanded. As a direct result of those changes, there has been a corresponding expansion in the scope of what constitutes irreparable harm. In the second year following *eBay*, a Texas District Court granted an injunction in favor of a non-practicing entity.¹⁵⁴ Later, a California court granted an injunction based on market competition, not just product competition,¹⁵⁵ specifically holding, “one need not necessarily be a direct competitor in order to secure an injunction.”¹⁵⁶ The District Court in Oregon granted an injunction to a patent holder that was one of a number of competitors in a particular market and had licensed the patented technology to other competitors.¹⁵⁷

¶47 In the third year post-*eBay*, the definition of “competitor” expanded further. In the District of Delaware, a court granted the patent holder a permanent injunction although it had ceased manufacturing the product embodying the patented technology.¹⁵⁸ In so doing, the court relied in part on the fact that the parties were competitors at the market

2008) (vacating and remanding on the issue of claim construction); *Transocean Offshore Deepwater Drilling, Inc. v. GlobalSantaFe Corp.*, No. H-03-2910, 2006 U.S. Dist. LEXIS 93408 (S.D. Tex. Dec. 27, 2006) (injunction granted); *3M Innovative Prods. Co. v. Avery Dennison Corp.*, No. 01-1781, 2006 U.S. Dist. LEXIS 70263 (D. Minn. Sept. 25, 2006) (same); *Visto Corp. v. Seven Networks, Inc.*, No. 2:03-CV-333-TJW, 2006 U.S. Dist. LEXIS 91453 (E.D. Tex. Dec. 19, 2006) (same); *TiVo Inc. v. EchoStar Commc’ns Corp.*, 446 F. Supp. 2d 6641 (E.D. Tex. 2006) (same), *aff’d in part, rev’d in part*, 516 F.3d 1290 (Fed. Cir. 2008) (affirming injunction); *Atlanta Attachment Co. v. Leggett & Platt, Inc.*, No. 1:05-CV-1071-ODE, 2007 U.S. Dist. LEXIS 96872 (N.D. Ga. Feb. 23, 2007) (injunction granted); *rev’d*, 516 F.3d 1361 (Fed. Cir. 2008) (reversing and remanding on validity); *O2 Micro Int’l Ltd. v. Beyond Innovation Tech. Co., Ltd.*, No. 2-04-CV-32, 2007 U.S. Dist. LEXIS 25948 (E.D. Tex. Mar. 21, 2007) (injunction granted), *vacated*, 521 F.3d 1351 (Fed. Cir. 2008) (vacating and remanding on infringement); *MGM Well Servs., Inc. v. Mega Lift Sys., LLC*, 505 F. Supp. 2d 359 (S.D. Tex. 2007) (injunction granted), *aff’d*, 264 F. App’x 900 (Fed. Cir. 2008); *MPT, Inc. v. Marathon Labels, Inc.*, 505 F. Supp. 2d 401 (N.D. Ohio 2007) (same).

¹⁵² See cases listed in note 151, *supra*.

¹⁵³ *Novozymes A/S v. Genencor Int’l Inc.*, 474 F. Supp. 2d 592 (D. Del. 2007) (injunction granted; loss of the right to exclude); *MGM Well Servs., Inc. v. Mega Lift Sys., LLC*, 505 F. Supp. 2d 359 (S.D. Tex. 2007) (injunction granted), *aff’d*, 264 F. App’x 900 (Fed. Cir. 2008); *Visto Corp. v. Seven Networks, Inc.*, No. 2:03-CV-333-TJW, 2006 U.S. Dist. LEXIS 91453 (E.D. Tex. Dec. 19, 2006) (same; future damages cannot be calculated with precision, so monetary damages are an inadequate remedy); *Smith & Nephew, Inc. v. Synthes (U.S.A.)*, 466 F. Supp. 2d 978 (W.D. Tenn. 2006) (injunction granted; inability to calculate future damages); *Transocean Offshore Deepwater Drilling, Inc. v. GlobalSantaFe Corp.*, No. H-03-2910, 2006 U.S. Dist. LEXIS 93408 (S.D. Tex. Dec. 27, 2006) (injunction granted); *Black & Decker Inc. v. Robert Bosch Tool Corp.*, No. 04 C 7955, 2006 U.S. Dist. LEXIS 86990 (N.D. Ill. Nov. 29, 2006) (same) *aff’d in part, vacated in part*, 2008 U.S. App. LEXIS 207 (Fed. Cir. Jan. 7, 2008) (vacating and remanding on the issue of claim construction).

¹⁵⁴ See *Commonwealth Scientific & Indus. Research Org. v. Buffalo Tech. Inc.*, 492 F. Supp. 2d 600 (E.D. Tex. 2007).

¹⁵⁵ See *Broadcom Corp. v. Qualcomm Inc.*, No. SACV 05-467 JVS, 2007 U.S. Dist. LEXIS 97647 (C.D. Cal. Dec. 31, 2007) (injunction granted); *Broadcom Corp. v. Qualcomm, Inc.*, No. SACV 05-0467-JVS, 2008 U.S. Dist. LEXIS 105232 (C.D. Cal. Mar. 24, 2008) (injunction granted).

¹⁵⁶ *Broadcom Corp.*, 2007 U.S. Dist. LEXIS 97647, at *5-27.

¹⁵⁷ *Acumed LLC v. Stryker Corp.*, 551 F.3d 1323 (Fed. Cir. 2008) (permanent injunction affirmed).

¹⁵⁸ See *Callaway Golf Co. v. Acushnet Co.*, 585 F. Supp. 2d 600 (D. Del. 2008).

level (rather than at the product level). In the Northern District of Georgia, a permanent injunction against a patent infringer was granted despite the fact that the corporate defendant was dissolved and its principal was incarcerated. The court noted that “[e]specially when an infringing company is not actively selling the offending product, the harm to a patent-holder may seem esoteric.”¹⁵⁹ Nonetheless, the court considered the parties competitors and granted the request for an injunction. The District Court in New Jersey found irreparable harm although the patent holder had ceased operating and was in the process of liquidating its assets through a bankruptcy proceeding. It granted the injunction recognizing that in order for the patent holder to maximize the value of the patent, there would have to be an injunction against infringement.¹⁶⁰

¶48 The District Court in the Eastern District of Texas, in a decision regarding a requested stay of the proceedings, recently confirmed its view that patent holders that are also non-practicing entities may be entitled to permanent injunctive relief.¹⁶¹

¶49 The *eBay* decision has had a significant impact on the analytical process courts use to determine whether a patent holder is entitled to an injunction. Every post-*eBay* case to consider a request for equitable relief contains an evaluation of the facts of the case in view of each of the four elements of the traditional four-factor test for equitable relief. If such an analysis is not present and an appeal is taken, the Federal Circuit is likely to remand the case for further proceedings. However, the *eBay* decision has not had a significant and lasting impact on the *outcome* of those decisions. A close analysis of the post-*eBay* cases reveals that in most jurisdictions, courts have returned to the pre-*eBay* practice of generally granting injunctions against patent infringers. In the first year after the *eBay* decision, there was a noticeable spike in the number of cases denying injunctive relief. Those decisions, relying on a narrow definition of competition between the parties, often found that the patent holder had failed to demonstrate that it would suffer irreparable harm unless an injunction issued. In recent years, the scope of what courts find constitutes competition between the parties and thereby irreparable harm, has expanded. As a result, the number of cases in which a patent holder is denied permanent injunctive relief has diminished. Today, in most jurisdictions, proof of patent infringement will generally, absent a compelling public interest concern, result in the imposition of a permanent injunction against the infringer.

¹⁵⁹ *Emory Univ. v. Nova BioGenetics, Inc.*, No. 1:06-CV-0141-TWT, 2008 U.S. Dist. LEXIS 57642, at *12-13 (N.D. Ga. July 24, 2008) (injunction granted).

¹⁶⁰ *Joyal Prods., Inc. v. Johnson Elec. N. Am., Inc.*, No. 04-5172, 2009 U.S. Dist. LEXIS 15531, at *32 (D.N.J. Feb. 26, 2009) (granting permanent injunction).

¹⁶¹ *BarTex Research, LLC v. FedEx Corp.*, 611 F. Supp. 2d 647, 652 (E.D. Tex. Apr. 20, 2009) (“BarTex may still be entitled to a permanent injunction, even though it does not practice its patent”).

Chart of Post-*eBay* Permanent Injunction Patent Cases

01/2006	02/2006	03/2006	04/2006	05/2006	06/2006	07/2006	08/2006	09/2006	10/2006	11/2006	12/2006
				(eBay) ⁱ	(z4) ⁱⁱ	(Finisar) ⁱⁱⁱ Wald ^{iv} KEG ^v	(Paice) ^{vi} USSC ^{vii} Floe ^{viii} Litecubes ^{ix} Tivo ^x Telequip ^{xi}	(Voda) ^{xii} 3M ^{xiii} Rosco ^{xiv}	Smith & ^{xv} Nephew	Black & Decker ^{xvi}	Transocean ^{xvii} Visto ^{xviii}
01/2007	02/2007	03/2007	04/2007	05/2007	06/2007	07/2007	08/2007	09/2007	10/2007	11/2007	12/2007
(Sundance) ^{xix} MPT ^{xx} (IMX)** ^{xxi}	Leggett & Platt ^{xxii} Novozymes ^{xxiii}	O2 Micro ^{xxiv} Ortho- Mcneil ^{xxv} (Praxair)** ^{xxvi} (Amado) ^{xxvii}	MGM ^{xxviii} 800 Adept ^{xxix}		CSIRO ^{xxx} Brooktrout ^{xxxi} Apotex ^{xxxii}	Muniauction ^{xxxiii}	Johns Hopkins ^{xxxiv} Allan Block ^{xxxv}	Baden Sports ^{xxxvi} Verizon ^{xxxvii}	Martek ^{xxxviii}	Acumed ^{xxxix}	
01/2008	02/2008	03/2008	04/2008	05/2008	06/2008	07/2008	08/2008	09/2008	10/2008	11/2008	12/2008
(Respironics) * ^{xl} (Innogenetics))** ^{xli}	(Nichia)* ^{xlii}	Broadcom ^{xliii}	Power- One ^{xliv} Fresenius ^{xlv}	eSpeed ^{xlvi}		TruePosition ^{xlvii} Emory ^{xlviii} Mannatech ^{xlix}			(Medtronic) ^l Amgen ^{li} Becton ^{lii} Sensormatic ^{liii} Extreme Networks ^{liv}	(Boston Scientific) ^{lv} Callaway ^{lvi}	Fairchild ^{lvii}
01/2009	02/2009	03/2009	04/2009	05/2009	06/2009	07/2009	08/2009	09/2009	10/2009	11/2009	12/2009
U.S. Philips ^{lviii} (Telcordia) ^{lix} Funai ^{lx}	(Hynix) ^{lxi} Joyal ^{lxii}	Kowalski ^{lxiii} (Bard) ^{lxiv}	Ergotron ^{lxv}		Ecolab ^{lxvi} TransAmeric a ^{lxvii}		i4i ^{lxviii} Finjan ^{lxix}				

Cases are listed by the date of the district court decision unless the decision was reversed on appeal and the reversal was based on the issue of equitable relief. In that situation, the case is listed by the date of the appellate court decision. The cases listed in parentheses are ones in which the request for injunctive relief was denied.

*Injunction denied based on the courts determination that there was no likelihood of future infringement.

** Injunction denied without prejudice, so not a final order. Decided by Judge Sue Robinson, District of Delaware.

*** Injunction denied based on the fact that the jury's royalty award included a market entry fee.

-
- ⁱ eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006).
- ⁱⁱ z4 Techs., Inc. v. Microsoft Corp., 434 F. Supp. 2d 437 (E.D. Tex. 2006) (permanent injunction denied), *aff'd*, 507 F.3d 1340 (Fed. Cir. 2007).
- ⁱⁱⁱ Finisar Corp. v. DirecTV Group, Inc., No. 1:05-CV-264, 2006 U.S. Dist. LEXIS 76380 (E.D. Tex. July 7, 2006) (permanent injunction denied), *aff'd in part, rev'd in part, remanded*, 523 F.3d 1323 (Fed. Cir. 2008) (issue on appeal was validity and infringement).
- ^{iv} Wald v. Mudhopper Oilfield Servs., Inc., No. CIV-04-1693-C, 2006 U.S. Dist. LEXIS 51669 (W.D. Okla. July 27, 2006) (permanent injunction granted).
- ^v KEG Techs., Inc. v. Laimer, 436 F. Supp. 2d 1364 (N.D. Ga. 2006) (consent order for permanent injunction entered July 24, 2006).
- ^{vi} Paice LLC v. Toyota Motor Corp., No. 2:04-CV-211-DF, 2006 U.S. Dist. LEXIS 61600 (E.D. Tex. Aug. 16, 2006) (permanent injunction denied), *aff'd in part, vacated in part*, 504 F.3d 1293 (Fed. Cir. 2007).
- ^{vii} Am. Seating Co. v. USSC Group, Inc., No. 01-00578, 2006 U.S. Dist. LEXIS 59212 (W.D. Mich. Aug. 22, 2006) (permanent injunction granted).
- ^{viii} Floe Int'l, Inc. v. Newmans' Mfg. Inc., No. 04-5120 (DWF/RLE), 2006 U.S. Dist. LEXIS 59872 (D. Minn. Aug. 23, 2006) (permanent injunction granted).
- ^{ix} Litecubes, L.L.C. v. N. Light Prods., Inc., No. 4:04CV00485 ERW, 2006 U.S. Dist. LEXIS 60575 (E.D. Mo. Aug. 25, 2006) (permanent injunction granted), *aff'd*, 523 F.3d 1353 (Fed. Cir. 2008).
- ^x TiVo Inc. v. EchoStar Commc'ns Corp., 446 F. Supp. 2d 664 (E.D. Tex. 2006) (permanent injunction granted), *aff'd in part, rev'd in part*, 516 F.3d 1290 (Fed. Cir. 2008) (injunction affirmed).
- ^{xi} Telequip Corp. v. Change Exch., No. 5:01-CV-1748 (FJS/GJD), 2006 U.S. Dist. LEXIS 61469 (N.D.N.Y. Aug. 15, 2006) (permanent injunction granted).
- ^{xii} Voda v. Cordis Corp., No. CIV-03-1512-L, 2006 U.S. Dist. LEXIS 63623 (W.D. Okla. Sept. 5, 2006) (permanent injunction denied).
- ^{xiii} 3M Innovative Prods. Co. v. Avery Dennison Corp., No. 01-1781 (JRT/FLN), 2006 U.S. Dist. LEXIS 70263 (D. Minn. Sept. 25, 2006) (permanent injunction granted).
- ^{xiv} Rosco, Inc. v. Mirror Lite Co., No. CV-96-5658 (CPS), 2006 U.S. Dist. LEXIS 73366 (E.D.N.Y. Sept. 28, 2006) (permanent injunction granted).
- ^{xv} Smith & Nephew, Inc. v. Synthes (U.S.A.), 466 F. Supp. 2d 978 (W.D. Tenn. 2006) (permanent injunction granted), *appeal dismissed*, 269 F. App'x 972 (Fed. Cir. 2008).
- ^{xvi} Black & Decker Inc. v. Robert Bosch Tool Corp., No. 04 C 7955, 2006 U.S. Dist. LEXIS 86990 (N.D. Ill. Nov. 29, 2006) (permanent injunction granted), *aff'd in part, vacated in part, remanded*, 260 F. App'x 284 (Fed. Cir. 2008) (vacated and remanded on the issue of claim construction).
- ^{xvii} Transocean Offshore Deepwater Drilling, Inc. v. GlobalSantaFe Corp., No. H-03-2910, 2006 U.S. Dist. LEXIS 93408 (S.D. Tex. Dec. 27, 2006) (permanent injunction granted).
- ^{xviii} Visto Corp. v. Seven Networks, Inc., No. 2:03-CV-333-TJW, 2006 U.S. Dist. LEXIS 91453, at *12-14 (E.D. Tex. Dec. 19, 2006) (permanent injunction granted).
- ^{xix} Sundance, Inc. v. DeMonte Fabricating Ltd., No. 02-73543, 2007 U.S. Dist. LEXIS 158 (E.D. Mich. Jan. 4, 2007) (permanent injunction denied), *rev'd*, No. 02-73543, 2007 U.S. Dist. LEXIS 77728 (E.D. Mich. Oct. 19, 2007), *rev'd on the issue of infringement*, 550 F.3d 1356 (Fed. Cir. 2008).
- ^{xx} MPT, Inc. v. Marathon Labels, Inc., 505 F. Supp. 2d 401 (N.D. Ohio 2007) (permanent injunction granted), *aff'd in part, rev'd in part, remanded*, 258 F. App'x 318 (Fed. Cir. 2007) (affirmed except to the extent that injunction prohibited non-infringing sales).

-
- ^{xxi} *IMX, Inc. v. Lendingtree, LLC*, 469 F. Supp. 2d 203 (D. Del. 2007) (permanent injunction denied).
- ^{xxii} *Atlanta Attachment Co. v. Leggett & Platt, Inc.*, No. 1:05-CV-1071-ODE, 2007 U.S. Dist. LEXIS 96872 (N.D. Ga. Feb. 23, 2007) (permanent injunction granted), *rev'd and remanded*, 516 F.3d 1361 (Fed. Cir. 2008).
- ^{xxiii} *Novozymes A/S v. Genencor Int'l, Inc.*, 474 F. Supp. 2d 592 (D. Del. 2007) (permanent injunction granted).
- ^{xxiv} *O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co., Ltd.*, No. 2-04-CV-32 (TJW), 2007 U.S. Dist. LEXIS 25948 (E.D. Tex. Mar. 21, 2007) (permanent injunction granted), *vacated and remanded*, 521 F.3d 1351 (Fed. Cir. 2008) (jury verdict vacated and case remanded on the issue of infringement).
- ^{xxv} *Ortho-McNeil Pharm., Inc. v. Mylan Labs. Inc.*, Nos. 04-1689, 06-757, 06-5166, 2007 U.S. Dist. LEXIS 19494 (D.N.J. Mar. 20, 2007) (permanent injunction granted), *aff'd*, 520 F.3d 1358 (Fed. Cir. 2008).
- ^{xxvi} *Praxair, Inc. v. ATMI, Inc.*, 479 F. Supp. 2d 440 (D. Del. 2007) (permanent injunction denied), *aff'd in part, rev'd in part, remanded*, 543 F.3d 1306 (Fed. Cir. 2008) (on appeal patent holder agreed to withdraw request for injunctive relief).
- ^{xxvii} *Amado v. Microsoft Corp.*, No. SA CV 03-242 DOC (ANx), 2007 U.S. Dist. LEXIS 96487 (C.D. Cal. Mar. 13, 2007) (permanent injunction granted), *rev'd*, 517 F.3d 1353 (Fed. Cir. 2008) (permanent injunction dissolved).
- ^{xxviii} *MGM Well Servs., Inc. v. Mega Lift Sys., LLC*, 505 F. Supp. 2d 359, 378-79 (S.D. Tex. 2007) (permanent injunction granted), *aff'd*, 264 F. App'x 900 (Fed. Cir. 2008).
- ^{xxix} *800 Adept, Inc. v. Murex Secs., Ltd.*, 505 F. Supp. 2d 1327 (M.D. Fla. 2007) (permanent injunction granted), *aff'd in part, rev'd in part, vacated in part by*, 539 F.3d 1354 (Fed. Cir. 2008) (reversed on the issue of infringement and permanent injunction vacated).
- ^{xxx} *Commonwealth Scientific & Indus. Research Org. v. Buffalo Tech. Inc.*, 492 F. Supp. 2d 600 (E.D. Tex. 2007) (permanent injunction granted).
- ^{xxxi} *Brooktrout, Inc. v. Eicon Networks Corp.*, No. 2:03-CV-59, 2007 U.S. Dist. LEXIS 43107 (E.D. Tex. June 14, 2007) (permanent injunction granted), *appealed dismissed*, 253 F. App'x 25 (Fed. Cir. 2007) (joint motion).
- ^{xxxii} *Sanofi-Synthelabo v. Apotex Inc.*, 492 F. Supp. 2d 353 (S.D.N.Y. 2007) (permanent injunction granted), *aff'd*, 550 F.3d 1075 (Fed. Cir. 2008).
- ^{xxxiii} *Muniauction, Inc. v. Thomson Corp.*, 502 F. Supp. 2d 477 (W.D. Pa. 2007) (permanent injunction granted), *rev'd and vacated*, 532 F.3d 1318 (Fed. Cir. 2008) (reversed and vacated on validity and infringement).
- ^{xxxiv} *Johns Hopkins Univ. v. Datascope Corp.*, 513 F. Supp. 2d 578 (D. Md. 2007) (permanent injunction granted), *rev'd and remanded*, 543 F.3d 1342 (Fed. Cir. 2008) (reversed and remanded on the issue of infringement).
- ^{xxxv} *Allan Block Corp. v. E. Dillon & Co.*, 509 F. Supp. 2d 795 (D. Minn. 2007) (permanent injunction granted).
- ^{xxxvi} *Baden Sports, Inc. v. Kabushiki Kaisha Molten*, No. C06-210MJP, 2007 U.S. Dist. LEXIS 70776 (W.D. Wash. Sept. 25, 2007) (permanent injunction granted).
- ^{xxxvii} *Verizon Servs. Corp. v. Vonage Holdings Corp.*, 503 F.3d 1295 (Fed. Cir. 2007) (affirming injunction as to certain claims and reversing injunction as to certain claims).
- ^{xxxviii} *Martek Biosciences Corp. v. Nutrinova Inc.*, 520 F. Supp. 2d 537 (D. Del. 2007) (permanent injunction granted).
- ^{xxxix} *Acumed LLC v. Stryker Corp.*, 551 F.3d 1323 (Fed. Cir. 2008), *aff'g Acumed LLC v. Stryker Corp.*, 04-CV-513-BR, 2007 U.S. Dist. LEXIS 86866 (D. Or. Nov. 20, 2007) (permanent injunction granted).

-
- ^{xi} *Respironics, Inc. v. Invacare Corp.*, No. 04-0336, 2008 U.S. Dist. LEXIS 1174 (W.D. Pa. Jan. 7, 2008) (permanent injunction denied).
- ^{xli} *Innogenetics, N.V. v. Abbott Labs.*, No. 05-C-0575-C, 2007 U.S. Dist. LEXIS 3148 (W.D. Wis. Jan. 12, 2007) (permanent injunction granted), *aff'd in part, rev'd in part, remanded*, 512 F.3d 1363, (Fed. Cir. 2008) (injunction vacated and case remanded for setting of compulsory license).
- ^{xlii} *Nichia Corp. v. Seoul Semiconductor, Ltd.*, No. 06-0162 MMC, 2008 U.S. Dist. LEXIS 12183 (N.D. Cal. Feb. 7, 2008) (permanent injunction denied).
- ^{xliii} *Broadcom Corp. v. Qualcomm Inc.*, No.: SACV 05-467 JVS (RNBx), 2007 U.S. Dist. LEXIS 97647 (C.D. Cal. Dec. 31, 2007) (district courts reasoning for granting permanent injunction); *Broadcom Corp. v. Qualcomm, Inc.*, No. SACV05-0467-JVS (RNBx), 2008 U.S. Dist. LEXIS 105232 (C.D. Cal. Mar. 24, 2008) (order granting permanent injunction), *aff'd in part, rev'd in part, remanded*, 543 F.3d 683 (Fed. Cir. 2008) (permanent injunction partially affirmed).
- ^{xliv} *Power-One, Inc. v. Artesyn Techs., Inc.*, No. 2:05-CV-463, 2008 U.S. Dist. LEXIS 30338 (E.D. Tex. Apr. 11, 2008) (permanent injunction granted).
- ^{xlv} *Fresenius Med. Care Holdings, Inc. v. Baxter Int'l, Inc.*, No. C 03-1431 SBA, 2008 U.S. Dist. LEXIS 79689 (N.D. Cal. Mar. 21, 2008) (permanent injunction granted).
- ^{xlvi} *Trading Techs. Int'l, Inc. v. eSpeed, Inc.*, No. 04 C 5312, 2008 U.S. Dist. LEXIS 86953 (N.D. Ill. May 22, 2008) (permanent injunction granted).
- ^{xlvii} *TruePosition v. Andrew Corp.*, 568 F. Supp. 2d 500 (D. Del. 2008) (permanent injunction granted), *amended by* No. 05-747-SLR, 2009 U.S. Dist. LEXIS 9946 (D. Del. Jan. 26, 2009) (court reconsidered amount of pre- and post-judgment interest).
- ^{xlviii} *Emory Univ. v. Nova BioGenetics, Inc.*, No. 1:06-CV-0141-TWT, 2008 U.S. Dist. LEXIS 57642 (N.D. Ga. July 24, 2008) (permanent injunction granted).
- ^{xlix} *Mannatech, Inc. v. Glycoproducts Int'l, Inc.*, No. 3-06-CV-0471-BD, 2008 U.S. Dist. LEXIS 52537 (N.D. Tex. July 9, 2008) (permanent injunction granted).
- ^l *Advanced Cardiovascular Sys., Inc. v. Medtronic Vascular, Inc.*, 579 F. Supp. 2d 554 (D. Del. 2008) (permanent injunction denied).
- ^{li} *Amgen, Inc. v. F. Hoffmann-La Roche Ltd.*, No. 05-12237-WGY, 2008 U.S. Dist. LEXIS 77343 (D. Mass. Oct. 2, 2008) (permanent injunction granted), *aff'd*, 296 F. App'x 69 (Fed. Cir. 2008).
- ^{lii} *Becton Dickinson & Co. v. Tyco Healthcare Group LP*, No. 02-1694 GMS, 2008 U.S. Dist. LEXIS 87623 (D. Del. Oct. 29, 2008) (permanent injunction granted).
- ^{liii} *Sensormatic Elecs. Corp. v. Tag Co. US, LLC*, No. 06-81105-CIV-HURLEY/HOPKINS, 2008 U.S. Dist. LEXIS 102690 (S.D. Fla. Dec. 19, 2008) (permanent injunction granted).
- ^{liv} *Extreme Networks, Inc. v. Enterasys Networks, Inc.*, 07-cv-229-bbc, 2008 U.S. Dist. LEXIS 88540 (W.D. Wis. Oct. 28, 2008) (permanent injunction granted).
- ^{lv} *Boston Scientific Corp. v. Johnson & Johnson*, No. C 02-0790 SI, 2008 U.S. Dist. LEXIS 98939 (N.D. Cal. Nov. 25, 2008) (permanent injunction denied).
- ^{lvi} *Callaway Golf Co. v. Acushnet Co.*, 585 F. Supp. 2d 600 (D. Del. 2008) (permanent injunction granted).
- ^{lvii} *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, No. 04-1371-JJF, 2008 U.S. Dist. LEXIS 100539 (D. Del. Dec. 12, 2008) (permanent injunction granted).
- ^{lviii} *U.S. Philips Corp. v. Iwasaki Elec. Co., Ltd.*, 03 Civ. 0172 (PKC), 2009 U.S. Dist. LEXIS 6869 (S.D.N.Y. Jan. 13, 2009) (permanent injunction granted).
- ^{lix} *Telcordia Techs., Inc. v. Cisco Sys.*, 592 F. Supp. 2d 727 (D. Del. 2009) (permanent injunction denied).

-
- ^{lx} Funai Elec. Co., Ltd. v. Daewoo Elecs. Corp., 593 F. Supp. 2d 1088 (N.D. Cal. 2009) (permanent injunction granted).
- ^{lxi} Hynix Semiconductor Inc. v. Rambus Inc., No. C-00-20905 RMW, 2009 U.S. Dist. LEXIS 13530 (N.D. Cal. Feb. 23, 2009) (permanent injunction denied).
- ^{lxii} Joyal Prods., Inc. v. Johnson Elec. N. Am., Inc., No. 04-5172 (JAP), 2009 U.S. Dist. LEXIS 15531 (D.N.J. Feb. 26, 2009) (permanent injunction granted).
- ^{lxiii} Kowalski v. Mommy Gina Tuna Res., Nos. 05-00679-BMK, 05-00787-BMK, 06-00182-BMK, 2009 U.S. Dist. LEXIS 26216 (D. Haw. Mar. 30, 2009) (permanent injunction granted).
- ^{lxiv} Bard Peripheral Vascular, Inc. v. W.L. Gore & Assocs., Inc., No. CV-03-0597-PHX-MHM, 2009 U.S. Dist. LEXIS 31328 (D. Ariz. Mar. 31, 2009) (permanent injunction denied).
- ^{lxv} Mass Engineered Design, Inc., v. Ergotron, Inc., No. 2:06 CV 272, 2009 U.S. Dist. LEXIS 34173 (E.D. Tex. April 17, 2009) (permanent injunction granted).
- ^{lxvi} Ecolab, Inc. v. FMC Corp., No. 05-CV-831, 2007 U.S. Dist. LEXIS 39189 (D. Minn., May 29, 2007) (permanent injunction denied), *aff'd in part, vacated in part, rev'd in part, remanded*, 569 F.3d 1335 (Fed. Cir. 2009) (denial of permanent injunction vacated and remanded).
- ^{lxvii} Transamerica Life Ins. Co. v. Lincoln Nat'l Life Ins. Co., 625 F. Supp. 2d 702 (N.D. Iowa 2009) (permanent injunction granted).
- ^{lxviii} i4i Ltd. P'ship v. Microsoft Corp., No. 6:07CV113, 2009 U.S. Dist. LEXIS 70104 (E.D. Tex. Aug. 11, 2009) (permanent injunction granted).
- ^{lxix} Finjan Software, Ltd., v. Secure Computing Corp., No. 06-369 (GMS), 2009 U.S. Dist. LEXIS 72825 (D. Del. Aug. 18, 2009) (permanent injunction granted).