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**The Presumption of Irreparable Harm in Patent Infringement
Litigation: A Critique of *Robert Bosch LLC v.
Pylon Manufacturing Corp.***

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The Presumption of Irreparable Harm in Patent Infringement Litigation: A Critique of *Robert Bosch LLC v. Pylon Manufacturing Corp.*

By Matthew C. Darch*

I. INTRODUCTION

¶1 On October 13, 2011, a three-judge panel of the Federal Circuit eliminated the presumption of irreparable harm for injunctive relief in patent infringement cases.¹ This note criticizes that ruling and argues that the loss of exclusivity caused by continued infringement should create a rebuttable presumption of irreparable harm.

¶2 Injunctive relief is a remedy available to patent holders who can show another product infringes their patent.² Once a patent holder either establishes a likelihood of success on the merits of her claim, or actually prevails in proving infringement of a valid patent, the court determines whether an injunction is an appropriate remedy.³ When an injunction is sought, the court looks to four factors to determine whether to grant an injunction.⁴ One of these factors is “irreparable harm.”⁵ Prior to the decision in *Robert Bosch LLC v. Pylon Manufacturing Corporation*, upon showing infringement, a patent holder was entitled to the presumption that the holder would be irreparably harmed by continued infringement.⁶ However, the infringer could overcome this presumption by offering contrary evidence, and determination of the issue would be for the judge.⁷

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¹ *Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1149 (Fed. Cir. 2011) (“We take this opportunity to put the question to rest and confirm that *eBay* jettisoned the presumption of irreparable harm as it applies to determining the appropriateness of injunctive relief.”).

² 35 U.S.C. § 283 (2006) (“The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.”).

³ *Id.*

⁴ *eBay Inc. v. MercExchange L.L.C.*, 547 U.S. 388, 391 (2006) (“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.”).

⁵ *Id.* See also *Teledyne Indus., Inc. v. Windmere Products, Inc.*, 433 F. Supp. 710, 739 (S.D. Fla. 1977) (“Harm is irreparable when it cannot be compensated adequately in money damages.”) (citing *Nuclear-Chicago Corp. v. Nuclear Data Inc.*, 465 F.2d 428 (7th Cir. 1972)).

⁶ *Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1149 (Fed. Cir. 2011).

⁷ See *Roper Corp. v. Litton Sys., Inc.*, 757 F.2d 1266, 1272 (Fed. Cir. 1985) (“The presumption does not change the ultimate equitable showing needed to justify a preliminary injunction. Like most legal presumptions, it is rebuttable by clear evidence that it is overcome in the case at hand.”); see generally, *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254–55 (1981) (holding once a presumption has been rebutted, the Court then considers the merits of the underlying claims); *Routen v. West*, 142 F.3d 1434, 1440 (Fed. Cir. 1998) (“However, when the opposing party puts in proof to the contrary of that

¶3 The following hypothetical case illustrates the issue: assume an inventor receives a patent for a better mousetrap. The patent holder determines that another company has stolen her design and has already begun to sell the patented mousetrap. The patent holder files a lawsuit seeking damages for past infringement and an injunction to prevent future infringement. At trial, the patent holder establishes the patent is valid and demonstrates infringement of the patent claims by the other party. In order to receive a permanent injunction, the hypothetical patent holder must show four factors.⁸ The first factor requires a patent holder to demonstrate irreparable harm. Prior to the *Bosch* decision, when the patent holder was able to prove her patent was valid and infringed, irreparable harm was presumed. After *Bosch*, the hypothetical patentee, valid patent and final verdict in hand, cannot rely on that presumption and must prove irreparable harm when seeking a permanent injunction.

¶4 This note examines the basis, history, and elimination of the presumption of irreparable harm in light of the *Bosch* decision. Part II introduces a few general concepts related to intellectual property law and then discusses the history of the presumption of irreparable harm. Part III describes the Federal Circuit's justification in *Bosch* for the elimination of the presumption in the context of a motion for a permanent injunction following a successful trial establishing infringement of a valid patent. Part IV reviews the *Bosch* decision, examines the factors the Federal Circuit suggested, and details some factors other courts have applied in the absence of a presumption of irreparable harm in patent litigation. Part V argues that irreparable harm should be presumed based on existing case law and the rights envisioned by the Constitution embodied in the patent statute. Finally, Part VI summarizes the main arguments.

II. BACKGROUND

¶5 This Part briefly surveys sources of intellectual property rights and the remedies available when intellectual property rights are violated. This Part also describes and analyzes the case law that developed in relation to the enforcement of those remedies.

A. *Intellectual Property Rights Generally*

¶6 The Constitution of the United States recognizes some intellectual property rights.⁹ The Constitution provides that Congress has the power to pass laws that will promote science and useful arts.¹⁰ Using this Constitutional grant of authority, Congress has established at least three different types of intellectual property rights: specifically protections for patents,¹¹ copyrights,¹² and trademarks.¹³ While this note focuses

provided by the presumption, and that proof meets the requisite level, the presumption disappears.”); *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1037 (Fed. Cir. 1992) (“[A] presumption . . . completely vanishes upon the introduction of evidence sufficient to support a finding of the nonexistence of the presumed fact.”).

⁸ See *eBay Inc.*, 547 U.S. at 391.

⁹ See U.S. CONST. art. I, § 8, cl. 8 (stating that Congress shall have the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

¹⁰ *Id.*

¹¹ See generally, 35 U.S.C. §§ 100–299 (2006) (codifying requirements for patentability, the rights associated with patents, and the remedies available for infringement).

primarily on patents, a limited understanding of copyright and trademark law is helpful to understand and distinguish the presumption of irreparable harm in those types of infringement cases.

1. Patent

¶17 Patents are issued to protect “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof”¹⁴ Patents are only granted if the invention or improvement was previously unknown¹⁵ and was not obvious at the time.¹⁶ If an inventor thinks her work is useful, novel, and non-obvious, she can file an application, which will be examined by the U.S. Patent and Trademark Office.¹⁷ A patent granted by the USPTO confers an exclusive right “to exclude others from making, using, offering for sale, or selling the invention throughout the United States.”¹⁸ Patents are presumed to be valid.¹⁹

2. Copyright

¶18 A copyright protects works of authorship.²⁰ Generally, this includes books, songs, motion pictures, architectural works, and other works of authorship.²¹ Copyrights grant exclusive rights to the holder.²² Unlike patent rights, there are some limits to an author’s

¹² See generally, 17 U.S.C. §§ 101–205 (2006) (codifying the requirements for copyright protection, the rights of ownership, and limitations on exclusivity); 17 U.S.C. §§ 501–513 (2006) (codifying copyright infringement and the remedies available for infringement).

¹³ See generally, 15 U.S.C. §§ 1051–1141 (2006) (codifying the requirements for trademark protection, the rights created for trademarks, and the remedies available for infringement).

¹⁴ 35 U.S.C. § 101 (2006).

¹⁵ 35 U.S.C. §§ 102(a)–(b) (2006).

¹⁶ 35 U.S.C. § 103 (2006) (“[T]he differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.”).

¹⁷ The application process is controlled by 35 U.S.C. §§ 111–123 (2006). The examination process is governed by 35 U.S.C. §§ 131–135 (2006).

¹⁸ 35 U.S.C. § 154 (2006).

¹⁹ 35 U.S.C. § 282 (2006).

²⁰ 17 U.S.C. § 102(a) (2006) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”).

²¹ See 17 U.S.C. § 102(a) (2006) (“Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.”).

²² 17 U.S.C. § 106 (2006).

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial,

exclusive use of the copyrighted material.²³ The doctrine of “fair use” is one such example.²⁴ Because there is considerable flexibility in defining what is fair use, a copyright holder does not have the total right to exclude.²⁵ Generally, copyrights are considered to offer a smaller degree of protection compared to a patent holder’s broader right to exclusive use.²⁶ This difference helps to explain and distinguish the case law in copyright infringement cases from patent cases, which hold that a patentee should be entitled to more protections given the total nature of his right to exclude. Still, the copyright statute authorizes courts to enter injunctions if a copyright is infringed.²⁷

3. Trademark

¶9

A trademark is “anything which is adopted and used to identify the source or origin of goods, and which is capable of distinguishing them from goods emanating from a competitor.”²⁸ A trademark is generally used to identify a producer or otherwise identify an object or product.²⁹ Like patents and copyrights, trademarks are exclusive and are considered to create a monopoly.³⁰ The Lanham Act, the statute that creates trademark rights, provides for registration of trademarks if certain specified requisites are met.³¹ Trademarks are subject to exclusive appropriation, and the Supreme Court recognized the creation of “quasi-property rights” in trademarks.³² The rights conferred to a trademark holder vary considerably from the rights created by the patent statute. The underlying difference between the bundles of rights associated with trademarks and patents can often distinguish cases dealing with the enforcement of those rights, including the injunction litigation discussed below.

B. Remedies for Infringement of Rights

¶10

Dating back to *Marbury v. Madison*, the United States Supreme Court has recognized an ancient maxim of English law: where there is a right, there is a remedy.³³ It therefore follows that when patent, copyright, or trademark rights are infringed, a

graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Id.

²³ See generally, 17 U.S.C. §§ 107–112, 117, 119, 121 (2006) (limiting the exclusive rights of the copyright holder).

²⁴ 17 U.S.C. § 107 (2006).

²⁵ See generally, *id.* (limiting the right to exclude).

²⁶ *Demetriades v. Kaufman*, 680 F. Supp. 658, 662 (S.D.N.Y. 1988).

²⁷ 17 U.S.C. § 502(a) (2006) (“Any court having jurisdiction of a civil action arising under this title may . . . grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.”).

²⁸ JOHN GLADSTONE MILLS III *ET AL.*, PATENT LAW BASICS § 3:1 (2011).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ See *Marbury v. Madison*, 5 U.S. 137, 147 (1803) (“It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.”) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES 109 (1765)).

remedy must be available.³⁴ Each statute granting patent,³⁵ copyright,³⁶ and trademark³⁷ rights offers certain remedies. While the remedies vary slightly, this note is limited to injunctive relief in patent cases. Since the presumption of irreparable harm has been discussed in preliminary and permanent injunction copyright infringement cases, this note also presents the similarities in those cases to provide a more thorough understanding of the presumption of irreparable harm. However, it is important to remember that each statute confers slightly different rights. Often these statutory differences, which reach different conclusions regarding the enforcement of those rights, can explain and reconcile the different cases.

C. Relevant Case Law History of Injunctive Relief in Patent, Copyright, and Trademark Infringement

¶11 The patent statute provides several remedies for infringement.³⁸ The statute allows for damages and injunctions against infringement.³⁹ An injunction is a powerful remedy.⁴⁰

¶12 A substantial advantage of an injunction is contempt proceedings.⁴¹ A contempt motion is considered a part of the original action, and therefore the adjudged infringer is already under the jurisdiction of the court and may be summoned to appear to respond on the merits much more quickly.⁴² Further, contempt proceedings do not require a full trial, and instead can be decided using motions and affidavits.⁴³ If the court chooses to forego a full trial, the movant bears the burden of proving violation by clear and convincing

³⁴ *See id.*

³⁵ “A patentee shall have remedy by civil action for infringement of his patent.” 35 U.S.C. § 281 (2006). Further, 35 U.S.C. § 283 provides, “The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.” 35 U.S.C. § 284 provides in part, “Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.”

³⁶ 17 U.S.C. § 504 (2006) (“(a) In General.—Except as otherwise provided by this title, an infringer of copyright is liable for either—(1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or (2) statutory damages, as provided by subsection (c).”).

³⁷ 15 U.S.C. § 1117 (providing that, “[w]hen a violation of any right of the registrant of a mark . . . shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled . . . to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action”).

³⁸ *See generally*, 35 U.S.C. §§ 281–283 (2006) (explaining remedies available for patent infringement).

³⁹ 35 U.S.C. § 283 (2006).

⁴⁰ *Behringer v. Page*, 789 N.E.2d 1216, 1227 (Ill. 2003) (holding that an injunction is an “extraordinary remedy which should apply only in situations where an extreme emergency exists and serious harm would result if the injunction is not issued.”).

⁴¹ *See KSM Fastening Sys., Inc. v. H.A. Jones Co.*, 776 F.2d 1522, 1524 (Fed. Cir. 1985), *abrogated by* *TiVo Inc. v. EchoStar Corp.*, 646 F.3d 869 (Fed. Cir. 2011).

⁴² *Id.* (citing *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448 (1932)).

⁴³ *KSM Fastening Sys.*, 776 F.2d at 1524.

evidence.⁴⁴ The penalties for contempt—even civil contempt—include fines and imprisonment.⁴⁵

¶13 For example, following an injunction, an enjoined party may try to modify a product so that the new product would no longer infringe on the patent. The patent owner may consider the modified product to still be infringing; however, instead of having to institute a separate suit to enjoin the new infringement, the patent holder could initiate contempt proceedings. The advantages noted above would enable the patent holder to more quickly resolve the new issue, since the infringer would already be under the jurisdiction of the court and subject to harsher sanctions.

¶14 Without an injunction, the patent owner cannot prevent continued infringement. In such a case, the patent owner's relief is limited to money damages.⁴⁶ In this way, the patent owner is essentially forced to accept a compulsory license arrangement: the infringement cannot be stopped but the patent owner collects an ongoing royalty.⁴⁷

¶15 In the past, following a successful showing of infringement of a valid patent, a permanent injunction was presumed.⁴⁸ One of the first and clearest articulations of this standard is *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, wherein the Federal Circuit stated, “[t]his court has indicated that an injunction should issue once infringement has been established unless there is a sufficient reason for denying it.”⁴⁹ Applying this principle more broadly, the Federal Circuit in *Richardson v. Suzuki Motor Co.* noted, “Infringement having been established, it is contrary to the laws of property, of which the patent law partakes, to deny the patentee's right to exclude others from use of his property.”⁵⁰ Further, the Federal Circuit stated, “the right to exclude recognized in a patent is but the essence of the concept of property.”⁵¹ Although not expressly stated, the Federal Circuit in *Richardson*, seems to suggest that not only should there be a presumption of an injunction, but in its reading of 35 U.S.C. § 261, injunctions are necessary if patents are to confer a meaningful property right.⁵² Not surprisingly, the Federal Circuit granted a permanent injunction in *Richardson*.⁵³

¶16 Despite the rather extreme approach advanced in *W.L. Gore & Associates* and *Richardson*, there has been a more moderate line of cases suggesting that there is, at the very least, a presumption of irreparable harm once infringement has been established.⁵⁴

⁴⁴ *Id.* See 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2960 (2d ed.) (1987). See also *Quinter v. Volkswagen of Am.*, 676 F.2d 969, 974 (3d Cir. 1982); *A.H. Robins Co., v. Fadely*, 299 F.2d 557, 559 (5th Cir. 1962); *Fox v. Capitol Co.*, 96 F.2d 684, 686 (3d Cir. 1938).

⁴⁵ *KSM Fastening Sys.*, 776 F.2d at 1524.

⁴⁶ See ALAN L. DURHAM, PATENT LAW ESSENTIALS: A CONCISE GUIDE 14 (3d ed. 2009).

⁴⁷ *Id.*

⁴⁸ See, e.g., *W.L. Gore & Assocs., Inc. v. Garlock, Inc.*, 842 F.2d 1275, 1281 (Fed. Cir. 1988); *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1246–47 (Fed. Cir. 1989), *cert. denied*, 493 U.S. 853 (1989).

⁴⁹ *W.L. Gore & Assocs.*, 842 F.2d at 1281.

⁵⁰ *Richardson*, 868 F.2d at 1246–47. See 35 U.S.C. § 261 (2006) (“Subject to the provisions of this title, patents shall have the attributes of personal property.”).

⁵¹ *Richardson*, 868 F.2d at 1247 (quoting *Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1548 (Fed. Cir. 1983)).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See *Smith Int'l, Inc. v. Hughes Tool Co.*, 718 F.2d 1573, 1581 (Fed. Cir. 1983), *cert. denied*, 464 U.S. 996 (1983) (holding that “where validity and continuing infringement have been clearly established, . . .

The court in *Smith International, Inc. v. Hughes Tool Co.* offered the following reasoning:

The very nature of the patent right is the right to exclude others. Once the patentee's patents have been held to be valid and infringed, he should be entitled to the full enjoyment and protection of his patent rights. The infringer should not be allowed to continue his infringement in the face of such a holding. A court should not be reluctant to use its equity powers once a party has so clearly established his patent rights. We hold that where validity and continuing infringement have been clearly established, as in this case, immediate irreparable harm is presumed.⁵⁵

A subsequent case applied this rule but emphasized that although mere infringement of a valid patent is sufficient to show irreparable harm, the presumption can be rebutted by clear evidence.⁵⁶ Until 2006, both lines of cases were used and applied in patent cases.⁵⁷

¶17

In 2006, Justice Thomas delivered the unanimous decision of the Supreme Court in *eBay Inc. v. MercExchange, L.L.C.*, which held that following a successful trial on the merits where infringement was shown, a court could not automatically presume a permanent injunction, and instead, the patent holder would have to satisfy the traditional equitable elements to receive an injunction.⁵⁸ In *eBay*, MercExchange alleged that eBay infringed on one of its business method patents.⁵⁹ A jury found that MercExchange's patent was valid, eBay had infringed that patent, and an award of damages was proper.⁶⁰ Following the jury verdict, the district court denied MercExchange's motion for a permanent injunction.⁶¹ MercExchange appealed the judgment of the district court decision to the Federal Circuit.⁶² The Federal Circuit reversed, and applied its "general

immediate irreparable harm is presumed."); *Roper Corp. v. Litton Sys., Inc.*, 757 F.2d 1266, 1272 (Fed. Cir. 1985) ("The presumption rests on a strong showing that a valid patent is being infringed. When that is true, irreparable injury may be presumed."); *H.H. Robertson Co. v. United Steel Deck, Inc.*, 820 F.2d 384, 390 (Fed. Cir. 1987) ("In matters involving patent rights, irreparable harm has been presumed when a clear showing has been made of patent validity and infringement.") (citing *Smith Int'l*, 718 F.2d at 1581).

⁵⁵ *Smith Int'l, Inc.*, 718 F.2d at 1581.

⁵⁶ In 1985, the Federal Circuit held:

The presumption does not change the ultimate equitable showing needed to justify a preliminary injunction. Like most legal presumptions, it is rebuttable by clear evidence that it is overcome in the case at hand. The presumption merely requires that an alleged infringer confronted by a patentee's strong showing of validity and infringement bring forward evidence that irreparable injury would not actually be suffered by the patentee if the motion for preliminary injunction were denied. The presumption rests on a strong showing that a valid patent is being infringed. When that is true, irreparable injury may be presumed.

Roper Corp., 757 F.2d at 1272.

⁵⁷ *MercExchange, L.L.C. v. eBay, Inc.*, 401 F.3d 1323, 1339 (Fed. Cir. 2005), *reh'ng and reh'ng en banc denied* April 26, 2005, *vacated and remanded sub nom.* *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006). ("We therefore see no reason to depart from the general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances.")

⁵⁸ *eBay Inc. v. MercExchange L.L.C.*, 547 U.S. at 388 (2006).

⁵⁹ *Id.* at 390.

⁶⁰ *Id.* at 390–91.

⁶¹ *Id.* at 391, (quoting *MercExchange, L.L.C. v. eBay Inc.*, 275 F. Supp. 2d 695 (E.D. Va. 2003)).

⁶² *Id.*

rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances.”⁶³

¶18 The Supreme Court granted certiorari to determine whether this rule was appropriate.⁶⁴ The Supreme Court rejected the invitation to replace traditional equitable considerations with a rule that an injunction automatically follows infringement.⁶⁵ The Court rejected categorical approaches, both for providing injunctive relief and denying it.⁶⁶ Instead, the Court held that “a plaintiff seeking a permanent injunction must satisfy a four factor test” which is derived from equitable principles.⁶⁷ The Court held that:

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.⁶⁸

¶19 Following the *eBay* decision, the Federal Circuit considered the presumption of irreparable harm an open issue.⁶⁹ In 2008, the Federal Circuit decided two cases regarding the presumption of irreparable harm.⁷⁰ In *Amado v. Microsoft Corp.*, the Federal Circuit did not reach the issue of whether the presumption of irreparable harm was intact following the *eBay* decision.⁷¹ In *Broadcom Corp. v. Qualcomm Inc.*, the Federal Circuit offered the following:

“It remains an open question ‘whether there remains a rebuttable presumption of irreparable harm following *eBay*,’ *Amado v. Microsoft Corp.*, 517 F.3d 1353, 1359 n. 1 (Fed. Cir. 2008), but the district court did not abuse its discretion in finding irreparable injury here even if Broadcom benefits from no such presumption.”⁷²

Both of these cases demonstrate the question was still unresolved in the Federal Circuit. However, following *eBay*, other Federal Courts of Appeals have eliminated the presumption of irreparable harm in slightly different contexts.⁷³

⁶³ *Id.* (quoting *MercExchange, L.L.C. v. eBay Inc.*, 401 F.3d 1323, 1339 (Fed. Cir. 2005)).

⁶⁴ *eBay, Inc. v. MercExchange, L.L.C.*, 546 U.S. 1029, 1029 (2005).

⁶⁵ *eBay Inc.*, 547 U.S. at 392–93. *See also* *New York Times Co. v. Tasini*, 533 U.S. 483, 505 (2001) (holding that permanent injunctions do not automatically follow a determination that a copyright has been infringed).

⁶⁶ *Id.* at 394.

⁶⁷ *Id.* at 391.

⁶⁸ *Id.*

⁶⁹ *See infra* notes 7072.

⁷⁰ *See Amado v. Microsoft Corp.*, 517 F.3d 1353 (Fed. Cir. 2008); *Broadcom Corp. v. Qualcomm Inc.*, 543 F.3d 683 (Fed. Cir. 2008).

⁷¹ *See Amado*, 517 F.3d 1353, 1359 n.1 (Fed. Cir. 2008), (“[B]ecause regardless of whether there remains a rebuttable presumption of irreparable harm following *eBay*, the district court was within its discretion to find an absence of irreparable harm based on the evidence presented at trial.”).

⁷² *Broadcom*, 543 F.3d at 702 (Fed. Cir. 2008).

⁷³ *See Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976 (9th Cir. 2011). The court eliminated the presumption of irreparable harm in preliminary injunction proceedings in copyright infringement following *eBay*, despite “repeat[ing] and rel[y]ing on this rule numerous times in the nearly three decades since *Apple Computer, Inc. v. Formula International Inc.*, 725 F.2d 521 (9th Cir. 1984).” *Id.* at 979. *See also* *Salinger*

¶20 In 2010, the Second Circuit eliminated the presumption of irreparable harm for preliminary injunction proceedings in copyright cases in *Salinger v. Colting*.⁷⁴ This case made three significant extensions to the general proposition announced in *eBay*.

¶21 First, in *eBay*, MercExchange was seeking a permanent injunction; yet, the Second Circuit applied the ruling to a preliminary injunction case.⁷⁵ Second, *eBay* was a patent infringement case; however, the Second Circuit applied the ruling to a copyright infringement case.⁷⁶ Finally, and most significantly, while *eBay* stood for the general proposition that the rules of equity would govern the grant of injunctions, the Second Circuit read this to mean that *eBay* had eliminated all presumptions, including the presumption of irreparable harm.⁷⁷

¶22 In 2011, two Ninth Circuit panels also arrived at similar conclusions in copyright cases: *eBay* had eliminated the presumption of irreparable harm when seeking a preliminary injunction in a copyright proceeding.⁷⁸ Since *Apple Computer, Inc. v. Formula International, Inc.*, the Ninth Circuit recognized that, in the context of preliminary injunctions in copyright cases, a reasonable likelihood of success on the merits in a copyright infringement claim raised a presumption of irreparable harm.⁷⁹ However, this rule was eliminated by the holdings in *Perfect 10, Inc. v. Google, Inc.*, and *Flexible Lifeline Systems, Inc. v. Precision Lift, Inc.*⁸⁰

¶23 Most recently, the Fourth Circuit also concluded in a preliminary injunction copyright infringement case that the presumption of irreparable harm did not survive the *eBay* decision.⁸¹ The Fourth Circuit also noted that the “differences [between preliminary and permanent injunctive relief] are therefore insufficient to warrant a presumption of irreparable harm” in a preliminary injunction.⁸²

¶24 While the Second, Fourth, and Ninth Circuits eliminated the presumption of irreparable harm in preliminary injunction copyright cases, the First Circuit, in *Voice of the Arab World, Inc. v. MDTV Medical News Now, Inc.*, “declined to decide” whether the

v. Colting, 607 F.3d 68 (2d Cir. 2010) (eliminating the presumption of irreparable harm in preliminary injunction proceedings in copyright infringement actions).

⁷⁴ *Salinger*, 607 F.3d at 82.

⁷⁵ *Id.* at 70.

⁷⁶ *Id.* at 74–75.

⁷⁷ *Id.*

⁷⁸ See *Perfect 10, Inc.*, 653 F.3d at 980–81 (9th Cir. 2011) (“We therefore conclude that the propriety of injunctive relief in cases arising under the Copyright Act must be evaluated on a case-by-case basis in accord with traditional equitable principles and without the aid of presumptions or a ‘thumb on the scale’ in favor of issuing such relief.”). See also *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 998 (9th Cir. 2011) (“We conclude that presuming irreparable harm in a copyright infringement case is inconsistent with, and disapproved by, the Supreme Court’s opinions in *eBay* and *Winter*. Thus, our long-standing precedent finding a plaintiff entitled to a presumption of irreparable harm on a showing of likelihood of success on the merits in a copyright infringement case, as stated in *Elvis Presley* and relied on by the district court, has been effectively overruled Accordingly, we hold that even in a copyright infringement case, the plaintiff must demonstrate a likelihood of irreparable harm as a prerequisite for injunctive relief, whether preliminary or permanent.”).

⁷⁹ *Salinger*, 607 F.3d at 75, (quoting *Apple Computer, Inc. v. Formula Int’l, Inc.*, 725 F.2d 521, 525 (9th Cir. 1984)).

⁸⁰ See *supra* note 78.

⁸¹ *Bethesda Softworks, L.L.C. v. Interplay Entm’t Corp.*, 452 F. App’x 351, 355 (4th Cir. 2011).

⁸² *Id.* at 355 (“The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.”) (citing *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 546 n.12 (1987)).

presumption of irreparable harm was eliminated by the *eBay* holding.⁸³ This case is significant because it appears to slightly push back from the trend of eliminating the presumption of irreparable harm following *eBay*. It should be noted that *Voice of the Arab World, Inc.* was a trademark infringement action and thus distinguishable from the copyright cases noted above.⁸⁴

¶25 Despite the ability to distinguish the Second, Fourth and Ninth Circuits' holdings as copyright infringement cases, the Federal Circuit in *Bosch* eliminated the presumption of irreparable harm in the patent context. The *Bosch* decision is significant because it is the first time that any of the Federal Courts of Appeal applied the *eBay* decision to the presumption of irreparable harm in patent infringement litigation, and in a case where the plaintiff sought a permanent injunction.⁸⁵

III. DISCUSSION OF *ROBERT BOSCH LLC v. PYLON MANUFACTURING CORP.*

A. Underlying Facts

¶26 Robert Bosch LLC (Bosch) is a subsidiary of Robert Bosch GmbH and is one of the world's largest suppliers of automotive parts.⁸⁶ Part of Bosch's business involves developing windshield wiper blades.⁸⁷ Bosch holds at least four patents for "beam blades," a type of windshield wiper blade.⁸⁸ Bosch sued a generic windshield wiper blade company, Pylon Manufacturing Corporation (Pylon), for infringing on the four patents for beam style wiper blades. Both parties moved for summary judgment.⁸⁹ On summary judgment, the district court determined, *inter alia*, that Pylon infringed on claims 1 and 8 of Bosch patent 6,292,974 ('974) and that remaining issues should be decided by the jury.⁹⁰ The jury determined, *inter alia*, that claims 13 of both the 6,944,905 and 6,675,434 ('905 and '434) patents were valid and that Pylon was infringing on those claims.⁹¹ Based on these favorable rulings, Bosch moved for entry of a permanent injunction based on the infringement of the valid claims in patents '905 and

⁸³ *Voice of the Arab World, Inc. v. MDTV Med. News Now, Inc.*, 645 F.3d 26, 34–35 (1st Cir. 2011).

In other words, we decline to decide whether the aforementioned presumption [of irreparable harm] is analogous to the 'general' or 'categorical' rules rejected by the Supreme Court in *eBay*. . . it is unnecessary to decide this question here because—even if we assume without deciding that said presumption is good law—we still find that the district court abused its discretion in applying the presumption here, in light of the fact that such presumption has been held inapplicable in cases where the party seeking injunctive relief excessively delays in seeking such relief.

Id.

⁸⁴ *Id.* at 37.

⁸⁵ *See Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142 (Fed. Cir. 2011).

⁸⁶ Gabi Thesing, *German Business Confidence Fell for a Second Month in April*, BLOOMBERG BUSINESSWEEK (Jan. 29, 2012, 2:55 PM), <http://www.businessweek.com/news/2011-04-21/german-business-confidence-fell-for-a-second-month-in-april.html>.

⁸⁷ *Robert Bosch LLC*, 659 F.3d at 1145.

⁸⁸ *Id.* *See also* U.S. Patent No. 6,292,974 (filed June 11, 1999); U.S. Patent No. 6,675,434 (filed Feb. 16, 2001); U.S. Patent No. 6,944,905 (filed April 22, 2002); U.S. Patent No. 6,978,512 (filed May 8, 2002).

⁸⁹ *Robert Bosch LLC*, 659 F.3d at 1145.

⁹⁰ *Id.*

⁹¹ *Id.*

‘434.⁹² The district court denied that motion on November 3, 2010, holding that Bosch failed to prove irreparable harm.⁹³ Bosch timely appealed the ruling denying the permanent injunction.⁹⁴

B. Discussion

¶27 Prior to the Federal Circuit’s decision in *Bosch*, plaintiffs who had successfully proved infringement of a valid patent were entitled to a rebuttable presumption that they had suffered irreparable harm, the first element of the four factor test necessary for a permanent injunction.⁹⁵

¶28 The *Bosch* decision begins its discussion of the presumption of irreparable harm by noting that, “In *eBay*, the Supreme Court made clear that ‘broad classifications’ and ‘categorical rule[s]’ have no place in this inquiry.”⁹⁶ Further, the Federal Circuit noted that *eBay* allows courts to “exercise their discretion in accordance with traditional principles of equity,” but “[t]he Supreme Court . . . did not expressly address the presumption of irreparable harm.”⁹⁷ The Federal Circuit then clarified the issue by definitively stating, “[w]e . . . confirm that *eBay* jettisoned the presumption of irreparable harm as it applies to determining the appropriateness of injunctive relief.”⁹⁸

¶29 Immediately following this pronouncement, the Federal Circuit qualified the *eBay* approach:

Although *eBay* abolishes our general rule that an injunction normally will issue when a patent is found to have been valid and infringed, it does not swing the pendulum in the opposite direction. In other words, even though a successful patent infringement plaintiff can no longer rely on presumptions or other shortcuts to support a request for a permanent injunction, it does not follow that courts should entirely ignore the fundamental nature of patents as property rights granting the owner the right to exclude.⁹⁹

The Federal Circuit continued to qualify and limit the *eBay* approach, noting that the Constitution creates a property right in patents that right cannot be ignored.¹⁰⁰ Moreover, the Federal Circuit noted that district courts are not required to “act on a clean slate,” meaning that past precedents suggest that injunctions should be granted following a trial demonstrating that a valid patent was infringed.¹⁰¹ Further, the *Bosch* opinion quotes the concurring opinion of Chief Justice Roberts in *eBay*, specifically, ““a page of history is

⁹² *Id.*

⁹³ *Robert Bosch LLC v. Pylon Mfg. Corp.*, 748 F. Supp. 2d 383, 409 (D. Del. 2010).

⁹⁴ *Robert Bosch LLC*, 659 F.3d at 1146.

⁹⁵ *Id.* at 1148. *See, e.g.*, *Fisher-Price, Inc. v. Safety 1st, Inc.*, 279 F. Supp. 2d 526, 528–29 (D. Del. 2003); *Boehringer Ingelheim Vetmedica, Inc. v. Schering-Plough Corp.*, 106 F. Supp. 2d 696, 701 (D. N.J. 2000) (entering a permanent injunction after noting that irreparable harm is presumed in patent cases).

⁹⁶ *Robert Bosch LLC*, 659 F.3d at 1148 (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)).

⁹⁷ *Id.* at 1148 (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. at 394).

⁹⁸ *Id.* at 1149.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

worth a volume of logic’ when ‘it comes to discerning and applying those standards.’”¹⁰² Based on this language, the Federal Circuit offers what appears to be a slight reversal:

... this court has encountered many cases involving a practicing patentee seeking to permanently enjoin a competitor upon an adjudication of infringement . . . we have developed certain legal standards that inform the four-factor inquiry and, in particular, the question of irreparable harm. While none of these standards alone may justify a general rule or an effectively irrebuttable presumption that an injunction should issue, a proper application of the standards to the facts of this case compels the conclusion that Bosch is entitled to the injunction it seeks.¹⁰³

This language seems to suggest that while *eBay* eliminated the rebuttable presumption of an injunction, past case law and experience has “developed certain legal standards,” including, arguably, a presumption of irreparable harm when an infringing party is practicing the invention.¹⁰⁴ Based upon this reading of the case, it appears that while the Federal Circuit has expressly dismissed the presumption of irreparable harm, district courts should still allow it to “inform” their decisions, especially when the entity is practicing the patent.¹⁰⁵

IV. ANALYSIS OF *ROBERT BOSCH LLC v. PYLON MANUFACTURING CORP.*

A. *Aftermath of the Bosch Decision*

¶30 In reading all the limiting language of the *Bosch* opinion, it appears that the court, while eliminating the presumption of irreparable harm, does not attack the underlying premise: the loss of the right to exclude is an irreparable harm. However, the loss of the right to exclude is not a listed factor in the court’s irreparable harm analysis. This premise is more thoroughly discussed in Part V. The remainder of this Part examines what factors now govern the irreparable harm analysis, assuming that *Bosch* is not overturned or overruled.

B. *What Factors Does Bosch Propose Instead of the Presumption of Irreparable Harm?*

¶31 Because the court in *Bosch* could not rely on the presumption of irreparable harm, the court instead looked to various other factors in order to determine whether Pylon’s infringement caused irreparable harm.¹⁰⁶ The court concluded that Bosch provided evidence of irreparable harm in three distinct categories: first, the nature of the competition between the parties; second, the loss in market share and access to potential customers; and third, Pylon’s inability to pay a judgment.¹⁰⁷ Each factor is analyzed below.

¹⁰² *Id.* at 1149–1150 (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. at 395 (Roberts, C.J., concurring)).

¹⁰³ *Id.* at 1150.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1152–56.

¹⁰⁷ *Id.* at 1150.

¶32 In *Bosch*, the Federal Circuit first examined the nature and extent of the competition between the parties.¹⁰⁸ Bosch presented evidence to show it competes with Pylon in all of the market segments identified by the parties.¹⁰⁹ Pylon and Bosch were in direct competition, and although there were other infringers in the marketplace, that did not negate irreparable harm.¹¹⁰

¶33 The Federal Circuit also held that changes in market share and access to potential customers resulting from an introduction of infringing technology can demonstrate irreparable harm.¹¹¹ Bosch was able to demonstrate that it lost market share and access to potential customers because Pylon was awarded a contract to sell its infringing blades in Wal-Mart stores.¹¹² Many cases have held that monetary damages cannot adequately compensate for a loss in market share, and thus, loss in market share is an irreparable harm.¹¹³

¶34 Finally, the Federal Circuit held that Pylon's lack of financial wherewithal to satisfy a judgment would be an irreparable harm.¹¹⁴ Bosch was able to introduce evidence, specifically public financial disclosures, that suggested Pylon was experiencing financial difficulty.¹¹⁵ Pylon did not rebut that evidence, so the court concluded that Pylon would be unable to satisfy a judgment, and therefore held that Bosch would be irreparably harmed.¹¹⁶

¶35 Based on Bosch's demonstration that Pylon directly competed for customers, caused a decrease in Bosch's market share, and that Pylon would be unable to satisfy a judgment, the Federal Circuit concluded that Bosch would be irreparably harmed.¹¹⁷

C. Factors that Other Courts Have Considered When Determining Irreparable Harm

¶36 The *Bosch* opinion provides three potential ways to demonstrate irreparable harm; however, there are many alternative ways for patent holders to demonstrate irreparable harm.¹¹⁸ Other courts have found that a loss of prospective goodwill creates irreparable harm.¹¹⁹ Additionally, evidence of the inability to advertise and market a product as

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1152.

¹¹⁰ *Id.* at 1151 (quoting *Pfizer, Inc. v. Teva Pharm. USA*, 429 F.3d 1364, 1381 (Fed. Cir. 2005)) (explaining that additional infringers in the marketplace do not negate irreparable harm).

¹¹¹ *Id.* at 1153–54.

¹¹² *Id.* at 1153.

¹¹³ *See, e.g., Hoffman-LaRoche, Inc. v. Cobalt Pharm. Inc.*, No. 07–cv–4539, 2010 U.S. Dist. LEXIS 119432, at *36–37 (D.N.J. Nov. 10, 2010); *Praxair, Inc. v. ATMI, Inc.*, 543 F.3d 1306, 1330 (Fed. Cir. 2008); *TruePosition Inc. v. Andrew Corp.*, 568 F. Supp. 2d 500, 531 (D. Del. 2008).

¹¹⁴ *Robert Bosch LLC*, 659 F.3d at 1153–54.

¹¹⁵ *Id.* at 1154.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1154–55.

¹¹⁸ *See, e.g., Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1263–64 (10th Cir. 2004) (collecting cases which establish irreparable harm).

¹¹⁹ *See, e.g., Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 37–39 (2d Cir. 1995) (loss of prospective goodwill through inability to market unique product constituted irreparable harm); *Basiccomputer Corp. v. Scott*, 973 F.2d 507, 511–12 (6th Cir. 1992) (violation of covenant not-to-compete constituted irreparable harm where damages were difficult to calculate, customer goodwill was damaged, and plaintiff suffered loss of competitive position).

unique can support a finding of irreparable harm.¹²⁰ Finally, a mere showing of a loss of exclusivity may support a finding of irreparable harm.¹²¹

V. THERE SHOULD BE A PRESUMPTION OF IRREPARABLE HARM AT LEAST IN THE PATENT CONTEXT

A. *Did eBay Eliminate the Presumption of Irreparable Harm?*

¶37 The question of whether *eBay* eliminated the presumption of irreparable harm is a topic of considerable scholarly debate. One commentator argues that “courts should continue to employ the presumption of irreparable harm in trademark infringement cases because damages caused by trademark infringement are by their very nature irreparable.”¹²² Further, that commentator argues that the holding of *eBay* is “capable of coexisting with the presumption” of irreparable harm.¹²³ Another commentator states that “*eBay* should be read as preserving a rebuttable presumption of irreparable harm” primarily because the availability of injunctions is very important in furthering the goals of the patent system.¹²⁴

¶38 Given the text of the patent statute, the Supreme Court in *eBay* determined that the principles of equity apply to disputes arising under the Patent Act, as noted in 35 U.S.C. § 283.¹²⁵ However, the Court also announced, “this Court has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination” of infringement.¹²⁶ Further, the Court noted that a categorical grant of such relief violated the “considerable discretion” district courts are supposed to have when deciding whether to grant injunctions.¹²⁷ Afraid that this holding would be taken too broadly, the Court limited the rule: “We hold only that the decision

¹²⁰ See, e.g., *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) (irreparable harm established because intangibles like advertising efforts and goodwill were injured); *Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 592 (8th Cir. 1984) (irreparable harm found where company was disadvantaged in competitive market by inability to market unique seed corn); *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907-09 (2d Cir. 1990) (loss of unique product and goodwill supports finding of irreparable harm when customers indicate a strong preference for the product and threaten discontinuation of business relationship).

¹²¹ See, e.g., *J.C. Penney Co., Inc. v. Giant Eagle, Inc.*, 813 F. Supp. 360, 369 (W.D. Pa. 1992) (inherent nature of exclusive provision in lease coupled with damage to goodwill, difficulty of calculating damages, and unique nature of interest in real estate constituted irreparable harm); *Walgreen Co. v. Sara Creek Prop. Co.*, 775 F. Supp. 1192, 1197 (E.D. Wis. 1991) (where exclusivity clause in lease was breached, loss of goodwill, erosion of customer base, and diminution of corporate image provided grounds for finding irreparable harm), *aff'd sub nom. Walgreen Co. v. Sara Creek Prop. Co.*, B.V., 966 F.2d 273 (7th Cir. 1992).

¹²² Jeffrey M. Sanchez, Comment, *The Irreparably Harmed Presumption? Why the Presumption of Irreparable Harm in Trademark Law Will Survive eBay and Winter*, 2011 BYU L. REV. 535, 538 (internal quotes omitted).

¹²³ *Id.*

¹²⁴ Elizabeth E. Millard, Note, *Injunctive Relief in Patent Infringement Cases: Should Courts Apply a Rebuttable Presumption of Irreparable Harm after eBay, Inc. v. MercExchange, L.L.C.*?, 52 ST. LOUIS U. L.J. 985, 987 (2008).

¹²⁵ *eBay Inc. v. MercExchange L.L.C.*, 547 U.S. 388, 391–92 (2006).

¹²⁶ *Id.* at 392–93; see also *New York Times Co. v. Tasini*, 533 U.S. 483, 505 (2001) (following copyright infringement, an injunction does not automatically follow).

¹²⁷ *eBay Inc.*, 547 U.S. at 394 (citing *Roche Prod., Inc. v. Bolar Pharm. Co.*, 733 F.2d 858, 865 (Fed. Cir. 1984)).

whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than other cases governed by such standards.”¹²⁸

¶39 The *eBay* decision was joined by two concurring opinions which both seem to suggest that injunctions should normally follow, but should not be presumed.¹²⁹ Based on these concurring opinions, it can also be argued that the presumption of irreparable harm was not disturbed by the majority opinion.

¶40 In his concurring opinion, Chief Justice Roberts notes that, “[f]rom at least the early 19th century, courts have granted injunctive relief upon a finding of infringement in the vast majority of patent cases.”¹³⁰ Further, Roberts notes this tradition of granting injunctions is not surprising because remedies consisting entirely of monetary damages are generally insufficient to protect a right to exclude, and this difficulty of protecting the right to exclude another’s use implicates the first two factors of the traditional four-factor test.¹³¹ Finally, Chief Justice Roberts notes that discretion is not unlimited and courts should not start from an “entirely clean slate.”¹³² Based on the language of this concurring opinion, it appears that Chief Justice Roberts did not envision that lower courts would use *eBay* to eliminate the presumption of irreparable harm, since the right to exclude “implicates” the first two factors of the traditional test.¹³³

¶41 Justice Kennedy also filed a concurring opinion which seems to suggest that changing times require more discretion on the part of the district court when granting an injunction.¹³⁴ His concurring opinion describes an industry which merely uses patents “primarily for obtaining licensing fees.”¹³⁵ The opinion notes that the “threat of an injunction” is sometimes used as “undue leverage” and, in those cases, monetary damages would sufficiently compensate a non-practicing plaintiff.¹³⁶ This is in harmony with the notion of the presumption of irreparable harm. Specifically, if an infringing entity presents evidence that a patent holder was merely using the “threat of an injunction as leverage,” then this evidence can be sufficient to rebut the presumption. Additionally, Justice Kennedy notes that the fourth factor in the analysis, whether an injunction serves the public interest, can be used to block injunctions even if irreparable harm is presumed and not rebutted.¹³⁷

¹²⁸ *Id.*

¹²⁹ *See Id.* at 394–95 (Roberts, C.J., concurring); *eBay Inc.*, 547 U.S. at 395–97 (Kennedy, J., concurring).

¹³⁰ *Id.* at 395 (Roberts, C.J., concurring).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 395–97 (Kennedy, J., concurring).

¹³⁵ *Id.* at 396.

¹³⁶ *Id.*

¹³⁷ *Id.* at 396–97.

*B. If eBay is Read as Eliminating the Presumption of Irreparable Harm,
Then It Should be Overruled*

¶42 In assessing whether *eBay* is sound law, the tension between what rights a patent confers and the harm associated with granting an injunction, and thereby excluding others, must be more thoroughly examined. First, it must be noted that the Constitution envisions patents as exclusive rights.¹³⁸ In adopting this provision into statutory law, Congress clarified in 35 U.S.C. § 261 that patents are to be treated as personal property.¹³⁹ Further, the Congress laid out specific remedies for the protection of the right conferred by a patent, including the following provision for injunctive relief: “The several courts having jurisdiction of cases under this title *may* grant injunctions *in accordance with the principles of equity* to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.”¹⁴⁰

¶43 If a mere showing of exclusivity may support a finding of irreparable harm, as noted in Part II, and patents and copyrights grant exclusive rights, it follows that any continued infringement would be irreparable harm, as the holder of the right has lost the ability to exclude. Several cases have discussed this exact issue. In *Hybritech Inc. v. Abbott Laboratories*, the Federal Circuit noted that, “[t]he patent statute provides injunctive relief to preserve the legal interests of the parties against future infringement which may have market effects never fully compensable in money.”¹⁴¹ This principle was expanded in *Reebok International Ltd. v. J. Baker, Inc.*, where the court noted that, “[b]ecause the principal value of a patent is its statutory right to exclude, the nature of the patent grant weighs against holding that monetary damages will always suffice to make the patentee whole.”¹⁴² In *Atlas Powder Co. v. Ireco Chemicals*, the Federal Circuit stated, “[t]he patent statute further provides injunctive relief to preserve the legal interests of the parties against future infringement which may have market effects never fully compensable in money.”¹⁴³ Further, in that decision the Federal Circuit noted, “[i]f monetary relief were the sole relief afforded by the patent statute then injunctions would be unnecessary and infringers could become compulsory licensees for as long as the litigation lasts.”¹⁴⁴ Based on this statement, it is clear that the Federal Circuit considers the right to exclude a right which is independent from the right to receive economic benefits. Accordingly, the separate right to exclude should have some remedy. While equitable principles, including the balance of hardships test, should control the grant of an injunction, the loss of the right to exclude is certainly a harm that does not have a monetary value. Thus, following a showing of infringement, irreparable harm should be presumed in patent infringement cases. The Federal Circuit has held that the loss of the right to exclude alone is sufficient to establish irreparable harm,¹⁴⁵ thus the presumption of irreparable harm is warranted anytime patent infringement is demonstrated.

¹³⁸ U.S. CONST. art. I, § 8, cl. 8 (“ . . . the exclusive Right to their respective Writings and Discoveries”).

¹³⁹ 35 U.S.C. § 261 (2006) (“Subject to the provisions of this title, patents shall have the attributes of personal property.”).

¹⁴⁰ 35 U.S.C. § 283 (2006) (emphasis added).

¹⁴¹ *Hybritech Inc. v. Abbott Laboratories*, 849 F.2d 1446, 1456–57 (Fed. Cir. 1988).

¹⁴² *Reebok Int'l Ltd. v. J. Baker, Inc.*, 32 F.3d 1552, 1557 (Fed. Cir. 1994).

¹⁴³ *Atlas Powder Co. v. Ireco Chemicals*, 773 F.2d 1230, 1233 (Fed. Cir. 1985) (emphasis removed).

¹⁴⁴ *Id.*

¹⁴⁵ See, e.g., *Hybritech Inc.*, 849 F.2d at 1456–57; *Reebok Int'l Ltd.*, 32 F.3d at 1557; *Atlas Powder Co.*,

VI. CONCLUSION

¶44 The Supreme Court's decision in *eBay* has been interpreted by the Federal Circuit in *Bosch* as eliminating all presumptions in injunction litigation, including injunctions in patent cases. This is too broad of a reading of the majority opinion in *eBay* and discounts the additional comments made in the concurring opinions. The Federal Circuit should be reversed, at least in patent infringement injunction litigation. The factors proposed in *Bosch* are helpful, and certainly more will be developed as new cases are decided, but, the *exclusive* right given to patent holders—a factor which seems like it should be central in the analysis—has been marginalized.

¶45 Not all patent cases where infringement has been proven should result in the grant of an injunction. Instead, courts should still consider the other three traditional factors from *eBay*, and apply a rebuttable presumption of irreparable harm. The presumption is supported by the patent holder's loss of her "exclusive right" to her invention. That loss alone warrants a rebuttable presumption of irreparable harm.

