

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

APPLE INC.,

Plaintiff-Appellant,

v.

SAMSUNG ELECTRONICS CO., LTD.,
SAMSUNG ELECTRONICS AMERICA, INC., and
SAMSUNG TELECOMMUNICATIONS AMERICA, LLC,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of California in case no. 11-CV-1846, Judge Lucy H. Koh.

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Pursuant to Federal Circuit Rule 47.4, counsel of record for Plaintiff-Appellant Apple Inc. certifies as follows:

1. The full name of every party represented by us is:

Apple Inc.
2. The names of the real parties in interest represented by us are:

Not applicable
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the parties represented by us are:

None.
4. The names of all law firms and the partners or associates that appeared for the parties represented by us in the trial court, or are expected to appear in this Court, are:

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INTRODUCTION

Samsung does not dispute that its sale of infringing products has caused Apple, its closest and strongest competitor, to lose market share and incalculable downstream sales—precisely the type of irreparable harm that has traditionally warranted permanent injunctive relief. Instead, Samsung argues that the district court’s requirement of proof that each specific patented feature drives consumer demand for the infringing products is a “well-established feature of irreparable harm analysis.” Samsung Br. 2. But Samsung does not identify a single opinion from the Supreme Court or this Court requiring such a “causal nexus” in the permanent injunction context. The reason is simple: no court has *ever* imposed such a requirement because it is contrary to the traditional equitable principles articulated in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 393 (2006), and consistently applied by this Court in permanent injunction cases.

Nor is there any reason to import a causal nexus requirement from the *preliminary* injunction context of *Apple I* and *Apple II* into the *permanent* injunction context. When infringement and validity have been decided by a jury and confirmed by the district court, it is inappropriate to deny a patentee the right to exclude where its competitor’s sale of infringing products has caused irreparable harm. That is especially true in cases, such as this one, in which the competitor deliberately infringed multiple intellectual property rights, where no single one

may, by itself, drive consumer demand. Furthermore, the rigid causal nexus requirement applied by the district court here would make it exceedingly difficult for patentees to obtain injunctive relief against a competitor's infringement of patents that cover features implemented in complex multi-feature devices, effectively converting the statutory right to exclude into a compulsory license in many cases—a result that surely was not envisioned in *eBay* or authorized by Congress.

Samsung's arguments under the traditional *eBay* factors fare no better. Samsung contends that money damages would be an adequate remedy, but only by repeating the district court's error of demanding proof that Apple's patents are "priceless." A18. At the same time, the only hardship that Samsung claims it would suffer from an injunction is the inability to resume its infringement—behavior that the public has a strong interest in preventing. As to Apple's trade dress, the Federal Trademark Dilution Act does not require proof of ongoing dilution as Samsung suggests, but rather *presumes* injury from the jury's finding of dilution and thus underscores the appropriateness of an injunction in this case.

The district court's order denying a permanent injunction should be reversed or, at least, vacated and remanded for application of the correct legal standard.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO ENJOIN SAMSUNG'S ADJUDICATED PATENT INFRINGEMENT.

A. Apple Proved Irreparable Harm.

1. Samsung does not dispute the district court's finding of irreparable harm.

Samsung does not dispute the district court's findings that: (i) "Apple and Samsung continue to compete directly in the same market" (A5); (ii) "Apple has continued to lose market share to Samsung" as a result of Samsung's sale of infringing products (*id.*); and (iii) "Apple has suffered some irreparable harm in the form of loss of downstream sales" because customers purchasing Samsung's infringing products have cost Apple "lost future sales of both future phone models and tag-along products like apps, desktop computers, laptops, and iPods" (A5-6).

This Court has consistently held that such injuries satisfy the irreparable harm requirement for permanent injunctive relief. *See* Apple Br. 32-35. Thus, this Court reversed a finding of no irreparable harm where the evidence showed direct competition and lost market share. *Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1152 (Fed. Cir. 2011). Likewise, this Court reversed a finding of no irreparable harm where the record showed "[d]irect competition in the same market" and lost sales. *Presidio Components, Inc. v. Am. Technical Ceramics*

Corp., 702 F.3d 1351, 1363-1364 (Fed. Cir. 2012). The irreparable harm analysis in this case should begin and end with those same findings, which are undisputed.

2. This Court has never applied a causal nexus requirement in a permanent injunction case.

Samsung asserts that proof of a causal nexus is a “well-established” requirement that “has long been a part of the irreparable harm standard.” Samsung Br. 2, 14, 28. But Samsung points to no authority from the Supreme Court or this Court applying—or even discussing—any causal nexus requirement in the permanent injunction context. On the contrary, one district court has recently noted “a curious absence of references to the causal nexus standard,” leaving “doubt that the causal nexus as articulated in *Apple II* should be required for all irreparable harms offered in support of a request for a permanent injunction.” *Brocade Commc’ns Sys., Inc. v. A10 Networks, Inc.*, 2013 WL 140039, at *3 (N.D. Cal. Jan. 10, 2013).

Samsung cites only one non-precedential Ninth Circuit opinion and a handful of district court cases (Br. 18-19 nn.3-4), but even those do not support its argument. All of the non-patent cases cited by Samsung involved *preliminary* injunctions, which as discussed below, raise different considerations. *See infra* pp. 10-13. And in most of those cases, the plaintiff failed to show likely success

on the merits, which is not at issue here.¹ Meanwhile, in many of the patent cases that Samsung cites (Br. 18-19 n.4), the court denied an injunction for lack of evidence of *any* irreparable harm, not for failure to offer the highly particularized proof of consumer demand that the district court erroneously required here.² And in the other patent cases that Samsung cites, the issue before the court was not even whether to grant injunctive relief.³

¹ *Cant Strip Corp. of Am. v. Schuller Int'l, Inc.*, 1994 WL 475862, at *4 (9th Cir. Sept. 1, 1994) (denying preliminary injunction where the plaintiff could not “establish the threshold likelihood of success”); *Perfetti Van Melle USA v. Cadbury Adams USA LLC*, 732 F. Supp. 2d 712, 725-726 (E.D. Ky. 2010) (denying preliminary injunction where the plaintiff failed to demonstrate likely success or that the defendant’s product had resulted in lost sales); *Procter & Gamble Co. v. Ultreo, Inc.*, 574 F. Supp. 2d 339, 356 (S.D.N.Y. 2008) (denying preliminary injunction in a false advertising case where the plaintiff could not show consumer confusion); *Mostaghim v. Fashion Inst. of Tech.*, 2001 WL 1537545, at *3 (S.D.N.Y. Dec. 3, 2001) (denying preliminary injunction where the plaintiff failed to demonstrate likely success on any claim that could have entitled her to injunctive relief).

² *LG Elecs. U.S.A., Inc. v. Whirlpool Corp.*, 798 F. Supp. 2d 541, 563 (D. Del. 2011) (no irreparable harm where the patentee failed to identify “customers it has lost, or stands to lose”); *Quad/Tech, Inc. v. Q.I. Press Controls B.V.*, 701 F. Supp. 2d 644, 657 (E.D. Pa. 2010) (no irreparable harm due to the “absence of any evidence of lost sales” and the patentee’s delay in seeking an injunction); *Sundance, Inc. v. DeMonte Fabricating Ltd.*, 2007 WL 37742, at *2 (E.D. Mich. Jan. 4, 2007) (no irreparable harm where the patentee delayed filing suit).

³ *Advanced Med. Optics, Inc. v. Alcon Labs., Inc.*, 2005 WL 3454283, at *11 (D. Del. Dec. 16, 2005) (*staying* injunction pending appeal where no showing of future lost market share); *see also* Apple’s Memorandum of Law in Support of Its Motion to Stay at 13, *Eastman Kodak Co. v. Apple, Inc.*, No. 10-6021, ECF No. 18, 2010 WL 2209043 (W.D.N.Y. May 3, 2010) (seeking a *stay* of litigation involving no direct competition between the parties).

Samsung thus concedes that “the causal nexus requirement did not figure into the decisions to grant injunctive relief” in this Court’s post-*eBay* cases. Samsung Br. 22. That is precisely Apple’s point. Samsung does not even attempt to distinguish this Court’s recent decisions in *Presidio* and *Edwards Lifesciences AG v. CoreValve, Inc.*, 699 F.3d 1305 (Fed. Cir. 2012), which reaffirmed that, in cases between direct competitors, “the winner of a judgment of validity and infringement may normally expect to regain the exclusivity that was lost with the infringement,” again without discussing any causal nexus requirement. *Edwards*, 699 F.3d at 1314; *see also Presidio*, 702 F.3d at 1362-1363.

Samsung attributes the absence of any causal nexus discussion in *Bosch* and *Acumed LLC v. Stryker Corp.*, 551 F.3d 1323 (Fed. Cir. 2008), to the simplicity of the products involved. Samsung Br. 19-21. That understanding of the causal nexus requirement, however, would make the standard for injunctive relief turn on a determination whether the products involved are “simple” or “complex”—contrary to *eBay*’s admonition that “traditional equitable principles do not permit such broad classifications.” *eBay*, 547 U.S. at 393.

Similarly, Samsung’s argument (Br. 19-21) that this Court’s post-*eBay* decisions involved patents that were coextensive with the infringing products is simply incorrect. In *Bosch*, an injunction issued based on two infringed patents, each of which claimed a different aspect of the same windshield-wiper product.

659 F.3d at 1152; see *Robert Bosch, LLC v. Pylon Mfg. Corp.*, 748 F. Supp. 2d 383, 387-388 (D. Del. 2010) (one patent claimed a spoiler structure, and the other claimed protective end caps). And in *Broadcom Corp. v. Qualcomm Inc.*, 543 F.3d 683 (Fed. Cir. 2008), in affirming an injunction, this Court expressly recognized that the infringing chips contained multiple features, only some of which were actually claimed by the patents-in-suit. *Id.* at 686-687 (explaining that the patents related to separate video compression, wireless communication, and push-to-talk features supported by Qualcomm’s infringing chips).⁴

Contrary to Samsung’s suggestion, Apple does not seek to enjoin the “sale of a car based on infringing windshield-wiper blades.” Samsung Br. 20. As the jury found, Samsung deliberately infringed six different Apple patents—which (to continue the analogy) cover not only the windshield-wiper blades, but also the distinctive and innovative design of the car’s body, its dashboard, and several features under the hood that Samsung recognized were “critical” to its own products’ success. See Apple Br. 7-16. That infringement of multiple intellectual property rights allowed Samsung to capture part of Apple’s market share by

⁴ Nor is Samsung correct (Br. 21-22 n.6) that this Court’s failure to require proof of a causal nexus in *Broadcom* rested on the fact that the infringing products were not marketed directly to individual consumers. Had Samsung’s “causal nexus” test been the law, this Court easily could have asked whether the plaintiff’s injuries in *Broadcom* were attributable to demand for the infringing features in the relevant marketplace. That this Court did not do so is strong evidence that no such inquiry was appropriate.

implementing the very features that attracted consumers to Apple's products in the first place. *See* Apple Br. 17-23. The district court's insistence on a feature-specific showing of demand thus turns the irreparable harm analysis on its head, making it *more* difficult to obtain injunctive relief in a case such as this, where a competitor's infringement is so wide-ranging.

But even if this were a case of a single infringing feature such as a windshield-wiper blade (which it is not), the proper response is not to *deny* an injunction for the sale of the entire product upon a showing of irreparable harm, but rather to grant an injunction tailored to meet the infringement. That is precisely what the district court did in *Broadcom* through its "carefully constructed" sunset provision. 543 F.3d at 704; *see infra* p. 12. Otherwise, competitors would remain free to appropriate inventions that comprise only a portion of a product, reducing the patent right to the mere promise of a royalty for infringement. *Cf. Bowman v. Monsanto Co.*, No. 11-796, slip op. 8 (U.S. May 13, 2013) (rejecting interpretation of exhaustion doctrine that would cause patents to "plummet in value" and "result in less incentive for innovation than Congress wanted"). Moreover, a general rule that an injunction is unavailable if the patent covers less than the full product (or a demand-driving feature) would be a "broad classification[]" and "categorical rule" limiting the availability of injunctive relief

“in a broad swath of cases,” contrary to the traditional equitable principles articulated in *eBay*, 547 U.S. at 393, and applied by this Court ever since.

Samsung likewise fails in its attempt (Br. 20 n.5 & 22) to distinguish *Bosch* and *i4i Ltd. Partnership v. Microsoft Corp.*, 598 F.3d 831 (Fed. Cir. 2010), on the basis that the injury to the patentee was more severe than the harm to Apple here. Contrary to Samsung’s contention, the harm to Apple is not merely individual lost sales, but also (as the district court found) the incalculable lost downstream sales that flow from a consumer’s initial choice between two competing smartphone platforms. A5-6. If, as Samsung suggests, *Bosch* and *i4i* excused proof of a causal nexus due to the severity of the harm to the patentee, the same should happen here.

Samsung is also wrong to suggest (Br. 19, 48-49) that Justice Kennedy’s concurrence in *eBay* supports a causal nexus requirement in disputes between competitors. Justice Kennedy did not discuss irreparable harm at all, much less a rigid causal nexus requirement. Rather, Justice Kennedy addressed the recent development of non-practicing entities using “patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees.” *eBay*, 547 U.S. at 396 (Kennedy, J., concurring). He observed that, for non-practicing entities where the threat of an injunction “can be employed as a bargaining tool to charge exorbitant fees” even for patents covering “a small component of the product the companies seek to produce,” “legal damages may well be sufficient to compensate

for the infringement and an injunction may not serve the public interest.” *Id.* at 396-397. Those other equitable factors, including the balance of hardships and the public interest, are better suited to address any concerns about undue bargaining leverage, since they allow discretion to consider all of the circumstances, unlike the binary causal nexus test imposed by the district court here.

As this Court recognized in *Bosch*, the circumstances described in Justice Kennedy’s concurrence differ significantly from “traditional cases, such as this, where the patentee and adjudged infringer both practice the patented technology.” 659 F.3d at 1150. Samsung’s direct competition resulting in lost market share and incalculable lost downstream sales places this case squarely within the traditional circumstances that Justice Kennedy recognized warrant injunctive relief. *eBay*, 547 U.S. at 396 (Kennedy, J., concurring) (noting the historical practice of “granting an injunction against patent infringers almost as a matter of course” in cases between competitors).

3. The causal nexus requirement from *Apple I* and *Apple II* should not extend to permanent injunctions.

This Court stated in *Apple I* and *Apple II* that proof of a causal nexus is a required element of irreparable harm for preliminary injunctive relief—an extraordinary remedy granted *before* a determination on the merits. This Court reasoned that the causal nexus requirement helps to ensure that patentees do not secure “competitive gain beyond that which the inventive contribution and value of

the patent warrant.” *Apple Inc. v. Samsung Elecs. Co.* (“*Apple II*”), 695 F.3d 1370, 1375 (Fed. Cir. 2012). But Samsung offers no explanation why the same rationale should apply *following* a finding of liability that confirms the infringer’s trespass on the patentee’s right to exclude.

The cases that Samsung cites (Br. 23) actually demonstrate why requiring more rigorous proof of irreparable harm is appropriate at the preliminary injunction stage. *E.g., Abbott Labs. v. Sandoz, Inc.*, 544 F.3d 1341, 1364 (Fed. Cir. 2008) (“[E]quitable factors are of particular significance at the preliminary stage, where the question is whether to change the position of the parties during the litigation.”). Nor is Samsung correct that “Apple should not be able to benefit in this Court from a relaxed standard that is premised on a finding of liability” because this interlocutory appeal precedes an appeal from a final judgment on the merits. Samsung Br. 25. Because Samsung has chosen not to challenge the merits of the jury’s liability findings in this appeal, this Court should take as established Samsung’s infringement of valid patents when evaluating Apple’s request for a permanent injunction. In any event, this appeal asks the Court to review the

district court's decision to deny a permanent injunction, which itself took validity and infringement as established.⁵

Samsung also does not address the additional flexibility that courts have in fashioning equitable relief at the permanent injunction stage. After judgment, a court may halt the defendant's infringement even for complex multi-feature products where only portions of those products are claimed by the patents-in-suit, simply by enjoining only the use of the patented features. *See Versata Software, Inc. v. SAP Am., Inc.*, ___ F.3d ___, 2013 WL 1810957, at *13 (Fed. Cir. May 1, 2013) (recognizing that the district court could permanently enjoin use of the infringing feature, even where the patent-in-suit claims "only a fraction of the features contained in the infringing products," and not mentioning a causal nexus). A court may also delay enforcement of a permanent injunction to allow time for the infringer to design around the patents. *E.g., Broadcom*, 543 F.3d at 704 (describing the district court's "carefully constructed sunset provisions," which allowed the infringer twenty months to redesign its products to eliminate the infringing features before enforcing the injunction). This flexibility addresses the concern that patentees might reap a windfall by enjoining more than their inventive

⁵ Samsung's request (Br. 58) that this Court defer decision in this appeal until any appeal can be heard from a final judgment as to liability should be denied. This Court rejected the same request in *Bosch*, noting the absence of any "cases in which [this Court has] taken such measures." 659 F.3d at 1148 n.2.

contribution; indeed, it eliminates the very concern that motivated this Court to adopt a causal nexus requirement for preliminary injunctions in the first place. *See Apple II*, 695 F.3d at 1375 (stating that the causal nexus requirement prevents the patentee from receiving protection “beyond that which the inventive contribution and value of the patent warrant”). The district court erroneously imported the causal nexus requirement from *Apple I* and *Apple II* without considering that other mechanisms already fulfill the purpose of the causal nexus requirement at the permanent injunction stage. A3 n.2.⁶

4. Even if a causal nexus requirement applies, the district court adopted an overly rigid standard.

If this Court determines that a causal nexus requirement nevertheless applies at the permanent injunction stage, it should be a far more flexible standard than the highly particularized proof of consumer demand that the district court required here. The district court’s standard would impermissibly foreclose injunctive relief “in a broad swath of cases,” *eBay*, 547 U.S. at 393, particularly those involving complex multi-feature products.

⁶ Contrary to Samsung’s waiver argument (Br. 23, 27), Apple distinguished between the preliminary and permanent injunction contexts and expressly challenged the importation of a causal nexus requirement into the latter. *E.g.*, A4221 (“[T]here is no authority in the permanent injunction context requiring a causal nexus.”); A4931-4932 (explaining that it would be error to apply the causal nexus requirement to permanent injunctions because “[t]he contexts differ and affect the standard”).

Samsung incorrectly argues (Br. 26) that the preliminary injunction entered against Samsung's Galaxy Tab 10.1 earlier in this case demonstrates that the causal nexus requirement can be satisfied even when complex products are involved. But the facts of this case actually illustrate the stark divide that would result from the causal nexus requirement as applied by the district court. Injunctive relief would remain readily available for those patents that cover the entire device (such as the D'889 patent, *see* Samsung Br. 30 & n.13), but would be foreclosed for those that do not (such as the six patents that the jury found infringed). *eBay* forbids precisely that type of categorical approach.

Nor is Samsung correct that the district court required anything less than “proof that a single patent or feature be the *only* feature that drives demand” when evaluating Apple's request for a permanent injunction. Samsung Br. 26 (emphasis in original). Rather, the district court expressly required proof that the patented features are the deciding factor in determining whether “consumers will buy a Samsung phone instead of an Apple phone.” A11. In fact, the district court rejected evidence that consumers would pay more for the patented features and instead required proof that each “patented feature drives demand for the entire product.” A12. That standard perversely makes injunctive relief far more difficult to obtain where, as here, multi-feature products infringe several patents. And it adopts precisely the type of “expansive principle[] suggesting that injunctive relief

could not issue in a broad swath of cases” that the Supreme Court rejected. *eBay*, 547 U.S. at 393.

Samsung does not deny this. On the contrary, it concedes that, under the district court’s ruling, permanent injunctive relief is available only in circumstances that parallel availability of the entire market value rule (Br. 28 n.12)—which is “a narrow exception” to the normal damages rule.

LaserDynamics, Inc. v. Quanta Computer, Inc., 694 F.3d 51, 67 (Fed. Cir. 2012).

But unlike the limited circumstances where the entire market value rule applies, permanent injunctive relief remains available in most cases between competitors following a finding of infringement. *Presidio*, 702 F.3d at 1362 (“This analysis proceeds with an eye to the ‘long tradition of equity practice’ granting ‘injunctive relief upon a finding of infringement in the vast majority of cases.’” (quoting *eBay*, 547 U.S. at 395 (Roberts, C.J., concurring))); *Edwards*, 699 F.3d at 1314 (“Absent adverse equitable considerations, the winner of a judgment of validity and infringement may normally expect to regain the exclusivity that was lost with the infringement.”); *Bosch*, 659 F.3d at 1149 (“[E]ven though a successful patent infringement plaintiff can no longer rely on presumptions or other short-cuts 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.”).

Even if a causal nexus requirement were to apply to permanent injunctions, it could at most be one of several factors bearing on the patentee's overall showing of irreparable harm. Any other rule would impermissibly depend upon the type of "broad classifications" and "categorical rule[s]" that are contrary to traditional equitable principles. *eBay*, 547 U.S. at 393. The district court violated those principles by treating the causal nexus requirement as a single dispositive factor. *E.g.*, A12 ("Without a causal nexus, this Court cannot conclude that the irreparable harm supports entry of an injunction."); A22 ("Without the required causal nexus, the parties' status as direct competitors simply does not justify an injunction.").

5. Apple has satisfied any reasonable causal nexus requirement.

Samsung's criticisms of Apple's proof of a causal nexus illustrate just how difficult it is to satisfy the rigid test applied by the district court. The district court found that Apple had offered "significant evidence" that product design and ease-of-use are important drivers of consumer demand for the infringing products. A8; A10. But the district court (A8) and Samsung (Br. 29-31) would require *specific* proof that each patented feature *by itself* drives demand for the infringing products. Samsung cannot explain how any patentee could prove that each of many equally important patented features drives demand *by itself*. Nor has Samsung explained why this Court should ignore that Samsung is infringing six of Apple's design and

utility patents, which collectively have a major effect on consumer demand for the infringing products.

Apple offered compelling evidence that the patented features are important drivers of demand, including: (1) consumer surveys by Samsung, Apple, and third parties concluding that design and ease-of-use are important to consumers; (2) evidence that the patented features are central to the iPhone's beautiful design and revolutionary user interface, including praise for those features by consumers, industry reviewers, and Samsung; (3) a conjoint analysis showing that consumers would pay a significant premium for the patented features; and (4) evidence that Samsung deliberately copied the patented features. *See* Apple Br. 5-6, 12-16, 62-66 (citing evidence). That evidence should have sufficed to prove a causal nexus (if one were required). Any greater requirement would encourage competitors to engage in precisely the type of copying that Samsung undertook here (Apple Br. 12-16),⁷ knowing that they need only pay a royalty and face no risk of injunctive relief as a consequence of their infringement.

⁷ Samsung attempts to refute Apple's evidence of copying by citing material (Br. 33-34) *excluded* by the district court as a discovery sanction for Samsung's untimely disclosure. *E.g.*, A20290-20293(290:13-293:2). Because Samsung has not challenged the district court's decision to exclude that material in this appeal, this Court should not consider it. *See Vikase Corp. v. Am. Nat'l Can Co.*, 261 F.3d 1316, 1326 (Fed. Cir. 2001).

Finally, Samsung does not dispute that Apple currently sells products embodying four patents found infringed. And contrary to Samsung's contention (Br. 38), Apple continues to sell products (*i.e.*, iPhone 4) that practice the D'305 patent (A21369-21370(1369:1-1370:6)). That Apple no longer sells products embodying the D'087 patent does not diminish Apple's irreparable harm, particularly because the parties compete in the same market. *See, e.g., Presidio*, 702 F.3d at 1363-1364 (irreparable harm where patentee competed but did not sell embodying product); *Broadcom*, 543 F.3d at 701-703 (same).

B. Money Damages Would Not Compensate For Apple's Lost Market Share And Downstream Sales.

Samsung does not dispute the district court's finding that the difficulty in calculating the cost of Apple's lost market share and downstream sales suggests the inadequacy of money damages. A18. Nor does Samsung deny that the court found money damages adequate based *solely* on Apple's purported willingness to license and Samsung's ability to pay any damages award. Because that decision is contrary to *eBay* and this Court's precedent (and wrong on the facts as well), Samsung's efforts to defend the district court's decision fail.

1. The district court applied an incorrect standard.

While Samsung concedes that a patentee's willingness to license is not "a *per se* bar to a permanent injunction," it maintains that the district court did not

apply such a standard and that Apple took the court's language out of context.

Samsung Br. 39-40. But the context reveals that the court meant what it said:

“Apple’s licensing activity suggests that Apple does not believe that these patents are *priceless*, such that there can be *no fair price* set for Samsung’s practice of the claimed inventions or designs.”

“In sum, the difficulty in calculating the cost of lost downstream sales does suggest that money damages may not provide a full compensation for every element of Apple’s loss, *but Apple’s licensing activity makes clear that these patents and trade dresses are not priceless*, and there is no suggestion that Samsung will be unable to pay the monetary judgment against it. Accordingly, the Court finds that this factor favors Samsung.”

A17-18 (emphases added).

Samsung attempts to explain away these statements by claiming that the court was rejecting an argument that Apple never licensed its asserted patents. Samsung Br. 39-40. That is incorrect. *First*, as the court recognized, Apple never made such an argument, but rather distinguished its past licenses to the asserted utility patents. A17 (“Both parties discuss the evidence of Apple’s previous licenses and offers for these and other patents.”); A4937 (Apple reply brief distinguishing IBM and Nokia licenses). *Second*, the district court did not merely reject Apple’s limited licensing practice as evidence favoring an injunction. The court affirmatively found that Apple’s failure to prove its patents were “priceless” *outweighed* the undisputed evidence of Apple’s lost market share and downstream sales (which showed the inadequacy of monetary damages). A18. The court thus

did not accord “some weight” to Apple’s willingness to license (Samsung Br. 41); it treated this factor as dispositive of the adequacy of money damages.

Furthermore, Apple does not claim that prior licensing activity is “irrelevant” (Samsung Br. 40), only that the district court ran afoul of *eBay* in concluding that Apple’s willingness to license—no matter the restrictions, the reason for the license, or the identity of the licensee—was sufficient by itself to prove money damages adequate. 547 U.S. at 393 (rejecting bright-line rule that licensing demonstrates lack of irreparable harm). Samsung does not cite any case in which a court found that a patentee’s willingness to license *alone* demonstrated the adequacy of money damages—let alone a case where, as here, the court reached such a conclusion notwithstanding a finding that money damages would be difficult to quantify (A16; A18).

2. Apple’s limited licensing practice does not prove that an unrestricted compulsory license would adequately remedy Samsung’s infringement.

Apple has only granted narrow licenses to *some* of the asserted patents a few times, and never to Samsung. A21955-21957(1955:22-1957:9); A22013-22014(2013:9-2104:6); A22022(2022:20-24). Because these licenses bear no resemblance to a broad compulsory license to a direct competitor, Samsung asks this Court to draw inferences that the district court rejected and tries to shift the focus to irrelevant unasserted patents. Samsung’s arguments lack merit.

Samsung first claims (Br. 42) that Apple offered to license its prized “unique user experience” IP portfolio, including the asserted patents, to Samsung in a single pre-litigation presentation that broadly discussed a potential license to Samsung. That is simply not true. When asked about this presentation, Apple’s director of patents and licensing testified that Apple was “very clear” that any license would not cover Apple’s “unique user experience” patents.

A22013-22014(2013:9-2104:6); A22022(2022:20-24). No Samsung employee testified otherwise, and the district court never found that Apple had offered Samsung a license to any patent-in-suit. A17. Surely, Apple’s general discussion of a potential license to *unasserted* patents cannot demonstrate the adequacy of money damages for infringement of the *asserted* patents, which cover different features and which Apple treats as an entirely different set of intellectual property.

Samsung next points to three specific agreements with IBM, Nokia, and HTC, which cover the asserted utility patents and on which the district court relied. Samsung Br. 43-44. But Apple’s “willingness to license its patent[s] is not sufficient per se to establish lack of irreparable harm” or the adequacy of money damages. *Acumed*, 551 F.3d at 1328. Even so, the three agreements are easily distinguishable. Samsung concedes (Br. 43) that IBM was not Apple’s competitor and cites no case that relied on a license to a non-competitor to demonstrate the adequacy of money damages. And the HTC license, unlike an unrestricted license

to Samsung, excludes Apple's design patents and "clones" of Apple's products, thus preventing HTC from copying Apple as Samsung did here. A4783(¶1.11); A4792(¶5.1).

That Apple entered into the HTC and Nokia licenses to resolve pending litigation is not "legally irrelevant," as Samsung suggests (Br. 43). Rather, the context of a patentee's prior license, even to a direct competitor, should be considered. *Acumed*, 551 F.3d at 1327-1328 (money damages were inadequate even though the patentee had licensed the asserted patent to a direct competitor in connection with the settlement of a lawsuit against the competitor). Otherwise, litigants would face an enormous disincentive to settle patent litigation, because even offering a license could preclude an injunction in the future. It cannot be that by licensing two entities under these unique circumstances—especially where one license not only prevents copying Apple's designs, but was integral to settling worldwide litigation involving 50 different cases (A4817-4818)—Apple is somehow forever barred from obtaining an order enjoining its primary direct competitor. Such a ruling would unnecessarily discourage settlement in untold cases.

As to Apple's asserted design patents, Samsung has presented no direct evidence that Apple has licensed any of them. Samsung and the district court rely exclusively on testimony that Apple has, with certain limitations, licensed *some*

patents in its “unique user experience” IP portfolio, which includes both design patents *and* utility patents. Samsung Br. 42; A17; A21955-21957(1955:22-1957:9). But the court never found that Apple had licensed its asserted design patents (A17), and there is no evidence that Apple ever licensed its design patents to a competitor. Samsung dismisses these facts and instead treats any prior licensing as a *per se* bar to injunctive relief (Br. 42 n.20), which is not the law. *See Acumed*, 551 F.3d at 1328. The question is not whether Apple could be adequately compensated by a narrow, voluntary license to a non-competitor. Instead, the court must ask whether an unrestricted compulsory license to Apple’s primary direct competitor is an adequate remedy. The answer to that question is clearly no.

C. The Balance Of Hardships Favors Apple.

Samsung’s arguments confirm that the balance of hardships tips decidedly in Apple’s favor. Samsung claims (Br. 45) no hardship other than the burden of having enjoined products that are not more than colorably different from those found to infringe. Samsung ignores, however, that it has no right to sell such products because they would also likely infringe Apple’s patents. *See TiVo Inc. v. EchoStar Corp.*, 646 F.3d 869, 883 (Fed. Cir. 2011) (en banc) (the absence of colorable differences suggests there is not “a fair ground of doubt as to the wrongfulness of the defendant’s conduct” (internal quotation marks omitted)); *see also Hallco Mfg. Co. v. Foster*, 256 F.3d 1290, 1298 (Fed. Cir. 2001) (res judicata

bars challenges to validity and infringement for products “essentially the same or only colorably different” from those involved in a prior litigation). Injunctions may thus properly apply to products that are not more than colorably different from those already found to infringe. *E.g., Int’l Rectifier Corp. v. IXYS Corp.*, 383 F.3d 1312, 1316 (Fed. Cir. 2004). Nor can Samsung credibly claim (Br. 45-46) that an injunction would harm its relationships with third-party carriers. Because those harms would result only if Samsung resumes its infringement, avoiding them is entirely within Samsung’s control.

Samsung also cannot claim any hardship from a “broad” and “sweeping injunction.” Samsung Br. 45. Samsung has trespassed on Apple’s property rights, and the injunctive remedy is coextensive with the scope of that trespass. *See Presidio*, 702 F.3d at 1362-1363. If anything, the fact that Samsung’s infringement was so extensive shows that the balance of hardships favors Apple, which should not have to continue to bear the risk of further harm from Samsung’s adjudicated infringement. To hold otherwise would unfairly reward infringement the more widespread it is.

Moreover, contrary to Samsung’s assertion (Br. 46-47), the current rejection of the asserted claims of the ’381 and ’915 patents in pending reexamination proceedings has no bearing on the balance of hardships. Samsung is bound by the jury’s determination that those claims are not invalid (A4193)—which the district

court upheld on JMOL (A94-99)—unless and until those claims are held invalid by this Court. *See Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1428 (Fed. Cir. 1988).

Regardless, the jury found four other patents that have nothing to do with those reexamination proceedings valid and infringed.⁸

D. The Public Interest Favors An Injunction.

Despite Samsung’s argument (Br. 48), the public’s strong interest in upholding patent rights can, and does, suffice to support the public interest factor where, as here, injunctive relief does not threaten any adverse consequence. *E.g.*, *ActiveVideo Networks, Inc. v. Verizon Commc’ns, Inc.*, 694 F.3d 1312, 1341 (Fed. Cir. 2012) (the public interest in patent enforcement decisively favors an injunction even though withdrawal of the accused technology would harm consumers). There is no claim that an injunction would endanger public safety; the only concerns raised by Samsung and the district court are legally deficient.

First, the district court improperly conflated its causal nexus analysis with its assessment of the public interest factor, concluding that it would not be “equitable” to deprive consumers of products containing certain supposedly “non-core” infringing features. A21; Samsung Br. 48. Not only is the causal nexus reasoning erroneous, but there can be no unfairness to consumers because, if

⁸ Contrary to Samsung’s waiver argument (Br. 47), Apple argued below that Samsung’s broad product line favors an injunction (*e.g.*, A4230)—a point that the district court specifically addressed in its opinion (A20-21).

Samsung is to be believed (Br. 8, 38-39), it has either withdrawn the infringing products from the market or already implemented design-arounds. Samsung does not dispute the district court's finding that any "disruption will be limited to existing stock, and would surely be brief" such that "consumers will have substantial choice of products, even if an injunction were to issue." A20. The court thus correctly concluded that "Samsung overstates the danger" an injunction would create for the public. *Id.*⁹

Second, neither the district court nor Samsung has provided any legitimate basis for concluding that the breadth of the injunction weighs against injunctive relief. Samsung contends (Br. 49) that an injunction covering products "not more than colorably different" from the accused products is unduly broad. Samsung essentially argues that, if a defendant discontinues the infringing product and states that it will not infringe, no injunction covering future products can issue, even though the harm to the defendant, if any, will be minimal. But Samsung concedes (Br. 49 n.24) that this Court has previously upheld injunctions with similar language. Without such language, patentees would be unable to prevent infringers from introducing purportedly new products—as Samsung frequently does—

⁹ Absent any risk that an injunction will materially reduce Samsung's product offerings, the concern that an injunction would result in "undue leverage in negotiations" is not applicable here. *eBay*, 547 U.S. at 396-397 (Kennedy, J. concurring).

containing the infringing features without initiating another lawsuit. Nor is Samsung correct (Br. 49) to suggest that Apple's proposed injunction would bar consumers from "using" previously sold devices and distributed phones. Apple proposed an injunction that would prevent Samsung, not consumers, from continuing to use the infringing products. A4252. The proposed injunction was thus "tailor[ed] [to] minimize[] disruptions to the market and the public." *i4i*, 598 F.3d at 863.

II. THE DISTRICT COURT COMMITTED LEGAL ERROR IN REFUSING TO ENJOIN SAMSUNG'S TRADE DRESS DILUTION.

All traditional equitable factors weigh decisively in favor of enjoining Samsung's dilution of Apple's iPhone trade dress. The balance of hardships favors Apple because an injunction will not harm Samsung, which claims to have ceased manufacturing its diluting phones, but will indisputably provide Apple with crucial security against the prospect of Samsung diluting Apple's trade dress again. *See supra* pp. 23-25. As to the adequacy of money damages, Samsung and the district court both err by relying exclusively on evidence of Apple's willingness to license certain of its *patents* to conclude that money damages are adequate compensation for the dilution of Apple's *trade dress*. A17; Samsung Br. 54-55. Not only did Apple present un rebutted testimony that it has never offered Samsung a license to practice the specific "proprietary features" protected by its "unique user experience" IP portfolio, which includes Apple's trade dress, neither Samsung nor

the district court cited any direct evidence that Apple offered anyone a license to the design patents in this portfolio, let alone those asserted in this case. *See supra* pp. 20-23; A22013-22014(2013:9-2104:6); A22022(2022:20-24). Thus, even if Apple's trade dress is coextensive with its asserted design patents, Samsung cannot assert that Apple previously licensed its trade dress.

Nor is Samsung able to defend the district court's erroneous conclusion that Samsung's alleged voluntary cessation of its diluting activity defeats Apple's right to an injunction. That conclusion was based on the district court's mistaken belief that no court had ever issued an injunction in such circumstances. A15; A21. Samsung does not deny that at least two courts have granted injunctions against a defendant that voluntarily ceased selling the diluting products. *See Gucci Am., Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, 223-224 (S.D.N.Y. 2012); *OBH, Inc. v. Spotlight Magazine, Inc.*, 86 F. Supp. 2d 176, 186 (W.D.N.Y. 2000). Rather, Samsung argues that the district court properly "exercis[ed] ... its discretion" to consider Samsung's voluntary cessation as "one factor" weighing against injunctive relief. Samsung Br. 57. But "[a] district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996).

Samsung finally argues (Br. 51-53) that the district court should have required Apple to prove *future* dilution. But unlike the Patent Act or the other

statutes that Samsung cites (Br. 51), which do not require issuance of an injunction upon finding a violation,¹⁰ the FTDA states that following a dilution finding “the owner of a famous mark ... *shall* be entitled to an injunction ... regardless of the presence or absence ... of actual economic injury.” 15 U.S.C. § 1125(c) (emphasis added). Moreover, the statute specifically provides that the plaintiff is entitled to an injunction “at any time” after its mark has been diluted, suggesting that the dilution need not be ongoing. *Id.* Nor is there any demonstrated need for importing a continuing dilution requirement into the FTDA, given that the harm resulting from the dilution of a necessarily famous trade dress is unlikely to cease after a plaintiff stops selling products embodying the trade dress. Indeed, Samsung does not dispute that the only court to address the issue found that the plaintiff can continue to suffer harm after it has ceased selling the products using the protected design. *See Ferrari S.p.A. Esercizio Fabbriche Automobili e Corse v. McBurnie*, 1989 U.S. Dist. LEXIS 13442, at *18-20 (S.D. Cal. May 26, 1989) (concluding that the plaintiff continued to suffer harm from trade dress dilution for a product no longer on the market because the product “remained in the public eye, and the

¹⁰ Patent Act of 1952, 35 U.S.C. § 283 (courts “*may* grant injunctions in accordance with the principles of equity” (emphasis added)); Alaska National Interest Lands Conversation Act, 16 U.S.C. § 3120 (does not explicitly authorize injunctive relief); *Hecht Co. v. Bowles*, 321 U.S. 321, 329-330 (1944) (the Emergency Price Control Act “falls short of making mandatory the issuance of an injunction” because it allows courts to issue injunctions and “other order[s]”).

goodwill symbolized by this design is still strongly associated with [the plaintiff]”).

CONCLUSION

The district court’s order denying a permanent injunction should be reversed or, alternatively, vacated and remanded for application of the correct legal standard.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing Reply Brief for Plaintiff-Appellant Apple Inc. with the Clerk of the United States Court of Appeals for the Federal Circuit via the CM/ECF system and served a copy on counsel of record, this 16th day of May, 2013, by the CM/ECF system and by electronic mail to the parties on service list below.

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CERTIFICATE OF COMPLIANCE

Counsel for Plaintiff-Appellant hereby certifies that:

1. The brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because exclusive of the exempted portions it contains 6,991 words as counted by the word processing program used to prepare the brief; and

2. The brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared using Microsoft Office Word 2010 in a proportionally spaced typeface: Times New Roman, font size 14.

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