

No. 2012-1507

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IN THE  
**United States Court of Appeals**  
FOR THE FEDERAL CIRCUIT

APPLE INC.,  
*Plaintiff-Appellee,*

v.

SAMSUNG ELECTRONICS CO., LTD.,  
SAMSUNG ELECTRONICS AMERICA, INC., AND  
SAMSUNG TELECOMMUNICATIONS AMERICA, LLC,  
*Defendants-Appellants.*

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Appeal from the United States District Court  
for the Northern District of California  
Case No. 12-cv-0630, Judge Lucy H. Koh

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**BRIEF OF BUSINESS SOFTWARE ALLIANCE AS *AMICUS CURIAE* IN  
SUPPORT OF PLAINTIFF-APPELLEE IN FAVOR OF AFFIRMANCE**

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**CERTIFICATE OF INTEREST**

Counsel for *amicus curiae* Business Software Alliance certifies the following:

1. The full name of every party or *amicus* represented by me is:

Business Software Alliance

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

Business Software Alliance

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or *amicus* represented by me are:

None

4. The names of all law firms and the partners or associates that appeared for the party or *amicus* now represented by me in the trial court or agency or are expected to appear in this Court are:

**MoloLamken LLP**  
Jeffrey A. Lamken  
Michael G. Pattillo, Jr.

August 6, 2012

/s/ Jeffrey A. Lamken  
Jeffrey A. Lamken

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### **INTEREST OF *AMICUS CURIAE***

The Business Software Alliance (“BSA”) is an association of the world’s leading software and hardware technology companies.<sup>1</sup> On behalf of its members, BSA promotes policies that foster innovation, growth, and a competitive marketplace for commercial software and related technologies. BSA members develop hundreds of new products each year, contributing to a significant sector of the U.S. economy. And by virtue of their inventions, BSA members collectively hold more than 85,000 patents. Because patent policy is vitally important to promoting the innovation that has kept the United States at the forefront of software and hardware development, BSA members have a strong stake in the proper functioning of the U.S. patent system. *Amicus*’s members, moreover, are frequently compelled to protect their own patent rights through litigation. Accordingly, they have an acute interest in ensuring that district courts are afforded discretion to order proper remedies—including preliminary injunctions—when patent holders have made the showings required under this Court’s and the Supreme Court’s precedents.

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<sup>1</sup> Pursuant to Fed. R. App. P. 29(c)(5), *amicus* certifies that no party’s counsel authored this brief in whole or part, that no counsel or party contributed money intended to fund this brief, and that no one other than *amicus*, its members, and its counsel made such a contribution. Plaintiff-Appellee Apple Inc. consented to the filing of this *amicus* brief. Defendants-Appellants Samsung Electronics Co., Ltd., *et al.*, denied consent.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

This is a patent infringement suit involving competitors in the high-tech industry—Apple and Samsung. In a 101-page order, the district court issued a preliminary injunction prohibiting Samsung from selling its Galaxy Nexus smartphone in the United States. This Court’s review of that ruling is likely to have importance well beyond the high-stakes controversy between the parties. It has the potential to affect profoundly the availability of effective relief in intellectual property disputes in the high-tech industries—and thus affect the vitality of the fundamental patent-law right to exclusively practice a patented invention. *See* 35 U.S.C. § 154(a)(1).

I. The high-tech industries, including the software industry, are primary drivers of this Nation’s economy. Those industries live or die by their ability to continuously innovate—innovation that requires tremendous investments in research and development. Effective patent protection is necessary to provide industry participants assurance that they will have the opportunity to commercialize their investments in innovation without having their inventions misappropriated. At the same time, relief under the patent laws must be balanced to ensure that enforcement actions serve innovation rather than deter the creativity that drives our economy and benefits the public.

**II.** In the Patent Act, Congress provided the traditional remedies of damages and equitable relief in the form of injunctions. In 35 U.S.C. §284, Congress provided for an award of damages to the patentee upon a finding that its patent has been infringed. And as a safeguard against aggravated infringement, district courts may also award enhanced damages—up to three times actual damages—where the infringement was willful.

Congress also provided for injunctive remedies where damages will not suffice. In 35 U.S.C. §283, Congress afforded district courts authority to “grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent.” The Supreme Court has clarified that injunctions in patent cases are governed by the same principles of equity that govern in other cases: There is no categorical entitlement to an injunction upon a finding of infringement or likelihood of infringement. Rather, plaintiffs asserting infringement claims, like all other plaintiffs, must satisfy the multi-factor test that governs elsewhere, establishing success (or likelihood of success) on the merits, irreparable harm, including inadequacy of monetary relief, that the equities balance in favor of relief, and that the public interest supports equitable relief as well.

Where traditional equitable principles support an injunctive remedy to enforce patent rights—and the right to exclude in particular—courts must vindicate those rights as appropriate through an injunction prohibiting the infringer from

practicing the patented invention. That will frequently be the case where the patentee and the accused infringer are competitors practicing the patented invention in the same market. Where an infringer directly competes with the patentee, the infringer may improperly take market share from the innovator that can never be regained. Losing the benefit of exclusivity for even a period of six months can be the difference between establishing your company as a leader or being left behind. No patentee is automatically entitled to injunctive relief. But where the other equitable factors are satisfied, a preliminary injunction may be the only means of keeping competitors from infringing and taking market share from innovators while an infringement suit plays out. Nowhere is that more important than in the software and related high-tech industries.

Precisely because Congress provided multiple statutory remedies to protect intellectual property rights, courts must carefully tailor the remedy appropriate for the particular circumstances.

**III.** The district court in this case carefully analyzed each of the traditional equitable elements the Supreme Court and this Court have required before a preliminary injunction may issue. It analyzed the evidence; concluded that the factors had been satisfied; and determined that it was appropriate to issue the preliminary injunction on the specific facts of the case.

## ARGUMENT

### **I. Enforceable Patent Rights Are Essential to Innovation in the Software Industry, a Leading Sector of the Nation's Economy**

“The economic success of the United States is deeply rooted in the history of American innovation.” David J. Kappos, Under Sec’y of Commerce for Intellectual Prop., Speech at the Center for American Progress: The Innovation Economy: Unleashing Intellectual Property To Fuel Growth and Create Jobs 1 (June 2, 2010), [http://www.uspto.gov/news/speeches/2010/Kappos\\_CAP\\_speech.jsp](http://www.uspto.gov/news/speeches/2010/Kappos_CAP_speech.jsp). Indeed, “technological innovation is linked to three quarters of the Nation’s post [World War] II growth rate.” *Id.* And if innovation is the engine of the American economy, then intellectual property is its fuel. Today, “as a share of gross economic value, the United States invests more in intangible assets than any of our major trading partners,” with our “intangible investments now exceed[ing] those in tangible assets by more than 20%.” *Id.* As a result, “strong intellectual property protection,” including “high-quality patents” and their “effective enforcement” by the courts, is crucial to driving economic growth. *Id.* Without those protections, “the creators of intellectual property would tend to lose the economic fruits of their own work, thereby undermining the incentives to undertake the investments necessary to develop the IP in the first place.” Econ. and Statistics Admin. and U.S. Patent and Trademark Office, *Intellectual Property and the U.S. Economy: Industries In Focus*, at v (“PTO Report”) (2012), <http://www.uspto.gov/news/>

publications/IP\_Report\_March\_2012.pdf. Nowhere are those realities clearer than in the software industry: It both provides a leading example of the tremendous economic benefits the Nation derives from intellectual property and attests to the essential role that patent protections play in spurring the development of intellectual property.

**A. The Software Industry Is a Leading Sector of the Nation's Economy**

The software industry's importance to the Nation's economy and the continued success of American industry cannot be overstated. The software and related services industry added over \$276 billion in value to the economy and employed nearly two million people in the United States in 2009. Org. for Econ. Co-operation and Development, *STAN Database for Structural Analysis, OECD.Stat Extracts*, <http://stats.oecd.org/Index.aspx?DatasetCode=STAN08BIS&lang=en> (last updated May 24, 2011) (select "United States" under "Country"). Jobs in this industry pay nearly twice what workers make in industries that are not intellectual-property intensive. *See PTO Report, supra*, at 50. In 2010 alone, consumers and businesses in the United States invested over \$257 billion in new or replacement software. Bureau of Econ. Analysis, *Relation of Private Fixed Investment in Equipment and Software (by Type) in the Fixed Assets Accounts to the Corresponding Items in the National Income and Product Accounts 7* (2011), [http://www.bea.gov/national/FA2004/E&S\\_type.pdf](http://www.bea.gov/national/FA2004/E&S_type.pdf). And U.S. software publish-

ers' exports provide a major boon to the U.S. economy as well, totaling over \$22.3 billion in 2007 alone. *PTO Report, supra*, at 55.

The software industry's innovations, moreover, provide a "domino effect" in which "downstream businesses benefit from innovative products that lower their costs and improve their processes and finished articles." *PTO Report, supra*, at ii. In addition to the companies that "produce, complement, and consume the innovation," there are countless other "logistical and supporting businesses [that] are required to keep these companies up and running," from marketing firms to shipping companies. *See id.*

Simply put, the software and related technological industries "represent the leading edge of our economy." *PTO Report, supra*, at ii. And the "effective protection" of those industries' "IP rights," as explained below, is critical to the Nation's economic growth and international competitiveness. *Id.*

## **B. Patent Protections Are Critical to Continued Innovation in the Software Industry**

"[I]nnovation is the life blood of [the software] industry. It is what separates successful [software] firms from unsuccessful ones." Bruce A. Lehman, Assistant Sec'y of Commerce and Comm'r of Patents and Trademarks, Opening Remarks at the Public Hearing on Use of the Patent System to Protect Software-Related Inventions 1 (Feb. 10, 1994), <http://www.uspto.gov/web/offices/com/hearings/software/arlington/vahrng.pdf>. Market leaders and startups alike must continually

innovate—whether by developing wholly new features or by improving on existing functions by finding ways to perform them faster and better—in order to expand or even keep their share of a particular market. “[I]n order to invest the necessary resources,” however, companies “need some assurance that they will benefit from and recover the costs of the creation of intellectual property.” *PTO Report, supra*, at 1. Only a robust system of readily enforceable intellectual property rights—and patents in particular—can provide software companies with the assurances they need to make the staggering investments in research and development that are required to push the envelope of innovation in today’s high-tech world.

Since the time of the Framing, it has been understood that to “promote the Progress of . . . useful Arts,” U.S. Const. art. I, § 8, cl. 8, it is essential to provide economic incentives for those who develop new inventions. Implementing that, the Patent Act affords patentees “the right to exclude others” from practicing or selling the invention for a period of years. 35 U.S.C. § 154(a)(1). The patent system thus “represents a carefully crafted bargain that encourages both the creation and the public disclosure of new and useful advances in technology, in return for an exclusive monopoly for a limited period of time.” *Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55, 63 (1998). The “economic rewards during the period of exclusivity are the carrot” that encourages the “investment-based risk” upon which

innovation so dearly depends. *King Instruments Corp. v. Perego*, 65 F.3d 941, 950 (Fed. Cir. 1995) (quotation marks omitted), *cert. denied*, 517 U.S. 1188 (1996).

Innovation in the U.S. software industry is, and long has been, heavily dependent upon such intellectual property protections. See U.S. Congress, Office of Technology Assessment, *Finding a Balance: Computer Software, Intellectual Property, and the Challenge of Technological Change* 23 (1992) (“patent protection is of importance to the U.S. software industry, both domestically and in the global market”). Without an enforceable, exclusive right to practice or sell their inventions, software developers would face serious risks that competitors will free-ride on their innovations, either by making copies through outright piracy or by pilfering the essential elements of a software program for their own product. See, e.g., Bradford L. Smith & Susan O. Mann, *Innovation and Intellectual Property in the Software Industry: An Emerging Role for Patents?*, 71 U. Chi. L. Rev. 241, 241-42 (2004). Absent such enforceable intellectual property rights, “the inventor who had invested time and money in developing the new product . . . would always be at a disadvantage to the new firm that could just copy and market the product without having to recoup any sunk costs or pay the higher salaries required by those with the creative talents and skills.” *PTO Report, supra*, at v.

The existing regime of intellectual property rights generally provides U.S. software publishers with the necessary degree of confidence that their innovations

will be protected from misappropriation, and that adequate remedies will be provided if their rights are violated. Based on that, the industry spends tens of billions of dollars annually on the research and development necessary to advance the state of the art and maintain the United States' status as the world leader in software technology. See Raymond M. Wolfe, Nat'l Ctr. for Science and Eng'g Statistics, *Business R&D Performed in the United States Cost \$291 billion in 2008 and \$282 Billion in 2009*, at 2 (2012), <http://www.nsf.gov/statistics/infbrief/nsf12309/nsf12309.pdf>. Basic economics suggest, however, that if intellectual property rights for software were curtailed or its remedies were found to be inadequate in practice to protect innovations, the adverse consequences would be swift and severe. With less profit to capture, businesses would divert their resources into other ventures that are less subject to misappropriation. And, because of the size and importance of the software industry, the spillover effects would have disastrous consequences for the U.S. economy as a whole.

## **II. Congress Provided for Both Monetary and Equitable Relief for Patent Infringement, and Courts Should Provide Each Remedy in Appropriate Circumstances**

The Constitution gives Congress 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.” U.S. Const. art. I, § 8, cl. 8. Consistent with that, the Patent Act affords patentees “the right to

exclude others from making, using, offering for sale, or selling the invention” for a period of years. 35 U.S.C. § 154(a)(1), (2). And because a “right without a remedy” is often of little avail, *Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535, 554 (1867), the Patent Act provides two potential remedies for patentees whose rights are infringed: Upon a finding of infringement, it provides for monetary damages, and it also grants courts the authority to order injunctive relief in accordance with general principles of equity. Those remedies serve distinct purposes in protecting intellectual property rights, and both are crucial to the overall scheme Congress enacted. District courts thus must continue to have broad discretion to impose the full panoply of remedies under the Patent Act as circumstances warrant.

**A. The Patent Act Provides a Potent Actual Damages Remedy for Infringement and Enhanced Damages for Willful Infringement**

Congress provided that, “[u]pon 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.” 35 U.S.C. § 284. The methodology for computing damages for infringement is largely within the district court’s discretion. *See Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1310 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 3324 (2010). “Two alternative categories of infringement compensation are the patentee’s lost profits and the reasonable royalty he would have received through

arms-length bargaining.” *Id.* at 1324. As the statute itself makes clear, the reasonable-royalty measure is simply “the floor below which damages shall not fall.” *Bandag, Inc. v. Gerrard Tire Co.*, 704 F.2d 1578, 1583 (Fed. Cir. 1983).

The Patent Act, however, does not limit a patentee’s monetary compensation to actual damages. Section 284 also gives district courts discretion, in appropriate circumstances, to “increase the damages up to three times the amount found or assessed” by the jury against the infringer. 35 U.S.C. § 284. “An award of enhanced damages,” however, “requires a showing of willful infringement.” *In re Seagate Tech., LLC*, 497 F.3d 1360, 1368 (Fed. Cir. 2007) (en banc).

The Patent Act’s damages provisions thus serve an important function in protecting patentees’ intellectual property rights. They provide district courts with a reasonable degree of flexibility to ensure that patentees are made whole and placed in the same financial position they would be but-for the infringement. And the prospect of enhanced damages serves as a deterrent to those who would willfully infringe another’s patents.

**B. The Patent Act Grants District Courts Broad Discretion To Award Injunctive Relief in Accordance With the Principles of Equity**

There are, however, circumstances in which an after-the-fact award of damages—even enhanced damages—will not suffice to vindicate a patentee’s intellectual property rights. Congress has long recognized “the difficulty of

protecting a right to *exclude*”—the primary property right afforded by a patent—solely “through monetary remedies that allow an infringer to *use* an invention against the patentee’s wishes.” *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 395 (2006) (Roberts, C.J., concurring). As a result, Congress also gave district courts the power to “grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent.” 35 U.S.C. § 283. It is crucial that district courts retain broad authority to order injunctive relief where those principles are satisfied. And preliminary injunctive relief often will be particularly appropriate where the patentee and alleged infringer compete in a fast-moving technological market such as software or computing.

**1. *Injunctive Relief in Patent Cases Must Be Decided on a Case-by-Case Basis Based on the Application of Traditional Equitable Principles***

For years, this Court had applied a “general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances.” *MercExchange, L.L.C. v. eBay, Inc.*, 401 F.3d 1323, 1339 (Fed. Cir. 2005). The Supreme Court, however, rejected that “categorical rule” as inconsistent with the “traditional equitable principles” that the Patent Act itself directs courts to apply. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392-93 (2006). It is now clear that a patentee is neither presumptively entitled nor disentitled to injunctive relief.

Rather, a patentee seeking a permanent injunction must satisfy the multi-factor test long settled under principles of equity:

(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 the permanent injunction.

*Id.* at 391. The standards for a preliminary injunction are essentially the same, except that rather than first succeeding on the merits, the plaintiff must prove “that he is likely to succeed on the merits.” *Apple, Inc. v. Samsung Elecs. Co.*, 678 F.3d 1314, 1323 (Fed. Cir. 2012) (quotation marks omitted). The decision to grant or deny an injunction lies within the sound discretion of the district court. *Id.*

Although the Supreme Court’s decision in “*eBay* abolishe[d] [this Court’s] 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.” *Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1149 (Fed. Cir. 2011). Nor does the fact that courts must apply traditional equitable principles when considering whether to order injunctive relief “mean that the nature of patent rights has no place in the appropriate equitable analysis.” *Id.* Thus, while patentees “can no longer rely on presumptions” in lieu of proving up the elements required for injunctive relief, “it does not follow that courts should entirely ignore

the fundamental nature of patents as property rights granting the owner the right to exclude.” *Id.*

A patent confers a patentee with the “right to exclude,” but that right itself has little practical value unless the patentee can “invoke the state’s power” to prohibit “others from utilizing the patentee’s discovery without his consent.” *Smith Int’l, Inc. v. Hughes Tool Co.*, 718 F.2d 1573, 1577 (Fed. Cir.), *cert. denied*, 464 U.S. 996 (1983). It is precisely for “[p]rotection of this right to exclude” that Congress granted district courts the power in 35 U.S.C. § 283 to order injunctive relief in patent cases where the traditional equitable factors are satisfied. *Id.* As this Court explained:

Without this injunctive power of the courts, the right to exclude granted by the patent would be diminished, and the express purpose of the Constitution and Congress, to promote the progress of the useful arts, would be seriously undermined. The patent owner would lack much of the “leverage,” afforded by the right to exclude, to enjoy the full value of his invention in the market place. Without the right to obtain an injunction, the right to exclude granted to the patentee would have only a fraction of the value it was intended to have, and would no longer be as great an incentive to engage in the toils of scientific and technological research.

*Id.* at 1577-78.<sup>2</sup> Thus, where a patentee can prove the elements that the traditional

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<sup>2</sup> Injunctive relief, moreover, may be appropriate to exclude an infringer’s product even where the patented invention being infringed is only one part of the infringer’s more complex product. *See i4i Ltd. P’ship v. Microsoft Corp.*, 598 F.3d 831, 862-63 (Fed. Cir. 2010), *aff’d*, 131 S. Ct. 2238 (2011); *Apple*, 678 F.3d at 1329-33.

equitable test requires, district courts must retain their broad discretion to order the injunctive relief necessary to protect that most fundamental of a patentee's rights.<sup>3</sup>

**2. *Preliminary Injunctions Will Often Be Appropriate in an Infringement Action Between Competitors in a Fast-Moving Industry***

Courts have recognized that injunctions are often appropriate “where the patentee and [alleged] infringer both practice the patented technology”; *i.e.*, where they are direct competitors. *Robert Bosch*, 659 F.3d at 1150; *see also i4i Ltd. P’ship*, 598 F.3d at 861-62. It is in precisely such situations that the patentee’s need to literally enforce the “right to exclude” is at its apex, because infringement by a competitor may irrevocably alter the patentee’s market position, both in the near and longer term, causing irreparable harms that cannot be quantified in damages. And the need for preliminary injunctions is particularly acute when the competitors are in a fast-moving industry like software and technology, where the

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<sup>3</sup> BSA believes that patentees generally should be free to exercise their intellectual property rights as they see fit. Regulators, including the U.S. Department of Justice, the U.S. Federal Trade Commission, and the E.U. Competition Directorate have made clear, however, that significant competition policy issues are raised when some patentees attempt to improperly gain leverage by seeking injunctive relief in inappropriate circumstances. Patentees have a choice whether or not to submit their patented technologies to become part of internationally recognized standards. It is BSA’s position that, if a patentee elects to participate in the development of technology standards and makes an affirmative commitment to license its technology on fair, reasonable, and non-discriminatory terms, it should not then be allowed to breach that commitment and use the threat of an exclusionary injunction to extract unreasonable royalties after the technology is incorporated into the standard.

pace of innovation is rapid; improved new technologies build on existing technologies; and the value of a patent and the exclusive rights associated with it drive companies' investment and product-development cycles.

This Court has explained that patent infringement by a competitor will often cause irreparable harm to the patentee:

Competitors change the marketplace. Years after infringement has begun, it may be impossible to restore a patentee's . . . exclusive position . . . . Customers may have established relationships with infringers. The market is rarely the same when a market of multiple sellers is suddenly converted to one with a single seller by legal fiat.

*Polymer Techs., Inc. v. Bridwell*, 103 F.3d 970, 975-76 (Fed. Cir. 1996).

Thus, where the patentee practices an invention in a competitive market, “[t]he opportunity to practice an invention during the notoriously lengthy course of patent litigation may itself tempt infringers.” *H.H. Robertson Co. v. United Steel Deck, Inc.*, 820 F.2d 384, 390 (Fed. Cir. 1987), *overruled on other grounds*, *Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed. Cir. 1995). Indeed, potential infringers may make a business decision that “the benefits of having been in the market during the pendency of the lawsuit are worth any damages.” Mark A. Lemley & Ragesh K. Tangri, *Ending Patent Law's Willfulness Game*, 18 Berkeley Tech. L.J. 1085, 1112 (2003).<sup>4</sup> That is because the benefits to the infringer—and

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<sup>4</sup> Where patents are involved, a competitive business strategy based on outright infringement may be particularly attractive and cost-effective. Because the patent specification must, by its terms, “enable” others to practice the invention, 35

corresponding damage to the patentee—from “erosion of markets, customers, and prices” from ongoing infringement during litigation “is rarely reversible.” *Abbott Labs. v. Sandoz, Inc.*, 544 F.3d 1341, 1361-62 (Fed. Cir. 2008); *see also Purdue Pharma L.P. v. Boehringer Ingelheim GmbH*, 237 F.3d 1359, 1368 (Fed. Cir. 2001); *H.H. Robertson*, 820 F.2d at 390. The market effects, moreover, may extend beyond the patented device itself: Customers are often hesitant to change brands once they have made their first purchase of a device, and so any initial loss of market share to an infringer may cause the patentee “the loss of future downstream purchases” in next-generation devices as well. *Apple*, 678 F.3d at 1336-37 (O’Malley, J., concurring in part and dissenting in part).

Those incentives to risk infringement despite the prospect of a damages award—and the corresponding harms to patentees—are particularly acute in industries in which new products rapidly displace the old in a short cycle of innovation. Since 1998, “median time-to-trial has maintained a fairly steady duration of two to two-and-a-half years from the complaint date to trial.” PricewaterhouseCoopers LLP, *2011 Patent Litigation Study* 27 (2011). That is an eternity in the software and technology industries. The hot new technology that has the potential to propel a company to the top of the market today is likely to be

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U.S.C. § 112, competitors need not waste time and resources developing new technologies or inventing around existing ones. They need only implement the inventions that the patentee has disclosed to the world.

obsolete (or at a minimum, passé), in the two-or-more years it would take its inventor to obtain a judgment against a company that simply appropriated the idea and entered the market as a competitor.

Thus, the value of a patent in these industries lies primarily in the first several years, when it represents the state of the art. Yet “every year waiting to enforce the right in court is a year that a patentee does not have exclusivity in the market.” Mark A. Lemley, *Where to File Your Patent Case*, 38 AIPLA Q.J. 401, 403 (2010). Being the first and only actor in the market for even a brief period can be the difference between being a market leader and being a market laggard—between garnering a reputation for innovation with the corresponding loyal customer base, and being an also-ran. In such circumstances, absent injunctive relief, an infringer may quickly appropriate an idea, enter the market, and thereby deprive the patentee of the majority of the competitive value of the patent well before the patentee can try an infringement suit to judgment. In that case, a company is unlikely to profit from having a court later establish its exclusive right to sell an outdated invention over the remainder of the patent’s 20-year term. The harm to the patentee, and its position in the market, will have been done.

No patentee is categorically entitled to injunctive relief. But neither is any infringer categorically entitled to practice the invention during the course of litigation. Where the other equitable factors are satisfied, courts will often find it

necessary to issue preliminary injunctions to keep competitors from gaming the system to take market share from innovators while the tortuous process of an infringement suit plays out.<sup>5</sup> Nowhere is that more important than in the software and related high-tech industries.

### **III. The District Court Analyzed Each of the Required Elements Under *eBay***

The district court in this case issued a 101-page order in which it granted a preliminary injunction prohibiting Samsung from “making, using, offering to sell, or selling” its Galaxy Nexus smartphone within the United States. Order at 101. It issued the injunction only after methodically applying each of the traditional equitable factors recited by the Supreme Court in *eBay* to the record in this case. That is precisely what district courts should do.

Indeed, there appears to be little dispute between the parties that the district court applied the appropriate legal standards governing preliminary injunctions. The court acknowledged that, while the Patent Act authorizes district courts to grant injunctions, “the owner of a valid and infringed patent is not entitled to an injunction as a matter of right.” Order at 3. It recognized that the decision whether to grant or deny an injunction is a matter of the court’s discretion, which “‘must be

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<sup>5</sup> Injunctions against practicing a patent, moreover, have collateral benefits for society. They foster innovation by the infringer by providing a “‘negative incentive’ to ‘design around’” the patented product so as to remain competitive. *State Indus., Inc. v. A.O. Smith Corp.*, 751 F.2d 1226, 1236 (Fed. Cir. 1985).

exercised consistent with traditional principles of equity.’” *Id.* (quoting *eBay*, 547 U.S. at 394). It then proceeded to analyze the traditional equity factors seriatim: First, the district court considered Apple’s likelihood of success on the merits. *See id.* at 7-64. Second, the court analyzed the likelihood of irreparable harm to Apple, including the adequacy of legal remedies. *See id.* at 64-96. Third, the court balanced the hardships to the parties that would result from the injunction. *See id.* at 97-98. Fourth, the court considered the public interest. *See id.* at 98-99. And finally, the court weighed the various factors against the relief requested. Because it found the equitable factors weighed in Apple’s favor, the court granted the injunction. *See id.* at 100.

In sum, the district court correctly applied, with appropriate rigor, the traditional equitable factors that the Supreme Court and this Court have made clear govern the granting of injunctions in patent cases post-*eBay*. Its analysis, which did not accept all of Apple’s positions and in fact rejected a number of them, shows a careful consideration of both parties’ arguments. The district court’s decision thus represents precisely the sort of reasonable exercise of discretion that should be respected on appeal.

### **CONCLUSION**

The district court’s order should be affirmed.

August 6, 2012

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on August 6, 2012, I electronically filed the foregoing Brief of Business Software Alliance as *Amicus Curiae* in Support of Plaintiff-Appellee in Favor of Affirmance with the Clerk of the Court for the U.S. Court of Appeals for the Federal Circuit using the CM/ECF system. Pursuant to ECF-10(B) of this Court's May 17, 2012 Administrative Order Regarding Electronic Case Filing, I certify that I will submit to the Court six paper copies of this Brief within five days of this Court's acceptance of the brief in ECF. I certify that on August 6, 2012, a copy of the foregoing brief was served electronically through the Court's CM/ECF system on the following counsel:

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**CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitation of Fed. R. App. R. 29(d) because the brief contains 5,022 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Cir. R. 32(b).

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