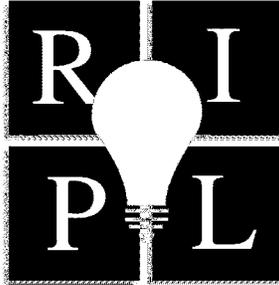


# THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



## PATENT REFORM, INJUNCTIONS, AND EQUITABLE PRINCIPLES: A TRIANGLE OF CHANGES FOR THE FUTURE

MATTHEW J. MAY

### ABSTRACT

In *eBay v. MercExchange*, the Supreme Court held the Federal Circuit could no longer utilize their long-standing “general rule” that an injunction should follow the finding of patent infringement. The Supreme Court held that courts should utilize a set of rules known as the four-factor test, which utilizes traditional principals of equity. Concurrently, Congress has been debating patent reform with one of the topics being the use of injunctive relief as a remedy for patent infringement. These two changes could potentially have a significant effect on the technological and economic landscape of patents in the future. It now may be more difficult for these patent holders to get injunctive relief or more importantly, to threaten an injunction against alleged patent infringers. The goal of this proposal is to protect the legitimate inventors and patent holders, large or small, from big companies’ abuse of patented technology while also protecting those same big companies against the Patent Trolls. The two-fold proposal presented meets both needs while furthering innovation, and thus, it also serves the fundamental goals of the patent system.

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PATENT REFORM, INJUNCTIONS, AND EQUITABLE PRINCIPLES:  
A TRIANGLE OF CHANGES FOR THE FUTURE

MATTHEW J. MAY\*

INTRODUCTION

“[A] valid patent system is vital to the continued health of innovation, and, hence, economic growth and prosperity.”<sup>1</sup> One of the current subjects intensely debated in connection with Patent Act reform is the availability of permanent injunctions<sup>2</sup> to patent holders.<sup>3</sup> Some patent holders, known as “Patent Trolls,” threaten to sue larger technology companies for patent infringement with the threat of a permanent injunction.<sup>4</sup> Patent Trolls are typically defined as a patent holding company or individual that has acquired a patent with little participation in the marketplace of that patent.<sup>5</sup> The threat of a permanent injunction against powerful technology companies by Patent Trolls forces those companies into costly settlement agreements because they are wary of imminent litigation and the threat of shutting down their product lines.<sup>6</sup> Large technology firms argue patent reform is necessary

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\*\* Available at <http://www.jmripl.com>

<sup>1</sup> ADAM B. JAFFE & JOSH LERNER, INNOVATION AND ITS DISCONTENTS—HOW OUR BROKEN PATENT SYSTEM IS ENDANGERING INNOVATION AND PROGRESS, AND WHAT TO DO ABOUT IT 207 (Princeton University Press 2004).

<sup>2</sup> BLACK’S LAW DICTIONARY 800 (8th ed. 2004). “An injunction [court order commanding or preventing an action] granted after a final hearing on the merits.” *Id.* See also JANICE M. MUELLER, AN INTRODUCTION TO PATENT LAW 383 (2d ed. Aspen Publishers 2006) (“A permanent injunction is one that is issued after a final judgment of infringement and no invalidity or unenforceability. This is a standard part of the final judgment in a patent case that permanently enjoins the infringing party from any further infringement during the remaining term of the patent.”).

<sup>3</sup> MUELLER, *supra* note 2, at 384 (discussing the possible effects of patent reform on the use of injunctive relief in a patent infringement case).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*; see also Elizabeth D. Ferrill, Comment, *Patent Investment Trusts: Let’s Build a PIT to Catch the Patent Trolls*, 6 N.C. J.L. & TECH. 367, 367 (2005) (defining a Patent Troll as “somebody who tries to make a lot of money off a patent that they are not practicing and have no intention of practicing and . . . [have] never practiced.”) (quoting Peter Detkin, the former assistant general counsel for Intel Corp.); *Patent Trolls: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109<sup>th</sup> Cong. (2006) (statement of Lamar Smith, Chairman, Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary) (defining a Patent Troll as an individual or company who “invents a patented product or process of suspect legal integrity or who acquires such a patent from a third party” and then “makes money by extorting a license from a manufacturer who allegedly has infringed the patent”).

<sup>6</sup> MUELLER, *supra* note 2, at 384.

to deny the availability of permanent injunctions as a remedy to Patent Trolls.<sup>7</sup> Conversely, small technology firms and inventors argue the courts should continue to grant permanent injunctions to protect patent property rights.<sup>8</sup>

Part I of this comment discusses the statutory background and case history of injunctive relief in patent infringement cases, the patent reform recommendations with regards to injunctive relief, and a case analysis of a recent Supreme Court case regarding the use of injunctive relief in a patent infringement case. Part II provides an analysis of injunctive relief by discussing the Supreme Court's decision in the *eBay* case as well as proposed patent reform recommendations, including the positive and negative effects for technological advances and economic prosperity. Finally, Part III proposes a recommendation for injunctive relief in patent infringement cases for both the courts and Congress as a positive measure for both technological and economic prosperity.

## I. BACKGROUND

In 1952, Congress codified Title 35, known as The Patent Act.<sup>9</sup> Section 283 of The Patent Act states the following regarding injunctions: “[t]he 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.”<sup>10</sup> Injunctive relief has long been an important remedy for the patent holder because an injunction excludes others from using the patent holder's ideas.<sup>11</sup>

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<sup>7</sup> See Brief of Time Warner, Inc. et al. as Amici Curiae Supporting Petitioners at \*\*8–9, *eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837 (2006) (No. 05-130), 2006 U.S. S. Ct. Briefs LEXIS 167.

<sup>8</sup> Brief of the United Inventors Ass'n and Technology Licensing Corp. as Amici Curiae in Support Of *MercExchange, L.L.C.* on the Merits at \*\*4–5, *eBay*, 126 S. Ct. 1837 (No. 05-130), 2006 U.S. S. Ct. Briefs LEXIS 333.

<sup>9</sup> 35 U.S.C. § 1 (2006).

<sup>10</sup> 35 U.S.C. § 283.

<sup>11</sup> *Smith Intern., Inc. v. Hughes Tool Co.*, 718 F.2d 1573, 1577 (Fed. Cir. 1983). The Federal Circuit further discussed the right to exclude. *Id.* When it stated:

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.

### A. Historical Use of Injunctive Relief as a Remedy

Throughout history, courts have commonly used injunctive relief as a remedy for patent infringement cases.<sup>12</sup> For example, in *W.L. Gore & Associates, Inc. v. Garlock, Inc.*<sup>13</sup> the district court stated previous courts have found an injunction should follow a finding of patent infringement absent any exigent circumstances.<sup>14</sup> *W.L. Gore* indicated courts should issue an injunction following the establishment of infringement unless a sufficient reason exists for denying it.<sup>15</sup> The Federal Circuit had labeled this rule the “general rule” for injunctions in patent infringement cases.<sup>16</sup> The district court in *W.L. Gore* found infringement, but they declined to follow the “general rule” in granting an injunction because the patent infringer no longer made or sold either of the infringing products.<sup>17</sup> Following the appeal, the Federal Circuit affirmed the finding of infringement, but overturned the denial of an injunction.<sup>18</sup> The Federal Circuit stated “[t]he fact that the defendant has stopped infringing is generally not a reason for denying an injunction against future infringement unless the evidence is very persuasive that further infringement will not take place.”<sup>19</sup>

However, in August 2006, in *eBay Inc. v. MercExchange, L.L.C.*, the Supreme Court held that courts should no longer use the Federal Circuit’s “general rule”.<sup>20</sup> The Supreme Court held that courts should utilize a set of equity rules for injunctive relief as the remedy for a patent infringement case.<sup>21</sup> This set of rules, known as the four-factor test, has arisen from “established principals of equity.”<sup>22</sup> The Supreme Court has historically held in any injunction case that a plaintiff seeking a

<sup>12</sup> 7 DONALD S. CHISUM, CHISUM ON PATENTS § 20.04 (1)(a)(i) (2006).

<sup>13</sup> 842 F.2d 1275 (Fed. Cir. 1988).

<sup>14</sup> *Id.* at 1281. The *W.L. Gore* court stated, “[a]lthough the district court’s grant or denial of an injunction is discretionary depending on the facts of the case, injunctive relief against an adjudged infringer is usually granted.” *Id.* (citations omitted). See also *Windsurfing Intern. Inc. v. AMF, Inc.*, 782 F.2d 995, 1002 (Fed. Cir. 1986) (opinion written by Chief Judge Markey stating injunctive relief against an adjudged infringer is usually granted). *KSM Fastening Sys. v. H.A. Jones Co.*, 776 F.2d 1522, 1524 (Fed. Cir. 1985) (stating while injunctive relief is discretionary by the district court, the granting of an injunction is the “norm” when there is infringement).

<sup>15</sup> *Gore*, 842 F.2d at 1281; see also *Trans-World Mfg. Corp. v. Al Nyman & Sons, Inc.*, 750 F.2d 1552, 1564–65 (Fed. Cir. 1984) (holding an injunction can also include barring the “use” of an infringed product if that will “prevent the violation of any right secured by patent”).

<sup>16</sup> *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1246–47 (Fed. Cir. 1989). (stating “[i]t is the general rule that an injunction will issue when infringement has been adjudged, absent a sound reason for denying it.”).

<sup>17</sup> *Gore*, 842 F.2d at 1278.

<sup>18</sup> *Id.* at 1283.

<sup>19</sup> *Id.* at 1281–82; see also *Gen. Elec. Co. v. New England Elec. Mfg. Co.*, 128 F. 738, 740 (2d Cir. 1904) (stating “[t]he argument in such circumstances is very simple. If the defendant be honest in his protestations an injunction will do him no harm; if he be dishonest the court should place a strong hand upon him . . .”).

<sup>20</sup> *eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837, 1841 (2006) (stating “We hold only that the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards.”).

<sup>21</sup> *Id.* at 1839.

<sup>22</sup> *Id.* In this case, the Supreme Court held a categorical denial or grant of injunctive relief was error in patent cases like any other case without resort to any categorical rules. *Id.*

permanent injunction must satisfy a four-factor test before a court may grant such relief.<sup>23</sup> The plaintiff has the burden of proof to demonstrate (1) it has suffered an irreparable injury, (2) any available remedy at law is inadequate to compensate for that injury, such as monetary damages, (3) a remedy in equity is warranted considering the balance of hardships between the plaintiff and defendant, and (4) the public interest would not be disserved by a permanent injunction.<sup>24</sup>

*B. Patent Trolls Had Substantial Bargaining Power Against Large Technology Firms Under the Federal Circuit's "General Rule"*

Prior to *eBay*, most courts followed the Federal Circuit's decision in *W.L. Gore* with respect to a "general rule" for injunctive relief in patent infringement disputes.<sup>25</sup> Because of the Federal Circuit's strong tendency to issue injunctive relief to patent holders in infringement cases, Patent Trolls had tremendous bargaining power under the Federal Circuit's "general rule."<sup>26</sup>

Historically, few courts have used the term Patent Troll.<sup>27</sup> However, a district court in Utah recently discussed the Patent Troll controversy in *Overstock.com, Inc. v. Furnace Brook, L.L.C.*<sup>28</sup> In this case, the district court determined that Furnace Brook clearly resembled a Patent Troll according to the court's definition.<sup>29</sup>

Overstock.com sought a declaratory judgment against Furnace Brook to show either Furnace Brook's patent was invalid, or that Overstock.com did not infringe.<sup>30</sup> Furnace Brook had attempted to coerce several large companies into either paying for a license or facing an infringement lawsuit, with the threat of an injunction.<sup>31</sup> Overstock.com decided not to pay for a license and therefore, Furnace Brook brought suit against them.<sup>32</sup> Ultimately, the district court dismissed the case for lack of jurisdiction.<sup>33</sup> The court held that Furnace Brook was not subject to federal jurisdiction by merely sending cease-and-desist letters to a company in Utah, and therefore, the court made no ruling on the infringement aspect of the case.<sup>34</sup>

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<sup>23</sup> See *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–13 (1982).

<sup>24</sup> *Id.*; see also *eBay*, 126 S. Ct. at 1839 (concurring with the long-held four-factors for injunctive relief in a patent infringement case as defined in *Weinberger v. Romero-Barcelo*).

<sup>25</sup> See *Windsurfing Intern. Inc. v. AMF, Inc.*, 782 F.2d 995, 1003 (Fed. Cir. 1986). See also *Genentech, Inc. v. Wellcome Found.*, 826 F. Supp. 828, 829 (D. Del. 1993). ("Entry of a permanent injunction following a finding of infringement is usually granted. An injunction should issue once infringement has been established unless there is a sufficient reason for denying it.") (citations omitted).

<sup>26</sup> See MUELLER, *supra* note 2, at 384.

<sup>27</sup> *Overstock.com, Inc. v. Furnace Brook, L.L.C.*, 420 F. Supp. 2d 1217, 1222 (D. Utah 2005). "Indeed, while 'patent troll' appears to be a term commonly used in the popular literature, the phrase has yet to appear in a Federal Circuit case." *Id.*

<sup>28</sup> *Id.* at 1218.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* Furnace Brook acquired a patent for software and computer systems that facilitates Internet selling. *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 1218–19.

<sup>33</sup> *Id.* at 1218.

<sup>34</sup> *Id.* at 1221.

However, in dicta, the court asserted that when a case involves a Patent Troll, the court should provide a different remedy.<sup>35</sup> The court found that Furnace Brook was more interested in negotiating licensing agreements with many firms rather than enforcing its patent rights.<sup>36</sup> Therefore, in situations like this, the court should provide a different remedy, such as money damages, and the court should not follow the “general rule” of an automatic injunction.<sup>37</sup>

*Overstock.com* also discussed how Patent Trolls are able to prosper in the environment the Federal Circuit had created. Federal Circuit holdings using the “general rule” have given Patent Trolls the ability to threaten injunctions and litigation against a potential infringer in a forum without personal jurisdiction, and without fear of being subject to suit themselves in that forum.<sup>38</sup> The *Overstock.com* court further stated this unintentional benefit might make it reasonable to hold Patent Trolls subject to personal jurisdiction.<sup>39</sup> “Such a change in precedent might well help stem the tide of coercive patent litigation.”<sup>40</sup> *Overstock.com* concluded that the Federal Circuit’s “general rule” does not appear to consider Patent Trolls like Furnace Brook whose only apparent asset is a patent which is used to send demand letters to potential infringers in order to procure licensing fees.<sup>41</sup>

The recent case of *NTP, Inc. v. Research in Motion, Ltd.*<sup>42</sup> also demonstrated the bargaining power of Patent Trolls with the threat of injunction. Research in Motion (“RIM”) is recognized for their wireless technology known as the Blackberry™.<sup>43</sup> In

<sup>35</sup> *Id.* at 1222–23. Furnace Brook’s first two letters to *Overstock.com* did not directly accuse *Overstock.com* of infringing its patent, however, they did make several lucrative offers to license it. *Id.* at 1222. Furnace Brook’s final letter to *Overstock.com* presented a virtually identical case to that of Sharper Image Corporation filing against Furnace Brook in San Francisco. *Id.* The final letter included Furnace Brook’s strategy to seek dismissal for lack of personal jurisdiction, which is the same strategy they attempted to use with *Overstock.com*. *Id.* These actions revealed that Furnace Brook used a calculated business strategy to demand licenses from non-New York corporations in reliance on the Federal Circuit’s pronouncement that its cease-and-desist letters alone will not subject it to suits in non-New York courts. *Id.* The court found that these actions are all characteristic of a Patent Troll. *Id.*

<sup>36</sup> *Id.* The court also stated that Furnace Brook focused its efforts on intimidating *Overstock* with threats of injunction and litigation in order to coerce and persuade *Overstock* that it was in its best interest to enter into a licensing agreement. *Id.* Also, Furnace Brook made no efforts to practice its patent or otherwise improve their own technology. *Id.*

<sup>37</sup> *Id.* at 1223.

<sup>38</sup> *Id.* (stating “[p]rinciples of fair play and substantial justice’ . . . might suggest that it is fair and reasonable to subject patent trolls to personal jurisdiction in the fora in which they attempt to club alleged infringers into signing license agreements.”) (citation omitted).

<sup>39</sup> *Id.*

[T]here is undoubtedly some benefit in the currently risk-free proposition Furnace Brook has undertaken of purchasing a patent at a bankruptcy auction and sending demand letters throughout the country while hiding from preemptive declaratory judgment actions behind the personal jurisdiction shield the Federal Circuit has created. That benefit, it seems, would make jurisdiction reasonable in this case.

*Id.* at 1222–23.

<sup>40</sup> *Id.* at 1222.

<sup>41</sup> *Id.* at 1223. Ultimately, the Federal Circuit later affirmed the judgment by the District Court. *Id.* The court stated “[u]nder the existing law, the court has no choice but to dismiss.” *Id.*

<sup>42</sup> 418 F.3d 1282 (Fed. Cir. 2005).

<sup>43</sup> *Id.* at 1289–90. BlackBerry™ is a wireless handheld device that supports e-mail, cellular telephone, text messaging, internet faxing, web browsing and other wireless information services.

2001, NTP sued RIM for infringing their wireless technology patents.<sup>44</sup> On every issue during trial, the jury found in favor of NTP.<sup>45</sup> On August 5, 2003, the district court entered final judgment in favor of NTP for over \$53 million.<sup>46</sup>

During the appeal and after a technical analysis of the claims,<sup>47</sup> the Federal Circuit found RIM had committed patent infringement on at least some of NTP's claims, which meant that an injunction may ensue for the BlackBerry™.<sup>48</sup> Following the finding of infringement on August 2, 2005, both parties continued to negotiate, finally resulting in an enormous settlement between RIM and NTP in favor of NTP in the amount of \$612.5 million.<sup>49</sup>

This result also illustrates the bargaining and economic power of a Patent Troll.<sup>50</sup> NTP had no desire to market, make, or sell their patented invention for wireless email.<sup>51</sup> NTP's only desire was to sell the licensing rights to their patent and hold others like RIM hostage for a large settlement agreement because of the fear of an injunction.<sup>52</sup>

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*See id.* The BlackBerry™ also includes the standard Personal Digital Assistant (“PDA”) functions of calendar, contacts, to-do task lists, and notes. *See id.* The BlackBerry's™ popularity comes from its ability to send and receive email wherever it can access a wireless network. *See id.* The BlackBerry™ is especially popular for corporate wireless e-mail traffic, which accounts for 59% of the wireless e-mail market. Ian Austen, *Blackberry Adds Diversions, Counting on Sales*, N.Y. TIMES, Sept. 18, 2006, at C5.

<sup>44</sup> *NTP*, 418 F.3d at 1290. The case proceeded to trial on fourteen claims. *Id.* The patents in question were: 5,019,172, 5,436,960, 5,625,670, 6,067,451, 6,317,592. *Id.* at 1287.

<sup>45</sup> *Id.* A verdict was rendered on November 21, 2002. *Id.* The jury found direct, induced, and contributory infringement by RIM on all asserted claims of the patents. *Id.* The jury also found that the infringement was willful. *Id.* It rejected every defense proposed by RIM. *Id.* The jury awarded damages to NTP in the amount of approximately \$23 million, adopting a reasonable royalty rate of 5.7%. *Id.*

<sup>46</sup> *Id.* The court awarded monetary damages totaling \$53,704,322.69, with the following approximate division: (1) compensatory damages of \$33 million; (2) attorneys' fees of \$4 million; (3) prejudgment interest of \$2 million; and (4) enhanced damages of \$14 million. *Id.* The court also entered a permanent injunction against RIM, enjoining it from further manufacture, use, importation, and/or sale of all accused BlackBerry™ systems, software, and handhelds. *Id.* The injunction was stayed pending the appeal. *Id.*

<sup>47</sup> *See id.* at 1291–1311.

<sup>48</sup> *Id.* at 1325–26. The court reversed the judgment of infringement on the method claims. *Id.* The court affirmed the judgment of infringement to the system and apparatus claims not including the “originating processor” limitation. *Id.* The court vacated the judgment of infringement to the system claims containing the “originating processor” limitation. *Id.* Finally, the court remanded to the lower court the questions as to whether and to what extent the verdict of infringement should be vacated based on the prejudicial effect of the erroneous claim construction of the term “originating processor.” *Id.*

<sup>49</sup> Susan Decker & Rebecca Barr, *Settlement Reached: Blackberry Saved: Maker ends Four-Year Patent Fight with \$612.5 Mil. Payment*, CHICAGO SUN TIMES, Mar. 4, 2006, at 2.

<sup>50</sup> *Id.* RIM took a strong stance against trolls in that they would not negotiate with trolls. Tim Wu, *Weapons of Business Destruction*, SLATE, Feb. 6, 2006, <http://www.slate.com/id/2135559>. After RIM refused to pay NTP, NTP sued RIM in 2001. *Id.* “Given numerous chances to settle the case for millions of dollars, [RIM] balked, cheated at trial, and managed to infuriate federal trial Judge James Spencer.” *Id.*

<sup>51</sup> *See id.* Co-founder of New Technologies Products (“NTP”), David Stout, patented a series of inventions based on wireless email in the early 1990s. *Id.* David Stout was a former patent examiner and patent attorney and therefore had a solid knowledge of the patent system. *Id.*

<sup>52</sup> *Id.* NTP's patents for “wireless email” are arguably not even valid patents because the Patent and Trademark Office (“PTO”) should have considered the patents too obvious to merit a

### C. *The Future of Injunctive Relief as a Remedy for Patent Infringement*

Many large technology companies have suggested the court's broad injunctive discretion needs revising. One of the recently recommended patent reform bills may make it more difficult for Patent Trolls to use injunctive relief as a remedy.<sup>53</sup> The bills recommended two key additional phrases: "irreparable harm to the owner of the patent,"<sup>54</sup> and "the balance of hardships . . . does not favor the owner of the patent."<sup>55</sup> These phrases are directly tied to traditional equitable principles, and they should make it more difficult to grant injunctive relief to Patent Trolls.<sup>56</sup> However, it is interesting to note that the current Patent Reform bills before the House and Senate make no reference or recommended change to the existing language of section 283, Injunctions.<sup>57</sup>

In parallel with the patent reform bills, the Supreme Court unanimously decided *eBay*, an important case for patent holders attempting to protect their patents rights, and those seeking injunctive relief.<sup>58</sup> In *eBay*, the Supreme Court utilized the set of equity rules for injunctive relief as the remedy for a patent infringement case.<sup>59</sup> The Supreme Court held that courts should use the four-factor test in patent infringement cases and not follow the Federal Circuit's "general rule".<sup>60</sup>

During the trial court proceedings, the jury in *eBay* found the patent valid and infringed and held damages were appropriate.<sup>61</sup> However, the district court denied the plaintiffs motion for permanent injunctive relief.<sup>62</sup> The Federal Circuit then

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patent. *Id.* Some argue NTP's concepts for "wireless email" are obvious and should not have been granted a patent at all. *See id.*

<sup>53</sup> *See* H.R. 5096, 109th Cong. (2006); *see also* H.R. 2795, 109th Cong. (2005). The following was proposed to be added to the end of 35 U.S.C. § 283:

In determining equity, the court shall consider the fairness of the remedy in light of all the facts and the relevant interest of the parties associated with the invention. Unless an injunction is entered pursuant to a nonappealable judgment of infringement, a court shall stay the injunction pending an appeal upon an affirmative showing that the stay would not result in irreparable harm to the owner of the patent and that the balance of hardships from the stay does not favor the owner of the patent.

H.R. 5096, 109th Cong. (2006); *see also* H.R. 2795, 109th Cong. (2005).

<sup>54</sup> H.R. 5096, 109th Cong. (2006) (the language in the previous version of H.R. 2795, 109th Cong. (2005) is the same as H.R. 5096).

<sup>55</sup> H.R. 5096, 109th Cong. (2006).

<sup>56</sup> MUELLER, *supra* note 2, at 384.

<sup>57</sup> S. 1145, 110th Cong. (2007); H.R. 1908, 110th Cong. (2007).

<sup>58</sup> *eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837 (2006). This case is important because it is the first case in which the Supreme Court has made a decision based on injunctive relief with respect to a patent infringement case. *Id.* at 1838. Prior to this case, the Federal Circuit was the controlling authority on this subject. *Id.* Much of the business and technology community was interested in the resolution of this case because of the magnitude of the final decision. *See id.*

<sup>59</sup> *Id.* at 1839.

<sup>60</sup> *Id.* at 1841.

<sup>61</sup> *Id.* at 1839.

<sup>62</sup> *Id.* The Court further stated that although the District Court mentioned the traditional four-factor test, the court appeared to adopt expansive principles with respect to injunctive relief and stated that it could not issue such relief "in a broad swath of cases." *Id.* at 1840. The District Court stated and concluded that a "plaintiff's willingness to license its patents" and "its lack of commercial activity in practicing the patents" would be sufficient to establish that the patent holder would not suffer irreparable harm if an injunction did not issue. *MercExchange, L.L.C. v. eBay*,

reversed and applied the “general rule that courts will issue permanent injunction against patent infringement absent exigent circumstances.”<sup>63</sup> Finally, the Supreme Court remanded the case back to the jury for further findings and concluded “neither court below correctly applied the traditional four-factor framework that governs the award of injunctive relief.”<sup>64</sup>

Justice Kennedy’s concurring opinion in *eBay*, joined by Justice Stevens, Justice Souter, and Justice Breyer, alluded to Patent Trolls, although it did not explicitly state the term “Patent Trolls.”<sup>65</sup> In his concurring opinion, Justice Kennedy stated that companies use injunctions as a “bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent.”<sup>66</sup>

The Supreme Court ruling in *eBay* and the proposed Patent Reform Act additions to 35 U.S.C § 283, will create a different landscape with respect to patent infringement disputes that categorically have been followed with an injunction.<sup>67</sup> Large technology companies, patent holding companies, Patent Trolls, small technology companies, as well as the courts, will have to change the way they

Inc., 275 F. Supp. 2d 695, 712 (E.D. Va. 2003), *rev’d*, 401 F.3d 1323, 1339 (Fed. Cir. 2005), *vacated and remanded*, 126 S. Ct. 1837 (2006).

<sup>63</sup> *MercExchange, L.L.C. v. eBay, Inc.*, 401 F.3d 1323 (Fed. Cir. 2005), *vacated and remanded*, 126 S. Ct. 1837 (2006). In reversing the district court, the court of appeals departed in the opposite direction from the four-factor test. *Id.* The court articulated a “general rule”, unique to patent disputes, “that a permanent injunction will issue once infringement and validity have been adjudged.” *Id.* at 1338. The court further indicated that injunctions should be denied only in the “unusual” case, under “exceptional circumstances” and “in rare instances . . . to protect the public interest.” *Id.* at 1338–39.

<sup>64</sup> *eBay*, 126 S. Ct. at 1841. Following this finding, the Supreme Court held that they could take no position regarding the permanent injunctive relief. *Id.* The Court did finally state that the “decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts.” *Id.* They also held that this discretion should be exercised consistently with traditional principles of equity. *Id.* These should occur in patent disputes no less than in other cases governed by such standards. *Id.*

<sup>65</sup> *Id.* at 1842 (Kennedy, J., Stevens, J., Souter, J., Breyer, J., concurring). Justice Kennedy further stated that in cases now arising, trial courts should bear in mind that in many instances the nature of the patent being enforced and the economic function of the patent holder present considerations quite unlike earlier cases. *Id.* An industry has developed in which firms use patents not as a basis for producing and selling goods, but instead, primarily for obtaining licensing fees. See FED. TRADE COMM’N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY, ch. 3, pp 38–39 (Oct. 2003), available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>.

<sup>66</sup> *eBay*, 126 S. Ct. at 1842 (Kennedy, J., Stevens, J., Souter, J., Breyer, J., concurring). When the patented invention is a small component of the product the companies are producing and the threat of an injunction is employed for undue leverage in negotiations, legal damages may be sufficient to compensate for the infringement and an injunction would not serve the public interest. *Id.* In addition, injunctive relief may have different consequences for the growing number of business method patents, which were not of much economic and legal significance in earlier times. *Id.* The potential vagueness and validity of some of these patents may affect the balance of equities under the four-factor test. *Id.* The equitable discretion over injunctions, as stated by The Patent Act, will allow courts to adapt to the rapid technological and legal developments in the patent system. *Id.*

<sup>67</sup> *Patent Trolls: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109<sup>th</sup> Cong. (2006) (statement of Lamar Smith, Chairman, Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary).

approach patent protection and patent infringement disputes. It is uncertain how this will affect innovation and technology advances in the future.

## II. THE SUPREME COURT DECISION IN *EBAY* ALONG WITH THE PREVIOUSLY RECOMMENDED CHANGES TO THE PATENT REFORM ACT FOR INJUNCTIONS COULD HAVE A SIGNIFICANT EFFECT ON BUSINESS AND INNOVATION

The decision in *eBay*<sup>68</sup> and the previous Patent Reform Act recommendations<sup>69</sup> will potentially make it more difficult for a patent holder to receive a permanent injunction in an infringement case. There are mainly two sides to the debate, the large technology companies versus the small inventors and patent holding companies (which include Patent Trolls). On one side, the large technology companies favor the decision in *eBay* and are against the Federal Circuit's "general rule." On the other side, the small inventors and patent holding companies are against the decision in *eBay* and favor the Federal Circuit's "general rule." The following analysis centers around four key ideas.<sup>70</sup>

First, both sides have compelling arguments with respect to the presumption of equitable principles required for an injunction. Second, both sides feel innovation will be negatively affected by the other's position. Third, the small inventors and patent holding companies feel Congressional action is required to change the standard of issuing injunctive relief because of historical court precedent.<sup>71</sup> Last, the large technology firms feel the issuing of injunctions according to the Federal Circuit's "general rule" would continue to promote patent abuses causing significant costs to both industry and society.<sup>72</sup>

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<sup>68</sup> *eBay*, 126 S. Ct. 1837.

<sup>69</sup> H.R. 5096, 109th Cong. (2006).

<sup>70</sup> Brief of Wisconsin Alumni Research Foundation et al. as Amici Curiae Supporting Respondent at \*\*4, *eBay*, 126 S. Ct. 1837 (No. 05-130), 2006 U.S. S. Ct. Briefs LEXIS 341. Universities have a fifth separate idea with regards to the analysis of the "general rule". *Id.* at \*\*16-17. If the injunctive relief power is lessened, university researchers would find it harder to license their innovations. *Id.* The transfer of university technology to the public is required. *Id.* Without the power of an injunction, a larger company could dominate the market with an infringing product or process. *Id.* This impact could have a substantially negative effect on innovation and the public. *Id.* It is also important to note many colleges and universities earn considerable royalties from their intellectual property. Brief of the American Bar Ass'n as Amicus Curiae Supporting Respondent at \*\*17-18, *eBay*, 126 S. Ct. 1837 (No. 05-130), 2006 U.S. S. Ct. Briefs LEXIS 342. Harvard University reported \$23.7 million in royalty fees in 2004. *Id.* at \*\*18, n9 (citing HARVARD UNIVERSITY, OFFICE OF TECHNOLOGY DEVELOPMENT, ANNUAL REPORT TO THE COMMITTEE ON PATENTS AND COPYRIGHTS FISCAL YEAR 2004 5 (2005)). The University of Michigan reported royalty earnings of \$16.7 million. *Id.* at \*\*18, n9 (citing UNIVERSITY OF MICHIGAN TECH TRANSFER, 2005 ANNUAL REPORT 1 (2005)). If a university's ability to license their technologies is diminished, their incentive to conduct research and further innovation is diminished and the public will suffer the resultant harm. *Id.*

<sup>71</sup> See Brief of the American Bar Ass'n, *supra* note 70, at \*\*8-10.

<sup>72</sup> See, e.g., Brief of Time Warner, Inc. et al., *supra* note 7, at \*\*14-21; JAFFE & LERNER, *supra* note 1, at 113-14 (noting that one patent injunction cost Kodak \$200 million in losses and 4,500 lost jobs).

*A. Courts Should Follow the Principles of Equity for the Issuance of  
Injunctive Relief in a Patent Infringement Case*

There is no disagreement from either side that the courts should follow the principles of equity to grant an injunction in a patent infringement action.<sup>73</sup> However, the proposed legislation and *eBay* could still greatly affect how the courts analyze the principles of equity with respect to patent infringement and injunctions in the future. When courts review the grant or denial of an injunction, four equitable factors are evaluated: (1) whether the plaintiff would face irreparable harm or injury, (2) whether the plaintiff has no adequate remedy at law, (3) whether granting of the injunction is in the public interest, and (4) whether the balance of those hardships tips in the plaintiff's favor.<sup>74</sup>

Those favoring the "general rule" assert that it adequately addresses the principles of equity. They feel the "general rule" appropriately presumes each of the traditional principles as valid when there is a finding of infringement.<sup>75</sup> However, those against the Federal Circuit's "general rule" feel the four equitable factors should be reviewed with the specific facts and circumstances for all patent infringement cases with injunctions.<sup>76</sup>

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<sup>73</sup> See 35 U.S.C. § 283 (2006).

<sup>74</sup> See *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–13 (1982); *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987).

<sup>75</sup> See Brief for General Electric Co. et al. as Amici Curiae Suggesting Affirmance at \*\*25–40, *eBay*, 126 S. Ct. 1837 (No. 05-130), 2006 U.S. S. Ct. Briefs LEXIS 331 (arguing in favor of maintaining the "general rule" because of the historical protection of patents by injunctions, the proper application of the principles of equity, and the lack of specific congressional action with regard to injunctions); see also Brief of the American Bar Ass'n, *supra* note 70, at \*\*11–13 (arguing in favor of maintaining the "general rule" because of historical court precedent and irrebuttable presumptions of the equitable principles in a patent infringement case); Brief of American Intellectual Property Law Ass'n and Federal Circuit Bar Ass'n as Amici Curiae Supporting Neither Party at \*\*14–32, *eBay*, 126 S. Ct. 1837 (No. 05-130), 2006 U.S. S. Ct. Briefs LEXIS 90 (arguing that the "general rule" appropriately recognizes three of the traditional injunction factors—irreparable harm, inadequate remedy at law and the public interest—and these three are normally in favor of the patent holder because of the exclusive right given by patents).

<sup>76</sup> See Brief of Business Software Alliance et al. as Amici Curiae Supporting Petitioners at \*\*37–52, *eBay*, 126 S. Ct. 1837 (No. 05-130), 2006 U.S. S. Ct. Briefs LEXIS 144. The equitable factors do not disfavor injunction in patent infringement cases. *Id.* at \*\*38. The opposite is true, injunctions will almost always be appropriate in the typical case of patent infringement where a patentee practicing the invention sues a competitor in the same market and selling products that infringe the patent. *Id.* However, there are some cases that will not follow this situation and it is with these cases in which it is most important to apply all of the equitable principles. *Id.*; see also Brief of 52 Intellectual Prop. Professors as Amici Curiae Supporting Petitioners at 4–5, *eBay*, 126 S. Ct. 1837 (No. 05-130), 2006 U.S. S. Ct. Briefs LEXIS 169 (arguing that the federal circuit has abandoned the role of equity against the statutory language and that the application of the equitable factors is important to avoid abuse of the patent system); Brief of Securities Industry et al. as Amici Curiae Supporting Petitioners at \*\*8–10, *eBay*, 126 S. Ct. 1837 (No. 05-130), 2006 U.S. S. Ct. Briefs LEXIS 160 (arguing that the "equitable principles should govern injunctive relief" and that the "general rule" actually distorts incentives to innovation in science and the arts).

*1. Does the Patent Holder Face Irreparable Injury and Have an Adequate Remedy at Law if the Injunction Is Not Granted?*

The Federal Circuit, before *eBay*, had always found irreparable injury when a valid patent had been infringed.<sup>77</sup> Those that favor this “general rule” feel the exclusive right granted to a patent holder exists for a limited time and this right cannot be replaced.<sup>78</sup> The Federal Circuit had decided that infringement of a patent was an unauthorized denial of that limited exclusive right and was thus an irreparable harm not compensable by monetary damages.<sup>79</sup> Accordingly, because of the patent’s very nature of exclusivity, the patent holder’s loss of the finite exclusivity period is irreparable and therefore there is no adequate remedy at law.<sup>80</sup>

Those opposing the “general rule” assert irreparable injury does not necessarily always follow the finding of infringement.<sup>81</sup> “The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy . . . are not enough.”<sup>82</sup> There is not enough support for the presumption of irreparable injury and therefore in some situations there are other adequate remedies at law available.<sup>83</sup>

In situations where the patent holder grants non-exclusive licensing rights to multiple buyers, irreparable injury would be difficult to prove. The patent holder’s willingness to grant these licenses to anyone willing to pay indicates the loss of the “exclusive” right of the patent is redressable by money damages. Therefore, the patentee’s willingness to license freely coupled with its lack of commercial activity in the patent demonstrates the patentee would not suffer irreparable harm and therefore there is an adequate remedy at law available.

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<sup>77</sup> *Smith Intern. v. Hughes Tool Co.*, 718 F.2d 1573, 1580–81 (Fed. Cir. 1983). The Federal Circuit held that irreparable injury should be presumed when the party seeking the injunction clearly establishes the validity and infringement of the patent. *Id.*; see also *H.H. Robertson Co. v. United Steel Deck Inc.*, 820 F.2d 384, 390 (Fed. Cir. 1987) (commenting on the rationale of the presumption of irreparable injury and asserting that the opportunity to practice an invention during the long course of patent litigation could be enough alone to tempt infringers).

<sup>78</sup> Brief for General Electric Co. et al., *supra* note 75, at \*\*29.

<sup>79</sup> *Smith Intern.*, 718 F.2d at 1581.

<sup>80</sup> See *id.* at 1581–82.

<sup>81</sup> Brief of Business Software Alliance et al., *supra* note 76, at \*\*40–43.

<sup>82</sup> *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (quoting *Va. Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958)); see also Brief of Business Software Alliance et al., *supra* note 76, at \*\*40 (citing 1 DAN B. DOBBS, *LAW OF REMEDIES* § 2.5(1) (1993) (defining an irreparable injury as an injury for which there is no adequate remedy at law)).

<sup>83</sup> Brief of Business Software Alliance et al., *supra* note 76, at \*\*42; see also *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 545 (1987) (stating that a “presumption [of irreparable injury] is contrary to traditional equitable principles”); *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (stating that without a clear congressional limitation included in the statutory language, there is no basis for creating such a presumption).

## 2. *Is the Granting of the Injunction in the Public Interest?*

In *Continental Paper Bag Co. v. Eastern Paper Bag Co.*,<sup>84</sup> the Supreme Court recognized a court of equity might be justified in not granting an injunction “in view of the public interest.”<sup>85</sup> However, the Federal Circuit’s use of the “general rule” created a presumption in favor of the patent holder on this equitable factor.<sup>86</sup> Although the Federal Circuit made only one exception in favor of public health to their “general rule,”<sup>87</sup> the Federal Circuit had never stated that was the only exception that could apply.<sup>88</sup> With the *eBay* decision, as an example, the public interest might weigh against injunctions that would deprive the public a useful product or services and technologies.<sup>89</sup> The *RIM v. NTP* case, involving the Blackberry™ is a prime example of this.<sup>90</sup> Another example is the situation in which a patent injunction threatens third-party users, and society as a whole may be harmed, because the injunctive relief will prohibit the use of interoperable systems and services.<sup>91</sup> Therefore, the public interest factor is still an important equitable principle, which the patent holder should prove and can be analyzed on a case-by-case basis.

## 3. *Do the Patent Holder’s Harms or Hardships if the Injunction Is Granted Outweigh the Patent Infringer’s Harms or Hardship if the Injunction Is Not Granted?*

The equitable balance attempts to weigh those hardships incurred by the patent holder’s suffering without the injunction against the harm the injunction would impose on the infringer.<sup>92</sup> Those in favor of the “general rule” feel the hardship imposed on the infringer rarely supports the denial of injunctive relief because of the

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<sup>84</sup> 210 U.S. 405 (1908).

<sup>85</sup> *Id.* at 430.

<sup>86</sup> *See* Odetics, Inc. v. Storage Tech. Corp., 14 F. Supp. 2d 785, 795–96 (E.D. Va. 1998).

<sup>87</sup> *See, e.g.*, Datascope Corp. v. Kontron, Inc., 786 F.2d 398, 400 (Fed. Cir. 1986) (refusing to grant an injunction in a medical-device case where practicing physicians preferred to use an infringing product); Hybritech, Inc. v. Abbott Lab., 1987 U.S. Dist. LEXIS 16768, at \*3–6 (C.D. Cal. 1987) (public interest required that an injunction not stop the supply of medical test kits that the patentee itself was not marketing), *aff’d*, 849 F.2d 1446 (Fed. Cir. 1988).

<sup>88</sup> Brief of Business Software Alliance et al., *supra* note 76, at \*\*50–52. The Department of Justice filed a Statement of Interest in the *RIM* litigation explaining that consumers, the public, and the government had a substantial interest in the loss of the use of Blackberry™ technology. *Id.* (citing United States’ Statement of Interest, *NTP Inc. v. Research In Motion, Ltd.*, No. 3:01 CV767 (E.D. Va.) at 2 (filed Nov. 8, 2005)).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* In the *NTP* case, the Department of Justice filed a Statement of Interest in the *RIM* litigation explaining that consumers, the public, and the government had a substantial interest in the loss of the use of Blackberry™ technology.<sup>90</sup> *Id.* (citing United States’ Statement of Interest, *NTP Inc. v. Research In Motion, Ltd.*, No. 3:01 CV767 (E.D. Va.) at 2 (filed Nov. 8, 2005)).

<sup>91</sup> *Id.* at \*\*52.

<sup>92</sup> *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). “Where plaintiff and defendant present competing claims of injury, the traditional function of equity has been to arrive at a ‘nice adjustment and reconciliation’ between competing claims . . .” *Id.* (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)).

right of exclusivity provided by a patent.<sup>93</sup> Protecting the patent exclusivity right overwhelms any of the commercial harms caused to the patent infringer or wrongdoer.<sup>94</sup>

Those against the “general rule” however, feel this balance of hardships should consider the pertinent facts of the case and relevant factors.<sup>95</sup> In analyzing the facts of the case with the relevant factors, it is possible in some cases that the harms caused to the infringer outweigh the hardship to the patent owner. Therefore, the courts should not impose a presumption in favor of one party in regard to this factor.

*B. The Broad Use or Non-Use of Injunctive Relief Has a Detrimental Effect on Innovation.*

Both sides feel the decision to eliminate the Federal Circuit’s “general rule” will have an impact on innovation. Small inventors and patent holding companies feel innovation will suffer greatly if their injunctive power is diminished by the elimination of the “general rule.”<sup>96</sup> Large technology companies feel that innovation will suffer if courts would have continued to follow the Federal Circuit’s “general rule” for injunctive relief.<sup>97</sup>

The small inventors, patent holding companies and biotechnology firms’ main argument is that their inventions and innovations contribute significantly to the American economy. However, without the threat of an injunction, the costly

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<sup>93</sup> Brief for General Electric Co. et al., *supra* note 75, at \*\*29–36.

<sup>94</sup> *Id.* at \*\*33–34. “Protecting this exclusive right must be a paramount consideration in the district court’s equitable balancing.” *Id.*

<sup>95</sup> Brief of Business Software Alliance et al., *supra* note 76, at \*\*43–50. Those factors include: harm to the patentee if no injunction is issued, the patent owner’s investment in the patent and the circumstances of the acquisition, whether the patentee presented the claim to the PTO prior to the infringing activity became publicly known, whether the infringing company made substantial investments dependent on the patented technology before it learned of the alleged infringements, and whether the injunction would require the defendant to redesign its product in a way that would render it incompatible with their other products or services, causing products already used by consumers to be negatively affected. *Id.* at \*\*44.

<sup>96</sup> See Brief of the United Inventors Ass’n and Technology Licensing Corp., *supra* note 8, at \*\*5–13 (arguing independent inventors will suffer without the threat of an injunction because of the financial imbalance between the large companies and independent inventors); see also Brief of Biotechnology Industry Organization as Amicus Curiae Supporting Respondent at \*\*9–21, *eBay*, 126 S. Ct. 1837 (No. 05-130), 2006 U.S. S. Ct. Briefs LEXIS 347 (arguing that biotech innovation would be hindered if there is a loss of injunctive relief when the patent holder does not use the invention).

<sup>97</sup> Brief of Business Software Alliance et al., *supra* note 76, at \*\*14–22 (arguing that the “general rule” deters innovation because of the complexity and overlapping of patented products and their components); see also Brief of Securities Industry et al., *supra* note 76, at \*\*28–39 (arguing that the “general rule” distorts incentives to advance science and technology because “[i]nnovation depends on patent protection that is both strong and flexible.”); Brief of Nokia Corp. as Amicus Curiae Supporting Petitioners at \*\*15–29, *eBay*, 126 S. Ct. 1837 (No. 05-130), 2006 U.S. S. Ct. Briefs LEXIS 163 (arguing that the “general rule” threatens to slow progress in technological fields by “undermining interoperability standards that are vital to technological sophisticated industries”); Brief of Computer & Communications Industry Ass’n as Amicus Curiae Supporting Petitioners at \*\*26–30, *eBay*, 126 S. Ct. 1837 (No. 05-130), 2006 U.S. S. Ct. Briefs LEXIS 173 (arguing that the “Federal Circuit’s rule impedes innovation by ignoring the changing nature of innovation”).

litigation required to protect their patents will greatly diminish the licensing value and bargaining power of these groups.<sup>98</sup> For example, a member of the United Inventors Association reported, “[w]hen I approached a large company with my invention to offer it for licensing, their exact words were: ‘if we decide to manufacture this, just sue us . . . .’”<sup>99</sup> In this situation, the large company knew that litigation was too costly for the independent inventor, so they never even took the offer to license his technology seriously.<sup>100</sup>

The biotechnology industry specifically argues that in their industry, the risks of their products and innovation require a patent system that will adequately protect their interests.<sup>101</sup> The primary asset of these biotechnology companies are their patents.<sup>102</sup> Obviously protecting these patents is important to earning a payback for the high-cost of research and development aimed at the high rewards of promoting health, longevity and well-being.<sup>103</sup> Without an ability to place injunctions on infringers as a general rule, the right to exclude will become meaningless.<sup>104</sup> Therefore, many of these biotechnology firms will not be able to attract the capital necessary to fund the research and development required for new medicines and treatments.<sup>105</sup> The two examples below demonstrate the importance of investment in the biotechnology industry:

(1) Nektar Therapeutics. The company’s reliance on a single patent raised \$1.2 billion in financing from outside investors.<sup>106</sup>

(2) AlphaVax. AlphaVax patented a technology that is not anticipated to be approved for use until 2011.<sup>107</sup> The company must attract investors who will risk millions of dollars on the chance this therapy will reach the marketplace.<sup>108</sup> The company, as well as the investors, must have confidence in their patent’s ability to provide a predictable right to exclude.<sup>109</sup>

In contrast, large technology companies feel the use of the “general rule” was a detriment to innovation. They feel patents are not limited to discrete technologies where the market value of a patent can be tied to one or a few single patents.<sup>110</sup>

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<sup>98</sup> Brief of the United Inventors Ass’n and Technology Licensing Corp., *supra* note 8, at \*\*9–13. See also JAFFE & LERNER, *supra* note 1, at 4.

[V]aluable technologies have become snarled in a web of litigation and licensing negotiations. And as young firms have found themselves unable to commercialize their ideas, economic growth has suffered. Consumers therefore have less access to new products—from lifesaving drugs to productivity-enhancing software—than would be the case if innovative companies were not distracted from innovation by litigation and fear of litigation.

*Id.*

<sup>99</sup> Brief of the United Inventors Ass’n and Technology Licensing Corp., *supra* note 8, at \*\*11.

<sup>100</sup> *Id.*

<sup>101</sup> Brief of Biotechnology Industry Organization, *supra* note 96, at \*\*12.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at \*\*13.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at \*\*13–14. In 2006, the company received approval for their inhaled insulin product, the first insulin not administered by injection. *Id.*

<sup>107</sup> *Id.* at \*\*14.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Brief of Nokia Corp., *supra* note 97, at \*\*15–29.

Today, products are made of many components and processes, each patented individually, which could be from many different companies, organizations, or individuals.<sup>111</sup> Also, a marketable product is made of many interoperable patents.<sup>112</sup> Therefore, it is difficult for companies to proceed forward with innovative products with the possibility of an automatic injunction shutting down their entire product line because of one small component infringing on another's patent.<sup>113</sup>

*C. Those in Favor of the "General Rule" Feel Court Precedent Requires Congressional Action to Change the Standard of Issuing Injunctive Relief*

The Patent Law precedent has been consistent and predictable in resolving conflicts between patent holders and patent infringers. Historically, the Federal Circuit has followed the "general rule" after finding infringement.<sup>114</sup> Therefore, to change the rules "mid-stream" would not be fair or just to the current participants in the market.

Those against the "general rule" argue that the use of injunctions should be limited to a certain class of patent holder, those who are practicing their patents. However, those in favor of keeping the "general rule" have counter-argued that limiting injunctions to certain patent holders is an issue for Congress, and not the courts.<sup>115</sup> There should be no difference or limitation between those who are practicing their patents and those who are not.<sup>116</sup>

The goal of the previously proposed legislation was to more narrowly define situations in which injunctive relief should be granted.<sup>117</sup> In this previous 2006 proposal, Congress specifically added phrases from the traditional equitable principles such as, "irreparable harm" and "balance of hardships" to section 283, Injunction.<sup>118</sup> Therefore, if this legislation were to be passed into law, those against the "general rule" feel the courts should then follow the changes in legislation and more narrowly define the granting of injunctions. Until that time, the courts should continue following the historical precedent set for the past one hundred years until *eBay*.

*D. Those Against the "General Rule" Argue Injunctive Relief Granted Using the "General Rule" Will Cause Patent Abuse While Causing Significant Costs to Business and Society*

An injunction is a powerful remedy. It can force a potential infringer to close down a production line or stop marketing their main product, with potentially grave

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<sup>111</sup> *Id.* at \*\*16.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at \*\*23, \*\*25, \*\*26.

<sup>114</sup> *W.L. Gore & Assocs., Inc. v. Garlock, Inc.* 842 F.2d 1275, 1281 (Fed. Cir., 1988).

<sup>115</sup> Brief of the American Bar Ass'n, *supra* note 70, at \*\*17–21.

<sup>116</sup> *Id.* at \*\*17–18.

<sup>117</sup> MUELLER, *supra* note 2, at 384; H.R. 5096, 109th Cong. (2006).

<sup>118</sup> H.R. 5096, 109th Cong. (2006).

business results.<sup>119</sup> The threat of an injunction enables the patent holder to extract licensing fees disproportionate to the value of the patent, while also imposing significant additional social costs.<sup>120</sup>

Patent infringement is relatively easy to prove, while patent invalidity is difficult to prove, and patent litigation is expensive. Because of these reasons, the patent infringer will most likely not participate in patent litigation. Therefore, the threat of an automatic injunction causes the patent infringer to license the patent at exorbitant fees. In most cases, these fees are passed on to society in the increased costs of consumer products, forcing everyone to pay.<sup>121</sup>

The “general rule” also caused significant costs to consumers and public interests that are not covered in the Federal Circuit’s narrow exception for extraordinary and imminent harm to public health.<sup>122</sup> These costs could also include the loss of access to medically needed procedures<sup>123</sup> or vital communications equipment.<sup>124</sup>

### III. THE TRIANGLE OF CHANGE

The recent *eBay* decision mandated all lower courts with patent infringement cases to use traditional equitable principles and the four-factor test when evaluating

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<sup>119</sup> JAFFE & LERNER, *supra* note 1, at 113–14.

<sup>120</sup> Brief of Time Warner, Inc. et. al., *supra* note 7, at \*\*14–21, \*\*33–36; *see also* FED. TRADE COMM’N., TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY 6 (2003), <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>. (“In some industries, such as computer hardware and software, firms can require access to dozens, hundreds, or even thousands of patents to produce just one commercial product.”)

<sup>121</sup> Brief of Time Warner, Inc., et. al., *supra* note 7, at \*\*13–21. Companies must now review numerous patents to ensure that the many components they utilize to make their products are not infringing. *Id.* at \*\*15. It can be expensive to incorporate a new non-infringing minor element into a larger manufactured process. *Id.* at \*\*17. Increased costs can come from a number of different scenarios: 1) removal of a component from a process control system could shut down an entire manufacturing process, 2) substitution of a new component can create expensive and time consuming testing and integration into the process system, 3) substitution of a new software subroutine as software programs have intricate and unexpected interactions with other programs and systems, 4) the changing of a minor component will cause a delay that is costly because of the installation time or debugging of software and this delay can cost the company significant sales. *Id.* at \*\*17–19.

<sup>122</sup> Brief of Time Warner, Inc., et. al., *supra* note 7, at \*\*33–36.

<sup>123</sup> *Mallinckrodt Inc. v. Masimo Corp.*, No. 00-6506, 2004 U.S. Dist. LEXIS 28518 (C.D. Cal. July 12, 2004) (demonstrating the Federal Circuit’s narrow exception to the public policy factor). In this case, the trial judge denied Masimo’s request for injunction because the doctors testified that an injunction “would likely compromise patient safety by forcing health professionals to switch back and forth between types of oximeters.” *Id.* at \*103. In an unreported opinion, the Federal Circuit reversed the trial judge’s denial of the injunction. *Mallinckrodt Inc. v. Masimo Corp.*, 147 F. App’x 158, 175–78 (Fed. Cir. 2005). The Federal Circuit stated that “it is contrary to the laws of property to deny a patentee the right to exclude others from use of his property.” *Id.* at 178.

<sup>124</sup> Brief of Time Warner, Inc., et. al., *supra* note 7, at \*\*35. The public health exception does not take into account any other widespread harms that an automatic injunction could cause to the public. *Id.* With the *BlackBerry* case, 3.65 million BlackBerry™ users would have been deprived service if an injunction were enforced. *Id.* This shows that an automatic injunction may be allowed even though it could potentially disrupt vast and established communication networks on which much of the public depends. *Id.*

the grant of injunctive relief to a patentee.<sup>125</sup> This decision essentially resulted in removing the Federal Circuit's long-standing "general rule" of granting an injunction to a patent holder when the patent has been infringed.<sup>126</sup> Concurrently, Congress has been debating reform to the Patent Act with regards to this same subject. The previously proposed legislation's goal is to define more narrowly situations in which the courts can grant injunctive relief.<sup>127</sup> In this legislation, the proposal specifically adds phrases from the equitable principles such as "irreparable harm" and "balance of hardships."<sup>128</sup>

One of the main policies of the patent system is to reward innovation through the use of protection in the form of patents.<sup>129</sup> The goal of this proposal is to protect legitimate inventors and patent holders, large or small, from big technology firms' abuse of patented technology while also protecting those same big technology firms against the Patent Trolls. The two-fold proposal presented meets both needs while furthering innovation, and thus, the goals of the patent system.

Courts should follow the Supreme Court's finding in *eBay* and the four-factor test as the rule for granting injunctions in a patent infringement case. However, when requesting an injunction, the patent holder should have a rebuttable presumption on two of the factors. My proposal states in order to eliminate the granting of an injunction, the patent infringer or the wrong-doer must (1) prove the patent holder will not suffer an irreparable harm from the infringement and (2) the patent holder does have an adequate remedy at law other than the granting of an injunction. Additionally, this comment proposes Congress codify the patent reform bill as previously proposed in H.R. 5096, specifically the modification to the injunctive relief section.

*A. When Granting Injunctions, the Courts Should Continue to Use the Four-Factor Test from eBay of (1) Irreparable Harm, (2) Inadequate Remedy at Law, (3) Balance of Hardships, and (4) Public Interest*

When examining each of the four factors,<sup>130</sup> the courts should use a rebuttable presumption of validity for the factors of irreparable harm and inadequate remedy at

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<sup>125</sup> *eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837, 1841 (2006). Compare *z4 Technologies Inc. v. Microsoft Corp.*, 434 F. Supp. 2d 437, 439, 444 (E.D. Tex. 2006) (restating the four-factor test from *eBay* and finding the plaintiff did not meet the factor of irreparable harm and therefore an injunction was not granted), with *Tivo, Inc. v. EchoStar Comm'n Corp.*, 446 F. Supp. 2d 664, 669 (E.D. Tex. 2006) (restating the four-factor test from *eBay* and finding that the plaintiff did meet all factors of the test, therefore an injunction was granted).

<sup>126</sup> *eBay*, 126 S. Ct. at 1841; see also *Paice, L.L.C. v. Toyota Motor Corp.*, No. 2:04-CV-211-DF, 2006 U.S. Dist. LEXIS 61600 at \*3 (E.D. Tex. 2006) (stating that the district court's "general" rule should no longer be used, "equitable relief is not mandatory in patent cases"); *Voda v. Cordis Corp.*, No. CIV-03-1512-L, 2006 U.S. Dist. LEXIS 63623 at \*17 (W.D. Okla. 2006) (stating "permanent injunctions in patent cases should not automatically follow a finding of infringement").

<sup>127</sup> MUELLER, *supra* note 2, at 384.

<sup>128</sup> H.R. 5096, 109th Cong. (2006).

<sup>129</sup> JAFFE & LERNER, *supra* note 1, at 7-9.

<sup>130</sup> *eBay*, 126 S. Ct. at 1838; see also *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-13 (1982) (stating that 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).

law in order to maintain innovation and inventiveness. If a presumption of validity in these two factors is not present, the small inventors will have limited bargaining power compared to large technology corporations. These large technology companies will be able to infringe and use their economic power without fear of injunctive relief to overpower the small inventors, thus stunting innovation and invention. Using a presumption of validity for these two factors shifts the burden to the defendant, the wrong-doer, and infringer, to prove the presumption is not valid.

*1. The Accused Infringer Must Demonstrate the Patent Holder Has Not Suffered an Irreparable Injury*

Many courts find it difficult to define “irreparable injury.” The Federal Circuit recently defined irreparable injury as an injury that cannot be remedied with money or when the district court cannot issue a remedy following the case circumstances.<sup>131</sup> In the past, the Federal Circuit has used a number of different factors to determine whether irreparable harm exists.<sup>132</sup> One of these factors is: Will the infringement erode the patent holder’s position in the market?<sup>133</sup> Another example of one of the considerations is: Will plaintiff lose substantial profits from defendant’s continuing infringement?<sup>134</sup>

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<sup>131</sup> *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001).

<sup>132</sup> *Jacobson v. Cox Paving Co.*, Civ. No. 89-1786 PHX PGR, 1991 U.S. Dist. LEXIS 17787 at \*44–45 (D. Ariz. 1991), *aff’d*, 949 F.2d 404 (1991). The Federal Circuit’s factors to determine if irreparable harm exists:

1. Will the defendant’s continuing infringement injure any collateral benefit provided by the patent other than a right to receive money damages?
2. Will the defendant’s continuing infringement interfere with the plaintiff’s ability to control the use and licensing of the patented technology?
3. Will the defendant’s continuing infringement erode the plaintiff’s position in the market?
4. Will the defendant’s continuing infringement encourage others to infringe?
5. Will issuance of an injunction deter other existing or potential infringers and influence them to back off?
6. Does defendant’s continuing infringement threaten survival of the plaintiff’s business?
7. Are plaintiff and defendant direct competitors trying to influence the same group of customers?
8. Has plaintiff spent a large sum of money on market development?
9. Does plaintiff stand to lose a large part of its market share if infringement is not enjoined?
10. Will defendant’s continued infringement have a substantial deleterious impact on plaintiff’s market share and pricing structure?
11. Will plaintiff lose substantial profits from defendant’s continuing infringement?
12. Has the defendant destroyed the value of the plaintiff’s patent?
13. Will the plaintiff’s patent expire in less than two years?
14. Is the defendant judgment proof?

*Id.* at \*44–45 (citations omitted).

<sup>133</sup> *Jacobson*, 1991 U.S. Dist. LEXIS 17787 at \*45.

<sup>134</sup> *Id.*

Prior to the finding in the *eBay* case, the Federal Circuit found irreparable injury should be presumed when the patent holder seeking the injunction establishes the validity and infringement of the patent.<sup>135</sup> This should continue to be the case as the courts go forward. Because of the very nature of the exclusivity of patents, the patent holder should be granted a presumption of irreparable harm even in light of the recent *eBay* decision. If irreparable harm is not presumed, the patent holder would be required to prove that irreparable harm exists by proving any number of the aforementioned considerations. This may be difficult and more importantly, expensive, especially for the small company inventor or the single inventor versus a large technology company who is not as concerned with the costs of litigation.

However, this presumption of irreparable harm does not preclude the patent infringer from proving irreparable harm does not exist. The Federal Circuit has stated a “patentee’s entitlement to a presumption of irreparable harm would not in itself and in every case be dispositive of the irreparable harm question.”<sup>136</sup> This presumption of irreparable harm is of course rebuttable by the accused infringer.<sup>137</sup>

Maintaining the current presumption of irreparable harm for the patent holder helps protect the large corporations from wielding their enormous legal and economic power over the smaller inventors. The rebuttal of the presumption of irreparable harm will ensure that Patent Trolls will not be able to maintain the bargaining power they currently possess. The accused infringer in a Patent Troll situation should be able to easily show the patentee will not suffer irreparable harm. In most Patent Troll cases, the Patent Troll attempts to license the product to multiple companies and does not practice the patent. Therefore, the accused patent infringer will be able to rebut the presumption of irreparable harm to the Patent Troll by showing that there is no irreparable harm because of the Patent Troll’s actions.

## *2. The Accused Infringer Must Demonstrate an Adequate Remedy Other Than an Injunction Exists for the Patent Holder*

The courts have recognized the irreparable harm requirement and the adequate remedy at law are similar.<sup>138</sup> A patent holder suffers no irreparable harm if he can obtain full compensation through the legal remedy of monetary damages.<sup>139</sup>

One way to demonstrate that an adequate remedy at law exists is through the previous dealings between the patentee and patent infringer. Patent Trolls are known to send out hundreds of cease and desist letters to infringing companies with

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<sup>135</sup> *Smith Intern., Inc. v. Hughes Tool Co.*, 718 F.2d 1573, 1580–81 (Fed. Cir. 1983); *see also* *H.H. Robertson Co. v. United Steel Deck Inc.*, 820 F.2d 384, 390 (Fed. Cir. 1987).

<sup>136</sup> *Ill. Tool Works, Inc. v. Grip-Pak, Inc.*, 906 F.2d 679, 681 (Fed. Cir. 1990).

<sup>137</sup> *H.H. Robertson*, 820 F.2d at 390; *see also* *Jack Guttman, Inc. v. Kopykake Enters. Inc.*, 302 F.3d 1352, 1363 (Fed. Cir. 2002) (finding “the presumption is rebuttable, and [an accused infringer] must be afforded the opportunity to rebut it . . .”).

<sup>138</sup> CHISUM, *supra* note 12, at § 20.04 (1)(e) (2006).

<sup>139</sup> *Id.*; *see also* 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 30:46 (4th ed. 2006) (stating the “irreparable injury’ requirement is merely a specific application of the general doctrine that equitable relief cannot be granted unless plaintiff shows that the remedy at law is inadequate”).

the option of a license agreement and monetary payment.<sup>140</sup> In these situations, it is obvious the Patent Troll has an adequate remedy of money damages because of his previous negotiations and communications. The Patent Trolls routinely request licensing arrangements in cease and desist letters to accused infringers. Therefore, money damages are an adequate remedy at law and no injunction is appropriate.

### *3. The Patent Holder Must Demonstrate the Balance of Hardships Weighs in His Favor Should the Injunction Be Granted*

For the balance of hardships equitable principle of the four-factor test, it is important to perform the analysis with a focus on the particular facts and circumstances of the case.<sup>141</sup> As the Supreme Court stated, all four factors must be analyzed in order to determine whether injunctive relief can be granted.<sup>142</sup>

The courts should maintain the same analysis as in the past. In the past, courts have granted injunctive relief to the patent holders with regard to the balance of hardships, unless the balance is decidedly in favor of the patent infringer.<sup>143</sup> These cases may occur when (1) the patent infringer uses a patented product that does not compete with the patent holder's product in manufacturing and sales,<sup>144</sup> (2) the patent infringer is a small company with little impact on the market of the patent holder,<sup>145</sup> or (3) the injunction would shut-down a substantial market,<sup>146</sup> such as the *RIM* case involving the Blackberry™.<sup>147</sup>

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<sup>140</sup> *Overstock.com, Inc. v. Furnace Brook, L.L.C.*, 420 F. Supp. 2d 1217, 1218 (D. Utah 2005) (stating that Furnace Brook has issued a number of cease and desist letters to potential patent infringers); *see also eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837, 1838 (2006) (stating that MercExchange settled with numerous companies by sending licensee letters to potential infringers).

<sup>141</sup> *H.H. Robertson*, 820 F.2d at 390 (stating "[e]ven when irreparable injury is presumed and not rebutted, it is still necessary to consider the balance of hardships.").

<sup>142</sup> *eBay*, 126 S. Ct. at 1842.

<sup>143</sup> CHISUM, *supra* note 12, at § 20.04 (1)(f)(i) (2006).

<sup>144</sup> *Gilbert & Barker Mfg. Co. v. Bussing*, 10 F. Cas. 348, 349 (C.C.S.D.N.Y. 1875).

<sup>145</sup> *Hewlett-Packard Co. v. Genrad, Inc.*, 882 F. Supp. 1141, 1153–54 (D. Mass. 1995); *see also Wang Labs. Inc. v. The Chip Merchant Inc.*, Civ. No. 93-893, 1993 U.S. Dist. LEXIS 20012 at \*18–19 (S.D. Cal. 1993) (stating that if a patent infringer is a small sole proprietorship that may be forced into bankruptcy if an injunction is granted shows a balance of hardships because the patent infringer may not be able to pay a monetary judgment).

<sup>146</sup> *Tyco Indus., Inc. v. Tiny Love, Ltd.*, 914 F. Supp. 1068, 1083 (D.N.J. 1996); *see also Am. Cyanamid Co. v. U.S. Surgical Corp.*, 833 F. Supp. 92, 124, 132–33 (D. Conn. 1993) (finding that there was greater hardship to the accused infringer because the patentee was a large, diversified company and if an injunction was granted against the distribution of the accused product, it would preclude the accused infringer from selling the entire line of products to hospitals; the potential for job losses at the accused infringer was greater than the potential for job losses at the patentee).

<sup>147</sup> CHISUM, *supra* note 12, at § 20.04 (1)(f)(i) (2006). *Compare z4 Techs. Inc. v. Microsoft Corp.*, 434 F. Supp. 2d 437, 442–43 (E.D. Tx., 2006) (finding that the balance of hardships for the patent infringer, Microsoft, of the resources, time, and expenses required to redesign the Windows and Office software significantly outweigh the hardships argued by z4 of the use of its intellectual property), *with Tivo, Inc. v. EchoStar Comm'ns Corp.*, 446 F. Supp. 2d 664, 669 (E.D. Tex., 2006) (finding that the hardship weighs in favor of granting a permanent injunction in that the patentee is continually losing business as the infringing company is allowed to produce and sell their product which directly compete with the patentee).

*4. The Patent Holder Must Demonstrate the Public Interest Would Be Disserved If an Injunction Is Not Granted.*

Donald Chisum states only rarely will the public interest be seriously affected by the grant or denial of an injunction in a patent infringement case.<sup>148</sup> The interests of the public are both in the protection of patents and the economic growth of industries. In the past, courts have placed a high public interest value on the maintenance and enforcement of a valid patent.<sup>149</sup> This high public interest in protecting valid patents should be maintained.<sup>150</sup> However, there are situations where the public interest of maintaining a valid patent is outweighed by other public interests.<sup>151</sup> These situations should be examined on a case-by-case basis with the merits of the case and surrounding circumstances.

*B. Congress Should Codify the Previously Proposed Changes to the Injunction Section of the Patent Reform Bill.*

In the House and Senate's most recent proposal of patent reform recommendations, they do not make a recommendation to change the injunction section, section 283.<sup>152</sup> These recent proposals were introduced after *eBay* in August 2006. It would be a mistake not to include the proposed changes to the injunction section. Congress must ensure this section is changed similarly to the earlier proposed House Bills.<sup>153</sup> Each of the earlier proposed House Bills includes the terms "irreparable harm" and "balance of hardships."<sup>154</sup> By including these terms, it is clear that Congress supports the *eBay* Supreme Court decision. Without including these terms, it leaves a question in the minds of subsequent courts as to whether a

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<sup>148</sup> CHISUM, *supra* note 12, at § 20.04(1)(f)(ii) (2006); *see also* Alliance Research Corp. v. Telular Corp., 859 F. Supp. 400, 406 (C.D. Cal. 1994) (stating "[t]he public has an interest both in protecting patent rights and ensuring that markets are competitive").

<sup>149</sup> *See* Jacobson v. Cox Paving Co., Civ. No. 89-1786 PHX PGR, 1991 U.S. Dist. LEXIS 17787 at \*60-61 (D. Ariz. 1991), *aff'd*, 949 F.2d 404 (Fed. Cir. 1991) (stating public policy favors the protection of the rights of patentees' valid patents and that the American public is not served by favoring short-term effects of competition in the marketplace over the long-term effects of decreased incentives for innovation under the patent laws); *Eli Lilly & Co. v. Premo Pharm. Labs*, 630 F.2d 120, 138 (3d. Cir. 1980) (stating "Congress has determined that it is better for the nation in the long-run to afford the inventors of novel, useful, and non-obvious products short-term monopolies on such products than it is to permit free competition in such goods").

<sup>150</sup> *Tivo, Inc. v. EchoStar Commc'ns Corp.*, 446 F. Supp. 2d 664, 670 (E.D. Tex. 2006) (finding that the public interest of maintaining a strong patent system is best served by enforcing the patent and granting an injunction to the patentee against the accused infringer).

<sup>151</sup> *z4 Technologies Inc. v. Microsoft Corp.*, 434 F. Supp. 2d 437, 443-44 (E.D. Tex. 2006) (finding that the public interest due to the enormous and undisputed reliance on Microsoft Windows and Office outweighs the public interest of protecting the patent system in this case and therefore not granting the injunction to the patentee).

<sup>152</sup> S. 1145, 110th Cong. (2007); H.R. 1908, 110th Cong. (2007).

<sup>153</sup> H.R. 5096, 109th Cong. (2006) (adding terms such as "irreparable injury" and "balancing of hardships" to the current section 283).

<sup>154</sup> H.R. 5096, 109th Cong. (2006) (each of these bills add to the current section 283 wording by adding terms such as "irreparable injury" and "balancing of hardships").

“general rule” of injunctive relief should be granted as previously recognized by the federal courts.

The proponents for the “general rule” feel the courts should continue to use the “general rule” as long as there is no Congressional intervention. Their stance is the decision in *eBay* should not overturn the historical precedent of the past one hundred years of using the general rule. This is why it is even more important Congress includes the revisions as stated by the previous House Bills in the injunction section of the patent reform bills.

#### IV. CONCLUSION

It is evident the four-factor test as pronounced in *eBay* must be followed as patent litigation moves forward. However, the district courts and the Federal Circuit should start to adopt rebuttable presumptions on the factors of irreparable harm and adequate remedy at law. This will help to ensure the patent holder retains the most power, while requiring the patent infringer to demonstrate these factors are not present in order to defeat the grant of an injunction.

It is also important Congress continues to move forward with the Patent Reform Act and include the changes to Section 283, Injunction to codify the language of the Supreme Court in *eBay*, such as “irreparable injury” and a “balance of hardships.” Adoption by Congress of these terms will continue to foster innovation and invention, especially with respect to injunctive relief in infringement cases.

These two actions will help to ensure that one of the main policies of the patent system, to reward innovation through the use of protection in the form of patents is maintained. This proposal protects legitimate inventors and patent holders, large or small, from big technology firms’ abuse of patented technology while also protecting those same big technology firms against the Patent Trolls. The two-fold proposal presented meets both needs while furthering innovation, and thus, the goals of the patent system.