2014-1802

United States Court of Appeals
for the
Federal Circuit

APPLE INC., A CALIFORNIA CORPORATION,
Plaintiff-Appellant,

v.

SAMSUNG ELECTRONICS CO., LTD., A KOREAN CORPORATION, SAMSUNG ELECTRONICS, AMERICA, INC., A NEW YORK CORPORATION, AND SAMSUNG TELECOMMUNICATIONS AMERICA, LLC, A DELAWARE LIMITED LIABILITY COMPANY,
Defendants-Appellee,

Appeal from the United States District Court for the Northern District of California in No. 5:12-cv-00630-LHK, Judge Lucy H. Koh

BRIEF OF *AMICI CURIAE* NOKIA CORPORATION AND NOKIA USA INC. IN SUPPORT OF NEITHER PARTY

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October 20, 2014

CERTIFICATE OF INTEREST

Counsel for *amici curiae* Nokia Corporation and Nokia USA Inc. certifies the following:

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

Nokia Corporation and Nokia USA Inc.

2. The real 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:

Not Applicable

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

Nokia Corporation has no parent corporation and no publicly held company owns 10 percent or more of its stock.

Nokia USA Inc.'s parent corporation is Nokia Corporation. Nokia Corporation owns 100 percent of the stock in Nokia USA Inc.

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:

Alston & Bird LLP: Patrick J. Flinn; John D. Haynes; Ryan W. Koppelman

Dated: October 20, 2014

/s/ John D. Haynes
John D. Haynes

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STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici are Nokia Corporation and Nokia USA Inc. ("Nokia").[1] Nokia is a leading innovator in the telecommunications industry. Nokia has cumulatively invested over $64 billion in research and development relating to mobile communications, and as a result of this commitment, currently owns more than 10,000 patent families. Nokia was one of the largest manufacturers of wireless handsets for many years, and continues to invest heavily in research and development, and to license and expand its industry-leading patent portfolio. For example, Nokia's recently formed Technologies business unit continues to develop and license innovations that are powering the next revolution in computing and mobility: the "programmable world" where intelligent connections bring millions of everyday objects online. This work includes a team of experts in areas including imaging and sensing, wireless connectivity and power management, advanced materials, and others.

Nokia has been involved in numerous patent cases in U.S. district courts, both as a plaintiff and a defendant, including cases where injunctive relief is sought by or against Nokia. Nokia is a significant patent owner that might seek injunctive remedies for patent infringement in U.S. district courts, and thus the appropriate

[1] No counsel for any of the parties authored any portion of this brief. No entity other than *amici curiae* Nokia Corporation and Nokia USA Inc. monetarily contributed to the preparation or submission of this brief. *See* Fed. R. App. P. 29(c)(5).

legal standards and their application to requested injunctive remedies may be at issue.

Nokia's interest in this case is to advocate for the appropriate statement and application of equitable and legal standards governing the level of protections available to patent owners, including the circumstances in which injunctive relief may or may not be appropriate. Companies such as Nokia must be assured that their past, present, and future substantial research and development efforts are properly protectable, and that upon an appropriate showing they are able to prevent unauthorized use of their patented technologies. Although Nokia does not take any ultimate position on the facts of this specific case, Nokia agrees with Appellant to the extent that Appellant argues that the district court committed certain errors in its statement and application of the Court's jurisprudence relating to irreparable harm and the adequacy of remedies at law under the injunction analysis.

SOURCE OF AUTHORITY TO FILE

Amici have attached this brief to a motion for leave of the Court to file as *amici*.

SUMMARY OF ARGUMENT

The district court's decision below creates certain unprecedented and unfair burdens on U.S. patent holders seeking to enjoin infringing conduct. If broadly applied, the district court's rationale could impose a categorical requirement that

an injunction against the use of a patented feature in a multi-component device would be appropriate only when the patented feature is shown to drive consumer demand for the product as a whole. Such a requirement, however, is contrary to law and sound policy. Consistent with the principles of equity, courts should properly consider the patentee's right to exclude in the context of the activity sought to be enjoined by analyzing all relevant factors at issue, including the scope of the injunction being sought. Categorical requirements should be rejected, and the equities of each case weighed appropriately based on the facts of the case. Where the requested injunction is narrowly tailored to prohibit only the use of the patented technology, there should be no categorical requirement that the patent owner demonstrate that the patented technology drives consumer demand for the entire product. Instead, the court should carefully consider the specific harms to the patentee under the particular facts of the case. Moreover, while consumer demand of a multi-component product may be relevant to demonstrating a nexus between certain types of harm and the patented feature, a showing of such consumer demand should not be required where the harm to a patent owner's proven reputation stems from something other than loss of sales of competing products, such as harm caused by the loss of the ability to exercise exclusive use of the patented feature, or harm to a company's reputation as an innovator.

If applied broadly, the district court's analysis will likely lead to granting compulsory licenses to infringers on many patented features, which although innovative, may not be shown to drive consumer demand for the entire product. Because many patents cover technologies that are important to multi-component products, but many such technologies may not necessarily drive consumer demand of the entire product, the district court's reasoning could preclude patent owners from ever obtaining an injunction, even if narrowly tailored, against unauthorized use of their patented innovations. Absent the ability to effectively enforce the right to exclude, patent owners will be forced to forfeit the ability to exclusively practice their patented inventions. Moreover, if patentees are unable to prevent unauthorized uses in the marketplace, then they may be effectively deprived of their right to grant an exclusive license to some set of their patent rights, which in turn would devalue those patent rights and stifle incentives for further innovation. In already negotiated agreements, this could result in an exclusive licensee losing the benefit for which it bargained, further limiting a patentee's ability to grant such licenses in the future. This imbalance should be corrected, as it is necessary to preserve the patentee's bundle of rights, including the right to exclusionary relief when an appropriate showing has been made.

Moreover, because the district court's ruling could effectively eliminate the potential of exclusivity for a wide, but undefined, range of issued patents, the

resulting uncertainty created by this rule may devalue such patents and reduce the incentive for leading innovators to invest in further research and development efforts – a result that runs counter to the express goals of the patent scheme set forth in the U.S. Constitution. Because patentees rely on predictability in the ability to protect their patented rights to continue their investments and explore new projects, the availability of the exclusionary rights when an appropriate showing is made must be preserved.

Irreparable harm can also stem from damage to a company's reputation as an innovator. For example, certain companies, like Nokia, are known as leaders and premier innovators in their respective industries. Such innovators must be able to maintain their reputations and goodwill as the source of their valuable patented innovations. Allowing an infringer to continue to use such patented inventions without authorization can improperly credit the infringer as the source of the innovation and thereby deprive the true innovator of the ability to maintain its reputation as a leading innovator in the relevant industry. The harm in such circumstances stems from the unauthorized use of the patented innovation, which unfairly attributes the innovation to the infringer, and deprives the patent owner of the ability to identify itself as the exclusive source of the innovation. Requiring a showing of consumer demand as a prerequisite to demonstrating irreparable harm

to a company's reputation as an innovator places an unreasonable burden on the patent owner and ignores the nature of the harm involved.

Where the harm involved is to the patent owner's reputation as an innovator, the proper inquiry is to consider how continuing use of the patented technology harms that reputation and whether money damages are adequate to remedy that harm. This inquiry requires an examination of the facts of the particular case, and should not involve any categorical rules. For example, contrary to the district court's suggestion, a separate showing of actual harm or confusion should not be considered a prerequisite to demonstrating reputational harm, nor should there be any per se requirement that the patent owner manufacture or sell products embodying the patent. Any such categorical requirements ignore the harm at issue and focus instead on the existence of competition, which is not required for harm to reputation to occur. Similarly, the presence of patent licenses covering the patented innovation should not automatically bar a finding of irreparable harm when the harm claimed is damage to a patentee's reputation as an innovator because such licenses could promote that reputation rather than detract from it. Lastly, when considering the particular facts regarding harm to reputation, more weight should be given to patent owners with greater reputations for innovation. The district court's suggestion that companies with "robust" reputations deserve

less protection unfairly provides such companies with less protection than companies lacking such a reputation.

As recognized by the Supreme Court, these sorts of categorical rules should be rejected, and the courts should instead analyze the specific facts present in each case to determine whether the harm complained of is present.

ARGUMENT

I. ANY CAUSAL NEXUS REQUIREMENT SHOULD BE COMMENSURATE WITH THE SCOPE OF THE INJUNCTION SOUGHT

In deciding whether to grant an injunction against a product to prohibit infringement of a patent covering a feature of that product, this Court has held that some showing of a "causal nexus" is required between the act of infringement and the harm to the patentee. *See Apple Inc. v. Samsung Elecs. Co.*, 735 F.3d 1352, 1364 (Fed. Cir. 2013). As stated by this Court, "[t]he purpose of the causal nexus requirement is to show that the patentee is irreparably harmed *by the infringement*." *Id.* at 1363 (emphasis in original). This requirement ensures that the harm complained of is actually related to the infringement and ensures that products containing diverse technologies are not enjoined when the harm is not attributable to the infringer's use of the patented feature. *See id.* at 1362 (noting that causal nexus analysis is more easily satisfied in simple products or

technologies possessing a small number of features which might be responsible for demand).

This rationale, however, logically applies only in situations where the scope of the injunction sought is broader than the infringing activity itself. When the injunction sought narrowly targets the found-to-be-infringing feature, the remaining features of the product become irrelevant to the analysis because the patentee is not seeking to enjoin use of those other features. The proper harm inquiry in such cases then, should focus on the patented feature and whether allowing the infringer to continue including that feature in its products causes irreparable harm to the patentee.

Indeed, under controlling precedent in at least the public interest analysis, the scope of an injunction sought in a patent infringement case is to be taken into account in determining whether to enjoin an infringing act. *See, e.g.*, *See Apple Inc.*, 735 F.3d at 1372 ("We see no problem with the district court's decision, in determining whether an injunction would disserve the public interest, to consider the scope of Apple's requested injunction relative to the scope of the patented features."); *see also i4i Ltd. v. Microsoft Corp*, 589 F.3d 1246, 1277 (Fed. Cir. 2009) ("In particular, the injunction's narrow scope substantially mitigates the negative effects on the public, practically and economically.").

When the scope of the injunction sought is narrowly tailored to address only the found-to-be infringing patented features, the risk that a patentee is attempting to "leverage its patent for competitive gain beyond that which the inventive contribution and value of the patent warrant" is minimized, if not non-existent.[2] *Apple Inc.,* 735 F.3d at 1360-61 (quoting *Apple Inc. v. Samsung Elecs. Co*., 695 F.3d 1370, 1374-75 (Fed. Cir. 2012)). And, therefore, requiring a patentee in such situations to also demonstrate that use of each patented feature is a leading driver of consumer demand for the entire product as a prerequisite to obtaining a narrowly tailored permanent injunction means the patentee has to demonstrate harms disproportionate to the injunctive relief it seeks, resulting in an unfair burden. *See i4i Ltd. v. Microsoft Corp.*, 598 F.3d 831, 862-63 (Fed. Cir. 2010) (granting an injunction against future sale of a word processing program containing the infringing technology due to the patented technology's centrality to the plaintiff's business and the circumstantial evidence that defendant's infringement had rendered the plaintiff's product obsolete, despite the fact that "the infringing custom XML editor relates to only a small fraction of [the defendant's] sizeable business").

[2] There are other considerations that may be relevant when standards-essential patents (SEPs) are at issue, but since the Apple patents-in-suit are not SEPs, those considerations will not be addressed herein.

Importantly, a patent confers on the patentee the right to exclude others from practicing its patented technology. *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 392 (2006); *Continental Paper Bag Co. v. Eastern Paper Bag Co*., 210 U.S. 405, 430 (1908) ("It hardly needs to be pointed out that the [patent] right can only retain its attribute of exclusiveness by prevention of its violation. Anything but prevention takes away the privilege which the law confers upon the patentee."). The analytical framework set forth in *eBay* balances that right against the equitable considerations that result from such exclusion. *eBay*, 547 U.S. at 391. But this balancing should weigh more in favor of the patentee when the scope of the injunction sought is narrowly tailored to the found-to-be infringing technology. In such situations, the infringer can either design around the patent, or remove the infringing feature, to avoid the narrowly-tailored injunction. The harm to the patentee is necessarily tied to the patented feature, because only that feature is being enjoined. Conversely, the only harm to the infringer is the inability to continue using the patented feature without permission from the patentee. But such harm should not be heavily weighted in the equitable inquiry, because an infringer has no right (like, for example, the patentee's right to exclude) to continue infringing activity without authority from the patentee. *Bell & Howell Document Mgmt. Prods. Co. v. Altek Sys*., 132 F.3d 701, 708 (Fed. Cir. 1997)

(rejecting argument that parties have a "right to infringe" for purposes of determining whether an injunction is appropriate).

Knowing that appropriately-tailored injunctions are still available to protect patent rights will also spur further innovation. For example, if an infringer is enjoined from use of a certain feature, a strong incentive will be created for the infringer to implement a new design that no longer infringes. *See*, *e.g.*, *i4i*, 598 F.3d at 863-64 (granting defendant a five month delay in the effective date of the injunction in order to design a software patch to remove the infringing functionality). This design-around process could lead to new alternative technologies and additional alternatives for consumers. At the same time, an injunction in this kind of situation preserves the patentee's right to exclude by ensuring that unauthorized uses are not generally permitted.

Nokia does not, however, suggest that the injunction analysis ends following a court's determination that the act of infringement has caused irreparable harm to the patentee. The remaining *eBay* factors – the adequacy of the remedies at law, the balance of hardships between the plaintiff and defendant, and whether the public interest is disserved by an injunction – of course, also need to be considered. *eBay*, 547 U.S. at 391. Each of these factors, similar to the irreparable harm factor, should be analyzed in the specific context of the infringing feature and the scope of the injunction requested, not the entire product containing the infringing feature.

Contrary to the analysis undertaken by the district court here, those additional factors are not to be analyzed in a vacuum. As this Court has previously held, "the issues of irreparable harm and adequacy of remedies at law are inextricably intertwined." *ActiveVideo Networks, Inc. v. Verizon Commc'ns., Inc*., 694 F.3d 1312, 1337 (Fed. Cir. 2012). In the decision below, the district court agreed that monetary damages were not calculable to remedy the patentee for the infringement, but nevertheless concluded that Apple failed to demonstrate irreparable harm. Other courts, however, have found irreparable harm satisfied where monetary damages could not be determined. *See, e.g.*, *Osborn v. Bank of U.S*., 22 U.S. 738, 749 (1824) ("All the cases where injunctions have been granted, to protect parties in the enjoyment of a franchise, proceed upon the principle, that the injury was consequential, not direct, and that it would be difficult, if not impossible, to estimate the damages."); *id.* at 844 (affirming injunction where inadequacy of monetary damages is an "injury [that] would, in fact, be irreparable); *Jayaraj v. Scappini*, 66 F.3d 36, 39 (2d Cir. 1995) ("Irreparable harm 'means injury for which a monetary award cannot be adequate compensation.'") (quoting *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979); *see also* 2 JOSEPH STORY & JARIUS W. PERRY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 959b at 156-57 n.1 (12th ed. 1877) (noting that injunctions are tools of equity used in "cases of great

injury where courts of law cannot afford an adequate or commensurate remedy in damages"); *eBay*, 547 U.S. at 393 (rejecting categorical rules denying injunctions, and instead requiring courts to rely on traditional principles of equity). Consistent with these principles, a showing of an inadequate remedy at law should support a determination that the harm was indeed irreparable. *See Paine Lumber Co. v. Neal*, 244 U.S. 459, 476-77 (1917) ("It is only where a threatened infringement will produce injury and damage for which the law can afford no remedy – such, for instance, as irreparable and continuing damage . . . that resort may be had to equity. . .").

II. THE DISTRICT COURT'S EROSION OF A PATENTEE'S RIGHT TO EXCLUDE WILL HARM TECHNOLOGY COMPANIES

A. The District Court's Rationale, If Broadly Applied, Would Effectively Eliminate A Patent Owner's Ability To Grant An Exclusive License For Many Patents

The district court's reasoning, if broadly applied, would likely strip many patentees of the exclusive rights granted under the Constitution and Title 35. In particular, patentees are provided with a "right to exclude others from making, using, offering for sale, or selling the invention throughout the United States." 35 U.S.C. § 154(a)(1); *see also* 35 U.S.C. § 271; U.S. CONST. art. I, § 8 cl. 8 (granting inventors the "exclusive right" to their discoveries); *eBay*, 547 U.S. at 395 (Roberts, C.J., concurring) (explaining "long tradition of equity practice" of

granting injunctions "upon a finding of infringement in the vast majority of patent cases" "is not surprising given the difficulty of protecting a right to *exclude* through monetary remedies that allow an infringer to *use* an invention against the patentee's wishes"). This Court agrees, noting that "[a] patentee's right to exclude is a fundamental tenet of patent law." *See Edwards Lifesciences AG v. CoreValve, Inc.*, 699 F.3d 1305, 1314 (Fed. Cir. 2012); *see also id.* ("Absent adverse equitable considerations, the winner of a judgment of validity and infringement may normally expect to regain the exclusivity that was lost with the infringement."); *Presidio Components, Inc. v. American Tech. Ceramics Corp.*, 702 F.3d 1351, 1362 (Fed. Cir. 2012) ("Of course the axiomatic remedy for trespass on property rights is removal of the trespasser.").

Subsumed within this right to exclude is the patentee's right to license (or not license) the patented inventions, as well as to specify the circumstances and limitations under which any such authorized use is permitted. For example, a patentee may choose to offer a single party an exclusive license to a set of patent rights, or to offer exclusivity in specific fields, or with respect to specific products.

Under the district court's reasoning, however, many patent owners and their exclusive licensees may be effectively deprived of this right because they may have a diminished ability to stop infringing uses of patented technology in multi-component products, unless the specific technology drives consumer demand for

the entire product under the required proof showing. In the telecom industry, for example, most patented technologies are used in multi-feature products and many patented features are not even necessarily customer-facing. Having to prove that consumer demand is driven by each such patented feature will often be too difficult, as can be seen in the case below. But having such a rule would allow infringers to continue to implement these kinds of patented features in their devices knowing that injunctive relief is likely not available to patent owners. In such situations, each infringer is effectively granted a compulsory license, and the patent owner is thereby deprived of its statutory right to exclude. *See Smith Int'l Inc. v. Hughes Tool Co*., 718 F.2d 1573, 1577-78 (Fed. Cir. 1983) ("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 . . . 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.") (abrogated on other grounds); *see also* Michael W. Carroll, *Patent Injunctions and the Problem of Uniformity Cost*, 13 MICH. TELECOMM. & TECH. L. REV. 421, 433 (2007) (explaining that patent policy favors finding irreparable harm in situations where a patentee has signed an exclusive license).

This cannot be the correct result. As a simplified example, while mobile phones necessarily have a user interface, the user interface may be comprised of a number of innovative features, one or more of which are patented. Any single patented feature of the phone's user interface, however, may not be readily shown to drive consumer demand for the phone as a whole. Under the court's rationale, assuming the patented features of a phone's user interface do not serve as a driver of phone demand, any such patented features included in the user interface would never be subject to an injunction against an infringer (in this example, a mobile phone maker) using such features in an unauthorized manner. This would be true even if alternative, non-infringing user interface features were available or if the features could be easily removed. Similarly, a patentee would have difficulty offering a third party an exclusive license to the patent rights covering the user interface features, because its unauthorized use by known infringers may not be prevented. This is tantamount to forcing the patentee to offer a compulsory license on its patented technology – a proposition this Court has rejected. *See e.g.*, *Hybritech Inc. v. Abbott Labs.*, 849 F.2d 1446, 1456-57 (Fed. Cir. 1988) (granting injunction after affirming principle that the "principal value of a patent is its statutory right to exclude" and noting that statutory right to exclude was designed to prevent infringers from being compulsory licensees).

This kind of result also runs counter to the Supreme Court's *eBay* decision, where it stated that the injunction test "do[es] not permit . . . broad classifications" or "categorical rule[s]." *eBay*, 547 U.S. at 393. The Supreme Court made no suggestion that the lack of a consumer demand showing for an entire product in a multi-component device precludes a patentee from obtaining narrowly-tailored injunctions. To the contrary, these are precisely the categorical rules that the Supreme Court cautioned against. *Id.* In other words, the exclusive rights granted under 35 U.S.C. § 271 are the same regardless of the subject matter covered by the patent, and once lost, that period of exclusivity cannot be regained. *See Continental Paper Bag Co.*, 210 U.S. at 430.

Rather, the proper focus should be on facts and circumstances relevant to the harm resulting from the infringement. In the case of an exclusive license, for example, the ongoing infringement of the patentee's technology causes harm by damaging the exclusive license rights granted to the licensee. This can be true even if the patentee itself is not directly practicing the patent. *See Trebro Mfg., Inc. v. Firefly Equip., LLC*, 748 F.3d 1159, 1171 (Fed. Cir. 2014) ("[T]he fact that [the patentee] does not presently practice the patent does not detract from its likely irreparable harm."). In such a situation, the irreparable harm analysis is focused on whether exclusive licensee rights are being deprived by the infringement. If it is,

the appropriate remedy is to enjoin unauthorized use of that technology and preserve the exclusive license rights.

Similarly, a patentee may wish to license only certain patented technology in conjunction with a broader technology package, thus preventing unauthorized parties from practicing its patented innovations outside of the patentee's preferred design. The availability of injunctive relief in this context is similarly necessary to assure that the patentee's right to offer a limited license to its patents is preserved.

B. Appropriately Tailored Injunctive Rights Are Necessary To Foster Further Research And Development

As recognized by the Constitution, patents are granted in order to "promote the progress of science." U.S. CONST. art. I, § 8 cl. 8. The ability to exclude others in the marketplace, upon an appropriate showing, from using a patentee's technology maintains predictability and incentivizes innovation by providing assurances to the patentee that they can protect their patented technologies and that unauthorized uses can be stopped. *See Sears, Roebuck & Co. v. Stiffel Co*., 376 U.S. 225, 229 (1964) ("Patents are not given as favors . . . but are meant to encourage invention by rewarding the inventor with the right, limited to a term of years fixed by the patent, to exclude others from the use of his invention."); *Fox Film Corp v. Doyal*, 286 U.S. 123, 127-28 (1932) ("A copyright, like a patent, is at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals, and the incentive to further efforts for the

same important objects.") (internal quotations omitted). This certainty and predictability also increases the value of patents and thereby promotes further innovation. *See, e.g.*, *Smith Int'l Inc*., 718 F.2d at 1578. Innovators, like Nokia, rely on this kind of predictability to support their continuing and future research and development efforts. *See eBay*, 457 U.S. at 393 ("[S]ome patent holders, such as university researchers or self-made inventors, might reasonably prefer to license their patents . . . .").

Absent the ability to obtain appropriately-tailored injunctions to prevent unauthorized uses of a wide, but undefined, range of technologies, U.S. patents will be devalued and innovation in complex technologies will be unduly stifled.

III. DAMAGE TO A PATENTEE'S REPUTATION AS AN INNOVATOR IS A HARM THAT IS IRREPARABLE AND NOT COMPENSABLE BY MONEY DAMAGES

As noted previously, certain companies are well-recognized in their respective industries as innovators. *Amici curiae* Nokia is one such company. Nokia has spent over $64 billion over the past two decades in researching, designing, and inventing groundbreaking advances in the telecommunications industry, many of which have been patented. Through this large investment in resources and capital over the years, Nokia has built a reputation as a leading innovator in the telecommunications industry. One's reputation as such an innovator is worthy of protection.

An infringer's unconsented use of a patentee's protected technologies necessarily damages a proven reputation as an innovator because it attributes the innovation to a different, in fact infringing, source. *Douglas Dynamics, LLC v. Buyers Prods. Co.*, 717 F.3d 1336, 1344-45 (Fed. Cir. 2013) ("Douglas's reputation as an innovator will certainly be damaged if customers found the same 'innovations' appearing in competitors' snowplows . . . ."). In other words, under the appropriate facts, the unauthorized infringement of the patentee's technology demonstrates a link between the infringement and the harm to the patentee's reputation. For example, an infringer's unauthorized use of a patented feature unfairly suggests or implies that the infringer is the origin of the feature, and thereby confuses the industry and the public as to the true source of that innovative feature. This kind of reputational harm is real, and once an inaccurate perception has been created, the harm may not be reversible or compensated through money damages alone. *See, e.g.*, *Parker v. Winnipiseogee Lake Cotton & Woollen Co.*, 67 U.S. 545, 551 (1862) ("A Court of Equity will interfere when the injury by the wrongful act of the adverse party will be irreparable, as where . . . the loss of trade . . . must ensue.").

That this type of reputational harm is irreparable is not surprising. Indeed, this Court has recently held that money damages are not adequate to compensate a patentee for the loss or damage of a patentee's reputation. *See Douglas Dynamics*,

717 F.3d at 1345 ("This court finds remedies at law inadequate to compensate Douglas for at least the reputation loss Douglas has suffered from Buyers's infringement."); *see also Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) (holding that damage to goodwill supported finding of irreparable harm because such damage was an intangible injury that could not easily be quantified).

The harm to a patentee's reputation as an innovator in these kinds of circumstances is premised on the unauthorized use of the patented innovation because the infringement results in the reputation of source being diluted. A separate showing of consumer demand as a requirement to establish irreparable harm to a patentee's reputation as an innovator is therefore unnecessary, and if mandated, poses an undue burden on the innovator. Indeed, this Court has recognized that the irreparable harm requirement for sales-based harms is distinguishable from "irreparable 'erosion in reputation and brand distinction.'" *Apple Inc.*, 735 F.3d at 1362.

Nor should a separate showing of "actual" harm to a patentee's reputation or evidence of actual confusion to the source of the innovation be required. *Douglas Dynamics*, 717 F.3d 1344-45 ("Douglas's reputation as an innovator *will certainly be damaged if* customers found the same 'innovations' appearing in competitors' snowplows.") (emphasis added). Under controlling precedent, the likelihood of

reputational harm, not evidence of actual harm, is sufficient to demonstrate irreparable injury to an innovator's reputation.

Moreover, there should be no requirement that a patentee demonstrate that it manufactures or sells products embodying the patented invention in order to be eligible to obtain injunctive relief when the established harm is reputational harm to an innovator. For example, injunctions may be an appropriate remedy in circumstances where an infringer uses patented technology embodied in a cellular chip, and the patentee would suffer harm by being forced to offer a compulsory license even though the patentee does not practice the claimed invention. *See Broadcom Corp. v. Qualcomm Inc*., 543 F.3d 683, 703 (Fed. Cir. 2008) ("Broadcom provided evidence of irreparable harm, despite the fact that it does not currently practice the claimed inventions."); *see also Trebro Mfg.*, 748 F.3d at 1171 (Fed. Cir. 2014) ("[T]he fact that Trebro does not presently practice the patent does not detract from its likely irreparable harm."). This reasoning applies equally to situations where the proven harm is to the reputation of an innovator.

Similarly, the fact that a patentee has previously licensed its patents in some way should not automatically preclude a finding of irreparable harm stemming from damage to the patentee's proven reputation as an innovator, and certainly there should not be a categorical rule to that effect. A patentee has the right to choose the manner in which it licenses its patents, including but not limited to, the

scope of any licenses granted, the parties which are licensed, and whether the license is exclusive or non-exclusive. This flexibility in licensing permits the patentee to control the source and quality of its innovations, and any unauthorized infringement may damage that ability because it inaccurately suggests to the public, including potential licensees and technology consumers, that the patented innovations are not worthy of judicial protection or are not innovative. This, in turn, could encourage third parties to view the lack of available injunctive relief as an invitation to use the patented inventions free of concern, precluding innovator patentees from being able to control the source and quality of their innovations by selectively licensing such patents on their own terms.

In addition, contrary to the district court's ruling, companies with "robust" reputations for innovation are more deserving of protection from reputational harm resulting from unauthorized uses of their inventions, not less so as a result of having worked for and obtained such a "robust" reputation. The district court's suggestion that such harm is unavailable to large, industry-leading and innovative companies is precisely the type of categorical ban that the Supreme Court has rejected in the injunction analysis. *eBay*, 547 U.S. at 393. Further, such a rule reverses logic and would not be applied fairly to different participants in a market. For example, while the district court suggests that the most innovative companies with "robust" reputations are somehow more resilient and immune from being

harmed, less innovative companies apparently may be able to claim the presence of such irreparable harm to their reputations. *Douglas Dynamics*, 717 F.3d at 1345 ("[T]his court again disagrees with the district court that Douglas should suffer some penalty for managing through great effort to maintain market share in the face of infringing competition."). Because such a rule would effectively force market leaders to suffer by affording more patent protection to companies with weaker reputations, it should be rejected.

The ability to rely on reputational harm in the injunction analysis under the appropriate circumstances is also consistent with the Supreme Court's *eBay* ruling which banned "broad classifications" or "categorical rule[s]" in the injunction analysis. *See eBay*, 547 U.S. at 393. Rather than applying overly broad and unduly burdensome rules having the effect of disallowing reputational harm as a cognizable basis for showing irreparable harm, the specific facts of each case should be analyzed.

CONCLUSION

For the reasons set forth above, *amici* urge this Court to reverse the district court's ruling concerning the appropriate standard to be applied when determining whether to award narrowly-tailored permanent injunctive relief targeted at preventing the infringing conduct, as opposed to the infringer's entire product. In particular, this Court should reject the district court's requirement that consumer

demand for an entire product need be demonstrated when the patentee seeks only to enjoin the use of certain features. A broad interpretation of the district court's ruling will erode a patentees' exclusive rights, devalue patents, and stifle innovation, and should therefore be rejected. Finally, this Court should affirm the principle that, under the appropriate circumstances, damage to a patentee's reputation as an innovator can support a finding of irreparable harm.

Date: October 20, 2014

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) and 32(a)(7)(B). This brief, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), contains 5,693 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word, in 14 Point Times New Roman.

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United States Court of Appeals

for the Federal Circuit

Apple Inc. v Samsung Electronics Co., Ltd., 2014-1802

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Undersigned counsel hereby certifies that on **October 20, 2014**, the foregoing **Brief for *Amici Curiae* Nokia Corporation and Nokia USA Inc. in Support of Neither Party** was filed with the Clerk of Court using the CM/ECF System, which will serve via e-mail notice of such filing to all counsel registered as CM/ECF users, including any of the following:

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October 20, 2014 /s/ John D. Haynes
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CERTIFICATE OF INTEREST

Counsel for *amici curiae* Nokia Corporation and Nokia USA Inc. certifies the following:

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

Nokia Corporation and Nokia USA Inc.

2. The real 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:

Not Applicable

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

Nokia Corporation has no parent corporation and no publicly held company owns 10 percent or more of its stock.

Nokia USA Inc.'s parent corporation is Nokia Corporation. Nokia Corporation owns 100 percent of the stock in Nokia USA Inc.

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:

Alston & Bird LLP: Patrick J. Flinn; John D. Haynes; Ryan W. Koppelman

Dated: October 20, 2014

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