No. 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-Appellees.

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

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CERTIFICATE OF INTEREST

Counsel for Defendants-Appellees certifies the following:

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

Samsung Electronics Co., Ltd., Samsung Electronics America, Inc. and Samsung Telecommunications America, LLC

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

N/A

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:

Samsung Electronics America, Inc. ("SEA") is a wholly-owned subsidiary of Samsung Electronics Co., Ltd. ("SEC"), a publicly held corporation organized under the laws of the Republic of Korea. SEC is not owned by any parent corporation and no other publicly held corporation owns 10% or more of its stock. No other publicly held corporation owns 10% or more of SEA's stock. Samsung Telecommunications America, LLC ("STA") is a wholly-owned subsidiary of SEA. No other publicly held corporation owns 10% or more of STA's stock.

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 are expected to appear in this court are:

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Dated: December 17, 2014

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STATEMENT OF RELATED CASES

Defendants-Appellees identify the following appeals as related:

Apple Inc. v. Samsung Elecs. Co., No. 2012-1507, 695 F.3d 1370 (Fed. Cir. 2012) (Prost, J., joined by Moore & Reyna, JJ.).

Apple Inc. v. Samsung Elecs. Co., No. 15-1171 (pending), docketed December 2, 2015, and consolidated with No. 15-1195 Cross-Appeal (pending) on December 12, 2015.

PRELIMINARY STATEMENT

This is the fourth appeal to this Court concerning Apple's motions for injunctive relief in two patent litigations concerning smartphones that Apple brought against Samsung Electronics Co. Ltd., Samsung Electronics America, Inc., and Samsung Telecommunications America, LLC (together, "Samsung") in the U.S. District Court for the Northern District of California (Koh, J.). In all three of the previous appeals, this Court reiterated that, to satisfy the irreparable harm requirement and to limit patents to their proper scope, injunctive relief requires a showing of causal nexus between any patent infringement and the asserted irreparable harm. Apple once again seeks to minimize that requirement. That effort should be rejected. The district court's order denying Apple a permanent injunction rests upon a detailed opinion that carefully applies well-established precedents of this Court to the facts of this case. That order was well within the district court's proper discretion and should be affirmed.

As in its three previous appeals, Apple fails to point to evidence in the record sufficient to justify a finding of causal nexus to lost sales. That is an especially daunting burden here given that the three patents at issue in this appeal, as in the prior appeals, cover only minor aspects of the complex technologies embodied in a smartphone. And here, as in Apple's prior efforts, Apple's evidence was far too generic to tie the patented features to any claimed lost sales.

Apple now seeks to evade this Court's causal nexus requirement by asserting two differences from its prior unsuccessful efforts. *First*, Apple emphasizes that it now relies on reputational harm in addition to lost sales, and suggests that the causal nexus requirement is inapplicable or automatically satisfied if a request for injunctive relief asserts irreparable harm in the form of diminished reputation. But nothing in this Court's precedents suggests that reputational harm creates a free pass to irreparable harm, nor did Apple demonstrate any such reputational injury at all, much less any flowing from infringement of its three narrow patented features. *Second*, Apple emphasizes the newly worded scope of relief it seeks, and asserts that the causal nexus requirement is inapplicable so long as a request for injunctive relief seeks to enjoin only the infringement and not sales of the product. That argument too is unavailing, for Apple's nominal aim at "features" rather than "products" does nothing to connect the features themselves to the supposed irreparable harm. Furthermore, Apple's contention is mere semantics, since an injunction targeting "features" in complex, technological "products" would equally force the "products" with those "features" off the market. Indeed, no less than a "product" injunction, a "feature" injunction threatens to unfairly sow fear, uncertainty, and doubt about the product in the marketplace; to hinder competition; and to grant overprotection to patents.

Apple's arguments should be rejected and the district court's order affirmed.[1]

COUNTERSTATEMENT OF ISSUE

Whether the district court acted within its discretion in denying Apple's motion for a permanent injunction where (i) as the district court properly found, Apple failed to show that infringement of the three patents at issue—covering minor elements of complex smartphones embodying many thousands of features—actually caused Apple any irreparable harm, and where (ii) as the district court properly found, Apple failed to show that monetary damages cannot adequately compensate any harm; and, in the alternative, where (iii) the balance of hardships weighs against an injunction, and (iv) the public interest disfavors an injunction.

COUNTERSTATEMENT OF THE CASE

This appeal arises from the district court's order denying Apple's motion for a permanent injunction as to three utility patents: U.S. Patent No. 5,946,647 ("the '647 patent"), U.S. Patent No. 8,046,721 ("the '721 patent"), and U.S. Patent No. 8,074,172 ("the '172 patent").

[1] This is an interlocutory appeal from the denial of injunctive relief, in which liability for infringement is assumed *arguendo*. On November 25, 2014, the district court awarded ongoing royalties and entered final judgment, and on the same day, Samsung filed a notice of appeal. A6547, A6548-49, A6550-51. In that appeal, docketed in this Court as Case No. 2015-1171, Samsung will challenge the jury's infringement and damages determinations on their merits.

A. The Patents At Issue

The ’647 patent is directed to a computer system in which an “analyzer server” detects patterns in data from other applications and automatically identifies them as email addresses or phone numbers or the like. A354; A365. In the words of the patent, the patterns are “structures.” A365. The “analyzer server” is programmed to link the detected structure to a specified computer subroutine to perform an action on the identified structure, such as making a phone call. *Id.* Asserted claim 9 requires that “the user interface enables selection of an action by causing the output device to display a pop-up menu of the linked actions.” A368.

The ’721 patent is directed to a device with a touch-sensitive display that may be unlocked using pre-defined gestures and instructions. Asserted claim 8 of the patent relates specifically to “one or more modules including instructions: to detect a contact with the touch-sensitive display at a first predefined location corresponding to an unlock image; to continuously move the unlock image on the touch-sensitive display in accordance with the movement of the detected contact … ; and to unlock the hand-held electronic device if the unlock image is moved from the first predefined location on the touch screen to a predefined unlock region on the touch-sensitive display.” A397.

The ’172 patent is directed to a particular form of providing word recommendations for text correction. Specifically, asserted claim 18 covers one type of word recommendation whereby a “current character string” is displayed in a first and second area of a touch screen display. A419-20. The user can replace a mistyped word (*i.e.*, the “current character string”) by selecting a delimiter or selecting a replacement word in the second area. *Id.* The user can also keep the “current character string” by selecting it in the second area. *Id.*.

B. Apple’s Complaint And The Preliminary Injunction Orders

Apple filed an initial complaint on February 8, 2012, alleging infringement of eight patents, including the three discussed above and U.S. Patent No. 8,086,604 (“the ’604 patent”). A6001-270. The ’604 patent concerns an apparatus for “unified search” that uses heuristic modules to search multiple data storage locations. As this Court has explained, “a device equipped with unified search allows the user to search the local memory of the device as well as the Internet by entering a single search query.” *Apple Inc. v. Samsung Elecs. Co.*, 695 F.3d 1370, 1372 (Fed. Cir. 2012) (“*Apple II*”).

On February 8, 2012, Apple moved for a preliminary injunction, seeking to prohibit Samsung from selling its Galaxy Nexus smartphone based on alleged infringement of the ’647, ’604, ’721, and ’172 patents. A6271-72. The district court denied the preliminary injunction for the patents now at issue—*i.e.*,

the ’647, ’721, and ’172 patents—finding that Apple had not shown that the features claimed by the patents were substantial drivers of consumer demand as required to satisfy the irreparable harm requirement. A6368. But the district court granted a preliminary injunction for the ’604 patent, which is no longer at issue in this appeal. A6372.[2] The court held that the ’604 patent, unlike the other patents, had a causal nexus to lost sales because it is core to the functionality of Apple’s Siri application, as shown by Apple’s survey evidence regarding the popularity of Siri and the importance of search to its functionality and consumer demand. A6353-57.

Samsung appealed, and Apple did not cross-appeal the denial of the preliminary injunction as to the ’647, ’721, and ’172 patents. A6374-75. On October 11, 2012, this Court vacated the preliminary injunction order on the ’604 patent, holding that the district court had abused its discretion in entering that injunction because Apple had failed to show a causal nexus to irreparable harm: “[T]he only pertinent evidence—Apple’s own survey evidence—shows that unified search is not one of the top five reasons consumers select Android smartphones. In this light, the causal link between the alleged infringement and

[2] After this Court’s denial of Apple’s request for a preliminary injunction on the ’604 patent, Apple dropped that patent from the case in its submission on case narrowing in the district court in June 2013. A6377.

consumer demand for the Galaxy Nexus is too tenuous to support a finding of irreparable harm." *Apple II*, 695 F.3d at 1376.

C. The Trial And Jury Verdict

At trial, Apple sought approximately $2.1 billion in damages from Samsung for alleged infringement of five patents: the three at issue in this appeal, as well as two others not at issue here because the jury found no infringement of those patents (Patent No. 7,761,414 and Patent No. 6,847,959). Apple accused ten Samsung products, starting with the Samsung Galaxy SII line of products introduced in 2011. As relevant to this appeal, the following evidence was presented at trial:

1. The Trial Evidence Concerning Consumer Demand

In 2012, Samsung developed a strategy to focus on brand development. A11686 (Pendleton). And that strategy succeeded. A11685 (Pendleton). By the end of 2012, Samsung was leading the market in both the "brand awareness and brand preference" indexes, and it was recognized as the "most viral brand in the world" in 2012 and 2013 for its exposure in social media outlets. A11626-27 (Sohn); A11685 (Pendleton). During that period, Samsung continued to spend billions of dollars in smartphone research and development, recognizing that innovation was a "key success factor." A11463 (Sohn). Samsung's advertisements leveraged those innovations, focusing on its products' "big

hardware benefits" such as "big screen[s], battery life, camera, and processor speed." A11689, A11688, A11685 (Pendleton); A11624-25 (Sohn). Samsung's focus on hardware features rested on research showing that "[t]hat's what consumers tell[] us that they really care about, and those are the big purchase decision drivers." A11689-90 (Pendleton). There was no evidence at trial that Samsung advertised the accused features in this case. A11690 (Pendleton).

Apple's leadership recognized Samsung's competitive challenge. In January 25, 2013, Phil Schiller, Apple's senior vice president of Global Marketing, sent an email to the head of Apple's ad agency, forwarding a *Wall Street Journal* article titled "Has Apple Lost Its Cool To Samsung?" and wrote "We have a lot of work to do to turn this around." A30151. The article he forwarded highlighted Samsung's "Next Big Thing" ad campaign and stated that Samsung had "capitalized on what Apple wasn't doing in the smartphone market," noting that, "as Apple stuck to one new model each year with a narrow price band, Samsung released multiple smartphones in various shapes and sizes and with features such as larger screens." A30152. The article quoted consumers as saying that Samsung's Next Big Thing ads and larger screen sizes were important purchasing factors. *Id.* An Apple presentation at a sales meeting similarly acknowledged that "[c]onsumers want what we don't have," and identified screen sizes larger than 4 inches and lower price points as the key drivers of demand. A30200.

2. The Trial Evidence Concerning Damages

Apple's damages expert, Christopher Vellturo, opined that Apple was entitled to damages for infringement of the '647, '172, and '721 patents, which included both lost profits and a reasonable royalty. A30117.

Samsung's damages expert, Dr. Judith Chevalier, a chaired professor at the Yale School of Management, found that lost profits were inappropriate in this case because, after reviewing marketplace performance, websites, advertising, and internal market research, she saw no evidence that people were buying Samsung phones rather than Apple phones because of the patented features. A12381-91. Dr. Chevalier testified that a reasonable royalty award of 35 cents per unit per patent was appropriate in the event the jury found the patents valid and infringed. A12432-44 (Chevalier).

3. The Jury Verdict

On May 5, 2014, a jury returned a verdict finding that nine Samsung products infringed one or both of Apple's '647 and '721 patents. A2650; A2653. For the '172 patent, the only dispute was as to invalidity, and the jury found the patent valid. A2655. The jury found willful infringement only as to the '721 patent, *id.*, but the district court held in its decision on Samsung's motion for judgment as a matter of law that there was no objective willfulness because "Samsung's invalidity defense was not objectively baseless." A3950. While

Apple had sought approximately $2.1 billion in damages for all five asserted patents, the jury awarded Apple $119.6 million—less than six percent of what Apple requested—for infringement of the three patents at issue. A2656.

D. The District Court's Denial Of Permanent Injunction

After trial, Apple moved for a permanent injunction to prevent Samsung from making, using, selling, or offering any "Infringing Features," defined as the features of the adjudicated products found to infringe the '647, '721, or '172 patents. A2697-98. The proposed permanent injunction also covered any product with a feature "not more than colorably different" from the Infringing Features. A2698. By that time, Samsung had ceased selling all of the accused products except for the Galaxy Note II and Galaxy S III, which allegedly infringe only the '647 patent. A21441; A2657.

On August 27, 2014, the district court issued an order (A1-42) denying Apple's motion for a permanent injunction, applying each factor in the four-part *eBay* test:

First, the district court held (A7-31) that Apple had failed to prove irreparable harm from the infringement. The court rejected Apple's argument that the causal nexus requirement does not apply to reputational harm, stating that "the Court finds no reason to depart from the Federal Circuit's guidance that a patentee must demonstrate a causal nexus between infringement and any alleged irreparable

harm—including injury to reputation." A7-8. The district court also found that Apple had failed to establish that infringement was likely to harm Apple's reputation, noting that: (1) Apple's sole witness on the issue, Mr. Schiller, "did not link any harm to infringement of the three patented features in question," A15, and indeed "conceded that he did not know if the patent claims at issue were used in Apple's products," A18; (2) Apple "did not identify any other evidence of reputational harm," *e.g.*, any surveys showing any harm to its reputation, A15; (3) "Samsung argues persuasively that Apple's reputation has proved extremely robust, weakening Apple's claim that it has suffered or will suffer irreparable harm to its reputation from infringement of only three patents," *id.* (internal citation omitted); and (4) Apple had licensed the patents to competitors, A16. The court concluded that "the patents at issue cover three features in complex smartphones that contain many different patented inventions," and "Apple has not demonstrated that the inclusion of three infringing features in Samsung's products irreparably damages Apple's reputation." A17-18.

The district court also found (A22-25) that Apple had failed to prove any causal nexus to irreparable harm based on lost sales. Apple relied on a conjoint study from its expert, Dr. John Hauser, but the district court noted (A22) that, in a prior lawsuit between Apple and Samsung, it had "identified numerous potential flaws with that conjoint analysis, finding that the survey could not account for

actual market prices, provided little information about the significance of any price increases supposedly attributable to the patented features, and inflated the value of the patents by overemphasizing the relevant features while inadequately presenting noninfringing alternatives." The court noted that Dr. Hauser's methods in the prior case and his "methods in the instant case were 'identical' with respect to his analysis of 'willingness to pay.'" A22. Moreover, the court explained (A23-24) that Samsung's experts had testified to the flaws in the Hauser survey: it omitted the major drivers of sales, overstated the scope of the claimed features, confused the respondents as to the nature of the patented features, and produced nonsensical results. While the Court recognized (A24-25) Apple's criticisms of the analysis of Samsung's experts, it held (A25) that those criticisms "do not rebut Samsung's critiques of Dr. Hauser's techniques or show that Apple's conjoint study in this case establishes a causal nexus." Thus, after considering all the conflicting expert testimony, the court concluded: "The weight of the evidence shows that Apple's conjoint study fails to demonstrate that the features claimed in the '647, '721, and '172 patents drive consumer demand for Samsung's infringing products." A25.

Second, the district court held (A31-35) that Apple had offered no evidence that its alleged reputational harm cannot be remedied by money damages. The court recognized that, in some cases, courts have found that reputational harm could not be remedied by money damages, but held: "[T]hese cases share a

common denominator: in each case, the patentee provided evidence to support the court's conclusion. By contrast, in the instant case, Apple offers no evidence that its alleged reputational harm cannot be remedied." A32. The court also held that Apple could not show the inadequacy of monetary remedies because, even if its "alleged lost sales are difficult to quantify," such a "determination does not overcome Apple's failure to demonstrate a causal nexus between its alleged harm and Samsung's infringement." A35.

Third, the district court held that the balance of hardships favors Apple because there was no hardship to Samsung in light of its ability to design around the infringing features. A35-40.

Fourth, the district court held that the public interest factor favors Apple again because Samsung can design around the infringing features. A40-42.

In conclusion, the district court held: "Weighing all of the factors, the Court concludes that the principles of equity do not support a permanent injunction here" because "Apple has not shown that it suffered any of these alleged harms *because* Samsung infringed Apple's patents." A42.

SUMMARY OF ARGUMENT

The district court acted well within its discretion in denying Apple a permanent injunction to prevent the sales of smartphones with thousands of patented features based on the infringement of three minor software patents with

no plausible link to smartphone sales. The *only* evidence Apple provides showing that the infringement caused harm is the conclusory statement of its own marketing head, Mr. Schiller, who conceded that he did not know if Apple practiced the patents, and expert testimony based on a survey that, as the district court properly recognized, was fundamentally flawed. Given the absence of any meaningful evidence of harm from the infringement, Apple principally argues that this Court should disregard the lack of a causal nexus or simply presume that it exists. But that contention conflicts with *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), this Court's precedent, the proper scope of patent protection, and the common-sense principle that a party is not entitled to an injunction if it cannot prove that it faces harm caused by the infringement.

1. The district court correctly held that Apple failed to show irreparable harm caused by the infringement. Apple argues that no causal nexus is required because the scope of its injunction is supposedly narrow. As this Court has recognized time and again, however, causal nexus is an inherent part of the irreparable harm requirement, so the scope of the injunction cannot remove this requirement. Moreover, because the targeted features exist within complex, technological products, the supposedly narrow injunction is, in practice, no different from the injunctions against product sales that Apple has previously sought and that this Court has ruled must satisfy the causal nexus requirement.

There also is no basis to overturn the district court's factual finding that Apple failed to prove a causal nexus between the infringement and the supposed harm to Apple. Apple asserts harm to reputation, but the only evidence on this point is Mr. Schiller's self-serving, conclusory, and unsupported testimony, which conflicts with the abundant evidence that no such harm occurred. And even accepting Mr. Schiller's testimony, he fails to link any supposed harm with the three patents at issue. It would be impossible for him to do so since he admitted he did not know if Apple's iPhones even used the claimed features.

Apple also asserts that it suffered lost sales, but there is no evidentiary basis to conclude that the three patented features at issue here drive consumer demand for smartphones. Indeed, Samsung did not advertise these features at all. Apple relies entirely on a discredited survey that: (1) did not provide reasonable, non-infringing alternatives; (2) omitted many of the major features that drive consumer decision-making; (3) relied on widespread misunderstanding among respondents of the features they were evaluating; and (4) resulted in absurd conclusions about consumers' willingness to pay. The district court was well within its discretion to discount that survey in favor of the much stronger, real-world evidence to the contrary.

2. The district court also correctly concluded that monetary remedies would be adequate to compensate Apple here. Apple produced no evidence at all that

harm to reputation could not be compensated monetarily. Samsung's expert explained the accepted ways to measure harm to reputation, and Apple did not even attempt to show that such methods would be inadequate here. Apple's argument that monetary remedies are inadequate to compensate for lost sales is likewise erroneous. Courts regularly find that lost sales are adequately compensated through monetary remedies. And at trial, Apple's expert did, in fact, quantify the supposed harm from lost sales, including downstream sales.

3. The balance of hardships favors Samsung. On the one hand, there is no hardship to Apple because the supposed infringement of patents covering only minor features of complex smartphones does not harm Apple. Moreover, by the time of trial, only two Samsung models were subject to ongoing claims of infringement, and only for a single patent (the '647 patent). On the other hand, the hardship of a permanent injunction to Samsung would be great because Apple almost certainly would use the broad injunction to attack products and features not accused in this case under the vague "not colorably different" standard. And as Apple has unjustifiably tried in the past, Apple will likely attempt to harm Samsung (and consumer choice) by sowing fear, uncertainty, and doubt among Samsung's carriers and retailer customers.

4. Finally, the public interest supports denial of the injunction because the public has a strong interest in preventing smartphones from being removed from

shelves or impounded at customs. In addition, the cost to the judiciary of administering the broad injunction here weighs heavily against a permanent injunction. Apple's only argument to the contrary is that enforcing patent rights is in the public interest, but there is no automatic right to an injunction, and Apple's generic argument fails to show how an injunction in this case would be in the public interest.

STANDARD OF REVIEW

This Court reviews the denial of a motion for a permanent injunction for abuse of discretion. *eBay*, 547 U.S. at 391. This Court "may find an abuse of discretion on a showing that the court made a clear error of judgment in weighing relevant factors or exercised its discretion based upon an error of law or clearly erroneous factual findings." *Innogenetics, N.V. v. Abbott Labs.*, 512 F.3d 1363, 1379 (Fed. Cir. 2008) (internal quotation marks omitted). "[T]he weight given to particular evidence falls well within the discretion of the court." *Acumed LLC v. Stryker Corp.*, 551 F.3d 1323, 1331 (Fed. Cir. 2008).

ARGUMENT

For a permanent injunction to issue, the movant must demonstrate: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy

in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay*, 547 U.S. at 391. The district court acted well within its discretion in denying an injunction upon finding that Apple had failed to demonstrate irreparable harm or inadequacy of monetary remedies. Moreover, the third and fourth factors also support denial of an injunction.

I. THE DISTRICT COURT PROPERLY FOUND THAT APPLE MADE NO SHOWING OF IRREPARABLE HARM

A. Apple Cannot Avoid This Court's Precedent Requiring A Causal Nexus Between The Infringing Conduct And Any Irreparable Harm

1. This Court Has Repeatedly Rejected Apple's Attempts To Evade The Causal Nexus Requirement

Apple has repeatedly challenged the causal nexus requirement, and this Court has repeatedly upheld it, holding that the irreparable injury required for an injunction must actually be caused by the infringing conduct. In *Apple Inc. v. Samsung Electronics Co.*, 678 F.3d 1314 (Fed. Cir. 2012) ("*Apple I*"), Apple "contend[ed] that it need not show a nexus in order to establish irreparable injury." *Id.* at 1323. This Court squarely rejected Apple's argument: "To show irreparable harm, it is necessary to show that the infringement caused harm in the first place." *Id.* at 1324.

In *Apple II*—the preliminary injunction appeal in this very case—Apple argued for a watered-down version of the nexus requirement, such that it could "make[] a case for nexus circumstantially, based on the popularity of an iPhone 4S

application called Siri." 695 F.3d at 1375. This Court disagreed, holding that the causal nexus requirement demands a link between the demand for the product and the patented feature: "To establish a sufficiently strong causal nexus, Apple must show that consumers buy the Galaxy Nexus because it is equipped with the apparatus claimed in the '604 patent — not because it can search in general, and not even because it has unified search." *Id.* at 1376.

In *Apple Inc. v. Samsung Electronics Co.*, 735 F.3d 1352 (Fed. Cir. 2013) ("*Apple III*"), Apple once again "argue[d] that the court erroneously adopted a causal nexus requirement," this time because it supposedly did not apply in the permanent injunction context. *Id.* at 1360. And again this Court rejected Apple's argument: "The reasoning in *Apple I* and *Apple II* reflects general tort principles of causation and applies equally to the preliminary and permanent injunction contexts." *Id.* at 1361. Apple further suggested that this Court's prior cases, including *Douglas Dynamics, LLC v. Buyers Products Co.*, 717 F.3d 1336 (Fed. Cir. 2013), did not require causal nexus, but this Court stated that "Apple's reliance on those cases is misplaced" because "there is no indication that any of the infringers in those cases challenged the existence of a causal nexus between their infringement and the patentees' alleged harm, so this court did not have occasion to address the issue." *Apple III*, 735 F.3d at 1361-62.

2. Apple's New Attempt To Evade The Causal Nexus Requirement Should Likewise Be Rejected

Apple now takes a fourth try at evading the causal nexus requirement. In the district court, Apple argued that it need not show a causal nexus for an injury to reputation. But contrary to Apple's suggestion, the nature of the harm—whether it be from brand injury or lost sales—is irrelevant if it is not caused by the infringement. The district court accordingly rejected Apple's argument, holding that "it is possible that Apple's reputation as an 'innovator' could be harmed if Samsung's *noninfringing* features are perceived as innovative, but that would not justify an injunction." A8.

Apple tries to change tack in this Court, now arguing that the scope of the injunction obviates the need for causal nexus. Because Apple argued below that nexus is not required *only* for reputational injury, Apple has waived any argument that its lost-sales injury does not require a causal nexus. *See* A2679; A2686 (Apple's motion for permanent injunction, arguing that "harm to 'reputation and brand distinction' … d[oes] not require proof of a 'causal nexus,'" but that "*Apple III* required a sufficient 'causal nexus' between Apple's sales-based injuries and Samsung's infringement"). In any event, causal nexus is plainly required for both lost sales and reputational injury, and Apple's argument that it satisfied that requirement should be rejected for several reasons.

First, Apple's argument (Br. 34) that the causal nexus requirement does not apply to a "narrowly-tailored request for injunctive relief" fails for the same reason that Apple's arguments have failed before. Causal nexus is not an additional requirement that may or may not apply in a given case; it is part and parcel of the irreparable harm requirement. As this Court has explained, "although the irreparable harm and the causal nexus inquiries may be separated for the ease of analysis, they are inextricably related concepts." *Apple II*, 695 F.3d at 1374. If the alleged infringement does not cause the harm, then the infringement cannot justify an injunction. "Thus, the causal nexus inquiry is indeed part of the irreparable harm calculus: it informs whether the patentee's allegations of irreparable harm are pertinent to the injunctive relief analysis, or whether the patentee seeks to leverage its patent for competitive gain beyond that which the inventive contribution and value of the patent warrant." *Id.* at 1375. This Court made the same point in *Apple III* in rejecting Apple's treatment of causal nexus as an inapplicable, separate factor outside of *eBay*'s four-factor test. 735 F.3d at 1361; *see also Apple I*, 678 F.3d at 1324.[3]

[3] Amicus Nokia makes the same error, arguing that this Court should focus on irreparable harm rather than whether the feature drives demand for the product, *see* Br. of *Amici Curiae* Nokia Corp. and Nokia USA Inc. at 8, when the two inquiries are in fact the same.

Second, Apple's effort to create a special exception for its "narrow" injunction, because it supposedly targets features rather than products, has no legal or logical basis. No decision has ever recognized that distinction as a way out of the causal nexus requirement.[4] To the contrary, *Apple III* rejected the same kind of "narrow" injunction argument Apple is making now. In that case, Apple argued that a delayed injunction obviated the need for a causal nexus. 735 F.3d at 1363. Apple quotes (Br. 33) this Court's statement that "an injunction 'more likely to prevent only infringing *features* rather than the sale of entire *products*' may be 'more equitable,' especially if coupled with a sunset period." *Apple III*, 735 F.3d at 1363. But Apple ignores this Court's holding—in the very next few sentences—that, *despite* the fact that such an injunction might be more equitable, it still did *not* obviate the causal nexus requirement: "More fundamentally, the purpose of the causal nexus requirement is to show that the patentee is irreparably harmed *by the*

[4] Amicus Ericsson suggests that district courts are divided on whether to apply causal nexus, *see* Brief of *Amicus Curiae* Ericsson Inc. at 18-19, but none of the cases they cite disregards the causal nexus standard. *See Brocade Commc'ns Sys., Inc. v. A10 Networks, Inc.*, No. C 10-3428 PSG, 2013 WL 140039, at *3 (N.D. Cal. Jan. 10, 2013) ("The court does not however have to decide this broader question [of causal nexus] here, because Brocade has proven a sufficient nexus …."); *Complex Sys., Inc. v. ABN AMRO Bank N.V.*, No. 08 CIV. 7497 KBF, 2014 WL 1883474, at *15 (S.D.N.Y. May 9, 2014) ("[T]he situation before this Court is not similar to that in *Apple.* It is not concerned with the sale of a consumer good …."); *Blackberry Ltd. v. Typo Prods. LLC*, No. 14-CV-00023-WHO, 2014 WL 1318689, at *12 n.17 (N.D. Cal. Mar. 28, 2014) ("'causal nexus' is implicit in this case").

infringement. Without such a showing, it is reasonable to conclude that a patentee will suffer the same harm with or without an injunction, thus undermining the need for injunctive relief in the first place." *Id.*; *see also i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 861-63 (Fed. Cir. 2010) (considering the scope of the injunction only as part of the analysis of public interest, not as part of the irreparable harm inquiry).

As recognized in *Apple III*, Apple's argument has a fundamental error of logic. The scope of a proposed injunction does not affect whether the plaintiff has been or will be irreparably harmed by the infringement. And in the absence of a causal link to irreparable harm, there is no entitlement to *any* injunction, however supposedly narrow it might be.

Third, Apple's proposed injunction is, in reality, no more "narrow" than the injunctions it has previously sought against Samsung, without success. Samsung sells products, not software features. As a result, an injunction against a feature embedded in a product *is* an injunction against the product until the feature is removed. It has the same effect as an injunction on the product itself, which also would apply only until the infringing feature were removed. For instance, Apple's proposed preliminary injunction in *Apple II* stated that Samsung is "enjoined from making, using, … or selling … Samsung's Galaxy Nexus and any product that is no more than colorably different from the specified product *and infringes* U.S.

Patent No. 5,946,647; 8,086,604; 8,046,721; or 8,074,172." A6272 (emphasis added). Thus, while the injunction purported to apply to products, it applied only to those products that contained the infringing feature. Here, the supposedly narrow injunction proposed by Apple sought to enjoin Samsung "from infringing … the '647 patent, '721 patent, and/or '172 patent, by … making, using, [or] selling … software or code capable of implementing any Infringing Feature, and/or any feature not more than colorably different therefrom." A2697-98. Because Samsung uses or sells the allegedly infringing features only as part of its products, the proposed injunction would bar sales of the products to the extent they contain the infringing feature. In short, the language of the proposed injunction does not change the fact that an injunction concerning one patented feature of a multi-feature product necessarily applies to the product if (and only if) it uses the feature.

Apple's argument implausibly suggests that *all* of the previous cases involving multi-feature products required causal nexus merely because the plaintiffs failed to use the magic words "infringe the feature" in their proposed injunctions. But if Apple's theory were accepted, then injunctions would be granted without regard for whether the infringing feature drives demand for the product. Apple presents no rationale for such a shift in the law. And as discussed above, irreparable harm caused by the infringement is a requirement, as set forth in *eBay*, regardless of the scope of the injunction.

Finally, Apple argues (Br. 33) that, because the injunction focuses on *features*, there is no basis for causation to focus on consumer demand for the *product*. But even if the scope of the injunction sought here were unlike that in all of the previous cases (and it is not), the feature exists only as part of the product. A requirement that the feature drive consumer demand for the feature itself (rather than for the product) does not make sense because consumers do not buy the feature. Thus, Apple provides no alternative to the requirement that the feature drive consumer demand for the product. Rather, under Apple's theory, the irreparable harm requirement might be satisfied even if consumers believed the feature insignificant or nonexistent—an untenable result with no support in law or equity.

B. The District Court Properly Found No Irreparable Harm Based On Injury To Reputation

1. Apple Failed To Show Any Actual Injury To Reputation

The district court did not err, let alone abuse its discretion, in finding (A12-20) that Apple had failed to show any injury to reputation. Apple offers only speculation that its touted reputation for innovation has been injured. During trial, Apple did not pursue a theory of harm based on reputational injury. Rather, its experts testified that the harm to Apple came in the form of lost profits and reasonable royalty damages, and that those damages amounted to approximately $2.1 billion. A11217. Apple provided no expert testimony on injury to reputation.

And in its motion for a permanent injunction after the trial, Apple produced no additional evidence on this issue, instead resting on the evidence produced at trial.

In contrast, Samsung submitted a declaration from Dr. Tülin Erdem, an expert from New York University with 20 years of research and teaching experience in branding and brand management, who explained that Apple could have tried to demonstrate harm to reputation through well-developed methods of analysis. A3299-3304. Apple chose not to make such a showing. It also chose not to rebut Dr. Erdem's testimony, including the evidence that the value of Apple's brand increased by 20% in 2013 and that, "[b]ecause the value of a company's brand and reputation are rooted in consumer perceptions of its own products and services, sales of Samsung's accused devices are highly unlikely to have any meaningful effect on the value of Apple's brand and reputation." A3306-08.

Lacking any expert testimony on harm to reputation or any empirical evidence on the subject, Apple relies (Br. 41-43) solely on snippets of testimony by its head of worldwide marketing, Mr. Schiller. Mr. Schiller's conclusory and unsupported testimony, however, is insufficient to establish reputational harm, especially in the face of overwhelming evidence to the contrary. Specifically, Apple cites (Br. 42) Mr. Schiller's statement that Apple makes "unique and special" products that are the "hero," but such a generic statement touting Apple's products (which is not even tied to the features at issue) says nothing about

supposed reputational harm in this case. As to Apple's claimed reputational harm, Mr. Schiller's only testimony was another generic statement that copying of Apple's products "confuses customers." *Id.* (quoting A10471). Not only did Mr. Schiller provide no substantiation for his surmise, he did not even claim there was any actual harm to Apple's brand or reputation. Thus, the sum of Mr. Schiller's testimony on reputational harm was a cursory, unsupported supposition that copying can confuse consumers and can hurt Apple, without any explanation or proof that it had actually happened. Courts routinely dismiss such conclusory testimony of a party's own executive as insufficient to show harm to reputation.[5]

[5] *See, e.g.*, *Purdum v. Wolfe*, No. C–13–04816 DMR, 2014 WL 171546, at *9 (N.D. Cal. Jan. 15, 2014); *iCall, Inc. v. Tribair, Inc.*, No. C–12–2406 EMC, 2012 WL 5878389, at *13-14 (N.D. Cal. Nov. 21, 2012); *ConocoPhillips Co. v. Gonzalez*, No. 5:12–cv–00576–LHK, 2012 WL 538266, at *3 (N.D. Cal. Feb. 17, 2012); *Dotster, Inc. v. Internet Corp. for Assigned Names & Numbers*, 296 F. Supp. 2d 1159, 1164 n.2 (C.D. Cal. 2003); *Red Bend Ltd. v. Google, Inc.*, No. 09–cv–11813–DPW, 2011 WL 1288503, at *20 (D. Mass. Mar. 31, 2011).

Apple cites (Br. 41) two cases for the proposition that courts accept executive testimony of reputational harm, but in both cases, the testimony was more than conclusory and there was not, as here, contrary evidence. *See S. Snow Mfg. Co. v. SnoWizard Holdings, Inc.*, No. 06-9170, 2014 WL 1652436, at *7 (E.D. La. Apr. 24, 2014) (relying on the executive's explanation that the patent infringement caused his business to lose out on referrals); *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, No. 07-cv-331, 2013 WL 3043668, at *3 (D. Nev. June 17, 2013) ("Halo has demonstrated that Pulse's infringement has contributed to a decrease in customer goodwill towards Halo …."). Moreover, Apple never asserted any trademark or trade dress claim in this case, undermining any suggestion that there was, in fact, likely consumer confusion. Indeed, in prior litigation, Apple abandoned claims that consumers were likely to be confused, after its experts

Mr. Schiller also later refuted his own testimony on the subject. When confronted with an email stating that "Apple['s] brand [is] slipping," Mr. Schiller stated: "I completely disagree …. I don't agree with his comments." A10530. In response to a question about his displeasure with Apple's advertising, and its launch of a new branding campaign in 2013 for the first time in 16 years, Mr. Schiller further stated: "I began a process to turn around our advertising that had nothing to do with the situation at Samsung." A10541-42. Such testimony that Apple's brand did not slip and its brand advertising had nothing to do with Samsung is inconsistent with Apple's claim of reputational harm.

In addition, Mr. Schiller and other Apple executives testified that far more publicized and significant issues had no negative impact on the Apple brand. These included Apple's antenna problems with the iPhone 4, an event so highly publicized and problematic it became publicly known as "AntennaGate"; claims of poor working conditions at its overseas manufacturing facilities after widespread reports following a worker's suicide; and Apple's highly criticized maps application launched with iOS 6, an event so negatively reported on that Apple's CEO issued a public apology letter. A3837-42; A10516 (Schiller); A3305-06.

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conceded that no such confusion had occurred and was not likely. A50126; A50341-42; A50343-44; A50665-66.

Apple argues (Br. 35) that, because Apple and Samsung are competitors, reputational harm can be presumed. But this Court necessarily rejected the idea that direct competition creates a presumption of harm in its prior injunction decisions between these very parties. And any such presumption would be inconsistent with the Supreme Court's rejection of "categorical" rules in deciding entitlement to injunctive relief. *eBay*, 547 U.S. at 394. Apple relies on *Trebro Manufacturing, Inc. v. Firefly Equipment, LLC*, 748 F.3d 1159 (Fed. Cir. 2014), but in that case the competition occurred "in the small, niche sod harvester market" where "Trebro sells only roughly eight sod harvesters per year," and "[t]he opportunities to attract customers and make sales are thus scarce in this tight market." *Id.* at 1170 The market for smartphones obviously does not resemble such a market.

Apple also errs in trying (Br. 34-35) to create a five-factor test for reputational harm out of *Douglas Dynamics*. *Douglas Dynamics* did not purport to create any such test, but rather made a fact-specific analysis of whether there was actual harm to reputation. Apple relies (Br. 40-41) upon the statement that "Douglas's reputation as an innovator will certainly be damaged if customers found the same 'innovations' appearing in competitors' snowplows," 717 F.3d at 1344-45 (emphasis omitted), to support the proposition that "the ***mere likelihood of future*** reputational injury" suffices even "without any evidence of actual harm."

But *Douglas Dynamics* did not suggest that evidence was unnecessary or that "an innovator will certainly be damaged," 717 F.3d at 1344-45, in ***all*** cases. Rather, its conclusion depended on the particular facts of that case, where the patent (unlike here) concerned the most fundamental aspect of the product—namely, a "snowplow assembl[y] for mounting on the front of a truck"—and the patent "claims a snowplow assembly that can be conveniently mounted on a vehicle and removed as a single unit." *Id.* at 1339. As the district court correctly explained: "Apple's interpretation of *Douglas Dynamics* would essentially create *a per se* rule in cases where the patentee is an innovative company, forcing a finding of irreparable harm wherever the infringer is a direct competitor. This is at odds with the flexible and equitable nature of the irreparable harm inquiry." A13.

In any event, the key factors present in *Douglas Dynamics* are not present here. In *Douglas Dynamics*, the infringer "marketed itself effectively as [the patentee] at half the price." 717 F.3d at 1344. There is no evidence that Samsung marketed itself that way. And while Apple cites (Br. 37) testimony that Samsung is a "fast follower," it takes that statement out of context, for the testimony concerned only Samsung's reputation in the past. Samsung's Chief Marketing Officer Todd Pendleton in fact rejected the notion that Samsung was a "fast follower" in the relevant time period. Specifically, Mr. Pendleton explained that, between 2012 and 2014, Samsung "launched nine flagship devices in the time that

[Apple] launched three," offering a number of unique features that Apple could not yet provide customers (such as bigger screens, near field communications technology, an electronic stylus, and faster 4G cellular communication), and noted that "it's really hard to be following something when you're creating the whole category with new form factors and new product[s]." A11709-10 (Pendleton); *see* A3022-23; A11703-08. Thus, the district court correctly found that "the record indicates that Samsung's products are also reputable," and that "Apple has not identified specific evidence that Samsung's infringing *products* are perceived as 'less prestigious,' or that Samsung's products have been marketed as '[Apple's] at half the price.'" A16 (quoting *Douglas Dynamics*, 717 F.3d at 1344, 1345).

Apple overreaches even further by repeatedly citing (Br. 16, 38-39, 48) Samsung's counsel's statements after trial to demonstrate that, absent an injunction, observers will believe that Apple does not enforce its intellectual property rights. The district court properly rejected that argument, finding that, given Apple's vigorous pursuit of patent litigation, "there is little established risk that any customers or business partners will believe that Apple does not enforce its patent rights." A18-19. Unlike in *Douglas Dynamics*, where the infringer's expert "agreed [that] Douglas's reputation would be damaged if its dealers and distributors believed it did not enforce its intellectual property rights," 717 F.3d at 1345, no such evidence was presented here. In any event, Apple omits to mention

that it was Apple founder Steve Jobs himself who declared a "Holy War" on Android (A30388)—a statement to which Samsung's counsel was responding.[6] Given the highly publicized nature of this litigation and (to use Apple's own words) its campaign of "thermonuclear" patent litigation against competing smartphone manufacturers,[7] any attempted analogy to the *Douglas Dynamics* testimony fails.

2. Apple Failed To Show That Infringement Of The '721, '172, Or '647 Patents Caused Any Reputational Harm

In addition to failing to show reputational harm at all, Apple also failed to provide any evidence to link any alleged reputational harm to infringement of the three specific patents at issue. The district court correctly found (A15)—and acted well within its discretion in finding—that infringement of the three minor patents here would not affect Apple's robust reputation. Apple disputes (Br. 40) the district court's requirement of "actual injury" to reputation by equating it with "actual, quantifiable injury" and then saying that there is no need to quantify. In fact, the district court did not require quantification, but evidence, which was lacking for several reasons.

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[6] *See* A50881-84.

[7] In addition to Apple-Samsung cases, *see, e.g.*, *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286 (Fed. Cir. 2014); *Apple Inc. v. High Tech Comp. Corp.*, Nos. 10-544-GMS, 10-166-GMS, 10-167-GMS (D. Del.).

First, as discussed above, Apple relies entirely on Mr. Schiller's testimony, but as the district court correctly found, "Mr. Schiller did not link any harm to infringement of the three patented features in question." A15. Indeed, Mr. Schiller conceded that the harm he asserted was not based on the alleged infringement:

> Q. Okay. So when you were talking about that effect, you weren't talking about the effect of anyone using the particular claims that are asserted in this case because you don't even know what those claims are?
>
> A. I was talking about the totality of all of the copying, which include[s] many things, and not about any specific claim assertion.

A10483. Mr. Schiller even acknowledged that he did not know if any of the patent claims at issue were used in Apple's smartphones, A10486-87, thus conceding that he could not identify any consumer association of the patents at issue with Apple's products. If Apple's own worldwide marketing head does not associate the patented claims with Apple, it is implausible that consumers do. And if consumers do not associate the patented claims with Apple, there can be no injury to Apple's reputation based on Samsung's purported infringement.

Apple asserts (Br. 15, 41) that Mr. Schiller did link the supposed reputational harm to infringement, but none of the testimony Apple cites says anything about infringement. For instance, Apple asserts (Br. 42) that "Mr. Schiller also explained Apple's ability to preserve its unique features, and promote them as the 'hero,' is undercut ***each time*** Samsung competes with Apple using

products that incorporate Apple's own patented features." The testimony that Apple quotes, however, does not make any statement about each time Samsung competes or about Samsung's infringement, but rather makes only a generic statement about the effect of copying in response to a question about whether "copying, as such, causes Apple products problems in marketing." A10470-71.

Apple argues (Br. 43) that "the district court's reasoning unfairly makes it more difficult for a patentee to show irreparable harm where, as here, the defendant's infringement has been so wide-ranging that it is not limited to the patents-in-suit." But irreparable harm must be tied to the infringement in the suit, not to generalized assertions of other supposed infringement that has not been alleged (let alone adjudicated). To the contrary, Apple's contention is inconsistent with this Court's prior ruling in this litigation. *Apple II*, 695 F.3d at 1376 ("To establish a sufficiently strong causal nexus, Apple must show that consumers buy the Galaxy Nexus because it is equipped with the apparatus claimed in the '604 patent — not because it can search in general, and not even because it has unified search.").

Second, Apple cites no record evidence that any infringement of the patents on which the verdict rests had any impact on Apple's reputation—because none exists. The overwhelming evidence (including Apple's own consumer research and Mr. Schiller's admissions) is that consumers do not focus on minor features

like those at issue here, and thus, there is no basis for concluding that the claimed Samsung infringement has any impact on consumer perceptions. *See* A3021. The analysis of Samsung's expert, Dr. Chevalier, of consumer and professional reviews of the iPhone also showed that virtually none mentions the three patents. *See id.*; A2999-3022; A12381-89 (Chevalier). Dr. Erdem also explained why such an impact does not exist here: "Because the functionalities associated with the patented features are of limited importance to consumers, they are likely to play a limited role in forming consumers' perceptions of Apple products and the company that sells them." A3307-08. Apple did not rebut this expert testimony.

Third, the district court correctly found that "Apple's reputation has proved extremely robust, weakening Apple's claim that it has suffered or will suffer irreparable harm to its reputation from infringement of only three patents." A15 (citation omitted). Apple argues (Br. 43) that this Court rejected an argument based on robust reputation in *Douglas Dynamics*, but *Douglas Dynamics* simply stated that maintaining market share did not disprove harm, 717 F.3d at 1345; there was no suggestion that a robust reputation was irrelevant. And while Apple argues that it is unfair to be punished for having a robust reputation, the lack of an injunction is not a punishment. An injunction is the proper remedy only if the patentee has suffered irreparable harm; if there is no irreparable harm (for whatever

reason) or that harm is not the result of the infringement, then there is no basis for an injunction.

Fourth, where Apple does not practice its own claims, infringement of those claims cannot harm Apple's reputation. Apple conceded that it never practiced the relevant claim of the '172 patent, A10697, and while Apple asserts that it practices the '647 and '721 patents, the evidence is to the contrary. *See* A13 & n.3 (district court acknowledging but not resolving this dispute). For the '647 patent, Apple relies (Br. 7, 59 n.11) on the testimony of Thomas Deniau, but nothing in Mr. Deniau's testimony suggests that Apple uses an outdated client-server architecture or "links" that form a "specified connection," as required by the properly construed claims. *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1304-07 (Fed. Cir. 2014).[8] And Apple's most recent operating system, iOS7, does not practice the '721 patent. To unlock the iOS7 lock screen, a user can touch anywhere in the left portion of the screen and simply move in a roughly left to right direction. A11993. There is

[8] Mr. Deniau did not use the words "server" or "specified connection" in his testimony at all. A10790-812. Nor did he ever describe the structure of Apple's software, the way it makes (or does not make) "links" between structures and actions, or whether Apple's software contains an "action processor," as that term was construed by the district court. *Id.* Nor did Mr. Deniau discuss the structure of the relevant code or provide any comparison of any Apple device to the properly construed claims.

no "unlock image" with which the user must make contact, as required under the language of the patent claim. *Id.*[9]

As for Samsung, the only three accused devices still for sale at the time of trial were the Galaxy S III, the Galaxy Note II, and the Galaxy Tab II 10.1. A20547. The jury found that the Galaxy Tab II 10.1 did not infringe, and that product was not even accused of infringing the patents at issue in this appeal. A2651-52, A2657. Apple did not accuse the Galaxy S III or the Galaxy Note II of infringing the '721 and '172 patents. And Samsung has not launched a product including the '721 and '172 patented features in years. A2657; A11300-01; A21441. Apple argues (Br. 47) that it need not show that either it or Samsung practices the claims, but failure to practice is a substantial factor that confirms the other overwhelming evidence that no causal nexus to irreparable injury exists here.

Fifth, as the district court correctly found (A16-17), Apple's licensing of the patents also belies its argument that infringement harms its reputation. Apple argues (Br. 46) that its "licenses with Microsoft and HTC each include anti-cloning provisions," but that does not change the fact that other companies can use the

[9] Although Apple notes (Br. 9-10) that its expert contended that iOS7 practices claim 8 of the '721, he did not identify any "unlock image." A12908-10. Accordingly, the iOS7 lock screen does not satisfy at least the "detect a contact … at a first predefined location corresponding to an unlock image" and "continuously move the unlock image … in accordance with movement of the detected contact" limitations of claim 8. A11994; A12908-10; A397.

features Apple seeks to enjoin use of here. As the district court correctly explained, "Apple cannot argue that Samsung's use of patented features will damage Apple's reputation for exclusivity if these features are not in fact exclusive to Apple, due to licenses to competitors." A20. This finding alone defeats any claim of reputational harm. Apple has the burden to prove clear error in the district court's factual findings, and Apple cannot satisfy its burden where it has not produced any evidence that Microsoft and HTC cannot and do not use the patented features.

Finally, *Douglas Dynamics* does not weaken Apple's obligation to show that Samsung's infringement of the three specific patents at issue caused injury to its brand or reputation. This Court already rejected Apple's contention that there is any tension between *Douglas Dynamics* and the causal nexus requirement, and explained that "there is no indication that any of the infringers in those cases [including *Douglas Dynamics*] challenged the existence of a causal nexus." *Apple III*, 735 F.3d at 1362; *see also* A9. Moreover, as discussed above, there is no legal basis to treat reputational harm differently than harm to sales for purposes of the causal nexus requirement. Apple's erroneous argument, if accepted, would mean that any company claiming a reputation as an innovator can obtain an injunction against a competitor merely by alleging (without evidence) that infringement has caused reputational harm. Such a result would run afoul of *eBay* and would impermissibly reinstate a presumption of injunctive relief.

C. The District Court Properly Found No Irreparable Harm Based On Lost Sales

The district court was also correct in finding (A31) that "Apple has failed to demonstrate irreparable harm due to lost sales, nor any causal nexus between Samsung's infringement and the alleged harm." There was no error, let alone clear error, in the district court's factual finding that Apple failed to prove that the three patented software features at issue in this appeal, taken individually or together, drove consumer demand. Samsung's evidence showed that the "big purchase decision drivers" were major hardware features like screen size and connectivity and that Samsung did not advertise the accused software features because they are not "drivers for purchasing a phone." A11689-90 (Pendleton). Apple's evidence fails to prove otherwise, and certainly fails to show clear error by the district court.

1. The Hauser Survey Shows No Causal Nexus To Lost Sales

The district court correctly found that "[t]he weight of the evidence shows that Apple's conjoint study" conducted by its expert Dr. Hauser "fails to demonstrate that the features claimed in the '647, '721, and '172 patents drive consumer demand for Samsung's infringing products." A25. The district court found that Apple had failed to overcome "Samsung's critiques of Dr. Hauser's techniques," *id.*, and Apple here fails (Br. 52-59) to address any of those criticisms

of Dr. Hauser's survey. Nor, in any event, can Apple salvage the Hauser survey, for it is fundamentally flawed.[10]

First, the Hauser survey does not provide reasonable, non-infringing alternatives that are needed to focus respondents on the specific patented features. As a result, the Hauser survey fails to satisfy the requirement that the causal nexus "inquiry should focus on the importance of the claimed invention in the context of the accused product, and not just the importance, in general, of features of the same type as the claimed invention." *Apple III*, 735 F.3d at 1364 (quoting *Apple II*, 695 F.3d at 1376). For instance, the survey isolates "autocorrect" as a feature to be

[10] In *Apple III*, this Court vacated and remanded a limited portion of the district court's order denying a permanent injunction in a separate case between the parties in order to permit Apple to try to show causal nexus based on a similar conjoint survey by Dr. Hauser that "purported to show the 'price premium' that Samsung customers would pay for smartphones and tablets with Apple's patented features." 735 F.3d at 1367. On remand, the district court rejected Apple's renewed motion for permanent injunction, ruling that Dr. Hauser's survey failed to show the requisite causal nexus. A50147-49 (criticizing Dr. Hauser for measuring "market demand for the patented features in a vacuum, without relation to the actual price or value of the devices" and for failing to account for numerous other features that "are highly important to consumers" such as GPS, processor speed, battery life, etc.). As the district court summarized that ruling here, "the survey could not account for actual market prices, provided little information about the significance of any price increases supposedly attributable to the patented features, and inflated the value of the patents by overemphasizing the relevant features while inadequately presenting noninfringing alternatives." A22. Apple did not cross-appeal that ruling (or any aspect of the denial of permanent injunction) in *Apple Inc. v. Samsung Elecs. Co.*, No. 2014-1335 (pending). And the district court recognized that Dr. Hauser's "methods in the instant case were 'identical' with respect to his analysis of 'willingness to pay' in the first lawsuit." A22.

valued—as if the '172 patent covered autocorrect in all its forms. In fact, the '172 patent is directed only to one particular form of providing word recommendations for text correction, and multiple non-infringing alternatives were available. A6363-65; A12037-39 (Wigdor); A11300-01 (Vellturo). Nonetheless, the survey simply asked respondents whether they would value a phone with autocorrect more than a phone without autocorrect. *See* A30046 ("Without [automatic word correction], pressing space or period would retain your original text …; if you want to replace your original text, you would need to select the suggested [change] yourself."). This tells one nothing about whether the specific patented feature drives demand. The same flaw holds true for the '647 patent: the Hauser survey did not present reasonable, non-infringing alternatives to "quick links," instead presenting an alternative phone devoid of anything close to this feature. A30032 ("Without [quick links], if you wanted to take various actions, like calling or texting a number, you would have to manually identify and select the exact text …."); *see also* A6415.[11]

Second, the Hauser survey overstates the importance of the three patented features at issue here by testing only a small number of features that are part of complex smartphone devices comprised of a host of features from hardware to software to communications and design. Indeed, smartphones can embody

[11] Dr. Hauser did not even test the '721 patent for smartphones. A6385.

hundreds of thousands of patents. A3006. A conjoint study is not a useful tool for estimating market outcomes where, as here, major features are omitted. A12081-84; A3522-3540. Dr. Hauser's survey omitted many of the major features that drive consumer decision-making—including camera quality and battery life—rendering his survey incapable of accurate marketplace predictions. A12081-84; A12316; A3552.

Third, a pretest of Dr. Hauser's survey conducted by Samsung's expert, Dr. David Reibstein, a chaired professor at Wharton, showed widespread confusion and misunderstanding among respondents of the features they were supposedly evaluating. A12089-95 (Reibstein); A30276-311; A3504-3522 (96% confusion for '647 patent, 69% for '172). This kind of widespread misunderstanding rendered Dr. Hauser's survey results useless for determining the role of the patents in consumer decision-making. A12094 (Reibstein); A3498-540. Apple made no effort to rebut Dr. Reibstein's analysis based on his pretest.

Fourth, the survey produced invalid results, including implausibly inflated willingness-to-pay numbers. A12109 (Reibstein); A3501, A3544-47; *see also* A50148. In particular, the survey results produce the absurd result that consumers would be willing to pay about $102, on a phone that cost $149, for the automatic word-correction feature claimed in the '172 patent *alone*. A12109-10. That result is implausible on its face and demonstrates the inherent flaws in the Hauser survey.

The survey results also incorrectly predicted actual purchasing behavior of the survey participants, and failed to accurately predict actual sales in the marketplace. A12110 ("So using Professor Hauser's data, if you hold all the phone features constant, what does this show? A. This shows that 52 percent of the people would prefer a phone at $99 versus $49, all other things equal."); A12112 ("Galaxy S III, from his data, would [be] predict[ed to be] 29 percent [of the phones sold from among the four options]. What we see in the marketplace is 71 percent."); *see also* A3501-02, 3541-44, 3547-3551. *Cf. Oracle Am., Inc. v Google Inc.*, No. C 10–03561 WHA, 2012 WL 850705 at *10 (N.D. Cal. 2012), *reversed in part on other grounds*, 750 F.3d 1339 (Fed Cir. 2014) (rejecting conjoint survey on *Daubert* grounds because "the features selected to be surveyed, only seven in total, were purposely few in number and omitted important features that would have played an important role in real-world consumers' preferences"). These deficiencies, individually and collectively, preclude reliance on the Hauser survey to show that the infringing features drive consumer demand.

2. Apple's Additional "Evidence" Shows No Causal Nexus To Lost Sales

Apple fares no better in relying (Br. 52-55) on evidence purportedly showing Samsung's internal perception of the importance of the patented features or Samsung's copying of the patented features. The district court was correct to rule, consistent with this Court's precedent, that Samsung's beliefs are "'not

dispositive … because the relevant inquiry focuses on the objective reasons as to why the patentee lost sales, not on the infringer's subjective beliefs as to why it gained them.'" A26 (quoting *Apple I*, 678 F.3d at 1327-28). In any event, Samsung's internal documents at most show only discussions of generalized features related to the subject matter of the patents, not discussions specific to the patented features themselves. *See* A10881-87; A20063; A21867; A23696.

Nor does the jury's verdict furnish any basis to conclude that Apple showed lost sales due to infringement of the patents. Although Apple sought damages comprising both lost profits and a reasonable royalty (A30117; A11270-71 (Vellturo)), as the district court subsequently found, the jury's monetary award of $119,625,000 (A2656) was consistent with an award of royalties, and the court granted ongoing royalties to Apple based solely on its interpretation of the jury's determination of the royalty rate. A6535-38, A6547. Thus, under the district court's interpretation, the jury necessarily rejected Apple's lost profits claim.

3. Apple Cannot Show Causal Nexus To Lost Sales From Infringement Of The Three Patented Features In The Aggregate

The district court also correctly concluded (A20-25, A31) that Apple failed to show that, in the aggregate, the three patents at issue drive consumer demand. Apple did not even seek lost profits—and thus did not seek to establish lost sales—on the '172 or '721 patents because Apple conceded that Samsung's most

successful accused products did not use the '172 or '721 patented features. A11300-01. In any event, quite unlike this Court's hypothetical example of separate patents that together cover all use of a battery for a laptop, *see Apple III*, 735 F.3d at 1364-65, the three patents here are directed to disparate and minor software features that cannot be combined to create a single technology that drives consumer demand.

II. THE DISTRICT COURT PROPERLY FOUND THAT MONETARY DAMAGES PROVIDE ADEQUATE COMPENSATION

The second *eBay* factor "requires a patentee to demonstrate that 'remedies available at law, such as monetary damages, are inadequate to compensate' the patentee for the irreparable harm it has suffered." *Apple III*, 735 F.3d at 1368 (citation omitted). The district court properly found (A31-35) that Apple failed to do so here, concluding that "monetary remedies would more appropriately remedy Samsung's infringement that would and injunction." A35.

A. Apple Failed To Show That Reputational Harm Cannot Be Adequately Compensated

The district court correctly found—and certainly did not clearly err in finding—that "Apple offers no evidence that its alleged reputational harm cannot be remedied." A32. As Dr. Erdem explained in her declaration, well-established methodologies exist to quantify this type of harm. A3299-3304. Apple produced no evidence to the contrary and made no attempt to show that these methodologies

could not be applied here. Because the *only* evidence on the issue demonstrates that Apple can be adequately compensated by monetary damages, Apple cannot sustain its burden.

Rather than addressing the evidence, Apple instead suggests (Br. 60-61) that reputational injury may be presumed impossible to quantify. But it is well established that "there is no *presumption* that money damages will be inadequate …. Some evidence and reasoned analysis for that inadequacy should be proffered." *Nutrition 21 v. United States*, 930 F.2d 867, 872 (Fed. Cir. 1991). Indeed, the cases upon which Apple relies (Br. 60) to argue that reputational injury is unquantifiable so ruled based on the particular circumstances and evidence at issue, not a presumption that monetary damages can never remedy reputational injury.[12] Other courts have concluded that reputational injury can be quantified. *See, e.g.*, *Dexter 345 Inc. v. Cuomo*, 663 F.3d 59, 63 (2d Cir. 2011); *Martin v. Bimbo Foods Bakeries Distrib., Inc.*, No. 5:14-CV-17-BR, 2014 WL 2439954, at *6 (E.D.N.C. May 30, 2014) ("Depending on the facts, goodwill can often be

[12] *See Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) ("The district court focused on these intangible injuries in concluding that RAC's damages would be difficult to valuate …."); *MySpace, Inc. v. Wallace*, 498 F. Supp. 2d 1293, 1305 (C.D. Cal. 2007) ("Plaintiff has received 800 complaints about Defendant from users."); *Optinrealbig.com, LLC v. Ironport Sys., Inc.*, 323 F. Supp. 2d 1037, 1051 (N.D. Cal. 2004) ("[T]he loss of bandwidth could be an irreparable harm. Irreparable harm is further found where the conduct of a defendant threatens the existence of the business itself.").

valued in monetary terms.") (citing cases); *Torres Advanced Enter. Solutions LLC v. Mid-Atl. Prof'ls Inc.*, No. PWG-12-3679, 2013 WL 531215, at *5 (D. Md. Feb. 8, 2013).

Apple argues (Br. 60-61) that this Court held in *Douglas Dynamics* that monetary damages were inadequate to compensate a patentee for reputational injury even absent evidence of actual reputational injury. But the fact that the Court did not discuss the patentee's evidence in its one sentence on the issue does not suggest that evidence is not required or that any presumption exists. And as explained above, the nature of the patents and business in *Douglas Dynamics* are not comparable to those at issue here. In any event, even if reputational harm could be presumed irremediable by monetary damages in the absence of any evidence, here there *is* evidence that reputational harm is quantifiable. *See supra*, at p. 45. The district court was well within its discretion to accept this evidence, particularly where there was no evidence to the contrary.

B. Apple Failed To Show That Lost Sales Cannot Be Adequately Compensated

Even if Apple had shown lost sales due to infringement (it did not), the district court correctly held (A35) that Apple failed to prove that monetary damages would not provide adequate compensation for any such harm. Apple does not dispute (Br. 62) the district court's conclusion that Apple's failure to show causal nexus between infringement and lost sales supports a finding that

monetary remedies are adequate. A35 (citing *Apple III*, 735 F.3d at 1371 (holding that if "Apple cannot demonstrate that demand for Samsung's products is driven by the infringing features, then Apple's reliance on lost market share and downstream sales to demonstrate the inadequacy of damages will be substantially undermined")).

Even assuming lost sales existed and Apple could satisfy the causal nexus requirement, Apple also lacks evidentiary support for its claim that money damages cannot adequately compensate it for lost sales. Apple's own damages expert purported to quantify Apple's claimed harm from lost sales. Dr. Vellturo testified regarding the specific dollar amount that would compensate Apple for the supposedly lost sales. A11221, A11298-300, A11305, A11330; A30117. In his calculation of reasonable-royalty damages, Dr. Vellturo made a substantial "ecosystem adjustment" to reflect the alleged effects of lost downstream and ecosystem sales. A30143-44; A6482-83; A11322-24, A11330. As Dr. Chevalier explained, "Dr. Vellturo's reasonable royalty presentation at trial included a calculation of ecosystem effects. Thus, … the jury was presented a quantification of the magnitude of ecosystem effects at trial and the jury was able to place whatever weight on that quantification that they deemed appropriate in arriving at a damages award." A3025.

To the extent the district court concluded that Apple's lost sales and market share would be difficult to quantify (A32-33), it clearly erred, even though it reached the right conclusion on adequacy of monetary damages. The court relied on Mr. Schiller's testimony, but he has no expertise in attempting to quantify damages and his testimony did not even mention whether the supposed harm could be quantified. A10449-50.

The court also relied on the testimony of Dr. Vellturo, and in particular his statement in a post-trial reply declaration that he could not completely quantify ecosystem effects. *See* A6508-09. But that declaration cannot rewrite his trial testimony that did, in fact, quantify ecosystem effects. A11322-24. While Dr. Vellturo claims that his trial testimony covered only part of the ecosystem effect, he never informed the jury that his substantial "ecosystem adjustment" reflected only part of the ecosystem effect. And while he stated at trial that "the ecosystem effect here captures only one aspect of consumer loyalty," A11322, he did not state that his model captures only part of the ecosystem effect. In any event, Dr. Vellturo's only statement that the ecosystem effect could not be fully measured (from the reply declaration) is entirely conclusory. *See* A6508-09. It provides no analysis and no explanation of why attempts to measure the full ecosystem effect

were unsuccessful. Apple cannot carry its burden to establish that monetary remedies are insufficient based solely on this conclusory testimony.[13]

C. Apple's Prior Offer Of A License To Samsung And Its Licenses To Other Competitors Further Demonstrate The Adequacy Of Money Damages

In addition to the evidence discussed above, the evidence of Apple's licensing history further establishes the adequacy of monetary damages, notwithstanding the district court's reluctance to find Apple's past licensing history conclusive in light of "Apple's apparent unwillingness to license the patents-in-suit to Samsung." A35. As this Court held in *Apple III*, licensing can be "quite relevant" to the analysis of the adequacy of money damages. 735 F.3d at 1370; *see also id.* ("[W]e find no error in the district court's decision to consider evidence of

[13] Apple cites (Br. 62-63) three cases to support the inadequacy of money damages for lost profits, but in one, this Court simply vacated and remanded for the district court to re-perform the analysis, *see Apple III*, 735 F.3d at 1368, and the other two decisions rested on facts very different from those here. *See i4i Ltd. P'ship*, 598 F.3d at 862 ("Such losses may frequently defy attempts at valuation, particularly when the infringing acts significantly change the relevant market, as occurred here."); *Broadcom Corp. v. Qualcomm Inc.*, 543 F.3d 683, 703 (Fed. Cir. 2008) ("Broadcom's damages expert testified that any comparison of Qualcomm's lost profits based on an injunction to Broadcom's potential gain would be 'almost pure speculation at this point,' [and] this difficulty in estimating monetary damages reinforces the inadequacy of a remedy at law." (internal citation omitted)).

Apple also argues (Br. 63 n.13) that monetary damages are inadequate based on the rate of prejudgment interest and the postponing of supplemental damages. But Apple presents no argument that the district court's decision on these issues is legally erroneous, and the issue in any event is not whether Apple *is* being compensated but rather whether monetary damages *can* compensate Apple.

Apple's past licensing behavior."); *ActiveVideo Networks v. Verizon Commc'ns, Inc.*, 694 F.3d 1312, 1339 (Fed. Cir. 2012) (holding that "[t]he losses to ActiveVideo due to Verizon's infringement are clearly quantifiable" where "ActiveVideo sought to broadly and extensively license this technology (Cablevision, Grande, and TV Guide) including a campaign to secure a license from Verizon itself").

Here, the undisputed evidence shows Apple's willingness to license the patents at issue. *First*, Apple offered to license the '647 patent to Samsung in an August 2010 presentation. A20481, A20489. While the district court stated (A34-35) that this presentation did not necessarily constitute a firm offer on specific terms, it nonetheless correctly recognized (A34) that Apple's August 2010 presentation "provides some indication that Apple might have been willing to license Samsung."

Second, Apple does not dispute that it granted patent licenses to other smartphone competitors—HTC and Nokia. Apple seeks to minimize that evidence by arguing (Br. 46) that those agreements are "broad portfolio cross-licenses and litigation settlements encompassing hundreds of other patents" with "anti-cloning provisions." While the district court likewise relied on those aspects of the HTC and Nokia licenses to accord them diminished probative value (A33-34), the *nature* of those licenses does not alter the undisputed fact that Apple voluntarily

licensed the patents to smartphone competitors. When combined with Apple's willingness to negotiate some kind of license for the '647 patent to Samsung, the HTC and Nokia licenses confirm that Apple does not consider the '647, '172 and '721 patents to have such unique value that allowing competitors to use them would cause non-compensable harm.

For all these reasons, the district court was correct in concluding (A35) that "the second *eBay* factor favors Samsung," a conclusion bolstered by the additional uncontroverted facts the district court declined to credit.

III. THE BALANCE OF HARDSHIPS DOES NOT SUPPORT AN INJUNCTION

While the district court properly denied the permanent injunction, it abused its discretion in concluding (A40) that the balance of hardships favors Apple. The balance-of-hardships factor "assesses the relative effect of granting or denying an injunction on the parties." *Apple III*, 735 F.3d at 1371 (quoting *i4i Ltd. P'ship*, 598 F.3d at 862). In *Apple III*, this Court affirmed the district court's determination that the balance-of-hardships factor was neutral. 735 F.3d at 1371. Apple's showing here is even weaker.

A. Apple Will Not Suffer Any Significant Hardship Related To The Patents In The Absence Of An Injunction

There is little, if any, hardship to Apple because the patented features are minor components in an "extraordinarily complex and multi-featured" device

(A17)—for which the jury awarded damages. While Apple relies (Br. 64) on the district court's statement that Apple faces the "substantial hardship" of being forced to compete against products containing its own inventions (A39-40), Apple fails to note that there is no evidence that the *specific patented features* are giving Samsung any competitive or reputational advantage over Apple. Because the district court was correct in concluding that there was no nexus between the infringing features and any harm (A14-17, A23-25, A31; *see also supra*, at pp. 32-45), it necessarily erred in ruling that the balance of hardships favored Apple. If there is no sales or reputational harm flowing from the actual infringement, then there is no hardship to Apple in having those features in Samsung's products.

The district court also erred in relying on this Court's statement that "requiring a patentee to 'compete against its own patented invention … places a substantial hardship' on the patentee." A39-40 (quoting *Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1156 (Fed. Cir. 2011) (ellipses in original). The ellipses omit the key phrase "with the resultant harms described above," *Robert Bosch*, 659 F.3d at 1156, and the harms identified in *Robert Bosch* were irreparable harms of proven lost sales for a simple product (wiper blades) and the defendant's inability to pay a damages judgment. *Id.* In this case, by contrast, there are no such harms because Apple failed to prove irreparable harm, and Samsung can satisfy the judgment against it. It cannot be a "hardship" to compete against a

complex, multi-feature product with an infringing feature if that feature has no impact on sales, reputation, or buying decisions.

The "hardship" of competing with products using patented features is even further diminished here because while the jury awarded damages for three patents, only a single patent was subject to ongoing claims of infringement by the time of trial. As Apple's expert Dr. Vellturo recognized, by the time of trial, none of the products accused of infringing the '721 and '172 patents had been sold for many months. A11340-41; *see also* A21441. And of the products accused of infringing the '647 patent, by the end of 2013, only the Galaxy Note II and Galaxy S III were still being sold. *Id.*; A2657. Thus, at most, Apple's alleged hardship is the presence in the marketplace of two complex devices that include *a single*, minor software feature that has not been shown to have any effect on sales, consumer decisions, or reputation.

B. Samsung Would Suffer Substantial Hardship If An Injunction Issued

By contrast, the record shows that there would be real hardship to Samsung and its carriers, retailers, and customers if Apple's requested injunction were issued. In particular, Apple's requested injunction would create marketplace uncertainty and satellite litigation because it attempts to sweep in unadjudicated products. Although purporting to be narrow and directed to features, Apple's

proposed injunction in fact would extend broadly to non-accused products and non-parties, and would sweep within it an uncertain swath of products.

The proposed injunction is not narrow by virtue of its nominal confinement to features rather than products, for Samsung does not sell software—it sells products. *See supra*, at pp. 23-24. Should Samsung somehow run afoul of the proposed injunction, it would be *products*, not software, that are removed from the shelves or impounded at customs. Moreover, the "not colorably different" language, here as in *Apple III*,[14] would allow Apple to sweep within its injunction any product that Apple deems close to the adjudicated products, allowing Apple to use contempt proceedings as a substitute for new patent infringement claims. The district court was incorrect (A38) to discount the "not colorably different" aspect of the proposed injunction as merely "standard" language, for Apple's demonstrated efforts to leverage such broad language for more litigation will create fear, doubt, and uncertainty in the market as to what other products Apple might later claim are not colorably different. A50006-09 (declaration in the preliminary injunction appeal in this case, providing example of Apple threatening carriers even though the injunction did not apply to them). And a sunset period does

[14] Indeed, the current proposed injunction is even broader than that in the prior appeal because it purports to cover products with software that is "capable of implementing" the features accused at trial, or those not colorably different. A2698.

nothing to address the hardship to Samsung of being forced to litigate, under threat of contempt, the question of what functionalities and what products incorporating them are "not colorably different" or may be found to be "capable" of infringing if not infringing in fact.

In addition, Samsung would suffer hardship from the disruption of its contractual relationships with carriers who might be selling pre-existing stock and with customers who might still be using accused products. It was error for the district court to discount these hardships entirely.

IV. THE PUBLIC INTEREST WEIGHS AGAINST AN INJUNCTION

The district court was likewise incorrect in ruling (A42) that the public-interest factor favored Apple, and that factor when properly analyzed supports the district court's correct conclusion to deny the permanent injunction. In *Apple III*, the district court concluded that the same factor favored Samsung, a ruling this Court affirmed in relevant part, 735 F.3d at 1371-73. Apple's case is no stronger here.

Just as in *Apple III*, the smartphone products at issue are complex, multi-feature devices. Although Apple styles its proposed injunction as "feature-based," Samsung sells products, not software features. Enforcement of the injunction as to products that include features "not colorably different" from the accused features or software "capable of implementing" the accused features would result in the

removal of products (not features) from store shelves or the impoundment of products (not features) at customs—exactly the harm to the public interest discussed in the prior case. *See Apple III*, 735 F.3d at 1372-73 ("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 and the prospect that an injunction would have the effect of depriving the public of access to a large number of non-infringing features.").

In analyzing the public-interest factor, both "the harm that an injunction might cause to consumers who can no longer buy preferred products because their sales have been enjoined, and the cost to the judiciary as well as to the parties of administering an injunction" should be considered. *Apple, Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901, 921 (N.D. Ill. 2012), *aff'd in part, rev'd in part*, 757 F.3d 1286 (Fed. Cir. 2014). Apple's requested injunction presents both of these concerns.

The public has a strong interest in the protection of healthy competition and the resulting variety of product choices. Apple has provided no persuasive justification for depriving the public of product choices created by a thriving level of competition other than to assert (Br. 65) that an injunction serves the public's interest in protecting innovation and patent rights. But protection of patent rights

is an issue present in all patent cases where an injunction is sought. If that were sufficient to find this factor favored an injunction, the fourth *eBay* factor would always be found to weigh in favor of the patentee, a result that would improperly "hint[] at [a] categorical rule." *Apple III*, 735 F.3d at 1370. And while Apple suggests that an injunction here would encourage the development of alternatives to the patented features (Br. 66), it ignores the undisputed fact that non-infringing alternatives are already available for all of the patented features.

Furthermore, the cost to the judiciary and the parties of administering an injunction would be great here given the ambiguity of the proposed injunction's language and scope and the likelihood that Apple would use any injunction to turn contempt proceedings into a new, repeat forum for challenging non-accused products. Thus, the public interest, like the balance of hardships, properly provides an independent and alternative reason, in addition to the ones the district court properly relied upon, to affirm the denial of the permanent injunction here.

CONCLUSION

The district court's order denying a permanent injunction should be affirmed.

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Respectfully submitted,

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PROOF OF SERVICE

The undersigned hereby certifies that on December 17, 2014, I electronically filed the foregoing BRIEF FOR DEFENDANTS-APPELLEES with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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CERTIFICATE OF COMPLIANCE

Counsel for Defendants-Appellees hereby certifies that:

1. The brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because exclusive of the exempted portions it contains 13,987 words as counted by the word processing program used to prepare the brief; and

2. The brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared using Microsoft Office Word 2007 in a proportionately spaced typeface: Times New Roman, font size 14.

Dated: December 17, 2014

/s/ Kathleen M. Sullivan
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