No. 2014-1802

IN THE 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
Case No. 5:12-cv-00630, Judge Lucy H. Koh

BRIEF OF *AMICUS CURIAE* THE NATIONAL BLACK CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANTS–APPELLEES

J. CARL CECERE
CECERE PC
6035 McCommas Blvd.
Dallas, Texas 75206
469.600.9455

Counsel for the National Black Chamber of Commerce

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, counsel for *amicus curiae* certifies the following:

1. The full name of every *amicus* represented in this case by the undersigned counsel is:

   the National Black Chamber of Commerce

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 the undersigned counsel is:

   N/A

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

   None

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

   J. Carl Cecere of Cecere PC

Dated December 24, 2014 */s/ J. Carl Cecere*

J. CARL CECERE
CECERE PC
6035 McCommas Blvd.
Dallas, Texas 75206
Telephone: 469.600.9455
ccecere@cecerepc.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

Certificate of Interest i

Table of Contents ii

Index of Authorities iv

Interest of *Amicus Curiae* 1

Introduction and Summary of Argument 2

Argument 8

I. African-American-Owned Businesses Rely on Open, Competitive Markets to Enable Them to Overcome the Historical Disadvantages They Have Experienced in Breaking into High-Technology Industries 8

II. The Requirement that a Patentee Prove a Sufficient "Causal Nexus" Between the Infringing Features and the Alleged Irreparable Harm Must Be Met in All Cases to Prevent Injunctions From Being Used for Impermissible Anti-Competitive Purposes. 10

A. The "causal nexus" requirement should neither be abandoned nor be deemed automatically satisfied simply because the patentee alleges a reputational harm as opposed to other types of harm 13

B. The "causal nexus" requirement should also not be relaxed—much less abandoned entirely—simply because the patentee seeks to enjoin infringing "features" rather than entire "products." 17

III. The Types of Irreparable Harm Recognized in *Douglas Dynamics* Should Be Limited to the Unique Circumstances Presented in that Case 19

Conclusion 24

Certificate of Compliance 25

Certificate of Service 26

INDEX OF AUTHORITIES

Cases

Apple Inc. v. Samsung Elecs. Co., Ltd. ("Apple I"),
678 F.3d 1314 (Fed. Cir. 2012)..... 4, 8, 13, 15, 16

Apple Inc. v. Samsung Elecs. Co., Ltd. (*"Apple III")*,
735 F.3d 1352 (Fed. Cir. 2013)..... passim

Apple Inc. v. Samsung Elecs. Co., Ltd. ("Apple II"),
695 F.3d 1370 (Fed. Cir. 2012)..... passim

Apple Inc. v. Samsung Elecs. Co., Ltd.,
No. 5:12-cv-00630-LHK, 2014 WL 6687122
(N.D. Cal. Nov. 25, 2014).....3

Beacon Theatres, Inc. v. Westover,
359 U.S. 500 (1959).....14

Ciechon v. City of Chicago,
634 F.2d 1055 (7th Cir. 1980).....14

Douglas Dynamics LLC v. Buyers Prods. Co.,
717 F.3d 1336 (Fed. Cir. 2013)..... passim

eBay, Inc. v. MercExchange, L.L.C.,
547 U.S. 388 (2006)..... 13, 15, 27

Holly Sugar Corp. v. Goshen Cty. Coop. Beet Growers Ass'n,
725 F.2d 564 (10th Cir. 1984).....14

i4i Ltd. P'ship v. Microsoft Corp.,
598 F.3d 831 (Fed. Cir. 2010).....26

In re Arthur Treacher's Franchisee Litig.,
689 F.2d 1137 (3d Cir. 1982).....14

Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League,
634 F.2d 1197 (9th Cir. 1980).....14

Miss. Power & Light Co. v. United Gas Pipeline Co.,
760 F.2d 618 (5th Cir. 1985).....13

Monsanto Co. v. Geertson Seed Farms,
561 U.S. 139 (2010).....12

Reebok Int'l Ltd. v. J. Baker, Inc.,
32 F.3d 1552 (Fed. Cir. 1994).....5

Statutes

35 U.S.C. § 283.....3, 10

Rules

Fed. R. App. P. 29(c)(5),.....1

Other Authorities

DORISSA GRIFFIN & KRISTAL LAUREN HIGH, MINORITIES AND HIGH TECH EMPLOYMENT (2011).....10

Gregory L. Brown, Randell McShepard & Fran Stewart, PolicyBridge, *The Fusion of Inclusion* (2012).....9

ROBERT W. FAIRLIE & ALICIA M. ROBB, U.S. DEP'T OF COMMERCE, MINORITY BUS. DEV. AGENCY, DISPARITIES IN CAPITAL ACCESS BETWEEN MINORITY AND NON-MINORITY-OWNED BUSINESSES: THE TROUBLING REALITY OF CAPITAL LIMITATIONS FACED BY MBES (2010).....9

INTEREST OF *AMICUS CURIAE*

The National Black Chamber of Commerce is a nonprofit, nonpartisan organization dedicated to the economic empowerment of African-American communities through entrepreneurship.* Incorporated in 1993, the Chamber directly represents nearly 100,000 African-American-owned businesses, and advocates on behalf of all of the 2.1 million African-American-owned businesses in the United States. The Chamber has 190 affiliated chapters located throughout the nation, as well as international affiliates in many other countries, including the Bahamas, Brazil, Columbia, Ghana, and Jamaica.

Many of the African-American-owned businesses the Chamber represents own patents, and many compete for business against others that own patents. The Chamber therefore has a strong interest in ensuring that the proper balance is maintained between adequately protecting patent-holders and their intellectual property while avoiding the danger that patent-holders might attempt to "leverage" their patents "for competitive gain beyond that which the inventive contribution and

---

* Pursuant to Fed. R. App. P. 29(c)(5), amicus certifies that no party's counsel wrote this brief in whole or in part, that no counsel or party contributed money intended to fund this brief, and that no one other than amicus, its members, and its counsel made such a contribution. All parties have consented to the filing of this brief.

value of the patent warrant." *Apple Inc. v. Samsung Elecs. Co., Ltd. ("Apple II")*, 695 F.3d 1370, 1375 (Fed. Cir. 2012).[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal concerns three patents owned by Apple Inc. that cover various features of Apple's user interface, including:

- U.S. Patent Number 5,946,647, which discloses a system and method for recognizing certain patterns in data such as email addresses or phone numbers, and then automatically linking that data to certain actions, such as dialing an identified phone number, emailing an identified email address, or saving the information into the user's contacts;

- U.S. Patent Number 8,046,721, which covers Apple's "slide-to-unlock" method to prevent accidental activation; and

- U.S. Patent Number 8,074,172, which covers a particular system, method, and interface for automatically correcting spelling errors on touchscreen devices by providing a menu of potential replacements for the misspelled word.

A jury found that various devices manufactured by Samsung Electronics Co., Ltd. and its affiliates infringed on these patents and awarded Apple well over $119 million to compensate Apple for Samsung's infringement. And although Samsung

[1] Several of the Court's previous opinions concerning the various disputes between Apple and Samsung are relevant in this appeal. For convenience, the Chamber will refer to these previous opinions using the same system of numbering the parties and the district court have consistently used throughout this case.

assured the district court that it had revised the designs of its entire line of products so they no longer infringed, the district court nevertheless awarded Apple supplemental damages under 35 U.S.C. § 283 that were intended to provide Apple compensation for any infringement by Samsung that might occur in the future. *See Apple Inc. v. Samsung Elecs. Co., Ltd.*, No. 5:12-cv-00630-LHK, 2014 WL 6687122 (N.D. Cal. Nov. 25, 2014).

In addition to this damages award for potential future infringement, Apple also sought a permanent injunction that would bar Samsung entirely from using the features of Samsung's products found to infringe (as well as those not colorably different from those products). Apple claims that without this injunction, it will suffer several types of irreparable harm. Among these include the types of irreparable injuries that patentees traditionally advance to justify injunctive relief—and that Apple itself has advanced against Samsung in previous lawsuits—namely loss of market share and downstream sales.[2] But following in the wake of this

[2] *See, e.g.*, *Apple Inc. v. Samsung Elecs. Co., Ltd. ("Apple I")*, 678 F.3d 1314, 1323 (Fed. Cir. 2012) (claiming that "loss of market share" and "brand dilution" caused by Samsung's infringement on several of Apple's design and utility patents justified a temporary injunction); *Apple II*, 695 F.3d at 1373, 1374-77 (raising similar claims of irreparable harm stemming from Samsung's infringement on Apple's "unified search" patent); Apple Inc. v. Samsung Elecs. Co., Ltd. (*"Apple III")*, 735 F.3d 1352, 1360 (Fed. Cir. 2013) (seeking a permanent injunction based on Samsung's infringement on the same utility and design patents at issue in *Apple I*).

Court's decision last year in *Douglas Dynamics LLC v. Buyers Products, Co.*, 717 F.3d 1336 (Fed. Cir. 2013), Apple also advances a new and altogether different sort of alleged irreparable injury as justification for a permanent injunction against Samsung: an injury to its "reputation for innovation" that Apple says will occur if its "patented inventions appear" in the "products of a less prestigious competitor." (Apple Br. at 4-6, 15-16, 34-40)

Patentees have long claimed that injunctions were necessary to prevent certain kinds of "reputational harms." But these have traditionally been confined to claims of reputational harm resulting from situations in which a competitor's infringement causes consumer confusion—the patentee's brand image and reputation are harmed because the competitor's infringement causes consumers to wrongfully associate the competitor's faulty or inferior products with the plaintiff's. *See, e.g.*, *Reebok Int'l Ltd. v. J. Baker, Inc.*, 32 F.3d 1552, 1558 (Fed. Cir. 1994) ("Harm to reputation resulting from confusion between an inferior accused product and a patentee's superior product is a type of harm that is often not fully compensable by money because the damages caused are speculative and difficult to measure."). In *Douglas Dynamics*, however, the Court took such reputational harms into new territory, holding that "[e]ven absent consumer confusion however, there can still be harm to a company's reputation, particularly its perception in the marketplace by customers, dealers, and distributors," and mentioning as "one example" a potential for

irreparable harm to a patentee's "reputation as an innovator." 717 F.3d at 1344-45. Apple invokes this newly elucidated type of irreparable harm as one of the consequences it will suffer if its patented inventions appear in the "products of a less prestigious competitor." (Apple Br. at 23, 44)

Apple also strikes out into uncharted territory in arguing that both the nature of the impending harm to its "reputation for innovation"—as well as the nature of the relief it requests to prevent it—both justify significantly relaxing, if not abandoning, the standards this Court normally employs in determining whether the extraordinary relief of an injunction is warranted. Although this Court has held that "to satisfy the irreparable harm factor in a patent infringement suit," a patentee must establish "that a sufficiently strong causal nexus relates the alleged harm to the alleged infringement," *Apple II*, 695 F.3d at 1374, Apple claims that the particular "reputational harms" it has alleged do not require "separate proof of causal nexus" because such harm "naturally follows . . . where a patentee known as an innovator is forced to compete directly with products of a less prestigious competitor that include the patentee's own inventions." (Apple Br. at 23) And Apple further suggests that its proposed injunction should be viewed with special solicitude because it "solely sought to enjoin the infringing features" rather than "entire products." (*Id.* at 27, 36)

The Chamber believes the district court was correct in rejecting Apple's argument that the mere potential for harm to its self-proclaimed "reputation as an innovator" justifies an injunction against Samsung. The Chamber also feels that the district court was correct to resist Apple's attempts to erode the standards of causation determined by this Court to form an essential part of the "irreparable harm" analysis.

True innovation is, of course, deserving of protection. Indeed, that philosophy is fundamental to the very idea of patent protection. But care should be taken to prevent a patentee like Apple from using its self-proclaimed "reputation for innovation" to "leverage" its patents "for competitive gain beyond that which the inventive contribution and value of the patent warrant." *Apple II*, 695 F.3d at 1375. This is exactly what would happen if Apple's position is adopted. Industry leaders, claiming the need to protect their own reputations for "innovation," would be able to force less-established competitors to develop future products under the cloud of an injunction—and the constant accompanying fear of criminal sanctions—when the only "harm," if any, these industry leaders are suffering comes from their competitors' legitimate, non-infringing competition, or from some other source entirely. This would deny both new industry entrants and less-established competitors alike a level-playing field on which to legitimately compete against the leaders in their industries. And it would be especially unfair to the Chamber, its

members, and the African-American-owned businesses it represents, that so often find themselves in the position of upstarts forced to compete against more established businesses as a consequence of the racial discrimination and other unfair historical competitive disadvantages they have faced in the past.

Moreover, the law should regard with suspicion industry leaders' claims that their reputations will be harmed by mere dint of the fact that their inventions appear in other products. And courts should also apply a healthy dose of skepticism if a company brands a competitor as "less prestigious" or "inferior," when it stands to gain a competitive edge in doing so. It is unlikely that any truly competitive industry will have only one innovator, and it is bad policy to assume that one company's efforts to innovate—even if mistaken or misguided—will necessarily come at another's reputational expense.

Accordingly, the Chamber urges the Court to hold that the casual nexus requirement—which exists precisely to prevent patent-holders from trying to "leverage" their patents "for competitive gain beyond that which the inventive contribution and value of the patent warrant," *Apple II*, 695 F.3d at 1375—must be met regardless of the type of irreparable harm alleged, and is not "naturally" satisfied when a reputational harm is alleged. Similarly, the causal nexus requirement should neither be relaxed nor ignored simply because a patentee like Apple seeks to enjoin only infringing features of products, rather than the products themselves.

The Chamber also urges the Court to take this occasion to clarify that its decision in *Douglas Dynamics* does not signal that reputational harms will provide the automatic, box-checking means to an injunction that Apple seems to believe they do. The Court should explain instead that its obvious willingness in *Douglas Dynamics* to find irreparable harm to a patentee's "reputation for innovation" was driven by the unique, compelling facts of that particular case—in which a snowplow manufacturer's reputation for innovation hinged on a single innovative design covered by a single patent that was slavishly copied by an admittedly inferior competitor. The Court should also hold that an asserted need to protect a patentee's "reputation for innovation" will rarely, if ever, justify an injunction in situations in which infringing features form only small, limited parts of complex, multi-function devices.

ARGUMENT

I. African-American-Owned Businesses Rely on Open, Competitive Markets to Enable Them to Overcome the Historical Disadvantages They Have Experienced in Breaking into High-Technology Industries.

The concern that industry leaders will misuse their patents, and their asserted need to protect their reputations for "innovation," to prohibit legitimate competition from less-established businesses is of special concern to the Chamber because of the historical competitive disadvantages that African-American-owned businesses have suffered. Historically, African-Americans have found it harder to start and develop

businesses than whites, because of inequalities in experience and education, access to financial capital, as well as lending and other types of discrimination. ROBERT W. FAIRLIE & ALICIA M. ROBB, U.S. DEP'T OF COMMERCE, MINORITY BUS. DEV. AGENCY, DISPARITIES IN CAPITAL ACCESS BETWEEN MINORITY AND NON-MINORITY-OWNED BUSINESSES: THE TROUBLING REALITY OF CAPITAL LIMITATIONS FACED BY MBES 17-27 (2010) (hereafter "TROUBLING REALITY").[3]

As a result of these difficulties, African-Americans today own only 5.5 percent of all American businesses, and even a smaller proportion—4 percent—of high-tech businesses. TROUBLING REALITY, *supra* at 9; Gregory L. Brown, Randell McShepard & Fran Stewart, PolicyBridge, *The Fusion of Inclusion* 7 (2012).[4] As a stark illustration of the continued lack of progress in this area, only one percent of the teams seeking funding for technology ventures in 2010 identified themselves as African-American, and only 11 percent even identified themselves as having an

---

[3] *Available at* http://people.ucsc.edu/~rfairlie/presentations/Disparities%20in%20Capital%20Access%20Report%202010.pdf (last visited December 23, 2014).

[4] *Available at* http://www.policy-bridge.org/uploaded_files/PolicyBridge%20Fusion%20of%20Incusion%20Report%20on%20Technology_file_1341229622.pdf (last visited December 23, 2014).

African-American on their executive team. DORISSA GRIFFIN & KRISTAL LAUREN HIGH, MINORITIES AND HIGH TECH EMPLOYMENT 10-11 (2011).[5] African-American-owned businesses therefore rely on open competition in the technology sector, including the ability to at least compete on a level playing field with their more-established, patent-wielding rivals, in order to overcome these historic difficulties.

II. The Requirement that a Patentee Prove a Sufficient "Causal Nexus" Between the Infringing Features and the Alleged Irreparable Harm Must Be Met in All Cases to Prevent Injunctions From Being Used for Impermissible Anti-Competitive Purposes.

In order to provide economic incentives to those who develop new inventions, Congress has given district courts the power to grant injunctions "in accordance with the principles of equity." 35 U.S.C. § 283. But as this Court has recognized, "[a]n injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Apple III*, 735 F.3d at 1359 (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010)). Instead, the "traditional equitable principles," which place important time-honored restraints on the exercise of this authority, including the "traditional four-factor test" for injunctive relief, must be

[5] *Available at* http://mmtconline.org/lp-pdf/Jobs%20Report%20-%20Minorities%20&%20High%20Tech%20Employment.pdf (last visited December 23, 2014).

faithfully applied in determining whether a permanent injunction is appropriate. *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392-93 (2006).

Paramount among these equitable principles is that an injunction is only justified to remedy a "substantial and immediate irreparable injury." *Apple I*, 678 F.3d at 1325; *Apple II*, 695 F.3d at 1374 (citing cases); *see also eBay*, 547 U.S. at 391. Indeed, as the courts have universally recognized, the need for irreparable injury is not merely a "factor" to be weighed in the balance with other equitable considerations, but it is instead a *necessary* condition that must exist before any form of injunctive relief is justified over other, less intrusive remedies.[6] The irreparable harm requirement is thus necessarily more rigid and categorical than the other equitable factors analyzed in determining whether injunctive relief should issue.

This Court has held that one of the essential elements of this mandatory irreparable harm requirement is "that a sufficiently strong causal nexus relates the alleged harm to the alleged infringement." *Apple II*, 695 F.3d at 1374. As this Court

---

[6] *See, e.g.*, *Miss. Power & Light Co. v. United Gas Pipeline Co.*, 760 F.2d 618, 629 (5th Cir. 1985); *Holly Sugar Corp. v. Goshen Cty. Coop. Beet Growers Ass'n*, 725 F.2d 564, 569–70 (10th Cir. 1984); *In re Arthur Treacher's Franchisee Litig.*, 689 F.2d 1137, 1145–47 (3d Cir. 1982); *Ciechon v. City of Chicago*, 634 F.2d 1055, 1057–58 (7th Cir. 1980); *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1201–02 (9th Cir. 1980); *see also Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959) ("The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.").

has explained, while this causal nexus requirement is thus a prerequisite to injunctive relief required in all cases, it only reveals itself to be a problem requiring separate proof in cases in which "the accused product includes many features of which only one (or a small minority) infringe." *Apple II*, 695 F.3d at 1374*; see also Apple I*, 678 F.3d at 1324; *eBay*, 547 U.S. at 396-97 (Kennedy, J., concurring) (noting that when a patented invention "is but a small component of the product the companies seek to produce . . . legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest."). For simple devices in which the entire article is covered by a single patent, the connection between infringement and any reputational harm is obvious and therefore easily established. As the Court said in *Apple III*, "the causal nexus requirement applies regardless of the complexity of the products. It just may be more easily satisfied (indeed, perhaps even conceded) for relatively 'simple' products." 735 F.3d at 1362. This is probably why it was not contested in *Douglas Dynamics*, a case that involved a relatively simple design for a snowplow covered under a single patent. 717 F.3d at 1339-42.

But for more complex, multi-feature devices, the question will always arise whether the alleged harm stems from inclusion of the infringing feature or from other non-infringing features of the product—and would thus occur "even if the offending feature were absent from the accused product." *Apple I*, 678 F.3d at 1324; *see also*

Apple III, 735 F.3d at 1361-62. It is for this reason that in cases "where the accused product includes many features of which only one (or a small minority) infringe, in order to get an injunction, a finding that a patentee will be at risk of irreparable harm does not alone justify injunctive relief. Rather, the patentee must also establish that the harm is sufficiently related to the infringement." *Apple II*, 695 F.3d at 1374. If a sufficient causal relationship cannot be established because the harm, if any, is actually coming from non-infringing features of the product, or from other sources entirely, then an injunction will never be justified.

Apple acknowledges that its patents cover only a few of the features involved in the user interface of Samsung's smartphones and tablets, which also contain many other complex software and hardware components. But Apple nevertheless claims that the "reputational harms" it alleges it will suffer absent an injunction do not require "separate proof of causal nexus" because, to Apple, such harm "naturally follows . . . where a patentee known as an innovator is forced to compete directly with products of a less prestigious competitor that include the patentee's own inventions." (Apple Br. at 23) But Apple is mistaken.

A. The "causal nexus" requirement should neither be abandoned nor be deemed automatically satisfied simply because the patentee alleges a reputational harm as opposed to other types of harm.

Contrary to Apple's suggestion, the requirement that a patentee establish a sufficient causal nexus between the harm alleged and the infringement to be enjoined

is universal and applies in all cases. While it might be uncontested—or even assumed to be satisfied—in cases involving simple products covered under a single patent, it must be established by specific proof in any case in which the infringing features comprise only a small part of a complex, multi-function device, and does not vary with the type of irreparable harm alleged. This requirement is universal because the potential for abuse that it seeks to guard against is universal. The causal nexus requirement helps to distinguish "between irreparable harm caused by patent infringement and irreparable harm caused by otherwise lawful competition," such as from non-infringing features within the same device. *Apple III*, 735 F.3d at 1361.

If this requirement is ignored or relaxed, it would allow a patentee to obtain an injunction when damages would have been sufficient to remedy any harm actually resulting from the infringement. This would not only permit an award of an injunction beyond the scope of the relief permitted under the Patent Act, it would also permit a patentee to unfairly and improperly hamper an infringing competitor's future competitiveness by forcing it to work under a double threat—not only from the risk that it might be held liable for damages, but also from the risk of potential criminal sanctions and other penalties that would arise for violating the injunction. These threats will unduly inhibit the competitor's development of new products, forcing it to refrain from even legitimate forms of competition and design-arounds in order to reduce the risk of damages and criminal prosecution, and will accordingly

make it a less effective, less vigorous competitor. This danger, that a patentee might attempt to "leverage its patent for competitive gain beyond that which the inventive contribution and value of the patent warrant," *id.* at 1375, is no less acute when reputational harms, as opposed to other types of irreparable harm, are sought to be prevented. The causal nexus requirement should therefore be no less stringent for reputational harms than for other types of alleged irreparable injury.

Nor should Apple, or any other company for that matter, be entitled to evade the "causal nexus" requirement simply by suggesting that reputational harm—including harm to its asserted "reputation for innovation"—"naturally follows" from infringement." (Apple Br. at 23) For one thing, this would make reputational harms the exceptional type of irreparable harm that swallows the rule, leading to a flood of demands for injunctions from patentees claiming that every alleged infringement by a competitor was a core threat to their reputation. For another, it is simply not true that reputation harm follows any more "naturally" from infringement than other types of irreparable harm. The reputational effects that follow from infringement depend upon complex market factors and constantly changing public perceptions that can be hard to anticipate and cannot simply be assumed.

Even if a patentee can demonstrate a decline in its reputation that follows a competitor's infringement, that does not necessarily mean there is any connection between the harm and the infringement, even when it comes from an allegedly

"inferior or less prestigious competitor." Customers can frequently tell true innovation from copying, and can tell who is copying whom. It is thus possible that customers might assign no reputational weight whatsoever to the appearance of the infringing feature in a competitor's products. Any reputational decline could actually be caused solely by other sources, such as the patentee's own failures to innovate, or competition from a completely different, non-infringing competitor, and could thus bear no relationship to the infringement.

And even where a patentee's reputational decline can actually be attributed to an infringer's actions, that still does not necessarily mean that the decline was *caused* by the infringement. Even an "inferior competitor" can create advances of its own through legitimate competition that the marketplace recognizes, and that make the patentee look less innovative by comparison—indeed, in complex, multi-feature devices, such legitimate innovations could reside side-by-side with infringing features within a single device.

Accordingly, for all types of alleged irreparable harms, including reputational harms, the "causal nexus" remains a requirement to be proved to the satisfaction of the district court, rather than a toothless maxim that can be avoided through formulaic and simplistic assumptions. Requiring this proof is necessary to ensure that only harm resulting from infringement, rather than the "harm"—if it can even be called that—resulting from legitimate competition, is prohibited through

injunctive relief. To hold otherwise would permit injunctions to be improperly wielded as anti-competitive weapons, and would accordingly make it more difficult for African-American-owned businesses and other upstarts to break into or compete in a variety of "innovator"-dominated industries.

B. The "causal nexus" requirement should also not be relaxed—much less abandoned entirely—simply because the patentee seeks to enjoin infringing "features" rather than entire "products."

Apple also argues that the "causal nexus" requirement should be relaxed in this case, even though Apple's inventions comprise only a few isolated features in Samsung's devices, because Apple seeks to enjoin only the infringing "features" in those products, and not the "products" themselves. (Apple's Br. at 27) Apple suggests that the injunction's supposedly limited scope means that the "causal nexus" requirement is automatically satisfied: "there is necessarily a causal nexus to the infringing feature when an injunction seeks to enjoin the infringing feature itself." (*id*. at 10) It therefore argues that the district court misapplied this Court's precedents "in requiring Apple to prove that Samsung's infringing features drive demand for Samsung's entire products." (*id*. at 27)

But Apple's argument merely elides the problem. The scope of the requested injunctive relief has no bearing on whether the causal nexus requirement is satisfied. The only thing that matters in determining whether a sufficient causal nexus exists is whether it is actually infringement, or some other non-infringing influence, that

"drives" the alleged irreparable harm. *Apple II*, 695 F.3d at 1375. If the only harm that the patentee's reputation is suffering is actually driven by some other source besides infringement, then even the most narrowly focused injunction against infringement will still be improper. An infringing-features-only injunction will certainly stop infringement, but it will not necessary stop the supposed irreparable harm unless the harm is causally tied to those infringing features. Accordingly, while the scope of the requested injunction might be relevant for some purposes—including weighing in the balance of hardships and determining whether the public interest is served by the injunction—it should be irrelevant in determining whether the "causal nexus" requirement is met. Regardless of the scope of the injunction, the patentee must first prove that the infringement is sufficiently tied to the irreparable harm alleged before the drastic remedy of a permanent injunction is imposed, and a competitor's future ability to compete is thereby permanently hampered.

Because Apple must establish a sufficient relationship between its asserted reputational injury and Samsung's "infringing conduct" to suggest that the infringement "drives" its reputational harm, the district court was correct to demand that Apple "prove that Samsung's infringing features drive demand for Samsung's entire products." (Apple Br. at 27) If the infringing features are so minor as to not even drive demand for the products at issue, then there absolutely no reason to

suggest that these isolated features are so powerful as to harm Apple's very reputation as an institution.

III. The Types of Irreparable Harm Recognized in *Douglas Dynamics* Should Be Limited to the Unique Circumstances Presented in that Case.

Apple's argument on appeal not only raises anti-competitive concerns because of its effort to water down the "causal nexus" requirement, it is also troublesome because of the inherently speculative nature of the supposed irreparable harm it claims to have suffered. Claiming support from this Court's decision in *Douglas Dynamics*, Apple argues that it is entitled to enjoin future infringement by Samsung "based on the mere potential of future harm" to its "reputation for innovation" that might occur from the fact that its patented inventions appear "in the products of a less prestigious competitor." (Apple Br. at 30, 32) Apple claims, based solely on the testimony of its own executives, that this harm occurs because this "confuses customers" about the source of its inventions, "whether Apple is being [an] innovator . . . or whether Samsung or someone else is innovating." (*id*. at 15, 23)

Apple's argument would allow every industry leader who could credibly claim a "reputation for innovation" to automatically enjoin infringement based on the mere "potential of future harm" to that reputation that might occur if the infringement were to continue. And this would not only give industry leaders an unfair leg-up on their competitors, it would also deny new industry entrants—

including African-American-owned businesses—a fair opportunity to enter into and compete in such "innovator"-dominated industries.

The Court gave no indication in *Douglas Dynamics* that it meant to permit injunctions to be used for such impermissible, anti-competitive purposes, or to provide the automatic box-checking means to an injunction that Apple suggests it does. On the contrary, the reputational harm recognized in *Douglas Dynamics* is highly fact dependent and would justify an injunction in only exceptional circumstances.

Douglas Dynamics concerned a specific design for a snowplow that was covered under a single patent and embodied a single major innovation in the snowplow industry—a design for a detachable snowplow that required only a very small attachment assembly to be bolted on the truck, such that when the snowplow was removed, the remaining attachment assembly did not protrude past the bumper, thereby reducing the risk of accidents. *See* 717 F.3d at 1339-42. In *Douglas Dynamics*, the patentee's "reputation for innovation" hinged on this snowplow design, such that when it was slavishly copied by a competitor and incorporated into an admittedly "less prestigious and innovative" substitute, the Court held that the patentee's reputation as an innovator "will certainly be damaged." *Id*. at 1344-45. Indeed, in *Douglas Dynamics*, the infringing competitor did not dispute that this reputational harm would occur absent an injunction, or that a sufficient "causal

nexus" between its infringement and that harm existed. Accordingly, on the facts alleged in that case, there were compelling reasons to enjoin the "less prestigious and innovative" infringer.

But the type of reputational harm protected in *Douglas Dynamics* simply cannot be used as a means to justify injunctions against infringement in complex-multi-feature devices. Unlike in *Douglas Dynamics*, where the patent embodied a single, major innovation, Apple's patented inventions are meant to serve as only a small part of its own complex, multi-feature devices. And when Samsung builds products to compete against Apple's devices, their devices will inevitably have many similarities to Apple's products, and will also include many innovations belonging solely to Samsung. And as these products develop over time, other competitors will build upon the innovations of their predecessors, hoping to create new innovations in the process. Indeed, in most cases, industry upstarts seeking to break into an industry will have little alternative but to build upon the advances of those more established in the industry. None of this is unlawful, but each of these actions will affect consumers' views on the "reputation for innovation" of the creators and their competitors, and such reputations are in a constant state of flux as a result. If only a few of the features included in these devices are covered by patents, it will be very difficult, if not impossible, to trace the effect that these isolated infringing features might have on the patentee's "reputation for innovation" as a whole. That is not

because these types of harms should be categorically excluded from protection. It is instead simply a consequence of the fact that the addition of a few infringing features will not drive consumer's assumptions about the innovativeness of the companies whose products they buy, and are therefore unlikely to lead to catastrophically harmful effects on a patentee's reputation.

Contrary to Apple's insistence, this does not mean that injunctions will not issue for multi-function products. Indeed, this Court's decision in *i4i Ltd. Partnership v. Microsoft Corp.*, 598 F.3d 831, 861 (Fed. Cir. 2010), which barred Microsoft from "buying, selling, and/or importing" infringing versions of its Word software, demonstrates that it is certainly possible to demonstrate irreparable harm from sales of multi-function products. But it does suggest that the types of reputational harms at issue in *Douglas Dynamics* are categorically different, because they are inherently more suspect, speculative, and difficult to tie to infringement than the types of irreparable harm normally sought to be protected by patentees through injunction—such as loss of market share or harm from true consumer confusion.

Nor does it mean that patentees will be left with no recourse at all if the reputational harms outlined in *Douglas Dynamics* are held not to justify injunctive relief where the infringement involves only a few isolated features in complex, multi-function devices. Awards of supplemental damages like the one provided to Apple in this case can, and should, be used to remedy the harms stemming from the

potential for future infringement to the greatest extent possible. And such relief, properly crafted, would at least help to mitigate reputational injuries.

Accordingly, the Court should take this occasion to clarify the limited nature of its ruling in *Douglas Dynamics*, to prevent a regression towards the position that injunctions should be granted on the mere presumption of irreparable harm in patent cases, a rule rejected by *eBay* and that would raise significant concerns that industry leaders would be able to misuse patent injunctions to prevent legitimate competition.

After all, all patents protect innovations. But the law cannot treat every infringement as treading on a patentee's reputation as an innovator—and should not grant an injunction to every industry leader simply because it objects to having its patented features appear in an allegedly "inferior" or "less prestigious" product. If the law did allow industry leaders to obtain injunctions on such generous terms, that would deny new market entrants and upstarts a fair opportunity to compete in these industries, and would deprive these upstarts of the breathing room they need to develop. Such breathing room is not only important to allow competitors an opportunity to create their own innovations, it will prove vital to allow African-American-owned business to make strides in overcoming the historical difficulties that have denied them a fair opportunity to compete in American business.

CONCLUSION

For all these reasons, the Court should affirm the district court's refusal to grant Apple's request for an injunction.

Dated: December 24, 2014

Respectfully submitted,

/s/ J. Carl Cecere

J. CARL CECERE
CECERE PC
6035 McCommas Blvd.
Dallas, Texas 75206
Telephone: 469.600.9455

Counsel for the National Black Chamber of Commerce

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) because the brief contains 5,437 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because the brief has been prepared using Microsoft Word 2013 in fourteen-point Times New Roman font, which is a proportionally spaced typeface.

Dated: December 24, 2014 */s/ J. Carl Cecere*

J. Carl Cecere

CERTIFICATE OF SERVICE

I hereby certify that, on this 24th day of December, 2014, I filed the foregoing Brief of *Amicus Curiae* the National Black Chamber of Commerce in Support of Defendants-Appellees with the Clerk of the Court for the U.S. Court of Appeals for the Federal Circuit using the CM/ECF system, which will send notice of such filing to all registered CM/ECF users. Pursuant to ECF-10(B) of this Court's May 17, 2012 Administrative Order Regarding Electronic Case Filing, I certify that I will submit to the Court six paper copies of this Brief within five days of this Court's acceptance of the brief in CM/ECF.

/s/ J. Carl Cecere

J. Carl Cecere