The Truth About Injunctions In Patent Disputes

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Injunction Statistics

Injunction Grant Rate by PAE Status

Percent of Injunctions Granted

- Patent Assertion Entities (PAEs): 16%
- All Other Patentees: 80%

[Bar chart showing the percentage of injunctions granted for Patent Assertion Entities (PAEs) and All Other Patentees.]
Injunction Statistics

Injunction Grant Rates: Competition Between Litigants

- Competitors: 84%
- Not Competitors: 21%

Percent of Injunctions Granted
Historical “Injunctions”

- Roman Praetor’s “Interdicts”
  - Prohibitory - forbidding an act
    - Most common
  - Restitutory – ordering property to be restored
  - Exhibitory – produce something in court

Historical “Injunctions”

• Orders (Writs) of the King
  – Orders to recusant defendants
  – Often property-related
    • e.g., to not molest lands, woods, pastures
Historical “Injunctions”

- Equity in common law courts (before about 1380 AD)
  - Writ of Prohibition
    - Order defendant to refrain from wrongful act
      - Again, often property-related
    - Order defendant to take affirmative steps to remove interference with another’s property
      - e.g., remove a dike that restricted access to pasture land
Historical Patent Remedies

• 1790 Patent Act – 1 Stat. 109 (1790)
  – Plaintiff allowed to recover damages (determined by jury) and possession of the infringing device

• 1793 Patent Act – 1 Stat. 318 (1793)
  – Infringers pay at least three times the amount the patentee usually received for either selling the patented invention or licensing the invention

  – Infringer should pay “a sum equal to three times the actual damage sustained”
Historical Patent Remedies

• Congress allowed federal courts equitable jurisdiction in all patent cases in 1819 (3 Stat. 481)
  – Injunctions and equitable accounting
  – Division between law and equity remained
    • Court sitting in equity could not award damages

• Patent Act of 1836
  – Maintained law/equity divide
  – Section 14 allowed “actions on the case” to recover actual damages
  – Section 17 allowed for suits in equity
Preliminary vs. Permanent Injunctions

• Preliminary Injunctions
  – In early 19th century, granted if no “glaring defects”
  – Today, four-factor test is typically applied
  – Preliminary injunctions granted inconsistently
  – Risky for patent owner’s to request
  – For preventing both patent infringement & other acts such as the filing of infringement actions

• Permanent Injunctions
  – Often granted to prevailing plaintiff
  – No reason for hesitation associated with preliminary injunctions
35 U.S.C. §283


• Patents convey “the right to exclude others from the making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States.” 35 U.S.C. § 154(a)(1).

• Courts “may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.” 35 U.S.C. § 283.
Injunctive Relief

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

Injunctive Relief

“In view of the finite life of a patent and the prolonged nature of patent infringement litigation, the preliminary injunction becomes a necessary tool to insure that accused infringers do not abuse the litigation process by using a lawsuit as a means of obtaining a compulsory license during the pendency of the suit.”

“From at least the early 19th century, courts have granted injunctive relief upon a finding of infringement in the vast majority of patent cases.”

– eBay concurrence
“According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four factor test before a court may grant such relief...These familiar principles apply with equal force to disputes arising under the Patent Act.”
A patentee (patent owner) must satisfy the following four-factor test for injunctive relief before a court may grant a permanent injunction:

1. that the patent owner 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 patent owner and defendant, a remedy in equity is warranted; and
4. that the public interest would not be disserved by a permanent injunction.

*ebay inc. v. mercexchange, llc, 547 u.s. 388, 391, 126 s. ct. 1837 (2006).*
Injunctions Law

• The decision to grant or deny a permanent injunction is an act of equitable discretion by the district court judge, reviewable on appeal for abuse of discretion. *eBay Inc.*, 547 U.S. at 391, 126 S. Ct. at 1839.

• On appeal, an “abuse of discretion” may be found 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.” *Acumed*, 551 F.3d at 1327.

• Practically speaking, under this standard of review, it is very difficult to have a district court’s decision on whether or not to grant an injunction overturned on appeal.
Injunctions Law

Factors typically analyzed in connection with factors (1) and (2), namely whether the patent owner has suffered irreparable harm and whether monetary damages are inadequate to compensate for that injury, include:

- Whether the patent owner and defendant are direct competitors in the marketplace regarding the patented product.
- Whether the patent owner has lost market share or lost sales due to the infringement.
- Whether the patent owner has suffered price erosion due to the infringement.
- Whether the patent owner has lost goodwill with customers due to the infringement.
- Prior licensing activities by the patent owner, including whether the patent owner has previously licensed the patent to competitors.
- Whether the patent owner has previously offered to license the patent to the defendant.
- Whether the patent owner delayed in bringing suit or failed to request a preliminary injunction.

Injunctions Law

In the majority of cases where infringement is found and the patent owner and defendant are direct competitors, courts (A) grant permanent injunctions, (B) find irreparable harm with respect to factor (1) including loss of market share, customer goodwill and/or price erosion, and (C) find that monetary damages are inadequate to compensate for injuries due to infringement with respect to factor (2).

“An industry has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees...For these firms, an injunction, and the potentially serious sanctions arising from its violation, can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent.”
“When the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest.”
• Several prior empirical studies have sought to evaluate eBay’s impact by reviewing district court decisions on permanent injunctions in patent cases post-eBay.

• Although these studies have evaluated different time periods, they generally agree that patent owners who prevail in litigation receive an injunction (a property rule) about three-quarters of the time post-eBay.
However, certain categories of patentees are much less successful at obtaining injunctive relief, most notably “patent assertion entities” (PAEs), which are firms that principally exploit their patents through litigation and/or licensing rather than direct commercialization.

These previous studies show that PAEs – sometimes pejoratively called “patent trolls” – generally receive only monetary compensation (a liability rule) instead of an injunction against future infringement.
Post-eBay

• A further empirical study of district court injunction decisions for a 7½-year period following the Supreme Court's decision (May 2006-December 2013) confirmed that while most patentees still obtain injunctive relief, PAEs rarely do.

• “[D]istrict courts appear to have adopted a de facto rule against injunctive relief for PAEs and other patent owners who do not directly compete ... against an infringer” – a rule which, ironically, is in tension with the Court’s conclusion in eBay that “the District Court erred in its categorical denial of injunctive relief” to a non-practicing patentee.
Injunction Statistics

Permanent Injunction Grant Rate:
May 2006 to December 2013

- 72.50% Granted
- 27.50% Denied
Injunction Statistics

Permanent Injunction Grant Rate by Year

- 2006: 80%
- 2007: 83%
- 2008: 69%
- 2009: 77%
- 2010: 66%
- 2011: 67%
- 2012: 68%
- 2013: 67%
## Injunction Statistics

### Injunction Grant Rate, by Technology

<table>
<thead>
<tr>
<th>Technology</th>
<th>Grant Rate</th>
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<tbody>
<tr>
<td>Biotechnology</td>
<td>100%</td>
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<tr>
<td>Pharmaceuticals</td>
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<tr>
<td>Other</td>
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<tr>
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<td>Mechanical</td>
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<tr>
<td>Electronics</td>
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<tr>
<td>Medical Devices</td>
<td>65%</td>
<td>34</td>
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<tr>
<td>Software</td>
<td>53%</td>
<td>36</td>
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### Injunction Grant Rate, by District

<table>
<thead>
<tr>
<th>Technology</th>
<th>Grant Rate</th>
<th>N</th>
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<tbody>
<tr>
<td>District of New Jersey</td>
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<tr>
<td>District of Massachusetts</td>
<td>82%</td>
<td>11</td>
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<tr>
<td>Central District of California</td>
<td>73%</td>
<td>11</td>
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<tr>
<td><strong>National Average</strong></td>
<td><strong>72.5%</strong></td>
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</tr>
<tr>
<td>Eastern District of Texas</td>
<td>61%</td>
<td>36</td>
</tr>
<tr>
<td>Northern District of California</td>
<td>60%</td>
<td>10</td>
</tr>
<tr>
<td>District of Delaware</td>
<td>50%</td>
<td>26</td>
</tr>
</tbody>
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Injunction Grant Rates: Competition Between Litigants

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Competitors: 84%
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Injunction Statistics

Types of Irreparable Harm Found

- Loss of Market Share: 80%
- Loss of Goodwill: 43%
- Loss of Business Opportunity: 19%
- Other: 17%
- Price Erosion: 13%
- Inability to Pay: 5%
Post-eBay Injunction Statistics

Affirmance Rates - Permanent Injunction Decisions (All Merits Decisions)

- Injunction Denied: 53% (9 of 17)
- Injunction Granted: 88% (22 of 25)

Affirmance Rates - Permanent Injunction Decisions (Excluding Rule 36 Affirmances)

- Injunction Denied: 33% (4 of 12)
- Injunction Granted: 77% (10 of 13)

Post-eBay Injunction Statistics