THE INJUNCTION FUNCTION: HOW AND WHY COURTS SECURE PROPERTY RIGHTS IN PATENTS

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INTRODUCTION

Although the United States patent system is 230 years old, the nature of patents as legal rights and as commercial assets is contentiously debated today. Some scholars characterize the U.S. patent system as a regulatory system created and defined by solely public policy goals; Mark Lemley, for instance, argues that a patent is the equivalent of a welfare benefit.1 This is an odd comparison if only because the personal entitlement to a welfare payment is not a basis for venture capital investment,2 it cannot be licensed or otherwise exchanged in the marketplace,3 and it is not a platform for innova-
tion markets and new business models. The theoretical and constitutional debates aside, the legal and commercial reality is that the U.S. patent system has been at its core a private law system securing private property rights.

The scholarly and legal debates about whether the patent system is a private law or public law system are quite “old in the art” (to turn a phrase from patent law), and they touch on all aspects of patent rights, including what remedies patent owners should receive for the violation of their property rights. As with all property rights, the remedies a patent owner receives for patent infringement have long been defined by a mix of statutes and court decisions. Some courts and scholars maintain that patent law should be conceived as a species of public law and thus governed by public policy. Yet, remedies for patent infringement have traditionally comprised the classic forms of legal relief that citizens can receive when seeking redress in courts for wrongs: damages to compensate for their losses and an injunction to prevent willful or ongoing violations of their rights.


9 See Oil States, 138 S. Ct. at 1373–74 (claiming that a patent is a public right because it is a “creature of statute law” and “did not exist at common law” (first quoting Crown Die & Tool Co. v. Nye Tool & Mach. Works, 261 U.S. 24, 40 (1925); and then quoting Gayler v. Wilder, 51 U.S. (10 How.) 477, 494 (1850))); Sichelman, supra note 7, at 569 (“Instead of viewing patents as conferring a private right on the patentee, under a public law model, a patent confers a kind of private attorney general status on the patentee that allows it to collect payment on behalf of society, which is then immediately remitted in full to the patentee solely in order to optimize overall social innovation incentives.”).

10 See Adam J. MacLeod, Patent Infringement as Trespass, 69 Ala. L. Rev. 723, 728 (2018). Advocates for the “public law” conception acknowledge this fact about the patent
This Essay addresses one aspect of this legal and policy debate concerning remedies in patent law: how and why courts presumptively secured patent owners with injunctions against ongoing or willful infringements of their property rights. Prompted by the United States Supreme Court’s 2006 decision in *eBay v. MercExchange*, which created a new four-factor test for issuing injunctions on a finding of ongoing infringement of a valid patent, there is a growing body of scholarly commentary on the role of injunctive remedies in securing property rights in new technological innovations. Much of this commentary focuses on how *eBay* has resulted in a significant reduction in availability of injunctive remedies for patent infringements, especially in the context of patents on standardized technologies, such as standard essential patents covering WiFi or 5G telecommunications technologies in mobile devices.

This Essay builds upon this scholarly work by addressing more generally the legal and policy function of injunctive remedies in patent law, detailing newly identified primary sources in historical caselaw that courts presumptively secured to patent owners an injunction to redress ongoing or willful statutes; for instance, Professor Sichelman argues that the remedial provisions in the Patent Act should be amended to reflect the public law theory of patents. See Sichelman, supra note 7, at 566–69 (explaining how §§ 283 and 284 should be amended). 11 *eBay*, Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006).


13 See supra note 7 (identifying some examples).


infringements of their property. The Essay proceeds as follows. First, it
summarizes the 2006 *eBay* decision and how it led to courts significantly
reducing injunctions as a remedy for ongoing or willful infringement of valid
patents. It describes how *eBay* changed the legal doctrine for issuing injunc-
tions from a presumptive remedy to a four-factor test and why this change
matters. Second, it discusses the nature and function of injunctions as a pre-
sumptive remedy in securing property rights, both for landowners and for
owners of new and useful inventions. Historical patent decisions confirm
the legal doctrine, and, even more importantly, the policy and commercial func-
tion of injunctions as essential backstops in the efficient functioning of mar-
kets. Of course, an essay cannot address every legal and policy issue in the
historical cases and in the economic and philosophical literature. The con-
tribution here is narrow but important: it confirms that *eBay* indeed changed
remedies doctrine in patent law, and that the resulting reduction in injunc-
tions undermines the function of these property rights in spurring economic
activities in the U.S. innovation economy.

I. *eBay* AND ITS AFTERMATH IN THE LAW AND POLICY OF INJUNCTIVE
REMEDIES

The question presented to the Supreme Court in *eBay v. MercExchange*
was how courts should decide to issue an injunction for ongoing or willful
infringement of a valid patent. The legal context for answering this funda-
mental question about the appropriate remedy for a legal wrong is that U.S.
patents are property rights. The 1952 Patent Act expressly states that “pat-
ents shall have the attributes of personal property.” Before 1952, the statutes
did not state this expressly, but legislators, courts, and commentators
from the early American republic up through the early twentieth century
consistently acknowledged that patents are property rights.

As a result, patents have long been secured by the remedies afforded to
all property rights, such as legal remedies (damages) and equitable remedies
(injunctions). In the historical statutes and in caselaw, patent infringement
was defined similarly to how all other property rights are violated: patent

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16 The historical patent cases are based on an ongoing empirical study by the author
of all nineteenth-century patent cases published in the *Federal Cases* reporter. The in-pro-
gress database is on file with the author.


18 See, e.g., United States v. Dubilier Condenser Corp., 289 U.S. 178, 187 (1933) (“A
patent is property and title to it can pass only by assignment.”); Cont’l Paper Bag Co. v. E.
Paper Bag Co., 210 U.S. 405, 424 (1908) (“[A patent] is his absolute property.” (quoting
Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent “Privilege” in Histor-
Patent “Privilege” in Historical Context*] (detailing extensive use of property concepts, rhet-
oric, and doctrines by early to mid-nineteenth-century courts); Adam Mossoff, *Patents as
Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87
owners have been secured against unauthorized interferences by third parties in the acquisition, use, or disposal of their inventions. Today, the patent statutes state that any unauthorized access or use of a patented invention is an infringement. On a finding of infringement of a valid patent, a patent owner may receive damages for past infringement, an injunction to stop ongoing infringement or willful infringement, or both.

This Part summarizes eBay, which sowed confusion by simultaneously claiming that it was merely reaffirming historical caselaw on equitable remedies for patent infringement while changing this law at the same time. This created a state of legal confusion among courts exacerbated by a policy narrative about alleged abuses by patent owners of their property rights. This one-two legal and policy punch produced a significant decline in injunctions issuing for ongoing or willful infringements of valid patents.

A. A Brief Summary of eBay

Before eBay, the Court of Appeals for the Federal Circuit had developed a “general rule” that injunctions should issue on a finding of ongoing or willful infringement of a valid patent. It applied this general rule in this case, as the district court found that eBay infringed a valid patent owned by a patent licensing company, MercExchange. But the district court denied MercExchange’s petition for an injunction given that it only licensed its property rights. The Federal Circuit reversed, and eBay petitioned the Supreme Court. eBay argued that the Federal Circuit’s general legal rule failed to reflect the “equitable” nature of injunctions. The remedies doctrine for issuing injunctions was not supposed to be a rule, eBay argued, but rather a context-specific, equitable-type inquiry that assessed each case on its own terms.

In its decision, the eBay Court criticized both the district court’s general rule denying injunctions for patent owners who license their property rights and the Federal Circuit’s general rule issuing injunctions on a finding of infringement of a valid patent. The eBay Court thus affirmed the right of all patent owners to obtain injunctions against infringers, but it rejected any categorical or rule-based approach in favor of an allegedly “historical” four-factor inquiry: (1) the plaintiff must suffer an irreparable injury, (2) legal remedies must be inadequate, (3) the balance of the hardships between the

19 See 35 U.S.C. § 271 (prohibiting unauthorized making, using, selling, or offering to sell the invention).
20 See 35 U.S.C. § 284 (damages); id. § 283 (injunctions).
22 id. at 393–94.
23 id. at 393.
defendant and plaintiff must weigh in favor of the plaintiff, and (4) an injunction must not be against the public interest. 25

Notably, and something often forgotten by many commentators and judges, the eBay Court affirmed its 1908 decision in Continental Paper Bag Co. v. Eastern Paper Bag Co. In Continental Paper Bag, the Court held that all patent owners were entitled to receive injunctions to stop ongoing or willful infringements of their property rights, even if they were not using their patented inventions in the marketplace through licensing or manufacturing activities. 26 The Court observed that all “trespasses and continuing wrongs . . . are well-recognized grounds of equity jurisdiction, especially in patent cases.” 27 The eBay Court approvingly cited Continental Paper Bag in rejecting eBay’s argument (and the district court’s argument) that patent licensing was legally insufficient to justify an injunction to remedy an ongoing or willful infringement of this patent. 28

In its evenhanded criticism of both the district court’s general rule denying injunctions for patent owners who only license their property and the Federal Circuit’s general rule on issuing injunctions on a finding of infringement of a valid patent, the eBay Court intimated that its “four-factor test” should be applied neutrally. For patent owners, though, hope springs eternal. For both legal and policy reasons, eBay has been neither interpreted nor applied neutrally by courts.

B. eBay Changed the Law for Injunctions as a Presumptive Remedy for Patent Infringement

Contrary to the eBay Court’s contention that it was merely reestablishing a longstanding legal test, there was no historical four-factor test for issuing injunctions as a remedy for ongoing or willful infringement of a valid patent. 29 Remedies scholars have pointed out that the eBay Court pulled out of thin air its claims that “[o]rdinarily, a federal court . . . applies the four-factor test historically employed by courts of equity” and that “[a]ccording to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test.” 30 Professor Doug Rendleman bluntly states that “[r]emedies specialists had never heard of the four-point test.” 31

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25 See eBay, 547 U.S. at 391.
27 Id. at 430.
28 eBay, 547 U.S. at 393.
29 See generally Gergen et al., supra note 12.
30 See eBay, 547 U.S. at 390–91.
31 Doug Rendleman, The Trial Judge’s Equitable Discretion Following eBay v. MercExchange, 27 REV. LITIGATION 63, 76 n.71 (2007). It appears the eBay Court was confused between the test for permanent injunctions and the modern test for a preliminary injunction, as there is no “historical” four-factor test for issuance of permanent injunctions, but there is a modern four-factor test for preliminary injunctions. See DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 444 (4th ed. 2010) (observing that the
There was no historical four-factor test for issuing injunctions as a remedy for patent infringement, but the Federal Circuit was also mistaken that there was a general rule requiring injunctions. Since the United States defined and secured patents as private property rights, federal courts applied to patents the same legal doctrines governing the issuance of injunctive remedies as they applied to all other property rights. In sum, courts applied a presumptive remedy of an injunction.

There is much confusion today about what is a presumptive remedy. Some lawyers and commentators assume mistakenly that this means an injunction is automatically guaranteed to a patent owner whose property right is violated by another person. In effect, they believe that it is a per se rule that functions formalistically. For example, an injunction issues automatically on a finding of infringement just as one is automatically liable in receiving a speeding ticket for violating a speed limit law. But this is not how presumptions function in the law generally or in remedies doctrine specifically.

In the context of patent litigation, a presumptive remedy means that, following a patent owner establishing the validity of the patent and ongoing or willful infringement of this valid property right, an injunction issued presumptively. (Today, patents are presumed valid per statutory mandate, the four-factor test for preliminary injunctions was what “the Court tried to transfer to permanent injunctions in eBay”).

32 See supra notes 17–19 and accompanying text.
33 See, e.g., Cook v. Ernest, 6 F. Cas. 385, 391 (C.C.D. La. 1872) (No. 3155) (“If the rights of property so invaded were rights to land or other tangible estate, no court would hesitate for a moment to restrain the wrong-doer by injunction. The property in a patent is just as much under the protection of the law as property in land. The owner has the same right to invoke the protection of the courts, and when he has made good his claim to his patent, and shown an infringement of it, it is the duty of the courts to give him the same relief meted out to suitors in other cases.”).
35 This is the way per se rules function in antitrust. See Richard A. Epstein, Monopolization Follies: The Dangers of Structural Remedies Under Section 2 of the Sherman Act, 76 Antitrust L.J. 205, 223 (2009) (“The most destructive trope in Alcoa was Learned Hand’s soaring rhetoric on the necessity of per se illegality even when all the direct evidence suggests that the particular scheme might make economic sense.”).
36 See, e.g., Conover v. Mers, 6 F. Cas. 322, 323 (C.C.S.D.N.Y. 1868) (No. 3123) ("[W]here, as here, the patent has been sustained on full hearing, and the infringement is clear . . . the complainant is entitled to have his rights promptly protected by injunction."; Potter v. Muller, 19 F. Cas. 1170, 1170 (C.C.S.D. Ohio 1864) (No. 11,334) (“The rule as to granting or continuing injunctions in patent right cases is now well settled by the modern usages of the courts of the United States. They are now granted without a previous trial at
and in the nineteenth century, courts adopted various presumptions in favor of patent validity.) 38 In 1858, for instance, a court held that “[i]f the rights of a party, under a patent, have been fully and clearly established, and an infringement of such rights is threatened, or, if, when they have been infringed, the party has good reason to believe they will continue to be infringed, an injunction will issue.” 39

As a presumptive remedy, an injunction was not automatically guaranteed for a patent owner—nor for any property owner—as it could be rebutted by a defendant. 40 A defendant could defeat an injunction by proving that the patent was invalid or that the defendant did not infringe it. 41 Alternatively, a defendant found liable for ongoing infringement of a valid patent could still defeat an injunction by proving classic counterclaims in equity for why an injunction should not issue, such as unreasonable delay that prejudiced the defendant (“laches”), 42 “public interest” concerns of threats

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38 See, e.g., Miller v. Androscoggin Pulp Co., 17 F. Cas. 301, 303 (C.C.D. Me. 1872) (No. 9559) (“The complainant has for a long time been in exclusive possession under the . . . patent, with the acquiescence of the public therein, and there is no evidence of any interruption of the exclusive possession under this patent, tending in any way to weaken the presumption in favor of his title arising from this enjoyment and acquiescence.”); Hayden v. Suffolk Mfg. Co., 11 F. Cas. 900, 902 (C.C.D. Mass. 1862) (No. 6261) (recognizing that an issued patent establishes a “prima facie case for the plaintiff in the question of title”); Orr v. Badger, 18 F. Cas. 831, 832 (C.C.D. Mass. 1844) (No. 10,587) (“Dr. Orr was in quiet enjoyment of the benefit of his invention for several years under the original patent, and received considerable sums of money. This is prima facie evidence of the right.”); see also Mossoff, Reevaluating the Patent “Privilege” in Historical Context, supra note 18, at 998–1001 (discussing “presumption favoring liberal construction of patents” adopted by early courts).


40 See, e.g., Bachelder v. Moulton, 2 F. Cas. 307, 310 (C.C.S.D.N.Y. 1873) (No. 706) (“The plaintiff’s title and the validity of his claims are free from doubt, and have been established, and the infringement by the defendants’ machine is clear. An injunction must issue on all the claims.”); Day v. New Eng. Car Co., 7 F. Cas. 248, 248–49 (C.C.S.D.N.Y. 1854) (No. 3686) (“Under the rules of equity pleading . . . the defendants must disprove the invention, or the right of the plaintiff as assignee, or the infringement of the patent . . . . Otherwise, the plaintiff will be entitled to an injunction on his proofs.”).

41 See, e.g., Stow v. City of Chicago, 23 F. Cas. 195, 199 (C.C.N.D. Ill. 1877) (No. 13,512) (dismissing complaint and denying injunction given defendant proving that patent is invalid); Smith v. Clark, 22 F. Cas. 487, 488 (C.C.D. Mass. 1850) (No. 13,027) (dismissing complaint and denying injunction given defendant proving that he did not infringe the patent).

42 See, e.g., Goodyear v. Honsinger, 10 F. Cas. 692, 695 (C.C.N.D. Ill. 1867) (No. 5572) (considering laches argument by defendant but ultimately issuing preliminary injunction for patent owner); Parker v. Sears, 18 F. Cas. 1159, 1163 (C.C.E.D. Pa. 1850) (No. 10,748) (denying request for preliminary injunction given patent owner “standing by, for so many years, without complaint or demand of compensation”); Stevens v. Fei, 23 F. Cas. 10, 11.
to public health and safety, a cloud on the title, or other equitable defenses. In practice, courts did usually issue injunctions for patent owners, as Chief Justice John Roberts pointed out in his concurrence in *eBay*, but not because injunctions issued automatically on a finding of infringement. Rather, courts applied to patents the same doctrinal rules governing remedies for all property rights. As one court explained in 1879: “[T]he court has no discretion, but is bound to grant a preliminary injunction where the validity of the complainant’s patent has been established by protracted and expensive litigation, and the proof of infringement is clear.”

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43 See, e.g., Bliss v. Brooklyn, 3 F. Cas. 706 (C.C.E.D.N.Y. 1871) (No. 1544) (denying injunction for infringement of a patent on fire hoses used by city fire department on public interest grounds of threat to public health and safety in the city); Hodge v. Hudson River R.R. Co., 12 F. Cas. 276, 278–79 (C.C.S.D.N.Y. 1868) (No. 6560) (granting conditional preliminary injunction on payment of royalty during pendency of lawsuit given defendant’s argument that, as a “common carrier” that carries U.S. mail and is part of an interconnected railway system, the public would be harmed).

44 See, e.g., Morris v. Lowell Mfg. Co., 17 F. Cas. 822, 823 (C.C.D. Mass. 1866) (No. 9833) (“Nor am I sure that their title is so entirely clear as to make it a matter of course to issue the [preliminary] injunction without regard to the damage it might do the defendants.”); Isaacs v. Cooper, 13 F. Cas. 153, 153–54 (C.C. Pa. 1821) (No. 7096) (“If the bill states an exclusive possession of the invention, or discovery for which the plaintiff has obtained a patent, an injunction is granted, although the court may feel doubts as to the validity of the patent. But if the defects in the patent, or specification, are so glaring that the court can entertain no doubt as to that point, it would be most unjust to restrain the defendant . . . .”)

45 See, e.g., Potter v. Fuller, 19 F. Cas. 1148, 1150–51, 1154 (C.C.S.D.N.Y. 1862) (No. 11,327) (reviewing and rejecting numerous defenses, including laches, “oppressive conduct” by plaintiffs, and others, before issuing preliminary injunction); see also Smith, supra note 15, at 1079, 1081–88 (discussing how balance of hardship, unclean hands, laches, and other defenses would apply in considering issuing injunctions in cases involving SEPs).


47 Green v. French, 10 F. Cas. 1107, 1109 (C.C.D.N.J. 1879) (No. 5757). Just as with the *eBay* four-factor test for final injunctions, the formal four-factor test for a preliminary injunction is a modern test and not found in historical cases. See, e.g., Earth Closet Co. v. Fenner, 8 F. Cas. 261 (C.C.D.R.I. 1871) (No. 4249) (denying a preliminary injunction after assessing only whether title is valid and whether plaintiffs had proven immediate need to avert irreparable harm); Doughty v. West, 7 F. Cas. 969, 971 (S.D.N.Y. 1865) (No. 4029) (stating as requirements for issuing a preliminary injunction whether there is a presumption of validity through exclusive public use of the patent, a judgment at a law had been obtained, and a hearing in equity had been held); Sargent v. Seagrave, 21 F. Cas. 505 (C.C.D.R.I. 1855) (No. 12,365) (issuing preliminary injunction after only assessing validity of patent and whether defendants were infringing it).
Such statements reveal that courts sometimes did speak starkly about securing a property right by an injunction. Judicial opinions declaring “no discretion” in issuing an injunction could confuse lawyers or judges today about the nature of this equitable remedy—whether it was a presumptive or automatic remedy. In fact, by the mid-nineteenth century, it was common for courts to refer to injunctions as the “usual decree” for a plaintiff who established valid title and ongoing or willful infringement of the patent. Another court stated in 1866 that “[a]s a general rule, if the plaintiff has made out a clear title, and the question of infringement presents no difficulty, an injunction will be granted.” Strong judicial rhetoric notwithstanding, the doctrine was clear that injunctions issued in equity only as a presumptive remedy for ongoing or willful infringement of a valid patent.

Although the substance of the four-factor eBay test reflects equitable inquiries in issuing injunctions, this multifactor test for issuing injunctions was new. The Court sowed confusion in claiming it was applying a well-established, historical legal test. Since its four-factor test was a new legal doctrine for issuing injunctions, lower courts seeking to apply it could not find controlling legal precedent for their decisions after 2006. This likely was a contributing factor in the significant reduction after eBay in patent owners receiving an injunction as a presumptive remedy to redress ongoing or willful infringement of their property rights.

C. eBay Changed Judicial Practice in Issuing Injunctions for Patent Infringement

Within a few years after eBay, courts began altering their practice in generally issuing injunctions on a finding of ongoing or willful infringement of a valid patent. Perhaps lacking controlling legal precedent in guiding their decisions and lacking any guidance from the very brief eBay majority opinion itself that runs only several pages in length, lower courts have construed the

48 See, e.g., Hodge, 12 F. Cas. at 278 (“[T]he rule, as established by this court is, that a plaintiff has a right to protection by injunction, although great injury may thereby be caused to the infringer.”).


51 See, e.g., Hussey v. Whitely, 12 F. Cas. 1067, 1071 (C.C.S.D. Ohio 1860) (No. 6950) (“The authorities are numerous to support the position, that when such grounds of presumption exist in favor of the novelty of an invention covered by a patent, courts will not refuse an injunction, or, if granted, will not dissolve it unless the patent is impeached by the most conclusive evidence.”).

52 See Smith, supra note 15, at 1081 (“[T]he four-part test of eBay is a mistake in the making. To begin with, the supposedly ‘well-established’ four-factor test is anything but, and is actually based on the test for preliminary relief (with a doubling up of the first factor).” (footnote omitted)).

53 Gergen, Golden, and Smith call it “brusque.” Gergen et al., supra note 12, at 204.
how and why courts secure property rights in patents

The eBay test as requiring a change in the actual legal doctrine on injunctions. Thus, for instance, the Federal Circuit believed that eBay required it to abrogate any presumptions in injunction analyses.54

This shift in the legal analysis corresponded with another equally important legal and policy change in the application of the eBay test: lower courts began citing Justice Kennedy's policy-laden concurrence in eBay rather than Justice Thomas's majority opinion.55 In eBay, Justice Kennedy argued separately that a new “licensing” business model had arisen in the innovation industries, as opposed to patent owners manufacturing patented inventions.56 He argued that injunctions gave these licensors, especially when patents covered only a component of a commercial product, “undue leverage” to “charge exorbitant fees.”57

In the patent policy debates, Justice Kennedy’s concern is known as “patent holdup” theory. It arises from a profound misunderstanding of the nature and role of injunctions as a remedy for patent infringement. Many view injunctions as a blunt legal tool exploited by patent owners with threats of litigation or actual lawsuits to either shut down competitors and charge monopoly prices or extort high royalties in licensing agreements.58 The argument—framed at a high level of generality or within an economic model59—is that “patent holdup” via a threat or issuance of an injunction results in unreasonably higher royalties for a licensor or higher prices generally through less competition for a manufacturer—harming the public, reducing innovation, or both.60 Subsequent scholarship has rigorously ana-

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54 See Gómez-Arostegui & Bottomley, supra note 24 (manuscript at 10–11) (discussing how the Federal Circuit “discarded its rebuttable presumptions” in injunction analyses in Robert Bosch LLC v. Pylon Manufacturing Corp., 659 F.3d 1142 (Fed. Cir. 2011)).
55 See Holte, supra note 14, at 721–22, 726 (identifying a shift in court citations to eBay from the majority opinion to Justice Kennedy's concurrence).
57 Id.
58 See, e.g., id. (criticizing patent licensors as using the threat of an injunction in litigation to “charge exorbitant fees”); Barnett, supra note 4, at xii (“Prevailing scholarly approaches to IP and innovation law and policy generally focus on the use of IP rights to block imitators through litigation and then extract a supracompetitive premium in the market.”).
59 See Alexander Galetovic & Stephen Haber, The Fallacies of Patent-Holdup Theory, 13 J. COMPETITION L. & ECON. 1, 9–10 (2017) (providing extensive literature review of efforts to test “patent holdup” theories and models, and observing that “there is no positive evidence in support of its core predictions”); Mossoff & Claeys, supra note 7 (manuscript at S17) (“In almost all assessments of equitable relief in patent cases, there are few data on the actual comparative costs and benefits either to the parties or to society.”); cf. Richard A. Epstein, A Clear View of The Cathedral: The Dominance of Property Rules, 106 YALE L.J. 2991, 2995 (1997) (noting that in the property rule/liability rule framework, “the claims here are implicitly empirical but not capable of precise justification” and “the choice between property rules and liability rules is often decided at a very high level of theoretical abstraction”).
60 See, e.g., eBay, 547 U.S. at 397 (Kennedy, J., concurring) (asserting that “an injunction may not serve the public interest” in a patent holdup scenario); Mark A. Lemley &
lyzed and tested “patent holdup” theory for over a decade and failed to find any empirical support for its predictions. Nonetheless, “patent holdup” became conventional wisdom in academic scholarship, in courts, and in regulatory agencies.

Justice Kennedy was wrong that patent licensing is a new business model leading to a new legal and commercial practice of “patent holdup.” His concurrence simply compounded the legal and historical inaccuracies already found in the majority opinion in eBay. Thus, as Justice Kennedy’s concurring opinion came to represent eBay in the minds of legal decisionmakers and commentators, it fed a widespread apprehension within courts and regulatory agencies that patent licensing is hampering both innovation and commercial activities in the economy.

Any court issuing an equitable remedy rightly hews closely to the classic principle, “first, do no harm.” Lacking controlling legal precedent and


62 See, e.g., Barnett, supra note 61, at 1321–38 (describing widespread adoption of “patent holdup” and related concepts of “royalty stacking” and “thickets” by legal decisionmakers and scholars); Epstein et al., supra note 15, at 13–14 (identifying and critiquing agency “rules set by academic theory rather than set by consensus of actual industry participants (as are existing SSO rules) or by statute and common-law evolution guided by a multitude of real-world fact situations (as are existing rules governing damages and injunctive relief”).


64 See supra note 15 and accompanying text (reviewing scholarship discussing court and agency decisions that implemented “patent holdup” theory).

presented with policy arguments from litigants, academics, and advocacy organizations about “patent holdup,” courts became wary of issuing injunctions. The inexorable result was a substantial reduction in injunctions issuing to stop ongoing patent infringement. One study found that courts are increasingly denying injunctions requested by patent owners who manufacture their products or services, a legal result supported by some academics who argue that “patent holdup” can be committed as much by manufacturers as by licensors. Thus, patent owners are forced into compulsory licensing schemes in which they receive a court-ordered “reasonable royalty” as the sole remedy for the ongoing infringement of their patents.

II. INJUNCTIONS AS A PRESumptive REMEDY FOR PATENT INFRINGEMENT

Feeding the misplaced arguments about “patent holdup” is a widespread misunderstanding about the function of injunctions in securing property rights and as a driver of economic activity in the U.S. innovation economy. Although some companies internalize research and development, manufacturing, and commercializing products and services in their business models, many companies do not do this. Businesspersons regularly create innovative

L.J. 803, 827 (2001) (“In law, as in medicine, we should still remember that the basic principle is, primum, non nocere: first, do no harm.”).

66 See Nichia Corp. v. Everlight Ams., Inc., 855 F.3d 1328, 1331, 1341–44 (Fed. Cir. 2017) (affirming denial of an injunction given that plaintiff’s patent licensing business model establishes that monetary damages are adequate); Apple Inc. v. Samsung Elecs. Co., 735 F.3d 1352, 1372–73 (Fed. Cir. 2013) (“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.”); ActiveVideo Networks, Inc. v. Verizon Commc’ns, Inc., 694 F.3d 1312, 1337–41, 1343 (Fed. Cir. 2012) (vacating grant of an injunction given that damages in the form of a court-ordered reasonable royalty rate is deemed to be a sufficient remedy for the infringement); cf. WBIP, LLC v. Kohler Co., 829 F.3d 1317, 1343 (Fed. Cir. 2016) (“The district court’s decision is based on its reasoning that having more manufacturers of a lifesaving good in the market is better for the public interest. But this reasoning . . . would create a categorical rule denying permanent injunctions for life-saving goods, such as many patented pharmaceutical products.”).

67 See generally Gupta & Kesan, supra note 14.

68 Id. at 25–26.

69 See Sichelman, supra note 7, at 523 (observing that “[Lemley & Shapiro’s ‘patent holdup’] arguments against issuing injunctions to NPEs are often just as applicable to practicing entities”).

70 See ActiveVideo Networks, 694 F.3d at 1341 (“We vacate the grant of a permanent injunction in this case and remand for the district court to consider an appropriate ongoing royalty rate for future infringement by Verizon.”); Paice LLC v. Toyota Motor Corp., 504 F.3d 1293, 1316 (Fed. Cir. 2007) (affirming court-ordered payment of ongoing reasonable royalty in lieu of issuing an injunction under the eBay test). But see H. Tomás Gómez-Arostegui, Prospective Compensation in Lieu of a Final Injunction in Patent and Copyright Cases, 78 FORDHAM L. REV. 1661, 1699–1707 (2010) (detailing substantial historical caselaw stating that courts do not have authority in equity to order “reasonable royalty” payments in lieu of issuing injunctions as a prospective remedy).
economic arrangements to efficiently produce new products and services, such as creating disaggregated supply chains among different companies distributed throughout the global economy, franchise business models formed around licenses of a portfolio of intellectual property rights, portfolio licensing of patents, and patent pools, among many others.\textsuperscript{71} The ability of inventors, businesspersons, and ultimately consumers to reap the benefits of these innovative markets is dependent on the ability of patent owners and businesspersons to create and sell their property in the marketplace. This Part explains how injunctions facilitate these commercial practices for all property owners, whether landowners or patent owners.

A. Injunctions as Remedies for Trespasses of Property Rights Generally

Property rights are a legal platform for commercial activity in the production and exchange of products and services in growing economies and flourishing societies.\textsuperscript{72} This well-established economic principle is applicable to all property rights, including intellectual property rights such as patents.\textsuperscript{73} Property rights in all assets, including patents, foster commercial activities in innovation markets, as market participants engage in specialization and division of labor in maximizing value creation all along the production and distribution value chain.\textsuperscript{74} This key economic insight was first formulated by Adam Smith in 1776 in \textit{The Wealth of Nations}.\textsuperscript{75}

Property rights can achieve this economic function only when property owners have reliable and effective control over their property. If anyone can


\textsuperscript{72} See Harold Demsetz, \textit{Toward a Theory of Property Rights}, 57 Am. Econ. Rev. 347, 355 (1967) (observing that “an owner of a private right to use land acts as a broker” in facilitating efficient uses of the land); Stephen Haber, \textit{Patents and the Wealth of Nations}, 23 Geo. Mason L. Rev. 811, 811 (2016) (“There is abundant evidence from economics and history that the world’s wealthy countries grew rich because they had well-developed systems of private property. Clearly defined and impartially enforced property rights were crucial to economic development . . . .”).

\textsuperscript{73} See, e.g., Hernando de Soto, \textit{The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Elsewhere} Else 83 (2000) (“[P]eople who could not operate within the law also could not hold property efficiently or enforce contracts through the courts . . . . Being unable to raise money for investment, they could not achieve economies of scale or protect their innovations through royalties and patents.”).


\textsuperscript{75} See Mossoff, supra note 3, at 971 & n.66 (identifying nineteenth-century patent licensing practices as exemplifying Adam Smith’s insight about the benefits of the division of labor and specialization in the \textit{Wealth of Nations}).
violate a property right by trespassing, and the only consequence they suffer is that they must pay the property owner some form of monetary compensation set by a government official following a legal or regulatory process, then property owners can no longer determine how best to use their property in the marketplace. Contracts are replaced by “efficient infringement” in which putative licensees can exploit costly judicial or regulatory processes to depress licensing rates, which reduces the willingness of innovators to create new inventions and invest in new commercial mechanisms for deploying these inventions in the marketplace.\textsuperscript{76}

This is the legal and economic function of injunctions. Continuing wrongs—ongoing violations of property rights—harm owners (and ultimately society) in ways that are not compensable merely by an award of damages for the trespass. When a trespasser wantonly crosses a farmer’s field, the harm to the landowner is not fungible with the one dollar in compensatory damages for the trodden grass.\textsuperscript{77} The value to the farmer of the private property is not one dollar. If the trespasser wished to access and use the land, this person should have negotiated with the farmer and paid the market price of this access right based on what he was willing to pay and what the farmer was willing to accept, assuming they could agree on an amount that was mutually acceptable. The injunction secures this capacity of the farmer to require this negotiation by the would-be trespasser.

This economic principle—injunctions facilitate market transactions by securing a property owner’s right to decide how she will use her assets and sell her products and services in the marketplace—is well recognized by courts in tangible property cases. In \textit{Continental Airlines v. Intra Brokers},\textsuperscript{78} for example, Continental successfully enjoined Intra Brokers’ unauthorized resale of Continental’s discount airfare coupons, which Continental expressly prohibited in the coupons.\textsuperscript{79} In appealing the injunction, Intra Brokers argued that, even if it was liable for its resale of the coupons, the value of the coupons was easily measured by the face value of each coupon; thus, Intra Brokers concluded that Continental failed to prove that it suffered an irreparable injury that could not be remedied by a legal remedy (damages). The Ninth Circuit decisively rejected Intra Brokers’ argument, stating that “Continental was entitled to control whether its coupons were transferred.”\textsuperscript{80} The court held that Continental had proven irreparable injury because the

\textsuperscript{76} See Mossoff, \textit{supra} note 6, at 939–40 (describing efficient infringement and how it devalues patents as a commercial asset class); \textit{see also} Auer et al., \textit{supra} note 7, at 160–64 (identifying role of injunctions in commercial transactions and how weakening patents devalues patents); Epstein & Noroozi, \textit{supra} note 15, at 1418–19 (identifying how a “misallocation of rights” without injunctive relief for SEPs results in lower royalty rates).

\textsuperscript{77} See, e.g., Jacque v. Steenberg Homes, 563 N.W.2d 154, 163–65 (Wis. 1997) (upholding $100,000 punitive damages award on the basis of a $1 compensatory damages award for a willful trespass given the personal and societal values undermined by intentional trespasses of private property).

\textsuperscript{78} \textit{Cont’l Airlines, Inc. v. Intra Brokers, Inc.}, 24 F.3d 1099 (9th Cir. 1994).

\textsuperscript{79} \textit{Id.} at 1100, 1105.

\textsuperscript{80} \textit{Id.} at 1104–05.
harm to Continental was to its power, not its purse. [Regardless w]hether Continental is right or wrong about the effect of coupon brokering on its profits . . . it is entitled to make its own decisions about whether to give out discount coupons, and whether to make them transferrable or nontransferable. Neither Intra nor the courts are entitled to substitute their business judgment for Continental’s . . . .

In Pardee v. Camden Lumber Co., the West Virginia Supreme Court similarly held that a trespasser who cut down the trees of a landowner could not simply elect to pay the landowner damages representing the fair market value of the trees. As in Continental Airlines, the defendant in Pardee argued that it was possible to precisely measure the monetary value of the trees and to pay this amount in damages to the plaintiff landowner. The Pardee court soundly rejected this argument, observing that this economic fact was insufficient to remedy the legal injury suffered by the landowner. The property owner’s harm was to its power of dominion, not merely to its purse. The court recognized that the fundamental policy function for “all forms of property either real or personal” is that courts “guarantee to the owner of property the right, not only to possession thereof and dominion over it, but also its immunity from injury.” The court further recognized that real estate is truly unique because “no two pieces of land are alike in all respects,” and thus courts cannot assume as a default rule that fair market value (damages) is fungible with the full value of the real estate to its owner.

In securing control rights over property, courts protect fully not only the commercial decisions that make possible private-ordering decisions in business models and market exchanges, but they also secure the liberty interest in how people may choose to live their lives, to secure their privacy rights, and to create their own business models and develop corporate goodwill with a reputation as innovative companies. As the Wisconsin Supreme Court recognized in another famous trespass case: “[T]he actual harm is not in the damage done to the land . . . but in the loss of the individual’s right to exclude others from his or her property.”

81 Id. at 1105 (emphasis added).
82 73 S.E. 82, 85 (W. Va. 1911).
83 See id. at 84–85.
84 Id. at 84.
85 Id.
86 See generally Mossoff & Claeys, supra note 7 (explaining natural rights justification for injunctive remedies for patent owners on the basis of an ethical theory that promotes human flourishing).
87 See Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 159 (Wis. 1997) (identifying privacy interests as nonfungible interests secured by real property).
88 See Douglas Dynamics, LLC v. Buyers Prods. Co., 717 F.3d 1336, 1344 (Fed. Cir. 2013) (identifying many different types of losses resulting from patent infringement that are often difficult to quantify, such as the patent owner’s lost sales, erosion in its reputation, and loss of its brand distinction).
89 Jacque, 563 N.W.2d at 159.
B. Injunctions as a Presumptive Remedy for Patent Infringement

Historically, courts applied these same principles in securing exclusive control rights in property rights in inventions. As with property rights in tangible goods, property rights in inventions serve as a platform in facilitating the creation of innovative patent licensing arrangements and other commercial institutions, such as patent pools, franchise business models, and standard development organizations. Just as a presumptive right to an injunction to prevent ongoing or willful trespasses secures to a farmer the exclusive control over the use of his land and how to sell the fruits of his labors, “injunctive relief supplies the legal bedrock on which patent licensing negotiations take place.” It was not rhetoric when early American courts wrote that “[a]n inventor holds a property in his invention by as good a title as the farmer holds his farm and flock.” In legal doctrine, Congress and courts secured the same rights for patent owners as they secured for landowners, such as the right to freely sell or license a patent. They also applied to patents the same remedial doctrines securing patents against ongoing or willful trespasses of a patent.

Even more important, this legal platform of licensing rights and presumptive injunctive remedies provided the basis for specialization and division of labor via market transactions. This made possible value creation by

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90 See, e.g., Cook v. Ernest, 6 F. Cas. 385, 391 (C.C.D. La. 1872) (No. 3155) (“If the rights of property so invaded were rights to land or other tangible estate, no court would hesitate for a moment to restrain the wrong-doer by injunction. The property in a patent is just as much under the protection of the law as property in land. The owner has the same right to invoke the protection of the courts, and when he has made good his claim to his patent, and shown an infringement of it, it is the duty of the courts to give him the same relief meted out to suitors in other cases.”).

91 See supra notes 3–4 and accompanying text. See also Barnett, supra note 4, at xiv (“Secure IP rights provide the necessary property-rights foundation for forming secondary markets in intellectual assets divorced from any particular product or service, which in turn facilitates disaggregated supply chains in which upstream R&D-specialist entities broadly disseminate technology inputs to a large pool of intermediate users.”); Smith, supra note 15, at 1059 (“Property thus provides a platform for coordinating transactions used to develop technology standards.”).

92 Barnett, supra note 61, at 1302.

93 Hovey v. Henry, 12 F. Cas. 603, 604 (C.C.D. Mass. 1846) (No. 6742); Davoll v. Brown, 7 F. Cas. 197, 199 (C.C.D. Mass. 1845) (No. 3662) (“[A] liberal construction is to be given to a patent, and inventors sustained, if practicable, . . . as only in this way can we protect intellectual property, the labors of the mind, productions and interests as much a man’s own, and as much the fruit of his honest industry, as the wheat he cultivates, or the flocks he rears.”); see also supra note 18 (identifying caselaw and scholarship).


95 See Mossoff, Reevaluating the Patent “Privilege” in Historical Context, supra note 18, at 993 (detailing how early courts recognized patent infringement as a form of trespass); see also MacLeod, supra note 10, at 725–80 (detailing the conceptual structure of patent infringement doctrine as a private law doctrine like trespass).
undercapitalized innovators, such as independent inventors, and, in today’s innovation economy, startups, universities, and research companies. These individuals and firms do not have the labor and capital necessary to establish their own manufacturing facilities, but they can license their patent rights and contract with other companies and entities who do have these capabilities to achieve efficiencies in the marketplace in producing and distributing new products and services to consumers. Economists recognize this economic consequence of the historically unique American approach in securing patents as property rights.96

Although the Patent Acts of 1790 and 1793 did not provide specific equity jurisdiction in patent infringement cases, federal courts still issued injunctions in exercising their general equity jurisdiction in lawsuits between citizens of different states.97 Congress amended the patent statutes in 1819 and specifically provided for an injunctive remedy for patent infringement.98 This made sense, as patent infringement was rarely a one-off wrongful act.

96 See, e.g., KHAN, supra note 4, at 9–10 (“[P]atents and . . . intellectual property rights facilitated market exchange, a process that assigned value, helped to mobilize capital, and improved the allocation of resources. . . . Extensive markets in patent rights allowed inventors to extract returns from their activities through licensing and assigning or selling their rights.”); Lamoreaux et al., supra note 63, at 4 (identifying economic activities prompted by U.S. patents).

97 See Nevins v. Johnson, 18 F. Cas. 28, 29 (C.C.S.D.N.Y. 1853) (No. 10,136) (discussing equitable jurisdiction in patent cases as far back as 1811 and observing that the 1819 legislation was enacted only “to remove doubts as to the authority of the courts of the United States to employ that process in patent cases to the same extent it is used in courts of general jurisdiction”); Sullivan v. Redfield, 23 F. Cas. 357, 360 (C.C.D.N.Y. 1825) (No. 13,597) (“This act [of 1819] does not enlarge or alter the powers of the court over the subject matter of the bill or the cause of action. It only extends its jurisdiction to parties not before falling within it. Before this act it had been held, that a citizen of one state could not obtain an injunction in the circuit court for a violation of a patent right against a citizen of the same state, as no act of congress authorized such suit. This act removed that objection, and gave the jurisdiction, although the parties were citizens of the same state. But in the exercise of the jurisdiction in all cases of granting injunctions to prevent the violation of patent rights, the court is to proceed according to the course and principles of courts of equity in such cases.” (citation omitted)); Whitney v. Carter, 29 F. Cas. 1070, 1071 (C.C.D. Ga. 1810) (No. 17,583) (“[T]he plaintiff’s counsel cited . . . the opinion of the court, delivered by Judge Johnson, in December term, 1807, in the case of Whitney and others v. Fort, upon a bill of injunction.” (footnote omitted)); Morse v. Reed, 17 F. Cas. 873, 873 (C.C.D.N.Y. 1796) (No. 9860) (reporting no opinion, but stating in headnote that “[i]n a suit . . . for infringement of patent, the circuit court will also grant a perpetual injunction” under the 1793 Patent Act). Morse is apparently mistakenly listed as a patent case, as it was a copyright case. See James Ryan, A Short History of Patent Remedies, 6 CYBARIS 150, 160 (2015).

98 See Patent Act of 1819, Pub. L. No. 13-19, 3 Stat. 481, 481–82. After 1819, federal courts continued to invoke general equity jurisdiction in patent cases. See, e.g., Potter v. Dixon, 19 F. Cas. 1145, 1146 (C.C.S.D.N.Y. 1863) (No. 11,325) (“It has been frequently decided that the power conferred on the United States circuit court to entertain bills in equity in controversies arising under the patent act, is a general equity power, and carries with it all the incidents belonging to that species of jurisdiction.”); Sullivan, 23 F. Cas. at 360 (observing that, even after the 1819 legislation, “in the exercise of the jurisdiction in
comprising typically ongoing manufacture, use, and commercial sale of infringing products or processes. The classic jurisdictional justifications for an equity court to interject itself into a legal dispute and issue an injunction—preventing multiplicity of lawsuits, redressing ongoing wrongs that are undeterred by legal remedies, etc.—applied in spades to patent infringement cases.99 As a result, nineteenth-century courts quickly developed doctrines, based in part on the same preexisting presumptions for issuing equitable remedies in securing other property rights, permitting injunctions to issue without the patent owner first receiving an express decision at law.100

all cases of granting injunctions to prevent the violation of patent rights, the court is to proceed according to the course and principles of courts of equity in such cases”).

99 See, e.g., M’Millin v. Barclay, 16 F. Cas. 302, 303–04 (C.C.W.D. Pa. 1871) (No. 8902) (“The principle . . . upon which courts of equity have jurisdiction in patent cases, and upon which injunctions are granted in them, is not that there is no legal remedy, but that the law does not furnish a complete remedy to those whose property is invaded; for, if each infringement of the patent were to be made a distinct cause of action, the remedy would be worse than the evil. The inventor or author might be ruined by . . . perpetual litigation, without ever being able to have a final establishment of his rights.” (quoting Motte v. Bennett, 17 F. Cas. 909, 910–11 (C.C.D.S.C. 1849) (No. 9884)); Sanders v. Logan, 21 F. Cas. 321, 323 (C.C.W.D. Pa. 1861) (No. 12,295) (“There are many cases . . . where [an injunction] is the only efficient remedy to protect the patentee, and prevent continuing trespasses on his rights.”); Motte, 17 F. Cas. at 910–11, 916–17 (discussing broadly equitable principles for securing patents against “piracy,” including prevention of multiple lawsuits, and issuing injunction to protect a patent owner licensing its property rights).

100 Some courts followed the traditional jurisdictional requirement that legal issues, such as infringement and validity, must first be decided at law before a plaintiff filed a petition in equity. See, e.g., Sullivan v. Redfield, 23 F. Cas. 357, 359 (C.C.D.N.Y. 1825) (No. 13,597) (“Whether the complainant’s patent is good and valid so as ultimately to secure to him the right he claims, is not a question for decision upon the equity side of this court. That is a question which belongs to a court of law, in which the parties have a right of trial by a jury. The equity jurisdiction exercised by the court over patents for inventions is merely in aid of the common law . . . .”). Other courts did not follow this rule, and courts ultimately settled on a rule providing liberal access to equity courts. See, e.g., Hoffheins v. Brandt, 12 F. Cas. 290, 290–91 (C.C.D. Md. 1867) (No. 6575) (“There at one time prevailed, in the circuit courts of the United States, the idea that the court, as a court of equity, would interfere in aid of a patentee only where his patent was sanctioned by general acquiescence for many years, or had been maintained at law, by the verdict of a jury, who had passed upon the novelty and utility of the invention, when called in question. But I think that the current of decisions of the last few years has been otherwise . . . [and] that the grant of jurisdiction is as full in equity as it is at law.”); Potter v. Muller, 19 F. Cas. 1170, 1170 (C.C.S.D. Ohio 1864) (No. 11,354) (“The rule as to granting or continuing injunctions in patent right cases is now well settled . . . . They are now granted without a previous trial at law in cases where the owner of the patent shows a clear case of infringement, and has been in the possession and enjoyment of the exclusive right for a term of years without any successful impeachment of its validity. Such possession and enjoyment, aided by the presumptions arising from the patent itself, are usually regarded as sufficient to warrant an injunction to restrain infringement.”); Sargent v. Carter, 21 F. Cas. 495, 497 (C.C.D. Mass. 1857) (No. 12,362) (“[C]ourts of the United States do
The 1875 decision in *Gilbert & Barker Manufacturing Co. v. Bussing* exemplifies many of these legal, policy, and economic insights.\footnote{101} First, the court denied the patent owner’s request for a preliminary injunction,\footnote{102} confirming that injunctions were only presumptive remedies that could be rebutted successfully by defendants. In fact, decisions concerning preliminary injunctions tend to be many of the historical cases in which defendants succeed, pleading either legitimate questions about patent validity or other concerns in equity, such as laches or the balance of hardship weighing in favor of the defendant before a full hearing of the legal dispute.\footnote{103} This was one such case, as the defendant was sued for an unauthorized noncommercial use of a patented machine that he used in his “private residence.”\footnote{104} Given the “great inconvenience” to the defendant in the issuance of a preliminary injunction and the absence of any commercial harm to the patent owner, the court denied the plaintiff patent owner’s request for a preliminary injunction.\footnote{105}

Second, and even more important, the court in *Gilbert & Barker Manufacturing Co.* expressly affirmed that injunctions are the presumptive remedy for patent infringement—payment of court-ordered reasonably royalties does not put a patent owner in its rightful position for the wrong suffered by infringement of its valid patent. The court recognized that patent owners should not be forced into compulsory licensing through denials of a final injunction after finding a defendant liable for ongoing infringement of a valid patent. In denying the plaintiff’s request for a preliminary injunction, the court bluntly stated: “I do not mean to intimate, that, on the final hearing, the complainants may not be entitled to a perpetual injunction against not, in all cases, require a verdict at law on the title, before granting a final injunction . . . .”); Ogle v. Ege, 18 F. Cas. 619, 620 (C.C.D. Pa. 1826) (No. 10,462) (“I take the rule to be, in cases of injunctions in patent cases, that where the bill states a clear right to the thing patented, which, together with the alleged infringement, is verified by affidavit; if he has been in possession of it by having used or sold it in part, or in the whole, the court will grant an injunction, and continue it till the hearing or further order, without sending the plaintiff to law to try his right.”).

\footnote{101} Gilbert & Barker Mfg. Co. v. Bussing, 10 F. Cas. 348 (C.C.S.D.N.Y. 1875) (No. 5416).  
\footnote{102} See id. at 349.  
\footnote{104} Gilbert & Barker Mfg. Co., 10 F. Cas. at 349 (“The defendant is not engaged in manufacturing and selling, and does not, therefore, interfere with the business of the complainants, by competition or otherwise. . . . He has a single machine, connected with, and used for lighting, his private residence.”).  
\footnote{105} Id.
the defendant. The complainants cannot be compelled, against their will, to permit the defendant to use their invention."  

In stressing the importance of the presumptive remedy of an injunction for ongoing infringement of a patent, *Gilbert & Barker Manufacturing Co.* was not an outlier.  

Disproving again Justice Kennedy’s claim in *eBay* licensing is a new business model, nineteenth-century courts repeatedly recognized that licensing was a sufficient commercial activity to justify an injunction to prevent ongoing or willful infringements that diminished the patent owner’s royalties in the marketplace.  

As Circuit Justice McLean explained in another patent case in 1845: in “an ordinary case of infringement . . . an absolute injunction is the only adequate relief.”  

In 1908, the Supreme Court recognized these and many other cases in its decision in *Continental Paper Bag Co. v. Eastern Paper Bag Co.* that all patent owners have a presumptive right to receive an injunction for ongoing “trespasses and continuing wrongs” of their property rights.  

The *Continental Paper Bag* Court recognized that patent owners can obtain an injunction for ongoing or willful infringements even if they were not actively using their property rights at the time of infringement. This proposition was so well settled, “especially in patent cases,” that the Court observed that “a citation of cases is unnecessary” in setting forth these legal rules.  

These principles sometimes make an appearance in modern cases, at least in the increasingly uncommon decisions in which a permanent injunction is issued by a district court or a denial of an injunction is reversed on appeal. In one such case in 2013, the Court of Appeals for the Federal Circuit observed that “[e]xclusivity is closely related to the fundamental nature of patents as property rights. It is an intangible asset that is part of [the] company’s reputation.”  

Courts have also recognized that patent infringement causes innumerable harms that are very difficult to identify, quantify,
and measure in a way that affords complete relief with only monetary damages. These harms include “[p]rice erosion, loss of goodwill, damage to reputation, and loss of business opportunities” in the marketplace, which the Federal Circuit rightly recognized as “all valid grounds for finding irreparable harm.”

These legal, policy, and economic concerns reflect the same concerns about loss of control rights over the use of real property that have animated well-established remedies doctrines. Even if monetary damages can be measured and awarded by a court, this does not put a property owner in the position the owner would have been but for the wrong of the violation of the property rights. The ability to secure personal values and commercial decisions in the use of one’s own property is an essential foundation of both a liberal political order and a free market. This principle applies to all forms of property, whether real estate or patents.

Conclusion

*eBay* changed the law governing how courts issue injunctions for ongoing or willful infringement of a valid patent, and this has resulted in a significant change in legal practice. Historically, patents were secured, like all property rights, by a presumptive remedy of an injunction when patent owners faced ongoing or willful trespasses. *eBay* displaced this equitable doctrine with a four-factor test that has been used by courts to significantly lower the rates of injunctions issuing as a remedy for patent infringement.

Since injunctions are a backstop to all commercial negotiations, the loss of this reliable and effective legal protection has stymied the role that these property rights serve as a platform for commercial activities in the innovation economy. Patents have been devalued as an asset class, as the ability to negotiate market prices, such as licensing of patents, is replaced by court-ordered compulsory licensing, which further depresses royalty rates in commercial negotiations generally. Congress recently abrogated *eBay* in trademark law, restoring the presumptive remedy of an injunction for trademark owners aggrieved by infringement of their property rights. Congress or the Supreme Court should now do the same in patent law, restoring the reliable and effective property rights that have spurred the U.S. innovation economy for two centuries.

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