

NON-CONFIDENTIAL

Appeal Nos. 2012-1548, 2012-1549

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

APPLE INC. AND NEXT SOFTWARE, INC.
(formerly known as NeXT Computer Inc.),

Appellants,

v.

MOTOROLA INC. (now known as Motorola Solutions, Inc.) AND
MOTOROLA MOBILITY, INC.,

Appellees-Cross-Appellants,

Appeals from the United States District Court for the Northern District of Illinois
in case no. 11-CV-8540, Judge Richard A. Posner

**REPLY BRIEF OF APPELLEES-CROSS-APPELLANTS
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CERTIFICATE OF INTEREST

Counsel for Appellees-Cross-Appellants Motorola Mobility LLC and Motorola Solutions, Inc. certifies the following:

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

Motorola Mobility LLC, formerly known as Motorola Mobility, Inc. On June 22, 2012, Appellant Motorola Mobility, Inc. was converted into a Delaware limited liability company, changing its name to Motorola Mobility LLC.

Motorola Solutions, Inc., formerly known as Motorola, Inc., is incorporated under the laws of Delaware and has its principal place of business in Schaumburg, Illinois.

2. The name of the real parties in interest represented by me is:

None.

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

Motorola Mobility LLC is a wholly owned subsidiary of Google Inc., a publicly held company.

The stock of Motorola Solutions, Inc. is publicly traded. No publicly held entity owns 10 percent or more of the stock of Motorola Solutions, Inc. Motorola Solutions, Inc. has no parent corporation.

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

See the Addendum to Motorola's Certificate of Interest on the following page.

ADDENDUM TO MOTOROLA'S CERTIFICATE OF INTEREST

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INTRODUCTION

Apple's response to Motorola's cross-appeal fails to overcome Motorola's arguments for the proper construction of its '559 and '712 patents. In the case of the '559 patent, Apple seeks to exclude the preferred embodiment, which clearly allows the inner code to be the same orthogonal codeword repeated over and over. Apple also insists that the steps of claim 5 must be performed in order, but ignores the portion of the specification which allows the steps to be done out of order. With respect to the '712 patent, Apple's construction would have the intrinsic evidence yield to the extrinsic evidence, even though the extrinsic evidence post-dates the issuance of the patent by many years, and in fact conflicts with the intrinsic evidence.

Apple's response also advocates damages standards that would ignore the most relevant evidence of the value of Motorola's standards-essential patents (SEPs): the prior comparable licenses Motorola has obtained for the same patents. As Apple does not and cannot dispute, Motorola and other companies in the mobile telecommunications industry contributed technologies essential to various telecommunications and wireless standards and cross-licensed those technologies to one another, while Apple never made similar contributions nor participated in this cooperative process. Motorola should be given the opportunity to present evidence at trial that a reasonable royalty for Apple's infringement of Motorola's

standards-essential '898 patent would be a proportion of Motorola's standard portfolio rate, established over years of licensing efforts. This rate does not reflect "hold up" but rather is the best evidence of how the patented technology is valued in real-world, bilateral negotiations between sophisticated parties.

Motorola also should be given an opportunity to demonstrate that an injunction is an appropriate remedy where, as here, an infringer is an unwilling licensee. The district court's denial of an injunction here was based solely on Motorola's FRAND commitment without factual analysis of the case-specific equities. It thus improperly imposed an effectively categorical rule against injunctions for SEPs, regardless of Apple's particular conduct in this case, contrary to the principles of *eBay*. This Court should not uphold such an effectively categorical rule here, for the practical elimination of injunctive relief for SEPs would disrupt the standard-setting process, create disincentives to participate in industry standards, and harm consumers by discouraging the collaboration that permits the efficient and compatible use of new technologies.

ARGUMENT

I. THE DISTRICT COURT MISCONSTRUED THE '559 PATENT

A. The District Court Erred By Imposing Strict Ordering And Storage Requirements In Claim 5

The disagreement over claim 5 is whether the steps *must* be performed in strict, sequential order. Apple's response brief misrepresents (ARB 20) the '559

patent specification, saying that it only “describes ‘the present invention’ as first forming the outer and inner codes, and ‘then multipl[ying]’ them together.” The claim language, “neither grammatically nor logically,” however, compels Apple’s construction. *Altiris v. Symantec*, 318 F.3d 1363, 1369-71 (Fed. Cir. 2003). Apple ignores that the phrase “the present invention” is also used at column 4, lines 15-17: “The preamble generator of the present invention can be implemented in custom hardware, programmable hardware, or software in a microprocessor.” A100214.

The district court did not address this portion of the specification. Apple’s response brief similarly has no answer to this portion, dismissing it as “ha[ving] nothing to do with the order of the steps.” ARB 21. But patents are written for persons with ordinary skill in the art, not laypersons, *see Phillips v. AWH*, 415 F.3d 1303, 1312-13 (Fed. Cir. 2005), and as Motorola explained below, one of ordinary skill in the art would understand “custom hardware” to be an implementation in an ASIC (application specific integrated circuit), and programmable hardware to be an FPGA (field programmable gate array) or PLD (programmable logical device). A140438-40; A140455-58. In these implementations, memory is often limited, and it may require much less chip area, complexity, and power to form and multiply the bits of the inner and outer codes one by one than it would to form the

entire codes, store them, and then proceed to the multiplication step. A140439-40; A140457-58.

Accordingly, one of ordinary skill in the art who reads claim 5 in light of the specification and practices the invention in custom or programmable hardware would understand that claim 5 can be practiced partially out of order. Apple's own expert conceded at his deposition that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See A140562, at 158:17-19, 159:12-160:14; 160:20-25, 161:12-15.

B. The Court Erred By Excluding From The Inner Code Of Claim 5 An Orthogonal Codeword That Is Repeated

Apple's response brief tries (ARB 23) but fails to reconcile the district court's construction of the inner code of claim 5 with the preferred embodiment of the patent, which states, that "[i]t is not required that the orthogonal codewords are unique[,]” A100214, col. 3:57. Apple argues that this statement from the specification simply means that some but not all of the codewords may repeat. But such a construction excludes the embodiment that most naturally comes to mind when considering things that are not unique—*i.e.*, that they are the same.¹

¹ Apple's comparison of the sentence at issue with Figure 6 is misleading. See ARB 23. Figure 6 is unambiguously described as just one example of the

Contrary to Apple's suggestion, one of ordinary skill would recognize that the concept of orthogonal codes for the inner code of claim 5 has to do with the relationship of these codes as used by *different handsets*, not the relationship between the codewords within the inner code of the *same handset*. See A100213, 1:16-18 ("Because multiple mobile stations may be trying to access this channel simultaneously, each user must use a different code."); A100214, 53-57 (emphasis added) ("[W]hen the transmitter and receiver oscillator frequencies are not exactly equal, the preamble received at the base station appears very different from, or highly uncorrelated with, the *other preambles in the set*"). Any given preamble sequence must be able to distinguish itself from the multiple other preamble sequences in the cellular network without causing interference and this disambiguation is accomplished when those inner codes of the preamble sequences are orthogonal to one another. A100213, 2:16-21; A100214, 3:38-39, 4:51-60. Whether some or all of the codewords of the inner code are orthogonal to each other is beside the point. A100214, 3:57.

preferred embodiment. A100214, 3:40-41 ("*As an example of the preferred embodiment*, FIG. 6 depicts . . .") (emphasis added). Column 3, line 57 of the '559 patent allows other examples of the preferred embodiment to have an inner code with a repeated codeword.

II. THE DISTRICT COURT'S CONSTRUCTION OF THE '712 PATENT WAS BASED EXCLUSIVELY ON EXTRINSIC EVIDENCE THAT CONFLICTED WITH THE INTRINSIC EVIDENCE

Apple does not dispute that the district court's construction of the "transmit overflow sequence number" ("TOSN") was based exclusively on extrinsic evidence. Instead, Apple argues (ARB 14-15) that "[t]ransmitting of the overflow sequence number would make no sense[]" because it would open transmissions to "eavesdroppers" and "snoops." Even a cursory review of Apple's citations (ARB 14-15) to the '712 patent, however, reveals that they say nothing about the purported security benefits (or lack thereof) of transmitting the TOSN. *See i4i P'ship v. Microsoft*, 598 F.3d 831, 843 (Fed. Cir. 2010) *aff'd*, 131 S. Ct. 2238 (2011) ("[N]ot every benefit flowing from an invention is a claim limitation."). For example, Apple cites (ARB 14) to column 2, lines 37 to 39, for the proposition that "an eavesdropper has only part of the frame number and, therefore, cannot decrypt the package[.]" and that the TOSN is therefore not transmitted. But that portion of the specification cited by Apple describes the decryption process at the *receiver*. A101585, 2:37-39. None of Apple's citations stand for the proposition that it would be either dangerous or beyond the scope of the '712 patent for the *transmitter* to transmit the TOSN to the receiver.

Moreover, the claims themselves say nothing about any downside to transferring the TOSN. *See* A101587, 5:67-10:11. Thus, notwithstanding Apple's

attempts to point to intrinsic evidence, the district court was correct that the intrinsic evidence is silent regarding whether the TOSN can or should be transmitted. A3334-35 (“[N]either the claim language nor the specification *prohibits* transmission of the overflow sequence number or gives any clear indication of what happens to the number. There is simply silence on the issue.”).

The patent’s use of “receive overflow sequence number” (“ROSN”) also does not mean that the TOSN cannot be transmitted to the receiver. The terms TOSN and ROSN simply indicate whether the overflow sequence number is being used as part of the method of encrypting at the transmitter or decrypting at the receiver. Claims in the ‘712 patent that relate to encrypting (e.g., claim 17, A101588) use the term TOSN because the encrypting is done at the transmitter. In contrast, claims that relate to decrypting (e.g., claim 18, *id.*) use the term ROSN because the decrypting is done at the receiver.

Basing a claim construction solely on extrinsic evidence dated years after the invention undermines the public notice function of patents and the public’s ability to rely on the patent and intrinsic evidence. Apple’s cases (ARB 17-18) are inapposite. In *Microsoft*, the Court found waiver based on the prosecution history of a related U.S. application, but that is intrinsic, not extrinsic, evidence. *Microsoft v. Multi-Tech Sys.*, 357 F.3d 1340, 1350-51 (Fed. Cir. 2004). Similarly in *Gillette*, also cited by Apple, this Court’s construction was based on extensive references to

the claim language itself and the specification. *Gillette v. Energizer Holdings*, 405 F.3d 1367, 1373-74 (Fed. Cir. 2005). The Court's reliance on the statements made in the foreign prosecution were merely further support, and unlike here the timing of those statements was not an issue. *See id.* at 1370-74.

This Court has repeatedly stated that the doctrine of "prosecution disclaimer promotes the public notice function of the *intrinsic evidence* and protects the public's reliance on definitive statements made during prosecution." *Omega Eng'g, v. Raytek*, 334 F.3d 1314, 1324 (Fed. Cir. 2003) (emphasis added); *see also Biogen v. GlaxoSmithKline*, No. 2012-1120, 2013 WL 1603360, slip op. at 8 (Fed. Cir. Apr. 16, 2013); *Elbex Video v. Sensormatic*, 508 F.3d 1366, 1371 (Fed. Cir. 2007). This Court should not effectively extend this doctrine to extrinsic evidence and thus retroactively narrow the scope of a patent years after the fact.

III. THE DISTRICT COURT ERRED IN CONCLUDING THAT MOTOROLA COULD NOT ESTABLISH DAMAGES FOR APPLE'S INFRINGEMENT

Apple's brief defends the district court's unprecedented decision (ARB 26-31) that reasonable royalty damages for infringement of patents that are part of Motorola's standards-essential cellular patent portfolio should be limited to the hypothetical value of the patent untethered to any real-world licenses and calculated years before infringement. Apple defends the district court's flawed decision to disregard the most relevant evidence of the value of those patents:

namely, actual license agreements negotiated between sophisticated parties, involving the patents-in-suit and similar SEPs practiced by similar products. A jury should be allowed to consider that evidence, which shows that Motorola's SEPs are properly valued at 2.25% of the base price of the products sold.

A. Motorola's License Agreements Do Not Include "Hold Up" Value

Contrary to Apple's assertion (ARB 26-27, 30-31), Motorola's license agreements with *all of the major handset manufacturers* selling in the United States, other than Apple, are highly probative of an appropriate damages award in this case. A117799. Unlike other potential damages factors, where a party must attempt to recreate a real-world situation *ex post*, these license agreements are evidence of how sophisticated parties valued Motorola's patent portfolio *ex ante* in actual real-world bilateral, arms-length negotiations. "[N]othing can be more reasonable than the price fixed by the patentee for the use of his invention, in his dealings with others[.]" *Washington, Alexandria & Georgetown Steam Packet Co. v. Sickles*, 86 U.S. 611, 618 (1873); *see also Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.*, 235 U.S. 641, 648-49 (1915) ("[H]ad the plaintiff pursued a course of granting licenses to others to deal in articles embodying the invention, the established royalty could have been proved as indicative of the value of what was taken, and therefore as affording a basis of measuring damages.").

Apple asserts throughout its brief (ARB 26-31, 33) that Motorola's licenses with RIM, HTC, Samsung, LG, Nokia and Ericsson are not probative because the licensed patents are SEPs and the licenses therefore inherently contain a "hold up" value. That assumption is incorrect. Motorola has been licensing its portfolio of SEPs, covering standards such as 2G, 3G and 802.11 (wifi), since 1992. A117799-800. Although the '559 and '898 patents were not incorporated into the relevant standards until the early 2000's, Motorola's licenses from both before and after that time have comparable payment terms. For example, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] A117799, A119623, A119440, A118883.

If Apple's assertions were true, then the value of Motorola's SEP portfolio should have surged in the early 2000's after the '559 patented invention was added to the UMTS standard and the '898 patented invention was added to the GPRS standard because of the increased "hold up" value owed to the newly-added SEPs. No such surge occurred. Instead, the consistent range of rates negotiated throughout

Motorola's licensing efforts (including the value attributed to SEPs licensed back from the licensee) indicates that Apple is wrong.

Licensing patents as part of a larger portfolio is also a recognized, proper practice, as acknowledged by this Court in *U.S. Philips Corp. v. ITC*, 424 F.3d 1179, 1188-89 (Fed. Cir. 2005). There, this Court found that it was not improper for Philips to charge a uniform licensing fee to manufacturers of compact discs covered by its patented technology, no matter how many of the patents in the patent portfolio the licensee chose to use. *Id.* Many firms throughout this industry negotiate and license on a portfolio basis and adhere to their FRAND commitments by determining portfolio rates through bilateral negotiations. *See, e.g.*, James Bessen, *Patent Thickets: Strategic Patenting of Complex Technologies* 2, 2003. In fact, ETSI itself contemplates that FRAND rates will be set by the marketplace; the ETSI Guide to Intellectual Property Rights (IPRs) states that “[s]pecific licensing terms and negotiations are commercial issues between the companies and shall not be addressed within ETSI.” A117952. Sophisticated parties in the same industry have negotiated agreements starting from Motorola's standard rate for its standards-essential portfolio of patents, giving rise to the inference under ETSI's own terms that such a rate is fair and reasonable. A jury should have been allowed to hear evidence of this long-standing practice and the rates associated with these licenses to determine the appropriate measure of damages in this case.

B. The Date of the Hypothetical Negotiation Should Be Shortly Before Infringement Began

Apple's response brief defends (ARB 26-30) the district court's holding (A140) that the date for determining the value of SEPs in a hypothetical negotiation is shortly before the standard was adopted, rather than shortly before infringement began. That defense fails. This Court has consistently held that a reasonable royalty should be determined based on a hypothetical negotiation as of the date *infringement* by the defendant began. *E.g., Applied Med. Res. Corp. v. U.S. Surgical Corp.*, 435 F.3d 1356, 1361 (Fed. Cir. 2006); *see also LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 76 (Fed. Cir. 2012) (the purpose of the hypothetical negotiation framework is to “discern the value of the patented technology to the parties in the marketplace when infringement began.”). Here, Apple's infringement began in 2007 with its first sale of the iPhone. A20089-90, ¶105.

Apple suggests (ARB 26-30) that any use of the infringement date will reflect “hold up” value, but cites no evidence in the record to support such a claim. If the patented technology is not useful in the standard, it may be replaced or improved (A131536-44); its value is not settled by its inclusion in a standard. Apple's citation (ARB 26) to *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 310 (3d Cir. 2007), is unavailing; that decision acknowledges that a patent holder “may” be able in certain circumstances to extract high royalties for a SEP because

of costs to switch away from a standard, causing the patent value to be enhanced, but Apple cites no evidence that such circumstances are present here.

Absent any such evidence, the district court's *ex ante* rule limiting the valuation analysis to a time prior to adoption of the standard is improper. By ignoring the marketplace conditions at the time infringement began, the rule fails to account for the popularity of the technology incorporating the standard or the true value of the patented technology to the patent holder at the time the infringer began using such technology in its product. Rather than adding "hold up" value, looking to real-world conditions at the time the defendant began infringement tethers the analysis to the usefulness of the patented technology at the time the decision was made to utilize such technology in a finished product. *See Applied Med. Res.*, 435 F.3d at 1361-62. Patents often gain value over time when a new, popular technology incorporates a patented feature; attributing any gain in a SEP's value solely to its inclusion in a standard is improper and, in this case, lacks any evidentiary support.

C. The District Court Placed Improper Weight On Potential Non-Infringing Alternatives

Apple admits (ARB 29) that there were no non-infringing alternatives in the market in 2007 when Apple began sale of the infringing devices, but nonetheless defends the district court's focus on hypothetical non-infringing alternatives prior

to standardization as determining the correct measure of damages.² Apple is incorrect. To begin with, the various damages factors are to be flexibly applied as appropriate to the specific facts of the case, and the cost of switching to a non-infringing alternative at the time of the hypothetical negotiation is only one factor that may be considered when determining a reasonable royalty. *See, e.g., Whitserve, LLC v. Computer Packages, Inc.*, 694 F.3d 10, 31 (Fed. Cir. 2012) (emphasis in original) (“Expert witnesses should concentrate on *fully* analyzing the *applicable* [*Georgia-Pacific*] factors, not cursorily reciting all fifteen.”). Here, actual licenses relating to the patents-at-issue are an additional factor that better measure the patents’ value because they reflect the value attributed to the patents in real-world negotiations. *See* IA, *supra*. The cost of swapping hypothetical alternative technology for the patented technology in the standard is therefore not useful in determining an appropriate measure of damages in this situation, and Motorola’s expert Mulhern’s analysis was not flawed for omitting a discussion of alternatives that did not exist. *See* A20119-121; *see generally* A20089-20126.

Apple is also incorrect to assert (ARB 31) that *Motorola* bears the burden of finding non-infringing alternative technologies and determining their value in order

² Apple provides no evidence that these supposed alternatives to the countdown function were actually acceptable alternatives. The proposals cited by Apple (ARB 29) were rejected in favor of the Motorola proposal (A137116-17, 137127, 137129), and the Motorola proposal in fact addressed technical shortcomings present in both supposed alternatives. A137115, 137123-25, 137273-276, 137290-91, 137296-99.

to prove damages. “Where, as here, an alleged substitute was not on the market during the damages period, the accused infringer has the burden to overcome the inference that the substitute was not ‘available.’” *SynQor, Inc. v. Artesyn Techs., Inc.*, 709 F.3d 1365, 1382 (Fed. Cir. 2013) (citation omitted). It was therefore *Apple’s* burden to demonstrate the existence of non-infringing alternatives to the patented technology that Apple could have utilized for a lower cost in such devices. *Id.* It failed to do so.

D. Motorola Is Not Improperly Applying The Entire Market Value Rule

Apple’s response brief asserts (ARB 32-37) that an additional reason to disregard relevant real-world portfolio licenses relating to the patented technology is that the licenses determine a royalty based on the selling price of the licensed devices as a whole. That is incorrect, and Motorola’s calculation of a royalty rate based on the price of Apple’s iPhone is proper. Contrary to Apple’s suggestion (ARB 36-37), Motorola is not claiming here, as in *LaserDynamics*, a small percentage royalty on a large revenue base for the purpose of making its damages proposal “appear modest” and to “artificially inflate the jury’s damages calculation.” 694 F.3d at 68. Instead, Motorola’s royalty calculation is consistent with what other major cellular handset manufacturers have agreed to after arms-length negotiations that cover the same patents at issue in this case. A117799, A118883, A119440, A119623.

In other Motorola licenses, the royalty rate paid by the handset manufacturers is a percentage of the sale price of the licensed device, not a percentage of a component of such products. This Court has acknowledged that “sophisticated parties routinely enter into license agreements that base the value of the patented inventions as a percentage of the commercial products’ sales price” and that “[t]here is nothing inherently wrong” with that practice. *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1339 (Fed. Cir. 2009). Because these agreements were negotiated between sophisticated parties and involved the portfolios of which the asserted patents are a part, the agreements are highly probative evidence of the outcome of a hypothetical negotiation involving the asserted patents. It is also probative of the value of the patented technology. It is proper for the jury to hear this evidence.

This case also presents a different scenario than the one addressed by this Court in *LaserDynamics*. There, the record contained evidence of numerous license agreements relating to the patent-at-issue that contained lump sum royalties rather than a running royalty. 694 F.3d at 70. As a result, the plaintiff’s use of the price of the entire laptop price as a royalty base was not premised on actual market demand for the patented technology and was in fact contradicted by the outcome of real world negotiations. “Actual licenses to the patented technology are highly probative as to what constitutes a reasonable royalty for those patent rights because

such actual licenses most clearly reflect the economic value of the patented technology in the marketplace.” *Id.* at 79. Here, numerous license agreements in the record actually calculate a running royalty based on the price of handsets and not a lump-sum basis, supporting Motorola’s damages theory.

In addition, the ETSI IPR Policy requires holders of SEPs to grant licenses to sell EQUIPMENT, where EQUIPMENT is defined as “any system, or device fully conforming to a STANDARD.” A117929-30, A117934. Generally speaking, components are not sufficient to fully conform to standards; as a result, industry parties generally negotiate royalty rates applied to the price of the entire end product. Nokia Br. 4. Using the sales price of components as part of a cellular communications device as a basis for a reasonable royalty therefore might *undercompensate* SEP holders in circumstances like the Motorola portfolio at issue here. *Id.* Any suggestion by Apple of a categorical ban on the use of entire product market value in such circumstances would contradict *LaserDynamics* and *Lucent*.

Although Apple argues (ARB 35) that it should pay a royalty closer to [REDACTED] [REDACTED] due to its former arrangement with the Taiwanese module supplier Chi Mei, Apple ignores several key facts relating to the arrangement with Chi Mei. *First*, only [REDACTED] [REDACTED] A126120, 31:12-32:4; A126136, 94:21-22. *Second*,

Motorola's agreement with Chi Mei [REDACTED]

[REDACTED]

[REDACTED] A127200,

A111377-78. *Third*, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] A111376 at 3.6, A111469. Although Apple implies that [REDACTED]

[REDACTED]

[REDACTED] *Id.* It was thus within Motorola's rights as a patent owner to offer Chi Mei, a Taiwanese module supplier, a different royalty structure from Apple, an American competitor selling mobile phones. Owners of SEPs do not violate FRAND by offering different royalties to differently-situated companies. A18776-77, ¶37-39; A20399, ¶19.

E. Motorola Properly Apportioned the Value of the '898 Patent

Apple further asserts (ARB 37-39) that Motorola improperly apportioned the value of its SEP portfolio to inflate the value of the '898 patent. That is incorrect. To begin with, the district court improperly excluded (A137-40) the expert testimony of Charles Donohoe, an expert in standards-essential patent licensing, and Ms. Mulhern in fact properly relied on Mr. Donohoe's testimony in determining the proper value for the '898 patent. Alternatively, even if Ms.

Mulhern's testimony were excluded, Motorola should have been permitted to rely on the testimony of Mr. Donohoe and its fact witnesses, Kirk Dailey and Brian Blasius (A118882-84; A20102, ¶131) to demonstrate the proper measure of damages for the '898 patent.

Apple in addition ignores the actual marketplace precedent for Motorola's apportionment. As Motorola's expert Mr. Donohoe explained, it is typical in the case of SEP portfolios for the first patent from the portfolio to be licensed to have a disproportionate value of 40 to 50 percent of the overall rate. A20330-38. Mr. Blasius, Motorola's Director of Outbound Licensing, concurred that in his experience a single patent or a small number of patents within Motorola's SEP portfolio would command "at least 50 percent" of the portfolio rate. A20102. SEPs are generally licensed together, because, if a company's product is using a standard, that company will need a license to *all* patents that are SEPs under that standard. Rather than engaging in a piecemeal licensing process for potentially hundreds of patents, these witnesses explained, it is more efficient and a standard industry practice to negotiate for an entire portfolio. A20101-04, ¶129-34. This is true across numerous technologies and standards; the fact that Mr. Donohoe's testimony did not relate specifically to the '898 patent does not undermine the value of his testimony about industry practices, and his testimony should not have been excluded.

Apple protests (ARB 39) that “[p]atent law does not recognize a volume discount[,]” but in fact Motorola’s long-standing licensing practices do recognize such a discount, and that fact should be included as part of the damages analysis. Motorola’s standards-essential patent portfolio includes patents necessary to practice the 2G, 3G and 802.11 standards (among others). A117800. Although it is Motorola’s position that the patents for each standard have a value of 2.25% of sales, Motorola does not engage in royalty “stacking.” A19046. Even as more patents are added to Motorola’s portfolio, the rate remains consistent. The value of one patent within that portfolio, then, is worth more than such patent’s fraction of the portfolio, because the efficiencies of the portfolio-based licenses are lost.³ Motorola should have been permitted to present that evidence to the jury.

IV. THE DISTRICT COURT IMPROPERLY CONCLUDED THAT MOTOROLA’S FRAND COMMITMENTS OBVIATE ANY FACT-FINDING ON INJUNCTIVE RELIEF

Although Apple argues (ARB 50, 53) that the district court did not announce a categorical rule against injunctions for SEPs, it fails to explain how the district

³ Under Apple’s theory, Motorola would be forced to sue on each patent in its standards-essential portfolio individually to recover the full value reflected in the previous standards-essential portfolio licenses Motorola has entered. And, in each individual case in which Motorola was successful, it could recover only the fraction of the overall rate attributable to that single patent. Therefore, under Apple’s theory, a company that contributed more technology to the standard than another would have significantly higher transaction costs to recover any value for the technology it developed. Such an outcome would eliminate much of the incentive for practitioners of the standard to negotiate a license, as well as the incentive for companies to contribute technology to the standards.

court's suggestion that injunctive relief is "unavailable for infringement of a patent governed by FRAND" (A141) is anything other than a categorical rule. Any such categorical rule would be improper, for the Patent Act provides that 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, and *eBay* holds that "traditional equitable principles do not permit [] broad classifications." *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 393 (2006).

Apple insists (ARB 50) that the district court did not impose a categorical rule against injunctions for SEPs, emphasizing the court's acknowledgement that Motorola could perhaps obtain an injunction if "Apple refuse[d] to pay a royalty that meets the FRAND requirement." (A140). But the district court failed to apply any such qualification to its categorical rule here, as it did not allow Motorola to make a factual showing that Apple has been such an intransigent infringer—declining even to consider "the parties['] . . . competing accounts . . . of why negotiations broke down[.]" (A142). This factual dispute should have been developed and considered by the district court before Motorola was denied injunctive relief.

Finally, as Apple admits (ARB 48), the district court explicitly addressed only the irreparable harm and adequacy of monetary compensation factors and did

not apply the balance of hardships or public interest to the specific facts of this case. This was an abuse of discretion, and contrary to Apple's argument (ARB 48), it is not enough that the district court might have considered such factors "conceptually."

A. FRAND Agreements Do Not Categorically Indicate That The Patentee Will Not Suffer Irreparable Harm

Apple attempts (ARB 46-47) to justify the district court's reasoning that a patentee with a FRAND commitment cannot suffer irreparable harm because it has agreed to accept a royalty as compensation. But if a potential licensee is unwilling to accept a FRAND license or unable to pay a FRAND royalty, the patentee is harmed by the ongoing infringement, as well as the cost of bringing enforcement actions. Qualcomm Br. 16. The DOJ and USPTO recognized that there are numerous situations where an injunction may be appropriate for a FRAND-encumbered SEP, including if a putative licensee has refused to negotiate, has insisted on terms clearly outside FRAND terms, or refuses to pay what has been determined to be a FRAND royalty. U.S. Dept. of Justice and U.S. Patent & Trademark Office, *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments*, January 8, 2013, at 7. Apple has refused to negotiate and refused to pay a FRAND royalty. Rather than investigating the facts of this situation and properly weighing them under *eBay*, the

district court simply assumed that no irreparable harm could ever exist where a patentee has made a FRAND commitment like Motorola's. That was incorrect.

1. Apple Refuses To Pay Court-Ordered FRAND Rates

Apple suggests (ARB 50) that Motorola could obtain an injunction if a court has set a FRAND rate and Apple has refused to accept it, but fails to note that it has *already* refused to be bound by a court-ordered FRAND rate. Apple sued Motorola in the Western District of Wisconsin, claiming anti-trust, unfair competition and breach of contract due to Motorola's allegedly inflated FRAND offer. *Apple, Inc. v. Motorola Mobility, Inc.*, No. 11-cv-178-BBC, 2012 WL 7324582, at *4, 11-12 (W.D. Wis. Jun. 7, 2011). Although Apple initially asked Judge Crabb to set a FRAND rate, Apple then *refused to be bound by that rate*. *Apple, Inc. v. Motorola Mobility, Inc.*, No. 11-cv-178-BBC, 2012 WL 7989412, at *3 (W.D. Wis. Nov. 8, 2012) ("Apple informed the court . . . that it did not intend to be bound by any rate that the court determined. This meant that the court would determine what it believed to be a fair, reasonable and non-discriminatory rate for a license with Motorola, but Apple would pay that rate only if it was the rate Apple wanted."). Judge Crabb properly dismissed those claims on summary judgment once Apple admitted that it would not be bound by any rate that she would apply. *Apple, Inc. v. Motorola Mobility, Inc.*, No. 11-cv-178-BBC, 2012 WL 5943791, at *1-3 (W.D. Wis. Nov. 28, 2012). Apple, therefore, has refused to negotiate with

Motorola *and* refused to be bound by a court-ordered FRAND rate; the district court should have permitted Motorola to present these facts before denying injunctive relief.

2. The FTC Consent Decree Does Not Prevent Motorola From Seeking An Injunction Here

Apple also raises the FTC consent decree with Google to imply that Motorola is improperly pursuing an injunction in this case. ARB 40-41. Apple is incorrect. The FTC has not banned Google from ever pursuing an injunction involving SEPs; instead, the FTC permits Google to seek injunctive relief for SEPs in certain specific circumstances. *In the Matter of Motorola Mobility LLC and Google Inc.*, FTC File No. 121-0120, Decision and Order, 2013 WL 124100, at *10-11. The FTC acknowledges that “[w]e agree that injunctions may issue in certain situations even when a RAND-encumbered SEP is involved, such as when a licensee is unwilling to license on FRAND terms....” *Id.* at 38, fn. 14. Nothing in the consent decree prevents Google from opposing the imposition of an effectively categorical rule against injunctions involving any SEPs or from continuing to seek an injunction in a case that is already pending in federal court.⁴

⁴ To the extent the Commission’s statement suggests otherwise, it was incorrect and cannot alter the terms of the actual consent decree. In addition, Google is within its rights to seek a court’s ruling that an injunction is proper in this case. If an injunction is granted, then Google understands that it would need to go through the steps outlined in the consent decree in order for the injunction to actually issue. *See* FTC Order at ¶ II(c) (prohibiting Respondents from “obtaining

B. FRAND Agreements Do Not Categorically Demonstrate That Monetary Damages Are Sufficient

Apple further asserts (ARB 41-42) that Motorola's agreement to license its patents on FRAND terms necessarily means that monetary damages are sufficient. That is incorrect. To begin with, this Court has granted injunctions in non-FRAND situations where the patent-holder had previously licensed the patent-at-issue. *See, e.g., Acumed LLC v. Stryker Corp.*, 551 F.3d 1323, 1328 (Fed. Cir. 2008) (holding that an injunction was warranted even where the patentee had previously licensed the patent; "While the fact that a patentee has previously chosen to license the patent may indicate that a reasonable royalty does compensate for an infringement, that is but one factor for the district court to consider."). In addition, payment of a royalty will not fully compensate the patentee in FRAND situations where a licensee refuses to accept other reasonable terms of a FRAND license, such as the licensee agreeing to grant a reciprocal license of its SEPs to the patentee. Qualcomm Br. 16-17.

Nor, contrary to Apple's suggestion (ARB 43), did Motorola agree to forego any right to seek an injunction by agreeing in its commitment to standards-setting

or enforcing"—but not seeking—an injunction in a pending action "unless and until Respondents have made Qualified Offers to the Potential Licensee). Because Motorola could obtain injunctive relief on remand (if it were to make Qualified Offers to Apple and ultimately prove both infringement and its entitlement to injunctive relief), the controversy is not moot, as Apple incorrectly suggests (ARB 40-41).

organizations to license on FRAND terms. In fact, the standards organization relevant to this case (ETSI) specifically contemplated including a waiver of the right to injunctive relief in its IPR policy (A138557-58) but ultimately did *not* include such a waiver in its 1994 policy (A138574-77). As Apple admits (ARB 47 n. 4), there is thus no language in ETSI's IPR policy prohibiting participants from seeking injunctive relief. A117929-35; *see Apple, Inc. v. Motorola Mobility, Inc.*, No. 11-cv-178-BBC, 2012 WL 5416941, at *15 (W.D. Wis. Oct. 29, 2012).

Finally, despite the district court's apparent qualification that monetary compensation would be inadequate if "Apple refuses to pay a royalty that meets the FRAND requirement" (A140), the district court denied Motorola the opportunity to demonstrate that Apple has been intransigent since it began its infringement in 2007. Motorola attempted to negotiate with Apple for *three years*, while Apple refused to meaningfully participate in negotiations or provide any counteroffers. A118884-86. This is not a situation where good faith negotiations eventually broke down; all along, Apple declined to negotiate and continued to infringe while collecting massive profits. Only after three years of attempting to negotiate with Apple did Motorola file a lawsuit to enforce its rights; now, an additional three years have passed as this lawsuit continues through the court

system.⁵ Motorola should have the opportunity to seek an injunction to stop Apple's six years of ill-gotten gains from stretching into a decade or more.

C. The District Court Improperly Ignored The Balance Of Hardships And Public Interest Factors, Which Favor Motorola

Apple's assertion (ARB 41-42) that the district court properly applied the *eBay* factors ignores that the *eBay* four-factor test is conjunctive, not disjunctive. Thus, it was improper for the district court to ignore two out of the four factors reiterated in *eBay*: the balance of hardships between Apple and Motorola, and whether the public interest would be disserved by a permanent injunction. *See Apple, Inc. v. Samsung Elecs. Co., Ltd.*, 678 F.3d 1314, 1332-33 (Fed. Cir. 2012) (remanding preliminary injunction denial in part for consideration of all four factors as to one patent); *Whitserve*, 694 F.3d at 36 n.19 (remanding due in part to the district court's failure to address all four factors relevant to the equitable analysis).

Once properly considered, the balance of hardships tips in favor of Motorola, contrary to Apple's assertion (ARB 48-49). Motorola invested billions of dollars and two decades to develop the technology it contributed to the standards at issue

⁵ And that suit was only filed after Apple filed its own lawsuits asserting infringement by the Android platform Motorola was using in its own offerings. *See Apple Inc. v. High Tech Computer Corp.*, No. 10-544-GMS, 2011 WL 143909 (D. Del. Jan. 18, 2011) (filed June 21, 2010); *Apple Inc. v. High Tech Computer Corp.*, No. 10-166-GMS, 10-167-GMS, 2011 WL 124446 (D. Del. Jan. 14, 2011) (filed March 2, 2010).

in this case, which Apple appropriated for its own use, resulting in significant revenues. Now Motorola has been forced to litigate this issue for years, at considerable expense. Apple has gained considerably from its intransigence, while Motorola still has nothing to show for the contributions it made to the standards that have enabled much of the functionality of Apple's devices.

Likewise, the public interest, if properly considered, cannot be served by allowing Apple to devalue SEPs that it played no part in creating but used to help generate billions of dollars in iPhone sales. The purpose of SDOs is for industry participants to work together to find the best technology to use for compatible offerings. A18770, ¶16-17; A117929 at 3.1. Standards-setting has substantially advanced the state of the art in industries such as the cellular communications industry, and it is in the public interest to encourage the continuing pro-competitive benefits of standards-setting. A18772, ¶23; A19300, ¶21. Motorola has agreed to license its SEPs on FRAND terms and has successfully done so for decades with every major cellular handset company *except Apple*. A117799, A118883, A119623, A119440.

If Apple is able to set a precedent for refusing to compensate standards-essential patent-holders, these public benefits will be lost as there will be a disincentive for SDOs to work together to incorporate the best technologies in standards. The Department of Justice and U.S. Patent & Trademark Office agree

in the analogous setting of exclusion orders, stating that “[a]n exclusion order may still be an appropriate remedy in some circumstances,” including when the licensee “refuses to take a F/RAND license and is acting outside the scope of the patent holder’s commitment to license on F/RAND terms.” DOJ and USPTO Policy Statement at 7. Eliminating the possibility of an injunction may remove any incentive for licensees to negotiate in good faith; in turn, this could discourage patent holders from participating in the standardization process. Qualcomm Br. 25, RIM Br. 13. Such a result would be bad for consumers, as it may depress technology innovation. Qualcomm Br. 26. The DOJ and USPTO stated that the appropriate remedy for FRAND-encumbered SEPs “should be made against the backdrop of promoting. . . strong incentives for innovators to participate in standards-setting activities.” DOJ & USPTO Policy at 10. This is not to suggest that an injunction is an appropriate remedy in all cases. But, whether an injunction for infringement of a SEP is an appropriate remedy should be considered on the facts of the individual case, just as it is with all other patents.

CONCLUSION

The Court should reverse the district court’s constructions of the ‘559 and ‘712 patents and should remand this case to trial for the factual issues relating to damages and the availability of an injunction for the ‘898 patent.

Dated: May 13, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2013, I caused the nonconfidential version of the Opening Brief and Addendum of Appellees-Cross Appellants Motorola Mobility LLC and Motorola Solutions, Inc. to be electronically filed with the Clerk of the Court using CM/ECF, which will automatically send email notification of such filing to the following counsel of record:

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**CERTIFICATE OF COMPLIANCE WITH
FED. R. APP. P. 32(a)(7) AND FEDERAL CIRCUIT RULE 32**

Counsel for Appellees-Cross Appellants Motorola Mobility LLC and Motorola Solutions, Inc. certify that the brief contained herein has a proportionally spaced 14-point typeface, and contains 6,955 words, based on the “Word Count” feature of Word 2007, including footnotes and endnotes. Pursuant to Fed. R. App. P. 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b), this word count does not include the words contained in the Certificate of Interest, Table of Contents, Table of Authorities, and Statement of Related Cases.

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