

## DISCUSSION

Consistent with traditional equitable principles, a patentee seeking a permanent injunction must make a four-part showing:

(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and the defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

*eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Prior to the Supreme Court’s decision in *eBay*, this court followed the general rule that a permanent injunction will issue once infringement and validity have been adjudged, absent a sound reason to deny such relief. *See, e.g., Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1247 (Fed. Cir. 1989) (citing *W.L. Gore & Assocs., Inc. v. Garlock, Inc.*, 842 F.2d 1275, 1281 (Fed. Cir. 1988)). In addition, at least in the context of preliminary injunctive relief, we applied an express presumption of irreparable harm upon finding that a plaintiff was likely to succeed on the merits of a patent infringement claim. *See Smith Int’l, Inc. v. Hughes Tool Co.*, 718 F.2d 1573, 1581 (Fed. Cir. 1983) (“We hold that where validity and continuing infringement have been clearly established, as in this case, immediate irreparable harm is presumed.” (footnotes omitted)). Based on our case law, district courts also have applied a presumption of irreparable harm following judgment of infringement and validity to support the issuance of permanent injunctions . . . .

In *eBay*, the Supreme Court made clear that “broad classifications” and “categorical rule[s]” have no place in this inquiry. 547 U.S. at 393. Instead, courts are to exercise their discretion in accordance with traditional principles of equity. *Id.* at 394. The Supreme Court, however, did not expressly address the presumption of irreparable harm, and our subsequent cases have not definitively clarified whether that presumption remains intact. *See Broadcom Corp. v. Qualcomm Inc.*, 543 F.3d 683, 702 (Fed. Cir. 2008) (“It remains an open question whether there remains a rebuttable presumption of irreparable harm following *eBay*.” (internal quotation marks and citation omitted)).<sup>4</sup>

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<sup>4</sup> In an unpublished decision, we stated without analysis, and without citation to our other cases describing the issue as an open question, that *eBay* discarded the

presumption of irreparable harm. *Automated Merch. Sys., Inc. v. Crane Co.*, 357 Fed. Appx. 297, 301 (Fed. Cir. Dec. 16, 2009).

Our statements on this topic have led one district court judge to conclude that “the presumption of irreparable harm is at best on life support.” *Red Bend Ltd. v. Google, Inc.*, 2011 WL 1288503, at \*18 (D. Mass. Mar. 31, 2011) (citations omitted). We take this opportunity to put the question to rest and confirm that *eBay* jettisoned the presumption of irreparable harm as it applies to determining the appropriateness of injunctive relief. In so holding, we join at least two of our sister circuits that have reached the same conclusion as it relates to a similar presumption in copyright infringement matters. *See Perfect 10, Inc. v. Google, Inc.*, --- F.3d ---, 2011 WL 3320297, at \*4 (9th Cir. Aug. 3, 2011) (“[W]e conclude that our longstanding rule that a showing of a reasonable likelihood of success on the merits in a copyright infringement claim raises a presumption of irreparable harm is clearly irreconcilable with the reasoning of the Court’s decision in *eBay* and has therefore been effectively overruled.” (internal quotation marks and citations omitted)); *Salinger v. Colting*, 607 F.3d 68, 76-78 (2d Cir. 2010) (finding that *eBay* abrogated the presumption of irreparable harm in copyright cases).

Although *eBay* abolishes our general rule that an injunction normally will issue when a patent is found to have been valid and infringed, it does not swing the pendulum in the opposite direction. In other words, even though a successful patent infringement plaintiff can no longer rely on presumptions or other short-cuts to support a request for a permanent injunction, it does not follow that courts should entirely ignore the fundamental nature of patents as property rights granting the owner the right to exclude. Indeed, this right has its roots in the Constitution, as the Intellectual Property Clause of the Constitution itself refers to inventors’ “*exclusive* Right to their respective . . . Discoveries.” U.S. Const. art. I, § 8, cl. 8 (emphasis added). Although the Supreme Court disapproved of this court’s absolute reliance on the patentee’s right to exclude as a basis for our prior rule favoring injunctions, that does not mean that the nature of patent rights has no place in the appropriate equitable analysis. *See eBay*, 547 U.S. at 392 (“According to the Court of Appeals, this statutory right to exclude alone justifies its general rule in favor of permanent injunctive relief. But the creation of a right is distinct from the provision of remedies for violations of that right.”). While the patentee’s right to exclude alone cannot justify an injunction, it should not be ignored either.

*See Acumed LLC v. Stryker Corp.*, 551 F.3d 1323, 1328 (Fed. Cir. 2008) (finding in a post-*eBay* decision that, “[i]n view of that right [to exclude], infringement may cause a patentee irreparable harm not remediable by a reasonable royalty”).

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#### A.

The court’s first legal error lies in its conclusion that the presence of additional competitors, without more, cuts against a finding of irreparable harm. It is well-established that the “fact that other infringers may be in the marketplace does not negate irreparable harm.” *Pfizer, Inc. v. Teva Pharms. USA, Inc.*, 429 F.3d 1364, 1381 (Fed. Cir. 2005). As we explained in *Pfizer*, a patentee need not sue all infringers at once. *Id.*

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#### B.

The court also erred in relying on the “non-core” nature of Bosch’s wiper blade business in relation to its business as a whole . . . . *See Praxair, Inc. v. ATMI, Inc.*, 543 F.3d 1306, 1330 (Fed. Cir. 2008) (Lourie, J., concurring) (“[A] patent provides a right to exclude infringing competitors, regardless of the proportion that the infringing goods bear to a patentee’s total business.”).

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#### II.

Turning to the remaining equitable factors, we conclude that, on balance, they also favor entry of a permanent injunction.

With respect to the adequacy of money damages, Bosch argues that it will continue to suffer irreparable harm due to lost market share, lost business opportunities, and price erosion unless Pylon is permanently enjoined. According to Bosch, money damages alone cannot fully compensate Bosch for these harms. We agree. There is no reason to believe that Pylon will stop infringing, or that the irreparable harms resulting from its infringement will otherwise cease, absent an injunction. *Cf. Reebok Int’l, Ltd. v. J. Baker, Inc.*, 32 F.3d 1552, 1557 (Fed. Cir. 1994) (recognizing that “future infringement . . . may have market effects never

fully compensable in money”). More importantly, the questionable financial condition of both Pylon and its parent company reinforces the inadequacy of a remedy at law. A district court should assess whether a damage remedy is a meaningful one in light of the financial condition of the infringer before the alternative of money damages can be deemed adequate. While competitive harms theoretically can be offset by monetary payments in certain circumstances, the likely availability of those monetary payments helps define the circumstances in which this is so. *See, e.g., Canon, Inc. v. GCC Int’l Ltd.*, 263 Fed. Appx. 57, 62 (Fed. Cir. Jan. 25, 2008) (considering the improbability that the patentee could collect a money judgment as weighing in favor of an injunction) . . . .

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We also conclude that the third factor, the balance of hardships, favors Bosch. Pylon argues that “Bosch is an international conglomerate with a diverse product base,” whereas “Pylon is a small, domestic corporation that focuses on the manufacture and sale of wiper blades,” such that the parties’ respective size and business models demonstrate that an injunction would burden Pylon more than the absence of an injunction would harm Bosch. Appellee’s Br. 58. We are not persuaded. A party cannot escape an injunction simply because it is smaller than the patentee or because its primary product is an infringing one. *See Windsurfing Int’l, Inc. v. AMF, Inc.*, 782 F.2d 995, 1003 n.12 (Fed. Cir. 1986) (“One who elects to build a business on a product found to infringe cannot be heard to complain if an injunction against continuing infringement destroys the business so elected.”). On the other hand, requiring Bosch to compete against its own patented invention, with the resultant harms described above, places a substantial hardship on Bosch. This factor, therefore, favors entry of an injunction in this case.