Nos. 2012-1548, 2012-1549

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

APPLE, INC. and NeXT SOFTWARE, INC.,

Plaintiffs-Appellants,

v.

MOTOROLA, INC. and MOTOROLA MOBILITY, INC.,

Defendants-Cross-Appellants.

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

BRIEF OF *AMICUS CURIAE* THE AMERICAN ANTITRUST INSTITUTE, IN SUPPORT OF NEITHER PARTY

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CERTIFICATE OF INTEREST

Counsel for amicus American Antitrust Institute certifies the following:

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

   American Antitrust Institute

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

   American Antitrust Institute

3. There is no parent corporation associated with, and no publicly held company that owns 10 percent or more of any stock of, the American Antitrust Institute.

4. The names of all law firms and the partners or associates thereof that are expected to appear in this court on behalf of the American Antitrust Institute are:

   Cuneo, Gilbert and LaDuca, LLP

   Joel Davidow
   Robert Cynkar

December 4, 2012 /s/ Joel Davidow

Date

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

The American Antitrust Institute (AAI) is an independent and nonprofit education, research and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. *See* http://www.antitrustinstitute.org.[1] Its interest in the pending appeal in this case, as an amicus in support of neither party, concerns the issue of whether Judge Posner correctly denied Motorola's request for injunctive relief that would preclude Apple's continued sale of a product incorporating a standard-essential patent that Motorola persuaded a standard-setting organization (SSO) to incorporate into one of its standards upon Motorola's ex ante commitment to extend to all parties interested in implementing the standard a license on fair, reasonable and nondiscriminatory terms (FRAND commitment).[2] For all of the

[1] The AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists and business leaders. The AAI's Board of Directors alone has approved this filing for the AAI. The individual views of members of the Advisory Board may differ from the AAI's positions.

All parties to the appeal in this case have consented to AAI's filing of this brief. No counsel for any of the parties authored this brief in whole or in part. No party, their counsel, or any other person, other than AAI, its members, or its counsel, contributed money to fund the preparation or submission of this brief.

[2] Some SSOs and commentators use the term "FRAND" -- defined as fair, reasonable and nondiscriminatory-- while others use the term "RAND" – defined as reasonable and nondiscriminatory. The AAI uses these terms interchangeably herein and believes there is no material difference between them.

reasons set forth below, the AAI believes that injunctive relief should normally not be available in such cases because its availability could seriously threaten the public interest in robustly competitive standardized markets, and unduly strengthen the bargaining position of firms seeking to use standardization to obtain hold-up royalties.

SUMMARY OF ARGUMENT

As a matter of law, and consistent with Judge Posner's decision below,[3] injunctive relief should not be an available infringement remedy with respect to a standard-essential patent that is subject to an ex ante FRAND commitment made to the applicable SSO. Unless the presumed infringer insists on an unfairly low royalty, allowing the patent owner to seek such relief contradicts the whole procompetitive purpose of the FRAND commitment, which is to enable patented technology to be incorporated into an industry standard without thereupon subjecting competitors, consumers and the public generally to ex post patent holdup conduct. Allowing the patent owner, without justification, effectively to repudiate its prior commitment in that manner, moreover, could amount to blessing and encouraging exclusionary conduct to monopolize affected product markets in violation of Section 2 of the Sherman Act. In any event, *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), should be construed as calling for a

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[3] *Apple, Inc. v. Motorola, Inc.*, No. 1:11–cv–08540, 2012 WL 2376664, at *12 (N.D. Ill June 22, 2012).

strong presumption against the grant of an injunction in these circumstances because the strong public interest in robustly competitive standardized markets -- uncorrupted by patent holdup conduct -- would be seriously disserved by such relief.

I. Courts Should Recognize that Allowing the Owner of a Standard-Essential Patent Subject to a FRAND Commitment to Seek Injunctive Relief Against Competitors' Use of it to Implement the Standard Invites Anticompetitive Patent Holdup Conduct.

There is widespread recognition that private standard-setting through SSOs can enhance competition and consumer welfare in many markets throughout the economy, particularly standard-setting that enables interoperability among both competing and complementary products in the information technology and communications sectors.[4] The Supreme Court, however, has called attention to substantial dangers of anticompetitive abuse, thus cautioning that standard-setting is allowed "only on the understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits" and in the presence of "meaningful safeguards" that prevent bias "by members with economic interests in stifling

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[4] *See, e.g.*, U.S. Dep't of Justice & F.T.C., *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* at 33-34 (2007), available at http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf_; H.R. Rep. No. 108-125, *Standards Development Organization Advancement Act of 2003* at 3 (2003), available at http://www.gpo.gov/fdsys/pkg/CRPT-108hrpt125/html/CRPT-108hrpt125.htm; 2 Herbert Hovenkamp, et al., *IP & Antitrust* 35-3 to 35-4 (Supp. 2012).

product competition." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501, 506-07 (1988); *see also Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 571-72 (1982).

Authorities have also recognized the potential for both positive and negative competitive effects from the incorporation into a standard of a participant's patented technology. On the one hand, the patented technology in question may enable the addition to standardized products of consumer-valued features that would not otherwise be available. On the other hand, competitors of the patent owner become locked into dependence on a license from that owner in order to remain within the standardized market. The standard may then "threaten to endow holders of standard-essential patents with disproportionate market power." *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 876 (9th Cir. 2012). "In this unique position of bargaining power, the patent holder may be able to extract supracompetitive royalties" from all such competitors, a condition known as "patent holdup." *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 310 (3d Cir. 2007).[5] "To guard against anticompetitive patent hold-up, most [SSOs] require

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[5] As several prominent economists have explained, patent holdup in the standard-setting context is not merely a private contracting problem; it "concerns the inefficient acquisition of market power"; it is "a public policy concern because downstream consumers are harmed when excessive royalties are passed on to them. Downstream consumers also can be harmed when other burdensome terms are imposed in patent licenses and when cumulative innovation is retarded by

firms supplying essential technologies for inclusion in a prospective standard to commit to licensing their technologies on FRAND terms." *Id*. at 313.[6]

Such an ex ante FRAND commitment does not avoid any or all ex post disputes including litigation over patent validity, infringement damages or what should be deemed fair, reasonable and nondiscriminatory license terms. It should, however, be understood to ensure all competitors or would-be competitors reasonable access to the standardized market under conditions enabling robust price and non-price competition. In short, if it is to become a meaningful safeguard against ex post patent holdup conduct, a FRAND commitment must be enforceable as a promise that a suitable license will be made readily available in the event such a license is necessary to practice the standard. All SSO participants and other would-be entrants into the market in question who are willing to pay a fair royalty should be able to rely on that promise as an assurance against exclusion

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patent holdup." Joseph Farrell, John Hayes, Carl Shapiro & Theresa Sullivan, *Standard Setting, Patents, and Hold-up*, 74 Antitrust L.J. 603, 608-09 (2007).

6 *See also* Joseph F. Wayland, Acting Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, *Antitrust Policy in the Information Age: Protecting Innovation and Competition*, Remarks as Prepared for the Fordham Competition Law Institute at 3(Sept. 21, 2012), available at http://www.justice.gov/atr/public/speeches/287215.pdf: "To reduce the occurrences of this type of opportunistic conduct, most standards bodies have adopted patent policies that seek commitments from participants to license the patents they own that are essential to the standard on 'reasonable and non-discriminatory' (RAND) or 'fair, reasonable and non-discriminatory' (FRAND) terms."

from the market altogether by an injunction or other prohibition upon the sale of their standard-compliant products.[7]

As Judge Posner recognized in his decision below, the Federal Trade Commission (FTC) highlighted the mischief in allowing a patent holder whose patent is both standard-essential and subject to an ex ante FRAND commitment to seek an injunction in ex post litigation, particularly where a FRAND royalty can be determined. While the statement was submitted to the International Trade Commission (ITC) in the context of urging the ITC to refrain from issuing exclusion orders or cease-and-desist orders in ITC proceedings, its logic applies more generally to "the potential economic and competitive impact of injunctive relief on disputes involving" standard-essential patents (SEPs). *In re Certain Wireless Communication Devices, Portable Music & Data Processing Devices,*

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[7] *See* Joseph S. Miller, *Standard Setting, Patents, and Access Lock-in: RAND Licensing and the Theory of the Firm*, 40 Ind. L. Rev. 351, 358 (2007) ("by making this promise all the participants who own patents in the resulting standard grant the adopter community an irrevocable right to use [their] patented technology to comply with the standard in exchange for a reasonable royalty and other reasonable terms, the details of which are negotiated later without any possibility of a court injunction. . . . Indeed, the details of the license that the parties later negotiate are quite minor compared to the paramount importance of establishing the patentee's inability to seek an injunction"); *see also* Doug Lichtman, *Understanding The RAND Commitment*, 47 Hous. L. Rev. 1023, 1043 (2010) (suggesting courts should "interpret RAND as creating an implied license, with the license rendering moot any claim to injunctive relief or triple damages, but leaving the court with the power to determine the royalty due"); Mark A. Lemley, *Ten Things to Do About Patent Holdup of Standards (And One Not To)*, 48 B.C.L. Rev. 149, 167 (2007) ("Denying [injunctive] relief is the most powerful way to prevent patent holdup").

Computers & Components Thereof, Inv. No. 337-TA-745 at 2 (June 6, 2012), available at http://www.ftc.gov/os/2012/06/1206ftcwirelesscom.pdf.

As the FTC explained, "incorporating patented technologies into standards . . . has the potential to distort competition by enabling SEP owners to negotiate high royalty rates and other favorable terms, after a standard is adopted, that they could not credibly demand beforehand, conduct known as patent hold-up." *Id.* "Prior to adoption of a standard, alternative technologies compete to be included in the standard" and, in that context, SEP owners provide RAND commitments "as a quid pro quo for the inclusion of their patents in the standard." *Id.* After the standard is adopted, implementers make investments to comply with it and "an entire industry may become locked in" to it, giving the SEP owner "the ability to demand and obtain royalty payments based not on the true market value" of the patent "but on the costs and delays of switching away from the standardized technology." *Id.*

That hold-up threat "can deter innovation," "reduce the value of standard-setting" and deprive consumers "of the substantial procompetitive benefits of standard-setting." *Id.* at 3. RAND commitments "mitigate the risk of patent hold-up"; but "a royalty negotiation that occurs under threat of an exclusion order may be weighted heavily in favor of the patentee in a way that is in tension with the RAND commitment." *Id.* The FTC elaborated as follows:

> High switching costs combined with the threat of an exclusion order could allow a patentee to obtain unreasonable licensing terms despite its RAND commitment, not because its invention is valuable, but because implementers are locked in to practicing the standard. The resulting imbalance between the value of patented technology and the rewards for innovation may be especially acute where the exclusion order is based on a patent covering a small component of a complex multicomponent product. In these ways, the threat of an exclusion order may allow the holder of a RAN-encumbered SEP to realize royalty rates that reflect patent hold-up, rather than the value of the patent relative to alternatives, which could raise prices to consumers while undermining the standard setting process.

Id. at 3-4. Again, that analysis applies not only to any allowance of an exclusion order or cease-and-desist order in an ITC proceeding but equally to any allowance of an injunction remedy in a district court infringement proceeding. The availability of any such relief to an owner of a standard-essential patent that is subject to a FRAND commitment effectively nullifies the whole purpose of the FRAND commitment, inviting the very kind of anticompetitive patent holdup conduct that can undermine the whole standard-setting process.

II. Allowing a Patent Owner Effectively to Repudiate its ex ante FRAND Commitment By Seeking Injunctive Relief in ex post Litigation Could Bless and Encourage Monopolization and Attempted Monopolization of Affected Product Markets in Violation of Section 2 of the Sherman Act.

In *Broadcom Corp. v. Qualcomm Inc.*, *supra*, the Third Circuit called attention to "a growing awareness of the risks associated with deceptive conduct in the private standard-setting process," 501 F.3d at 312, particularly with deception by a patent owner that may later enable it "to demand supracompetitive royalties." *Id*. at 314. "It is in such circumstances that measures such as FRAND commitments become important safeguards against monopoly power." *Id*. In that light, the Court of Appeals held that "(1) in a consensus-oriented private standard-setting environment, (2) a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms, (3) coupled with an [SSO's] reliance on that promise when including the technology in a standard, and (4) the patent holder's subsequent breach of that promise, is actionable anticompetitive conduct," *id*.; and, more specifically, the Court of Appeals supported Broadcom's stated claims for monopolization and attempted monopolization under Section 2 of the Sherman Act. *Id*. at 303. As the Court of Appeals explained, deception of this kind "harms the competitive process by obscuring the cost of including proprietary technology in a standard and increasing the likelihood that patent rights will confer monopoly power on the patent holder." *Id*. at 314.[8]

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[8] *See also Research in Motion Ltd. v. Motorola, Inc.*, 644 F. Supp. 2d 788, 792-97 (N.D. Tex. 2008) (allegation that Motorola obtained monopoly power by misrepresenting to SSOs its intentions to offer FRAND licenses sufficed to state anticompetitive conduct element of a Section 2 claim). In *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008), the D.C. Circuit reversed an FTC holding of unlawful monopolization based on Rambus's deceptive failure to disclose its patent interests prior to an SSO's incorporation of Rambus technologies into the SSO's standards. It did so because the FTC found only that the deception "enabled [Rambus] *either* to acquire a monopoly through the standardization of its patented technologies rather than possible alternatives, *or* to avoid limits on its patent licensing fees that the SSO would have imposed as part of its normal process"; and, in the view of that D.C. Circuit panel, "deceit merely enabling a monopolist to charge higher prices than it otherwise could have charged . . . would not in itself constitute monopolization." *Id.* at 459 (emphasis in original). As two leading scholars have observed, "[t]here is some tension between *Broadcom* and the D.C.

The deception alleged in that case was that Qualcomm "induced" ETSI and other SSOs to include its patented technology in a final standard "by falsely agreeing to abide by" the SSOs' patent policies "but then breached those agreements by licensing its technology on non-FRAND terms." *Id.* at 304. The complaint also alleged that Qualcomm "ignored its FRAND commitment" to those SSOs "by demanding discriminatorily higher (i.e., non-FRAND) royalties from competitors and customers using chipsets not manufactured by Qualcomm." *Id.* If promising FRAND terms but thereafter licensing on non-FRAND terms thereby sufficed to support the element of "exclusionary" conduct for Section 2 claims, a subsequent demand for injunctive relief forcing a competitor out of the affected market altogether with *no* license granted should all the more clearly meet the exclusionary conduct requirement. Competitor participants in the SSO process would be acting in a wholly irrational manner if they acquiesced in -- affirmatively supported -- incorporation of the patent owner's technology into a draft standard under development with the understanding that the patent owner would (or could) subsequently seek to exclude them altogether from the affected product market. By virtue of either that exclusion altogether or the mere threat of it to extract

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Circuit's *Rambus* decision, though they are not in direct conflict." Hovenkamp, et al, *supra*, at 35-48.1. In any event, those scholars have also observed that deception regarding license intentions "can have anticompetitive consequences" and "distort competition in the downstream market." *Id.* at 35-52 to 35-53. S*ee also* note 10, *infra*, and accompanying text.

supracompetitive royalties that cripple licensees' competitive viability, the deception inherent in this situation threatens to enable the patent owner to monopolize that market.[9]

Federal courts should not be in the business of allowing and encouraging conduct of that kind. Doing so can only heighten the risk that standards development processes become so susceptible to holdup outcomes that the business community abandons reliance upon "open" standards solutions to product development needs and the consuming public thereby loses the procompetitive benefits that private standard setting has long provided. Courts should accordingly adhere to the rule that a patent owner's available remedies for infringement of a standard-essential patent that is subject to an ex ante FRAND commitment do not ordinarily include injunctive relief.[10]

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[9] *See* Hovenkamp et al., *supra*, at 35-52 to 35-53 (where an SSOs' policy required licensing on RAND terms, "a misrepresentation about a patentee's willingness to license on those terms can have anticompetitive consequences"; this "may result because a patentee sues to enforce the patents it had previously promised to license, and because of the threat of an injunction or treble damages, the defendant must pay more to settle the claim than it would have had to pay" as a RAND license; the "resulting overcharge will distort competition in the downstream market").

[10] *Cf. In the Matter of Robert Bosch GmbH*, FTC Docket No. C-4377, Complaint Issued Nov. 21, 2012, available at http://www.ftc.gov/os/caselist/1210081/121126boschorderassets.pdf, at ¶¶ 20, 23 (patent owner's "breach of its commitment to offer" RAND licenses for its standard-essential patents "by seeking injunctive relief over" those patents "would exclude its competitors from the market" and thereby cause or threaten harm to

III. *Ebay* Should be Construed as Calling for a Strong Presumption Against the Grant of an Injunction in Cases Involving a Standard-Essential Patent that is Subject to an ex ante FRAND Commitment

In *eBay Inc. v. MercExchange, L.L.C.*, *supra*, the Supreme Court held that a patent owner seeking a permanent injunction against an infringer must satisfy the same four-factor test as other plaintiffs in other cases under well-established principles of equity. In short, such a plaintiff "must demonstrate: (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 defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Id.*at 391. Justice Kennedy's concurring opinion highlighted circumstances in which "an injunction, and the potentially serious sanctions arising from its violation, can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent." *Id.* at 396. Justice Kennedy added that, "[w]hen the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may

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competition; this conduct "tends to undermine the vitality of the standard-setting process" and "constitutes an unfair method of competition in or affecting commerce in violation of Section 5 of the FTC Act").

not serve the public interest." *Id.* at 396-97. That scenario aptly describes most situations in which an owner of a standard-essential patent subject to a FRAND commitment seeks an injunction against an infringer.

In the decision below in this case, Judge Posner focused on the second equity factor -- inadequacy of damages -- in his statement that, "[b]y committing to license its patents on FRAND terms, Motorola committed to license the [patent at issue] to anyone willing to pay a FRAND royalty and thus implicitly acknowledged that a royalty is adequate compensation . . . ."*Apple, Inc. v. Motorola, Inc.*, No. 1:11–cv–08540, 2012 WL 2376664, at *12 (N.D. Ill June 22, 2012).While we agree with that statement, we respectfully urge this Court to affirm the denial of injunctive relief in this case upon an additional broader proposition under the fourth equity factor: in *eBay's* wake, there should be a strong presumption against the grant of an injunction in any case involving a standard-essential patent that is subject to a FRAND commitment because the strong public interest in robustly competitive standardized markets -- uncorrupted by patent holdup conduct -- would be seriously disserved by such relief.

There is a long history of courts' consideration of effects on competition and the consuming public as relevant to the public interest factor in connection with both preliminary and permanent injunction requests. And this includes the Federal Circuit in patent cases not involving standard-essential patents or RAND terms. In *Cordis Corp. v. Bos. Scientific Corp.*, 99 Fed. App'x 928, 935-36 (Fed. Cir. 2004), for example, the Federal Circuit held that the public interest weighed in favor of denying injunctive relief due to competition concerns. While acknowledging that the patent system values upholding the exclusive rights held by a patentee, this Court held that "it cannot control in every case without obliterating the public interest component of the preliminary injunction inquiry." *Id*. at 935. Rather, the Court noted that the public interest supported a broad choice of products in the given marketplace, particularly where consumers may prefer one alternative over another. *Id*. at 935-36. *See also Aero Corp., S.A. v. United States*, 38 Fed. Cl. 237, 242 (Court of Federal Claims 1997) (examining an injunction request in the military procurement context, and holding that competition should be considered under the public interest factor because "[c]learly, the public interest in honest, open and fair competition in the procurement process is compromised whenever a plaintiff is improperly excluded from that process").

In *Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.*, 815 F.2d 500, 505 (8th Cir. 1987), the Eighth Circuit reversed a lower court's preliminary injunction ruling in a trademark infringement case in part because the court did not properly consider the broader economic consequences of injunctive relief. More specifically, the district court failed to consider price effects or the tendency toward monopoly that would result from injunctive relief. The reviewing court thus concluded it "was erroneous for the district court to determine that the public interest weighed in favor of granting Calvin Klein's motion for a preliminary injunction." *Id*. The district court was required to consider the strong public interest in favor of lower prices, robust competition, and avoidance of monopolies. *Id*. Similarly, in *Machlett Labs, Inc. v. Techny Indus., Inc.*, 665 F.2d 795, 798 (7th Cir. 1981), the Seventh Circuit vacated a preliminary injunction based in part on a covenant not to compete between x-ray technicians. "[T]he public interest in the low cost of health care is also disserved insofar as reduced competition would probably increase the price of mobile x-ray machines." *Id*.[11]

Courts do not consider competitive concerns only in cases where it denies injunctive relief. Rather, courts have examined the competitive effects of an injunction even in cases where injunctive relief was eventually granted, often narrowing the scope of the injunction to allay competitive concerns. For instance, in *Abbott Labs v. Mead Johnson & Co.*, 971 F.2d 6, 18-19 (7th Cir. 1992), the Seventh Circuit examined the competitive effects of injunctive relief sought against a manufactured drug. The court acknowledged that enjoining the sale of the product from the market would harm the public interest. *Id*. at 18. "This is

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11 *See also Fed. Mar. Comm'n v. City of Los Angeles, California*, 607 F. Supp. 2d 192, 203-04 (D.D.C. 2009) (court considered competitive effects of a new regulation in deciding whether to enforce the regulation or grant injunctive relief to the plaintiff).

particularly so when the purged product is one of only two in a given market; monopolies, as a general rule, carry substantial social costs, including higher prices, lower output, and a reduced incentive to engage in product innovation beneficial to consumers." *Id*. at 19 (citing Phillip E. Areeda & Donald F. Turner, II Antitrust Law ¶ 403, at 271-72 (1978)). In light of those concerns, the Seventh Circuit narrowed the injunction there at issue to correct aspects of the challenged behavior while still leaving defendant's product on the market as a viable competitor. *Id*.[12]

In short, as the above decisions illustrate and consistent with *eBay*'s mandate, courts presented with injunction requests in all patent infringement cases must now consider effects on competition and on consumers as part of applying the public interest prong of the four-factors equity test. But cases involving standard-essential patents subject to FRAND commitments are a subset of such cases that warrant a more definitive standard in the face of any such injunction request. As detailed earlier in this brief, allowing patent owners in such cases to

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[12] *See also Vecoplan L.L.C. v. Ameri-Shred Corp.*, 335 F. Supp. 2d 657, 660 (M.D.N.C. 2004). There, the plaintiff sought injunctive relief to prevent, among other things, advertisements alleging that plaintiff's products caused fires. Id. at 658. The court held that the public interest is served by eliminating false or misleading advertisements to protect consumers. *Id*. at 660. However, given the competitive interest in allowing truthful advertising, the court granted an injunction only to the extent that the defendant could not substantiate its claims. "In this case, the proposed injunction is narrowly tailored to allow continued comparisons of product and commercial competition." *Id*.

seek injunctive relief invites anticompetitive patent holdup conduct, vitiating SSOs' core protection against market outcomes of that kind. Indeed, it could well bless and encourage monopolization and attempted monopolization of affected markets in violation of Section 2 of the Sherman Act. Patent owners in these circumstances are thereby empowered to subvert all of the promised procompetitive benefits that "open" standards processes are designed to provide for the public and, instead, reap for themselves the anticompetitive benefits of unlawfully acquired market power. For these reasons, *eBay* should be construed as calling for a strong presumption against the grant of an injunction in these cases.

CONCLUSION

As a matter of law, and consistent with Judge Posner's decision below, injunctive relief should not normally be an available infringement remedy with respect to a standard-essential patent that is subject to an ex ante FRAND commitment made to the applicable SSO.

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing Brief of *Amicus Curiae* American Antitrust Institute, in Support of Defendants-Cross-Appellants and Affirmance. using the Court's CM/ECF filing system. Counsel registered with the CM/ECF system have been served by operation of the Court's CM/ECF SYSTEM per Fed. R. App. P. 25 and Fed. Cir. R. 25(c) on this 4th day of December, 2012:

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

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