

B. Preliminary Injunctions

The Federal Circuit recently has changed the proof required to secure a preliminary injunction in a patent case. The Court now requires that the patentee establish a causal nexus between the infringement and the harm suffered by the patentee in order to secure a preliminary injunction.

In *Apple I*, Apple sought a preliminary injunction against the sale of Samsung's Galaxy-brand smart phones based on certain design patents.⁸⁷ The district court found that Apple had established a likelihood of success on the merits. However, it denied the preliminary injunction on the ground that Apple had not established a nexus between the alleged design patent infringement and Apple's claims of lost market share and brand dilution.⁸⁸

The court held that to secure a preliminary injunction the patentee was required to show "some causal nexus between [defendant's] infringement and the alleged harm to [the patentee] as part of the showing of irreparable harm."⁸⁹ The Court stated:

To show irreparable harm, it is necessary to show that the infringement caused harm in the first place. Sales lost to an infringing product cannot irreparably harm a patentee if consumers buy that product for reasons other than the patented feature. If the patented feature does not drive the demand for the product, sales would be lost even if the offending feature were absent from the accused product. Thus, a likelihood of irreparable harm cannot be shown if sales would be lost regardless of the infringing conduct.⁹⁰

On the merits, the court found that the district court did not err in concluding that patentee had failed to make the required clear showing that the allegedly infringing design of the accused product caused the patentee's lost sale.⁹¹

The *Apple II* case involved another claim by Apple that the Samsung Galaxy infringed eight other Apple patents.⁹² Apple moved for a preliminary injunction on four patents and the district court concluded that the injunction was warranted on one patent. That patent claimed a unified search module that allowed the user to search more than one location, such as searching a local memory and an Internet search. The district court felt the nexus requirement had been met because Apple had shown that in the absence of unified searching demand for the accused product would be lower.⁹³

The Federal Circuit reversed. The court explained that "only harm that should count" in the irreparable harm analysis was the harm that flows from the infringement. Thus, if the accused product

would sell as well without the infringing feature, the then the irreparable harm to the patentee cannot be said to flow from the infringement.⁹⁴

The Federal Circuit held that the causal nexus requirement is not met simply because an allegedly infringing feature, if removed, would leave the device less valued or inoperable. The court noted that while a laptop computer will not work without a battery or fan or screws to hold it together, that does not mean that those features are drivers of commercial demand. Instead the court found that that to establish a causal nexus between the infringement and the irreparable harm, the patentee must show that customers buy the accused product because it includes the patented feature.⁹⁵ The court found no such evidence in the record and reversed the grant of the preliminary injunction.

A natural question concerns to what extent the *Apple* nexus rule will be applied in the context of permanent injunctions. The Federal Circuit addressed that question for the first time in *Broadcomm Corp. v. Emulux Corp.*⁹⁶

The patent at issue in *Broadcomm* concerned a method of sampling high frequency analog signals in high speed communication devices (modems). After a full trial, the district court entered a permanent injunction. The district court reasoned that the parties were direct competitors, that they competed head to head for design wins at computer manufacturers, and that Broadcomm lost sales as a result of design competitions it lost to the defendant's infringing product. On appeal, the defendant argued that irreparable harm had not been proven because there was no link between Emulux's and Broadcom's market share changes and because there was no causal nexus "show[ing] that the infringement caused harm in the first place" as required by the *Apple* decisions.⁹⁷

The Federal Circuit affirmed the grant of the injunction. The decision seems to limit *Apple* based on the significant evidence in *Apple* that the patented feature was not determinative of lost sales. The panel decision stated:

In *Apple*, the district court found that there was considerable evidence that the patented feature was not a determinative factor in sales and that the alleged infringement "at most" caused an "insignificant amount of lost sales." *Apple*, 678 F.3d at 1324. Consequently, in those specific circumstances, this court affirmed the district court and agreed that a showing of a causal nexus between infringement and the alleged harm was required . . .⁹⁸

