

## “Efficient” Infringement and Other Lies

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### I. INTRODUCTION

Imagine you own a house and some land adjacent to where a new supermarket is being built. You and your neighbors are excited about the proximity and convenience the new market will provide. The supermarket, on the other hand, is less excited about the existence of your house because it interferes with its ability to create additional parking spaces. The supermarket may negotiate with you to buy your property; but if you decline to sell, the supermarket will need to work around your property and have fewer parking spaces. It may need to sweeten its offer to make it more attractive to you.

Scenarios like this happen every day, and for the most part, rarely give us pause.<sup>1</sup> After all, the supermarket knew your house was there before it moved into the neighborhood. The need for the supermarket to negotiate with you (or settle for a smaller parking lot) would not have

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<sup>1</sup> For examples of this battle between developers and homeowners, see Stefanos Chen, *New Development Returns, Along with New Holdouts*, N.Y. TIMES (Sept. 10, 2021), <https://www.nytimes.com/2021/09/10/realestate/holdout-new-development.html>.

caught it off-guard. Even if you were driving a hard bargain for the land, the supermarket should not have been surprised—after all, it is your home.<sup>2</sup>

Consider now a twist to this scenario. When you decline the supermarket's offer to purchase your land, the supermarket decides to put parking spaces on it anyway. If the supermarket knew that a court would side with it and, at worst, make it pay for its use of your land, it may even seem like a reasonable business decision. After all, the money it will bring in via these extra parking spaces (and thus customers) can easily cover whatever a court may determine is owed to you. In this case, you would be outraged. Your anger would be exponentially greater if you knew that the supermarket never even tried to negotiate with you. Anticipating a favorable outcome with the courts, the supermarket decided to pave over your yard and seek to compensate you later, if at all.

Now imagine, instead of a house and land, you have a patent on an innovative technology. Many people are excited about the possibilities this new technology brings, but at least one company is less excited about the existence of your patent. It could interfere with this company's ability to manufacture and market a product it hoped to add. In many cases like this, the company may try to purchase your patent or negotiate a license to use the technology covered by the patent. If you decline, the company may need to design around your technology or, if it is critical to the company's new product, perhaps sweeten its offer to seal a deal.

Scenarios like this happen every day and, just like the real property example above, rarely give us pause. Patents are sold, licensed, and cross-licensed regularly.<sup>3</sup> In fact, the ease of transacting is one of the features of the patent system.<sup>4</sup> Patents are published documents and, at least since 2000, most applications for United States patents are published eighteen months after filing.<sup>5</sup> Companies are often well aware of others' patents when working in a particular technology space. Similarly, given that patents are provided to give inventors a period of

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<sup>2</sup> D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 255 (2006) ("As our cultural cliché 'a house is not a home' suggests, 'home' means far more than a physical structure. 'Home' evokes thoughts of, among other things, family, safety, privacy, and community.").

<sup>3</sup> See Anne Kelley, *Practicing in the Patent Market Place*, 78 U. CHI. L. REV. 115, 115–16 (2011).

<sup>4</sup> See Paul J. Heald, *A Transaction Costs Theory of Patent Law*, 66 OHIO STATE L.J. 473, 476 (2005).

<sup>5</sup> American Inventors Protection Act of 1999, Pub. L. No. 106-113, 4502(a), 113 Stat. 1501A-561 (codified as amended at 35 U.S.C. § 122).

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exclusivity in which they may recoup some of their research and development investments,<sup>6</sup> it is not surprising that patent owners may drive a hard bargain to allow others to use their patents.

The same twist described above with a home can also happen with patents. If you decline to sell or license your patented technology to a company, that company may simply decide to use your technology anyway. If the company knows that a court will likely side with it and, at worst, make it pay for its use of your patent, it may seem like a rational business decision. Either pay now or pay later, it is all the same to the company. In fact, if it can pay later, the company effectively obtained an interest-free loan.<sup>7</sup> If the company was fairly certain that the worst outcome would be paying the patentee for past and ongoing infringement, perhaps that company should forgo the initial step of negotiating in the first place.<sup>8</sup> Given the clear parallels to the house and supermarket case, you would expect to be outraged by the behavior of this company. However, it turns out that is not always the case.

While the supermarket example may seem far-fetched, especially where the supermarket does not seek permission before paving, the scenario in patent law is common enough—and acceptable enough—to have its own name: “efficient” infringement.<sup>9</sup> In general, it happens in certain cases, where either the patent owner or the type of patent has been identified in some ways as problematic. These problems, however, used to justify the propriety of “efficient” infringement are, in many cases, simply not true. Moreover, the term “efficient” infringement connotes a certain analysis of costs and benefits that is also incorrect. This Article explains why the rationalizations for “efficient”

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<sup>6</sup> Katherine J. Strandberg, *Users as Innovators: Implications for Patent Doctrine*, 79 U. COLO. L. REV. 467, 472 (2008).

<sup>7</sup> Adam Mossoff, *Institutional Design in Patent Law: Private Property Rights or Regulatory Entitlements*, 92 S. CAL. L. REV. 921, 939 (2019) (explaining the choice when the infringer “economically gains from deliberately infringing on a patent because it knows the patent owner will not receive an injunction”) (internal quotations omitted).

<sup>8</sup> In fact, the infringer may even end up in a better position, paying less than it would have been able to negotiate. *See id.* at 943 (describing when “companies do not pursue a license and instead infringe a patent given their economic calculation that a denial of an injunction and a below-market-rate ‘reasonable royalty’ awarded by a court will result in a smaller compulsory license fee than if they negotiated a license directly with the patent owner”).

<sup>9</sup> The term “efficient” infringement seems to date back to a law review comment written by Julie S. Turner in 1998. *See* Julie S. Turner, *Comment, The Nonmanufacturing Patent Owner: Toward a Theory of Efficient Infringement*, 86 CALIF. L. REV. 179, 179 (1998) (proposing the use of liability rules where the patent owner is not practicing the patent). But imposing liability-type rules for patent infringement was not practical until after the Supreme Court’s decision in *eBay Inc. v. MercExchange, LLC*. *See infra* Section II.B.

infringement should not be accepted and further, whether the purported reasons are valid or not, why “efficient” infringement must be stopped.

This Article will proceed in three parts. Part II will explain “efficient” infringement in greater detail, including why the concept has gained greater traction in the last couple of decades. Specifically, the Supreme Court’s 2006 decision in *eBay Inc. v. MercExchange, LLC*<sup>10</sup> led to uncertain grants of injunctive relief in some cases that gave rise to the circumstances in which “efficient” infringement can flourish. Part III will describe both the particular patent owner and type of patent that have been deemed problematic, such that “efficient” infringement has become a viable, and supposedly rational, course of action. Companies that do not manufacture things but instead license their patents and patents that cover inventions that have been incorporated into technology standards have often failed the test for injunctive relief set forth in *eBay*. Moreover, there are several other justifications concerning these patent owners and types of patents that are also used to sanction “efficient” infringement. Part IV will demonstrate that these alleged problems, which are used to defend certain types of patent infringement, are not actually true. This Part will also show that, regardless of whether these patent owners or specific type of patents are problematic, the notion of “efficient” infringement is a misnomer that glosses over what should be viewed as troubling behavior.

## II. WHAT IS “EFFICIENT” INFRINGEMENT AND WHY IS IT A THING?

*“[B]ig companies can now largely ignore legitimate patent holders. Of course, they don’t call it stealing. . . . [A] new phrase has emerged in Silicon Valley: ‘efficient infringing.’”*<sup>11</sup>

A patent provides its owner with property rights—and, in fact, the only right that is associated with a patent is the right to exclude, or keep others from using the subject matter that is patented.<sup>12</sup> The right to

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<sup>10</sup> *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 389, 391 (2006).

<sup>11</sup> Joe Nocera, Opinion, *The Patent Troll Smokescreen*, N.Y. TIMES (Oct. 23, 2015), <https://www.nytimes.com/2015/10/24/opinion/the-patent-troll-smokescreen.html>.

<sup>12</sup> 35 U.S.C. § 261 (“[P]atents shall have the attributes of personal property.”); 35 U.S.C. § 154(a)(1) (“Every patent shall contain . . . a grant to the patentee, his heirs or assigns, of the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States . . .” (emphasis added)); *In re Etter*, 756 F.2d 852, 859 (Fed. Cir. 1985) (“The essence of

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exclude is usually associated with the ability to obtain injunctive relief against a trespasser or infringer.<sup>13</sup> "Efficient" infringement, or choosing to infringe another's patent instead of negotiating and accepting a license first, is only a rational course of action when the infringer will not later be enjoined from using the patented technology. These next Sections first explain injunctive relief and its historical place in patent law, before briefly discussing how the 2006 Supreme Court decision in *eBay* changed the analysis when deciding whether it may be lucrative to infringe.

#### A. Injunctive Relief and "Efficient" Infringement

Injunctive relief springs from the rights associated with the grant of a patent. The Constitution grants authors and inventors an "exclusive [r]ight" in their writings and discoveries.<sup>14</sup> The Patent Act of 1790 gave inventors "the sole and exclusive right and liberty of making, constructing, using and vending to others,"<sup>15</sup> and in 1819, Congress expressly authorized injunctive relief for patent infringement.<sup>16</sup> The modern 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."<sup>17</sup> The Supreme Court has recognized "the essence of a patent grant is the right to exclude . . ."<sup>18</sup> The Federal Circuit, which hears patent appeals, similarly noted that "the right to exclude recognized in a patent is . . . the essence of the concept of property."<sup>19</sup>

Injunctions, then, are an important type of equitable remedy, issued by a court and requiring the enjoined party to refrain from a particular act or acts (or alternatively to perform certain acts).<sup>20</sup> If the

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all property is the right to exclude, and the patent property right is certainly not inconsequential.").

<sup>13</sup> Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL'Y 593, 598 (2008) ("For quite some time, the right to exclude in the context of both tangible and intangible property has come to be associated with an entitlement to exclusionary (injunctive) relief.").

<sup>14</sup> U.S. CONST., art. I, § 8, cl. 8.

<sup>15</sup> Patent Act of 1790, ch. 7, § 1, 1 Stat. 109, 110 (1790).

<sup>16</sup> An Act to Extend the Jurisdiction of the Circuit Courts of the United States to Cases Arising Under the Law Relating to Patents, ch. 19, 3 Stat. 481, 481 (1819).

<sup>17</sup> 35 U.S.C. § 283.

<sup>18</sup> *Dawson Chem. Co. v. Rohm & Hass Co.*, 448 U.S. 176, 215 (1980).

<sup>19</sup> *Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1548 (Fed. Cir. 1983).

<sup>20</sup> *Injunction*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/injunction> (last visited Jan. 30, 2021).

enjoined party fails to refrain from the prohibited act, a court may hold that party in contempt.<sup>21</sup> In the patent context, continued infringement is typically enjoined.<sup>22</sup> Although the scope and language of injunctive relief in patent cases can range from simply “do not infringe” to “obey the law” and from very broad to very tailored language, the practical result of injunctive relief is the reinstatement of the exclusive right associated with the grant of a patent.<sup>23</sup>

Previously, patent infringement cases had a fairly reliable rhythm. A patent owner would sue an accused infringer, and a court—whether it be the judge or the jury—would determine whether the patent is infringed.<sup>24</sup> Additionally, the accused infringer would often assert that the patent was invalid and this too would be determined.<sup>25</sup> If the patent in question was found both not invalid and infringed, the court would award damages for past infringement and, in nearly all cases, grant a permanent injunction.<sup>26</sup> The issuance of a permanent injunction would serve as a strong deterrent to infringement. After all, it is very expensive to embark on a course of manufacturing and distributing a product that a court may later enjoin.

This predictable system had, built within it, a set of beneficial outcomes. First, an accused infringer who feared a possible future court order enjoining its behavior would often engage in pre-infringement negotiations in an attempt to license the technology before embarking on potentially infringing behavior.<sup>27</sup> Second, if the accused infringer did not obtain a license ahead of time, when facing a lawsuit in which injunctive relief is the likely outcome if infringement is found, the accused infringer and the patent owner may be more likely to engage in

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<sup>21</sup> *Id.*

<sup>22</sup> Karen E. Sandrik, *Reframing Patent Remedies*, 67 U. MIAMI L. REV. 95, 102–03 (2012).

<sup>23</sup> John M. Golden, *Injunctions as More (or Less) than “Off Switches”: Patent-Infringement Injunctions’ Scope*, 90 TEX. L. REV. 1399, 1403–04 (2012).

<sup>24</sup> Megan M. La Belle, *Patent Law as Public Law*, 20 GEO. MASON L. REV. 41, 52 (2012); Jason Rantanen, *Empirical Analyses of Judicial Opinions: Methodology, Metrics & the Federal Circuit*, 49 CONN. L. REV. 227, 256 (2016).

<sup>25</sup> Shawn P. Miller, *What’s the Connection Between Repeat Litigation and Patent Quality? A (Partial) Defense of the Most Litigated Patents*, 16 STAN. TECH. L. REV. 313, 316 (2013) (noting success in litigation where patents are found not invalid and infringed).

<sup>26</sup> See Balganes, *supra* note 13, at 650–51 (discussing the Federal Circuit’s rule of nearly automatically granting injunctive relief); Colleen V. Chien & Mark A. Lemley, *Patent Holdup, the ITC, and the Public Interest*, 98 CORNELL L. REV. 1, 16 fig. 3 (2012) (illustrating a grant rate of greater than 90 percent for the period before the *eBay* decision).

<sup>27</sup> See *cf.* Sandrik, *supra* note 22, at 98.

pre-lawsuit (or at least pre-decision) settlement negotiations.<sup>28</sup> Finally, even if the lawsuit drew to a conclusion, these regularly-granted injunctions would serve as a place from which post-lawsuit negotiations would begin.

If injunctive relief is not routinely granted, however, these benefits disappear. Instead, it makes much more sense for a potential infringer to infringe now—and pay later. At worst, if an injunction is not granted following a patent infringement trial, the infringer will simply have to pay damages for past infringement and an ongoing royalty for continued, future infringement.<sup>29</sup> This result is akin to having taken a license to start with, but with the bonus of an interest-free loan for the period of infringement prior to and during the trial period.<sup>30</sup> Moreover, the infringer could actually end up in a better position. The patent owner may never bring suit, meaning that the infringer pays no royalties, or the patent owner could prevail, but the royalty rate determined by the court for past and ongoing infringement could be substantially lower than the rate that the patent owner was offering at the outset, saving the infringer money.<sup>31</sup>

#### B. *The Disappearance of Injunctive Relief*

As described above, for “efficient” infringement to be an attractive course of action, there must be a realistic probability that a court will not award a patent owner injunctive relief upon the finding of a valid patent and infringement by the accused. The onset of the current wave of “infringe now, pay later,” traces to the 2006 Supreme Court case of *eBay Inc. v. MercExchange, LLC*,<sup>32</sup> which altered the landscape of near-certain grants of injunctive relief in patent cases.

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<sup>28</sup> John M. Golden, *Litigation in the Middle: The Context of Patent Infringement Injunctions*, 92 TEX. L. REV. 2075, 2078–79 (2014) (explaining how injunctive relief affects the expected gains and losses from litigation and may alter settlement decisions).

<sup>29</sup> Nocera, *supra* note 11 (“Because the courts have largely robbed small inventors of their ability to seek an injunction . . . the worst that can happen is that the infringer will have to pay some money.”).

<sup>30</sup> Damages are not awarded until the completion of a trial. Thus, any infringement that occurs prior to and during the trial will occur before any payments are made by the infringer. Infringing without paying until years after the behavior is akin to an interest-free loan. This period includes any time of infringement before trial and up to three years during trial before damages are awarded. See Derek Freitas, *2020 Patent Litigation: Year in Review*, JDSUPRA (Mar. 25, 2021), <https://www.jdsupra.com/legalnews/2020-patent-litigation-year-in-review-5104923/> (showing a period of over 1.5 up to nearly 3 years from filing date to trial date for new patent cases in several popular districts).

<sup>31</sup> See Mossoff, *supra* note 7, at 938.

<sup>32</sup> See generally *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006).

The patent in the *eBay* case was held by MercExchange, a company that did not itself make use of the patent.<sup>33</sup> Instead, as a failed start-up, MercExchange licensed the patented technology to others.<sup>34</sup> The district court found that the patent was not invalid and was infringed by eBay and, therefore, granted MercExchange substantial damages.<sup>35</sup> The district court declined MercExchange's request for a permanent injunction based on that company's willingness to license the patent.<sup>36</sup> MercExchange appealed to the Federal Circuit, which affirmed the district court's finding of not invalid and infringed, but reversed the denial of permanent injunction based on its general rule that permanent injunctions should be issued upon a finding of patent infringement.<sup>37</sup>

The Supreme Court granted certiorari and unanimously reversed the Federal Circuit.<sup>38</sup> In doing so, the Court announced a four-factor test that courts should use when deciding whether to grant a permanent injunction.<sup>39</sup> The four-factor test requires the party seeking a permanent injunction to 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."<sup>40</sup> These factors are balanced and considered on the merits of each particular case.<sup>41</sup> The Supreme Court took issue with both the district court's denial of injunctive relief and the Federal Circuit's reversal/grant of injunctive relief, noting that both categorical grants or denials are inapposite for this equitable doctrine.<sup>42</sup>

Despite the opinion's rather straightforward command against categorical relief or lack thereof, the *eBay* opinion spawned two concurring opinions. One concurrence, authored by Chief Justice Roberts and joined by Justices Scalia and Ginsburg, noted that, although automatic grants of injunctive relief for patent infringement were

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<sup>33</sup> See Ryan T. Holte, *Trolls or Great Inventors: Case Studies of Patent Assertion Entities*, 59 ST. LOUIS U. L.J. 1, 23–28 (2014) (providing the history of MercExchange).

<sup>34</sup> See *id.* at 27–28.

<sup>35</sup> MercExchange, LLC v. eBay Inc., 275 F. Supp. 2d 695, 698–99 (E.D. Va. 2003).

<sup>36</sup> *Id.* at 712, 722.

<sup>37</sup> MercExchange, LLC v. eBay Inc., 401 F.3d 1323, 1338–1339 (Fed. Cir. 2005).

<sup>38</sup> eBay Inc. v. MercExchange, LLC, 547 U.S. 388, 389, 391 (2006).

<sup>39</sup> *Id.* at 391.

<sup>40</sup> *Id.* at 391.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 393–94.

inappropriate, there were very clear and valid reasons that injunctions should still be predictably granted in most cases.<sup>43</sup> The other concurrence, written by Justice Kennedy and joined by Justices Stevens, Souter, and Breyer, laid out what may be best characterized as the three bogeymen of patent law: patent trolls, small components of big devices, and business method patents.<sup>44</sup> When one or more of these issues are present in a case, a court should be wary about granting injunctive relief.<sup>45</sup>

Interestingly, the four-factor test from *eBay* has become "the test" for whether injunctive relief should be granted, regardless of the type of case involved; in fact, the test has appeared in decisions in other areas of intellectual property, government regulations, constitutional law, and even state tort and contract law cases.<sup>46</sup> As one set of commentators remarked: "For an opinion that claims merely to apply generally acknowledged principles, *eBay* has become a remarkable legal juggernaut."<sup>47</sup>

While the reach of the *eBay* factors may be surprising, the effect it has had on patent law remedies is less shocking. Predictable grants of injunctions for patent infringement were standard until 2006, when the Supreme Court's *eBay* opinion created a major shift.<sup>48</sup> Studies of injunction grants prior to *eBay* found that injunctive relief was granted in the vast majority of cases where courts found patent infringement.<sup>49</sup> Studies done in the first decade after *eBay* found that requests for a permanent injunction were granted in approximately three-quarters of the cases where patent infringement was found (and an injunction was requested). A widely-cited study conducted by Professor Christopher Seaman following *eBay* found that requests for a permanent injunction

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<sup>43</sup> *Id.* at 394–95 (Roberts, C.J., concurring) (noting that injunctions should continue to issue in the "vast majority of patent cases," as the right to exclude is difficult to capture via monetary damages).

<sup>44</sup> *See id.* at 395–97 (Kennedy, J., concurring).

<sup>45</sup> *See eBay Inc.*, 547 U.S. at 397 (Kennedy, J., concurring).

<sup>46</sup> Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 205 (2012).

<sup>47</sup> *Id.* at 206.

<sup>48</sup> *See MercExchange LLC v. eBay, Inc.*, 401 F.3d 1323, 1339 (Fed. Cir. 2005) (citing a "general rule that courts will issue permanent injunctions against patent infringement" absent a good reason, such as a public health concern, to deny it); *see also* *W.L. Gore & Assocs. v. Garlock, Inc.*, 842 F.2d 1275, 1281 (Fed. Cir. 1988).

<sup>49</sup> Ryan T. Holte, *The Misinterpretation of eBay v. MercExchange and Why: An Analysis of the Case History, Precedent, and Parties*, 18 CHAP. L. REV. 677, 719 (2015).

were granted in 72.5 percent of cases.<sup>50</sup> Similar numbers were shown in studies by Professors Colleen Chien and Mark Lemley (approximately 75 percent in the five years following *eBay*) and Professor Jay Kesan and Kirti Gupta (80.7 percent between June 2006 and December 2012).<sup>51</sup>

The change from near-guaranteed injunctive relief to injunctions in 75–80 percent of cases where patent infringement is found does make “efficient” infringement more attractive. Because injunctions are not granted in only a quarter of the cases, there is still a substantial risk in the “infringe now, pay later” strategy. If the odds of this gamble could be made even more favorable, the analysis in choosing this route would change dramatically. Fortunately (for infringers, at least), there are certain types of patent owners and certain types of patents that are even less likely to receive injunctive relief—heightening the odds that “efficient” infringement will pay off.

### III. WHEN IS “EFFICIENT” INFRINGEMENT HAPPENING?

There are two primary circumstances that account for the portion of cases where injunctive relief is routinely unavailable despite a finding of patent infringement. The first is when the patent owner is a “patent troll,” as was at issue in the *eBay* case. Patent trolls are companies that “don’t make anything,” but instead license their patented technology to others.<sup>52</sup> The second instance is in the case of standard-essential patents (“SEPs”), or patents that cover technology incorporated in a technology standard such as Wi-Fi or 4G LTE.<sup>53</sup> This Section will discuss each of these circumstances, in turn, as well as explain why these two circumstances are most likely to fail to satisfy the *eBay* factors.

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<sup>50</sup> Christopher B. Seaman, *Permanent Injunctions in Patent Litigation After eBay: An Empirical Study*, 101 IOWA L. REV. 1949, 1983, 1988 (2016).

<sup>51</sup> Colleen V. Chien & Mark A. Lemley, *Patent Holdup, the ITC, and the Public Interest*, 98 CORNELL L. REV. 1, 9–10 (2012); Kirti Gupta & Jay P. Kesan, *Studying the Impact of eBay on Injunctive Relief in Patent Cases* 15, fig. 3, (July 10, 2015) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2629399](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2629399).

<sup>52</sup> Colleen V. Chien, *Turn the Tables on Patent Trolls*, FORBES (Aug. 9, 2011, 11:37 PM), <http://www.forbes.com/sites/ciocentral/2011/08/09/turn-the-tables-on-patent-trolls/>. In addition to stating that “trolls don’t make anything,” she also focuses on their allegedly litigious nature. *See id.*

<sup>53</sup> *See* Mark A. Lemley & Carl Shapiro, *A Simple Approach to Setting Reasonable Royalties for Standard-Essential Patents*, 28 BERKELEY TECH. L.J. 1135, 1136 (2013) (“Patents covering technology necessary to comply with a standard are ‘standard-essential patents.’”).

### A. Patent Trolls

A "patent troll" is a company that uses, to some extent, a licensing business model.<sup>54</sup> Despite the typical accusation that "patent trolls" "don't make anything,"<sup>55</sup> the term has been applied to a wide variety of firms that have a diversity of actual business models—some of which even make things. Although there are various conflicting definitions about what precise type of firm qualifies as a "patent troll," the primary point of agreement is that a substantial portion of the firm's income derives from licensing patents.<sup>56</sup> The term "patent troll" is obviously pejorative and is used to justify accusing these licensing firms of harming innovation or the economy.<sup>57</sup> This Author personally prefers "patent licensing firm,"<sup>58</sup> but for the sake of this Article—where the mainstream pejorative view of these firms is relevant—the term "patent troll" will be used.

"Patent trolls" have adopted a business model where they obtain licenses from those companies who wish to use their technology via direct negotiation and, when that fails, via patent infringement lawsuits.<sup>59</sup> Although numerous commentators claim that the licensing business model creates negative impacts, there are positive aspects associated with licensing business, including facilitating commercialization by better-equipped firms and expanding the market for patents.<sup>60</sup> Despite these beneficial traits, as seen in *eBay*, other court decisions, the media, and elsewhere, many clearly have a negative view of patent trolls primarily because they do not make anything.<sup>61</sup> Further, this bogeyman of the patent troll is often combined with another problem as set forth by Justice Kennedy—the business method patent.<sup>62</sup>

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<sup>54</sup> Kristen Osenga, *Formerly Manufacturing Entities: Piercing the "Patent Troll" Rhetoric*, 47 CONN. L. REV. 435, 441 (2014).

<sup>55</sup> See *supra* note 52.

<sup>56</sup> See *id.* at 443–44.

<sup>57</sup> See *id.* at 442.

<sup>58</sup> For the Author's viewpoint generally on "patent trolls" versus "patent licensing firms," see generally Kristen Osenga, *Sticks & Stones: How the FTC's Name-Calling Misses the Complexity of Licensing-Based Business Models*, 22 GEO. MASON L. REV. 1001 (2015).

<sup>59</sup> See Osenga, *Formerly Manufacturing Entities*, *supra* note 54, at 445.

<sup>60</sup> See *id.* at 449–451.

<sup>61</sup> *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 396 (2006) (Kennedy, J., concurring) ("An industry has developed in which firms use patents *not as a basis for producing and selling goods* but, instead, primarily for obtaining licensing fees.") (emphasis added).

<sup>62</sup> See *id.* at 397; 157 Cong. Rec. H4480 (daily ed. June 23, 2011) (statement of Rep. Grimm) ("Infamous 'patent trolls' . . . have made business-method patents their specialty in recent years.").

These adverse views, as well as a superficial application of the *eBay* factors, are why “patent trolls” routinely are denied injunctive relief and are thus subject to “efficient” infringement by others.

The reason that patent trolls are generally considered to fail the *eBay*-factor test is that, because their business model relies on licensing of the patent, the courts believe there is no irreparable harm caused by infringement and that money damages will make the patent troll whole.<sup>63</sup> Moreover, because the patent troll is not making anything, the public’s interest is in the infringer, who is actually putting products on the market.<sup>64</sup> This distrust of companies that are not making anything echoes the concerns from Justice Kennedy’s concurrence in *eBay*. This disdain, however, for companies that hold patents, but do not make things, is interesting given Supreme Court precedent from the early 1900s. In the *Continental Paper Bag* case in 1908, the Court directly spoke to patent holder non-use, stating that “nonuse is no efficient reason for withholding injunction[,]” if the nonuse did not offend public policy.<sup>65</sup> The Supreme Court has cited *Continental Paper Bag* on at least six subsequent occasions for the proposition that a patentee need not be practicing the patent to obtain injunctive relief.<sup>66</sup> And yet, after *eBay*, patent trolls—that is, patent owners who “do not make anything”—are precisely the type of patentee that is not able to obtain injunctions.

Although *eBay* stated that there should be no categorical grants or denials of injunctive relief, at least in the area of patent licensing firms, there is a growing body of case law that suggests that injunctions are presumptively denied in cases where the patent holder is not practicing the technology covered by the patent.<sup>67</sup> In the study conducted by Professor Seaman, discussed above, requests for injunction were granted only 16 percent of the time where the patent holder was not practicing the patent.<sup>68</sup> Similar low grant rates were seen in the studies by Chien and Lemley, as well as Kesan and Gupta.<sup>69</sup>

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<sup>63</sup> Seaman, *supra* note 50, at 1987–90.

<sup>64</sup> James Boyle, *Open Source Innovation, Patent Injunctions, and the Public Interest*, 11 DUKE L. & TECH. REV. 30, 57 (2012) (“If the public is being denied access to the technology altogether during the injunction . . . the public interest will frequently lean strongly *against* an injunction.”).

<sup>65</sup> *Cont’l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405, 429 (1908).

<sup>66</sup> Ryan T. Holte, *Clarity in Remedies for Patent Cases*, 26 GEO. MASON L. REV. 127, 154 n.171 (2018) (citing these cases).

<sup>67</sup> Seaman, *supra* note 50, at 1953.

<sup>68</sup> *Id.* at 1983, fig. 1; 1988, fig. 3.

<sup>69</sup> Chien & Lemley, *supra* note 51, at 9–10; Gupta & Kesan, *supra* note 51.

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An exemplary case where a so-called "patent troll" was denied injunctive relief based on the *eBay* factors is *Soverain Software v. Newegg, Inc.*<sup>70</sup> Soverain Software sought a permanent injunction after the court found Newegg infringing two of Soverain's patents.<sup>71</sup> Although Soverain argued that its licensing program would be irreparably harmed if an injunction did not issue and that money damages would be inadequate to remedy the harm to its licensing program, the district court was not persuaded.<sup>72</sup> The court deemed these claims to be speculative, focusing instead on Soverain's extensive licensing and the relatively small portion of Newegg's product that Soverain's technology represented.<sup>73</sup> In a rather circular argument, the court found that the balance of the hardships favored Newegg because money damages would make Soverain whole and that the public interest would be harmed by granting an injunction where Soverain would be adequately remedied with money.<sup>74</sup>

Of course, as found in the studies above, the very low percentage of grants is not zero, and so some patent licensing firms are able to get injunctive relief. Professor Seaman's study found that courts were more inclined to grant injunctive relief to patent holders that were "failing or failed operating companies that had previously sought to commercialize" their technology.<sup>75</sup> Another example shows that patent licensing firms that are particularly "appealing" can obtain injunctive relief. In *CSIRO v. Buffalo Technologies*, a permanent injunction was granted to the plaintiff.<sup>76</sup> CSIRO, however, was not just any patent licensing firm, but the Commonwealth Scientific and Industrial Research Organization, the principal research institution of the Australian government.<sup>77</sup> Because of this status, the district court found that CSIRO would suffer irreparable harm, absent an injunction, due to losses of reputation and opportunity.<sup>78</sup> Justice Kennedy had already granted the potential for special plaintiffs in the *eBay* case, noting "some patent

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<sup>70</sup> This Author has previously written about Soverain Software in a study of formerly-manufacturing companies that pivoted to licensing business models (and had been deemed, by others, to be "patent trolls"). See Osenga, *supra* note 54, at 458-60.

<sup>71</sup> *Soverain Software LLC v. Newegg, Inc.*, 836 F. Supp. 2d 462, 480 (E.D. Tex. 2010).

<sup>72</sup> *Id.* at 481-82.

<sup>73</sup> *Id.* at 482. The court did, however, find that the patented technology was "necessary" to Newegg's system. *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Seaman, *supra* note 50, at 1989.

<sup>76</sup> *CSIRO v. Buffalo Tech. Inc.*, 492 F. Supp. 2d 600, 607-08 (E.D. Tex. 2007).

<sup>77</sup> *Id.* at 601.

<sup>78</sup> *Id.* at 604.

holders, such as university researchers or self-made inventors, might reasonably prefer to license their patents” but could still satisfy the four-factor test.<sup>79</sup>

Bound up with the unfavorable application of the *eBay* factors in denying injunctive relief to patent trolls, there are also other purported characteristics of these types of patent owners that discourage courts from granting these requests. Without a doubt, patent trolls have gotten a bad reputation in the media and elsewhere; their very moniker evokes the type of behaviors that many assume these patent owners engage in. They hide under bridges, waiting to catch good manufacturing companies unaware.<sup>80</sup> They buy up and then wield “bad” patents like swords and are only in it for the money.<sup>81</sup> Of course, when considering an equitable remedy, these patent owners are at a disadvantage—courts do not like patent trolls, and the public certainly has no interest in making them happy.

#### B. *Standard Essential Patents*

The other instance where injunctive relief is considered largely unavailable is less about the patent owner and more about the status of the patent as a standard essential patent. SEPs cover technology that is incorporated into a technology standard, such as Wi-Fi or 4G. In theory, use of these SEPs is necessary for producing a standards-compliant product or service.<sup>82</sup> Some SEPs cover optional features or certain implementations of a standard.<sup>83</sup>

Technology standards today are often set by standard development organizations (“SDOs,” also known as standard setting

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<sup>79</sup> *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 396 (Kennedy, J., concurring).

<sup>80</sup> John R. Allison et al., *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 GEO. L.J. 677, 683 (2011) (accusing patent trolls of “hiding under a bridge” and “demanding a toll from surprised passers-by”).

<sup>81</sup> Marc Morgan, *Stop Looking Under the Bridge for Imaginary Creatures: A Comment Examining Who Really Deserves the Title Patent Troll*, 17 FED. CIR. BUS. J. 165, 178 (2007) (defining bad-faith patent trolls as (1) hiding patent ownership until a company “unsuspectingly infringes it”; (2) acquiring large patent portfolios simply to use offensively; and (3) intentionally obtaining and asserting “low quality patents”). On the other hand, some scholars disagree: “We are not aware of any evidence that patent trolls are more likely to have or assert bad patents than practicing entities.” Matthew Sag & Kurt Rohde, *Patent Reform and Differential Impact*, 8 MINN. J.L. SCI. & TECH. 1, 8 (2007).

<sup>82</sup> Richard H. Stern, *Who Should Own the Benefits of Standardization and the Value It Creates?*, 19 MINN. J.L. SCI. & TECH. 107, 109 n.3 (2018).

<sup>83</sup> *Id.*

organizations or "SSOs").<sup>84</sup> Participants in SDOs often own patents that cover one or more aspects of the standards being developed—that is, SEPs. SDOs have intellectual property rights, or IPR, policies that (a) often require SDO participants to disclose patents and patent applications they hold that they consider to be essential to the standard while the standard is being developed, deeming them SEPs; and (b) often require owners of SEPs to agree to license these patents on fair, reasonable, and non-discriminatory ("FRAND") terms to anyone who would like to incorporate the standardized technology into their own products or services.<sup>85</sup> The purpose of the FRAND commitment is to facilitate adoption of the standard by implementers while still providing reasonable rewards to companies who invested in the research, development, and standardization process.<sup>86</sup>

The reason that these patents fail the *eBay* factor test is because the patent owner is obligated to license the patent on fair, reasonable, and non-discriminatory terms. Specifically, if a patent owner agreed to license the patent on FRAND terms, there is unlikely to be an irreparable injury, and money damages will certainly make the patentee whole, thus failing the first two prongs of the *eBay* test. Because of the FRAND commitment, where the SEP owner agreed to license the patent on fair, reasonable, and non-discriminatory terms to any party, injunctive relief is generally denied because the SEP owner "is, by definition, willing to license rather than exclude, and benefits from the widespread adoption of its technology resulting from standardization."<sup>87</sup>

Unlike patent licensing firms, where there are some "special" plaintiffs that can still obtain permanent injunctions even under the *eBay* factors,<sup>88</sup> patent owners alleging infringement of SEPs are almost universally shut out of this remedy—at least in the United States. Beyond FRAND, some SDO policies—both external and internal to SDOs—discourage or even prohibit the seeking of injunctive relief for infringement of patents subject to FRAND commitments.<sup>89</sup> There are

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<sup>84</sup> Kristen Osenga, *Ignorance over Innovation: Why Misunderstanding Standard Setting Organizations Will Hinder Technological Progress*, 56 U. LOUISVILLE L. REV. 159, 164–65 (2018).

<sup>85</sup> *Id.* at 183–87.

<sup>86</sup> *Id.*

<sup>87</sup> Thomas F. Cotter, *Reflections on Holdup and Royalty Stacking, Part 1*, COMPAR. PAT. REMEDIES (June 11, 2014, 4:20 AM), <http://comparativepatentremedies.blogspot.com/2014/06/reflections-on-holdup-and-royalty.html>.

<sup>88</sup> See *supra* notes 75–79.

<sup>89</sup> Dirk Auer & Julian Morris, *Governing the Patent Commons*, 38 CARDOZO ARTS & ENT. L.J. 291, 339–40 (2020) (discussing the effects of the 2015 amendment to the IEEE IPR policy on injunctive relief).

other externalities that have made getting an injunction for infringement of an SEP difficult. For example, in 2013, the U.S. Department of Justice (“DOJ”) and the U.S. Patent and Trademark Office (“USPTO”) issued a policy statement that suggested strongly that injunctive relief was generally inappropriate in patent infringement cases involving SEPs.<sup>90</sup> More recently, in an executive order from July 2021, President Biden asked the Attorney General and the Secretary of Commerce to consider what remedies would be available for SEPs;<sup>91</sup> seemingly reversing a 2019 Policy Statement issued jointly by the DOJ, the USPTO, and the National Institute of Standards and Technology (“NIST”) that allowed for injunctive relief in cases of SEP infringement.<sup>92</sup>

Few courts have had the opportunity to consider whether to grant injunctive relief for infringement of SEPs, as many SEP owners do not seek injunctive relief for the reasons noted above. In *Microsoft Corp. v. Motorola, Inc.*, however, Judge James Robart determined that Motorola’s FRAND commitment illustrated that there was not irreparable harm and that money damages were adequate, thus deciding that Motorola would not be entitled to injunctive relief.<sup>93</sup> Beyond the first two *eBay* factors, commentators have argued that the balance of the hardships and the public interest also weigh in favor of denying injunctions for infringement of SEPs, because the infringer needs access to the technology to produce and market its standards-compliant products.<sup>94</sup> “[W]hile *eBay* counsels against the use of ‘broad classifications’ and ‘categorical’ rules for or against the entry of injunctive relief, one might safely conclude that the application of the *eBay* factors in the typical case involving an SEP generally would militate against the use of permanent injunctions.”<sup>95</sup>

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<sup>90</sup> U.S. Dep’t of Just. & U.S. Pat. & Trademark Off., *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments* (Jan. 8, 2013), <https://www.justice.gov/atr/page/file/1118381/download>.

<sup>91</sup> Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 9, 2021).

<sup>92</sup> U.S. Dep’t of Just., U.S. Pat. & Trademark Off. & Nat’l Inst. of Standards & Tech., *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments* (Dec. 19, 2019), <https://www.justice.gov/atr/page/file/1228016/download>. This policy statement replaced the 2013 policy statement. See *supra* note 90.

<sup>93</sup> *Microsoft Corp. v. Motorola, Inc.*, No. C10-1823JLR, 2012 WL 5993202, at \*6-7 (W.D. Wash. Nov. 30, 2012). Judge Richard Posner, sitting as a trial judge by designation, arrived at the same conclusion in *Apple Inc. v. Motorola, Inc.*, 869 F.Supp.2d 901, 913-15 (N.D. Ill. 2012).

<sup>94</sup> Thomas F. Cotter, *Comparative Law and Economics of Standard-Essential Patents and FRAND Royalties*, 22 TEX. INTELL. PROP. L.J. 311, 320-21 (2014).

<sup>95</sup> *Id.* (internal citations omitted).

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Additionally, SEPs often cover a smaller component of a much larger standard or product; this is the second bogeyman of Justice Kennedy's concurrence. Although *eBay* did not speak directly to SEPs, again Justice Kennedy's concurrence has been prescient in cutting off injunctive relief for SEPs. Specifically, Justice Kennedy warned against granting injunctions against whole devices for infringement of patents that simply cover small component parts thereof:

When 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 not serve the public interest.<sup>96</sup>

Because the number of SEPs implicated for any particular standard can number in the hundreds, or even thousands,<sup>97</sup> infringement of one or a few of these SEPs could lead to Justice Kennedy's concern.

Analogous to the popular narratives we hear about patent trolls hiding under bridges, tales about badly behaving SEP owners abound. Specifically, the assertion is that companies who own SEPs seek unreasonably high licensing rates from companies who wish to make standards-compliant products using the threat of injunctive relief as a hammer to make the implementing companies accept these exorbitant royalty rates.<sup>98</sup> This phenomenon, which allegedly is prevalent, is known as patent holdup and is yet another reason, along with the *eBay* factors, that courts are unlikely to grant injunctions upon a finding that an SEP has been infringed.<sup>99</sup>

## IV. THE LIES WE HEAR ABOUT "EFFICIENT" INFRINGEMENT

"Efficient" infringement is a misnomer—the behavior, while certainly infringement, is not efficient in the usual senses of that term. In any case, the determinations that patent trolls and SEP owners are nearly categorically not eligible for injunctive relief are superficial at

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<sup>96</sup> *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 396–97 (2006) (Kennedy, J., concurring).

<sup>97</sup> For one example of the quantity of SEPs declared for a particular standard, see Tim Pohlmann, *Who Is Leading the 5G Patent Race for Edge Computing?*, *MANAGING IP* (May 26, 2021), <https://www.managingip.com/article/b1rznbcc4dsk23/who-is-leading-the-5g-patent-race-for-edge-computing>.

<sup>98</sup> Jorge L. Contreras, *Much Ado About Hold-up*, 2019 U. ILL. L. REV. 875, 877 (2019).

<sup>99</sup> See J. Gregory Sidak, *Is Patent Holdup a Hoax*, 3 *CRITERION J. ON INNOVATION* 401, 476 (2018) (Sidak found approximately 140 cases between 2007–2018 involving SEPs where the court mentions "patent holdup" in its analysis.).

best. Moreover, the narratives used to support the denial of injunctions are misunderstandings or, perhaps at worst, outright lies. The following Sections will describe why “efficient” infringement should be called “predatory” infringement and why patent trolls and SEP owners should not be generally excluded from obtaining injunctive relief in most cases.

#### A. *Predatory Infringement*

While this type of infringement—that is, infringing in the face of a low likelihood of being enjoined—is known as “efficient” infringement, it is not efficient in the economic sense of the word. As the head of Global IP for IBM, William LaFontaine, stated: “Efficient infringement is an attempt to make infringement seem appropriate. Let me be clear—it is not.”<sup>100</sup> Some commentators have likened “efficient” infringement to efficient breach in contract law.<sup>101</sup> But other scholars have noted that both efficient breach and “efficient” infringement are, at best, theoretical ideas.<sup>102</sup> In the model of efficient breach, there is an overall net gain in social welfare based on a willful breach of a contract because the breaching party takes advantage of an opportunity to obtain a higher payment that exceeds any damages the breach causes, pays off the party to the original contract any lost profits the breach causes, and keeps the extra.<sup>103</sup> Both parties, and society, are at least as well off as they would have been if there had been no breach.<sup>104</sup> But this idealized scenario rarely plays out as such in the real world, as losses often exceed lost profits, courts may award additional damages, and society loses out on its ability to confidently trust in contractual commitments.<sup>105</sup>

Similarly, “efficient” infringement does not result in an overall net gain in social welfare. The costs to the patent owner are rarely captured in the reasonable royalties a court imposes. Worse, though, society loses

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<sup>100</sup> Richard Lloyd, “Patent Sales Are Now an Integral Part of Our Innovation Cycle,” says IBM’s Global IP Head, IAM (Oct. 26, 2020), <https://www.iam-media.com/law-policy/ibm-global-ip-head-the-fallacy-of-efficient-infringement-and-more>.

<sup>101</sup> James Young Hurt, Comment, *Reasonable Royalty for Patent Infringement of Non-Direct Revenue Producing Products*, 56 IDEA 211, 227 (2016); Ted Sichelman, *Purging Patent Law of “Private Law” Remedies*, 92 TEX. L. REV. 517, 557 (2014).

<sup>102</sup> Adam Mossoff & Bhamati Viswanathan, *Explaining Efficient Infringement*, GEO. MASON UNIV.: CTR. FOR INTELL. PROP. & INNOVATION POL’Y (May 11, 2017), <https://cip2.gmu.edu/2017/05/11/explaining-efficient-infringement/>; Richard A. Epstein & Kayvan B. Noroozi, *Why Incentives for “Patent Holdout” Threaten to Dismantle FRAND, and Why It Matters*, 32 BERKELEY TECH. L.J. 1381, 1405 (2017).

<sup>103</sup> Mossoff & Viswanathan, *supra* note 102.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

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out on its ability to confidently trust in the patent system.<sup>106</sup> By removing a patentee's exclusive right—the only right that is granted by a patent—"efficient" infringement eviscerates the reward that is intended to incentivize invention and innovation. Losing the very reasons for the patent system is a significant loss in overall social welfare, not a gain.

Additionally, "efficient" infringement puts a burden that should be borne by the parties onto the court system. Proponents of "efficient" infringement counter that it is efficient for someone who wants to make use of another party's patented technology if there are differences of opinion as to whether the patent is infringed or valid, or if the expected cost of negotiating a license is too high.<sup>107</sup> This assessment, however, fails to realize the burden placed on the judicial system. Congress, recognizing the burden that patent cases put on both litigants and the patent system, created a series of post-grant proceedings designed to allow the validity of issued patents to be challenged outside of the court system.<sup>108</sup> Although there are significant concerns about the execution of these proceedings, the primary point is that there are savings when the judicial system is not required to consider all patent disputes. "Efficient" infringement, on the other hand, takes an activity that should be happening entirely outside of the legal system—that is, the negotiation between a patent owner and a party that wants to use the patent—and forces it into the legal system.

Instead of "efficient" infringement, this type of behavior is more aptly called predatory infringement. By continuing to refer to this willful infringement of someone else's patent rights as "efficient," it evokes a sense of increased welfare and productive allocation of resources, neither of which are true. Predatory infringement provides a more accurate depiction of what is occurring. The infringer is making a choice that is his alone and for his sole benefit; the needs and rights of the prey, or patent owner, are irrelevant to the predator's calculus.

Of course, changing the term to predatory infringement is only part of the solution. To curb predatory infringement, it is critical to make injunctive relief generally available to all patent owners, regardless of their business model or whether the patent is an SEP. Although *eBay* prohibits categorical grants of permanent injunctions in cases of patent

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<sup>106</sup> *Id.*

<sup>107</sup> Sichelman, *supra* note 101.

<sup>108</sup> See Leahy-Smith America Invents Act, H.R. Rep. No. 112-98, pt. 1, at 48 (2011), as reprinted in 2011 U.S.C.C.A.N. 67, 78; see also *id.* at 40 (AIA "is designed to establish a more efficient and streamlined patent system that will improve patent quality and limit unnecessary and counterproductive litigation costs.").

infringement,<sup>109</sup> if these remedies remained a viable option in all cases, potential infringers would consider predatory infringement much less attractive most of the time. It is only when the chances of being enjoined are quite low that predatory infringement becomes practical.

### B. Fixing the Patent Troll Narrative

As just explained, the term “efficient” infringement evokes a false sense of benefit in an otherwise problematic behavior. Similarly, much of the narrative about patent trolls is either partially or completely untrue, and yet courts regularly rely on these stories when deciding to decline injunctive relief to companies that rely on a licensing business model.<sup>110</sup> Specifically, what we hear about patent trolls is that they hide under bridges, waiting for companies to use their patented technology, and only then jumping out to sue the accused infringer—depicting a scene of an unwary traveler being startled.<sup>111</sup> Other myths about patent trolls include both that they do not make anything, but also that they buy up scads of patents from other companies which they then wield like swords when setting upon unwary, good folks who are just trying to put products on shelves.<sup>112</sup> Beyond that, the story goes, these patent trolls are wielding bad, invalid patents, that probably also cover business methods. The question is whether these stories are real. The answer is—they are not.

First and foremost, patent trolls are not all the same.<sup>113</sup> Despite the idea that patent trolls exist simply to buy up patents that they then use like swords, the origin stories and behaviors of patent licensing firms are quite varied. Some patent licensing firms began as operating companies that needed to change course in view of industry shifts.<sup>114</sup>

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<sup>109</sup> See *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 393–94 (2006).

<sup>110</sup> See generally Edward Lee, *Patent Trolls: Moral Panics, Motions in Limine, and Patent Reform*, 19 STAN. TECH. L. REV. 113 (2015) (describing the etymology of patent trolls, including the “under the bridge” narratives and explaining how the derogatory term can have a “moral panic” effect on judges and others).

<sup>111</sup> Herbert Hovenkamp, *Antitrust and the Patent System: A Reexamination*, 76 OHIO STATE L.J. 467, 559 (2015) (“The widely used term patent ‘troll’ suggests the catching of people who are unaware that they have committed patent infringement until they are surprised.”).

<sup>112</sup> See, e.g., *Network Prot. Scis., LLC v. Fortinet, Inc.*, No. C 12-01106, 2013 U.S. Dist. LEXIS 118105, at \*1–4 (N.D. Cal. Aug. 20, 2013) (opening the opinion with a negative op-ed about patent trolls buying up unused patents to assert).

<sup>113</sup> Osenga, *Sticks and Stones*, *supra* note 58, at 1014–16. See generally Christopher A. Cotropia, Jay P. Kesan & David L. Schwartz, *Unpacking Patent Assertion Entities (PAEs)*, 99 MINN. L. REV. 649, 650, 659–60 (2014).

<sup>114</sup> Osenga, *Formerly Manufacturing Entities*, *supra* note 54.

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Other patent licensing firms are failed startups.<sup>115</sup> Still other patent licensing firms operate as research and development shops.<sup>116</sup> And yes, some patent licensing firms do exist purely to bring nuisance litigation actions based on questionable patents. But lumping all patent trolls together and deciding, categorically, that these patent owners are ineligible for injunctive relief fails to recognize the complexity of the patent licensing ecosystem. While Justice Kennedy, in his *eBay* concurrence, made allowances for special types of patent trolls, like university researchers or self-made inventors,<sup>117</sup> and extraordinary patent trolls, like CSIRO, have been able to obtain injunctive relief, the vast majority of patent trolls have been denied injunctions simply because they license their patents, without any attention being paid to the specific issues they may face in their circumstances. Treating all patent trolls as a monolith and reflexively denying injunctive relief is precisely the opposite of what the *eBay* case purported to do.

Second, most patent trolls do not stealthily attack unsuspecting companies. While there are certainly tales that support the stereotypical patent troll, the reality is that many infringement cases where an injunction was denied begin with the story of failed negotiations between the parties.<sup>118</sup> The infringer was not caught unaware after sinking substantial resources into their product; rather, the infringer made a calculated decision to not agree to a license that the patent holder offered. In fact, many courts specifically use a patent holder's licensing programs in their *eBay* analysis to find no irreparable harm and that money damages are sufficient.<sup>119</sup> Even in the *eBay* case itself, the patent troll narrative falls apart. *eBay* was aware both of MercExchange's patents and that its technology was covered by these patents, and *eBay* and MercExchange attempted to reach a licensing

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<sup>115</sup> Cotropia et al., *supra* note 113, at 669–71.

<sup>116</sup> *Id.* at 670.

<sup>117</sup> *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 396 (2006) (Kennedy, J., concurring).

<sup>118</sup> Sannu K. Shrestha, Note, *Trolls or Market-Makers? An Empirical Analysis of Nonpracticing Entities*, 110 COLUM. L. REV. 114, 119–31 (2010) (providing an overview of relevant literature and competing arguments).

<sup>119</sup> See, e.g., *BASF Plant Sci., LP, v. CSIRO*, No. 2:17-CV-503-HCM, 2019 U.S. Dist. LEXIS 228305, at \*52–54 (E.D. Va. Dec. 20, 2019) (denying injunctive relief due to failure to meet the *eBay* factors because “[t]he fact that Proponents are willing to share with technology with Opponents counsels against injunction”); *Ricoh Co. v. Quanta Comput.*, 2010 U.S. Dist. LEXIS 38220, at \*5 (W.D. Wis. Apr. 19, 2010) (denying injunctive relief in part because of Ricoh's extensive licensing of its patents to multiple competitors in Quanta's industry).

agreement, with MercExchange only filing its lawsuit when those negotiations failed.<sup>120</sup>

Finally, proponents of “efficient” infringement use “bad” patents (and particularly business method patents) as a justification for denying injunctions to patent trolls.<sup>121</sup> There is a lot to unpack in this particular justification. First, the decision whether to grant injunctive relief does not begin until a patent has been adjudged not invalid and infringed, at which point it certainly is not a bad (meaning invalid) patent.<sup>122</sup> Second, making a decision to infringe first and pick up the pieces later because of a belief that a patent could be invalid denies the existence of the various post-grant proceedings at the Patent Office that allow for easier and cheaper invalidation of issued patents. Third, the link between patent trolls, “bad” patents, and business method patents is tenuous at best.<sup>123</sup> Professor Michael Risch has extensively studied the behavior of patent trolls and found that patents asserted by the most prevalent patent trolls were related to a variety of technologies, including communications and computers, mechanical arts, and even a few chemical patents.<sup>124</sup> Only approximately 10 percent of patents that patent trolls asserted in Risch’s study listed Class 705 (commonly associated with business methods) as one of their technology classes.<sup>125</sup> Even under a broader classification of “high tech” patents that Professor Colleen Chien proposed, only 40 percent of the patents in Risch’s study qualify.<sup>126</sup> Moreover, Risch’s study found that “traditional patent quality measures imply at the very least” that patents asserted by patent trolls are no different than those patents litigated by others, which may demonstrate that patent trolls are not asserting “bad” patents more often than any other plaintiffs.<sup>127</sup>

Correcting these misconceptions about patent trolls would go a long way towards returning their ability to obtain injunctive relief for patent infringement. Additionally, thoughtful and rigorous application

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<sup>120</sup> *eBay*, 547 U.S. at 392; Brief for Respondent at 1–3, *eBay*, 547 U.S. at 392 (2006) (No. 5-130).

<sup>121</sup> Michael Risch, *Patent Troll Myths*, 42 SETON HALL L. REV. 457, 460–61 (2012).

<sup>122</sup> Richard Stroup et al., *Patent Holder’s Equitable Remedies in Patent Infringement Actions Before Federal Courts and the International Trade Commission*, 99 J. PAT. & TRADEMARK OFF. SOC’Y 530, 533 (2017) (“If the patent holder prevails at trial [by showing the patent not invalid and infringed], the courts can issue a permanent injunction . . .”).

<sup>123</sup> Risch, *supra* note 121, at 475.

<sup>124</sup> *Id.* at 475.

<sup>125</sup> *Id.* at 476–77.

<sup>126</sup> *Id.* at 477.

<sup>127</sup> *Id.* at 478, 481–83. Risch found these patents faired similar to other patents in litigation as well. *Id.* at 481–82.

of the *eBay* factors in each case where the plaintiff is a patent licensing firm should be required—that is, a court should truly examine each of the factors under the facts of the specific case, rather than relying on the presumption that patent licensing firms will always be made whole by money damages. Effects of permitted predatory infringement on a patent licensing firm's ability to negotiate with others and opportunity costs incurred while pursuing predatory infringers should be given greater weight in these determinations. And, of course, the value of a strong, reliable patent system to the public's interest should not be easily overlooked.

### C. Correcting the SEP Owner Story

Just as with patent trolls, the story we often hear about SEP owners is not entirely true—and yet it is used regularly to justify denying injunctive relief for infringement of SEPs. Specifically, we hear that SEP owners use their patents to seek wildly exorbitant licensing terms from companies who want to make standards-compliant products and that the SEP owners are wholly unreasonable when it comes to negotiations about these licenses. Although these two issues are often conflated as the concept of patent holdup, it is worth considering not just holdup but also the behaviors surrounding negotiation in these cases. It turns out that nothing we are being told is exactly what it seems.

Patent holdup is a topic receiving much coverage in the scholarly literature of late.<sup>128</sup> A not-insignificant portion of this research questions whether patent holdup is an actual problem or just a theoretical concern (or worse).<sup>129</sup> Although, or perhaps because, the data on this issue are mixed, courts simply accepting patent holdup as a reason to deny injunctive relief—without examination—is a serious concern. An interesting example of this is the case of *Hynix Semiconductor Inc. v. Rambus*.<sup>130</sup> After setting forth the *eBay* factors, the judge inserted a section in the opinion entitled "Injunctions should not encourage holdup."<sup>131</sup> Within this section, the judge discussed how patent holdup and injunctive relief can have a disproportionate cost on

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<sup>128</sup> A quick search of the LEXIS database for law reviews and journals indicates over 700 articles that mention "patent holdup" since Jan. 1, 2010 and almost 150 articles that discuss it in significant detail in the same time frame.

<sup>129</sup> See generally Sidak, *supra* note 99; Osenga, *Ignorance over Innovation*, *supra* note 84, at 175; Epstein & Noroozi, *supra* note 102 at 1384; Jonathan M. Barnett, *Has the Academy Led Patent Law Astray?*, 32 BERKELEY TECH. L.J. 1313, 1324–25 (2017); Bowman Heiden & Nicolas Petit, *Patent "Trespass" and the Royalty Gap: Exploring the Nature and Impact of Patent Holdout*, 34 SANTA CLARA HIGH TECH. L.J. 179, 181 (2017).

<sup>130</sup> *Hynix Semiconductor Inc. v. Rambus Inc.*, 609 F. Supp. 2d 951 (N.D. Cal. 2009).

<sup>131</sup> *Id.* at 966–68.

the infringer.<sup>132</sup> Without referring to this section, the judge then applied the remaining *eBay* factors and denied the patent owner injunctive relief.<sup>133</sup> This omission of any discussion of holdup is relevant because without even determining whether holdup exists (in this case or in general), the judge made a decision on the requested injunction in the literal shadow of patent holdup. More recently, the Federal Circuit has indicated that for a jury to be instructed about patent holdup, there should be some evidence of it in the record.<sup>134</sup> This requirement to provide evidence of holdup, however, does not keep patent holdup from being present in a judge's mind when deciding whether to issue an injunction against a patent infringer.

Just as the evidence that patent holdup exists is, at best, mixed, there is also little evidence that SEP owners are behaving in a generally predatory fashion. Professor Jonathan Barnett has nicely gathered and synthesized a large amount of the empirical research into allegedly excessive licensing rates for SEPs, as well as indirect evidence that would support the claim that these rates are unreasonable and found that the evidence is simply not there.<sup>135</sup> The SEP owner is, most often, seeking to obtain adequate and fair remuneration for the use of its patented technology, while the company that wishes to use the technology would prefer to pay less, rather than more. This practice does not make the SEP owner a predator, but rather a normal business owner; if the infringer would like to pay less, that is also prudent. But, in the case of "efficient" infringement, the infringer would like to pay nothing; this is where the real predatory behavior is occurring.

There are also two sides to the story that SEP owners refuse to negotiate fairly with companies who wish to use their patents. The existence of unwilling licensees, some of whom become predatory infringers, receives less attention. As noted above, SEP owners often agree to FRAND commitments as part of the standards development process; they promise to offer a license to their patents that are implicated in a technology standard on fair, reasonable, and non-discriminatory terms.<sup>136</sup> On the other hand, companies who wish to practice the standard have made no such promise. Not only have they not agreed to accept FRAND terms, but they are not even held to a standard of negotiating in good faith.<sup>137</sup> While the United States has

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<sup>132</sup> *Id.* at 967–68

<sup>133</sup> *Id.* at 986.

<sup>134</sup> *Ericsson, Inc. v. D-Link Sys., Inc.* 773 F.3d 1201, 1234 (Fed. Cir. 2014).

<sup>135</sup> Barnett, *supra* note 129, at 1352–59.

<sup>136</sup> *See supra* note 85.

<sup>137</sup> *See Epstein & Noroozi, supra* note 102, at 1416–18.

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taken a step backwards from considering the behavior of the infringer when deciding whether to issue injunctions for SEP infringement, other judicial systems have proactively imposed a "willing licensee" requirement on would-be predatory infringers and have restored injunctive relief if the licensee has not upheld its end of the bargain.<sup>138</sup>

It is important to recognize that, in the world of SEPs, there is the possibility for unreasonable behavior on both sides. As such, denying—or worse, prohibiting the seeking of—injunctive relief does not ameliorate the problem one side causes, but instead exacerbates bad behavior by encouraging it on the other side. Just like with patent trolls, if courts would instead carefully apply the *eBay* factors based on evidence from the specific case, the problem of predatory infringement would decrease. Of course, given the FRAND commitment made by SEP owners, perhaps the issuance of injunctions for infringement of SEPs would be rare. If, however, the particular circumstances of the case were scrutinized before making that determination, it would put an equal burden on potential infringers to engage in good faith negotiations with SEP owners, which is how it should be.

## V. CONCLUSION

Returning to the story that opened this Article, we would not dream of letting the grocery store pave over my lot without permission, simply because I was not using that portion of my land or because I had a pattern of letting other groups or businesses use that portion of my land. We would not let the grocery store use my lot, free of charge, because I indicated to the developer that I was open to negotiating an acceptable price for their use, but the grocery store and I had yet to arrive at an agreed upon price. The indignation that we feel when the story involves our personal property, our home, should still be present when the story is changed to involve a patent instead. Giving the bad behavior a name that, in its very self, claims the benefit of "efficiency" does not make it any less offensive. Knowing that its "efficiency" is based on a set of potentially untrue narratives further delegitimizes it.

We need to be more judicious in choosing to believe the stories we are being told to justify short-circuiting the *eBay* factors. We should demand evidence to support these narratives of the patent troll and the opportunistic SEP owner. After all, if these stories have always been true, they should be easy to prove. We should make the "efficient" infringer demonstrate the net gain in social welfare in a particular case

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<sup>138</sup> *Unwired Planet Int'l Ltd. v. Huawei Techs. Co.*, [2020] UKSC 37, [61], (appeal taken from Eng.), aff'g [2018] EWCA (Civ.) 2344 (Eng.); Case C-170/13, *Huawei Techs. Co. v. ZTE Corp.*, ECLI:EU:C:2015:477, ¶ 71 (July 16, 2015).

and explain how willful disregard of the patent system does not counter that net gain. We must require evidence that patent trolls swooped in to accost the unwary and that this is not just another failed licensing negotiation scenario. We should, as the Federal Circuit has suggested, seek proof that the case involves actual patent holdup and, as the European courts recently have, insist that licensees be similarly held to a good faith, willing standard to avoid being enjoined. We can make running to the court to settle private contracting issues less attractive by ensuring that both sides have some skin in the game; the patent owner already has its rights at stake anytime the court is involved, but the infringer should also have some potential loss other than a reduced royalty rate hanging over its head.

It is important to restore a sense of respect of others' property in the patent world. The good news is that no substantial legal changes are required. We only need to fairly and thoroughly apply the law we were given in *eBay*. As the *eBay* case noted, there should be no categorical grants of injunctive relief—nor should there be categorical denials. Although patent trolls and SEP owners currently face near-categorical denials of injunctive relief, if we pay greater attention to the stories about these patent owners and require proof, we can return to a place where injunctive relief is available for all patent owners where warranted, and predatory infringement can become a thing of the past.