

Reframing Patent Remedies

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The Patent Act grants an inventor the right to exclude others from making, using, and selling the qualifying invention for twenty years. When enforcing their patents, inventors often ask for permanent injunction relief against infringers, and, until recently, courts employed a presumption in favor of granting permanent injunction relief. Yet the Patent Act also grants courts the power to deny the inventor the ability to enforce these exclusionary rights. There has been an increase in the denial of permanent injunctions because of the Supreme Court's 2006 opinion—*eBay, Inc. v. MercExchange, LLC*. Rejecting the permanent injunction presumption in favor of patentees, the Court stated that the traditional four-factor test for injunction relief should apply. This rule change was made in large part because of the concern about the conduct of many non-practicing entities (“NPEs”). These NPEs would strategically delay in agreeing to license their technology in hopes of demanding a royalty that not only reflects the value of the patented technology, but also a premium for holding out. The Supreme Court sent a strong message in *eBay* to patentees who were bottlenecking the industry: if you holdout, you won't be allowed to exclude. Many infringers, even willful ones, have benefited from this rule change. After paying millions of dollars in damages, infringers are permitted to continue willfully infringing the patented technology.

The increased number of injunction denials has prompted scholars to argue that patent law is shifting towards a liability rule system, where remedies focus on the balancing of utilities and reasonableness of patent use. Yet I find this position incomplete and unsettling because patent law is not most accurately described as a take-and-pay system. A key element is missing here: the punishment for an entity that willfully takes. The Supreme Court's rule change creates a tension in the structure of patent remedies in that punitive damages are imposed but injunctive relief is not. For example, Microsoft was adjudicated to be a willful infringer, requiring it to pay forty million dollars more in damages to the patentee as punishment for its conduct and incentive to play by the rules in the future; yet, Microsoft was then permitted to continue willfully infringing against the patentee's wishes. Microsoft is a wrongdoer and is responsible for the wrongful loss it caused and its reprehensible conduct. However, due to concerns regarding NPE behavior and wealth maximization, Microsoft is permitted to continue this bad conduct. Patent law cannot have it both ways: punishing blameworthy infringers and allowing those same infringers to in essence force their way into a flexible liability-rule system. Thus, the concern over NPEs and efficiency in general has caused a shift towards liability rules and away from the essence of patent: the right to exclude in exchange for public disclosure.

In this article, I argue that our patent system and its beneficiaries are better served if its remedies structure resembles that of trespass instead of nuisance. Patent law should look to the law of trespass to regain its property roots, as well as gain a predictable framework for the occasions that merit a different approach. Under this framework, the vast majority of patentees will be able to reestablish the right to exclude

by receiving injunctive relief. For the patentee that appears to be using its leverage in a way that will cause significant harm to the public, an incomplete privilege will allow the infringer to use the technology until it has sufficient time to begin designing around the patent. Under this incomplete privilege, the infringer will pay for its continued use of the patented technology. This trespass framework will rebalance the structure of patent remedies within the patent system, while still appreciating the potential harm of NPEs.