

No. 07-1449

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

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COMMONWEALTH SCIENTIFIC AND  
INDUSTRIAL RESEARCH ORGANISATION,

Plaintiff-Appellee,

v.

BUFFALO TECHNOLOGY (USA), INC. and BUFFALO, INC.,

Defendants-Appellants.

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On Appeal from the United States District Court  
for the Eastern District of Texas  
Case No. 2:05-CV-53, Judge Leonard Davis

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**BRIEF FOR *AMICI CURIAE* ATHEROS COMMUNICATIONS, INC.,  
BELKIN INTERNATIONAL, INC., CONSUMER ELECTRONICS  
ASSOCIATION, DELL INC., HEWLETT-PACKARD COMPANY,  
INTEL CORPORATION, NETGEAR, INC., NORTEL NETWORKS, INC.,  
NVIDIA CORPORATION, ORACLE CORPORATION, SAP AG, AND  
YAHOO! INC. IN SUPPORT OF DEFENDANTS-APPELLANTS AND  
VACATUR OF PERMANENT INJUNCTION**

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## CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, counsel for *amici curiae* certify:

1. The full name of every party represented in this case by the undersigned counsel is: Atheros Communications, Inc.; Belkin International, Inc.; Consumer Electronics Association; Dell Inc.; Hewlett-Packard Company; Intel Corporation; NETGEAR, Inc.; Nortel Networks, Inc.; NVIDIA Corporation; Oracle Corporation; SAP AG; and Yahoo! Inc.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by the undersigned counsel is: N/A.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the parties represented by the undersigned counsel are: None.

4. The names of all the law firms and partners or associates who appeared for the parties now represented by the undersigned counsel in the trial court or are expected to appear in this Court are: Theodore B. Olson, Matthew D. McGill, Amir C. Tayrani, and Thomas A. Burns, of Gibson, Dunn & Crutcher LLP.

DATED: October 19, 2007

By: \_\_\_\_\_

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Buffalo	Defendants-Appellants Buffalo Technology (USA), Inc. and Buffalo, Inc.
CSIRO	Plaintiff-Appellee Commonwealth Scientific and Industrial Research Organisation.
Hr’g Tr.	The transcript of the district court’s permanent injunction hearing held on February 7, 2007.
IEEE	Institute of Electrical and Electronics Engineers, Inc.
Order	The district court’s Permanent Injunction Order of June 15, 2007.
RAND	Reasonable And Non-Discriminatory.
SDO	Standards-Developing Organization.
WLAN	Wireless Local Area Network.
’069 Patent	U.S. Patent No. 5,487,069.

## INTEREST OF *AMICI CURIAE*

*Amici curiae* are leading manufacturers and providers of computer, networking, communications, and Internet products and services, and are among the most prolific producers of patents in the United States, as well as a leading industry organization whose mission is to grow the consumer electronics industry. Several *amici curiae* manufacture or market wireless networking products that comply with the 802.11 wireless networking standard promulgated by the Institute of Electrical and Electronics Engineers, Inc. (“IEEE”) and that Appellee Commonwealth Scientific and Industrial Research Organisation (“CSIRO”) contends (in cases related to this action) infringe CSIRO’s U.S. Patent No. 5,487,069 (“’069 patent”).<sup>1</sup> Because *amici curiae* (and, in the case of the industry association, its members) are frequently involved in patent litigation as both plaintiffs and defendants, they have a vital interest in ensuring that the patent laws are applied in a manner that strikes a reasonable balance between protecting property rights and promoting innovation.

*Amici curiae* believe that the permanent injunction issued in this case is at odds with the United States Supreme Court’s recent decision in *eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837 (2006), which held that “in patent disputes

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<sup>1</sup> Among *amici curiae*, Belkin, Dell, Hewlett-Packard, Intel, and NETGEAR are parties in related litigation with CSIRO concerning the ’069 patent.



no less than in other cases,” the discretion to grant permanent injunctive relief “must be exercised consistent with traditional principles of equity.” *Id.* at 1841. Specifically, *amici curiae* believe that the district court’s view as to what constitutes an irreparable harm is so expansive, and its view as to when an injunction might be contrary to the public interest is so narrow, that the district court’s decision effectively reinstates the same presumption in favor of injunctive relief that the Supreme Court rejected in *eBay*.<sup>2</sup>

## BACKGROUND

The IEEE is a leading standards-developing organization (“SDO”) for the telecommunications and information technology industries. SDOs such as the IEEE play a vital role in the implementation, distribution, and adoption of new technologies. By evaluating competing technologies in a field and promulgating as a standard the most reliable and accessible of those technologies, an SDO can reduce costs for manufacturers; encourage the development of comparable, competing products; and enhance the credibility of new technologies. *See generally* Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 Cal. L. Rev. 1889 (2002).

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<sup>2</sup> Though *amici curiae* here address only the propriety of the district court’s injunction, *amici curiae* agree with Buffalo that the district court’s findings as to validity and infringement also are erroneous.

In the late 1990s, the IEEE began work on a standard for wireless local area network (“WLAN”) technology. In the course of developing its 802.11 WLAN standard, the IEEE was notified that its implementation might implicate the alleged invention disclosed in CSIRO’s ’069 patent, as well as the inventions disclosed in a number of similar patents held by other companies. When the IEEE is notified that a patent is potentially implicated by a proposed standard, it will typically issue the standard only if the patentee makes a reciprocal promise either (1) not to enforce the patent against those complying with the IEEE standard, or (2) to license the patent on royalty-free or reasonable and nondiscriminatory (“RAND”) terms. *See IEEE, Standards Board Bylaws § 6.2, available at <http://standards.ieee.org/guides/bylaws/sect6-7.html>. IEEE policy provides that such a promise from a patentee “is irrevocable once submitted.” *Id.**

Upon receiving notice that the ’069 patent might be necessary to the implementation of the IEEE’s proposed 802.11 WLAN standard, the IEEE sent CSIRO a letter requesting that CSIRO state its position as to licensing of the ’069 patent. *See Letter from Dennis N. Cooper, Chief of Division, CSIRO Telecommunications & Industrial Physics, to V. Hayes, Chair, IEEE p802.11 (Dec. 4, 1998), available at [http://standards.ieee.org/db/patents/loa-802\\_11a-csiro-04Dec1998.pdf](http://standards.ieee.org/db/patents/loa-802_11a-csiro-04Dec1998.pdf) (“CSIRO RAND Letter”).* CSIRO responded that it “agrees upon written request to grant a nonexclusive license under [the ’069] patent on a non discriminatory basis and on

reasonable terms and conditions including its then-current royalty rates.” *Id.* In reliance on CSIRO’s RAND licensing assurance—and similar assurances offered by numerous other patent holders—the IEEE approved the 802.11 standard in 1999, and later approved the amended 802.11a and 802.11g standards.<sup>3</sup>

IEEE’s 802.11 standard quickly took root, and dozens of companies soon offered 802.11 WLAN products. In 2003, CSIRO—which does not itself produce any WLAN product—contacted those companies and demanded that they take a license for the ’069 patent. Order 3. CSIRO offered to provide a nonexclusive license for a royalty of \$4.00 for each licensed WLAN product. Hr’g Tr. 49 (Feb. 7, 2007). Not one company practicing the 802.11 standard accepted CSIRO’s offer. The entire WLAN industry rejected CSIRO’s licensing demands as egregiously unreasonable, and all the more so given the questionable validity of the ’069 patent. If every patent holder that had provided a RAND assurance to IEEE on the 802.11 standard demanded \$4.00 per WLAN product, it would add well more than \$100 to the cost of each WLAN product, some of which now retail for less than \$50.

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<sup>3</sup> For a list of the more than 100 companies that have given RAND assurances with respect to the 802.11 WLAN standard, see 802.11 Patent Letters of Assurance, *available at* [http://standards.ieee.org/db/patents/pat802\\_11.html](http://standards.ieee.org/db/patents/pat802_11.html).

Finding virtually no company willing to accede to its licensing demands, in 2005, CSIRO sued Defendants-Appellants Buffalo Technology (USA) Inc., and Buffalo, Inc., (“Buffalo”) in the United States District Court for the Eastern District of Texas, alleging infringement of the ’069 patent, and only later brought similar suits against larger players in the WLAN industry. After the district court granted summary judgment to CSIRO on the issues of validity and infringement, CSIRO elected to forgo a damages hearing. It instead moved for a permanent injunction against future acts of infringement. By order of June 15, 2007, the district court granted CSIRO’s motion for a permanent injunction.

The district court applied the traditional four-factor test (irreparable harm, inadequacy of legal remedies, balance of hardships, and public interest). Although it found that “CSIRO’s intent from the beginning was to derive revenue from its invention through licensing the ’069 patent” (Order 3)—indeed, even CSIRO’s counsel had acknowledged that “ultimately” CSIRO’s dispute with the WLAN industry “come[s] down to money” (Hr’g Tr. 24:22)—the district court concluded that all four factors favored injunctive relief. Order 5-13.

The district court identified three purportedly irreparable injuries: (1) lost research opportunities, (2) harm to “CSIRO’s reputation,” and (3) harm to CSIRO’s ability to license its patent. Order 7; *see also id.* at 5. With regard to lost research opportunities, the district court suggested that an infringer’s refusal to

take a license causes “[d]elays in funding,” which in turn compel CSIRO to forgo opportunities to “fund further research and development for frontier projects” undertaken “[w]hen extra funding becomes available.” *Id.* at 6-7. The district court stated that monetary damages could not compensate CSIRO for those lost opportunity costs because “[o]nce those opportunities have passed, they are often lost for good, as another entity takes advantage of the opportunity.” *Id.* at 7.

The district court also found—without citing any evidentiary support—that “[h]aving its patents challenged via the courts . . . impugns CSIRO’s reputation as a leading scientific research entity,” Order 7, in the same manner that “another company’s brand recognition or good will may be damaged” by infringement. *Id.* at 9. The “impossib[ility] [of] determin[ing] . . . how much damage was done to the patent owner’s [reputation]” suggested to the district court that this harm could not be remedied by monetary damages. *Id.*

Finally, the district court concluded that, unless Buffalo were enjoined, other companies might be encouraged to challenge the validity of CSIRO’s patent rather than capitulate to CSIRO’s licensing demands, causing supposedly irreparable damage to CSIRO’s licensing program. *See* Order 5. The district court acknowledged that its infringement finding would compel Buffalo to pay CSIRO at least a reasonable royalty going forward and that any damage Buffalo caused to CSIRO’s licensing program was therefore “certainly . . . suffered in the past.” *Id.* at 8. The

district court reasoned that injunctive relief was nevertheless necessary to prevent a similar “harm *by others* [that] CSIRO will suffer in the future.” *Id.* (emphasis added). Thus, despite CSIRO’s counsel’s frank explanation of CSIRO’s purpose in seeking an injunction—“without an injunction, you’re going to get a lot less money,” Hr’g Tr. 24:2-3—the district court concluded that this was not a case where “the threat of an injunction is [being] employed simply for undue leverage in negotiations.” Order 9 (quoting, *eBay*, 126 S. Ct. at 1842 (Kennedy, J., concurring)).

Turning to the public-interest factor, the district court observed that an otherwise appropriate injunction will be contrary to the public interest only in “rare and limited circumstances”—specifically, when an injunction will jeopardize “the public health or public welfare.” Order 12-13. The district court concluded that “Buffalo’s WLAN products are not essential for the public health or public welfare,” and that in view of the public interest in a “strong patent system” and in “encouraging investment by research organizations,” the public interest favored an injunction. *Id.* at 13.

## ARGUMENT

In *eBay*, the Supreme Court confirmed that, “in patent disputes no less than in other cases,” a district court’s power to issue injunctive relief “must be exercised consistent with traditional principles of equity.” 126 S. Ct. at 1841. The decision

below cannot be reconciled with—and indeed, threatens to effectively nullify—that clear mandate. The district court’s decision failed to consider the corpus of controlling precedent applying the traditional four-factor test for injunctive relief. In its stead, the district court adopted a potentially boundless view of irreparable harm that encompassed lost research opportunities, past damage to reputation, and even damage to a patentee’s licensing program. At the same time, the court disregarded the fact that the patentee—which itself makes no product using its patent—had made an express and open commitment to license its patent on reasonable and non-discriminatory (“RAND”) terms to an entire industry and had repeatedly acknowledged that its suit distilled to a disagreement as to what constitutes a reasonable royalty for the ’069 patent. *See* Order 12; *see also* Hr’g Tr. 23-24. Together, the district court’s expansive notion of irreparable harm and sharply circumscribed view of public interests dramatically lowers the bar for the issuance of injunctive relief, effectively reinstating—at least as applied to any organization that can hold itself out as a “research” entity—precisely the presumptive entitlement to injunctive relief that the Supreme Court rejected so emphatically in *eBay*.

As demonstrated below, decisions of the Supreme Court and this Court establish that the purportedly irreparable harms identified by the district court are either too speculative to be cognizable, or are remedied adequately with monetary damages, or both. Those decisions also make clear that the district court’s narrow

view of the public interests at stake cannot be sustained, and that the district court should have considered the public’s strong interest in binding patentees to their SDO commitments to license on RAND terms. The district court’s departure from those controlling authorities constitutes an abuse of discretion. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (“A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law”).

*Amici curiae* therefore urge this Court to reject the district court’s “broad classifications” favoring injunctions against infringement of patents held by research institutions, to give effect to the “traditional principles of equity” that must be applied under *eBay*, and to vacate the permanent injunction. 126 S. Ct. at 1841.

**I. None Of The Injuries Identified By The District Court Constitutes Legally Cognizable Irreparable Harm.**

CSIRO failed to demonstrate that it will be irreparably harmed in the absence of an injunction. None of the injuries identified by the district court satisfies the standards—established by controlling decisions of the Supreme Court and this Court—for irreparable harm. Nor could the district court have premised its injunction on CSIRO’s general right to exclude others from practicing its invention; having promised the IEEE and the IEEE implementers that it would license the ’069 patent on RAND terms, CSIRO cannot now demand enforcement of a right to exclude those entities who stand willing to take a license on reasonable terms.



**A. CSIRO’s “Irreparable” Injuries Are Unsupported By Evidence, Speculative, Or Otherwise Remediable By Monetary Damages.**

The three injuries that Buffalo’s future WLAN products sales supposedly will inflict upon CSIRO—“lost opportunities,” harm to “CSIRO’s reputation” within the scientific community, and harm to CSIRO’s licensing program—do not qualify as irreparable. It is well settled that permanent injunctive relief only may issue where the plaintiff is threatened with an injury that is (1) otherwise certain to occur, and (2) not remediable with monetary damages. *See, e.g., Bonaparte v. Camden & A.R. Co.*, 3 Fed. Cas. 821, 827 (C.C.D.N.J. 1830) (Baldwin, J.). These legal rules set the parameters for the proper exercise of a court’s equitable powers. *See eBay*, 126 S. Ct. at 1841-42 (Roberts, C.J., concurring) (“limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike”) (quoting *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005)). Yet the district court’s all-encompassing conception of irreparable harm pays them no heed.

**1. Lost Research Opportunities Are Not Irreparable Injuries.**

The district court held that without “revenue from licensing its intellectual property,” CSIRO would suffer “lost research capabilities, lost opportunities to develop additional research capabilities, [and] lost opportunities to accelerate existing projects or begin new projects.” Order 6-7. The district court concluded that

monetary damages could not compensate CSIRO for these lost opportunities because, by the time damages would be paid, the opportunity “already [would] belong[] to someone else.” *Id.* at 8. For at least two reasons, such “lost research opportunities” do not constitute irreparable harm.

*First*, this Court already has rejected—expressly—the notion that lost research opportunities can constitute irreparable harm. *See Eli Lilly & Co. v. Am. Cyanamid Co.*, 82 F.3d 1568, 1578 (Fed. Cir. 1996). In that case, drug pioneer Eli Lilly sued a generic manufacturer for patent infringement and sought a preliminary injunction against further infringement. *Id.* at 1569-70. Lilly argued that “the loss of profits” on sales of its patented drug would “result in irreparable injury to Lilly’s overall pharmaceutical research efforts.” *Id.* at 1578. Specifically, Lilly contended that the loss of profits would compel it “to reduce its research and development budget” and, accordingly, its ability to discover new beneficial pharmaceuticals. *Eli Lilly & Co. v. Am. Cyanamid Co.*, 896 F. Supp. 851, 860 (S.D. Ind. 1995). The district court denied the injunction, *see id.*, and this Court affirmed, holding that “a claim of lost opportunity to conduct research” could not establish “a finding of irreparable harm.” 82 F.3d at 1578. If it were otherwise, this Court explained, one could scarcely “imagine a[] manufacturer with a research and development program that could not make the same claim,” because Lilly’s claim of lost research opportunities was “not materially different from any claim of injury

by a business that is deprived of funds that it could usefully reinvest.” *Id.* This Court further concluded that countenancing lost opportunities as irreparable harm “would convert the ‘extraordinary’ relief of a[n] . . . injunction into a standard remedy”—an outcome that ultimately would “disserve the patent system.” *Id.* (quoting *Ill. Tool Works, Inc. v. Grip-Pak, Inc.*, 906 F.2d 679, 683 (Fed. Cir. 1990)). What this Court found true with respect to Lilly’s purportedly lost research opportunities, it must also find for CSIRO’s.<sup>4</sup>

*Second*, CSIRO’s assertion that the loss of licensing revenue from Buffalo will result in lost research opportunities that would otherwise benefit both CSIRO and the public is far too speculative to be deemed irreparable. Numerous decisions of the Supreme Court, this Court, and other courts of appeals establish that claims of injury built on conjecture and speculation will not be countenanced as irreparable harms. *See, e.g., Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931) (an injunction “will not be granted against something merely feared as liable to occur

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<sup>4</sup> This Court’s recent conclusion that “price erosion” and “lost opportunities to sell other services to . . . lost customers” can constitute irreparable harm, *Verizon Servs. Corp. v. Vonage Holdings Corp.*, No. 07-1240, slip op. at 24 (Fed. Cir. Sept. 26, 2007), is not to the contrary. That case involved competitors in the same industry and simply reaffirms the well-established proposition that the loss of market share to a competitor can, in some circumstances, constitute irreparable injury. *See Polymer Techs., Inc. v. Bridwell*, 103 F.3d 970, 975 (Fed. Cir. 1996). Buffalo and CSIRO, however, are not competitors because CSIRO does not make any WLAN products. *Verizon*’s holding is therefore inapposite.

at some indefinite time in the future”); *Roper Corp. v. Litton Sys., Inc.*, 757 F.2d 1266, 1273 (Fed. Cir. 1985) (rejecting an irreparable harm contention as “conjectural and insufficiently supported to be persuasive”); *United States v. Emerson*, 270 F.3d 203, 262 (5th Cir. 2001) (“Speculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant.”).

Here, the district court never scrutinized CSIRO’s claim that, if it had received the royalties that it demanded from Buffalo—funds amounting at most to \$600,000 over three-and-a-half years (*see* Hr’g Tr. 50)—that the funds would have been used for additional research projects, as opposed to administrative costs. Even assuming that the royalties would have been devoted to research, it is exceedingly unlikely that the additional \$171,000 per annum would have enabled CSIRO—an organization with an annual budget of more than \$600 million—to achieve a significant research success for which it would otherwise have lacked the funds. *See* CSIRO, *Australian Government Budget 2007-08*, available at <http://www.csiro.au/news/Budget2007.html>. The district court nevertheless saw fit to assume that CSIRO would have used these licensing fees to fund additional research that would have benefited the public. *See* Order 7 (“When extra funding becomes available, existing frontier projects are expanded to create greater benefits.”). But even CSIRO’s counsel rejected the assumption, admitting that “I can’t” “say that had we had this money that CSIRO would have made a break-through.”

Hr’g Tr. 20. That admission makes plain the district court’s error in presuming that Buffalo’s continued failure to pay licensing fees would deprive CSIRO of irreplaceable research opportunities.

Moreover, because an injunction cannot itself fill CSIRO’s coffers or otherwise provide the funds needed for such “frontier project[s],” the injunction sought by CSIRO will do absolutely nothing to prevent CSIRO from losing research opportunities in the future. Yet it is axiomatic that injunctive relief must be tailored to the injury it purports to remedy. *See Lewis v. Casey*, 518 U.S. 343, 357 (1996) (“The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established.”); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (“injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs”). If the harm here is caused by Buffalo’s failure to pay licensing fees, then the proper remedy—the one “limited to the inadequacy that produced the injury in fact”—is an order that Buffalo promptly pay a reasonable royalty. CSIRO’s willingness to forgo a damages trial in favor of a hearing on injunctive relief thus strongly suggests that any such harm to its research opportunities is more imagined than real, and that its real interest in pursuing an injunction was in compelling Buffalo and those similarly situated to settle CSIRO’s infringement claim for amounts far in excess of a reasonable royalty.

**2. Past Injury To CSIRO's Reputation As A Scientific Research Organization Is Speculative And Legally Insufficient.**

The district court also concluded that “[h]aving its patents challenged via the courts” had “impugn[ed] CSIRO’s reputation as a leading scientific research entity.” Order 7. In the district court’s view, the harm Buffalo caused to CSIRO’s reputation—like an injury to a patent holder’s brand name—could not be adequately remedied with monetary damages. *Id.* at 9. Though reputational injuries sometimes cannot be remedied with monetary damages, *see, e.g., Reebok Int’l Ltd. v. J. Baker, Inc.*, 32 F.3d 1552, 1558 (Fed. Cir. 1994), CSIRO’s alleged reputational injury presents no such case. If CSIRO’s reputation within the scientific community has been “impugned” at all by Buffalo’s actions, that harm occurred in the past, can be adequately remedied with monetary damages, and was self-inflicted in any event.

As a threshold matter, there is absolutely nothing in the record to support the supposition that Buffalo’s actions injured CSIRO’s reputation within the scientific community. The district court’s order makes clear that it was not so much Buffalo’s alleged acts of infringement, but Buffalo’s temerity in “challeng[ing]” the ’069 patent “via the courts” that supposedly “impugn[ed] CSIRO’s reputation.” Order 7; *see also* Hr’g Tr. 28:12-23 (asserting that “CSIRO’s reputation has suffered” because litigation is viewed “as a form of adventurism,” and there is “do-

mestic criticism that CSIRO is spending money that ought to be spent on diabetes research”). Indeed, the very notion that a challenge to the validity of a patent could be countenanced as an injury to a patentee’s reputation flies in the face of this Court’s cases recognizing the strong public interest in “resolving questions of patent validity.” *Cardinal Chem. Co. v. Morton Int’l*, 508 U.S. 83, 100 (1993); *see also SmithKline Beecham Corp. v. Apotex Corp.*, 403 F.3d 1331, 1354 (Fed. Cir. 2005) (Gajarsa, J., concurring) (discussing the “significant public policy interest in removing invalid patents from the public arena” and collecting cases). Additionally, this theory of injury overlooks the fact that CSIRO is the *plaintiff* and Buffalo the *defendant* in this action. It was not Buffalo that hauled CSIRO into court, but *vice-versa*, and having initiated the litigation, CSIRO cannot be heard to complain that Buffalo challenged the validity of the ’069 patent. *See* 11A Wright, Miller & Kane, *Federal Practice and Procedure* § 2948.1, at 152-53 & n.7 (2d ed. 1995) (“Not surprisingly, a party may not satisfy the irreparable harm requirement if the harm complained of is self-inflicted.”); *see also San Francisco Real Estate Investors v. Real Estate Inv. Trust of Am.*, 692 F.2d 814, 818 (1st Cir. 1982) (Breyer, J.). If it were otherwise, every party that raised patent invalidity as a defense would be exposed to injunctive relief for having irreparably harmed the patentee.

Moreover, at oral argument, CSIRO’s counsel expressly disclaimed any such reputational harm: “I don’t think it’s fair to say, nor do I mean to imply that

CSIRO's reputation has been injured by lack of licensing." Hr'g Tr. 19:4-6. The district court's finding of irreparable harm thus contradicted even the argument of CSIRO's counsel. Its conclusion, therefore, could have been founded only on speculation, which, as a matter of law, is insufficient to support injunctive relief. *See, e.g., Roper Corp.*, 757 F.2d at 1273 (rejecting the contention that a patentee's reputation was irreparably harmed as "conjectural and insufficiently supported to be persuasive"); *Int'l Bhd. of Teamsters v. Sw. Airlines Co.*, 875 F.2d 1129, 1136 (5th Cir. 1989) (en banc) (vacating injunction based on "speculative possibility of irreparable harm" to employees' reputation).<sup>5</sup>

Even if there were evidence to support CSIRO's claim of reputational harm (which there is not), it is clear that any harm Buffalo inflicted on CSIRO's reputation through this patent litigation would have occurred only in the past. Such past injuries are not properly the subject of injunctive relief, which is exclusively prospective, *see City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983), and could be adequately remedied with monetary damages. Indeed, there is an entire body of

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<sup>5</sup> The district court's finding of reputational harm is also counter-intuitive. One would think that the publicity generated by CSIRO's lawsuit would have improved rather than detracted from its reputation for innovation and that an injunction prohibiting other companies from incorporating its technology into their products would actually diminish CSIRO's reputation by reducing the number of products that purportedly rely upon its technology.



tort law (defamation) that demonstrates that such past reputational injuries can be remedied with damages. *See generally* W. Page Keeton et al., *Prosser and Keeton on Torts* 843 (5th ed. 1984).

### **3. The Purported Harm To CSIRO's Licensing Program Cannot Support Injunctive Relief.**

Relying on this Court's decision in *Roper*, 757 F.2d at 1273, the district court suggested that unless Buffalo were permanently enjoined, CSIRO's "licensing . . . program[] will be irreparably harmed." Order 5. *But see Paice LLC v. Toyota Motor Corp.*, No. 06-1610, slip op. at 33 n.14 (Fed. Cir. Oct. 18, 2007) (rejecting patentee's argument that failure to award injunctive relief would "inhibit[] [its] ability to grant an exclusive license under its patent"). Buffalo's "plan to appeal" the district court's validity and infringement findings purportedly "encouraged" others "to infringe the '069 patent and risk litigation rather than enter into a license agreement." *Id.* A permanent injunction, the district court reasoned, would compel Buffalo to dismiss its appeal and "encourage[]" other manufacturers of WLAN products to accept CSIRO's licensing offer. *Id.* This reasoning suffers from three flaws, each equally fatal to the proposition that Buffalo has irreparably harmed CSIRO's licensing program.

*First*, *Roper* does not hold, as the district court suggested, that a patent holder may support a permanent injunction "by showing that an existing infringement precludes his ability to license his patent." Order 5 (internal quotation marks

omitted). In *Roper*, this Court affirmed the denial of a preliminary injunction, finding that the plaintiff had adduced no evidence that it would suffer irreparable harm in the future; it had established, at most, a “mere apprehension” of future harm. 757 F.2d at 1273. Against this backdrop (of denying an injunction as speculative), the Federal Circuit hypothesized in dicta that a nonpracticing patent holder might establish irreparable harm where “an existing infringement precludes his ability to license his patent or to enter the market.” *Id.*

Yet neither *Roper* nor any other precedent cited by the district court held that an infringer’s interference with a patentee’s licensing program constitutes irreparable harm. Indeed, it would be surprising if any such case existed. An injury to a licensing program is necessarily economic, see *High Tech Med. Instrumentation, Inc. v. New Image Indus., Inc.*, 49 F.3d 1551, 1557 (Fed. Cir. 1995), and it is axiomatic that, in all but the rarest of circumstances, economic injuries are remediable with monetary damages. See *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (“Mere injuries, however substantial, in terms of money . . . are not enough” to warrant injunctive relief). Thus, even if CSIRO had demonstrated harm to its licensing program, monetary damages would have been adequate to remedy that injury.

**Second**, CSIRO’s theory fails even on *Roper*’s own terms. Under *Roper*’s dicta, demonstrating that a threatened act of infringement “precludes [the patentee’s] ability to license his patent” may, in some circumstances, constitute irrepa-

rable harm. 757 F.2d at 1273. It seems highly improbable that the acts of Buffalo—one of the least significant players in the WLAN market, with a market share approaching one percent—could alone scuttle CSIRO’s licensing program. But even so, as the district court itself observed, it was not Buffalo’s threatened future acts of infringement that had allegedly damaged CSIRO’s ability to license its patent, but rather its past acts of infringement. *See* Order 5 (“Once the litigation against Buffalo commenced, there was little chance any company would take a license until Buffalo’s defenses had been shown to be without merit.”). Injunctive relief, however, is not available to remedy an injury that occurred in the past. *See Lyons*, 461 U.S. at 111.<sup>6</sup>

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<sup>6</sup> To the extent that CSIRO contends that, rather than past acts of infringement, it is Buffalo’s interposition of litigation defenses in the district court and its pursuit of an appeal to vindicate those defenses that has injured CSIRO’s licensing program, that contention must be rejected. As a legal matter, the argument fails because CSIRO sued Buffalo; Buffalo’s defense of that litigation advanced the public interest, and any injury accruing to CSIRO as a result must be viewed as self-inflicted. *See supra* Part I.A.2. The contention fails as a factual matter as well: CSIRO’s implicit assertion that other WLAN manufacturers would have accepted CSIRO’s licensing terms, if only tiny Buffalo had immediately surrendered upon reading CSIRO’s complaint, is—to put it gently—fanciful. For their part, those *amici curiae* involved in related litigation with CSIRO suggest that the WLAN industry declined to accede to CSIRO’s licensing demands because (1) the ’069 patent is invalid; (2) 802.11-compliant WLAN products do not infringe the ’069 patent, and (3) CSIRO’s royalty demands were and remain unreasonable. That Buffalo has chosen to defend itself in civil litigation (as even the most basic notions of due process permit) could not have influenced an entire industry’s licensing or litigation decisions.

*Third*, the district court’s reasoning runs headlong into the admonition of Justice Kennedy (joined by Justices Stevens, Souter, and Breyer) that injunctive relief ought not “be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses.” *eBay*, 126 S. Ct. at 1842 (Kennedy, J., concurring). The district court’s suggestion that “in the absence of the injunction, other potential infringers will be encouraged to infringe,” Order 5 (quoting *Hybri-tech Inc. v. Abbott Labs.*, 849 F.2d 1446, 1456 (Fed. Cir. 1988)), cannot be reconciled with the view articulated by Justice Kennedy that, when an injunction is sought “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.” *eBay*, 126 S. Ct. at 1842.

Here, there can be no doubt as to CSIRO’s intent in seeking an injunction: “[I]t does ultimately come down to money.” Hr’g Tr. 24:22. “[W]ithout an injunction, you’re going to get a lot less money.” *Id.* 24:2-3. CSIRO’s candid acknowledgement that it seeks an injunction only to extort unwarranted and unreasonable licensing fees from Buffalo (and presumably those that will follow Buffalo in litigation) strongly suggests (and perhaps conclusively establishes) that monetary damages are an adequate remedy in this case.

**B. Injunctive Relief Cannot Be Premised Upon Harm To CSIRO's "Right To Exclude."**

The district court also suggested that its injunction could be premised on the purported violation of CSIRO's "right to exclude"—which is one of the property rights initially held by all patentees. Order 8-10. But CSIRO did not suffer *any* harm (irreparable or otherwise) to that right. To the contrary, as the district court recognized, CSIRO had always intended to license the '069 patent, which is to say, CSIRO has long displayed a willingness to be compensated monetarily for others' use of the patent. More than that, having promised the IEEE and the IEEE implementers that it would license the '069 patent on RAND terms, it is doubtful that CSIRO retains a right to exclude from its patent those implementing the same standard and willing to take a license on reasonable terms.

The Chief Justice's concurrence in *eBay* argued that the injury to a patent holder least likely to be adequately remedied with monetary damages is injury to the patent holder's right to exclude. *See* 126 S. Ct. at 1841 (Roberts, C.J., concurring) (observing the "difficulty of protecting a right to *exclude* through monetary remedies that allow an infringer to *use* an invention against the patentee's wishes"). Here, to the extent that CSIRO seeks to premise its injunction on an injury to its right to exclude, it contravenes several of this Court's decisions. This Court has recognized that where a patentee is "willing to forgo its right to exclude by licensing the patent," injunctive relief should not be premised on harm to that

same right. *Pfizer, Inc. v. Teva Pharms. USA, Inc.*, 429 F.3d 1364, 1381 (Fed. Cir. 2005). Indeed, a “right to exclude” is generally “incompatible with” an established licensing program, *T.J. Smith & Nephew, Ltd. v. Consol. Med. Equip.*, 821 F.2d 646, 648 (Fed. Cir. 1987), and accordingly, this Court will not hear a patent holder to complain of a trespass upon its patent where it has “engaged in a pattern of granting licenses under the patent.” *Polymer Techs.*, 103 F.3d at 974 (evidence that a patentee has “engaged in a pattern of granting licenses under the patent” is inconsistent with irreparable harm to the patentee’s right to exclude). This is manifestly the case here; the district court itself acknowledged that “CSIRO’s intent from the beginning was to derive revenue from its invention through licensing the ’069 patent.” Order 3.

Those authorities apply with even greater force in the RAND context, where the patent holder has not merely expressed a willingness to license, but has made a public commitment to license its invention to all comers and on reasonable terms. Though, certainly, there are situations in which a RAND licensor may retain a limited right to exclude by premising its RAND assurance on certain conditions—for example, the receipt of a cross-license or a field-of-use restriction—CSIRO placed no such conditions on its RAND assurance. *See* CSIRO RAND Letter (CSIRO “agrees upon written request to grant a nonexclusive license under [the ’069] pat-

ent on a non discriminatory basis and on reasonable terms and conditions including its then-current royalty rates”).

CSIRO’s RAND assurance is a particularly good candidate for enforcement. It most certainly was not a gratuitous act on CSIRO’s part. In reliance on CSIRO’s RAND assurance, the IEEE issued the 802.11 standard and, in turn, conferred a benefit on CSIRO—the possibility of enhanced licensing revenue if its patent were incorporated into standard-compliant products. Having accepted the benefit of its bargain, CSIRO cannot now renege on its promise to license on RAND terms and seek to enforce a right to exclude against the alleged infringers of its choice.

Under the particular circumstances of this case—where the patent holder makes an unconditional promise to license on RAND terms, where the SDO acts in reliance on that assurance in issuing its standard, and economic benefits accrue to the patent holder as a result of the standard’s issuance—the patent holder must be viewed as having surrendered its right to exclude those IEEE implementers willing to take a license on RAND terms. The concerns expressed by the Chief Justice in his *eBay* concurrence—where he suggested that harm to a patent holder’s right to exclude cannot generally be remedied with monetary damages—thus are inapposite here. Injunctive relief, if it is to be awarded at all, must be premised on an irreparable injury to something other than CSIRO’s right to exclude. Inasmuch as

CSIRO failed to demonstrate irreparable harm to any of its other property rights, the permanent injunction cannot be sustained.<sup>7</sup>

## **II. The District Court Failed To Take Into Account The Full Range Of Public-Interest Considerations.**

The district court’s award of a permanent injunction rests on an unduly narrow conception of the “public interest.” In conflict with well-established precedent, the district court focused its public-interest inquiry exclusively on public-health and welfare considerations, and overlooked the strong public interest that favors requiring patent holders to honor their RAND commitments to SDOs. In so doing, the district court adopted an approach to injunctive relief that will stifle innovation, undermine competition, and facilitate “patent ambushes.”

Far from being restricted to “rare and limited circumstances,” Order 12, the Supreme Court has long recognized the public interest is a “supple principle,” *R.R. Comm’n v. Pullman Co.*, 312 U.S. 496, 500 (1941), for which courts of equity should “go much farther both to give and withhold relief than they are accustomed to go when only private interests are involved.” *Virginian R. Co. v. Sys. Fed’n*, 300 U.S. 515, 552 (1937). Indeed, the “history of equity jurisdiction is the history

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<sup>7</sup> Lest there be any confusion on the point, *amici curiae* are **not** arguing that injunctions are categorically unavailable to RAND licensors. *Amici curiae* contend only that, on these facts, CSIRO must demonstrate irreparable harm to something other than its right to exclude others (*i.e.*, those it promised to license) from the patent.



of regard for public consequences in employing the extraordinary remedy of the injunction.” *Pullman Co.*, 312 U.S. at 500. “[W]here the patentee and those claiming under him are using the patent privilege contrary to the public interest,” district courts must “withhold [injunctive] relief.” *Mercoïd Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 669 (1944). A district court abuses its discretion—and an injunction must be vacated—where it fails to take into account all relevant public-interest considerations. *Cf. Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981) (in *forum non conveniens* context, observing that a district court abuses its discretion when it fails to consider “all relevant public . . . interest factors” or “its balancing of those factors is [un]reasonable”); *Mullen v. Treasure Chest Casino, L.L.C.*, 186 F.3d 620, 631 (5th Cir. 1999) (in class action context, a “district court’s failure to consider the appropriate factors constitutes an abuse of discretion” (internal quotation marks and citation omitted)).

The district court did not consider the full range of public-interest factors when awarding injunctive relief in this case. It instead limited its public-interest inquiry to whether the denial of injunctive relief would be “essential for the public health or welfare.” Order 13. The district court did not find those “rare and limited circumstances” to be present in this case, and—relying on the public interest in “protecting the rights of patent holders as well as enforcing adequate remedies for

patent infringement”—therefore awarded CSIRO a permanent injunction. *Id.* at 12-13.

The district court’s constricted public-interest inquiry disregarded the public’s strong interest in requiring patent holders to abide by their RAND commitments to SDOs. These organizations play a critical role in today’s high-tech economy by developing technological standards that promote product compatibility and even enhance consumer health and safety. These standards, however, also can facilitate abusive patent litigation tactics. Increasingly, standards issued by SDOs incorporate one technology to the exclusion of others. Although this exclusivity promotes the rapid adoption of new technologies, it also can create incentives for the holders of patents incorporated into such standards to “ambush” those adopting standard-compliant technology. Holders of such patents are in a “unique position of bargaining power” that allows them to “extract supracompetitive royalties” from companies due to an SDO’s decision enshrining the patent holder’s technology as part of the industry standard. *Broadcom Corp. v. Qualcomm Inc.*, \_\_ F.3d \_\_, 2007 WL 2475874, at \*8 (3d Cir. 2007).

To forestall such “patent ambushes,” SDOs request RAND commitments from patent holders before adopting standards that might incorporate patented technology. Although CSIRO was among the dozens of companies that made a RAND commitment to the IEEE in connection with its 802.11 WLAN standard,

CSIRO did not adhere to that commitment in its dealings with Buffalo, and instead filed suit to permanently enjoin Buffalo from using its WLAN technology. Because the permanent injunction obtained by CSIRO will effectively bar Buffalo from marketing any 802.11 WLAN products and result in the loss of the company's sunk-cost investments, it drastically alters the bargaining relationship between CSIRO and Buffalo and enables CSIRO to demand a licensing fee that vastly exceeds the RAND terms to which it committed. Indeed, CSIRO's own statements make clear that it sought injunctive relief solely to enhance its negotiating position. *E.g.*, Hr'g Tr. 23:25-24:1 ("the absence of a right to an injunction dramatically reduces the value of the patent"); *id.* 24:2-3 ("without an injunction, you're going to get a lot less money"); *id.* 24:22 ("it does ultimately come down to money"); *id.* 26:4-6 ("without a right to an injunction . . . the value of CSIRO's patent and the patents of every other research institution will plummet in value").

CSIRO's failure to adhere to its RAND commitment and its use of this suit to extract an extortionate licensing fee from Buffalo and other companies substantially undermines the public interest by stifling innovation in WLAN technology and eliminating competition among WLAN providers. The district court did not account for these adverse public-interest considerations when awarding a permanent injunction to CSIRO.

In his *eBay* concurrence, Justice Kennedy highlighted the profoundly negative repercussions of such abusive patent litigation tactics. He recognized that patent holders frequently employ injunctive relief as a “bargaining tool to charge exorbitant fees,” and cautioned courts not to award equitable relief where it will be used “simply for undue leverage in negotiations.” *eBay*, 126 S. Ct. at 1842 (Kennedy, J., concurring). Other courts have issued similar warnings about the potentially far-reaching consequences of awarding injunctive relief in patent infringement actions. This Court, for example, has recognized that rewarding patent holders’ extortionate litigation tactics merely “encourage[s] [them] to adopt a strategy of ambush rather than providing fair notice.” *Odetics, Inc. v. Storage Tech. Corp.*, 185 F.3d 1259, 1273 (Fed. Cir. 1999). Such relief is especially inappropriate—and the public-interest effects are especially pernicious—where, as here, the patent holder agreed to license on RAND terms (*i.e.*, expressly declared a willingness to accept money in exchange for rights under its patents).

Because the district court failed to take into account the full spectrum of relevant public-interest considerations and because none of the purported harms suffered by CSIRO was irreparable, it was an abuse of discretion to award CSIRO permanent injunctive relief. The injunction should be vacated.

## CONCLUSION

For the foregoing reasons, the permanent injunction should be vacated.

Respectfully submitted this 19th day of October, 2007.

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## CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Brief For *Amici Curiae* Atheros Communications, Inc., Belkin International, Inc., Consumer Electronics Association, Dell Inc., Hewlett-Packard Company, Intel Corporation, NETGEAR, Inc., Nortel Networks, Inc., NVIDIA Corporation, Oracle Corporation, SAP AG, and Yahoo! Inc. In Support Of Defendants-Appellants And Vacatur Of Permanent Injunction were served on counsel for Commonwealth Scientific and Industrial Research Organization, Buffalo Technology (USA), Inc., and Buffalo, Inc., on this date by overnight delivery, addressed as follows:

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**CERTIFICATE OF COMPLIANCE  
WITH TYPE-VOLUME LIMITATION**

I hereby certify that the foregoing Brief For *Amici Curiae* Atheros Communications, Inc., Belkin International, Inc., Consumer Electronics Association, Dell Inc., Hewlett-Packard Company, Intel Corporation, NETGEAR, Inc., Nortel Networks, Inc., NVIDIA Corporation, Oracle Corporation, SAP AG, and Yahoo! Inc. In Support Of Defendants-Appellants And Vacatur Of Permanent Injunction complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). The brief is printed in proportionally spaced 14-point type, and there are 6,920 words in the brief according to the word count of the word-processing system used to prepare the brief.

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