

DESIGN PATENT PERSPECTIVE: Preliminary Injunctions In Design Patent Cases



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When a copycat design appears in the marketplace, the initial reaction of a design patent owner usually is “How can I stop it?” A cease and desist letter is a typical first step and sometimes works, but it can be ignored or deftly deflected by the copyist. Suing for monetary damages is another option, but lawsuits take time and every day the copycat product may be damaging the patentee’s reputation, brand, and permanently siphoning off customers.

The damage done by an infringing design can be irreparable, so what is needed is a legal tool that can stop the damage immediately. Fortunately, such a legal tool does exist – the motion for preliminary injunction. A motion for preliminary injunction requests a court to prevent an accused infringer from committing further acts of alleged design patent infringe-

ment.¹ Preliminary injunctive relief exists to provide “speedy relief from irreparable injury.”²

Preliminary injunctions in design patent cases have been available for a long time. Indeed, in the 1885 case of *Dobson v. Hartford Carpet Co.*,³ the Supreme Court upheld a permanent injunction that earlier had issued as a preliminary injunction regarding carpet pattern design patents. But recently certain legal principles surrounding preliminary injunctions in patent cases have undergone significant changes. In this article, we will review the established principles and recent developments, and point out some evidentiary requirements and practical tips that may help parties move for and defend against preliminary injunctive relief in a design patent case.

Before filing a motion for preliminary injunction, a plaintiff must be fully prepared to satisfy a heavy burden. The Supreme Court characterizes injunctive relief as “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”⁴ A plaintiff must establish “that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” The decision to grant or deny is within the discretion of the district court, and the Federal Circuit will not reverse the judgment absent an abuse of discretion.⁵

Preliminary injunctions in design patent cases have been granted by the district court and affirmed by the Federal Circuit in three cases,⁶ granted and vacated in six cases,⁷ denied and affirmed in four cases,⁸ denied and remanded in one case,⁹ denied and dismissed in one case,¹⁰ and denied, affirmed in part, vacated in part, and remanded in one case.¹¹

The plaintiff’s first burden under the four-factor analysis is to establish a likelihood of success on the merits. This generally requires a showing that the plaintiff likely will prove infringement and likely will withstand challenges, if any, to the

validity of the patent.¹² To prove likely infringement, the design patentee should offer the court a construction of the patent that addresses functionality and other potential claim construction issues, and that analyzes infringement under the ordinary observer test.¹³

Although the grant of a preliminary injunction is in the district court’s discretion, the preliminary injunction will be vacated on appeal if the district court erroneously construes the claim. For example, in *Unique Functional Prods., Inc. v. Mastercraft Boat Co., Inc.*, the district court erred in its construction of the design claim by neglecting certain features shown in the design patent and by including certain unclaimed features in the patentee’s commercial embodiment.¹⁴ The Federal Circuit held that by basing the preliminary injunction on an erroneous claim construction, the district court abused its discretion, and the preliminary injunction was vacated.

It is also error and an abuse of discretion to compare an accused design against a design already subject to an injunction. Although the Federal Circuit permits such a comparison when determining whether contempt exists for violating an injunction, a proper infringement analysis in the initial preliminary injunction context “requires comparison of the accused design to the patent claims, not to another design.”¹⁵

Infringement under the ordinary observer test is a question of fact, and a preliminary injunction must be supported by adequate findings.¹⁶ The test for adequacy is whether the findings are “sufficiently comprehensive and pertinent to the issue to form a basis for the decision.”¹⁷ If the district court’s findings of fact are limited and conclusory, then meaningful appellate review is not possible and the preliminary injunction will be vacated and remanded for proper findings.¹⁸

With regard to validity, if the accused infringer does not challenge the validity of the patent, then the patentee may rely upon the presumption of validity to satisfy the burden of likelihood of success.¹⁹ If validity is challenged, the burden is on the accused infringer to come forward with evidence that raises a substantial question of invalidity. The patentee may respond with contrary evidence showing that the invalidity defense lacks substantial merit.

The district court then weighs all the evidence presented both for and against patent validity and determines whether a

“substantial question” exists concerning the validity of the patent.²⁰ If the alleged infringer presents an invalidity defense and the patentee cannot show that the defense lacks substantial merit, then a “substantial question” of validity will exist and no likelihood of success on the merits will be found.

Importantly, at the preliminary injunction stage, the accused infringer need not actually prove patent invalidity by clear and convincing evidence (the standard used at trial).²¹ Rather, as the Federal Circuit explained in *Titan Tire Corp. v. Case New Holland, Inc.*,²² the trial court “must determine whether it is more likely than not that the challenger will be able to prove at trial, by clear and convincing evidence, that the patent is invalid.”²³ In short, the clear and convincing standard used at trial “is a consideration for the judge to take into account in assessing the challenger’s case at the preliminary injunction stage; it is not an evidentiary burden to be met preliminarily by the challenger.”²⁴

Two of the six preliminary injunction orders vacated by the Federal Circuit in design patent cases were vacated based on invalidity grounds. In *PHG Techs., LLC v. St. John Cos.*,²⁵ a case involving designs for medical label sheets, the Federal Circuit found that the evidence raised a substantial issue of whether the designs were functional rather than ornamental. Similarly, in *Power Controls Corp. v. Hybrinetics, Inc.*,²⁶ a case involving plastic “clam shell” packaging, the Federal Circuit found that the evidence did not support a finding that the clam shell design was primarily functional. In both cases, the Court relied upon affidavits offered by the accused infringers that the designs were primarily functional – affidavits that the court also found were not effectively rebutted by the design patentees. Note that these two cases rely upon a theory of design patent functionality that borrows principles from trade dress law and that remains unsettled.²⁷

The Federal Circuit recently remanded a case where the district court denied a preliminary injunction based on invalidity grounds. In *Apple, Inc. v. Samsung Electronics*,²⁸ the district court found that Apple’s computer tablet design patent was subject to a substantial obviousness challenge due to a primary prior art reference and a secondary reference.²⁹ The Federal Circuit disagreed, finding that the putative primary reference was not “basically the same” as the Apple design patent and that

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the putative secondary prior art reference also was too different in appearance to serve as a secondary reference. The Federal Circuit remanded the case so the district court could make findings on the two remaining preliminary injunction factors – balance of hardships and the public interest (the district court previously ruled that irreparable harm existed). Note that *Apple v. Samsung* reasserts the principle that design patent obviousness is determined from the viewpoint of an ordinary designer³⁰ (and not an ordinary observer) and does not mention the new obviousness framework developed by the Federal Circuit in *Int’l Seaway Trading Corp. v. Walgreens Corp.*³¹

If plaintiff is able to make a showing of likelihood of success on the merits, then plaintiff next must demonstrate irreparable harm. Generally, irreparable harm is demonstrated when “remedies available at law, such as monetary damages, are inadequate to compensate for that injury.”³²

Historically, irreparable harm was presumed in a patent case when the plaintiff proved likelihood of success on the merits. The presumption arose because of a patent’s statutory right to exclude,³³ and could only be rebutted by clear proof that, for

example, future infringement was no longer likely, the patentee was willing to license its patent, or the patentee delayed in bringing suit.³⁴ However, last year in *Robert Bosch LLC v. Pylon Mfg. Corp.*,³⁵ the Federal Circuit confirmed that the Supreme Court in *eBay Inc. v. MercExchange, L.L.C.*,³⁶ “jettisoned the presumption of irreparable harm as it applies to determining the appropriateness of injunctive relief.” Following *Robert Bosch*, likelihood of success on the merits became just a factor to be considered by the district court.

The burden is upon the plaintiff to provide “[s]ome evidence and reasoned analysis” for the inadequacy of monetary damages.³⁷ The type of evidence that can lead to a finding of irreparable harm in design patent cases is customer confusion, reputational harm, damage to brand standing in the marketplace,³⁸ lost business opportunities, lost customer good will, and permanent loss of customers to competitors.³⁹ It is not enough to merely show that continued infringement will result in lost sales and lost market share.⁴⁰ There must be an additional component to the damage that is difficult to measure and compensate, such as harm to reputation, loss of goodwill,

price erosion, and permanent customer loss that likely will adversely affect downstream sales of later product versions and associated products and accessories.⁴¹

Irreparable harm may be easier to prove when the plaintiff and defendant are in a two-supplier market. The theory is that in such a market, the market share of plaintiff will decrease in proportion to the increase of the accused infringer's market share, and plaintiff's loss cannot be attributed to other competitors.⁴² But the presence of additional competitors does not necessarily weigh against a finding of irreparable harm, particularly when plaintiff has been diligent in pursuing the additional competitors for infringement.⁴³

In addition to proof of harm, plaintiff must provide evidence of a causal link between the harm and the allegedly infringing product. In *Apple v. Samsung*, the district court found that although Apple had shown irreparable harm with regard to Samsung's infringement of its smartphones, Apple had "failed to establish a 'nexus between Apple's harm of lost customers and loss in market share and Samsung's allegedly infringing conduct.'"⁴⁴ The court found the evidence conflicting with regard to whether smartphone purchasers bought the product because of the design and "the evidence was 'even more ambiguous in light of the fact that Apple's patents do not claim the entire article of manufacture.'"⁴⁵ Portion claiming (claiming less than the entire design) is a method used to make a design patent less vulnerable to a design around.⁴⁶ But note from this case the potential effect portion claiming may have on the ability to establish a nexus and receive a preliminary injunction.

As discussed above, when a presumption of irreparable harm existed upon a showing of likelihood of success, delay in moving for a preliminary injunction could rebut the presumption. Delay continues to be an important factor considered by district courts. In *Apple v. Samsung*, the district court found that Apple's failure to seek an injunction until July 2011 despite alleged infringement since 2007 undermined its claim of irreparable harm. The important lesson: plaintiffs should seek a preliminary injunction within a reasonable time after notice of infringement occurs. If the plaintiff does not believe the matter is urgent, the district court likely will not either.

An additional important consideration in the irreparable harm analysis is the ability

of the defendant to satisfy a money judgment. If plaintiff can show that defendant likely will be unable to satisfy a judgment, then a court may find that irreparable harm exists.⁴⁷

The district court next must consider the balance of hardships on the parties before granting a preliminary injunction. Courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief."⁴⁸

The primary hardship on a defendant if an injunction is granted is that it must cease selling the accused design. The Federal Circuit has observed that the effect of an injunction on a defendant can be "devastating."⁴⁹ However, such hardship may be insufficient to prevent an injunction because "one who elects to build a business on a product found to infringe cannot be heard to complain if an injunction against a continuing infringement destroys the business so elected."⁵⁰

The primary hardship on a plaintiff if an injunction is not granted is that it will continue suffering infringement damages. Courts recognize that requiring a plaintiff to compete against its own patented design, with all the resultant harms, places a substantial hardship on the plaintiff.⁵¹

In weighing these hardships, the court may look to the strength of the likelihood of confusion on the merits and the degree of irreparable harm that will be suffered. In *Apple v. Samsung*, the district court considered the balance of hardships to weigh in favor of Samsung on the smartphone claim in part because the issue of infringement was a close question and it was not clear that an injunction would prevent Apple from being irreparably harmed given the presence of other smartphone manufacturers in the market.⁵²

Parties may argue that a difference in size between the plaintiff and defendant and the relative importance of the infringing product are factors to consider. But a party "cannot escape an injunction simply because it is smaller than the patentee or because its primary product is an infringing one."⁵³

The final factor in a preliminary injunction analysis is consideration of the public interest. In general, the public has an interest in enforcing patent rights that are valid and infringed (which favors plaintiff),⁵⁴ but also an interest in preserving competition (which favors defendant).⁵⁵ However, "the focus of the district court's public interest

analysis should be whether there exists some critical public interest that would be injured by the grant of preliminary relief."⁵⁶ Absent such a critical public interest, a court may find that these competing public interests offset each other and do not strongly favor either party.⁵⁷

Following analysis of the above four factors, "the Court must 'weigh and measure each of the four factors against the other factors and against the magnitude of the relief requested.'"⁵⁸ As stated by the Supreme Court, "[i]n each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'"⁵⁹

A court may issue a preliminary injunction "only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained."⁶⁰ A district court has broad discretion to determine the amount of the bond.⁶¹ The decision of whether to award a bond also is in the district court's discretion and is a matter of regional circuit law.⁶²

A preliminary injunction order must "state the reasons why it issued," "state its terms specifically," and "describe in reasonable detail - and not by referring to the complaint or other document - the act or acts restrained or required."⁶³ A design patent preliminary injunction that fails to satisfy these requirements will be vacated.⁶⁴

Preliminary injunctions are designed to give immediate relief for irreparable harm. But injunctive relief remains extraordinary, and a plaintiff who asks a court for help must in turn be fully prepared with evidence and analysis to help the court make a proper and equitable decision. **IP**

ENDNOTES

1. Injunctive relief in patent cases is authorized specifically by 35 U.S.C. § 283, which states [t]he several courts having jurisdiction of cases under this title [35 USC §§ 1 et seq.] may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.
2. *Ross-Whitney Corp. v. Smith Kline & French Laboratories*, 207 F.2d 190, 198 (9th Cir. Cal. 1953).
3. 114 U.S. 439 (U.S. 1885).
4. *Winter v. NRDC, Inc.*, 129 S. Ct. 365, 376 (U.S. 2008).
5. *See Titan Tire Corp. v. Case New Holland, Inc.*, 566 F.3d 1372, 1375 (Fed. Cir. 2009).
6. *See Hoop v. Hoop*, 279 F.3d 1004 (Fed. Cir. 2002); *American Eagle Wheel Corp. v. American Racing Equip.*, 1997 U.S. App. LEXIS 28855

- (Fed. Cir. Oct. 20, 1997) (non-precedential); *Fiberglass in Motion, Inc. v. Hindelang*, 738 F.2d 452 (Fed. Cir. 1984) (non-precedential)
7. See *PHG Techs., LLC v. St. John Cos.*, 469 F.3d 1361 (Fed. Cir. 2006); *Unique Functional Prods., Inc. v. Mastercraft Boat Co., Inc.*, 82 Fed. Appx. 683 (Fed. Cir. 2003) (non-precedential); *Rubbermaid, Inc. v. Tucker Housewares Corp.*, 1993 U.S. App. LEXIS 14198 (Fed. Cir. May 5, 1993) (vacated and remanded); *Lund Indus. v. Go Indus.*, 938 F.2d 1273 (Fed. Cir. 1991) (vacated and remanded); *Oakley, Inc. v. International Tropic-Cal, Inc.*, 923 F.2d 167 (Fed. Cir. 1991); *Power Controls Corp. v. Hybrinetics, Inc.*, 806 F.2d 234 (Fed. Cir. 1986).
 8. See *Titan Tire Corp. v. Case New Holland, Inc.*, 566 F.3d 1372 (Fed. Cir. 2009); *Newspring Indus. Corp. v. Sun Gem Plastics Enter. Co.*, 66 Fed. Appx. 863 (Fed. Cir. 2003) (non-precedential); *Reebok Int'l v. J. Baker, Inc.*, 32 F.3d 1552 (Fed. Cir. 1994); *Chrysler Motors Corp. v. Auto Body Panels, Inc.*, 908 F.2d 951, 952 (Fed. Cir. 1990).
 9. *Payless Shoesource, Inc. v. Reebok Int'l, Ltd.*, 998 F.2d 985 (Fed. Cir. 1993).
 10. See *Norco Products, Inc. v. Mecca Dev., Inc.*, 821 F.2d 644 (Fed. Cir. 1987).
 11. See *Apple, Inc. v. Samsung Elecs. Co.*, 2012 U.S. App. LEXIS 9720 (Fed. Cir. May 14, 2012).
 12. See *Titan Tire Corp. v. Case New Holland, Inc.*, 566 F.3d 1372, 1376 (Fed. Cir. 2009).
 13. See generally *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665 (Fed. Cir. 2008).
 14. 82 Fed. Appx. 683, 689 (Fed. Cir. 2003) (non-precedential).
 15. *Lund Indus. v. Go Indus.*, 938 F.2d 1273, 1275 (Fed. Cir. 1991).
 16. See *Oakley, Inc. v. International Tropic-Cal, Inc.*, 923 F.2d 167, 168 (Fed. Cir. 1991); Federal Rule of Civil Procedure 52(a)(2), which states “[i]n granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action.”
 17. *Oakley, Inc. v. International Tropic-Cal, Inc.*, 923 F.2d 167, 168 (Fed. Cir. 1991).
 18. See *id.* at 169. (The Federal Circuit “cannot make the necessary factual findings relating to infringement at the appellate level.”)
 19. See *Titan Tire Corp. v. Case New Holland, Inc.*, 566 F.3d 1372, 1377 (Fed. Cir. 2009).
 20. *Id.* at 1377-1379.
 21. *Id.* at 1379. (“[T]he alleged infringer at the preliminary injunction stage does not need to prove invalidity by the ‘clear and convincing’ standard that will be imposed at trial on the merits.”)
 22. 566 F.3d 1372 (Fed. Cir. 2009).
 23. *Id.* at 1379.
 24. *Id.* at 1380.
 25. 469 F.3d 1361 (Fed. Cir. 2006).
 26. 806 F.2d 234 (Fed. Cir. 1986).
 27. See generally Oake, *Understanding Functionality in Design Patent Law, Parts 1, 2 and 3*, Intellectual Property Today (October and December 2011, January 2012) (reprinted by permission at www.designpatentschool.com).
 28. 2012 U.S. App. LEXIS 9720 (Fed. Cir. May 14, 2012).
 29. For a description of how obviousness is determined in a design patent case, see *id.* at *32, *33.
 30. *Id.* at *32. (“In addressing a claim of obviousness in a design patent, ‘the ultimate inquiry . . . is whether the claimed design would have been obvious to a designer of ordinary skill who designs articles of the type involved.’ *Titan Tire*, 566 F.3d at 1375, quoting *Durling v. Spectrum Furniture Co.*, 101 F.3d 100, 103 (Fed. Cir. 1996)).”
 31. 589 F.3d 1233 (Fed. Cir. 2009) (holding that obviousness is determined by the ordinary observer test - “For design patents, the role of one skilled in the art in the obviousness context lies only in determining whether to combine earlier references to arrive at a single piece of art for comparison with the potential design or to modify a single prior art reference. [footnote omitted] Once that piece of prior art has been constructed, obviousness, like anticipation, requires application of the ordinary observer test, not the view of one skilled in the art.” *Id.* at 1240).
 32. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (U.S. 2006).
 33. See *Polymer Techs. v. Bridwell*, 103 F.3d 970, 975 (Fed. Cir. 1996)
 34. *Id.*
 35. 659 F.3d 1142, 1149 (Fed. Cir. 2011).
 36. 547 U.S. 388 (U.S. 2006) (where the Supreme Court cautioned against applying categorical rules and presumptions when providing equitable relief).
 37. *Nutrition 21 v. United States*, 930 F.2d 867, 872 (Fed. Cir. 1991).
 38. See *Titan Tire Corp. v. Case New Holland, Inc.*, 2007 U.S. Dist. LEXIS 74173 (S.D. Iowa Oct. 3, 2007) (district court noting “these sorts of reputational harms are of the type generally characterized as not monetarily compensable.”); *Reebok Int'l v. J. Baker, Inc.*, 32 F.3d 1552, 1558 (Fed. Cir. 1994) (“Harm to reputation resulting from confusion between an inferior accused product and a patentee’s superior product is a type of harm that is often not fully compensable by money because the damages caused are speculative and difficult to measure.”).
 39. See *PHG Techs., LLC v. St. John Cos.*, 2005 U.S. Dist. LEXIS 32808 (M.D. Tenn. Dec. 5, 2005); see also *Polymer Techs. v. Bridwell*, 103 F.3d 970, 975-976 (Fed. Cir. 1996) (“Years after infringement has begun, it may be impossible to restore a patentee’s (or an exclusive licensee’s) exclusive position by an award of damages and a permanent injunction. Customers may have established relationships with infringers. The market is rarely the same when a market of multiple sellers is suddenly converted to one with a single seller by legal fiat. Requiring purchasers to pay higher prices after years of paying lower prices to infringers is not a reliable business option.)
 40. See *Nutrition 21 v. United States*, 930 F.2d 867, 871 (Fed. Cir. 1991) (“[N]either the difficulty of calculating losses in market share, nor speculation that such losses might occur, amount to proof of special circumstances justifying the extraordinary relief of an injunction prior to trial.”)
 41. See *Apple, Inc. v. Samsung Elecs. Co.*, 2012 U.S. App. LEXIS 9720, 10-11 (Fed. Cir. May 14, 2012)(Noting that district court “concluded that the economic effect of such losses of customers and future downstream purchases would be difficult to calculate and could support a finding of irreparable harm.”); *Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1155 (Fed. Cir. 2011).
 42. See *Apple, Inc. v. Samsung Elecs. Co.*, 2012 U.S. App. LEXIS 9720 (Fed. Cir. May 14, 2012).
 43. See *Pfizer, Inc. v. Teva Pharms. USA, Inc.*, 429 F.3d 1364, 1381 (Fed. Cir. 2005) (“A patentee does not have to sue all infringers at once. Picking off one infringer at a time is not inconsistent with being irreparably harmed.”) (quoting and citing *Polymer Techs. v. Bridwell*, 103 F.3d 970, 975 (Fed. Cir. 1996)).
 44. *Apple, Inc. v. Samsung Elecs. Co.*, 2012 U.S. App. LEXIS 9720, *11 (Fed. Cir. May 14, 2012).
 45. *Id.* at *12.
 46. See generally Oake, *Why Get A Design Patent?*, Intellectual Property Today (June 2012) (reprinted by permission at www.designpatentschool.com).
 47. See *Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1155 (Fed. Cir. 2011) (“A district court should assess whether a damage remedy is a meaningful one in light of the financial condition of the infringer before the alternative of money damages can be deemed adequate.”).
 48. *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987).
 49. *Ill. Tool Works, Inc. v. Grip-Pak, Inc.*, 906 F.2d 679, 683 (Fed. Cir. 1990) (“The hardship on a preliminarily enjoined manufacturer who must withdraw its product from the market before trial can be devastating.”).
 50. *Telebrands Direct Response Corp. v. Ovation Comm’ns, Inc.*, 802 F. Supp. 1169, 1179 (D.N.J. 1992) (quoting *Windsurfing Int’l Inc. v. AMF, Inc.*, 782 F.2d 995, 1002 n.12 (Fed. Cir. 1986).
 51. See *Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1156 (Fed. Cir. 2011).
 52. See *Apple, Inc. v. Samsung Elecs. Co.*, 2011 U.S. Dist. LEXIS 139049 (N.D. Cal. Dec. 2, 2011).
 53. *Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1156 (Fed. Cir. 2011).
 54. See *Abbott Labs. v. Andrx Pharms., Inc.*, 452 F.3d 1331, 1348 (Fed. Cir. 2006) (“the public is best served by enforcing patents that are likely valid and infringed.”).
 55. See *Apple, Inc. v. Samsung Elecs. Co.*, 2011 U.S. Dist. LEXIS 139049, *76 (N.D. Cal. Dec. 2, 2011).
 56. *Hybritech, Inc. v. Abbott Laboratories*, 849 F.2d 1446, 1458 (Fed. Cir. 1988).
 57. See *Apple, Inc. v. Samsung Elecs. Co.*, 2011 U.S. Dist. LEXIS 139049 (N.D. Cal. Dec. 2, 2011) (finding that the public interest factor did not weigh strongly in either party’s favor).
 58. *Apple, Inc. v. Samsung Elecs. Co.*, 2011 U.S. Dist. LEXIS 139049 (N.D. Cal. Dec. 2, 2011), reversed on other grounds, 2012 U.S. App. LEXIS 9720 (Fed. Cir. May 14, 2012) (citing and quoting *Chrysler Motors Corp. v. Auto Body Panels, Inc.*, 908 F.2d 951, 953 (Fed. Cir. 1990).
 59. *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008) (citing and quoting *Amoco Production Co.*, 480 U.S. at 542).
 60. Federal Rule of Civil Procedure 65(c).
 61. See *Apple, Inc. v. Samsung Elecs. Co.*, 2012 U.S. App. LEXIS 9720, *59, *60 (Fed. Cir. May 14, 2012) (Judge O’Malley dissenting).
 62. See *Hupp v. Siroflex of Am.*, 122 F.3d 1456, 1467 (Fed. Cir. 1997) (stating in the Fifth Circuit the award of the bond is not automatic).
 63. Federal Rule of Civil Procedure 65(d)(1).
 64. See, e.g., *Rubbermaid, Inc. v. Tucker Housewares Corp.*, 1993 U.S. App. LEXIS 14198 (Fed. Cir. May 5, 1993) (non-precedential).