

# Lost in translation? Injunctions and patent enforcement in a transatlantic perspective

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## Abstract

As the European Directive on the Enforcement of Intellectual Property Rights (IPRED) marked the twentieth anniversary of its adoption, renewed calls have emerged for its revision, aimed at fostering a more effective application of the principle of proportionality in patent enforcement. Proponents of reform argue that injunctive relief continues to be granted in an overly automatic manner and should therefore be subject to greater restraint. To this end, it has been suggested that valuable guidance may be drawn from the US legal landscape and, in particular, from the framework articulated by the US Supreme Court in *eBay v. MercExchange*. Against this background, the paper critically examines these reform proposals, arguing that they appear to rest on the same arguments that underpinned the highly controversial regulatory proposal on standard essential patents (SEPs), and questioning the purported alignment between the European and the US approaches to patent enforcement.

## KEYWORDS

enforcement, injunctions, patents, proportionality

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## 1 | INTRODUCTION

As a result of the increasingly strategic role played by patents in modern economies—particularly those incorporated into technical standards—patent enforcement has emerged as one of the most controversial and polarized issues in the global policy debate. This dynamic is especially pronounced within the European Union, where the odyssey of a regulatory intervention in the field of standards essential patents (SEPs), initiated by the Commission's proposal in April 2023<sup>1</sup> and culminated in litigation before the Court of Justice (ECJ) between the European Commission and the European Parliament, brought in November 2025.<sup>2</sup> After provoking extensive criticism directed at nearly every aspect of the initiative, beginning with its underlying rationale and justification,<sup>3</sup> the proposal was ultimately withdrawn by the Commission in February 2025, on the grounds that no foreseeable agreement between the European Parliament and the Council could be reached.<sup>4</sup> That decision, however, was contested by the Parliament, which alleged that the withdrawal infringed both the principle of conferral of powers and the duty of sincere cooperation between the EU institutions.

While that chapter may be regarded as closed, at least for the time being, new sources of contention are already on the horizon. Indeed, as the European Directive on the Enforcement of Intellectual Property Rights (IPRED) marked the twentieth anniversary of its adoption,<sup>5</sup> calls have emerged for a revision aimed at modernizing certain of its provisions.<sup>6</sup> Notably, as reported in the European Commission's recent follow-up study on the application of the IPRED, a range of legal practitioners, companies, and academics consider the interpretation and application of the proportionality principle to remain inconsistent across EU Member States.<sup>7</sup> Some national courts—particularly in patent cases—have been criticised for favouring rights holders by granting injunctions without undertaking a fully developed proportionality assessment.

Despite the Directive's broad and horizontal scope, it is unsurprising that such proposals for modernization have focused on patents and, more specifically, on the availability of injunctive relief following a finding of infringement. After all, for proponents of this intervention, the reasons of dissatisfaction with the current patent licensing ecosystem remain unchanged and largely mirror those that motivated the initiative for regulatory intervention in the field of SEPs.<sup>8</sup>

This is confirmed by the views collected by the European Commission in its IPRED follow-up study.<sup>9</sup> One group of stakeholders—primarily representing SEP holders and large companies that actively rely on litigation to enforce their patent rights—expressed satisfaction with the current application of the principle of proportionality within the EU framework. By contrast, another group of stakeholders—slightly larger in number in the context of the consultation activities and composed mainly of manufacturers of complex products—advocated amendments to the Directive aimed at further harmonising the application of the proportionality principle by national courts.<sup>10</sup>

Far from being novel, these claims have been reiterated over time<sup>11</sup> and rest on the traditional holdup theory, which underpinned the proposed SEP Regulation, whose central provisions were mainly driven by the objective of reallocating value within the standards ecosystem, thereby shifting bargaining power from patent holders to implementers.<sup>12</sup> In the standard-setting context, holdup refers to the ability of patent holders to demand excessively high royalty payments once implementers are locked into a standard.<sup>13</sup> According to this narrative, because the SEP licensing ecosystem is characterized by a systemic holdup problem, the imposition of fair, reasonable, and non-discriminatory (FRAND) commitments is understood to entail a limitation—if not a waiver—of the right to seek injunctive relief against infringers, potentially giving rise to antitrust liability for patent holders.

Concerns regarding the strategic leverage conferred by injunctions are amplified by the perceived growing risk of abusive patent litigation associated with the proliferation of patent assertion entities (PAEs), a subset of non-practicing entities (NPEs).<sup>14</sup> Such entities are typically described as firms whose business model relies not on the production and commercialization of goods, but rather on the acquisition and enforcement of patent rights primarily for the purpose of generating licensing revenues. PAEs are frequently accused of engaging in so-called patent trolling, namely the pursuit of speculative or opportunistic litigation strategies that exploit holdup dynamics by threatening injunctive relief in order to extract excessive damages or settlements from manufacturing firms.<sup>15</sup>

These risks are allegedly particularly acute in the context of modern technologies, which are often embodied in complex, multi-component products. In such settings, the opportunistic deployment of patent remedies against a single patented component may jeopardize the production or commercialization of the entire product, thereby magnifying the potential distortive effects of injunctive relief.

In this context, reform advocates invoke the need for a more effective application of the principle of proportionality in patent enforcement, arguing that injunctive relief continues to be granted in an excessively automatic manner and should therefore be more tightly constrained.<sup>16</sup> This criticism is also shared by the European Commission.<sup>17</sup> This development is regarded as particularly concerning in Germany, which hosts the largest number of patent disputes and whose courts are traditionally perceived as relatively patent holder-friendly.<sup>18</sup>

To this end, although there is no consensus on how best to improve the application of the proportionality principle in order to achieve greater harmonisation—particularly as to whether this should be pursued through legislative amendments or through the issuance of interpretative guidelines—,<sup>19</sup> it is suggested that valuable insights should be drawn from the US legal landscape, which, in the aftermath of the Supreme Court's landmark decision in *eBay v. MercExchange*,<sup>20</sup> is regarded as having embraced a more flexible approach to injunctive relief than that prevailing in most European jurisdictions.<sup>21</sup> Notably, proponents of IPRED reform emphasize the extent to which *eBay* has reshaped the approach of US courts to requests for injunctive relief in patent litigation, bringing to an end a decades-long practice in which such relief was granted on an almost automatic basis. Additional support for this position is drawn from Justice Kennedy's concurring opinion, which linked the rejection of any categorical rule in favor of permanent injunctions to the rise of NPEs and to concerns about the disproportionate effects of injunctive relief in cases where the patented invention constitutes only a minor component of the accused product.<sup>22</sup>

The relevance of such a reference extends well beyond a purely comparative exercise, as a potential convergence in patent policy between the EU and the US would carry significant geopolitical implications. Indeed, strengthening transatlantic alignment in this strategically important field serves broader shared concerns increasingly articulated by both US and EU policymakers regarding China's allegedly "predatory" approach to standardization.<sup>23</sup> In particular, China has been accused of leveraging its state-led, non-market approach to economic governance and trade policy in order to secure the dominance of Chinese enterprises in both domestic and global markets. This strategy is said to operate not only through the provision of extensive financial assistance and regulatory support to domestic industries, but also through the deliberate implementation of policies and practices designed to disadvantage foreign competitors. These concerns have been reflected, *inter alia*, in the two cases brought by the EU before the World Trade Organization (WTO), in which China has been accused of pursuing policies inconsistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) by weaponizing the full range of patent remedies—most notably anti-suit injunctions and global FRAND rate-setting—in ways that disadvantage and ultimately seek to displace foreign competitors.<sup>24</sup>

Against this background, the paper critically assesses proposals to reform the IPRED, arguing that both the exclusive emphasis on holdup risks and the reliance on the SEPs landscape reveal significant limitations, insofar as they appear to be grounded in the same arguments that underpinned the highly controversial regulatory proposal on SEPs.

The paper further contends that any proposal to adopt an *eBay*-like approach must be grounded in a comprehensive understanding of the structural and institutional features of the US patent enforcement system. Absent such a comprehensive assessment, the purported convergence between the European and US approaches to patent enforcement risks reflecting the aspirations of IPRED reform proponents more than the actual contours of contemporary US policy and practice. Indeed, not only does the legacy of *eBay* remain highly contested, but, as evidenced by a series of recent initiatives and interventions, the policy orientation advanced by the current US administration clearly favors strong patent protection as a primary driver of innovation. Moreover, in light of the distinctive features of the US institutional framework, the disruptive effects of *eBay* have been, at least in part, mitigated by the availability of alternative—and potentially even more advantageous—avenues for obtaining exclusionary relief.

Finally, the paper examines the proposed reform of the IPRED from a geopolitical perspective, highlighting a potential tension with the current U.S. administration's policy orientation in favour of robust patent protection. It argues that initiatives aimed at limiting the availability of injunctive relief are more likely to deepen transatlantic divergence than to promote convergence. At the same time, given that China is also making strategic use of the full range of patent remedies to support its domestic firms, such proposals—so far as the restriction of injunctive relief results in weaker patent protection—could paradoxically lead to an outcome resembling that pursued through China's approach to the enforcement of European and other foreign patents, which the European Union has itself challenged before the WTO.

The paper is structured as follows. Section 2 outlines the principles governing patent enforcement under the IPRED, as well as the policy objectives pursued by proponents of reform. It further examines recent developments in this area, notably the European Commission's follow-up study on IPRED and the Unitary Patent Court's first decision on the proportionality principle.<sup>25</sup> Section 3 investigates the post-*eBay* US legal framework and the approach to patent enforcement advanced during the Trump administration. Section 4 analyzes European patent policy from a geopolitical perspective. Section 5 concludes.

## 2 | REBALANCING PATENT ENFORCEMENT UNDER IPRED: PROPORTIONALITY, EFFECTIVENESS, AND INJUNCTIVE RELIEF

The policy rationale underlying the enactment of the IPRED in 2004 was to address the growing problem of intellectual property (IP) infringements within the EU internal market by harmonizing and strengthening the civil enforcement of intellectual property rights (IPRs).<sup>26</sup> To this end, the Directive established a common framework of measures, procedures, and remedies aimed at ensuring a consistent and effective level of IP protection across Member States.<sup>27</sup> In other words, it sought to establish a level playing field through a regime of minimum harmonization.

The IPRED was enacted within a specific historical context. By establishing a European minimum standard for measures, procedures, and remedies in cases of IP infringement, the Directive marked a significant shift in the trajectory of harmonisation efforts within the EU. Indeed, for a long time, such efforts had primarily focused on substantive aspects of intellectual property law, while matters of enforcement remained largely within the competence of the Member States.<sup>28</sup> The growing attention devoted to enforcement issues—ultimately culminating in the adoption of the IPRED—can be attributed to two principal factors. On the one hand, it reflected a broader trend toward the strengthening and expansion of IP protection. This development was also driven by the sharp rise in product piracy and counterfeiting, phenomena that had been facilitated by technological advances and the increasing globalisation of trade.<sup>29</sup> On the other hand, at the time of the Directive's adoption, the European Community was on the verge of a major enlargement, with ten Central and Eastern European countries preparing to accede. In this context, the Directive was also regarded as an important instrument for ensuring a consistent and adequate level of IP protection across the enlarged Union.<sup>30</sup>

The initiative was grounded in two interrelated premises. First, effective IP protection was recognized as an essential component of the internal market, not only for fostering innovation and creativity, but also for supporting employment and enhancing competitiveness.<sup>31</sup> Second, significant disparities existed among Member States with respect to the mechanisms available for enforcing IPRs. These divergences were considered detrimental to the proper functioning of the internal market, as they prevented IPRs from enjoying an equivalent level of protection throughout the EU.<sup>32</sup>

The Directive proceeded from the understanding that, in the absence of effective enforcement mechanisms, innovation and creativity would be discouraged and investment reduced, while persistent national disparities would weaken substantive IP law and contribute to the fragmentation of the internal market. Accordingly, the objective of IPRED was to overcome such fragmentation by approximating national legal

systems in the field of IP litigation, thereby ensuring a high, equivalent, and homogeneous level of enforcement of IPRs within the Union.<sup>33</sup>

Against this background, and in line with Article 41 of the TRIPS Agreement, the Directive provides that enforcement measures, procedures, and remedies must be fair and equitable and must not be unnecessarily complicated or costly, nor entail unreasonable time limits or unwarranted delays.<sup>34</sup> Moreover, in accordance with the general principle of proportionality recognized under EU law,<sup>35</sup> the IPRED specifies that such measures, procedures, and remedies must be effective, proportionate, and dissuasive.<sup>36</sup> Therefore, enforcement mechanisms are to be determined on a case-by-case basis, taking due account of the specific circumstances of each dispute, including the particular characteristics of the IPR at issue and, where appropriate, the intentional or unintentional nature of the infringement.<sup>37</sup>

This balancing between proportionality and effectiveness also applies, of course, to the granting of injunctions, which Member States are required to make available both as interlocutory and as permanent remedies.<sup>38</sup> As clarified by the European Commission in its Guidance, any injunction must be capable of producing effective results, while at the same time not exceeding what is necessary and proportionate in light of the circumstances of the case in order to achieve that objective.<sup>39</sup> Accordingly, it may be sufficient for an injunction to render the infringing acts in question difficult or to significantly discourage them, without necessarily requiring their complete cessation.<sup>40</sup> At the same time, the party subject to the injunction should not be compelled to undertake disproportionate or unbearable sacrifices.<sup>41</sup>

Although the IPRED applies horizontally across different categories of IPRs, the calls for reform are directed at patents, since, according to proponents, the proportionality of remedies is particularly significant in cases of patent infringement, as it is regarded as an important safeguard against potentially abusive enforcement practices by patent holders.<sup>42</sup>

Admittedly, the scope and meaning of the principle of proportionality in the context of injunctive relief have been the subject of extensive debate.<sup>43</sup> Indeed, consistently with its overarching objective of minimum harmonization, the Directive contains neither substantive nor procedural rules governing the specific design of injunctive relief, instead leaving the determination of the applicable conditions and procedures largely to the discretion of the Member States. While the text of the Directive does not impose any express or implicit obligation to grant injunctive relief in every case of infringement,<sup>44</sup> it is equally uncertain whether EU law mandates a systematic balancing of interests at the remedies stage.<sup>45</sup>

In this scenario, the prevailing criticism is that, notwithstanding the degree of flexibility and judicial discretion afforded by the Directive at the enforcement stage, national courts in practice often fail to engage in a meaningful assessment of the competing interests at stake and continue to grant injunctions on an almost automatic basis.<sup>46</sup> As a result, the balancing test envisaged by the IPRED is said to be *de facto* disregarded, insofar as the objective of ensuring effective patent protection is not adequately counterbalanced by the requirement of proportionality.

In general terms, as noted in the literature, divergences among national approaches to the granting of injunctions reflect, at a conceptual level, opposing models as to the nature of injunctive relief.<sup>47</sup> Under one model, injunctions are conceived primarily as a right and are therefore presumed to be available upon a finding of patent infringement, as a logical consequence of the exclusive nature of patent rights. Under the alternative model, injunctions are understood as a remedy and are accordingly assessed for their appropriateness as one among possible responses to patent infringement.

While this contrast is usually attributed to the differing legal traditions of civil law and common law systems, the reality appears more nuanced. On the one hand, empirical accounts suggest that, in most civil law jurisdictions, injunctions continue to be granted on an almost automatic basis, even where national legislation formally affords judges a degree of discretion.<sup>48</sup> This cultural *raison d'être* seems to be confirmed by the German experience, where, notwithstanding the 2021 reform introducing an explicit proportionality defence into the Patent Act,<sup>49</sup> no significant change in judicial practice has so far been observed.<sup>50</sup> On the other hand, although common law jurisdictions formally embrace a different conceptual model, it appears that in most such systems injunctions are likewise

granted without a genuinely individualized assessment, except in limited and exceptional circumstances, with the US representing the exception rather than the rule in this regard.<sup>51</sup>

## 2.1 | The case for reform: Rationale and limitations

Against this backdrop, in addition to doubts concerning the practical workability of a balancing test within the EU legal framework,<sup>52</sup> some commentators and stakeholders have pointed to a growing disconnect between the treatment of proportionality at the EU level and its application at the level of the Member States.<sup>53</sup> From this perspective, the flexibility afforded by the IPRED is viewed as a limitation rather than an asset. This perception has, in turn, prompted calls for reform of the IPRED aimed at reinforcing the role of proportionality in the enforcement of IPRs (particularly in the field of patents) by introducing explicit proportionality mechanisms designed to prevent overbroad injunctive relief and to replicate within the EU the policy outcomes observed in the US following the *eBay* decision.

The sources of discontent regarding the alleged inadequacy of the IPRED in ensuring an effective and consistent application of the proportionality requirement are closely linked to the pivotal role that injunctive relief may play in the field of patent enforcement. In this respect, these concerns largely reflect the traditional holdup theory, according to which patents confer market power on their holders, enabling the mere threat of injunctive relief to be leveraged in order to extract royalty payments that significantly exceed reasonable royalty levels.<sup>54</sup> From this perspective, the excessive enforcement of patent rights in the absence of meaningful proportionality assessments may lead to the overcompensation of patentees, increase prices for consumers by depriving them of the benefits of competition among technologies, and deter innovation by manufacturers exposed to the risk of holdup.

These risks are exacerbated by the fact that, as a result of the proliferation of patents, firms operating in certain technology-intensive sectors are claimed to be required to navigate a dense web of overlapping IPRs (commonly referred to as patent thickets) in order to commercialize new technologies.<sup>55</sup> The proliferation of patents can be explained in part by the nature of the technology involved. While innovation in more traditional industries tends to follow a largely linear model, in high-technology markets the innovation process is predominantly cumulative and incremental. This dynamic is often illustrated by the metaphor of a pyramid, in which any actor seeking to build further must obtain authorization from all those who have contributed to the construction of the base.<sup>56</sup> As a result, a single product may be covered by hundreds of patents, making infringement at times unavoidable and unintentional.<sup>57</sup>

Taken together, these elements may create fertile ground for opportunistic behavior and heighten the risk of a strategic use of IPRs. An entity that inadvertently infringes another's exclusive right, as well as one that, in order to produce a complex good, must obtain licenses from all holders of the proprietary rights covering its individual inputs, is exposed to the risk of contractual holdup.

Moreover, rising transaction costs may give rise to the phenomenon of royalty stacking, whereby a firm seeking to manufacture a complex product—whose constituent inputs are protected by patents held by multiple right holders—is required to bear the cumulative royalties associated with each individual patent, producing a compounding effect on the overall royalty burden.<sup>58</sup>

Finally, the unchecked proliferation of patents, by increasing the risk of inadvertent infringement, has fostered the strategic use of patent protection as a form of financial leverage rather than as a mechanism primarily intended to support productive innovation.<sup>59</sup> This phenomenon of opportunistic and potentially abusive exploitation of patent rights is particularly associated with the rise and diffusion of PAEs, namely financial vehicles that acquire and enforce patents against operating companies primarily for the purpose of extracting excessive damages or settlements.<sup>60</sup>

Given that their business model centres on the acquisition and monetisation of patents through licensing and enforcement—rather than through the traditional activities of producing and commercialising goods—and in light of

the increase in patent filings and acquisitions by PAEs over the past decades, an intense debate has emerged, particularly in the U.S., concerning their economic and innovation-related impact.<sup>61</sup> Notably, the concern is that, in seeking to maximise the monetisation of acquired patents, PAEs may engage in opportunistic litigation strategies that leverage the threat of injunctive relief to hold up practising entities and extract unmerited rents in the form of damages or settlement payments. In this context, the aggregation of patent portfolios may serve as a strategic tool, enabling PAEs to initiate a greater volume of litigation and thereby increase pressure over manufacturing firms. In this respect, PAEs are regarded as exploiting asymmetries in litigation costs and risks that arise from their non-practising status. Because they do not manufacture products, they are insulated from certain defensive strategies available to accused infringers (most notably, counterclaims for patent infringement) and their business model typically entails more limited discovery exposure, as they generally possess fewer relevant witnesses and documentary materials, thereby reducing the burdens and costs associated with litigation.<sup>62</sup> By contrast, the prospect of an injunction may result in the manufacturing firm losing all revenue derived from the affected product for the duration of the injunction. This asymmetry in costs and risks can render patent litigation highly unattractive to manufacturing firms, thereby strengthening the bargaining position of PAEs and enabling them to secure higher negotiated royalty rates.<sup>63</sup>

Against this background, proponents of reforming the IPRED seek to draw insights from the SEPs landscape, which is viewed as a paradigmatic example of holdup risks and of the constraints imposed (particularly under European competition law) on the availability of injunctive relief in such settings.

Firms participating in standardisation initiatives are typically subject to disclosure and licensing obligations established by standard development organisations (SDOs), which are intended to ensure the efficient functioning of the standard setting process and to mitigate the risk of opportunistic behaviour by participants. Notably, under SDO licensing policies, holders of SEPs are required to license their patents implemented in the standard on FRAND terms. This commitment has at times been understood as being primarily designed to address holdup risks, by preventing SEP holders from demanding excessively high royalties once implementers are locked into a given standard.<sup>64</sup>

In the EU, the assessment of FRAND commitments in the context of standard development is guided by the ECJ's ruling in *Huawei v. ZTE*, which constitutes the most significant judicial attempt to articulate a framework for good-faith licensing negotiations between holders of SEPs and implementers, with a view to facilitating agreement on FRAND royalties.<sup>65</sup>

Seeking to strike a balance between the preservation of effective competition and the need to safeguard the proprietor's IPRs and right to effective judicial protection, the Court held that the exercise of an exclusive right attached to a patent may, in exceptional circumstances, amount to abusive conduct within the meaning of EU competition law. In the case at issue, those exceptional circumstances derived from the fact that the patents were essential to standards established by SDOs and that their essentiality status had been obtained only in exchange for the holder's irrevocable commitment to license on FRAND terms. On this basis, by endorsing the so-called willing licensee framework, the ECJ introduced a set of procedural constraints governing the conduct of licensing negotiations, identifying the steps that both patent holders and implementers must follow when negotiating FRAND terms. Compliance with this code of conduct serves to shield SEP holders from competition law liability while simultaneously protecting implementers from the threat of injunctive relief.

In summary, although proportionality constitutes a binding legal principle, the current wording of the IPRED is widely regarded as overly open-ended and therefore insufficiently precise to operate as a self-executing norm. Accordingly, various options and mechanisms have been proposed to improve the application of the proportionality principle with a view to achieving greater harmonisation.

Admittedly, however, no consensus has emerged on how this objective should be pursued.<sup>66</sup> In particular, proponents of reform diverge on whether intervention should take the form of legislative amendments or, alternatively, the adoption of interpretative guidelines. Supporters of the former approach caution that, absent targeted amendments, there is little reason to expect significant change, as Member States are unlikely to apply the proportionality principle more robustly under the IPRED in its current form.<sup>67</sup>

Furthermore, differing views have emerged regarding how a proportionality test should be structured. In particular, the debate concerns which factors should be expressly identified for consideration by courts, how such factors should be weighted, and whether the introduction of rebuttable presumptions of the disproportionality of injunctive relief in certain circumstances would be warranted.<sup>68</sup> Indeed, there appears to be a general awareness that the U.S. *eBay* test cannot simply be transposed into the EU legal framework through a straightforward copy-and-paste approach.<sup>69</sup> Accordingly, a range of additional factors has been proposed as part of a potential adaptation of the *eBay* framework to EU law. These include, inter alia, the technical contribution of the patented invention to the overall product, the economic consequences of an injunction for both the patentee and the alleged infringer, the primary interest pursued by the patentee, and the relationship between the scope of the patent and the products affected by the injunction.<sup>70</sup> The last two factors are clearly intended to address some of the principal concerns raised by proponents of reform. In particular, the factor relating to the scope of the patent suggests that, where a patent covers only a minor component of a complex, multi-component product, this circumstance should weigh against the grant of an injunction. Similarly, the factor concerning the patentee's primary interest would enable courts to distinguish situations in which the patentee's objective is primarily to monetise the patent through licensing rather than to exclude competitors from the market. In such cases, it is argued that monetary damages may constitute a more appropriate remedy than injunctive relief. A comparable conclusion would apply where the patent holder is the owner of a SEP that is subject to a FRAND commitment.

With specific regard to complex technological products, it has even been proposed that IPRED should introduce tailored rules for component patents, including a rebuttable presumption that the grant of an injunction would be disproportionate.<sup>71</sup> Under such an approach, an injunction would be presumed to be disproportionate unless the patentee demonstrates otherwise. According to proponents, a presumption of this kind—similar to the framework applied in the context of SEPs—would not remove injunctions entirely as a possible remedy, but would allow licensing negotiations to proceed without the immediate threat of injunctive relief.

As illustrated above, although the IPRED applies horizontally across different categories of IPRs, the calls for its modernisation are in practice patent-focused. This raises a twofold question: first, whether the IPRED constitutes the appropriate framework for addressing what is essentially a sector-specific debate; and second, whether there is, in fact, a patent-specific justification that would warrant such an initiative.

In this regard, the longstanding controversy surrounding SEPs may have played a significant role in motivating such initiatives. Indeed, the entire evolution of SEP licensing rules can be examined through the lens of the longstanding debate between the risks of holdup and holdout, which has shaped competing views on the appropriate theoretical framework for regulatory and judicial intervention.<sup>72</sup>

A significant strand of the literature maintains that the primary objective of the licensing rules adopted by SDOs should be to mitigate the risk of holdup affecting implementers.<sup>73</sup> According to this perspective, once a technical standard has been adopted and market participants have committed substantial resources to developing products compliant with that standard, switching to an alternative technology becomes either impracticable or prohibitively costly. In such circumstances, SEP holders may acquire considerable bargaining power and could seek to extract royalties exceeding the fair economic value of their technological contribution to the standard. By contrast, another strand of the literature challenges the assumption that holdup represents a systemic problem in SEP licensing.<sup>74</sup> From this viewpoint, empirical evidence of widespread holdup is limited, while the opposite risk of holdout (or reverse holdup) may pose an equally significant concern. According to this approach, potential licensees may strategically exploit the uncertainty surrounding the precise content and scope of FRAND commitments in order to delay or avoid royalty payments. This strategy may involve prolonging licensing negotiations, contesting the validity or essentiality of patents, or engaging in protracted and costly litigation with SEP holders, thereby exerting pressure to secure more favourable licensing terms.

The dichotomy between holdup and holdout has also influenced the rationale underlying the European regulatory proposal on SEPs, at least according to some commentators.<sup>75</sup> In their view, the proposal appeared to be largely informed by a holdup-centric perspective and was therefore criticised as imbalanced and one-sided. It has

been argued that the regulatory framework would have imposed most of its compliance costs on SEP holders, while the principal benefits would have accrued to implementers, as suggested by the comparison between the expected costs and benefits set out in the Commission's Impact Assessment.<sup>76</sup> Moreover, it has been observed that the very study commissioned to support the regulatory initiative did not identify any clear evidence of a systemic failure in patent litigation within Europe that would justify such corrective intervention.<sup>77</sup>

Conversely, other scholars have supported the rationale underlying the Commission's initiative, viewing the proposal as a logical and promising response to several of the structural challenges associated with SEP licensing.<sup>78</sup> In particular, the initiative has been regarded as an attempt to address issues such as the growing incidence of international jurisdictional conflicts, the increasing reliance on private litigation to resolve licensing disputes, and the persistent uncertainty surrounding the terms and conditions under which SEPs subject to FRAND commitments should be licensed. In this view, a more structured regulatory framework at the EU level could contribute to greater transparency, predictability, and efficiency in SEP licensing negotiations.

After decades of scholarly and policy debate, it is reasonable to question the continuing centrality of the dichotomy between holdup and holdout,<sup>79</sup> while it appears more convincing to regard them as two sides of the same coin.<sup>80</sup> As acknowledged by the ECJ in *Huawei*, FRAND commitments are intended to address both forms of opportunistic behavior simultaneously, as the risks associated with holdout tactics are no less relevant or concerning than those arising from holdup.<sup>81</sup> In this regard, as emphasized by the UK Supreme Court in *Unwired Planet*, where holdout pressures force a patent holder to accept royalty rates below a fair level, the availability of injunctive relief constitutes a necessary component of the balance between the competing interests at stake.<sup>82</sup> The possibility of an injunction provides implementers with a strong incentive to engage in good-faith negotiations and to accept FRAND terms for the use of the SEP holder's portfolio. Conversely, if patent holders were confined exclusively to monetary remedies, infringing implementers would have a rational incentive to continue infringing until they are compelled—patent by patent and country by country—to pay royalties, thereby exacerbating holdout behavior and undermining the effectiveness of the licensing framework.<sup>83</sup>

Against this backdrop, both the emphasis on holdup risks alone and the reliance on the SEPs landscape reveal limitations in the proposals to reform the IPRED, insofar as they appear to be grounded in the very same arguments that underpinned the controversial regulatory proposal on SEPs.

In any event, by seeking to neutralise the potential "evils" of both holdup and holdout,<sup>84</sup> *Huawei* effectively operationalises the principle of proportionality in what is arguably the most relevant patent scenario for modern technological economies: the licensing of SEPs. Indeed, under the exceptional circumstances identified by the ECJ, proportionality already operates as a constraint on the availability of injunctive relief for patents that have been designated as standard-essential and are therefore subject to FRAND commitments. In this specific context, EU competition law requires SEP holders to act consistently with their obligation to offer licences on FRAND terms, while protecting implementers from the threat of injunctive relief, provided that they themselves behave in a manner consistent with their obligation to seek and obtain a licence on FRAND terms.

Admittedly, the *Huawei* framework has been criticised for failing to provide a model of coherent and predictable application. The European Commission has repeatedly expressed dissatisfaction with the manner in which that framework has been interpreted and applied at the national level, as the central justification advanced in the proposed SEP Regulation for an EU-level harmonization was precisely the divergent national interpretations of the *Huawei* criteria.<sup>85</sup> Notably, both in that proposal and in the calls to reform the IPRED, German courts emerge as the principal focus of criticism, being accused of excessive sensitivity to patent holders' interests and of thereby contributing to the broad availability of injunctive relief.<sup>86</sup> The divergence between the European Commission's position and the German approach to the proper interpretation of *Huawei* remains far from settled, as confirmed by the very recent decision of the German Federal Court of Justice in *VoiceAge v. HMD*.<sup>87</sup>

Nonetheless, these divergent interpretations do not alter the fact that, in the context of SEP licensing, the EU already benefits from a structured framework for the application of the proportionality principle, without the need for additional legislative intervention. Should the features of the *Huawei* framework continue to

generate controversy in the future, further clarification by the ECJ may provide an opportunity to refine its application.

A final consideration concerns the appropriateness of tailoring the availability of injunctive relief to the status of the patentee, in particular to whether the patentee qualifies as a NPE, and more specifically as a PAE.

From the outset, it is worth noting that the literature has developed two opposing narratives concerning NPEs. While, on the one hand, some scholars caution against their potentially negative impact on innovation, portraying NPEs as actors primarily focused on extracting rents through the threat of litigation, other commentators view these entities as intermediaries that may enhance the efficiency of patent licensing markets by facilitating the transfer and monetization of IPRs.<sup>88</sup> Such a sharp contrast can be explained by the heterogeneity of business models encompassed within the broad category of NPEs. While the term generally refers to firms that, unlike practicing entities, do not incorporate patented inventions into their own products, the entities falling within this category pursue markedly different strategies, target different types of patents, and may therefore exert divergent effects on market dynamics.<sup>89</sup> As a consequence, although patent trolls are widely criticized,<sup>90</sup> it is in practice far from straightforward to distinguish between “good” NPEs and “bad” trolls engaging in opportunistic enforcement strategies.<sup>91</sup>

This uncertainty about the true nature of NPEs clearly militates against the adoption of simplistic rules that would discriminate among patent holders solely on the basis of broad and imprecise labels. Penalizing the broad class of non-manufacturing patent holders may be suboptimal, as such an approach would also disadvantage genuinely innovative, research-oriented firms and university laboratories that actively contribute to the development and diffusion of innovation. Further, if the proportionality assessment is properly understood as relating to the scope of the exclusivity conferred by a patent, it is questionable to attach a stigmatizing distinction to a patent holder based on whether the latter was directly involved in developing the invention or practices the patent, as opposed to monetizing it through the collection of licensing royalties.<sup>92</sup>

## 2.2 | Recent developments: The European commission's follow-up study and the unitary patent court's first decision on the proportionality principle

At least in part, the concerns regarding the current state of the IPRED discussed in the preceding subsection have been echoed by the European Commission.

In its 2017 evaluation study, the Commission reported that the Directive had been successful in strengthening IP protection, noting that IPRED proved effective at a general and conceptual level by establishing a common European legal framework, facilitating the development of pan-European IP enforcement strategies, and enabling the productive cross-border exchange of information among judges.<sup>93</sup> At the same time, however, the study found that the Directive's effectiveness at a more operational level was undermined by its application in the Member States, which continued to exhibit significant inconsistencies in implementation.

These findings were restated by a more recent study published in 2026, which examined how the principle of proportionality can be applied more effectively across the EU, taking into account differences among national legal systems and the objectives of the Directive.<sup>94</sup> The study found that the proportionality principle is generally recognized across the Member States, although it is incorporated in different ways: in some jurisdictions it operates as a general principle inherent in the national legal order, while in others it has been explicitly codified in IP legislation.<sup>95</sup> According to the study, such divergences contribute to “small” variations in the practical application of proportionality across the Union.<sup>96</sup> Moreover, while courts frequently engage with the proportionality principle in copyright infringement cases, this practice is considerably less common in the context of patent litigation.<sup>97</sup>

After noting the lack of consensus among stakeholders on whether the IPRED should be amended to introduce a structured proportionality assessment framework akin to the U.S. *eBay* test, the study concluded that there is broad agreement on the need for greater harmonization in the manner in which courts assess proportionality in

patent injunction cases.<sup>98</sup> To this end, it suggested that the Commission could issue guidance identifying the factors that national courts should consider when applying the principle of proportionality, such as the nature of the claimant, the economic harm suffered by the parties, and the public interest.<sup>99</sup> By this view, although such soft law instruments would not be legally binding, they could contribute to harmonizing judicial decision-making across the Union and thereby enhance the consistent application of the IPRED.

However, a degree of internal inconsistency may be discerned between the Commission's conclusions and the findings of its study. On the one hand, the Commission maintains that the principle of proportionality is widely recognised and effectively applied across the Member States. On the other hand, it nevertheless calls for an intervention in order to achieve greater harmonisation. It is not immediately apparent why the relatively limited divergences reported in the practical application of proportionality throughout the Union would warrant an additional harmonisation initiative.

The study also examined the role of PAEs in the EU, adopting a cautious and nuanced approach.<sup>100</sup> While PAEs have become increasingly active in the United States—where higher damages awards and certain procedural features tend to incentivize litigation—their presence within the EU remains comparatively limited, with no clear evidence of a significant increase in PAE activity in recent years.<sup>101</sup> Nevertheless, the study found that PAE litigation is highly concentrated in Germany, a pattern attributed to a combination of procedural features, including the near-automatic granting of injunctions, the limited application of the proportionality principle, and generally favorable litigation conditions for patent holders.<sup>102</sup> Against this backdrop, the study suggested that the development of clear criteria for identifying PAEs could assist national courts in taking into account the nature of the claimant during proceedings, thereby enabling a more balanced assessment of the parties' respective interests and the appropriateness of the remedies sought.<sup>103</sup> In addition, the study proposed that greater harmonization in the application of the proportionality principle in patent infringement cases could help prevent PAEs from exploiting procedural disparities among Member States.<sup>104</sup>

However, the study's findings call into question the relevance of PAEs as a policy concern in the EU, thereby undermining the basic logic of one of the arguments advanced by proponents of IPRED reform. Indeed, if, as the IPRED follow-up study itself acknowledged, PAEs remain predominantly a United States-based phenomenon, the case for transplanting into the EU an *eBay*-style framework becomes difficult to sustain, given that such a framework was developed, at least in part, in response to enforcement dynamics that appear significantly more pronounced in the United States than in Europe.

Finally, a comprehensive assessment of the European landscape—and of the concerns surrounding the alleged fragmentation in the application of IPRED principles—necessarily also requires consideration of the future implications of the now-operative Unified Patent Court (UPC).

As the UPC has begun to develop supranational case law, it is expected to play a significant role in promoting the consistent application of IPRED principles across Member States, thereby mitigating the fragmentation that, according to some stakeholders and, to a certain extent, the European Commission, has been invoked to justify calls for reform.<sup>105</sup> In particular, the European Commission has noted that the UPC could play a relevant role in facilitating the exchange of knowledge within the judiciary regarding cases and approaches applied in different jurisdictions.<sup>106</sup> Under the UPC framework, judges from various Member States sit together in different panel configurations, which may encourage the development of shared judicial practices. In the Commission's view, this institutional feature—combined with the body of case law emerging from UPC decisions—may contribute to accelerating the establishment of a common standard for the proportionality assessment across the EU.<sup>107</sup>

Indeed, pursuant to Article 20 of the Agreement on a Unified Patent Court (UPCA), the Court is bound by EU law, including the IPRED.<sup>108</sup> Furthermore, under Article 63(1) UPCA, the Court may grant an injunction prohibiting the continuation of an infringement. The wording of this provision indicates that the grant of permanent injunctions is subject to judicial discretion, to be exercised in accordance with the proportionality requirement laid down in the IPRED. This interpretation is further confirmed by the UPC's Rules of Procedure governing decisions on the merits, which expressly provide that such decisions are without prejudice to the discretion of the Court referred to in Article 63.<sup>109</sup>

Against this backdrop, the judgment delivered a few months ago in *Meril v. Edwards* marked the first occasion on which the UPC Court of Appeal provided guidance on the entitlement to injunctive relief and on the circumstances under which such entitlement may be limited on proportionality grounds.<sup>110</sup> The judges emphasized that Article 63(1) UPCA gives effect to Article 11 IPRED.<sup>111</sup> Therefore, in its reasoning, the Court engaged with the principles underlying the IPRED, noting that the Directive establishes a range of legal remedies aimed at ensuring a high level of protection for intellectual property rights within the internal market.<sup>112</sup> This implies that, in principle, the right holder should not be deprived of the ability to initiate legal proceedings in order to secure the effective enforcement of its exclusive rights. Correspondingly, a third party wishing to use those rights, where it is not the proprietor, is in principle required to obtain a licence prior to such use. Accordingly, where the proprietor brings an infringement action and the Court finds that an IPR has been infringed, or is threatened with infringement, it shall issue an order prohibiting the continuation of the infringement, unless there are specific reasons justifying a different outcome.<sup>113</sup> Such special reasons may arise where, in the circumstances of the particular case, the grant of an injunction would not comply with the principle of proportionality laid down in Article 3 IPRED or would conflict with fundamental rights.<sup>114</sup> In this regard, the Court further clarified that, when assessing the proportionality of injunctive relief, it may take into account not only the interests of the parties to the proceedings but also the interests of third parties.<sup>115</sup>

### 3 | THE UNITED STATES APPROACH TO PATENT INJUNCTIONS: FROM EBAY TO THE TRUMP ADMINISTRATION

As the post-*eBay* US legal framework is invoked within the European policy debate as a comparative benchmark for proposed reforms concerning the availability of injunctions in patent litigation, a brief overview of the current US landscape is warranted in order to assess whether it aligns with such expectations.

Undoubtedly, the Supreme Court's 2006 decision in *eBay v. MercExchange* marked a turning point in the history of the US patent enforcement and policy.<sup>116</sup> Prior to 2006, US courts had been granting permanent injunctions to prevailing patent holders since at least the early nineteenth century, and over time the issuance of such injunctions appears to have become routine.<sup>117</sup> Against this historical background, the Court in *eBay* unanimously held that a prevailing patentee is not automatically entitled to a permanent injunction and instructed lower courts to apply a four-factor test for equitable relief. Under this balancing framework, a plaintiff seeking a permanent injunction must demonstrate: (i) that it has suffered an irreparable injury; (ii) that remedies available at law are inadequate to compensate for that injury; (iii) that, considering the balance of hardships between the plaintiff and the defendant, a remedy in equity is warranted; and (iv) that the public interest would not be disserved by the grant of an injunction. Further, within this context, the Court clarified that a NPE's willingness to license its patent does not, in itself, establish the absence of irreparable harm. Indeed, certain categories of patent holders—such as university researchers or individual inventors—may reasonably choose to license their inventions rather than undertake the substantial financial and operational efforts required to commercialize them directly, yet may nonetheless be able to satisfy the traditional four-factor test for injunctive relief.<sup>118</sup>

Nevertheless, as noted in the scholarly literature, the Court's reasoning revealed certain uncertainties in the application of the *eBay* standard.<sup>119</sup> Indeed, although the decision itself was unanimous, Chief Justice Roberts and Justice Kennedy authored separate concurring opinions that articulated divergent interpretative approaches. Notably, Roberts (joined by Justices Scalia and Ginsburg) emphasized that the long-standing tradition of equity practice suggests that injunctive relief should remain the norm in the vast majority of patent cases.<sup>120</sup> By contrast, Kennedy (joined by Justices Stevens, Souter, and Breyer) argued that, in contemporary cases, trial courts should take into account that the nature of the patents being enforced and the economic role of certain patent holders often differ markedly from those in earlier periods.<sup>121</sup> In particular, Kennedy linked the rejection of any categorical rule in favor of permanent injunctions to concerns regarding

NPEs, contending that the *eBay* decision plays an important role in limiting the bargaining leverage such entities may exert.

Unsurprisingly, both the interpretation of *eBay* and its broader implications remain highly contested.<sup>122</sup> Nonetheless, empirical studies indicate that Justice Kennedy's emphasis on NPEs and the risk of holdup in patent licensing has exerted a substantial influence on the manner in which lower courts have applied the *eBay* framework. In particular, the evidence suggests that, although the availability of injunctive relief in patent litigation has generally declined since *eBay*, this effect has been disproportionately pronounced in cases involving NPEs.<sup>123</sup>

However, these results must also be considered in light of an unintended consequence of *eBay* represented by the growing recourse to the International Trade Commission (ITC) as an alternative (and parallel) forum for patent enforcement.<sup>124</sup> In adjudicating disputes relating to importation, the ITC, upon a finding of infringement, may grant exclusively injunctive-type remedies in the form of exclusion orders and cease-and-desist orders. As a result, it offers patent holders an alternative, and potentially more advantageous, avenue for obtaining the very forms of exclusionary relief whose availability was curtailed under *eBay*. Indeed, patent disputes before the ITC are governed by a distinct statutory framework, characterised by procedural and substantive features that may be particularly attractive to rights holders, not least because the grant of relief is not subject to the equitable balancing test established in *eBay*. As a consequence of this dual standard governing the availability of patent injunctions within the US remedial framework, the *eBay* decision has enhanced the perceived attractiveness of the ITC as a forum for patent enforcement, particularly for PAEs.<sup>125</sup>

By limiting the availability of injunctive relief, the *eBay* decision has been criticized for fostering strategic holdout behaviour and for contributing to the gradual erosion of the economic value associated with patent rights.<sup>126</sup> On this basis, a bipartisan bill entitled the Realizing Engineering, Science, and Technology Opportunities by Restoring Exclusive (RESTORE) Patent Rights Act, introduced in 2024 during the 118th Congress and re-introduced in 2025 in the 119th Congress, seeks explicitly to abrogate the four-factor test and to restore the legal presumption in favor of injunctive relief that prevailed in US courts prior to *eBay*.<sup>127</sup> Illustrating the bill's rationale and objectives, Senator Coons cited empirical studies to emphasize the extent to which *eBay* has curtailed the availability of injunctive relief.<sup>128</sup>

This dissatisfaction with the *eBay* framework is largely shared by the current US administration.

In a recent joint statement of interest filed in *Radian Memory Systems, Inc. v. Samsung Electronics Co.* before the District Court for the Eastern District of Texas, the US Department of Justice (DoJ) and the US Patent and Trademark Office (PTO) emphasized that injunctions play a vital role in the patent system by promoting innovation, insofar as the incentive to innovate that lies at the core of the Patent Act is undermined when the availability of injunctive relief to prevent infringement is unduly restricted.<sup>129</sup> Relying on Chief Justice Roberts's concurrence in *eBay*, the DoJ and the PTO observed that, although a prevailing patentee is not entitled to an injunction in every case, it does not follow that courts should disregard the fundamental nature of patents as property rights conferring upon their holders the right to exclude.<sup>130</sup> Moreover, invoking Federal Circuit precedent, the DoJ and the PTO underscored that irreparable harm is frequently present in patent infringement cases, given that patents are inherently difficult to value and that monetary damages are often challenging to calculate, irrespective of whether the patent holder practices the invention or relies on licensing as its primary means of commercialization.<sup>131</sup>

A few months later, in another joint submission filed in *Certain Dynamic Random Access Memory (DRAM) Devices* before the US International Trade Commission, the DoJ and the PTO reiterated these concerns, warning that, absent the exclusive rights secured by patents, breakthrough innovations would remain confined to laboratories and workshops rather than reaching consumers through competitive markets.<sup>132</sup> Emphasizing that the enforcement of patent rights implicates interests far beyond those of the immediate parties, and instead raises issues of significant public concern, the DoJ and the PTO argued that the public interest overwhelmingly favors the effective enforcement of valid patent rights.<sup>133</sup> In this regard, the US authorities highlighted the broader economic stakes associated with patent enforcement, maintaining that when patent rights are devalued through ineffective enforcement, the entire innovation ecosystem is adversely affected: investment in research and development

declines, venture capital becomes less accessible for technology start-ups, manufacturing shifts offshore, and US technological leadership erodes.<sup>134</sup> As the agencies succinctly observed, “innovation follows investment, and investment follows protection.”<sup>135</sup>

The same approach was reiterated by the DoJ and the PTO in their joint statement of interest in *Communications Inc. v. Samsung Electronics Co.*, submitted before the US District Court for the Eastern District of Texas.<sup>136</sup> Reaffirming the importance of preserving incentives to innovate, the U.S. authorities argued that unduly restricting patentees' ability to seek injunctive relief against patent infringement may undermine such incentives. From this perspective, and with specific reference to the interpretation and application of the *eBay* test, the authorities emphasized that non-practicing entities should not be categorically denied access to injunctive relief. Rather, under appropriate circumstances, such patentees may be able to demonstrate irreparable harm and the inadequacy of monetary damages as compensation for ongoing infringement. As the statement explains: “To adopt a contrary rule—that licensing is effectively dispositive of the right to exclude infringers—would both contradict the Supreme Court in *eBay*, which specifically left open the possibility that non-practicing patentees can establish grounds for an injunction, and risk creating a compulsory licensing regime of the sort rejected by Congress.”<sup>137</sup>

Finally, “in furtherance of recent actions directed toward the restoration of robust and predictable patent remedies,” the PTO announced the establishment of a SEP Working Group dedicated to ensuring that “all patent holders—regardless of their size or level of sophistication—are treated fairly and that their rights receive strong and predictable enforcement” when patented technologies are incorporated into technical standards.<sup>138</sup> Accordingly, the principles articulated in *Radian Memory Systems* and *Certain Dynamic Random Access Memory (DRAM) Devices*—namely, that valid patents merit strong protection, that injunctive relief performs important functions within the patent system, that difficulties in calculating damages may constitute irreparable harm, and that the public interest favors the enforcement of patent rights—form the normative foundation of the SEP Working Group's mandate. Notably, the initiative proceeds from the premise that, although technical standards constitute the backbone of many modern technologies and frequently incorporate patented inventions reflecting substantial investment, ingenuity, and risk-taking by American innovators, the SEP ecosystem has become increasingly “hostile to innovators.”<sup>139</sup> Indeed, patent holders who contribute their technologies to standards are confronted with “widespread efforts to devalue their contributions,” uncertainty regarding the scope and enforcement of their rights, and the systematic suppression of licensing rates.<sup>140</sup> Against this backdrop, the Working Group is tasked with “counter[ing] the erosion of patent holders' rights and ensur[ing] that American inventors can obtain meaningful protection for their breakthroughs.”<sup>141</sup>

Admittedly, the current position of the US agencies is unsurprising, as a broadly similar policy orientation had already been advanced during the first Trump administration. At that time, the DoJ—together with the PTO and the National Institute of Standards and Technology (NIST)—advanced a significant shift in policy by characterizing holdout as an even more serious threat to dynamic innovation than holdup and by contending that antitrust law should not be employed to police fair, reasonable, and non-discriminatory (FRAND) commitments made by SEP holders.<sup>142</sup> In this vein, the agencies revised their position on remedies for FRAND-encumbered SEPs and explicitly rejected a categorical rule against injunctive relief.

This policy reorientation, which gave rise to multiple interventions in private litigation,<sup>143</sup> reflected in particular the “New Madison Approach” championed by the former Assistant Attorney General for the Antitrust Division, Makan Delrahim, grounded in the concern that the enforcement had drifted too far toward accommodating the interests of technology implementers at the expense of preserving robust patent rights.<sup>144</sup> Contesting the manner in which lower courts have applied the *eBay* test, Delrahim stressed that rules depriving patent holders of the ability to seek injunctive relief undermine incentives to innovate and exacerbate the problem of holdout as, absent the credible threat of an injunction, implementers may rationally choose to infringe without a license, secure in the knowledge that their potential liability will be limited to the payment of reasonable royalties.<sup>145</sup>

Criticizing both the emphasis on the risks of holdup and, more broadly, the role ascribed to antitrust law in SEP litigation, the current Deputy Assistant Attorney General, Dina Kallay, recently clarified that the DoJ's present

stance represents a direct continuation of the approach adopted during the first Trump administration, when the Antitrust Division was led by Delrahim.<sup>146</sup> Rather than adopting a holdup-centric and potentially “skewed” perspective, a case-by-case approach that takes into account both holdup and holdout dynamics is therefore regarded as the more appropriate framework.<sup>147</sup>

In summary, the policy direction of the US administration supports a more robust approach to remedies in the patent context. Under this view, injunctive relief should not be regarded as exceptional; instead, the right to exclude is understood as a core element of patent protection, and limitations on injunctions are seen as liable to weaken incentives for innovation.

## 4 | PATENT POLICY AND GEOPOLITICS

As the analysis developed thus far has shown, the calls to reform the IPRED suffer from significant limitations, insofar as they are fundamentally grounded in the same arguments and premises that characterized the ultimately unsuccessful proposal to adopt a regulation on SEPs (see *supra* Section 2.1). Moreover, the suggestion to draw inspiration from the United States experience by introducing an *eBay*-like framework for the granting of injunctions appears to overlook both the persistent controversy surrounding the interpretation of *eBay* and the current US administration's policy orientation in favor of strong IP protection (see *supra* Section 3).

The geopolitical implications of such a potential transatlantic divergence should not be underestimated.

Courts worldwide are, indeed, increasingly resolving patent disputes in ways that carry significant global implications. This trend is particularly evident in the context of SEPs, whose filing and litigation have become matters of strategic decision-making, as jurisdictions differ markedly in their approaches to patent protection in pursuit of technological leadership, especially in relation to critical and emerging technologies with strategic importance for competitiveness and national security.<sup>148</sup> Against this backdrop, both EU and US policymakers have repeatedly raised concerns about Chinese techno-nationalism, referring to the deliberate efforts of Chinese courts and authorities to advance domestic economic interests by systematically undervaluing foreign SEPs and setting comparatively low FRAND royalty rates.<sup>149</sup> In other words, the claim is that China is making strategic use of the full spectrum of patent remedies to support its national companies. The EU has gone so far as to bring a successful case before the WTO, in which the appellate arbitrator found that China's policy on anti-suit injunctions undermines the exercise of the exclusive rights conferred on patent holders from other WTO Members under the TRIPS Agreement.<sup>150</sup> Further, more recently, the EU has launched another WTO challenge against China, this time targeting its global FRAND rate-setting in SEP disputes.<sup>151</sup>

However, the approach adopted in Western jurisdictions with respect to the availability of injunctive relief for SEP holders appears difficult to reconcile with the concerns expressed regarding Chinese policy.<sup>152</sup> Indeed, from the outset, both the EU and the United States have advanced strategies aimed at constraining the economic value of SEPs, notably by limiting the royalty rates that patent holders may demand. These strategies have been justified primarily by reference to the need to mitigate holdup risks and have been implemented through the enforcement of FRAND commitments and by restricting the ability of holders of FRAND-encumbered SEPs to seek injunctive relief.

As previously illustrated, the current US administration has reconsidered this anti-injunction orientation, questioning the centrality of holdup concerns and emphasizing instead the critical role of robust patent protection in attracting investment and, in turn, fostering innovation. By contrast, the clash between the European Parliament and the Commission on the proposed regulation on SEPs and the criticisms advanced by the European Commission with respect to German judicial practice suggest that EU policymakers have not yet altered their policy direction and therefore remain misaligned with their U.S. counterparts. In this context, calls to reform the IPRED risk further exacerbating transatlantic divergence. Furthermore, and somewhat paradoxically, if China is making strategic use of patent remedies to advance the interests of its domestic firms, the position underlying the IPRED reform proposals—which favors a more restrictive approach to injunctive relief and a comparatively weaker model of

patent protection—not only appears to diverge from the current policy orientation of the US administration, but may also produce an outcome resembling that pursued by China in its policy against European and other foreign patents, an approach that the European Union has itself challenged before the WTO.

## 5 | CONCLUDING REMARKS

The debate on patent enforcement has become a recurring feature of policy discussions within the EU. While the controversy surrounding the proposed regulation on SEPs has not yet fully subsided, the twentieth anniversary of the IPRED has already generated a new source of dispute.

Calls for revision focus on strengthening the application of the principle of proportionality in the granting of injunctive relief. According to these reform-oriented perspectives, the current European framework continues, at the national level, to display a tendency toward the quasi-automatic issuance of injunctions in patent disputes—a practice perceived as insufficiently attentive to the broader economic and technological context in which patent rights are exercised. In support of this position, comparative arguments have been advanced that explicitly invoke the US experience, suggesting that meaningful guidance may be drawn from the analytical framework articulated by the US Supreme Court in its 2006 decision in *eBay*.

Admittedly, the anniversary of the IPRED serves largely as a pretext. The underlying reasons, arguments, and objectives advanced in support of reform are hardly novel, as they largely replicate positions that have been articulated by certain scholars, stakeholders, and policymakers about holdup risks in the debate on SEPs licensing over the past two decades.

While this perspective gained momentum at a certain point, it has lost traction in recent years, as evidenced by the withdrawal of the proposed European regulation on SEPs. This change in direction has been even more marked in the United States, where the Trump administration has explicitly advocated the restoration of robust and predictable patent remedies, while warning that the SEP ecosystem has become increasingly hostile to innovators. As a consequence, the comparative appeal of *eBay* appears to rest on a misunderstanding of the US system and to be ill-timed in the current policy context. Indeed, as that judgment also marks its twentieth anniversary this year, proposals have emerged in the United States to revisit and modernize it in ways that would lead to outcomes opposite to those contemplated by the proposed modernization of the IPRED in the EU.

For all these reasons, the debate on the purported need to reform the IPRED appears, at best, to constitute a paradigmatic case of old wine in new bottles.

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## ENDNOTES

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- <sup>5</sup> Directive 2004/48/EC on the enforcement of intellectual property rights, [2004] OJ L157/45.
- <sup>6</sup> See, e.g., IP2Innovate, European Automobile Manufacturers' Association, The App Association, Computer & Communications Industry Association, European Association of Automotive Suppliers, and Fair Standards Alliance, 'Letter to EVP Stéphane Séjourné on the IPRED modernisation', (2026) <<https://ip2innovate.eu/home/multi-association-letter-evp-sejourne-ipred/?lid=1670>>; IP2Innovate, 'Proportionality in patent remedies across the EU is needed to support the European Innovation Act's goals of creating innovation-friendly regulation and eliminating Single Market fragmentation', (2025) <[https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14593-European-Innovation-Act/F33069711\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14593-European-Innovation-Act/F33069711_en)>; Rafal Sikorski, 'Realising the Potential of Proportionality in Patent Enforcement: A Case for Amending IPRED', (2025) 47 EIPR 134.
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- <sup>9</sup> European Commission (n 7) 42.
- <sup>10</sup> *Ibid.*, fn 86, reporting that, looking at the responses to the survey, the interviews and feedback from the expert panel, 11 stakeholders were against any changes, 17 favoured harmonisation, and 7 held middle-ground opinions.
- <sup>11</sup> See, e.g., IP2Innovate, 'Promoting a Robust, Balanced & Flexible European Patent Ecosystem to Prevent Abusive Patent Practices of Patent Assertion Entities' (2017) <[https://ip2innovate.eu/swfiles/files/IP21\\_Coalitionscopeandobjectives\\_v15\\_040417\\_rev041119.pdf](https://ip2innovate.eu/swfiles/files/IP21_Coalitionscopeandobjectives_v15_040417_rev041119.pdf)>.
- <sup>12</sup> See, e.g., Borgogno and Colangelo (n 3).
- <sup>13</sup> See, e.g., Carl Shapiro, 'Injunctions, Hold-Up, and Patent Royalties' (2010) 12 ALER 280; Mark A. Lemley and Carl Shapiro, 'Patent Holdup and Royalty Stacking' (2007) 85 Texas LR 1991.
- <sup>14</sup> IP2Innovate, European Automobile Manufacturers' Association, The App Association, Computer & Communications Industry Association, European Association of Automotive Suppliers, and Fair Standards Alliance (n 6). See, e.g., US Federal Trade Commission, 'Patent Assertion Entity Activity: An FTC Study' (2016) <<https://www.ftc.gov/reports/patent-assertion-entity-activity-ftc-study>>; Europe Economics, 'Patent assertion entities in Europe—Their impact on innovation and knowledge transfer in ICT markets', (2016) <<https://data.europa.eu/doi/10.2791/134702>>.
- <sup>15</sup> See, e.g., Mark A. Lemley and Robin Feldman, 'Is Patent Enforcement Efficient?', (2018) 98 Boston LR 102; Fiona Scott Morton and Carl Shapiro, 'Strategic Patent Acquisitions' (2014) 79 Antitrust LJ 463.
- <sup>16</sup> IP2Innovate, European Automobile Manufacturers' Association, The App Association, Computer & Communications Industry Association, European Association of Automotive Suppliers, and Fair Standards Alliance (n 6); Sikorski (n 6).
- <sup>17</sup> See European Commission (n 7) 28, referring to the empirical evidence provided by a Darts-IP study examining 635 court decisions in patent cases across Europe between 2015 and 2020.

- <sup>18</sup> See, e.g., European Commission, 'Impact Assessment Report Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on Standard Essential Patents and Amending Regulation (EU) 2017/1001', SWD(2023) 124 final, 154 and 158. See also BMW Group, 'Feedback to EU Commission's Public Consultation', (2023) <[https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13109-Intellectual-property-new-framework-for-standard-essential-patents/F3434362\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13109-Intellectual-property-new-framework-for-standard-essential-patents/F3434362_en)>; Mercedes-Benz Group, 'Feedback to EU Commission's Public Consultation', (2023) <[https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13109-Intellectual-property-new-framework-for-standard-essential-patents/F3430251\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13109-Intellectual-property-new-framework-for-standard-essential-patents/F3430251_en)>; and Volkswagen, 'Feedback to EU Commission's Public Consultation', (2023) <[https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13109-Intellectual-property-new-framework-for-standard-essential-patents/F3430555\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13109-Intellectual-property-new-framework-for-standard-essential-patents/F3430555_en)>, welcoming the SEP Regulation Proposal for ensuring that no injunction request may be brought before national courts, "particularly in Germany".
- <sup>19</sup> European Commission (n 7) 48–51.
- <sup>20</sup> *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006).
- <sup>21</sup> IP2Innovate (n 6); Sikorski (n 6).
- <sup>22</sup> *eBay* (n 20) 395–397.
- <sup>23</sup> Office of the U.S. Trade Representative, '2024 Report to Congress on China's WTO Compliance', (2025) <<https://ustr.gov/sites/default/files/files/reports/2025/2024USTRReportCongressonChinaWTOCompliance.pdf>>; Office of the U.S. Trade Representative, '2023 Report to Congress on China's WTO Compliance', (2024) <[https://ustr.gov/sites/default/files/2023%20USTR%20Report%20on%20China's%20WTO%20Compliance%20\(Final\)%20\(USSTR%20Website\).pdf](https://ustr.gov/sites/default/files/2023%20USTR%20Report%20on%20China's%20WTO%20Compliance%20(Final)%20(USSTR%20Website).pdf)>.
- <sup>24</sup> European Commission, 'EU Requests WTO Panel in Dispute With China Over Royalties for EU High-Tech Sector', (2026) <[https://policy.trade.ec.europa.eu/news/eu-requests-wto-panel-dispute-china-over-royalties-eu-high-tech-sector-2026-02-12\\_en?prefLang=lv#:~:text=Since%20WTO%20consultations%20with%20China,protect%20their%20investments%20in%20innovation](https://policy.trade.ec.europa.eu/news/eu-requests-wto-panel-dispute-china-over-royalties-eu-high-tech-sector-2026-02-12_en?prefLang=lv#:~:text=Since%20WTO%20consultations%20with%20China,protect%20their%20investments%20in%20innovation)>; European Commission, 'WTO Appeal Arbitrator Finds China Wrong to Restrict Intellectual Property Rights in Dispute Brought by EU', (2025) <[https://policy.trade.ec.europa.eu/news/wto-appeal-arbitrator-finds-china-wrong-restrict-intellectual-property-rights-dispute-brought-eu-2025-07-22\\_en](https://policy.trade.ec.europa.eu/news/wto-appeal-arbitrator-finds-china-wrong-restrict-intellectual-property-rights-dispute-brought-eu-2025-07-22_en)>.
- <sup>25</sup> Court of Appeal of the Unified Patent Court, 25 November 2025, Joined Cases No. APL\_44701/2024, APL\_44702/2024, APL\_45049/2024, APL\_51701/2024, APL\_51746/2024, APL\_51748/2024, APL\_1926/2025, APL\_2205/2025, *Meril India Pvt Ltd, Meril GmbH, Meril Italy Srl v Edwards Lifesciences Corporation*.
- <sup>26</sup> Directive 2004/48/EC (n 5).
- <sup>27</sup> *Ibid.*, Recital 10.
- <sup>28</sup> Christian Heinze, 'Intellectual Property (Enforcement)' in J. Basedow, K.J. Hopt, R. Zimmermann, and A. Stier (eds) *The Max Planck Encyclopedia of European Private Law* (Oxford University Press 2012) <[https://max-eup2012.mpipriv.de/index.php/Intellectual\\_Property\\_\(Enforcement\)](https://max-eup2012.mpipriv.de/index.php/Intellectual_Property_(Enforcement))>.
- <sup>29</sup> *Ibid.*
- <sup>30</sup> Sikorski (n 6).
- <sup>31</sup> *Ibid.*, Recitals 1 and 3.
- <sup>32</sup> *Ibid.*, Recitals 7, 8, and 9.
- <sup>33</sup> *Ibid.*, Recital 10.
- <sup>34</sup> *Ibid.*, Article 3(1).
- <sup>35</sup> TEU, Article 5(4).
- <sup>36</sup> Directive 2004/48/EC (n 4), Article 3(2).
- <sup>37</sup> *Ibid.*, Recital 17.
- <sup>38</sup> *Ibid.*, Articles 9(1) and 11.
- <sup>39</sup> European Commission, 'Guidance on certain aspects of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights', COM/2017/0708 final, §IV.3.
- <sup>40</sup> *Ibid.*
- <sup>41</sup> *Ibid.*
- <sup>42</sup> See IP2Innovate, European Automobile Manufacturers' Association, The App Association, Computer & Communications Industry Association, European Association of Automotive Suppliers, and Fair Standards Alliance (n 6);

IP2Innovate (n 6); Sikorski (n 6). See also European Commission (n 7) 27–28, confirming that the debate is essentially centered on patents.

- <sup>43</sup> See, e.g., Peter Teunissen, 'Intellectual Property, Injunctions, and Proportionality: Towards a Uniform Approach', (2025) 74 GRUR Inter 805; Leon Dijkman, *The Proportionality Test in European Patent Law*, (Hart Publishing 2023); Matthias Leistner and Viola Pless, 'European Union' in J.L. Contreras and M. Husovec, (eds) *Injunctions in Patent Law. Trans-Atlantic Dialogues on Flexibility and Tailoring* (Cambridge University Press 2022) 26; Rafal Sikorski, 'Towards a More Orderly Application of Proportionality to Patent Injunctions in the European Union' (2022) 53 IIC 31.
- <sup>44</sup> Leistner and Pless (n 43).
- <sup>45</sup> Dijkman (n 43).
- <sup>46</sup> See, e.g., Sikorski (n 43).
- <sup>47</sup> Jorge L. Contreras and Martin Husovec, 'Issuing and Tailoring Patent Injunctions. A Cross-Jurisdictional Comparison and Synthesis' in *Injunctions in Patent Law* (n 43) 313.
- <sup>48</sup> Ibid.
- <sup>49</sup> See Section 139(1) of the German Patent Act (Patentgesetz—PatG), as amended by the Second Act to Simplify and Modernize Patent Law (Zweites Gesetz zur Vereinfachung und Modernisierung des Patentrechts), which provides that the right to injunctive relief is "excluded where the assertion of such a remedy would, in light of the particular circumstances of the individual case and the principle of good faith, result in disproportionate hardship for the infringer or third parties that is not justified by the exclusive right".
- <sup>50</sup> See, e.g., Christian Heinze, 'The EU Principle of Proportionality as a Limit to Injunctions in Patent Law—an Analysis of German Court Practice After the Second Act to Simplify and Modernize Patent Law of 2021', (2025) 20 JIPLP 775.
- <sup>51</sup> Contreras and Husovec (n 43).
- <sup>52</sup> Dijkman (n 43).
- <sup>53</sup> See, e.g., IP2Innovate (n 6); Sikorski (n 43).
- <sup>54</sup> See, e.g., US Federal Trade Commission, 'The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition', (2011) <<https://www.ftc.gov/sites/default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/110307patentreport.pdf>>.
- <sup>55</sup> See, e.g., Bronwyn H. Hall, Georg von Graevenitz, and Christian Helmers, 'Technology Entry in the Presence of Patent Thickets', (2021) 73 Oxford EP 903; Carl Shapiro, 'Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard-Setting in Innovation Policy and the Economy' in A.B. Jaffe, J. Lerner, and S. Stern (eds.) *Innovation Policy and the Economy*, vol. 1, (MIT Press 2001) 119; Robert P. Merges, 'Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations' (1996) 84 California LR 1293.
- <sup>56</sup> Shapiro (n 55).
- <sup>57</sup> See, e.g., U.S. Federal Trade Commission, 'To Promote Innovation: The Proper Balance of Competition and Patent Law Policy' (2003) <<https://www.ftc.gov/sites/default/files/documents/reports/promote-innovation-proper-balance-competition-and-patent-law-and-policy/innovationrpt.pdf>>.
- <sup>58</sup> Lemley and Shapiro (n 13).
- <sup>59</sup> See, e.g., Mark A. Lemley and Douglas Melamed, 'Missing the Forest for the Trolls' 113 Columbia Law Review 2117 (2013).
- <sup>60</sup> See, e.g., US Federal Trade Commission (n 14); Europe Economics (n 14).
- <sup>61</sup> See, e.g., Valerio Sterzi, 'Patent Assertion Entities and Patent Ownership Transparency: Strategic Recording of Patent Transactions at the USPTO' (2021) 17 JCLE 978; Lauren Cohen, Umit G. Gurun, and Scott Duke Kominers, 'Patent Trolls: Evidence from Targeted Firms' (2019) 65 MSS 5461; Lemley and Feldman (n 15); Mark A. Lemley and Robin Feldman, 'Patent Licensing, Technology Transfer, and Innovation' (2016) 106 American ER 188; Scott Morton and Shapiro (n 15); Christopher A. Cotropia, Jay P. Kesan, and David L. Schwartz, 'Unpacking Patent Assertion Entities (PAEs)' (2014) 99 Minnesota LR 649. On the presence of PAEs in the EU, see Valerio Sterzi, Cecilia Maronero, Gianluca Orsatti, and Andrea Vezzulli, 'Non-Practicing Entities in Europe: An Empirical Analysis of Patent Acquisitions at the European Patent Office' (2024) 33 ICC 1271; Europe Economics (n 14); Stefania Fusco, 'Markets and Patent Enforcement: A Comparative Investigation of Non-practicing Entities in the United States and Europe,' (2013) 20 Michigan TTLR 439.
- <sup>62</sup> See, e.g., Lemley and Melamed (n 59).

- <sup>63</sup> See, e.g., Scott Morton and Shapiro (n 15), how the availability of injunctive relief may confer upon the patent holder a disproportionately powerful bargaining instrument (an outsized threat), namely, a threat that exceeds the incremental value of the patented technology to the user.
- <sup>64</sup> See, e.g., U.S. Federal Trade Commission (n 54).
- <sup>65</sup> ECJ, 16 July 2015, Case C-170/13, *Huawei Technologies Co Ltd v. ZTE Corp.*, EU:C:2015:477.
- <sup>66</sup> European Commission (n 7) 48–51.
- <sup>67</sup> See, e.g., IP2Innovate, European Automobile Manufacturers' Association, The App Association, Computer & Communications Industry Association, European Association of Automotive Suppliers, and Fair Standards Alliance (n 6); Sikorski (n 6).
- <sup>68</sup> See, e.g., Sikorski (n 6).
- <sup>69</sup> See, e.g., European Commission (n 7) 47.
- <sup>70</sup> *Ibid.*
- <sup>71</sup> Sikorski (n 6).
- <sup>72</sup> See, e.g., Jorge L. Contreras, 'A Brief History of FRAND: Analyzing Current Debates in Standard Setting and Antitrust Through a Historical Lens' (2015) 80 *Antitrust LJ* 39.
- <sup>73</sup> See, e.g., Brian J. Love, Yassine Lefouilli, and Christian Helmers, 'Do Standard-Essential Patent Owners Behave Opportunistically? Evidence From U.S. District Court Dockets' (2023) 25 *American LER* 300; Shapiro (n 13); Lemley and Shapiro (n 13); Joseph Farrell, John Hayes, Carl Shapiro, and Theresa Sullivan, 'Standard Setting, Patents, and Hold-Up' (2007) 74 *Antitrust LJ* 603.
- <sup>74</sup> See, e.g., Bowman Heiden and Justus Baron, 'The Economic Impact of Patent Holdout' (2023) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4505268](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4505268)>; Gerard Llobet and Jorge Padilla, 'A Theory Of Socially Inefficient Patent Holdout' (2023) 32 *JEMS* 424; Richard A. Epstein and Kayvan B. Noroozi, 'Why Incentives for "Patent Holdout" Threaten to Dismantle FRAND, and Why it Matters' (2017) 32 *Berkeley TLJ* 1381; Alexander Galetovic and Stephen Haber, 'The Fallacies of Patent-Holdup Theory' (2017) 13 *JCLE* 1; J. Gregory Sidak, 'The Antitrust Division's Devaluation of Standard-Essential Patents' (2015) 104 *Georgetown LJ* 48.
- <sup>75</sup> See, e.g., Borgogno and Colangelo (n 3); Jacob and Nikolic (n 3).
- <sup>76</sup> European Commission (n 18) 58.
- <sup>77</sup> See Justus Baron, Pere Arque-Castells, Amandine Leonard, Tim Pohlmann, and Eric Sergheraert, 'Empirical Assessment of Potential Challenges in SEP Licensing' (2023) <<https://www.iplytics.com/wp-content/uploads/2023/04/Empirical-Assessment-of-Potential-Challenges-in-SEP-Licensing.pdf>>, reporting that existing empirical evidence on the causal effects of current SEP licensing conditions is largely inconclusive.
- <sup>78</sup> See, e.g., Drexler, Harhoff, Conde Gallego, and Slowinski (n 3); Contreras (n 3).
- <sup>79</sup> See, e.g., Jorge L. Contreras, 'Much Ado About Holdup' (2019) *UILR* 875.
- <sup>80</sup> Colleen V. Chien, 'Holding Up and Holding Out' (2014) 21 *Michigan TTLR* 1.
- <sup>81</sup> *Huawei* (n 65) paras. 65–67.
- <sup>82</sup> *Unwired Planet v Huawei*, [2020] UKSC 37, paras. 10 and 61.
- <sup>83</sup> *Ibid.* para. 167.
- <sup>84</sup> *Lenovo Group Ltd v Telefonaktiebolaget LM Ericsson (publ)* [2025] EWCA Civ 182, para. 6.
- <sup>85</sup> European Commission (n 1) Explanatory Memorandum, 4.
- <sup>86</sup> See European Commission (n 1) Explanatory Memorandum, 4; European Commission (n 18) 154 and 158; IP2Innovate (n 6); Sikorski (n 6).
- <sup>87</sup> Bundesgerichtshof (BGH), 27 January 2026, Case KZR 10/25.
- <sup>88</sup> For an illustration of the different views in the literature, see, for example, Feng Chen, Yu Hou, Jiaping Qiu, and Gordon Richardson, 'Chilling effects of patent trolls' (2023) 52 *RP* 104702; Josh Feng and Xavier Jaravel, 'Crafting Intellectual Property Rights: Implications for Patent Assertion Entities, Litigation, and Innovation' (2020) 12 *American EJAE* 140; Stephen H. Haber and Seth H. Werfel, 'Patent Trolls as Financial Intermediaries? Experimental Evidence' (2016) 149 *EL* 64.
- <sup>89</sup> See, e.g., Sterzi, Maronero, Orsatti, and Vezzulli (n 59), distinguishing among litigation NPEs, portfolio NPEs, and technology NPEs based on the types of patents they acquire, and finding that litigation NPEs tend to acquire patents

with a higher risk of infringement but comparable technological quality to those held by practicing entities, whereas patent aggregators and technology NPEs acquire patents of higher technological quality than those acquired by practicing firms.

- <sup>90</sup> See Kristen Osenga, 'Formerly Manufacturing Entities: Piercing the "Patent Troll" Rhetoric' (2014) 47 Connecticut LR 435, 437, noting that "[e]veryone seems to hate 'patent trolls'".
- <sup>91</sup> Sujitha Subramanian, 'Different Rules for Different Owners: Does a Non-competing Patentee Have a Right To Exclude? A Study of Post-eBay Cases' (2008) 39 IIC 419.
- <sup>92</sup> Dijkman (n 43).
- <sup>93</sup> European Commission, 'Support study for the ex-post evaluation and ex-ante impact analysis of the IPR enforcement Directive (IPRED)—Final report' (2017) <<https://data.europa.eu/doi/10.2873/903149>>.
- <sup>94</sup> European Commission (n 7).
- <sup>95</sup> *Ibid.*, 30–32 and 50.
- <sup>96</sup> *Ibid.*
- <sup>97</sup> *Ibid.*
- <sup>98</sup> *Ibid.*, 51.
- <sup>99</sup> *Ibid.*
- <sup>100</sup> *Ibid.*, 51–69.
- <sup>101</sup> *Ibid.*
- <sup>102</sup> *Ibid.*
- <sup>103</sup> *Ibid.*
- <sup>104</sup> *Ibid.*
- <sup>105</sup> See, in a similar vein, Francesca Ferrari, 'Resisting the Transplant: Why the EU Must Preserve IPRED's Rule-Based Proportionality in IP Enforcement' (2025) <<https://www.4ipcouncil.com/research/resisting-transplant-why-eu-must-preserve-ipreds-rule-based-proportionality-ip-enforcement>>.
- <sup>106</sup> European Commission (n 7) 49.
- <sup>107</sup> *Ibid.*
- <sup>108</sup> Agreement on a Unified Patent Court, [2013] OJ C 175/1.
- <sup>109</sup> Rules of Procedure of the Unified Patent Court, as adopted by decision of the Administrative Committee on 8 July 2022, Rule 118(1), <[https://www.unifiedpatentcourt.org/sites/default/files/upc\\_documents/Consolidated%20Rules%20of%20Procedure%20UPC\\_EN.pdf](https://www.unifiedpatentcourt.org/sites/default/files/upc_documents/Consolidated%20Rules%20of%20Procedure%20UPC_EN.pdf)>.
- <sup>110</sup> *Meril* (n 25).
- <sup>111</sup> *Meril* (n 25), para. 189.
- <sup>112</sup> *Ibid.*
- <sup>113</sup> *Ibid.*
- <sup>114</sup> *Ibid.*, para. 190.
- <sup>115</sup> *Ibid.*, para. 191.
- <sup>116</sup> *eBay* (n 20).
- <sup>117</sup> See, e.g., Thomas Cotter, *Comparative Patent Remedies* (Oxford University Press 2013), 99–100.
- <sup>118</sup> *eBay* (n 20) 393–394.
- <sup>119</sup> See, e.g., Cotter (n 117); John M. Golden, 'United States', in *Injunctions in Patent Law. Trans-Atlantic Dialogues on Flexibility and Tailoring* (n 43) 291.
- <sup>120</sup> *eBay* (n 20) 394–395.
- <sup>121</sup> *Ibid.*, 395–397.
- <sup>122</sup> See, e.g., the different views expressed by Lemley and Shapiro (n 13) and by Vincenzo Denicolò, Damien Geradin, Anne Layne-Farrar, and Jorge Padilla, 'Revisiting Injunctive Relief: Interpreting *eBay* in High-Tech Industries with Non-Practicing Patent Holders' (2008) 4 JCLE 571. See also, more recently, Fred Bereskin, Po-Hsuan Hsu, and Huijun Wang, 'Growth of Firms under Injunction Risk' (2026) 69 JCLE 175, finding that the removal of automatic injunctions

as result of *eBay* is associated with increased profitability and increased stock prices for ICT-related defendants as the ruling encourages firms to develop new products and thus earn more profits, with consequent implications for economic growth.

- <sup>123</sup> See Kristina M.L. Acri née Lybecker, 'Injunctive Relief in Patent Cases: The Impact of *eBay*' (2024) 38 *Harvard JLT* 735, finding that, since *eBay*, requests for permanent injunctions in patent cases fell by 87.4% for NPEs and 65% for operating companies. In a similar vein, see Christopher B. Seaman, 'Permanent Injunctions in Patent Litigation After *eBay*: An Empirical Study' (2016) 101 *Iowa LR* 1949; Colleen V. Chien and Mark A. Lemley, 'Patent Holdup, the ITC, and the Public Interest' (2012) 98 *Cornell LR* 1.
- <sup>124</sup> See Jorge L. Contreras, 'Reconsidering the Patent Jurisdiction of the International Trade Commission' (2024) 38 *Harvard JLT* 771; Chien and Lemley (n 115). See also Jonas Anderson, Jorge L. Contreras, and Sapna Kumar, 'The Unnecessary Agency', *Vanderbilt Law Review* (forthcoming).
- <sup>125</sup> Contreras (n 124); Chien and Lemley (n 123).
- <sup>126</sup> See, e.g., Kristen Osenga, 'Efficient' Infringement and Other Lies' (2022) 52 *Seton HLR* 1085, arguing that, by rendering injunctive relief in patent infringement cases no longer presumptively available, the *eBay* test has facilitated "predatory infringement" strategies, in which alleged infringers may rationally adopt a commercial strategy of "infringe now, pay later," calculating that, at worst, they will be required to pay damages *ex post*, and, at best, they may succeed in exhausting the patent holder through protracted litigation, ultimately inducing abandonment of the claim. See also Acri née Lybecker (n 123); Kirti Gupta and Urska Petrovic, 'Evidence of Systematic "Patent Holdout"' (2023) 38 *Berkeley TLJ* 575; Bowman Heiden and Nicolas Petit, 'Patent "Trespass" and the Royalty Gap: Exploring the Nature & Impact of Patent Holdout' (2018) 34 *Santa Clara HTLJ* 179.
- <sup>127</sup> <[https://www.coons.senate.gov/wp-content/uploads/media/doc/bill\\_text\\_for\\_restore\\_act\\_2025.pdf](https://www.coons.senate.gov/wp-content/uploads/media/doc/bill_text_for_restore_act_2025.pdf)>.
- <sup>128</sup> See Chris Coon, 'Senator Coons, Colleagues Introduce Bipartisan, Bicameral Bill to Restore Injunctive Relief for Patent Infringement' (2025) <<https://www.coons.senate.gov/news/press-releases/senator-coons-colleagues-introduce-bipartisan-bicameral-bill-to-restore-injunctive-relief-for-patent-infringement-2025/>>, citing Acri née Lybecker (n 123). In a similar vein, see also Adam Mossoff, 'The Injunction Function: How and Why Courts Secure Property Rights in Patents' (2021) 96 *Notre Dame LR* 1581, arguing that *eBay* has resulted in a significant reduction in availability of injunctive remedies for patent infringements, especially in the context of SEPs covering WiFi or 5G telecommunications technologies in mobile devices.
- <sup>129</sup> See *Radian Memory Systems LLC v. Samsung Electronics Co.*, Case 2:24-cv-01073 (E.D. Tex. 2025), quoting *Apple Inc. v. Samsung Elecs. Co.*, 809F.3d 633, 647 (Fed. Cir. 2015) and *Smith Int'l, Inc. v. Hughes Tool Co.*, 718F.2d 1573, 1577-78 (Fed. Cir. 1983).
- <sup>130</sup> *Radian Memory Systems* (n 129) quoting *Nichia Corp. v. Everlight Americas, Inc.*, 855F.3d 1328, 1341 (Fed. Cir. 2017).
- <sup>131</sup> *Radian Memory Systems* (n 129) quoting, e.g., *TEK Glob., S.R.L. v. Sealant Sys. Int'l, Inc.*, 920F.3d 777, 792 (Fed. Cir. 2019), *Metalcraft of Mayville, Inc. v. The Toro Co.*, 848F.3d 1358, 1368 (Fed. Cir. 2017), and *i4i Ltd. P'ship v. Microsoft Corp.*, 598F.3d 831, 862 (Fed. Cir. 2010).
- <sup>132</sup> U.S. International Trade Commission, *Certain Dynamic Random Access Memory (DRAM) Devices*, (2025) Investigation 337-1472, Docket No. 3854.
- <sup>133</sup> *Ibid.*, 2, quoting *Hi-Lo TV Antenna Corp. v. Rogers*, 274F.2d 661, 665 (7th Cir. 1960).
- <sup>134</sup> *Certain Dynamic Random Access Memory (DRAM) Devices* (n 132) 2.
- <sup>135</sup> *Ibid.* However, see Michela Bonani, 'Standard-Setting and the Incentives to Innovate: Evidence from the IEEE Patent Policy Update' (2026) 104 *IJO* 103235, finding that, although the Institute of Electrical and Electronics Engineers' (IEEE) 2015 patent policy revision—which limited SEP holders' ability to seek injunctive relief and encouraged royalty determinations based on the smallest salable patent-practicing unit—created challenges for SEP owners, the resulting increase in innovation among other firms more than offset these adverse effects; Christian Helmers and Brian J. Love, 'Patent Law Reform And Innovation: An Empirical Assessment of the Last 20 Years' (2024) 79 *IRLE* 106210, finding a positive association between *eBay* and R&D spending by firms that were relatively more exposed to patent litigation prior to the Court's decision; Filippo Mezzanotti and Timothy Simcoe, 'Patent Policy and American Innovation After *eBay*: An Empirical Examination' (2019) 48 *RP* 1271, presenting empirical evidence that *eBay* did not affect patenting, R&D investment, productivity, or venture capital investment.
- <sup>136</sup> *Communications Inc. v. Samsung Electronics Co.*, Case 2:23-cv-00587 (E.D. Tex. 2026).
- <sup>137</sup> *Ibid.*

- <sup>138</sup> U.S. Patent and Trademark Office, 'USPTO announces SEP Working Group', (2025) <<https://www.uspto.gov/subscription-center/2025/uspto-announces-sep-working-group>>.
- <sup>139</sup> Ibid.
- <sup>140</sup> Ibid.
- <sup>141</sup> Ibid.
- <sup>142</sup> U.S. Department of Justice, U.S. Patent and Trademark Office, and National Institute of Standards and Technology, 'Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments', (2019) <<https://www.justice.gov/atr/page/file/1228016/download>>. See also Makam Delrahim, 'The "New Madison" Approach to Antitrust and Intellectual Property', (2018) Remarks at the University of Pennsylvania Law School, <<https://www.justice.gov/opa/speech/file/1044316/download>>.
- <sup>143</sup> See, e.g., U.S. Department of Justice, 'Statement of Interest in Continental Automotive System Inc. v. Avanci LLC et al.', (2020) <<https://www.justice.gov/atr/case-document/file/1253361/download>>; U.S. Department of Justice, 'Statement of Interest Concerning Qualcomm's Motion for Partial Stay of Injunction Pending Appeal', (2019) <<https://www.justice.gov/atr/case-document/file/1183936/download>>.
- <sup>144</sup> Delrahim (n 142).
- <sup>145</sup> See Makan Delrahim, 'Take It to the Limit: Respecting Innovation Incentives in the Application of Antitrust Law' (2017) Remarks as Prepared for Delivery at the USC Gould School of Law, <<https://www.justice.gov/archives/opa/speech/file/1010746/dl?inline=>>, criticizing Judge Posner's decision in *Apple Inc. v. Motorola, Inc.*, 869F. Supp. 2d 901 (N.D. Ill. 2012).
- <sup>146</sup> Dina Kallay, 'That's What F/RANDs Are For' and Antitrust Implications When They're Gone', (2025) Keynote at Concurrences Dinner, <<https://www.justice.gov/opa/speech/daag-dina-kallay-delivers-keynote-concurrences-dinner-new-york>>.
- <sup>147</sup> Ibid. See also Dina Kallay, 'Fueling Innovation: Antitrust and Intellectual Property in Support of American Technological Leadership' (2026) Remarks at the Center for Strategic and International Studies (CSIS) Leadership, <<https://www.justice.gov/opa/speech/fueling-innovation-antitrust-and-intellectual-property-support-american-technological>>, arguing that an important aspect of an IP regime is to protect parties' right to seek relief from the courts or other adjudicatory bodies (e.g., the US International Trade Commission) when disputes involving IP arise and patent holders, including SEP holders, should not face antitrust scrutiny and the possibility of treble damages for seeking redress in the courts.
- <sup>148</sup> See, e.g., Giuseppe Colangelo, 'The Politicization of IP Protection: The Case of Standard Essential Patents' (2025) 47 *European IPR* 121.
- <sup>149</sup> See, e.g., Office of the U.S. Trade Representative (n 20); European Commission, 'Report on the Protection and Enforcement of Intellectual Property Rights in Third Countries', SWD (2021) 97 final, 19.
- <sup>150</sup> European Commission (n 24).
- <sup>151</sup> European Commission (n 24).
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