

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

E2INTERACTIVE, INC. and
INTERACTIVE COMMUNICATIONS
INTERNATIONAL, INC.,

OPINION AND ORDER

09-cv-629-slc

Plaintiffs,

v.

BLACKHAWK NETWORK, INC.,

Defendant.

Following a six-day trial in this patent infringement lawsuit related to processing prepaid gift cards, the jury found that defendant Blackhawk Network, Inc. infringed U.S. Patent No. 7,578,439 (the '439 patent) and awarded plaintiffs e2Interactive, Inc. and Interactive Communications International, Inc. (collectively InComm) \$3,475,159.95 in reasonable royalties. Before the court are the following motions:

1. Blackhawk's motion to stay further proceedings pending the final outcome of the reexamination, dkt. 518, and motion for leave to file a reply brief in support of the motion, dkt. 522.
2. InComm's motion for a permanent injunction. Dkt. 482.
3. Blackhawk's request to stay the grant of a permanent injunction pending appeal. Dkt. 500 at 18-23.

InComm's remaining motion to alter or amend judgment with respect to pre- and post-judgment interest and supplemental damages, dkt. 478, will be addressed in a separate order.

Because I conclude that InComm has satisfied the four-factor test for obtaining a permanent injunction set out in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), I am granting its request for a permanent injunction. I am denying Blackhawk's motions to stay and motion for leave to file a reply brief. Delaying the resolution of this lawsuit at this late stage would unduly prejudice InComm and not result in judicial economy.

OPINION

I. Motion to Stay Proceedings Pending Reexamination

Blackhawk requests that the court stay further proceedings in this case pending the final outcome of the reexamination of the '439 patent. On September 25, 2012, the patent office issued a Right of Appeal Notice in the *inter partes* reexamination of the '439 patent, confirming the rejection of claims 1 and 19 over five different combinations of prior art. InComm has appealed that decision to the Patent Trial and Appeal Board (PTAB). Blackhawk asserts that a stay is justified because there is an 80% likelihood that the PTAB will find claims 1 and 19 invalid. InComm disputes this assertion, claiming that statistics show that there is only a 47% to 57% chance that the appeal will result in invalidation of the claims.

District courts have broad discretion to manage their dockets, including the power to grant a stay of proceedings. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *Procter & Gamble Co. v. Kraft Foods Global, Inc.*, 549 F.3d 842, 848-49 (Fed. Cir. 2008); *Gould v. Control Laser Corp.*, 705 F.2d 1340, 1342 (Fed. Cir. 1983). In deciding whether to stay litigation pending reexamination, courts typically consider whether a stay will: (1) unduly prejudice or present a clear tactical disadvantage to the nonmoving party, (2) simplify the issues in question and trial of the case, and (3) reduce the burden of litigation on the parties and the court. *Marvellous Day Elec. (S.Z.) Co., Ltd. v. Ace Hardware Corp.*, ___ F. Supp. 2d ___, 2012 WL 4579511, *9 (N.D. Ill. Oct. 2, 2012); *Peach State Labs, Inc. v. Environmental Mfg. Solutions, LLC*, 2012 WL 503839, *3 (M.D. Fla. Jan. 13, 2012); *see also Orion IP, LLC, v. Mercedes-Benz USA, LLC*, 2008 WL 5378040, *7 (E.D. Tex. Dec. 22, 2008), *rev'd on other grounds*, 605 F.3d 967 (Fed. Cir. 2010) (listing third factor as “whether discovery is complete and whether a trial date has been set”).

Blackhawk contends that a stay would simplify the issues and reduce the burden both on this court in deciding the pending motions and on the federal circuit on appeal. In addition, it argues that a stay would not prejudice InComm because the infringing source code already has

been removed. At this late stage, Blackhawk's arguments are not particularly compelling. *See Peach State*, 2012 WL 503839 at *3 (noting same general rule). Blackhawk petitioned for *inter partes* reexamination almost a year after InComm filed this lawsuit and did not move for a stay based on those proceedings until three days after the court denied its post-verdict motions. *See Belden Technologies Inc. v. Superior Essex Communications LP*, 2010 WL 3522327, *2 (D. Del. Sept. 2, 2010) (request for reexamination made well after onset of litigation followed by subsequent request to stay may give moving party inappropriate tactical advantage). The court and the parties already have spent considerable resources trying this case to a verdict. All that's left are InComm's request for a permanent injunction and its motion to amend the judgment to include pre- and post-judgment interest and supplemental damages, both of which the court had started to address before Blackhawk filed its motion for a stay. In sum, absent remand from a reviewing court, this court's involvement in this lawsuit is almost finished.¹ Accordingly, the factors regarding simplification of the issues or reducing the burden of litigation weigh heavily against granting a stay.

Further, granting a stay that could last a year or more would prejudice InComm, which filed its lawsuit in this district to take advantage of this court's fast trial track. InComm has an interest in pursuing the finality of the jury's verdict. *See Orion*, 2008 WL 5378040, at *8 (finding same); *see also Silicon Graphics, Inc. v. ATI Technologies, Inc.*, 2007 WL 5433478, *2 (W.D. Wis. Aug. 8, 2007) (noting in dicta that stay would not be granted because benefits that might accrue from reexamination proceedings would not outweigh prejudice to plaintiff or court's interest in avoiding piecemeal litigation and securing just, speedy and inexpensive determination of action). Staying the case now would give Blackhawk the tactical advantage of

¹ Given that Blackhawk's Rule 50 and 59 motions were untimely, the appellate court likely will apply the more deferential standard of review for Rule 60 motions, making remand far less likely. *See* *dk. 517* at 4.

benefitting from a second opportunity to challenge invalidity, even though Blackhawk chose not to challenge the patent's validity in this lawsuit. *See Orion*, 2008 WL 5378040, at *8 (noting same where defendant had tried issue of invalidity).

Although Blackhawk maintains that the *inter partes* decision is likely to be affirmed, my review of the statistics and studies cited by the parties indicates that the PTAB affirmance rate varies, with a significant number of cases being reversed or affirmed only in part. *See* dkt. 518 at 7-8; dkt. 520 at 3-4. Further, as discussed below, the parties are direct competitors and InComm stands to suffer irreparable injury without the benefit of a permanent injunction. *See Tesco Corp. v. Weatherford Intern., Inc.*, 599 F. Supp. 2d 848, 851 (S.D. Tex. 2009) (“Where the parties are direct competitors, a stay would likely prejudice the non-movant.”). The Court of Appeals for the Federal Circuit has made clear that under most circumstances, a district court should not grant both a preliminary injunction and a stay because they serve cross purposes. *See Procter & Gamble Co. v. Kraft Foods Global, Inc.*, 549 F.3d 842, 849 (Fed. Cir. 2008) (noting that preliminary injunction granted where there is no substantial issue of patent validity but stay granted only where there is substantial patentability issue). Accordingly, I am denying the motion to stay pending the outcome of the reexamination.

II. Permanent Injunction

InComm requests that the court enjoin Blackhawk and those acting in concert with it from making, using, offering for sale or selling in the United States, the methods and computer programs embodied in claims 1 and 19 of the '439 patent, or a computer program or process “that is not more than a colorable variation thereof during the remaining life of the patent.” Dkt. 483 at 2. InComm also requests that Blackhawk provide it with periodic audit rights at InComm's expense to confirm Blackhawk's compliance with the injunction. Blackhawk opposes both the grant of an injunction and the scope of the one sought by InComm.

Under 35 U.S.C. § 283, a court “may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.” In *eBay*, the Supreme Court rejected the view that, in patent cases, “injunctions should be denied only in the unusual case, under exceptional circumstances and in rare instances . . . to protect the public interest.” *Id.*, 547 U.S. at 394 (internal quotations omitted). Rather, the same standard for obtaining a permanent injunction applies in patent cases as in any other case. InComm must show that: (1) it has suffered an irreparable injury; (2) the remedies available at law are inadequate to compensate for that injury; (3) considering the balance of hardships between InComm and Blackhawk, a remedy in equity is warranted; and (4) the public interest would not be disserved by a permanent injunction. *Id.* at 391; *i4i Ltd. Partnership v. Microsoft Corp.*, 598 F.3d 831, 861 (*i4i II*) (Fed. Cir. 2010).

Although the Supreme Court has rejected the general rule that an infringement verdict alone provides the basis for a permanent injunction, “in two separate concurrences in *eBay*, seven of the nine Justices noted that . . . courts still ought to be conscious of the fact that a permanent injunction is granted in many or most patent cases where infringement is proven.” *Metso Minerals, Inc. v. Powerscreen Intern. Distribution Ltd.*, 788 F. Supp. 2d 71, 73 (E.D.N.Y. 2011) (citing *eBay*, 547 U.S. at 395–96). “Four of these seven concurring Justices further noted that this precedent was particularly relevant to cases where the patent holder practiced the patent that was infringed.” *Id.* at 73-74.

A. Irreparable Harm

InComm argues that it will suffer irreparable harm in the absence of an injunction because it uses the patented invention with every stored-value card it distributes and is in direct competition with Blackhawk. Although Blackhawk contends that it has removed the infringing code and does not practice the infringing method, InComm believes that Blackhawk could just

as easily reinstitute the code. In making this argument, InComm points out that the best case for obtaining a permanent injunction often occurs when the plaintiff and defendant are competing in the same market. In that context, the harm in allowing the defendant to continue infringing is the greatest. *E.g., i4i Ltd. Partnership v. Microsoft Corp.*, 589 F.3d 1246, 1276 (*i4i I*) (Fed. Cir. 2009).

Blackhawk responds that the mere fact that it is InComm's direct competitor is not enough, arguing that InComm must show that it has lost or will lose an actual share of the market. Blackhawk claims that InComm cannot make such a showing because there is no evidence that InComm ever lost a customer because of Blackhawk or that any Blackhawk customer even has requested the patented feature. In support of its contention, Blackhawk relies on district court cases, including several from the District of Delaware and one from this court, in which the court found no irreparable injury at least in part because the plaintiff could not point to specific customers that it had lost or stood to lose. *See Belden Technologies Inc. v. Superior Essex Communications LP*, 802 F. Supp. 2d 555, 577 (D. Del. 2011); *LG Electronics U.S.A., Inc. v. Whirlpool Corp.*, 798 F. Supp. 2d 541, 563 (D. Del. 2011); *Edwards Lifesciences AG v. CoreValve, Inc.*, 2011 WL 446203, *14 (D. Del. Feb. 7, 2011); *Douglas Dynamics, LLC v. Buyers Products Co.*, case no. 09-cv-261-wmc, dkt. 530 at 4 (W.D. Wis. 2011); *Humanscale Corp. v. CompX Int'l, Inc.*, 2010 WL 1779963, *3 (E.D. Va. Apr. 29, 2010); *Advanced Cardiovascular Systems, Inc. v. Medtronic Vascular, Inc.*, 579 F. Supp. 2d 554, 559 (D. Del. 2008).

The Supreme Court made clear in *eBay* that there are no categorical rules or presumptions at a court's disposal when deciding whether to enter a permanent injunction. *ePlus, Inc. v. Lawson Software, Inc.*, 2011 WL 2119410, *6 (E.D. Va. May 23, 2011). Although evidence of past harm to a patentee's market share, revenues and brand recognition is relevant for determining irreparable injury, it does not establish a general rule. *i4i II*, 598 F.3d at 861-82; *see also Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1150 (Fed. Cir. 2011) ("facts relating to

the nature of the competition between the parties undoubtedly are relevant to the irreparable harm inquiry”). For example, in *i4i II*, the Federal Circuit held that the plaintiff was not required to show that specific customers stopped using its products because they switched to the infringing products; it was sufficient that the district court had considered circumstantial evidence that defendant’s infringement rendered plaintiff’s product obsolete in most of its custom market, causing plaintiff to lose market share and change its business strategy. *i4i II*, 598 F.3d at 862.

Unlike this case, almost all of the district court cases cited by Blackhawk involved parties that were part of a multi-competitor market. Therefore, without specific evidence about customers and market shares, it was impossible for the courts in those cases to determine what portion of the market the plaintiff lost as a direct result of the infringement. For example, in *L.G.*, the lack of specific evidence tying Whirlpool’s lost sales to LG’s infringement in the multi-competitor refrigerator market made it impossible for the court to determine whether the lost sales were due to customers’ desire for other features, to sales lost to competitors other than LG. *L.G.*, 798 F. Supp. 2d at 563. The court explained that because the “irreparable” component of Whirlpool’s injury began several years earlier when the introduction of L.G.’s accused product “shaped the market,” the harm would continue even if a permanent injunction were issued. *Id.* The plaintiff in *Edwards* faced a similar problem: because defendant CoreValve was the first to enter the market for the technology in question and had the opportunity to establish customer relationships, the alleged harm would continue because a permanent injunction could not reverse the reputational damage already done to Edwards. 2011 WL 446203, *14.

In sum, in *L.G.* and *Edwards*, the courts were concerned because it was not clear that plaintiffs faced a risk of future harm or that a permanent injunction would even make a difference. The same is true in almost all of the other cases cited by Blackhawk. *See Belden*, 802

F. Supp. 2d at 577 (small market share changes could not be attributed to defendant in industry that had experienced overall decrease in market as result of economy and high level of competition); *Advanced Cardiovascular Systems*, 579 F. Supp. 2d at 559 (no permanent injunction granted where defendant held smallest portion of market after infringement and plaintiff recaptured lost market share and was currently leading producer); *Douglas Dynamics*, dkt. 502-1 at 3-4 (although parties were part of multi-competitor snowplow market, there was no evidence that they were direct competitors or that accused product was comparable enough to result in plaintiff's losing sales). Although proving causation in a multi-competitor market was not at issue in *Humanscale*, that case also involved unique circumstances not present in the instant case: *Humanscale's* patent was set to expire in six weeks, and the court determined that this fact, combined with the lack of evidence that the plaintiff directly competed with defendant, did not justify the award of a permanent injunction. 2010 WL 1779963, *3.

In the instant case, the evidence adduced at trial showed that InComm and Blackhawk are direct competitors who fight for the same business in the third-party prepaid card industry and are primary competitors in the stored-value market. Further, InComm actually uses the patented technology in all of its products and does not issue licenses. Therefore, it stands to reason that Blackhawk's gain is InComm's loss as far as customers go. Accordingly, even though InComm has not quantified its loss of market share with great specificity, I am satisfied that there is sufficient evidence that Blackhawk competes with InComm for customers.

More importantly, this case involves unique circumstances because the accused product is a computer program and method, which by its nature is easily modified to either include or exclude a particular function. Blackhawk was able to remove the infringing portion of the source code over the course of a weekend, perhaps over the course of a lunch hour. It also is clear from the evidence presented at trial that Blackhawk has the flexibility to adapt its product almost immediately to meet customer requirements. For example, Sean Anderson, Senior Director for

Merging Products at Blackhawk, testified at trial that if a customer indicated that they wanted a particular function—such as terminal level validation—Blackhawk could add it for them, even though the function was not implemented already. Trial Transcript, 3-A-25-27. According to Anderson, Blackhawk instruction to its salespeople was “Just tell us and we’ll flip a switch and it suddenly works.” *Id.* at 27. Given the ease with which Blackhawk can modify its product, and the difficulty InComm would encounter attempting to detect and establish renewed infringement, the risk to InComm is great. As a result, the irreparable harm factor weighs in InComm’s favor.

B. Inadequate Remedies

The analysis required to determine whether remedies at law are inadequate overlaps with the analysis for irreparable harm. *MercExchange, L.L.C. v. eBay, Inc.*, 500 F. Supp. 2d 556, 582 (E.D. Va. 2007). On this point, Blackhawk repeats its arguments regarding the lack of evidence of lost sales and goodwill, then asserts that InComm cannot show that monetary damages would not adequately compensate it for future infringement because the jury based its damages award on a royalty to InComm of \$.01 per transaction. However, as InComm points out, the jury’s award only compensated InComm for past infringement.

Blackhawk counters that InComm’s damages expert opined that in a hypothetical negotiation, InComm might agree to a royalty of \$.05 per transaction, indicating that a legal remedy could compensate InComm for future infringement. However, a plaintiff’s general policy of not licensing its patent is evidence of the inadequacy of money damages. *See Broadcom Corp. v. Qualcomm Inc.*, 543 F.3d 683, 702-03 (Fed. Cir. 2008) (approving district court’s consideration of plaintiff’s general policy of not licensing patents in affirming district court’s imposition of a permanent injunction); *Trading Technologies Intern., Inc. v. eSpeed, Inc.*, 2008 WL

4531371, *4 (N.D. Ill. May 22, 2008) (noting that courts before and after *eBay* have reached this conclusion).

Evidence adduced at trial shows that InComm is not in the business of licensing its patents unless the patents are used by the licensee to provide services to or on behalf of InComm. Importantly, InComm never has licensed any of its patents to a competitor. Compensating InComm with monetary damages would be akin to forcing it into a licensing agreement with Blackhawk that “does not contain the myriad protections that a licensing agreement would normally possess.” *Trading Technologies*, 2008 WL 4531371, *4; *see also Broadcom*, 543 F.3d at 703 (approving district court’s consideration of same).

True, Blackhawk currently is not using the patented program and method, but the apparent ease with which the program can be altered would make it difficult to detect future infringement and to prove which transactions were in or out as far as future damages. Difficulty estimating monetary damages is evidence that remedies at law are inadequate. *i4i II*, 598 F.3d at 862 (citing *Broadcom*, 543 F.3d at 703–04). Given these considerations, this factor weighs in InComm’s favor.

C. Balance of Hardships

“The ‘balance of hardships’ assesses the relative effect of granting or denying an injunction on the parties.” *i4i II*, 598 F.3d at 862. Here, the patented program and method is central to InComm’s business because it uses this technology in all of its products. Blackhawk argues that an injunction will not benefit InComm because Blackhawk already has deleted the infringing code. But as already noted, Blackhawk easily could reinstall the offending code, and it would be difficult for InComm to determine if or when this had happened. This leaves InComm at genuine risk.

Blackhawk also points out that reexamination proceedings may be relevant to the balance of hardships analysis. *See Belden*, 802 F. Supp. 2d at 577 (considering status of reexamination proceedings in analysis of balance of hardships). This is true, but it seems that issuing the requested injunction could not adversely affect Blackhawk because Blackhawk claims that it never used the infringing code in the first place, and its removal mid-trial has had no impact on Blackhawk's operations. The great importance of the patented method to InComm, balanced against the apparently complete lack of impact on Blackhawk and its customers, weighs toward issuing a permanent injunction.

D. Public Interest

Similar to the balance of hardships analysis, “the touchstone of the public interest factor is whether an injunction, both in scope and effect, strikes a workable balance between protecting the patentee's rights and protecting the public from the injunction's adverse effects. *i4i II*, 598 F.3d at 863 (citing *Broadcom*, 543 F.3d at 704). The heart of the patent grant is the right to exclude. *See* 35 U.S.C. § 154(a)(1) (“Every patent shall contain . . . a grant to the patentee . . . of the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States.”). Courts give “considerable weight to the strong public interest in favoring entry of injunctive relief to protect . . . patent rights.” *ePlus*, 2011 WL 2119410, at *17; *see also ActiveVideo Networks, Inc. v. Verizon Communications, Inc.*, 694 F.3d 1312, 1341 (Fed. Cir. 2012) (enforcing right to exclude generally serves public interest). Further, in cases like this one, “[w]here products do not relate to a significant compelling public interest, such as health or safety, this factor weighs in favor of an injunction.” *Mass Engineered Design, Inc. v. Ergotron, Inc.*, 633 F. Supp. 2d 361, 394 (E.D. Tex. 2009). Although the court must balance that interest with the potential harm that Blackhawk's customers will suffer if an injunction is entered,

Blackhawk has admitted that its customers did not and will not suffer any harm. As a result, the public interest factor weighs fully in InComm’s favor.

E. Scope of Injunction

Blackhawk has responded to InComm’s proposed order for a permanent injunction with its own alternative proposed order. *See* dkts. 482, Exh. 1 and 502, Exh. 3. In its reply brief in support of its motion for a permanent injunction, InComm did not respond to Blackhawk’s objections to InComm’s proposed order. As a result, I will assume that Blackhawk’s proposed changes are acceptable to InComm and will adopt the proposed order submitted by Blackhawk. Even if this is an incorrect assumption, Blackhawk’s concerns are well-founded.

Blackhawk argues that InComm’s description of the “infringing conduct” is overly broad because it refers to the “making, using, selling, or offering to sell . . . computer programs that meet the limitations of claims 1 or 19” and does not limit the prohibited acts to the methods and programs specifically found to have infringed, namely lines 50-55 and 57-67 of the RAPTransaction Validator Code of BLAST. Blackhawk is correct that the Federal Circuit has rejected as overly broad a permanent injunction that simply prohibits future infringement of a patent. *See International Rectifier Corp. v. IXYS Corp.*, 383 F.3d 1312, 1316 (Fed. Cir. 2004) (broad injunctions merely instructing enjoined party not to violate statute impermissibly increase likelihood of unwarranted contempt proceedings). Although InComm’s proposed order actually identifies these specific lines of code and asks that Blackhawk be required to remove and not reinsert this code, InComm also seeks to enjoin lines of code that perform “in whole or in part the same or substantially similar functionality as the removed lines of source code.” This language seems to attempt to read in a doctrine of equivalents limitation that was never raised at trial. Blackhawk’s revised paragraph 1 is more straightforward and better comports with Federal Circuit law.

Blackhawk objects to the quarterly audit schedule proposed by InComm as burdensome. Instead, it proposes limiting InComm to two audits a year with five business days' notice. I agree that this more relaxed schedule is adequate for InComm to ensure Blackhawk's compliance while minimizing the interruption of Blackhawk's business.

InComm proposes enjoining Blackhawk from advertising "authorization configuration, configuration driven Authorization/Validation stack across all channels, configurable transaction types per merchant, or transaction types permitted at merchant locations." See *dk. 482, exh. 1 at ¶ 4*. Blackhawk asserts that the provision is too broad because (1) InComm has not presented any evidence that the first two terms even relate to the patented invention and (2) Blackhawk's Senior Director of Emerging Product, Sean Anderson, specifically testified that the second term does not relate to the patented invention. Because the first two terms do not appear to relate to the patented invention, they will be removed.

Blackhawk contends that it is unnecessary to include InComm's proposal to enjoin Blackhawk from stating that it has "not used the infringing source code" and to require Blackhawk to provide written notice of the injunction within 10 days to anyone it employs or with whom it has a relationship. InComm has not explained why these particular provisions are necessary and there is no obvious logical reason to impose them, I am not including them in the injunction.

III. Request To Stay the Injunction Pending Appeal

The relevant factors in deciding whether to issue a stay pending appeal include: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); see *E.I. DuPont de Nemours*

& Co. v. Phillips Petroleum, 835 F.2d 277, 278 (Fed. Cir. 1987). Each factor does not require equal weight, and the likelihood of success on appeal is not a rigid concept. *Standard Havens Prods. v. Gencor Indus.*, 897 F.2d 511, 512 (Fed. Cir. 1990).

With regard to the first factor, Blackhawk refers to the arguments that it made in its motion for judgment as a matter of law. *See* *dk.* 491. The court considered each issue at length in its ruling on Blackhawk's motion and will not repeat that discussion here. *See* Order denying motion for judgment as a matter of law, *dk.* 517. Worth noting is that because Blackhawk's Rule 50 and 59 motions were untimely, I converted them to a motion for relief from judgment under Rule 60 and determined that Blackhawk did not establish the type of extraordinary circumstances necessary to warrant relief from judgment under the more restrictive standard applicable to Rule 60 motions. Given this procedural turn, Blackhawk can not demonstrate a strong likelihood of success on appeal that would overturn the jury's verdict on the infringed claims.

The second and third factors require a similar analysis as the balance of hardships factor required to award a permanent injunction. As discussed above, Blackhawk will not be irreparably injured absent a stay: it already has removed the infringing code from its system and it claims that it never practiced the infringing method anyway. Further, issuing a stay could cause or allow substantial injury to InComm, given how easily Blackhawk could reinstitute the code, and how difficult it would be to detect future infringement in a timely manner. The public interest factor is identical to that in the standard for permanent injunctions, and for the reasons stated above, it favors InComm. Accordingly, a stay of the permanent injunction pending appeal to the Court of Appeals for the Federal Circuit is not warranted.

ORDER

IT IS ORDERED that

- (1) Defendant's motion to stay further proceedings pending the outcome of the reexamination (dkt. 518) and motion for leave to file a reply brief in support of the motion to stay (dkt. 522) are DENIED.
- (2) Plaintiffs' motion for a permanent injunction (dkt. 482) is GRANTED. The court will enter the permanent injunction order proposed by defendant (dkt. 502, exh. 3).
- (3) Defendant's request to stay the permanent injunction pending appeal is DENIED.

Entered this 6th day of December, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge