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## eBay's Practical Effect: Two Differing Visions

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## ***EBAY'S PRACTICAL EFFECT: TWO DIFFERING VISIONS***

*Jay Dratler, Jr. \**

When I first read the Supreme Court's pathbreaking decision in *eBay*,<sup>1</sup> I was pleased as punch. Not only was the Court's decision unanimous, but the unanimous opinion was short, general, and clear.<sup>2</sup> There was none of the dissension on the Court that I had become so accustomed to in cases outside my primary fields of intellectual property and antitrust law.

All this seemed, I thought, to augur well for the new Roberts Court. Gone were the multiple, prolix, tortuous opinions, filled with long footnotes—and sometimes whole paragraphs of text—in which the Justices argued with each other over the tiniest minutiae in an effort to prove to themselves and the public who was right. The *eBay* Court had spoken with one voice. That voice rang out succinctly and with suitable generality for the highest court in a large, diverse, and complex nation.

In that regard, the *eBay* decision reminded me of the many seminal decisions from the Warren Court that I had read in law school. The unanimous Court seemed collected, sure of itself, and conscious of its role at the top of a very large judicial pyramid. Maybe, I thought, Chief Justice Roberts had turned a new page in the Court's history, and maybe that change was for the better.

After more than a year of reflection, I'm not so sure. The Court *had* spoken with one voice on abstract principle. It had decreed that permanent injunctions in patent cases henceforth would issue only after due consideration of the traditional four equitable factors.<sup>3</sup> No longer

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1. *eBay Inc. v. MercExchange, L.L.C.*, 126 S.Ct. 1837 (2006).

2. *See id.* at 1838-41 (less than four pages for unanimous opinion).

3. *See id.* at 1839 (reciting four factors, discussed *infra*); *id.* at 1841 ("We hold only that the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards.").

would they issue as a matter of course,<sup>4</sup> and no longer could the lower courts apply simplistic presumptions to shortcut the analysis.<sup>5</sup> Furthermore, the unanimous Court had penned strong *dicta* that the same principles should apply in copyright law.<sup>6</sup> The Court thus had set down firm, clear and easily understood abstract principles for the lower courts to apply to injunctions in intellectual property cases.

Application of those principles, however, is a different matter. Beyond repudiating shortcuts, the unanimous opinion gave few hints as to how, if at all, the law's practical effect might change. It further muddled the waters by subtly misinterpreting a key and still valid precedent on patent suppression, the *Paper Bag* case.<sup>7</sup>

More importantly, on closer examination the Court's work product did not seem so unanimous after all. While the whole Court had agreed that the law's traditional four-part equitable test for permanent injunctions should apply in patent and copyright cases,<sup>8</sup> the Court had split on what practical change, if any, that would make in existing law. Three concurring Justices apparently thought it might make little or no change.<sup>9</sup> Quoting Justice Holmes' famous view that "a page of history is worth a volume of logic,"<sup>10</sup> they appeared to suggest that the lower courts might continue doing what they had been doing, as long as they explained their results better, dotted all their i's and crossed all their t's.<sup>11</sup> Four other concurring Justices seemed ready for substantial change, at least in three of the types of cases that are most important and most controversial in current practice: those involving patent "trolls"

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4. The eBay Court overturned the Federal Circuit's rule that permanent injunctions should issue in successful patent-infringement suits absent "exceptional circumstances." *See id.* at 1839, 1841.

5. *See id.* at 1840.

6. *See id.*

7. *See id.* at 1840-41 (interpreting *Cont'l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405 (1908)), as "reject[ing] the contention that a court of equity has no jurisdiction to grant injunctive relief to a patent holder who has unreasonably declined to use the patent." The Court in *Paper Bag* emphasized that the facts there at issue suggested none of what today we would call an antitrust violation, i.e., no unreasonably *anticompetitive* refusal to practice the patent, leaving open the question whether an antitrust offense might be reason for denying injunctive relief (*see infra* note 27 for further analysis).

8. *See eBay*, 126 S.Ct. 1837 (unanimous opinion).

9. *See id.* at 1841-42 (Roberts, C.J., concurring, joined by Scalia, J. Ginsburg, J.) (*see discussion infra* Part 2).

10. *See eBay*, 126 S.Ct. at 1842 (Roberts, C.J., concurring) ((quoting *New York Trust Co. v. Eisner*, 256 U.S. 345 (1921) (opinion for the Court by Holmes, J.)).

11. *See eBay*, 126 S.Ct. at 1841 (Roberts, C.J., concurring) ("[T]here is a difference between exercising equitable discretion pursuant to the established four-factor test and writing on an entirely clean slate.").

(i.e., nonpracticing patentees), patents on components, and business-method patents.<sup>12</sup> The remaining two Justices expressed no opinion on this divide.

This short paper examines the likely effect of the Court's three opinions on the actual practice of intellectual property cases in their remedial phase. The first part briefly discusses the unanimous opinion and its likely economic effect in increasing the already daunting complexity—and therefore the already considerable cost—of intellectual property litigation. The second part examines the first concurring opinion and the effect of its implicit suggestion that nothing much has really changed. The third part examines the possible practical effect of the second concurring opinion. The conclusion then offers a few general observations on where remedial practice in patent cases might go from here.

### I. THE EBAY COURT'S UNANIMOUS OPINION

The most striking things about the Court's opinion in *eBay* were its unanimity and its brevity.<sup>13</sup> With one voice, the Court required district courts to undertake a traditional four-factor equitable analysis in deciding whether to grant or deny permanent injunctions in fully-trying patent cases. They must consider: (1) whether the successful patentee suffered an irreparable injury, (2) for which remedies at law—principally damages—are inadequate to compensate, (3) whether the balance of hardships favors the patentee, and (4) whether a permanent injunction would not disserve the public interest.<sup>14</sup> These points were crystal clear.

Also clear was the Court's repudiation of shortcuts. The unanimous opinion repudiated the district court's simplistic presumptions that nonpracticing patentees (such as patent holding companies) and patentees that routinely license their patents (such as universities) should not get injunctions.<sup>15</sup> It also repudiated the Federal Circuit's longstanding rule that injunctions should issue in patent cases as a matter of course, absent "exceptional circumstances."<sup>16</sup> The lower

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12. See *id.* at 1842-43 (Kennedy, J., concurring, joined by Stevens, J., Souter, J., and Breyer, J.) (see discussion *infra* Part 4).

13. See *id.* at 1838-41 (unanimous opinion).

14. See *id.* at 1839 (citations omitted).

15. See *id.* at 1840 ("To the extent that the District Court adopted such a categorical rule, then, its analysis cannot be squared with the principles of equity adopted by Congress.")

16. *Id.* at 1841 ("Just as the District Court erred in its categorical denial of injunctive relief, the Court of Appeals erred in its categorical grant of such relief.") (citation omitted).

courts, it implied, must do their homework and do justice in the individual case. In strong *dictum*, the Court implied that the same principles should apply in copyright cases,<sup>17</sup> and its opinion revealed little reason why they should not apply to cases involving other intellectual property as well.<sup>18</sup>

Two effects of this ruling are immediately apparent. First, litigation will last longer and become more complex, especially in patent cases. The Federal Circuit's matter-of-course rule for permanent injunctions in patent cases did have one salient virtue. It focused the effort and complexity of the litigation on the issues of liability and damages; injunctive relief was a foregone conclusion and argument on it *pro forma*. Now that the Supreme Court has repudiated that rule, litigants will actually have to introduce evidence and argue reasons for and against permanent injunctive relief. Those evidentiary hearings and arguments will increase the already daunting complexity, delay, and cost of intellectual-property litigation.

The second effect is to increase the uncertainty of injunctive relief. Permanent injunctive relief is no longer assured once a patentee wins a suit on the merits. Instead, the patentee will have to convince the district court, based on all the facts of the case, that a permanent injunction is warranted on the facts (i.e., that there is irreparable harm in fact that damages cannot cure), justified by the parties' relative positions (the balance of hardships), and not contrary to the public interest.

In responding to arguments based on these facts, district courts will not be writing on completely clean slates. There is already a considerable body of precedent from decisions involving *preliminary* injunctions.<sup>19</sup>

The test for awarding preliminary relief is also a four-part test of equity.<sup>20</sup> Three of its factors are the same as those confirmed in *eBay*:

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17. See *id.* at 1840 ("And as in our decision today, this Court has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed.") (citations omitted).

18. For further discussion of this point, see JAY DRATLER, JR., 1 LICENSING OF INTELLECTUAL PROPERTY § 3.06 (introduction), [1][b] (Law Journal Press 1994 & Supps.) [hereinafter Dratler, *Licensing*]. In trademark and trade dress cases, however, the policy of avoiding consumer confusion provides an additional basis for granting permanent injunctions once infringement has been demonstrated. See *id.* § 3.01[1][b].

19. For an overview of this considerable body of law, see JAY DRATLER, JR. & STEPHEN MCJOHN, 4 INTELLECTUAL PROPERTY LAW: COMMERCIAL, CREATIVE, AND INDUSTRIAL PROPERTY, § 13.01[1] (Law Journal Press 1991 & Supps.) [hereinafter Dratler & McJohn, *IP Law*].

20. See *id.* at § 13.01[1][a] (introduction) (citing *Roper Corp. v. Litton Sys., Inc.*, 757 F.2d 1266, 1269 (Fed. Cir. 1985)) (other citations omitted).

irreparable harm, the balance of harms, and the public interest.<sup>21</sup> The last of the four factors for granting preliminary relief—the plaintiff's likelihood of success at trial<sup>22</sup>—is irrelevant to permanent injunctions because the trial has already occurred. Thus, the only real difference between the two tests is that the test for permanent relief splits the “irreparable harm” factor into two analytical components: irreparability in fact and law, i.e., whether the harm alleged is practically irremediable, and whether damages or some other remedy at law can compensate adequately for it.<sup>23</sup> Courts also consider both of these factors in deciding on preliminary injunctions, but they do so under the single rubric of “irreparable harm.”<sup>24</sup>

So one of the things that the Court's unanimous opinion in *eBay* does is introduce this large and constantly expanding body of precedent from the field of *preliminary* relief into decisions involving *permanent* relief. While having so much existing precedent to argue may make hearings on injunctive relief longer and more expensive, it will probably reduce the overall uncertainty in their outcomes, at least as compared to writing on an entirely clean slate. Lawyers familiar with the arguments and results in hearings on preliminary injunctions will have a solid basis

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Several courts also recognize an alternative, sliding-scale test for preliminary injunctive relief based on three of the four traditional factors, which focuses on the probable risk of harm from judicial error. See, e.g.: *Video Trip Corp. v. Lightning Video, Inc.*, 866 F.2d 50, 51- 52 (2d Cir. 1989) (copyright case); *Official Airline Guides, Inc. v. Goss*, 856 F.2d 85, 87 (9th Cir. 1988); *Hasbro Bradley, Inc. v. Sparkle Toys, Inc.*, 780 F.2d 189, 192 (2d Cir. 1985) (“The settled law of this circuit is that a preliminary injunction may be granted only upon ‘a showing of (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.’”) (quoting *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979)); *Frisch's Rest., Inc. v. Elby's Big Boy of Steubenville, Inc.*, 670 F.2d 642, 651 (6th Cir. 1982), *cert. denied* 459 U.S. 916 (1982) (similar test).

21. See *Hasbro* 780 F.2d at 192. See also, Dratler, *Licensing*, *supra* note 18 at § 3.06[1][b] (comparing four-part tests for preliminary and permanent injunctions).

22. See Dratler & McJohn, *IP Law*, *supra* note 19 at § 13.01[1][a].

23. For more discussion of this point, see Dratler, *Licensing*, *supra* note 18 at § 3.06[1][b].

24. *Hybritech Inc. v. Abbott Lab.*, 849 F.2d 1446, 1456 (Fed. Cir. 1988) (where defendant had “very large presence” in highly competitive field with rapidly changing technology, irreparable harm was shown in part by risks that defendant might wrongfully take plaintiff's market share, and that technology might bypass patent before litigation came to trial); see also *Atlas Powder Co. v. Ireco Chem., Inc.*, 772 F.2d 1230, 1233 (Fed. Cir. 1985) (irreparable injury is that which is impossible to measure in monetary terms); *Eli Lilly & Co. v. Premo Pharm. Lab., Inc.*, 630 F.2d 120, 137 (3d Cir.) (irreparable injury was shown where damages could exceed defendant's ability to pay, and denial of injunction could cause other generic drug producers to enter patentee's market). See also, Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 700 (1990) (“This definition of adequacy [as compensable by damages] was well established before the merger of law and equity, and it prevails today.”) (citations omitted).

for advising clients on what to expect from hearings on permanent injunctive relief, based on the facts of the cases before them.

Yet one conclusion remains inescapable: the availability of injunctive relief will no longer be as certain as it once was under the Federal Circuit's rule that denied injunctions only under exceptional circumstances. That change alone will have an effect on the economics of patent protection and patent-related business.

Can we make any valid general observations on what that effect might be? The traditional rationale for matter-of-course injunctive relief is that patents are property, the right to exclude is the essence of property, and a right to exclude without injunctive relief is illusory.<sup>25</sup> Economically, the argument goes, voluntary transactions in a free marketplace require clear and strong rules of ownership.<sup>26</sup> Without such rules, parties wishing to use patented inventions without authorization may resort to litigation rather than conclude voluntary deals in the private marketplace, resulting in delay, extra cost, and non-optimal terms. In other words, the traditional view is that matter-of-course injunctive relief promotes economic efficiency by making private bargaining the only lawful way to use someone else's patented invention. That view depends on the assumption that private bargaining is generally more efficient than court-ordered solutions to economic and business disputes.

That rationale and assumption, however, are and always have been somewhat simplistic. In real life, an absolute property rule can produce economic inefficiency. As absolute property owner, a patentee may overestimate her own ability to bring the patented product to market and underestimate a potential licensee's, leading to less efficient exploitation of the invention in production, marketing, or distribution. A patentee and potential licensee may not be able to agree on what would otherwise be an entirely efficient license because they have differing estimates of its probable economic benefits. A patentee may refuse to enter an efficient license in order to continue depreciating an already obsolete production plant—apparently precisely the situation in the *Paper Bag*

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25. See, e.g., *Atlas Powder Co.* 772 F.2d at 1233 (on preliminary injunction: “[i]f monetary relief were the sole relief afforded by the patent statute then injunctions would be unnecessary and infringers could become compulsory licensees for as long as the litigation lasts”); see also *Ortho Pharm. Corp. v. Smith*, 15 U.S.P.Q.2d 1856, 1863 (E.D. Pa. 1990) (refusing to enjoin activity later found infringing would be like “unacceptable involuntary license from the patentee”) (citation omitted), *aff'd*, 959 F.2d 936 (Fed. Cir. 1992); *Am. Parking Meter Adver., Inc. v. Visual Media, Inc.*, 693 F. Supp. 1253, 1255 (D. Mass. 1987), *aff'd without opinion* 862 F.2d 322 (Fed. Cir. 1988).

26. See Dratler, *Licensing*, *supra* note 18 at § 3.01[1].

case.<sup>27</sup> Being human, patentees as absolute owners (or their managers, for corporate patentees) may fail to make efficient deals out of spite, vanity, and simple stupidity.

But that is not all. The problem of bilateral monopoly rears its ugly head in connection with every improvement patent. When a dominant patent legally controls a patented improvement but the improvement dominates commercially, either patentee can keep the other from introducing the improvement into the market.<sup>28</sup> In those circumstances, there is no easy way to make a deal, even in abstract economic theory, because each party has an absolute legal right to exclude the other from practicing the improvement. There is no obvious focus for bargaining, so bluff and bluster often hold sway, and efficiency theory breaks down. Since dominant and improvement patent pairs are as common as leaves in the fall, this problem of bilateral monopoly is real and recurrent.<sup>29</sup>

There is therefore some reason to hope that the *eBay* Court's search for substantive justice, although at the risk of increasing *legal* transaction costs, may not be such a bad thing after all. A practical example may be helpful. In the notorious Blackberry case, a patent troll, which did not practice the patent at all, held up the leading firm in the wireless e-mail industry for a \$612.5 million patent ransom.<sup>30</sup> The

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27. See *Cont'l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405 (1908) (explaining that patentee, "a powerful and wealthy corporation" had failed to use patented machines, although they worked well, in order to make more money from older machines than could be made with new machines after deducting costs of building them, and noting that "[t]here was no question of a diminished supply or of increase of prices.") The *Paper Bag* Court also strongly hinted that the nonuse was therefore *not* unreasonable in this case, asking the rhetorical question, "can it be said, as a matter of law, that a non-use was unreasonable which had for its motive the saving of the expense that would have been involved by changing the equipment of a factory from one set of machines to another?" *Id.* at 429.

28. The holder of the dominant patent can keep the improvement patentee from the market by securing an injunction in patent litigation against practice of the subservient improvement patent, i.e., a patent on an improvement that, as described in the improvement patent, infringes the dominant patent. See *United States v. Line Material Co.*, 333 U.S. 287, 297, 311(1948) (dominant patent controls commercial use of subservient albeit patented improvement). See generally Dratler & McJohn, *IP Law*, *supra* note 19 at § 2A.01[1]. Similarly, the holder of the improvement patent, by suing on it, can keep the holder of the dominant patent from introducing the patented improvement to the market, although the holder of the dominant patent still has the right to produce and sell less desirable unimproved products under the dominant patent.

29. For more discussion of the problem of bilateral monopoly, its economic effects and the lack of any general solution, even in theory, see Jay Dratler, Jr., *Invention is a Process, or Why the Electronics and Pharmaceutical Industries are at Loggerheads over Patents* (Univ. of Akron Sch. of Law Legal Studies Research Paper No. 06-13), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=899924](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=899924).

30. See *NTP, Inc. v. Research in Motion, Inc.*, 397 F. Supp. 2d 785, 788-89 (E. D. Va. 2005) (outlining complex procedural history of case and refusing to stay injunction to await results of re-



leader's motivation for paying that ransom was an injunction granted by the district court, which would have forced it to cease or substantially re-engineer its e-mail service.<sup>31</sup>

Let us suppose, as was probably the case, that the industry leader's business was not in fact derivative of the contested patent, i.e., that the industry leader had developed its products and services independently, with no knowledge of or access to the contested patent. In other words, let us suppose that the contested patent taught the industry leader nothing. In that case, the \$612.5 million ransom would represent pure economic waste because the industry leader, and not the patentee, was the only party to bring anything to the marketplace. The huge ransom would be economically justified, if at all, only by virtue of its putative effect in keeping the patent system intact and motivating other, unidentified inventors to burn the midnight oil seeking new advances not yet discovered.

Now let us compare the probable transaction costs of a judicial, rather than private, solution to the standoff between troll patentee and industry leader. According to Kimberly Moore, now a Federal Circuit judge,<sup>32</sup> a typical full-blown patent litigation costs each side about \$2 million in lawyers' fees and court costs.<sup>33</sup> So the total transaction cost for both sides would be \$4 million. Now suppose that an *eBay* "full justice" hearing on injunctive relief would raise the litigation costs by 50%—a very high estimate and therefore very conservative in this context. Then the total transaction cost would be \$6 million.

But the "full justice" effect of the *eBay* standard would have two likely additional effects. First, because the patentee is a non-producing troll, the court might decide (for reasons discussed further below) not to grant a permanent injunction. Then the industry leader could continue its business, subject to a damage award fixed by the court, which might well be less than \$612.5 million. To the extent the court awarded the patentee less than \$606.5 million, the reduction in economic waste

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examination of relevant patent in PTO); Mike Hughlett & Eric Benderoff, *BlackBerry suit settled; \$612.5 million deal keeps network active*, CHI. TRIB., Mar. 4, 2006, at C1 (reporting settlement and circumstances).

31. See generally, Hughlett & Benderoff, *supra* note 30. See also, Jim Balsillie, *Patent Abuse*, WALL ST. J., Dec. 19, 2005, at A16 (guest editorial by CEO of Research in Motion, Inc., maker of Blackberries).

32. See Kimberly A. Moore — Biography, <http://www.cafc.uscourts.gov> (follow "Biographies" hyperlink; then follow "Kimberly A. Moore" hyperlink).

33. Private communication with Kimberly A. Moore to Faculty of Univ. of Akron Sch. of Law (February 23, 2006); see also Am. Intell. Prop. Law Ass'n (AIPLA), Report of the Economic Survey (2007) (further supporting Kimberly A. Moore's position on the current litigation costs).

would exceed the total of transaction costs for both sides, and we would all be better off.

Second, the mere *threat* that the court might deny an injunction under the *eBay* standard, by softening the patentee's absolute right to exclude, might motivate a lower private settlement, due to the uncertainty of injunctive relief in the patentee's favor. If that standard motivated the parties to agree on a settlement less than \$612.5 million, in the absence of litigation and its transaction costs, then the economic waste would be reduced, there would be no transaction cost of litigation, and we would all be better off. The only ones to suffer would be the lawyers whose hypothetical work on the litigation would be curtailed.

It is therefore not at all clear that economic efficiency, let alone substantive justice, requires the bright line rule that the Federal Circuit maintained and that the *eBay* Court repudiated. Given the vast amounts of money (and, by proxy, economic efficiency) now at stake in patent-driven businesses, the transaction costs of reaching a more just and economically rational decision may be literally "down in the noise." It is therefore of economic, as well as legal, interest to what extent the *eBay* rule represents a real departure from prior practice.

## II. THE HISTORICAL VIEW

In the first concurring opinion in *eBay*, three Justices opined, with Oliver Wendell Holmes, that "a page of history is worth a volume of logic."<sup>34</sup> The thrust of their concurrence was that the results of permanent-injunction hearings in patent cases need not change drastically as a result of the Court's unanimous insistence on a four-factor equitable analysis. There had been reasons for granting injunctions in nearly every case, and indeed for the Federal Circuit's "exceptional circumstances" rule reflecting that practice. Those reasons, the three Justices implied, will still exist under the new rule, which will require only that courts articulate them explicitly and recognize the few exceptional cases.<sup>35</sup> Thus the first concurrence in *eBay* implies that the unanimous decision requires only better (and more costly) explication of rationale.

There is much reason to support that point of view. In my treatise on intellectual property, I list eleven ways in which unlicensed competition can cause intellectual property owners irreparable harm both

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34. *eBay*, 126 S.Ct. at 1842 (Roberts, C.J. concurring) (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345 (1921) (opinion for the Court by Holmes, J.)).

35. See *supra* text accompanying notes 8-11.

in fact (i.e., the harm is permanent and practically hard to mitigate) and in law (i.e., damage remedies cannot adequately compensate for it, at least not without burdensome procedure and transaction costs).<sup>36</sup> Unlicensed competition may scare away investment in the patentee, including start-up or venture capital. It may impair relationships with the patentee's business partners who wish to market or distribute patented products or services or to develop complimentary technology. Hasty market entry by an unlicensed competitor may deprive a patentee of market leadership and a reputation for innovation. Unlicensed competition may even *destroy* an otherwise promising market, for example, if the unlicensed competitor produces shoddy or defective products or services, reducing the public's interest in the market.

Harm of this sort is irreparable in fact because the lost investment, partnership, or market opportunity can seldom be restored. It is irreparable in law because any damage award would be speculative, based on the hypothetical condition that the unlicensed competition had not actually occurred. To the extent these reasons and others like them motivated the Federal Circuit's propensity to countenance denying injunctive relief only in "exceptional circumstances,"<sup>37</sup> little will change, at least insofar as the first two *eBay* factors are concerned.

Nevertheless, two things are different after *eBay*. First, patentees will have to prove and argue these points on the facts of their cases. They will no longer be able to rely on a presumption that these sorts of irreparable harm exist in every case of patent infringement.<sup>38</sup> Second, patentees will also have to introduce proof on the last two factors, the balance of hardships and the public interest. As discussed further in Part III, these two factors are likely to be more variable and less "standardized" than the questions of irreparable harm and inadequate remedies at law. It makes a difference, for example, if the business to be shut down by an injunction is one employing 10,000 workers or a start-up company just going into operation. It also makes a difference, for example, that an injunction would deprive the public of a medicine, medical test, or medical device that the patentee is not yet ready to produce.<sup>39</sup> In general, the "public interest" factor will force courts to

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36. See Dratler & McJohn, *IP Law*, *supra* note 19 at § 13.01[1][a][iii][B].

37. See *eBay*, 126 S.Ct. at 1839.

38. Before *eBay*, not only the Federal Circuit, but also many other circuit courts of appeal, recognized presumptions of irreparable harm in a wide variety of intellectual property cases. See Dratler & McJohn, *IP Law*, *supra* note 19 at § 13.01[1][a][iii][C]. After *eBay*, the Supreme Court's repudiation of mini-presumptions probably makes these decisions bad law.

39. See *Hybritech*, 849 F.2d at 1458 (patent case: affirming limitation of preliminary

face squarely the social impact and possible economic waste of injunctive relief.

This brings us to one last but important point regarding possible change resulting from *eBay*. Before *eBay*, the lower courts' shortcuts in granting injunctive relief relied not only on general presumptions as to the question of relief as a whole. They also relied upon mini-presumptions applicable to individual equitable factors. For instance, courts presumed the existence of irreparable harm from patent infringement because unlicensed competition inherently erodes the patentee's statutory right to exclude.<sup>40</sup> Similarly, many courts presumed that the public interest favors injunctive relief because the public has an interest in an operative intellectual property system.<sup>41</sup>

Although the *eBay* Court did not explicitly repudiate these mini-presumptions along with the main one, its unanimous opinion ought to be construed as so doing. If the Court's decision means anything, it requires individual assessment of the four equitable factors on the facts of the case, not hand-waving on abstract principle. Although equity has its little mantras like "equity treats as done what should be done," its basic thrust is to do justice on a case-by-case basis. Abstract presumptions as to each of the four equitable factors would impede that

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injunction to products other than crucial diagnostic tests for hepatitis and cancer, for which plaintiff patentee had "substantial difficulties filling orders promptly.") *Cf.* *Vitamin Technologists, Inc. v. Wis. Alumni Research Found.*, 146 F.2d 941, 946-47, 956 (9th Cir. 1944), (denying permanent injunctive relief for alleged infringement of patented process for producing Vitamin D in margarine on ground that patent was invalid, but noting alternative ground of protecting public health).

40. *See, e.g., Hybritech* 849 F.2d at 1456 ("presumption flows from a strong showing of validity and infringement"); *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 611(1st Cir. 1988) (copyright case: irreparable injury presumed upon showing of likelihood of success); *H.H. Robertson Co. v. United Steel Deck, Inc.*, 820 F.2d 384, 390 (Fed. Cir. 1987) ("presumption [of irreparable harm] derives in part from the finite term of the patent grant"); *Roper*, 757 F.2d at 1271-1272 ("no warrant exists" to distinguish patents from copyrights with respect to "criteria for presuming irreparable injury" to intellectual property rights); *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1254 (3d Cir. 1983) (detailed showing of irreparable injury was not necessary in copyright case where plaintiff had likelihood of success on merits); *Smith Int'l, Inc. v. Hughes Tool Co.*, 718 F.2d 1573, 1581 (Fed. Cir. 1983), ("We hold that where [patent] validity and continuing infringement have been clearly established, as in this case, immediate irreparable harm is presumed") (footnotes omitted).

41. *See, e.g., Hybritech*, 849 F.2d at 1458 (courts serve public interest by protecting rights to valid patents); *Smith Int'l, Inc.*, 718 F.2d at 1581 ("public policy favors protection of the rights secured by valid patents"); *Ortho Pharm. Corp.*, 15 U.S.P.Q.2d at 1863, ("It is in the public interest to protect the pharmaceutical industry's investment into the discovery of new drugs") *aff'd*, *Ortho Pharm. Corp.* 959 F.2d 936; *Pittway Corp. v. Black & Decker, Inc.*, 667 F.Supp. 585, 593 (N.D. Ill. 1987) ("Generally, it may be said protecting patents from would-be infringers is always acting in the public interest.")

enterprise only slightly less than the Federal Circuit's old presumption that injunctions issue absent exceptional circumstances.

Therefore one hopes that the lower courts will not interpret the first concurrence as arguing for mini-presumptions that undermine eBay's basic thrust. It remains to be seen, however, whether the Federal Circuit will enthusiastically follow the *eBay* Court's directive, despite the fact that doing so threatens to complicate its docket, increase its workload, and lengthen its already prolix opinions.

### III. THE FORWARD-LOOKING VIEW

While they agreed with Holmes and the first set of concurring Justices on the relevance of history,<sup>42</sup> the second group of concurring Justices differed markedly in their approach. Their main point was that history, although always *potentially* relevant and valuable, may not be directly relevant to many of the most important current developments in patent law.<sup>43</sup>

These Justices pointed to three current developments in particular: (1) the proliferation of licensing firms and patent holding companies whose business is not to provide products and services, but to buy, sell, license and trade in intellectual property,<sup>44</sup> (2) the increasing tendency of patents covering individual components or particular aspects of products or services to control or influence the development those products or services and the industries that produce them,<sup>45</sup> and (3) the recent trend—now just a decade old<sup>46</sup>—to grant patents on business methods.<sup>47</sup>

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42. See *eBay*, 126 S.Ct. at 1842 (Kennedy, J., concurring) ("The Chief Justice is . . . correct that history *may* be instructive in applying [the four-factor equitable] test") (emphasis added).

43. *Id.* ("The lesson of the historical practice . . . is most helpful and instructive when the circumstances of a case bear substantial parallels to litigation the courts have confronted before.")

44. *Id.* ("An industry has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees.") (citing Federal Trade Commission, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*, ch. 3, at 38-39 (Oct. 2003), available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf> (as visited May 11, 2006)).

45. *Id.* ("When the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest.")

46. The Federal Circuit dispensed with the traditional understanding that business methods were excepted from patentability in *State St. Bank & Trust Co. v. Signature Fin. Group, Inc.*, 149 F.3d 1368, 1375 (Fed. Cir. 1998), ("We take this opportunity to lay this ill-conceived exception to rest.")

47. See *eBay*, 126 S.Ct. at 1842 ("injunctive relief may have different consequences for the burgeoning number of patents over business methods, which were not of much economic and legal significance in earlier times. The potential vagueness and suspect validity of some of these patents

The Justices observed that, in patent cases involving these recent developments, the history of an earlier, more innocent age might not be an entirely reliable guide.

The observation that patent law has changed dramatically in the last decade or two has considerable truth. Just ten years ago, the Federal Circuit vastly expanded the scope of patent protection and patent law by opening the floodgates to patents on computer programs and business methods.<sup>48</sup> Although perhaps implicitly endorsed by a later amendment to the patent act's remedial provisions,<sup>49</sup> patenting business methods seems to upset the delicate balance between intellectual property and antitrust law that has existing in Anglo-American society for nearly four centuries.<sup>50</sup> Business-method patents alone have the potential to reconfigure vast swatches of American commerce, as Congress wrestles, for example, with a proposed statutory exception to permit tax lawyers and accountants to continue their trades unhindered by patents.<sup>51</sup>

There are other changes in patent law as well. The Federal Circuit considerably weakened the standard of nonobviousness for patentable inventions,<sup>52</sup> and the Supreme Court's recent correction in *KSR*<sup>53</sup> has yet

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may affect the calculus under the four-factor test.”)

48. See *State St.*, 149 F.3d at 1375 (where programmed computer produces a “‘useful, concrete and tangible result’ . . . [t]his renders it statutory subject matter, even if the useful result is expressed in numbers, such as price, profit, percentage, cost, or loss”) (quoting *In re Alappat*, 33 F.3d 1526 (Fed. Cir. 1994), *en banc*); *State St.*, 149 F.3d at 1377 (“Whether the claims are directed to subject matter within § 101 should not turn on whether the claimed subject matter does ‘business’ instead of something else.”).

See generally, Jay Dratler, Jr., *Does Lord Darcy Yet Live? The Case Against Software And Business-Method Patents*, 43 SANTA CLARA L. REV. 823 (2003) (criticizing both conclusions of *State St.*) [hereinafter, Dratler, *Darcy*].

49. See Defense to infringement based on earlier inventor, 35 U.S.C. § 273 (1999), esp. (a)(2)(3) (defining method as “method of doing or conducting business,”) (b)(1) (providing limited exception).

50. See Dratler, *Darcy*, *supra* note 48 at 825-830 (discussing balance reached under Statute of Monopolies); *id.* at 840-53 (arguing that balance requires limiting patents to invention whose development involves technological risk); *id.* at 861-71 (arguing that pedestrian computer programs like that in *State St.* involve no technological risk); *id.* at 871-76 (same for business methods).

51. In July 2007, the House Judiciary Committee, while considering H. R. 1908, the proposed “Patent Reform Act of 2007,” adopted an amendment proposed by Rep. Boucher (D. Va.) to exclude “tax planning methods” from patentable subject matter. (Email from Hayden Gregory, of American Bar Association, to Chairs of Intellectual Property Law Committees) (July 25, 2007). Presumably, other lawyers’ and accountants’ activities, not related to tax planning, could still be controlled by patents as “business methods.”

52. See Dratler, *Darcy*, *supra* note 48 at 890-91 (discussing weakening of nonobviousness standard under federal circuit’s “suggestion” test before *KSR*).

53. *KSR Int’l Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1739, 1741-42, 1745-46 (2007) (unanimous opinion) (for assessing obviousness of claimed invention, rejecting Federal Circuit’s “teaching, suggestion or motivation” test as too rigid, requiring that courts consider prior art beyond

to be fully felt. In an attempt to mitigate its inherent uncertainty, the Federal Circuit tried to formalize the doctrine of equivalents, limiting its application by expanding the doctrine of prosecution history estoppel to any amended claim element; but the Supreme Court opted for a more flexible rule.<sup>54</sup>

Not only has patent law changed dramatically. The social, political, business, and economic environment in which patent law operates has changed drastically as well. Patents and other intellectual property have become important—if not vital—objects of international trade, as evidenced by the TRIPs Agreement setting international norms for protection, now little more than twelve years old.<sup>55</sup> Patents and other intellectual property are now an important part of virtually every high-technology and manufacturing business. They are the subjects of constant seminars on law, trade, business management, and even international health care, due to their potential for impeding the flow of life-saving medicine to poorer areas of the world. When I attended law school thirty years ago, patent law was a sleepy area of practice reserved for technology nerds. I even had one recruiting partner tell me that patent lawyers were not “real” lawyers. Today, intellectual property is one of the hottest areas of practice and a subject of frequent public controversy.

So the second group of concurring Justices is onto something in suggesting that the past, although prologue, may not be a good playbook for the future of patent law and industrial innovation. The question before us is how that suggestion ought to affect application of the *eBay* rule.

Perhaps the best way to examine that question is to look at the three areas that the four forward-looking Justices identified as specific foci of change. The first such area was the rise of patent licensing firms that

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specific problem at which it or patent was directed, and returning to basic principles of *Graham*) (referring to *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966)).

54. See *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 234 F.3d 558, 569 (Fed. Cir. 2000) (en banc) (“When a claim amendment creates prosecution history estoppel with regard to a claim element, there is no range of equivalents available for the amended claim element. Application of the doctrine of equivalents to the claim element is completely barred.”), *rev’d* 535 U.S. 722, 741 (2002) (rejecting complete bar in favor of more flexible approach). See generally, Dratler & McJohn, *IP Law*, *supra* note 19 at § 2A.03[2][a][ii].

55. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments - Results of the Uruguay Round vol. 31, 33 I.L.M. 81 (1994), reprinted in H.R. DOC. NO. 316, 103d Cong., 2d Sess. 1621 (Sept. 27, 1994). See also, Uruguay Round Agreements Act §101 (a), (d)(15), Pub. L. No. 103-465, 108 Stat. 4809, 4815 (Dec. 8, 1994) (congressional approval of agreement). The TRIPs Agreement came into force in the United States on January 1, 1996.

hold and license, but do not themselves practice, patents, i.e., so-called “patent trolls.”<sup>56</sup>

When a firm builds a business on licensing a patent without practicing it, the equitable and economic effect of the patent's exclusivity inevitably changes. The patentee is no longer responsible for exploiting the patent commercially but depends on its licensees' capabilities and business judgment. There is therefore less reason for believing that equity and economic efficiency demand absolute obeisance to the patentee's right to control development and exploitation of the patented technology. By limiting itself to the business of licensing, the patentee is admitting that its principal occupation is making money from others' effort and business judgment.

The extent to which that is true, however, depends primarily upon whether the license is exclusive or nonexclusive. Some licensing firms may attempt to maximize their revenue by licensing a patent to all comers nonexclusively, on standard, nondiscriminatory terms. That form of licensing benefits society by making the patented technology widely available, erecting few legal barriers to market entry, and encouraging vigorous competition in the subject matter of the patent.<sup>57</sup>

Yet paradoxically this beneficial form of licensing demands the least deference to the patentee's wishes in injunction hearings. If the patent at issue already has been licensed to multiple parties on a nonexclusive basis, at a standard royalty rate, all four equitable factors ordinarily favor *denying* an injunction. An additional license poses little risk of irreparable harm, and the damages from infringement can be

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56. A “patent troll” is a patentee, typically a patent holding company, that does not practice the patented invention but seeks to extract revenue from others who do by licensing the patent or suing others for infringing it. See [http://en.wikipedia.org/wiki/Patent\\_troll](http://en.wikipedia.org/wiki/Patent_troll).

Despite the term's pejorative connotation, the economic behavior that it identifies (licensing or suing under a patent without using it) is generally permitted under current law. See *Infringement of Patent* 35 U.S.C. § 271(d) (1988) (“No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: . . . (4) refused to license or use any rights to the patent”).

57. For that reason, mandatory nondiscriminatory licensing to all comers has been an occasional remedy for antitrust violations involving patents. See, e.g., *United States v. Glaxo Group, Ltd.*, 410 U.S. 52, 64 (1973) (“Mandatory selling on specified terms and compulsory patent licensing at reasonable charges are recognized antitrust remedies”) (citations omitted.); *Hartford-Empire Co. v. United States*, 323 U.S. 386, 413-17, (refusing to require licensing at zero royalty, as doing so would be tantamount to patent forfeiture, which Congress considered, but rejected, as remedy for antitrust violations), *clarified*, 324 U.S. 570 (1945); *United States v. Singer Mfg Co.*, 231 F. Supp. 240, 243-44 (S.D.N.Y. 1964) (requiring parties to submit for approval decree including compulsory licensing at reasonable royalty rate, and discussing authorities precluding royalty-free licensing or dedication of patents to public).



precisely calculated at the standard royalty rate, with interest. The balance of harms ordinarily favors the infringer, because keeping track of one additional (court-ordered) license will impose little additional burden on the patentee, while an injunction might destroy the infringer's business. As for the public, it has an interest in strong competition, which an additional license would serve, and an injunction might put the infringer's employees out of work and inconvenience its customers.

Therefore, the *eBay* test should support permanent injunctive relief under these circumstances only if the patentee can prove facts showing that the additional court-ordered license would impose special harm on the patentee or the public. For example, the proposed court-ordered licensee might have a reputation for shady business practices, nonpayment of bills, or offering products and services of poor quality that harm the public.

Similar considerations apply to nonexclusive licensing to one or a few licensees, but the argument for denying injunctive relief there is weaker. A limited, selective, nonexclusive licensing program may reflect the patentee's desire to use its own business judgment to maximize its own revenue, jump-start the introduction of new products or services, or serve the public interest by fostering rapid introduction to the market of high quality products and services. After all, a nonexclusive license intentionally granted to only one licensee has much the same economic effect as an exclusive license, as long as the patentee grants no additional licenses. When nonexclusive licensing is limited to one or a few licensees, court-ordered compulsory licensing through denial of injunctive relief may implicate the equitable *eBay* factors by upsetting the patentee's careful business plans for optimizing exploitation of the patent, reducing the patentee's revenue by an indeterminable amount, or harming the public through non-optimal or low quality commercialization of the patent.

When a troll engages primarily in exclusive licensing—either in general or in particular fields of use—the justification for honoring exclusivity with injunctive relief increases further. Exclusive licensing has much the same social, economic, and business justification as patent protection itself. By allowing the licensee to command a price premium (monopoly rent) for the patented technology, product or service (to the extent it has no viable economic substitutes), exclusivity can encourage substantial investment in further development and commercialization of the patented technology. This point is particularly important at the start-up stage, where the economic risk of developing new products and services and bringing them to market may be substantial. Under these

circumstances, unwanted competition introduced through compulsory licensing (by denying injunctive relief) may irreparably harm the patentee by disrupting its business plans, destroying the economic incentive of an exclusive license, reducing the patentee's licensing revenue by an indeterminable amount, or impairing the carefully planned development of an industry. These same effects, *inter alia*, may impact the balance of hardships and the public interest. Thus, in the general case, an injured patentee engaged in *exclusive* licensing will have arguments for permanent injunctive relief that are worthy of careful consideration.

The second area of current development identified by the four concurring Justices relates to the recent explosion of patents. As patents on components, improvements, and business methods proliferate, the chance increases that a patent controls only a small component, part or aspect of a product, service, or business, to which the infringer patently (pardon the pun) adds substantial value. Under those circumstances *all* remedies—both damages and injunctive relief—become problematic.

Damages become problematic because the court must somehow apportion the award of the patentee's lost profits, or set a reasonable royalty,<sup>58</sup> although there is little practical basis for doing so, and often no concrete evidence to aid the process. Manufacturing firms, for example, may not keep detailed accounts of the costs of producing components or subassemblies that later are found to infringe someone else's patent. They seldom price subassemblies separately unless they are sold separately as spare parts or accessories. Moreover, today patents often cover an abstract aspect of a product or service—such as a method of operation that is only part of the whole—that has no particular concrete or physical embodiment.

Courts have a devil of a time calculating damages or reasonable royalties under these circumstances because there is usually no accounting principle, and often no evidence, to provide persuasive evidence on apportionment. The usual expedient is to resort to expert testimony full of hypothetical calculations and speculation.

Another traditional expedient has been to grant the patentee permanent injunctive relief, thereby forcing the infringer: (1) to re-invent its product, service or business in order to avoid infringement, (2) to

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58. See *Damages*, 35 U.S.C. § 284 (1999) (first paragraph: "Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.")

negotiate a license with the patentee, or (3) to shut down entirely. Each of these alternatives has disadvantages from an economic perspective. Re-invention may require changes, for practical or engineering reasons, that have nothing to do with the patent. That is, changes made to avoid infringement may require additional, coincidental engineering changes for practical reasons alone. The cost of making those coincidental changes, and the risk that they may impair the product's operation or quality, may gratuitously harm the infringer and the public. The cost of making them represents pure economic waste not even justifiable as maintaining the integrity of the patent system.

The final alternative—shutting down the infringer's business to avoid infringement entirely—wastes the undepreciated part of the infringer's plant and equipment and harms the part of the public that depends on its products, services, or business. Even negotiation of a license—the best of all possible outcomes—had disadvantages. The threat of an injunction skews the negotiation in the patentee's favor,<sup>59</sup> thereby producing terms that vary from those of a hypothetical freely-negotiated license and that therefore are sub-optimal from a purely economic standpoint—apart from the putative benefits of maintaining the integrity of the intellectual property system.

That there is no generally optimal solution to this problem, even in theory, suggests that the *eBay* Court's case-by-case approach is correct. In some cases, it may be easy to apportion the value of what was infringed, relative to the whole, and injunctive relief may severely harm the infringer and the public. Then injunctive relief should be denied. In other cases, apportionment may have little or no rational basis, and the harm from an injunction may be minimal, for example, because a patented part can be replaced easily with a slightly more expensive substitute. In that case, granting the injunction may be wise. The vast number of permutations and combinations of circumstances that can pertain in these sorts of cases argues against any simple formulaic or presumptive rule. So does the fact that legal transaction costs, although high, are often a pittance compared to the sums at stake in the parties' businesses, as our example above has shown.<sup>60</sup> Spending some money on courts and lawyers for an economically rational decision is preferable to causing economic waste and disruption on a titanic commercial scale.

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59. See *eBay*, 126 S.Ct. at 1842 (“For [patent licensing] firms, an injunction, and the potentially serious sanctions arising from its violation, can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent”) (citation omitted).

60. See *supra* text accompanying notes 29-34.

The final area of concern expressed by the last four concurring Justices is business-method patents. I have railed against their existence sufficiently that I feel no compulsion to repeat my objections here.<sup>61</sup> Suffice it to say that I am not alone in warning that patenting ideas for businesses, in the abstract and apart from any technological risk, is neither what patents are all about nor a good way to promote a healthy, competitive economy.<sup>62</sup>

Nevertheless, if business-method patents are here to stay, avoiding matter-of-course injunctions can at least mitigate some of their negative economic impact. A provision now on the statute books permits an infringer of a patented business method,<sup>63</sup> who began to practice the method at least one year before the relevant patent application was filed,<sup>64</sup> to continue his business (but not to expand it),<sup>65</sup> without infringement liability. The salutary economic effect of this provision of course depends upon the fiction that everyone reads patent applications as soon as they are filed, although they remain secret inside the Patent Office until they are published<sup>66</sup>—usually eighteen months later but sometimes never.<sup>67</sup> For those business people whose lives do not reflect this legal fiction, who fail to start practicing a patented business method

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61. See Dratler, *Darcy*, *supra* note 48 at 871-876 (arguing that the federal circuit's receptivity to patents on business methods shifts line between competition and invention in place under Anglo-American law since 1623 by granting monopolies on what are essentially ideas for businesses devoid of technological risk).

62. See, e.g.: Federal Trade Commission, *To Promote Innovation: the Proper Balance of Competition and Patent Law and Policy*, Executive Summary at 5 (Oct. 2003) (“[M]any participants in and observers of the patent system expressed significant concerns that, in some ways, the patent system is out of balance with competition policy.”) One of the first to notice and decry the trend was Professor Thomas. See John R. Thomas, *The Patenting of the Liberal Professions*, 40 B.C. L. REV. 1139, 1163-1164 (1999): “With business and medical techniques firmly under wing, and patents on sports methods and procedures of psychological analysis trickling out of the Patent Office, patents appropriating almost any sort of communicable practice seem easily attainable. . . . Under increasingly permissive federal circuit case law, techniques within such far-flung disciplines as language, the fine arts and theology also now appear to be within the realm of patentability.” That a United States congressman now has to propose a special exception amending the patent statute in order to protect tax lawyers’ and accountants’ rights to freely practice their trades, *see supra* note 51, testifies to the accuracy and sagacity of Professor Thomas’ prediction.

63. See Defense to infringement based on earlier inventor 35 U.S.C. § 273(a)(3) (1999) (defining “method” as “a method of doing or conducting business”).

64. See *id.* at (b)(1).

65. See *id.* at (b)(3)(C), (7).

66. See Confidential status of applications; publication of patent applications, 35 U.S.C. § 122 (1999).

67. A patent applicant that does not want international protection and therefore files no foreign counterpart applications can keep her application secret until the patent issues or, if the patent never issues, forever. See *id.* at (b)(2).

at least one year before an unknown competitor files a patent application claiming it, or who have the misfortune to begin a business in ignorance of a patent that covers it, the *eBay* decision may provide some comfort. It may furnish a legal basis for them to avoid the economic waste of shutting down their business, or the lesser waste of paying an exorbitant price to keep it open against the threat of injunctive relief. If courts want to do justice and not do economic damage to our competitive economy, *eBay* gives them a road map to denying injunctive relief, while allowing them to require owners of business-method patents to be paid whatever their patents may be worth.

#### IV. CONCLUSION

As this brief discussion suggests, the *eBay* decision is rife with possibilities for the future. It reflects a judicial repudiation of the notion—long held in some economics-and-the-law circles—that absolute property rules promote justice and economic efficiency better than liability rules, under which courts sometimes have to make economic judgments that the marketplace might, in theory, make better. Yet in practice there are many reasons to suspect that notion of oversimplification and inaccuracy, especially as patents proliferate without number, claiming more and more complex abstract concepts, in a highly sophisticated, complex and interrelated global economy.

Today the cost of litigation, although high by historical and personal standards, is a drop in the bucket compared to the amounts often at stake in commercial litigation involving intellectual property. Rather than risk economic waste or suboptimal economic outcomes from negotiation under the duress of an injunction, *eBay* invites courts to spend these relative small transaction costs to reach a just and economically rational remedy.

Already the Federal Circuit has accepted that invitation.<sup>68</sup> It remains to be seen, however, whether other courts will do so, and whether the various panels of the Federal Circuit will do so consistently. They might recognize mini-presumptions regarding injunctive relief that the *eBay* Court did not explicitly abjure. Alternatively, they might follow the apparent suggestion of the first group of three concurring justices and look to the past more than the present and future. Yet if the lower courts accept the second concurring opinion's suggestion, they

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68. See *Paice LLC v. Toyota Motor Corp.*, 504 F.3d 1293, 1313-1315 (Fed. Cir. 2007) (affirming district court's order for "compulsory license" through denial of injunctive relief and award of reasonable royalty, but remanding for redetermination of amount of reasonable royalty).

will handle hearings on permanent injunctions with an eye on the rapid and fundamental changes that are ongoing in our patent system and our global economy. If they do, the *eBay* decision may become a strong force for justice and economic rationality in intellectual property litigation.