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## Legal Updates & News

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#### Bidding for a Copyright Injunction After eBay

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The Supreme Court's 2006 decision in *eBay Inc. v. MercExchange* addressed the standard for permanent injunctive relief to prevent future infringement of a business-method patent for an electronic marketplace. In *eBay*, the Court rejected the presumption in favor of granting a permanent injunction upon a finding of patent infringement and held that a court's decision whether to grant or deny such relief is "an act of equitable discretion." The Court then set forth a traditional four-factor test for courts to follow when considering permanent injunctive relief in the patent context, requiring a plaintiff to demonstrate: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." Notably, in reaching its decision, the Court drew a parallel between the rights of a patent owner and those of a copyright owner, observing that the 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."

On remand, in ruling on MercExchange's renewed motion for permanent injunctive relief, the *eBay* district court interpreted the Supreme Court's directive as having significance beyond a mere equitable checklist. In the view of the district court, the Supreme Court's holding also meant that courts can no longer presume the critical factor of irreparable harm simply because there has been a determination of infringement. Accordingly, with respect to the irreparable harm prong of the *eBay* test, the district court determined that the burden was on the plaintiff to prove irreparable injury through "case-specific facts."

The effects of *eBay* are being felt in the copyright world. Following the *eBay* decision, the majority of courts considering a motion for a permanent injunction upon a finding of copyright infringement have applied *eBay*'s four-factor test to reject the assertion that a plaintiff is automatically entitled to injunctive relief upon a showing of infringement. Moreover, it appears that at least some courts are following the lead of the *eBay* district court in denying the presumption of irreparable harm that has typically governed in copyright cases when considering the question of permanent injunctive relief. Thus, plaintiffs seeking permanent injunctive relief for copyright infringement should be well prepared to demonstrate the four *eBay* factors, including how irreparable harm will result absent the requested relief.

Because *eBay* addressed the propriety of a permanent injunction, its relevance in the context of a motion for *preliminary* injunctive relief is less clear. Rather than adhering to the specific factors set forth in *eBay*, the majority of courts appear to be invoking the existing balancing test of their circuit when considering preliminary injunctions in copyright cases. This may be because existing preliminary injunction standards already incorporate equitable considerations, including, typically, consideration of irreparable injury, among other factors. Traditionally, the factor of irreparable harm has been presumed at the preliminary injunction stage based upon an initial showing of infringement. *eBay*, however, has caused some courts to question whether such a presumption still properly applies. *eBay* does not answer this question; as one court has noted, the issue remains to be "clarified." Another court has suggested that *eBay* is inapposite in the preliminary relief context, opining that "[a] presumption temporarily removing the need to prove irreparable harm may serve the ends of equity." In short, while a plaintiff seeking preliminary injunctive relief in a post-*eBay* copyright infringement action may still benefit from the traditional presumption, in light of the uncertainty surrounding the issue, he or she should be ready to make the case for irreparable harm.