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Five years ago, the United States Supreme Court restricted a patent infringement plaintiff's ability to obtain an injunction by eliminating the "automatic presumption" of irreparable harm. (*eBay Inc. v. MercExchange, L.L.C.* (2006) 547 U.S. 388.) Now, following that decision, the Ninth Circuit has issued a similar ruling in the realm of copyright infringement.

A preliminary (before trial) injunction is a court order that usually aims to stop specific conduct, including infringement of intellectual property rights. Before ordering a preliminary injunction, courts have historically applied long-standing criteria requiring a plaintiff to show, among other things, a likelihood of suffering "irreparable harm" in the absence of injunctive relief. Some Circuit courts developed an exception to this required showing, essentially holding that an intellectual property owner who demonstrated likely success on its infringement claims did not have to prove the likelihood of "irreparable harm" resulting from the infringement to obtain an injunction. Instead, the infringement alone led to a presumption of harm, and an injunction would issue. In the patent realm, the presumption of harm was eliminated by the United States Supreme Court's landmark decision in *eBay*. Because the *eBay* decision focused on patent infringement, its application to copyright law was unclear. The Ninth Circuit resolved that uncertainty in its August 22, 2011 copyright decision *Flexible Lifeline Systems, Inc. v. Precision Lift, Inc.* (9th Cir. 2011) 2011 U.S. App. LEXIS 17462.

In 2009, Flexible Lifeline Systems, Inc. bought the assets – including intellectual property – of West Coast Weld Tech, Inc., a company that designed and manufactured customized stands used by aircraft maintenance personnel to stand on (with greater stability than a ladder) while working on aircraft. West Coast owned valuable intellectual property in the form of technical drawings for the stands. Before Flexible's purchase of West Coast's assets, Precision Lift, Inc. served as West Coast's sole distributor. West Coast allowed Precision to use the drawings to market the stands, but West Coast always maintained ownership of the drawings. In 2008, West Coast and Precision entered into a joint venture to compete for a United States Air Force contract. During the bid submission process West Coast encountered financial problems. Flexible purchased West Coast's assets and terminated the joint venture with Precision. Precision formed a new joint venture with a Flexible competitor and submitted a bid. Flexible objected to the bid, claiming that it used West Coast's drawings (then owned by Flexible), but Flexible did not submit its own bid. During the bid process, Flexible also registered copyrights on the drawings with the Copyright Office. The Air Force rejected Precision's bid, likely due to the dispute over ownership of the drawings. Flexible sued Precision, and asked for a preliminary injunction preventing Precision from making any further use of the drawings.

In its motion for a preliminary injunction, Flexible did not present evidence of actual harm it was likely to suffer from the ongoing infringement in the absence of an injunction. Instead, Flexible relied on the presumption of harm, which was supported by pre-*eBay* case law, and argued that the *eBay* rationale did not apply to copyright cases. The district court issued the injunction, finding that Flexible was likely to succeed on its copyright infringement claims and that “irreparable harm is presumed.”

The Ninth Circuit Court of Appeals reversed the decision of the district court. The court acknowledged its longstanding pre-*eBay* precedent holding that harm can be presumed upon a showing of copyright infringement. But, the court held that precedent was no longer good law in light of *eBay*. The court observed that the *eBay* holding applied broadly to a court’s power to issue injunctive relief and was not limited to patent infringement cases. The court concluded: “We hold that even in a copyright infringement case, the plaintiff must demonstrate a likelihood of irreparable harm as a prerequisite for injunctive relief, whether preliminary or permanent.” The court remanded the case back to the district court for factual determinations on the question of irreparable harm.

In light of the *eBay* and *Flexible* decisions, the law is now clear. A victim of patent or copyright infringement can always sue for past damages. But an injunction halting the infringing conduct is not automatic – the victim must present strong evidence that future irreparable harm is likely without the injunction.