

Legal Updates & News

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eBay Turns Three: Injunctive Relief Hard to Come by for Non-Practicing Entities

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This May marks the three-year anniversary of the United States Supreme Court deciding *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006). That decision overturned the Federal Circuit’s “general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances.” *Id.* at 391. In its place, the Supreme Court directed courts considering whether to award injunctive relief to apply the traditional four-factor test, 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.” *Id.* Though the Court noted that neither “a plaintiff’s willingness to license its patents” nor “its lack of commercial activity in practicing the patents” was a *per se* bar to injunctive relief, *id.* at 393, commentators nevertheless opined that, post-*eBay*, non-practicing entities would find it harder to obtain permanent injunctive relief.

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Have those initial predictions proved true? Have non-practicing entities found it difficult to obtain injunctive relief post-*eBay*? The short answer: Yes. Morrison & Foerster has followed the cases interpreting and applying *eBay* on behalf of its clients. We are often asked to advise both plaintiff and defendant clients on the likelihood of obtaining injunctive relief in light of *eBay*. We have identified more than 70 cases citing *eBay* to either grant or deny permanent injunctive relief. Apart from default judgments, there appears to be only *one* case in three years in which a court granted a non-practicing entity permanent injunctive relief.

		Injunction Granted?		
		Yes	No	
Entity Practices?	Yes	53	7	60
	No	1	13	14
		54	20	

The one case awarding a non-practicing entity injunctive relief was *CSIRO v. Buffalo Technology*, 492 F. Supp. 2d 600 (E.D. Tex. 2007). There, it was important to the court that the plaintiff was “a research institution and relies heavily on the ability to license its intellectual property to finance its research and development.” *Id.* at 604. The court noted that CSIRO “compet[e] internationally with other research groups — such as universities — for resources, ideas, and the best scientific minds to transform those ideas into realities.” The court concluded that denial of an injunction would “directly and negatively impact CSIRO’s research and development efforts and its ability to bring new technologies into fruition.” *Id.* at 606. It is also possible that CSIRO’s status as a foreign government’s national science agency played a role in the court’s conclusion.

Outside of research institutions, no non-practicing entity has been successful in obtaining permanent injunctive relief. It also bears noting that, where the plaintiff *is* a practicing entity, post-*eBay* cases suggest that the award of injunctive relief is still quite common - practicing entities successfully obtained such relief in almost 90% of the cases identified in our research. [The chart linked here is our detailed tracking of these cases.](#)