

Advertising Law

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Q&A: What False Advertising and Trademark Plaintiffs Need to Know Following Landmark *eBay* Decision

The Supreme Court’s 2006 landmark decision in *eBay* changed the landscape regarding injunctive relief in patent cases, where injunctive relief had long been the norm. Attorneys who deal with advertising issues need to understand how *eBay* has also changed the landscape for advertising litigation.

This week our newsletter editors asked Manatt partner [Tom Morrison](#) – a nationally renowned false advertising and trademark litigator – about the impact of *eBay* on false advertising and trademark cases, and what companies need to do to secure injunctive relief in these cases.

Editors: What precisely happened in *eBay*?

Morrison: MercExchange owned a business method patent for an electronic market designed to facilitate the sale of goods by individuals. MercExchange did not practice the patent but, like a “patent troll,” sought to license it to eBay. When negotiations failed, Merc sued for infringement. Following a jury verdict in Merc’s favor, the trial court applied the traditional “four factor” equity test and concluded that injunctive relief was not appropriate, largely because Merc was not practicing the patent and had exercised a willingness to license it, and thus had an adequate remedy at law.^[1] The Federal Circuit reversed, holding that, as a general rule, permanent injunctions should be awarded in patent infringement cases “absent exceptional circumstances.”^[2]

Editors: What happened in the Supreme Court?

Morrison: The Supreme Court held that the Federal Circuit erred in finding that injunctive relief is virtually automatic once there is a finding of validity and infringement. Citing the language of the Patent Act that injunctions “may” issue in patent cases “in accordance with the principles of equity,” the Court held that the propriety of injunctive relief must be determined via application of the four traditional equitable factors: (1) irreparable harm, (2) the inadequacy of legal remedies, (3) the balance of hardships, and (4) the public interest.^[3]

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Upcoming Events

April 19-20, 2012

PLI Information Technology Law Institute 2012

Topic: “Social Media Issues in Technology”

Speaker: [Marc Roth](#)

San Francisco, CA
New York, NY

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May 4, 2012

New York City Bar Association's Sweepstakes, Promotions, & Marketing Laws: Comprehension & Compliance Seminar

Topic: “Mobile Marketing—Certainties & Uncertainties”

Speaker: [Marc Roth](#)

New York, NY

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May 5–9, 2012

INTA's 134th Annual Meeting

Topic: “Social Media—An Ever Changing, Challenging and Competitive World: How to Provide Legal and Business Advice to Clients”

Speaker: [Linda Goldstein](#)

Washington, DC

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May 7-8, 2012

ERA Government Affairs Fly-In 2012

Speaker: [Linda Goldstein](#)

Washington, DC

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May 17, 2012

Response Expo 2012

Topic: “Counterfeits, Knockoffs and Digital Reputation Management”

Speaker: [Linda Goldstein](#)

San Diego, CA

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July 24–27, 2012

15th Annual Nutrition Business Journal Summit

Topic: “NBJ State of the Industry”

Speaker: [Ivan Wasserman](#)

Dana Point, CA

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Awards

The Court remanded the case to the District Court for consideration of an injunction under these four factors.

Editors: Has the Supreme Court had any occasion to revisit its ruling in *eBay*?

Morrison: Two years later, in the *Winter* case, [4] the Supreme Court extended *eBay* to cover preliminary injunctions. *Winter* involved an attempt by an environmental group to halt U.S. naval exercises involving sonar systems because of the alleged harm to whales. Reversing the Ninth Circuit's issuance of a preliminary injunction on the ground of "possible" irreparable injury, the Supreme Court held that "injunctive relief [is] an extraordinary remedy" that can be awarded only upon a "clear showing" that plaintiff is entitled to such relief. In the case of a preliminary injunction, that requires a showing that the following four factors are present: (1) likelihood of success on the merits, (2) likelihood of irreparable harm, (3) the balance of equities tip in plaintiff's favor, and (4) an injunction is in the public interest. *Winter* is particularly noteworthy in the false advertising context because of the regularity with which false advertising plaintiffs seek preliminary injunctions.

Editors: This brings us to false advertising cases. What's the story there?

Morrison: The most important thing for advertisers and their attorneys to know is that *eBay* applies to false advertising cases. Even though injunctions – both preliminary and permanent – have long been the norm in false advertising cases, it is absolutely clear that an injunction will not be entered unless it can be justified under *eBay*'s four-factor test. The Lanham Act is similar to the Patent Act in providing that injunctions may be granted "according to the principles of equity." This provision appears in both § 34(a) of the Lanham Act (which covers trademark infringement and false advertising) and § 43(c) (which covers trademark dilution). So the applicability of *eBay* is certain. What is less certain is the continued viability of various "presumptions" that have been applied in false advertising cases. The most common presumption is that irreparable harm may be presumed in cases involving false comparative advertising, i.e., advertising where the plaintiff's product is unfavorably compared to the advertiser's product. [5] This presumption has been important to false advertising plaintiffs because it has largely relieved them of the burden of actually proving irreparable injury. Some courts have said that this presumption still applies despite *eBay* and some have said that it does not. In one significant opinion, the Second Circuit applied the presumption – but failed to even consider the relevance of *eBay*. [6]

Editors: So what is your advice to a plaintiff in a false advertising case?

Morrison: You must assume that you cannot rely on the presumption of irreparable injury. Instead, you must marshal all the evidence you can find regarding the injury. False advertising plaintiffs have



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traditionally proven irreparable injury merely via an affidavit or the in-court testimony of a brand manager stating that the defendant's advertising is causing irreparable injury to the brand. This is no longer sufficient. More than one court has said that conclusory affidavits and testimony are insufficient to show irreparable injury.^[7] One court even directed the parties to engage in discovery regarding irreparable injury **after** the court had issued a post-trial ruling that the advertising in question was false.^[8] Several types of evidence should be considered, such as (1) testimony by a top marketing executive that explains (perhaps with data) why the advertising has caused irreparable injury, (2) tracking data showing a link between the product's sales decline and defendant's advertising, (3) testimony from a marketing expert explaining why false advertising causes irreparable injury, and (4) survey evidence showing the message in question is highly material to consumers and that it causes them to have a lower opinion of your client's product.

Editors: Has *eBay* been extended to other IP cases, such as copyright cases?

Morrison: The decisions in *eBay* and *Winter* make it clear that *eBay* applies to **all** federal court cases in which an injunction is sought, not just patent or IP cases. Thus *eBay* is now considered applicable to copyright cases, where the courts have long applied a presumption that irreparable harm flows automatically from infringement. In a recent case involving author J.D. Salinger, the Second Circuit reversed a preliminary injunction against publication of a *Catcher in the Rye* parody titled *60 Years Later: Coming Through the Rye*. The court held that *eBay* applies to copyright cases – and to any federal case in which injunctive relief is sought. Significantly, the court rejected the argument that irreparable injury can be presumed once copyright infringement has been found. Instead, the court said that a copyright plaintiff can obtain injunctive relief only by prevailing under the four-factor equitable analysis required by *eBay*.^[9]

Editors: What about trademark cases?

Morrison: As with copyrights and false advertising, trademark plaintiffs must recognize that *eBay* is clearly applicable to trademark and trade dress cases. In fact, unlike false advertising – where the issue has yet to be addressed by a Circuit Court – the Fifth, Ninth, Tenth, and Eleventh Circuits have held that a trademark infringement plaintiff must satisfy the *eBay* and *Winter* standards in order to secure injunctive relief.^[10]

Editors: What about the “presumption” that has been traditionally applied in trademark cases?

Morrison: In trademark infringement cases, the courts have traditionally said that irreparable injury may be presumed from a finding of infringement.^[11] The courts appear undecided about whether this presumption survives *eBay*. Some courts have continued to apply the presumption, while others have called the presumption into question. Ironically, three Circuit Courts have acknowledged this issue but specifically refused to decide it.^[12]

Editors: How should a trademark plaintiff deal with this issue when

seeking an injunction?

Morrison: The most important thing is to recognize that you must satisfy *eBay*'s four-factor test in order to secure an injunction, whether preliminary or permanent. The second most important thing is to recognize that you may not be able to satisfy the irreparable injury factor by merely relying on the presumption. You may want to cite that presumption in your briefs, but you should never stop there, as either the trial judge or the appellate court may well conclude that the presumption is no longer applicable. So, as in false advertising cases, you must come up with evidence of irreparable injury. It could be anything from testimony by the brand manager in question to financial data showing a decline in sales since the infringement occurred to testimony from a marketing expert. The important thing is to have "evidence" that can be utilized to show that, even without the benefit of a presumption, you have proven irreparable injury.

Editors: Any final thoughts?

Morrison: *eBay* should be of enormous concern to advertisers, trademark owners, and their lawyers. No longer can you spend all of your time proving falsity (or, in trademark cases, infringement) and relegate irreparable injury to the back burner, or claim that your irreparable injury can be presumed. Instead, you must treat the requirement of irreparable injury as a key part of your case and marshal all the evidence you can find. And, of course, be sure to address the other equitable factors, such as the balance of hardships (perhaps by showing that defendant's sales and/or market share were growing even without running the false advertising in question) and the public interest (you might show that the products in question have important health or safety consequences and that there is no public interest in permitting them to be falsely advertised). But above all, recognize that the landscape has changed as a result of the Supreme Court's decision in *eBay*.

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E=mc², or the Publicity Rights of Albert Einstein

After an image of Albert Einstein appeared in an ad in *People* magazine's 2009 Sexiest Man Alive edition, the Hebrew University of Jerusalem filed suit alleging infringement of publicity rights.

The University argued that Einstein transferred his right of publicity to the school through his will and that a General Motors' advertisement for a 2010 Terrain vehicle that displayed his likeness violated those rights.

The automaker moved for summary judgment, arguing that Einstein's will and trust did not explicitly give the school control of his name and likeness. Instead, Einstein only bequeathed his "manuscripts, copyrights, publication rights, royalties and royalty agreements, and all other literary property and rights, of any and every kind or nature whatsoever" to a trust that terminated and passed to the University.

Because the will did not explicitly include a right of publicity, such rights did not survive the physicist's death, GM said.

Interpreting New Jersey law, the state where Einstein was domiciled at

his death, California U.S. District Court Judge A. Howard Matz held that the “doctrine of probable intent” – what Einstein intended when he wrote his will – would be determinative.

The court declined to require that Einstein evidence his intent by demonstrating lifetime exploitation of such a right. “There are sound, even compelling, reasons to allow the heirs of a famous decedent to prevent strangers from exploiting his name, image, reputation and identity, even if the decedent himself did not do so during his lifetime. For example, there have been famous people who, during their lifetimes and afterward, renounced wealth or declined to pursue it, and in part for that reason were revered for their modesty and spirituality. Surely a part of whatever happiness and satisfaction they derived from being famous came from the realization that they were setting an example for those closest to them – presumably including their heirs. Such people fairly can be deemed to have ‘exploited’ their fame by developing a persona that showed that what they cared most about was ‘What do I stand for? How will I be remembered?’ Their death should not deprive them of the very attribute that they intended to leave as their legacy.”

Finding that a genuine issue of material fact remained as to Einstein’s probable intent, the court denied the defendant’s motion and directed the parties to brief the issue.

However, the court did dismiss the University’s causes of action for violations of the Lanham Act and California’s unfair competition law. The plaintiff failed to establish any evidence of consumer confusion over the ad, which appeared in just one issue of the magazine, the court said, and did not show “even a tenuous connection between the ‘goods’ at issue.”

“At most, the Terrain draws its value from Einstein’s image only indirectly and remotely; the ad was not for an Einstein product. Einstein is famous largely due to his towering intellect, a point emphasized by the ‘ $e=mc^2$ ’ tattoo sported by the advertisement’s Einstein doppelganger. So what the advertisement suggests is that the Terrain vehicle is endowed with ‘smart’ (but ‘sexy’) features. So what? Einstein = smart. Terrain = smart. Ergo, does Einstein = Approval of Terrain? In short, any link between the ‘hunky’ model in the ad, Einstein’s image and the vehicle is too weak to create a link between two ‘goods,’ ” the court concluded.

To read the opinion in *Hebrew University v. General Motors*, click [here](#).

Why it matters: The court recognized a postmortem right of publicity in the state of New Jersey despite the lack of a statute or state case law. Instead, the court relied upon federal court opinions in the state to find such a right. In addition, Judge Matz declined to impose a requirement of lifetime exploitation in order to recognize a postmortem right of publicity, noting an Eleventh Circuit decision upholding publicity rights for Dr. Martin Luther King, Jr.’s estate despite his lack of lifetime exploitation.

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Microsoft Announces Targeted Health Ads

Would you like more information about your allergies?

Complying with the Network Advertising Initiative's self-regulatory program, Microsoft Corp. recently updated its privacy policy to inform users that it serves targeted ads based on its health information Web site.

The company added a new page on its Web site about health-related personalized advertising in which it announced that it "personalizes ads on many different segments, including those that are health-related." Ads are served in 11 different "segments": allergies, cholesterol, cold and flu, diabetes, health/migraines, healthy eating, healthy heart, oral health, osteoporosis, sleep, and vision and eye care.

Last year, the NAI announced that its members would be required to disclose Internet behavioral advertising related to health or medical issues beginning in 2012.

The NAI principles allow health information targeting on an opt-out basis, with the exception of "precise information about past, present, or potential future health or medical conditions or treatments, including genetic, genomic and family medical history," which require opt-in consent. Examples of such health conditions include cancer, mental health-related conditions, and sexual health-related conditions.

The NAI has not created a list of all conditions or treatments considered to be "precise." The group's deputy general counsel and director of policy and compliance Meredith Halama wrote in a recent blog post that "Rather, in evaluating our members' health-related segments, NAI staff looks at the nature of the condition to which the segment relates, including, among other things, the seriousness of the condition, its prevalence, whether it is something that an average user would consider to be embarrassing, whether it is treated by over-the-counter or prescription medications, and whether it can be treated by modifications in lifestyle as opposed to medical intervention."

Other medical issues – such as those listed by Microsoft in its segments – merely require disclosure under the transparency policy, not opt-in consent.

To read Microsoft's new policy, click [here](#).

Why it matters: Other sites make similar disclosures, including AOL (targeting consumers with information on blood pressure and asthma). Despite such transparency, however, critics contend that the sites do not go far enough. "If people start seeing online ads from third-party ad networks targeted to medical research, they may be deterred from similar research in the future, which would be a terrible result," Justin Brookman, director for consumer privacy at the Center for Democracy & Technology, told *MediaPost*. He argued that all health-related targeting should require users' explicit, opt-in consent.

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\$1.5M for FTC in Latest Acai Berry Settlement

The Federal Trade Commission's enforcement sweep last April against the marketers of acai berry products has resulted in two more settlements with the agency totaling \$1.5 million.

Intermark Communications, dba Copeac, and Coulomb Media agreed to

permanently halt their use of fake news Web sites that deceptively tout the effectiveness of acai berry supplements and colon cleansers to lose weight.

The defendants were two of ten marketers [targeted last year by the FTC](#) for operating fake news sites with domain names such as “BreakingNewsAt6.com, which featured investigative reports with headlines such as “Acai Berry Diet Exposed: Miracle Diet or Scam?”

The agency alleged that the defendants engaged in false advertising by portraying the sites as legitimate news sites with reports that were carried by network media outlets. The FTC also claimed that defendants made false and unsupported weight loss claims, including assertions that consumers lost 25 pounds in four weeks.

According to the FTC, Intermark and its related defendants were part of the first suit against an affiliate network that not only operated its own fake news sites, but also recruited an entire network of others to use similar sites.

Under the terms of the settlement, Intermark agreed to pay \$1.3 million and halt the use of the “fake news” sites. The defendants also said they would comply with heightened monitoring of affiliate marketers by requiring them to get preapproval for marketing and advertising materials and refusing to pay them if disapproved materials are used.

A \$2.7 million judgment against Coulomb and related defendants will be suspended after a payment of \$170,000. The defendants are barred from making future deceptive claims about health-related products and must make clear that their commercial messages are advertisements, not legitimate journalism.

Neither company admitted any wrongdoing.

To read the complaints and settlement orders in both cases, click [here](#).

Why it matters: The settlements resolve eight of the ten “fake news” cases brought by the agency last year. Earlier this year, the other [six defendants settled](#) for \$500,000 and limitations on future marketing. The FTC has taken additional actions against acai berry marketers, however, reaching a [\\$1.5 million settlement](#) in January 2012 over charges that one such marketer engaged in deceptive advertising and unfair billing.

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New on the Hill: Anti-“Cramming” Bill and a Warning for Violent Video Games

Video game labels and “cramming” by phone companies are the subjects of legislation on Capitol Hill.

After concluding an investigation into “cramming,” where phone companies include third-party charges on consumers’ phone bills, Sen. Jay Rockefeller (D-W.V.) announced that he plans to introduce a bill to halt the practice.

According to the Federal Communications Commission, cramming comes in many forms and is often hard for consumers to detect. Charges for services such as “service fee,” “service charge,” “other

fees,” or “calling plan” may appear on the bill, as well as charges without a clear explanation such as “monthly fee.”

The investigation by the Senate Commerce Science and Transportation Committee, chaired by Sen. Rockefeller, found that phone companies added \$10 billion in such charges over the last five years, with a large percentage of those charges unauthorized by users.

Sen. Rockefeller was joined by Committee member Sen. Amy Klobuchar (D-Minn.) who sent letters to wireless carriers encouraging them to stop the practice.

In other federal legislative news, Reps. Joe Baca (D-Calif.) and Frank Wolf (R-Va.) introduced the Violence in Video Games Labeling Act, which would require video games to carry a warning label.

The bill would apply to games with a rating of “E (Everyone)” or above (which includes all games except those labeled “EC (Early Childhood)”), and the label would read: “WARNING: Exposure to violent video games has been linked to aggressive behavior.”

Pursuant to H.R. 4204, the label must be placed in a clear and conspicuous location on the packaging according to regulations promulgated by the Consumer Product Safety Commission.

“The video game industry has a responsibility to parents, families, and to consumers – to inform them of the potentially damaging content that is often found in their products,” Rep. Baca said in a statement. “They have repeatedly failed to live up to this responsibility. Meanwhile research continues to show that playing violent video games is a causal risk factor for a host of detrimental effects in both the short- and long-term, including increasing the likelihood of physically aggressive behavior. American families deserve to know the truth about these potentially dangerous products.”

Rep. Wolf analogized to the proposed warning to those found on tobacco products. “Just as we warn smokers of the health consequences of tobacco, we should warn parents – and children – about the growing scientific evidence demonstrating a relationship between violent video games and violent behavior.”

To read the Committee’s report on cramming, click [here](#).

To read the Violence in Video Games Labeling Act, click [here](#).

Why it matters: The future of both pieces of legislation remains unclear. Sen. Rockefeller did not elaborate on the specifics of his possible legislation nor a timeline for its introduction. As for the video game labeling bill, Rep. Baca has introduced a similar measure twice in the past with no success. Moreover, the bill, if enacted, would face substantial constitutional impediments in light of the U.S. Supreme Court’s ruling last year in *Brown v. Entertainment Merchants Association* that struck down California’s law banning the sale or rental of violent video games to minors and finding that video games deserve the same First Amendment protection as other forms of art, such as books, plays, and movies.

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6th Circuit Decision Splits the Courts on

Antismoking Law

Creating a split in the federal courts, the 6th Circuit upheld the majority of advertising and marketing restrictions of the Family Smoking Prevention and Tobacco Control Act, striking down only the Act's limitation of tobacco advertising to black and white text and the ban on continuity programs.

Manufacturers and sellers of tobacco products challenged a number of provisions, arguing that they violate their free-speech rights under the First Amendment and constitute an unlawful taking and an infringement on their due process rights under the Fifth Amendment.

A federal district court issued a mixed ruling for the plaintiffs and the Food and Drug Administration, upholding some provisions and striking others.

On appeal, the 6th Circuit upheld the majority of the Act's provisions, emphasizing the government's "significant interest" in preventing juvenile smoking and in "warning the general public about the harms associated with the use of tobacco products."

The Act's mandated packaging and advertising warnings – which require at least 50 percent of the packaging and 20 percent of advertising to be covered by a textual warning label and color image – are constitutional, the court said. "The warning labels required by the Act do not impose any restriction on plaintiffs' dissemination of speech, nor do they touch upon plaintiffs' core speech. Instead, the labels serve as disclaimers to the public regarding the incontestable health consequences of using tobacco."

Constraints on modified-risk tobacco products, like "light" or "mild" descriptors, were similarly upheld by the court, as were restrictions on claims that a tobacco product is safe or less harmful due to FDA regulation or compliance with FDA standards.

Finally, citing the tobacco industry's historic advertising and marketing practices geared toward attracting new young adult and juvenile smokers, the panel said bans on free samples, distribution of branded non-tobacco products (like hats and T-shirts), and event sponsorship were all constitutional. "The tobacco industry spent approximately \$13 billion in advertising to promote its products in 2005, and though plaintiffs claim that all of it was spent to attract and retain adult consumers, it is impossible to believe that promotion so successful in the adult context that it is valued by plaintiffs at \$13 billion had absolutely no effect on anyone below the age of eighteen."

However, the court found that a prohibition on continuity programs, designed to maintain the loyalty of existing customers, was overbroad and unconstitutional. "Logic dictates that the overwhelming beneficiaries, both numerically and comparatively, of these continuity programs are adult consumers," the panel said.

The court also struck down the Act's restriction of tobacco advertising to only black-and-white text as "vastly overbroad." "All use of color and imagery in tobacco advertising, of course, is not deceptive or manipulative," the court said. "Instead of instituting a blanket restriction on color and graphics in tobacco advertising, the government

may instead restrict only the speech necessary to effect its purposes.”

The 6th Circuit decision is at odds with a November 2011 U.S. District Court for the District of Columbia decision that found the prominent graphic warnings on cigarette packaging and advertising unconstitutional.

In that opinion, U.S. District Court Judge Richard J. Leon agreed with the tobacco industry that they would “suffer irreparable harm absent injunctive relief pending a judicial review of the constitutionality of the FDA’s rules.”

The injunction pushed enforcement of the new rules – originally set to take effect in September 2012 – to 15 months from the date the court issues a final ruling on the case. The FDA has already [filed notice](#) that it intends to appeal the decision.

To read the opinion in *Discount Tobacco City v. United States*, click [here](#).

Why it matters: While the panel upheld the textual and image warnings, that portion of the decision split the court 2-1. The dissenting judge argued that the graphic image requirement was “simply unprecedented” and that the government failed to show “that the inclusion of color graphic warning labels is properly or reasonably tailored to address” the harm of tobacco use. Alternatively, the majority emphasized that the plaintiffs challenged the Act on its face and that the challenge occurred prior to the issuance of the FDA’s selected images. Therefore it was not based on the selected images themselves, as the D.C. Court opinion was. “This record provides nothing to review on the issue of warnings save what the statute itself requires,” the majority wrote. “Plaintiffs would have to establish that a graphic warning cannot convey the negative health consequences of smoking accurately, a position tantamount to concluding that pictures can never be factually accurate, only written statements can be.” The court even offered examples of graphic warnings that it said would constitute factual disclosures, including a picture of a nonsmoker’s and smoker’s lungs displayed side by side and a picture or drawing of a person suffering from a smoking-related medical condition.

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[1] *MercExchange, LLC v. eBay, Inc.*, 275 F. Supp. 2d 695 (E.D. Va. 2003).

[2] *MercExchange, LLC v. eBay, Inc.*, 401 F.3d 1323 (Fed. Cir. 2005).

[3] *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 394 (2006).

[4] *Winter v. National Resources Defense Council, Inc.*, 555 U.S. 7, 28 (2008).

[5] *E.g., S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232 (2d Cir. 2001).

[6] *Time Warner Cable, Inc. v. DirecTV, Inc.*, 497 F.3d 144 (2d Cir. 2007).

[7] *See Stassurt v. Lakeside Joint School District*, 2009 U.S. Dist. LEXIS (N.D. Cal. 2009).

[8] *Schering-Plough Healthcare Products, Inc. v. Neutrogena Corp.*, 2011 U.S. Dist. LEXIS 61165 (D. Del. 2011).

[9] *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010).

[10] *Paulsson Geophysical Services Inc. v. Sigmar*, 529 F.3d 303 (5th Cir. 2008); *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873 (9th Cir. 2009); *Lorillard Tobacco Co. v. Engida*, 213 Fed. App. 654 (10th Cir. 2007); *North American Medical Corp. v. Axiom Worldwide Inc.*, 522 F.3d 1211 (11th Cir. 2008).

[11] *E.g., GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199 (9th Cir. 2000).

[12] *North American Medical* (11th Cir.); *Paulsson* (5th Cir.); and *Lorillard* (10th Cir.).

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