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Injunctive Relief, Equity, and Misuse of Rights

33. Tagung für Rechtsvergleichung
“Grenzen der Rechtsdurchsetzung im Immaterialgüterrecht”
16 September 2011
“[T]he very essence of the right conferred by the patent [...] is the privilege of any owner of property to use or not use it, without question of motive.”

Continental Paper Bag Co. v. Eastern Paper Bag Co.,
210 U.S. 405 (S. Ct. 1908)
“Without the right to obtain an injunction, the right to exclude granted to the patentee would have only a fraction of the value it was intended to have, and would no longer be as great an incentive to engage in the toils of scientific and technological research.”

Injunctive relief – pre-eBay

- Irreparable injury: presumed
- Inadequate remedies at law: damages
- Balance of hardships: prevention of economic waste
- Public interest: interest in a functioning patent system
Pre-eBay Development

- *City of Milwaukee v. Activated Sludge*, 69 F.2d 577 (7th Cir. 1934), *cert. denied* (sewage plant)


**eBay**

  - Plaintiff (*MercExchange*) – non-practicing entity
  - A business method patent (an “electronic market designed to facilitate the sale of goods between private individuals”)
  - Unsuccessful licensing proposals by *MercExchange*
  - Defendant (*eBay*) – willful infringer
  - No preliminary injunction requested
No injunction

– traditional equitable principles

No injunction

– traditional equitable considerations

Reversal – injunction issued as a “general rule”

Reversal – traditional equitable considerations

EDVA

CAFC

S.Ct.
Injunctive relief – pre-\textit{eBay}

- Irreparable harm
- Inadequate remedy at law
- Balance of hardships
- Public interest

presumed interest in a functioning patent system
Post-\textit{eBay} Development

Patent infringement cases - decisions on permanent injunctions issued during the period between the \textit{eBay} decision (2006) and 11 April 2011

| Permanent injunctions granted | 132 | 75% |
| Permanent injunctions denied | 44  | 25% |

Patstats, University of Houston Law Center, 20 July 2011
Post-eBay Development

- Predictability of awards of injunctions:
  - Practicing entity
  - Direct competitor
  - Offer to license
  - A small component of the infringing product

Post-eBay Development

Copyright cases:
- *Salinger v. Colting*, 607 F.3d 68 (2nd Cir. 2010)
- *Perfect 10 Inc. v. Google Inc.*, … (9th Cir. 2011)
  - no presumption of irreparable harm

Trademark case:
- *Marlyn Nutraceuticals Inc. v. Mucos Pharma GmbH*, 571 F.3d 873 (9th Cir. 2009)
Post-eBay Development

- Impact of patent trolls / non-practicing entities / patent asserting entities on patent law
  - Availability of injunctive relief
  - Rules of standard setting organizations
  - Calculation of damages
  - Work-product doctrine
  - Venue rules
  - ITC proceedings
  - Defensive patent pooling
  - Organizing of the victims
  - Calls for better examination of patent applications
Post-eBay Development

- International Trade Commission
  - Section 337 proceedings
  - Only limited injunctive relief
  - Possible parallel proceedings
  - Issue of standing of non-practicing entities
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