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*Availability of Injunctive Relief in Patent Cases: eBay, Inc.
v. MercExchange, L.L.C.*

Brian T. Yeh, American Law Division

May 19, 2006

Abstract. The Patent Reform Act of 2005 (H.R. 2795), currently being considered by the House Subcommittee on Courts, the Internet, and Intellectual Property, would, among other things, amend the injunction provision in the Patent Act to require that a court, in determining whether injunctive relief should or should not issue in a patent infringement case, "consider the fairness of the remedy in light of all the facts and the relevant interests of the parties associated with the invention." As this amendment was originally proposed in part to address concerns with the Federal Circuit's "general rule," it remains to be seen whether the eBay decision affects the status of this provision of the bill.

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Availability of Injunctive Relief in Patent Cases: *eBay, Inc. v. MercExchange, L.L.C.*

Summary

The most significant legal right that patent law confers on the patent holder is “the right to exclude others” from making, using, offering for sale, or selling the patented invention throughout the United States, or importing the invention into the United States. Injunctive relief is the usual remedy that courts authorize to prevent violation of this patent right. However, as the recent BlackBerry patent litigation demonstrated, the desirability of an injunction in patent cases could be questioned in certain circumstances, such as when an injunction’s disruptive effects on the public may outweigh the interest in enforcing the patent holder’s “right to exclude.”

In another closely watched patent case, eBay was accused of patent infringement for its website’s “Buy It Now” fixed-price purchase feature. Although a jury had found eBay liable for infringing a business method patent owned by MercExchange, the district court refused to grant a permanent injunction against the Internet company. However, the U.S. Court of Appeals for the Federal Circuit reversed the denial, asserting that the “general rule” in patent disputes is that courts must issue permanent injunctions against patent infringement, absent exceptional circumstances. In *eBay, Inc. v. MercExchange, L.L.C.*, the United States Supreme Court unanimously vacated the appellate court’s judgment and remanded the case to the district court. According to the opinion, district courts have equitable discretion to award injunctive relief, and such decision is reviewable on appeal only for abuse of that discretion. The Court explained that the four equitable considerations that traditionally govern the grant of an injunction apply to the same degree in patent cases as in other areas of law.

Despite the unanimity of the *eBay* Court, the two concurring opinions reveal an apparent disagreement among the justices. One concurrence observes that courts have granted injunctive relief to the patent holder in “the vast majority of patent cases” and thus courts should respect this historical practice. The other concurrence suggests that the recent emergence of patent holding companies and the “suspect validity” of some business-method patents are appropriate considerations for a court to “bear in mind” when applying the four-factor balancing test for injunctive relief.

The Patent Reform Act of 2005 (H.R. 2795), currently being considered by the House Subcommittee on Courts, the Internet, and Intellectual Property, would, among other things, amend the injunction provision in the Patent Act to require that a court, in determining whether injunctive relief should or should not issue in a patent infringement case, “consider the fairness of the remedy in light of all the facts and the relevant interests of the parties associated with the invention.” As this amendment was originally proposed in part to address concerns with the Federal Circuit’s “general rule,” it remains to be seen whether the *eBay* decision affects the status of this provision of the bill.

This report will be updated if events warrant such action.

Contents

Introduction	1
Patent Law Basic Principles	2
eBay, Inc. v. MercExchange, L.L.C.	3
The District Court's Opinion	4
The Federal Circuit Court's Opinion	5
The Supreme Court's Opinion	6
The Concurrences	7
The Patent Reform Act of 2005 (H.R. 2795)	8
Conclusion	9

Availability of Injunctive Relief in Patent Cases: *eBay, Inc. v. MercExchange, L.L.C.*

Introduction

On March 3, 2006, Research In Motion, Ltd. (RIM) and New Technologies Products, Inc. (NTP) reached a settlement that ended a contentious legal dispute that had endured for more than four years and sparked considerable public attention.¹ At issue was RIM's BlackBerry handheld device and communication service, which enables users to wirelessly receive and transmit electronic mail (e-mail) through radio frequencies rather than through a traditional landline Internet connection. A jury had found RIM guilty of willful infringement of NTP's patents concerning wireless e-mail communication services, a judgment affirmed by the U.S. district court² and U.S. Court of Appeals for the Federal Circuit.³ Once the U.S. Supreme Court declined to grant RIM's petition for writ of certiorari in late January 2006,⁴ many BlackBerry subscribers faced the unsettling prospect of an imminent cessation of service pursuant to a court-ordered injunction to enforce NTP's patent rights.

However, prior to the district court's decision on issuing a permanent injunction, NTP and RIM signed a \$612.5 million licensing and settlement agreement, leading to the court's dismissal of the litigation and ensuring uninterrupted operation of the BlackBerry service.⁵ Although RIM avoided an injunction by reaching this agreement with the patent holder, its strength in the settlement negotiations was potentially compromised by the Federal Circuit's then-applicable "general rule" that obliged courts to issue a permanent injunction upon a finding of patent infringement, except in rare instances when an important public need is involved.⁶

In a patent infringement case decided shortly after the BlackBerry litigation concluded, the United States Supreme Court unanimously held in *eBay, Inc. v. MercExchange, L.L.C.* that district courts have equitable discretion to award

¹ See, e.g., Jane Spencer & Jessica E. Vascallaro, *Imagining a Day Without BlackBerrys*, WALL ST. JOURNAL, Jan. 25, 2006, at D1.

² NTP, Inc. v. Research In Motion, Ltd., 261 F. Supp. 2d 423 (E.D. Va. 2002).

³ NTP, Inc. v. Research In Motion, Ltd., 418 F.3d 1282 (Fed. Cir. 2005).

⁴ Research In Motion, Ltd. v. NTP, Ltd., 126 S. Ct. 1174, 2006 U.S. LEXIS 1053 (2006).

⁵ Research In Motion, BlackBerry Press Releases, *Research In Motion and NTP Sign Definitive Settlement Agreement to End Litigation, available on May 18, 2006 at* [http://www.blackberry.com/news/press/2006/pr-03_03_2006-01.shtml].

⁶ MercExchange, L.L.C. v. eBay, Inc., 401 F.3d 1323, 1338 (Fed. Cir. 2005).

injunctive relief in patent infringement cases.⁷ In so ruling, the Court invalidated the “general rule” that the Federal Circuit had adopted for patent cases. The Supreme Court explained that the familiar principles of equity that traditionally govern the grant of an injunction apply to the same degree in patent disputes as in other cases governed by such standards. As the question was not before them, the Court expressly did not decide whether eBay should be permanently enjoined for its infringement of MercExchange’s patent; instead, the Court vacated the Federal Circuit’s judgment that had approved a permanent injunction and remanded the case to the district court to reconsider MercExchange’s motion for injunctive relief in light of the Court’s opinion.

Patent Law Basic Principles

One of the primary purposes of patent law is to provide individuals and institutions with economic incentives to engage in research and development that lead to new products or processes. The U.S. Constitution empowers Congress to confer on “inventors the exclusive right to their ... discoveries.”⁸ By enjoying this limited monopoly⁹ over their inventions, patent holders may be able to receive a return on investment from their creations. Without such patent protection, competitors could “free ride” on the inventor’s research and development efforts and easily duplicate or otherwise practice the new inventions without having incurred the costs to develop them.¹⁰

Under U.S. patent laws, patents have the attributes of personal property.¹¹ A patent holder has the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States, or importing the invention into the United States.¹² Whoever performs any one of these five acts during the term of the invention’s patent, without the patent holder’s authorization, is liable for

⁷ To the disadvantage of RIM, the Supreme Court’s opinion in *eBay* was delivered just a few months too late to affect the course of the BlackBerry litigation and its eventual settlement agreement with NTP. Prior to the Court’s decision in *eBay*, the Federal Circuit’s “general rule” precedent loomed over the district court judge in the BlackBerry case, and an injunction order was thus likely imminent in the aftermath of the injunctive relief hearing. The *eBay* decision is unlikely to change the RIM-NTP agreement, which stated that the \$612.5 million payment was “in full and final settlement of all claims against RIM, as well as for a perpetual, fully-paid up license going forward.” BlackBerry Press Releases, *supra* note 5.

⁸ U.S. CONST. art. I, §8, cl. 8.

⁹ This time period is generally 20 years from the date of filing the patent application for most inventions. 35 U.S.C. § 154(a)(2).

¹⁰ ROGER SCHECHTER & JOHN THOMAS, PRINCIPLES OF PATENT LAW 9-13 (2d ed. 2004).

¹¹ 35 U.S.C. § 261.

¹² 35 U.S.C. § 154(a)(1). However, there is no statutory requirement that a patentee make, use, or sell its invention. *Rite-Hite Corp. v. Kelley Co., Inc.*, 56 F.3d 1538, 1547 (Fed. Cir. 1995).

infringement.¹³ To prevent the violation of any right secured by a patent, the Patent Act provides that a federal court “may grant injunctions in accordance with the principles of equity.”¹⁴ Without the right to obtain injunctive relief, “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.”¹⁵

Each application for a patent consists of two primary parts: (1) a “specification,” which is a written description of the invention enabling those skilled in the art to practice the invention, and (2) one or more claims that define the scope of the subject matter which the applicant regards as his invention.¹⁶ Therefore, these claims define the scope of the patentee’s rights under the patent.¹⁷ Careful scrutiny of the claims is crucial to any infringement lawsuit, as patent infringement will not be adjudged unless the alleged infringer’s actions have been determined to fall within the patent claims. Every patent infringement case thus involves a “two-step” analysis¹⁸ of each asserted patent claim: first, an interpretation and construction of the patent claim, which is a matter of law within the province of the court,¹⁹ and second, whether the claimed invention is being made, used, offered for sale, sold, or imported by the alleged infringer, which is a question of fact.²⁰

eBay, Inc. v. MercExchange, L.L.C.

The patent at issue in the *eBay* case “pertains to a system for selling goods through an ‘electronic network of consignment stores.’”²¹ According to the district court in the case, the holder of the patent, Great Falls, Virginia-based MercExchange, L.L.C., is an entity that “does not practice its inventions and exists merely to license its patented technology to others.”²² The defendant eBay, based in San Jose, California, operates a website that allows sellers to list products for sale and buyers to purchase those goods either through an auction system or at a fixed price. MercExchange alleged that eBay’s “Buy It Now” functionality on its website, which permits users to buy items at fixed prices rather than bid for them, comes within the

¹³ 35 U.S.C. § 271(a).

¹⁴ 35 U.S.C. § 283.

¹⁵ *Smith Int’l, Inc. v. Hughes Tool Co.*, 718 F.2d 1573, 1578 (Fed. Cir. 1983) (citation omitted).

¹⁶ 35 U.S.C. § 112.

¹⁷ 3-8 DONALD S. CHISUM, CHISUM ON PATENTS § 8.01 (2006).

¹⁸ *Std. Oil Co. v. Am. Cyanamid Co.*, 774 F.2d 448, 452 (Fed. Cir. 1985).

¹⁹ *Markman v. Westview Instruments*, 517 U.S. 370 (1996).

²⁰ *Bai v. L&L Wings, Inc.*, 160 F.3d 1350, 1353 (Fed. Cir. 1998).

²¹ *MercExchange, L.L.C. v. eBay, Inc.*, 401 F.3d 1323, 1327 (Fed. Cir. 2005). The patent is U.S. Patent No. 5,845,265.

²² *MercExchange, L.L.C. v. eBay, Inc.*, 275 F. Supp. 2d 695, 712 (E.D. Va. 2003).

claims of its patent, and filed a lawsuit against eBay and its subsidiary Half.com²³ in September 2001.

The District Court’s Opinion. On May 27, 2003, a jury returned a verdict finding that eBay had willfully infringed MercExchange’s patent and holding eBay liable for \$10.5 million in damages.²⁴ The district court reduced the damages to \$5.5 million but upheld the jury’s finding of willful infringement. However, the court refused to issue an injunction against the Internet auctioneer.²⁵ In making this decision to deny injunctive relief to the patent holder, the district court considered four factors consistent with traditional equitable principles:

- (1) whether the plaintiff will suffer irreparable harm if an injunction does not issue,
- (2) whether the plaintiff has an adequate remedy at law,
- (3) whether the balance of hardships tips in the plaintiff’s favor, and
- (4) whether an injunction is in the public interest.²⁶

First, the court believed that MercExchange would not be irreparably harmed because of evidence of its willingness to license its patents, its lack of commercial activity in practicing the patents, and its comments to the media that it desired to obtain royalties rather than an injunction. Second, the court noted that monetary damages served as an adequate remedy at law in this case. Third, the balance of hardships tipped “slightly” in eBay’s favor because, in part, “the plaintiff exists solely to license its patents or sue to enforce its patents, and not to develop or commercialize them. Any harm suffered by the plaintiff by the defendant[’s] infringement of the patents can be recovered by way of damages.”²⁷ The court also noted that since eBay would probably attempt to “design around” the patent claims, any injunction would “be opening a Pandora’s box of new problems” at considerable litigation cost to the parties, as well as a strain on judicial resources. Finally, the court stated that the public interest factor equally supports both parties. The court identified “a growing concern over the issuance of business-method patents” within the Congress and the U.S. Patent and Trademark Office that have called into question the validity of such patents. Although the court acknowledged that this fourth factor usually favors the patentee out of an interest in maintaining the integrity of the patent system, this public interest would not necessarily be furthered in this case, “where the patentee does not practice its patents.”²⁸

²³ Half.com is a wholly owned subsidiary of eBay and operates a website “that allows users to search for goods posted on other Internet websites and to purchase those goods.” *eBay*, 401 F.3d at 1325.

²⁴ *eBay*, 275 F. Supp. 2d at 698.

²⁵ *Id.* at 715.

²⁶ *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-313 (1982).

²⁷ *eBay*, 275 F. Supp. 2d at 714.

²⁸ *Id.*

The Federal Circuit Court’s Opinion. On appeal and cross-appeal of the case, the U.S. Court of Appeals for the Federal Circuit²⁹ unanimously affirmed the jury’s verdict on the finding of infringement.³⁰ However, the appellate court ruled that MercExchange was entitled to an injunction to prevent further infringement by eBay, finding inadequate the district court’s reasons for refusing to issue an injunction.³¹

According to the Federal Circuit court, “Because the right to exclude recognized in a patent is but the essence of the concept of property, the general rule is that a permanent injunction will issue once infringement and validity have been adjudged.”³² Although the appellate court recognized a rare exception to that “general rule,” such as “when a patentee’s failure to practice the patented invention frustrates an important public need for the invention,”³³ it stated that the district court had failed to offer “any persuasive reason to believe this case is sufficiently exceptional to justify the denial of a permanent injunction.”³⁴

The Federal Circuit court deemed irrelevant the district court’s general concern for the validity of business-method patents or the likelihood of continuing litigation. The appellate court also viewed as inappropriate the district court’s several references to MercExchange as an entity that only exists to license its patents, because such a business strategy does not diminish patent rights:

Injunctions are not reserved for patentees who intend to practice their patents, as opposed to those who choose to license. The statutory right to exclude is equally available to both groups, and the right to an adequate remedy to enforce that right should be equally available to both as well.³⁵

On November 28, 2005, the U.S. Supreme Court granted certiorari to determine the appropriateness of the Federal Circuit’s “general rule.”³⁶

²⁹ Under 28 U.S.C. §1295, the United States Court of Appeals for the Federal Circuit has exclusive jurisdiction to hear an appeal from a district court case relating to patents.

³⁰ *eBay*, 401 F.3d at 1329.

³¹ *Id.* at 1339.

³² *Id.* at 1338 (citation and internal quotations omitted).

³³ Although courts usually grant injunctions against patent infringers, one noted exception is the 1934 decision of *City of Milwaukee v. Activated Sludge*, 69 F.2d 577 (7th Cir. 1934). The court in this case refused to issue an injunction against the city of Milwaukee for its infringement of a patented method for sewage treatment. Had injunctive relief been granted, Milwaukee would have been forced to dump raw sewage into Lake Michigan, thereby potentially endangering “the health and the lives of more than half a million people.” *Id.* at 593.

³⁴ *eBay*, 401 F.3d at 1338-39.

³⁵ *Id.* at 1339.

³⁶ *eBay, Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 733, 2005 U.S. LEXIS 8572 (2005).

The Supreme Court’s Opinion. On May 15, 2006, the Court unanimously vacated the appellate court’s judgment and remanded the case to the district court.³⁷ Although the Court noted that “we take no position on whether permanent injunctive relief should or should not issue in this particular case,”³⁸ the Court clarified that the traditional principles of equity that govern issuance of injunctive relief “apply with equal force to disputes arising under the Patent Act,”³⁹ thus dispelling any notion that patent disputes are subject to different standards than those applicable to cases arising under other areas of law. A district court’s decision to grant or deny injunctive relief is reviewable on appeal under an abuse of discretion standard, the Court stated.⁴⁰

However, according to Justice Clarence Thomas, the author of the opinion of the Court, neither of the lower courts had “fairly” applied the traditional equitable principles in determining whether injunctive relief should or should not issue in this case.⁴¹ The district court had erred by improperly suggesting that injunctive relief was categorically unavailable in cases where patent holders only license their patents rather than commercialize the invention themselves:

[S]ome patent holders, such as university researchers or self-made inventors, might reasonably prefer to license their patents, rather than undertake efforts to secure the financing necessary to bring their works to market themselves. Such patent holders may be able to satisfy the traditional four-factor test, and we see no basis for categorically denying them the opportunity to do so.⁴²

On the other hand, the appellate court was incorrect in pronouncing a rule, unique to patent cases, that strongly favored injunctions when infringement has been adjudged, the Court explained. While acknowledging that the Patent Act grants the patent holder the right to exclude others from performing the five acts that constitute patent infringement, Justice Thomas observed that “the creation of a right is distinct from the provision of remedies for violations of that right.”⁴³ In elaboration of this point, Justice Anthony Kennedy in a concurring opinion wrote, “the existence of a right to exclude does not dictate the remedy for a violation of that right.”⁴⁴ Therefore, the Federal Circuit’s “general rule” is unjustifiable, Justice Thomas said,

³⁷ *eBay, Inc. v. MercExchange, L.L.C.*, No. 05-130, slip op. (U.S. May 15, 2006), available on May 18, 2006 at [<http://www.supremecourtus.gov/opinions/05pdf/05-130.pdf>].

³⁸ *Id.* at 5.

³⁹ *Id.* at 3. Justice Thomas noted that this observation finds express statutory support in the Patent Act, which states that district courts “may” issue injunctions “in accordance with the principles of equity.” 35 U.S.C. § 283.

⁴⁰ *eBay*, No. 05-130, slip op. at 2.

⁴¹ *Id.* at 4.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *eBay*, No. 05-130, slip op. at 1 (Kennedy, J., concurring).

as it replaced traditional equitable considerations with a rule that almost categorically mandated injunctive relief following a determination of infringement.⁴⁵

The Court explained that its treatment of injunctive relief for patent cases is consistent with its approach towards injunctions in copyright infringement cases. For example, the Court cited *New York Times Co. v. Tasini*, a copyright case in which the Court refused to adopt a rule that injunctions must automatically issue upon a finding of copyright infringement.⁴⁶

The Concurrences. Two concurring opinions, written by Chief Justice John Roberts, Jr., and Justice Anthony Kennedy, were filed in *eBay* and reveal an apparent disagreement among the justices. Chief Justice Roberts' concurring opinion, joined by Justices Antonin Scalia and Ruth Bader Ginsburg, noted that

From at least the early 19th century, courts have granted injunctive relief upon a finding of infringement in the vast majority of patent cases. This “long tradition of equity practice” is not surprising, given the difficulty of protecting a right to exclude through monetary remedies that allow an infringer to use an invention against the patentee’s wishes — a difficulty that often implicates the first two factors of the traditional four-factor test. This historical practice, as the Court holds, does not *entitle* a patentee to a permanent injunction or justify a *general rule* that such injunctions should issue.... At the same time, there is a difference between exercising equitable discretion pursuant to the established four-factor test and writing on an entirely clean slate.⁴⁷

The implication of this concurrence is that Chief Justice Roberts and the two justices joining him would likely expect injunctive relief to be the usual remedy for patent infringement, consistent with the “long tradition of equity practice.” A district court’s equitable discretion in granting or denying an injunction in patent cases, therefore, is not unfettered, in the view of these three justices.

While agreeing with Chief Justice Robert’s concurrence that “history may be instructive” in applying the four-factor test when the circumstances of a patent case are similar to those of earlier cases, Justice Kennedy’s concurring opinion, joined by Justices John Paul Stevens, David Souter, and Stephen Breyer, suggested that historical practice might not necessarily be helpful for courts to follow when dealing with some patent infringement suits in the current business environment: “[T]rial courts should bear in mind that in many instances the nature of the patent being enforced and the economic function of the patent holder present considerations quite unlike earlier cases.”⁴⁸

⁴⁵ *eBay*, No. 05-130, slip op. at 3-4.

⁴⁶ 533 U.S. 483, 505 (2001)(stating “it hardly follows from today’s decision that an injunction against [copyright infringement] must issue. ... [W]e leave remedial issues open for initial airing and decision in the District Court.”).

⁴⁷ *eBay*, No. 05-130, slip op. at 1-2 (Roberts, C.J., concurring) (emphasis in original).

⁴⁸ *eBay*, No. 05-130, slip op. at 2 (Kennedy, J., concurring).

Concerning the “economic function” of the patent holder, Justice Kennedy acknowledged the emergence of patent holding companies and their impact on patent litigation today:

An industry has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees.... For these firms, an injunction, and the potentially serious sanctions arising from its violation, can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent.... When the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest.⁴⁹

In elaborating his point regarding “the nature of the patent being enforced,” Justice Kennedy stated:

[I]njunctive relief may have different consequences for the burgeoning number of patents over business methods, which were not of much economic and legal significance in earlier times. The potential vagueness and suspect validity of some of these patents may affect the calculus under the four-factor test.⁵⁰

The Patent Reform Act of 2005 (H.R. 2795)

35 U.S.C. § 283 permits a court to “grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.” The Patent Reform Act of 2005 (H.R. 2795), currently being considered by the House Subcommittee on Courts, the Internet, and Intellectual Property, would, among other matters,⁵¹ amend this injunction provision to require that a court, in determining equity, “consider the fairness of the remedy in light of all the facts and the relevant interests of the parties associated with the invention.” Although such express language is supported by the information technology industry, the pharmaceutical industry favors the status quo.⁵² Pharmaceutical companies consider injunctions to be critical to stopping infringement and encouraging investment in new drug research and development. However, typically only one or two patents cover a drug, whereas a computer chip or other advanced technology products often incorporate hundreds or thousands of patented inventions. A technological product in which one “relatively insignificant component” is found to be infringing on a patent may be withdrawn from the market, or the company that supports the product may be compelled to pay an expensive

⁴⁹ *Id.*

⁵⁰ *eBay*, No. 05-130, slip op. at 2 (Kennedy, J., concurring).

⁵¹ For a detailed analysis of many of the reforms proposed by H.R. 2795, see CRS Report RL32996, *Patent Reform: Innovation Issues*, by Wendy H. Schacht and John R. Thomas.

⁵² For a comparison of patent protection in the these two industries, see CRS Report RL33367, *Patent Reform: Issues in the Biomedical and Software Industries*, by Wendy H. Schacht.

settlement to preserve its business.⁵³ During any legislative consideration of H.R. 2795, Congress may face these divergent opinions over injunctive relief held by interested parties in different sectors of the economy. In addition, because this amendment was originally proposed in part to address concerns with the Federal Circuit's "general rule," it remains to be seen whether the *eBay* decision affects the status of this provision of H.R. 2795.

Conclusion

It is worth keeping in mind that Justice Thomas' opinion was the opinion of the Court in *eBay* and was joined by all of its members, including Justice Samuel Alito, who did not join either of the concurrences. While Justice Kennedy's concurrence raises skepticism over the validity of some business-method patents and implies patent holding companies may not be irreparably harmed in the absence of an injunction, this view did not receive the support of a majority of the Court's members and thus lacks the precedential value of the Court's opinion. Similarly, Justice Roberts' concurrence, which appears to favor injunctive relief except in rare instances, received the endorsement of only two other justices. Therefore, despite the unanimity of the *eBay* Court in invalidating the Federal Circuit's "general rule," the division among the justices as evidenced by the concurrences may contribute to uncertainty among the lower courts regarding whether to apply "historical practice" or to consider technological, legal, and business developments that may "affect the calculus" of equity when determining whether to award injunctive relief in patent infringement cases

⁵³ Brief of Business Software Alliance et al., at 4, *eBay, Inc. v. MercExchange, L.L.C.*, No. 05-130 (January 2006).