

A New Twist on eBay: Compulsory Licensing in Copyright Cases?

December 2, 2011 by [Michael Boudett](#)

As most readers know, the Supreme Court held in the [2006 eBay decision](#) that injunctions were no longer to be the norm in patent cases, and irreparable harm was not to be presumed. Instead, injunctions are within the equitable discretion of the district court, and are to be granted only if the plaintiff has shown entitlement under the traditional multi-factor test.

It's been clear for some time that the same principles now apply in copyright and trademark cases as well. The First Circuit, for instance, addressed *eBay* in the context of a trademark cases in the [Voice of the Arab World decision](#), and several courts have applied the holding to copyright cases, such as the Second Circuit in the [J.D. Salinger case](#).

What does this mean for plaintiffs in trademark and copyright cases? This is still unclear, and the question will be very case specific. In October, the Federal Circuit [reversed a lower court's denial of a permanent injunction](#) in a patent case, implying that *eBay* shouldn't be read too broadly. The court wrote this interesting summary:

Although *eBay* abolishes our general rule that an injunction normally will issue when a patent is found to have been valid and infringed, it does not swing the pendulum in the opposite direction. In other words, even though a successful patent infringement plaintiff can no longer rely on presumptions or other shortcuts . . . it does not follow that courts should entirely ignore the fundamental nature of patents as property rights granting the owner the right to exclude.

Some courts, though, appear not to share the Federal Circuit's view that the "pendulum" is now neutral. Last month, a district court in Maryland, citing *eBay*, [denied post-trial injunctive relief to a prevailing plaintiff in a copyright case](#). In that case, the plaintiff showed that the Baltimore Ravens NFL franchise had copied his drawing of a "Flying B Logo" without authority, and the Fourth Circuit had held that use of a similar logo (see below) in films and video clips was not fair use.



Plaintiff's Drawing



The Accused Work

But on remand, the district court compelled the defendant Baltimore Ravens to pay “reasonable compensation,” which seems to constitute something other than statutory damages or wrongful profits, and then cited the adequacy of that compensation as a reason for denying the requested injunction. The *eBay* decision appears to have spawned at least one judicially created compulsory licensing scheme.

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