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Impact of *eBay v. MercExchange* on Antitrust Standard-Setting Cases

by Robert N. Cook

The Supreme Court recently held in *eBay, Inc. v. MercExchange, L.L.C.* that injunctions may issue in patent cases only when the patent owner has met the traditional four-factor test for obtaining an injunction. Previously, injunctions were treated as more-or-less automatic upon a showing of patent infringement.

While *eBay v. MercExchange* is a patent case without antitrust issues, the decision may have a significant practical effect on those antitrust cases where there is an allegation of monopolization through subversion of a technology standard-setting process. The archetypal such case involves a patent owner who, while participating in industry standard-setting activity through a group such as JEDEC or IEEE, wrongfully fails to disclose the existence of a patent infringed by a proposed standard and then does not seek to enforce the patent until after the standard has become widely adopted.

It is common for promulgation of a technology standard to be accompanied by the creation of a patent pool to encourage implementation of the standard by making the necessary intellectual property available at a reasonable and nondiscriminatory royalty rate. Nondisclosure of a necessary patent means that such a patent pool will not be sufficient to convey the intellectual property rights necessary to use the technology standard. Wrongful nondisclosure, at least under certain circumstances, may provide the basis for a count of attempt to monopolize.

Such attempt to monopolize cases implicitly assume that a patent owner will be able to obtain injunctive relief preventing others from using a technology standard found to be an infringement of the patent owner's intellectual property. Prior to *eBay v. MercExchange*, such an assumption was consistent with patent practice in the United States. Under *eBay v. MercExchange*, however, an injunction may issue in a patent case only upon a showing of (1) irreparable injury, (2) inadequate remedy at law, (3) an appropriate balancing of the hardships, and (4) public interest considerations not mitigating against issuance of the injunction, as required for injunctions in other areas of law.

The concurring opinions in *eBay v. MercExchange* suggest that injunctions will continue to issue in typical patent cases. Those patent cases with significant antitrust dimensions, however, are often atypical and may carry unusual baggage, both in terms of public interest considerations and in terms of equitable defenses like unclean hands. Thus, in an archetypal case

of monopolization through manipulation of standard-setting processes, an injunction may be unlikely because of public interest considerations relating to the economic effects of shutting down a widely-used technology standard. In cases where evidence of fraud is present, an injunction becomes even less likely under the doctrine of unclean hands.

Absent an injunction, the ability of a would-be monopolist to reduce output by preventing firms from implementing a technology standard may be limited to obtaining an extremely high damage award at trial. Damage awards, however, require jury determinations and may be difficult to predict with accuracy. Furthermore, in cases where the other patents necessary to implement a technology standard have been made available through an industry patent pool, the likelihood of a damage award high enough to reduce output is affected by the prospect that a jury may determine that it is adequate simply to put the patent owner on an equal footing with the firms that participated in the patent pool.

Thus, while *eBay v. MercExchange* may not be directed to cases at the intersection of patent law and antitrust law, the Supreme Court's decision may nonetheless have a significant impact on such cases.

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