

CLARITY IN REMEDIES FOR PATENT CASES

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INTRODUCTION

The Supreme Court's 2006 patent injunction decision in *eBay v. MercExchange*,¹ is now over a decade old. For a unanimous judicial opinion on patent matters, applying "traditional"² and "well-established"³ law that did not determine the outcome of the dispute, one would expect the case to now lay fallow with little use beyond a string citation at the end of more significant discussion. But that is not where *eBay* is now. Indeed, less than five years after the opinion was issued, "*eBay* had been cited more than 4,100 times;"⁴ the "opinion has had cataclysmic effect . . . a remarkable legal juggernaut."⁵

The complicated story of the *eBay* case and its precedent is wrapped up in a saga dating back to the internet boom of the 1990s, a five-week jury trial finding eBay to be a willful infringer of twelve MercExchange patent claims,⁶ and a David versus Goliath litigation and appeal story spanning seven years.⁷ During the years of Supreme Court briefing and argument, 2005–06, more than thirty amici briefs were filed,⁸ and the case received more media

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¹ 547 U.S. 388 (2006).

² *Id.* at 390.

³ *Id.* at 391.

⁴ DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 340 (4th ed. 2012).

⁵ Mark P. Gergen et al., *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 205–06 (2012).

⁶ Ryan T. Holte, *The Misinterpretation of eBay v. MercExchange and Why: An Analysis of the Case History, Precedent, and Parties*, 18 CHAP. L. REV. 677, 683 (2015).

⁷ *Id.* at 716–17; Ryan T. Holte, *Trolls or Great Inventors: Case Studies of Patent Assertion Entities*, 59 ST. LOUIS U. L.J. 1, 29 (2014).

⁸ Holte, *supra* note 6, at 691.

coverage than any other Supreme Court case pending or decided that term.⁹ Even after the 2006 Supreme Court opinion, the injunction dispute continued on for further proceedings before the district court and Federal Circuit, further complicating the Supreme Court injunction decision and its application.¹⁰ It is no surprise, then, that the *eBay v. MercExchange* dispute had many complications that resulted in the confusion and misinterpretation of the Court's opinion and its precedent in a variety of later cases.¹¹

In *eBay*'s aftermath, the rate of permanent injunctions in patent infringement disputes decreased dramatically. In the two years prior to *eBay*, between 100 and 94 percent of patentee motions for injunctions were granted in district courts.¹² In contrast, in the years after *eBay*, that number dropped to 72.5 percent.¹³ In greater contrast, an analysis of grant rates based on patentee status showed that post-*eBay* patent assertion entity (PAE) injunction grants dropped to 16 percent.¹⁴ "PAEs rarely obtained a permanent injunction after prevailing on liability" in district courts.¹⁵ Adding even greater confusion to this significant district court change is the fact that, in injunctive decisions, the Federal Circuit is far more favorable to patentees than trial courts.¹⁶ The Federal Circuit affirms district court grants of permanent injunctions 88 percent of the time and affirms district court denials of such injunctions only 53 percent of the time.¹⁷ This difference was found to be statistically significant.¹⁸

Given the confusing case history and conflicting interpretations by trial and appellate courts when deciding injunction outcomes, commentators have attempted to pull the *eBay* aftermath in multiple directions. The crux of these arguments lies with patentees being allowed "property rules" or "liability rules."¹⁹ Some have argued that one interpretation of *eBay* that allows a

⁹ Cf. Lisa A. Dolak & Blaine T. Bettinger, *eBay and the Blackberry®: A Media Coverage Case Study*, 2 AKRON INTELL. PROP. J. 1, 24 fig.4 (2008) (comparing newspaper coverage of *eBay v. MercExchange* and *NTP v. Research in Motion*).

¹⁰ Gergen et al., *supra* note 5, at 205.

¹¹ Holte, *supra* note 6, at 728–31.

¹² See *id.* at 719; *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 395 (2006) (Roberts, C.J., concurring) (stating that courts have granted injunctive relief in the "vast majority" of cases).

¹³ Christopher B. Seaman, *Permanent Injunctions in Patent Litigation After eBay: An Empirical Study*, 101 IOWA L. REV. 1949, 1982–83 (2017).

¹⁴ *Id.* at 1988.

¹⁵ *Id.*

¹⁶ Ryan T. Holte & Christopher B. Seaman, *Patent Injunctions on Appeal: An Empirical Study of the Federal Circuit's Application of eBay*, 92 WASH. L. REV. 145, 199 (2017).

¹⁷ *Id.* at 187.

¹⁸ *Id.*

¹⁹ F. Scott Kieff, *Removing Property from Intellectual Property and (Intended?) Pernicious Impacts on Innovation and Competition*, 19 SUP. CT. ECON. REV. 25, 27 (2011) ("Property rules are seen as designed to generally keep an entitlement in the hands of its owner unless the owner consents to use or transfer; and emblematic property rules include injunctions designed to prevent such use or transfer Conversely, liability rules are seen as designed to allow infringement when the owner refuses consent, or

“weakening or limiting of property-based remedies . . . is not justified due to various countervailing policies” and Supreme Court practice.²⁰ Others have argued that the “conventional wisdom [of property-rights scholars] is outdated” and that liability rules should govern to prevent roadblocks in license negotiations²¹ and to promote other policies such as “beneficially slow[ing] down” patent cases.²² Finally, other scholars simply note that the *eBay* factors analysis is all wrong, that it is not traditional equity practice at all, and that there should be a return to rebuttable presumptions for irreparable injury.²³

This Article summarizes more detailed work done elsewhere and argues that after more than a decade of disjointed application and discussion regarding *eBay*'s precedent, it is time to add clarity to remedies for patent cases. Part I chronicles the history of the *eBay* case and the party and procedural case facts that led to a perfect storm of precedential confusion. Part II reviews the empirical evidence of a shift in patent remedies decisions in the aftermath of *eBay*. This Part details the significant differences in injunction decision outcomes between district courts and the Federal Circuit: compared to district courts, the Federal Circuit remains inclined toward injunctions, applying a property-rule remedy to prevent future infringement.²⁴ Part II further reviews the significance of the Supreme Court's 1908 *Continental Paper Bag*²⁵ opinion, which confirmed injunction remedies for nonusing patent owners, and which was reaffirmed in *eBay*, although the decision has continually been forgotten in patent law. This discussion includes a detailed historical review of the century-old case and of Margaret Knight, the “woman Edison” behind the case, who sustained her company through patent enforcement action and injunctive remedy. Part III reviews the work of other scholars in the *eBay* debate,²⁶ noting that the equity law precedent has confused other areas of the

when the owner is not even asked, and generally require the non-owner merely to pay, after a lawsuit . . . objectively measured damages caused by the infringement.”)

²⁰ E.g., Andrew Beckerman-Rodau, *Patents Are Property: A Fundamental but Important Concept*, 4 J. BUS. & TECH. L. 87, 96 (2009).

²¹ Ben Depoorter, *Property Rules, Liability Rules and Patent Market Failure*, 1 ERASMUS L. REV. 59, 66 (2008).

²² Doug Lichtman, *Patient Patents: Can Certain Types of Patent Litigation Be Beneficially Delayed?*, 46 J. LEGAL STUD. 427, 429 (2017).

²³ Gergen et al., *supra* note 5, at 207–08.

²⁴ Holte & Seaman, *supra* note 16, at 199.

²⁵ 210 U.S. 405 (1908).

²⁶ E.g., Kieff, *supra* note 19, at 36 (“[T]he recent Supreme Court decision in *eBay* may weaken this [injunction] practice. Some see this case as having raised the bar for patentees seeking an injunction after there has been a full adjudication of patent validity and infringement . . . Others see the case as merely restating the established practice that an injunction should issue once validity and infringement have been decided in court. In the final analysis, the full impact of the *eBay* case remains an open question for debate.” (footnote omitted)).

law²⁷ and has removed property remedies from patent rights.²⁸ This Part also summarizes arguments on both sides regarding whether this development is proper—are liability or property rules for patent rights best?²⁹ Part IV reviews recently proposed legislative changes to address *eBay*. Finally, Part V concludes by noting the core areas of ambiguity that require clarity in patent case remedies and why the Supreme Court might be best suited to address the ambiguities.

I. *EBAY*—A PERFECT STORM OF PRECEDENTIAL CONFUSION

To assist in understanding the need for clarification in *eBay*'s precedent, this section first discusses the history of the *eBay v. MercExchange* dispute. This includes the following: party background, procedural history of the dispute, Supreme Court decision, aftermath of the case remand before settlement, and subsequent cases.

A. *The Parties and Lower Court Decisions*

The *eBay* saga begins with the mid-1990s founding of MercExchange by former CIA engineer Tom Woolston.³⁰ MercExchange's business was initially directed towards selling collectibles via e-commerce, capitalizing on Woolston's 1995 patent application for trusted computer-based sales between parties unaffiliated with one another.³¹ MercExchange's dispute with

²⁷ *Infra* Section III.C; see also Mark A. Lemley, *Did eBay Irreparably Injure Trademark Law?*, 92 NOTRE DAME L. REV. 1795, 1796 (2017) (“[T]rademark courts have misinterpreted *eBay*, treating each of the four factors as a requirement rather than a consideration.”); Gergen et al., *supra* note 5, at 214–16.

²⁸ See Beckerman-Rodau, *supra* note 2020, at 88 (“[P]atent owners should be entitled to protect patent property rights from invasion of third parties without regard to whether the patent owner is injured by infringement.”); Eric R. Claeys, *The Conceptual Relation Between IP Rights and Infringement Remedies*, 22 GEO. MASON L. REV. 825, 860–61 (2015).

²⁹ *Infra* Part III; see also Andrew Beckerman-Rodau, *The Supreme Court Engages in Judicial Activism in Interpreting the Patent Law in eBay, Inc. v. MercExchange, L.L.C.*, 10 TUL. J. TECH. & INTELL. PROP. 165, 189–91 (2007) (“[I]t is imperative that when the Supreme Court unilaterally eliminates a well-established and long-followed rule of law that it provide clear guidance in its judicial opinion explaining the rationale for its actions. . . . The majority decision in *eBay* failed to provide any explanation for its rejection of almost a century of precedent.”); Richard A. Epstein, *The Property Rights Movement and Intellectual Property*, REGULATION, Winter 2008, at 58, 62. Compare Depoorter, *supra* note 21, at 66 (arguing that the idea that property rules are best for patents is “outdated”), with Lichtman, *supra* note 22, at 429 (discussing how a lack of property rules slows down patent litigation and how that is beneficial).

³⁰ Holte, *supra* note 7, at 23–27. Woolston's company was first named Fleanet, and then it was changed to MercExchange during the time when his first patent application was pending. *Id.* at 27. After founding Fleanet, Woolston received his law degree from the George Washington University School of Law. *Id.* at 24.

³¹ U.S. Patent No. 5,845,265 (issued Dec. 1, 1998); Holte, *supra* note 7, at 26–27.

eBay started in 2000 when MercExchange began experiencing financial problems and eBay—prior to any alleged infringement—expressed interest in purchasing MercExchange’s patent portfolio.³²

After a few months of unsuccessful negotiation, MercExchange believed eBay was “looking for ways to kill the patents instead of buying them.”³³ The negotiations ended, and, according to MercExchange, eBay then began infringing the Woolston patents.³⁴ MercExchange then sued eBay for patent infringement in September 2001, in the U.S. District Court for the Eastern District of Virginia, the jurisdiction where MercExchange was headquartered.³⁵

In 2003, after a five-week trial, a jury found Woolston’s ‘265 patent (and one other patent in the same family) not invalid and infringed; the jury awarded MercExchange \$35 million in damages.³⁶ MercExchange subsequently moved for entry of a permanent injunction, which the district court denied.³⁷ While recognizing that “the grant of injunctive relief against the infringer is considered the norm,” the district court stated that it was required to consider “traditional equitable principles,” including “(i) whether the plaintiff would face irreparable injury if the injunction did not issue, (ii) whether the plaintiff has an adequate remedy at law, (iii) whether granting the injunction is in the public interest, and (iv) whether the balance of the hardships tips in the plaintiff’s favor.”³⁸ After evaluating these four factors, the district court found none of them weighed in favor of granting an injunction.³⁹ The court placed particular emphasis on MercExchange’s “willingness to license its patents, its lack of commercial activity in practicing the patents, and its comments to the media as to its intent with respect to enforcement of its patent rights.”⁴⁰ The district court ultimately concluded that eBay successfully rebutted the presumption that MercExchange would suffer irreparable harm absent an injunction.⁴¹

Both MercExchange and eBay appealed to the Federal Circuit on various grounds. In March 2005, the Federal Circuit issued a seventeen-page opinion, addressing the injunction issue in just over one page.⁴² Reversing the denial of a permanent injunction, the Federal Circuit did not cite the four-

³² Holte, *supra* note 7, at 28.

³³ Julia Wilkinson, *The eBay Patent Wars: Interview with MercExchange CEO Thomas Woolston*, ECOMMERCEBYTES.COM (Sept. 30, 2004), <http://www.ecommercebytes.com/cab/abn/y04/m09/i30/s01>.

³⁴ *Id.*

³⁵ First Amended Complaint for Patent Infringement at 1, *MercExchange, L.L.C. v. eBay, Inc.*, 275 F. Supp. 2d 695 (E.D. Va. 2003) (No. 2:01-CV-736).

³⁶ *MercExchange*, 275 F. Supp. 2d at 698–99.

³⁷ *Id.* at 710–15.

³⁸ *Id.* at 711.

³⁹ *Id.* at 715.

⁴⁰ *Id.* at 712.

⁴¹ *Id.*

⁴² *MercExchange, L.L.C. v. eBay, Inc.*, 401 F.3d 1323, 1338–39 (Fed. Cir. 2005).

factor equitable test applied by the district court.⁴³ Instead, the court began its analysis by declaring “the general rule is that a permanent injunction will issue once infringement and validity have been adjudged.”⁴⁴ It went on to state that “a court may decline to enter an injunction” only in unusual circumstances, such as “when ‘a patentee’s failure to practice the patented invention frustrates an important public need for the invention,’ such as . . . to protect public health.”⁴⁵

The court went on to find that the district court erred in a number of areas. First, regarding the district court’s concern over the issuance of business-method patents, the Federal Circuit stated that a “general concern regarding business-method patents . . . is not the type of important public need that justifies the unusual step of denying injunctive relief.”⁴⁶ Second, regarding MercExchange’s public statements describing willingness to license the patents at issue, the Federal Circuit stated, “Injunctions are not reserved for patentees who intend to practice their patents If the injunction gives [MercExchange] additional leverage in licensing, that is a natural consequence of the right to exclude”⁴⁷ Finally, the Federal Circuit concluded its discussion of the injunction issue by holding that there was “no reason to depart from the general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances.”⁴⁸

B. *The Supreme Court Decision and Concurring Opinions*

eBay filed its petition for a writ of certiorari with the Supreme Court on July 25, 2005,⁴⁹ MercExchange filed an opposition,⁵⁰ and on November 28, 2005, the Supreme Court granted certiorari on two questions.⁵¹ The first question was whether the Federal Circuit erred in employing the general rule of issuing a permanent injunction after a finding of infringement.⁵² The second question was whether the Supreme Court should “reconsider its precedents,

⁴³ *Id.* at 1339.

⁴⁴ *Id.* at 1338 (citing *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1246–47 (Fed. Cir. 1989)).

⁴⁵ *Id.* (quoting *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1547 (Fed. Cir. 1995) (en banc)).

⁴⁶ *Id.* at 1339.

⁴⁷ *Id.*

⁴⁸ *eBay*, 401 F.3d at 1339.

⁴⁹ Petition for a Writ of Certiorari, *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (No. 05-130).

⁵⁰ Brief in Opposition to Petition for a Writ of Certiorari, *eBay*, 547 U.S. 388 (No. 05-130).

⁵¹ *eBay Inc. v. MercExchange, L.L.C.*, 546 U.S. 1029, 1029 (2005) (mem.) (granting writ of certiorari). The Supreme Court did not invite the Solicitor General’s office “to file an amicus brief setting forth the government’s views as to whether the Court should grant certiorari in” the case. John F. Duffy, *The Federal Circuit in the Shadow of the Solicitor General*, 78 GEO. WASH. L. REV. 518, 525 (2010) (“Such invitations, which Supreme Court practitioners refer to as ‘Calls for Views of the Solicitor General’ or ‘CVSG’ orders, have been an accepted part of Supreme Court practice for about a half century.”).

⁵² *eBay*, 546 U.S. at 1029.

including *Continental Paper Bag Co. v. Eastern Paper Bag Co.*,⁵³ a 1908 case containing language requiring a near-automatic injunction rule: “Anything but prevention takes away the privilege which the law confers upon the patentee.”⁵⁴ There was significant third-party interest in the case while it was pending at the Supreme Court. “In all, thirty-one amici briefs were filed: thirteen in support of eBay, fourteen in support of MercExchange, and four in support of neither party.”⁵⁵ The briefs presented the views of hundreds of professors, associations, corporations, inventors, and technology investors.⁵⁶

On May 16, 2006, the Supreme Court unanimously reversed the Federal Circuit.⁵⁷ Justice Thomas delivered the opinion for a unanimous Court. Chief Justice Roberts filed a concurring opinion (joined by Justices Scalia and Ginsburg),⁵⁸ as did Justice Kennedy (joined by Justices Stevens, Souter, and Breyer).⁵⁹ The Court’s opinion is succinct—less than five full pages in the official *United States Reports*—and holds that “a federal court considering whether to award permanent injunctive relief to a prevailing plaintiff” in a dispute arising under the Patent Act must apply the four-factor test “historically employed by courts of equity.”⁶⁰ The unanimous Supreme Court

⁵³ *Id.*

⁵⁴ *Cont’l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405, 430 (1908) (“From the character of the right of the patentee we may judge of his remedies. It hardly needs to be pointed out that the right can only retain its attribute of exclusiveness by a prevention of its violation. Anything but prevention takes away the privilege which the law confers upon the patentee.”).

⁵⁵ Holte, *supra* note 6, at 691.

⁵⁶ *Id.* Interested parties in support of eBay, including Time Warner, Amazon.com, Chevron, Cisco, Google, IAC, Infineon Tech., Shell Oil, VISA, and Xerox argued that automatic injunctions allowed patent holders too much leverage in litigation, encouraged the nonpractice of patents, and greatly discouraged innovation. *Id.* at 691–92. In further support, American Online, Applied Materials, Chevron, Cisco Systems, Google, Shell Oil, and VISA argued that injunctions exacerbated abusive litigation, overburdened courts, and undermined innovation. *Id.* at 692. In support of MercExchange, GE, 3M, Proctor & Gamble, Du Pont, and Johnson & Johnson argued that they continually relied on, and made decisions based on, the existing injunction rule; this argument was reinforced by the American Bar Association’s assertion that changes to the general rule would lead to forum shopping. *Id.* at 692–93. In broad support of the patent system, parties such as the United Inventors Association, the American Bar Association, and a number of universities emphasized their role in innovation as nonmanufacturing entities. *Id.* at 693–94. In a brief signed by the Patent and Trademark Office, Department of Justice, and Solicitor General, the United States argued in favor of the four equitable principles. *Id.* at 694. However, the government brief concluded that the Federal Circuit was correct in holding that the district court abused its discretion. *Id.* Notably, the *eBay* holding reflects the only patent case in which the Solicitor General’s interests did not prevail. In support of neither party, IBM noted the archaic rigidity of the Federal Circuit’s approach, while the Intellectual Property Law Association and Federal Circuit Bar Association argued for the general rule, recognizing the patentees’ lack of an adequate remedy at law. *Id.* at 695. Further, the case was argued by veteran Supreme Court practitioners Seth Waxman and Carter Phillips. *Id.* at 696.

⁵⁷ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390 (2006).

⁵⁸ *Id.* at 394–95 (Roberts, C.J., concurring).

⁵⁹ *Id.* at 395–97 (Kennedy, J., concurring).

⁶⁰ *Id.* at 390. Despite the Court’s language, some remedies scholars have argued that this “historical” or “traditional” four-factor test for a permanent injunction was in fact neither historical nor traditional.

emphasized that patents confer “the right to exclude others from making, using, offering for sale, or selling the invention,”⁶¹ but the Federal Circuit failed to recite and apply “traditional equitable principles” in deciding whether an injunction was warranted:

The [Federal Circuit] articulated a “general rule,” unique to patent disputes, “that a permanent injunction will issue once infringement and validity have been adjudged.” . . .

Because we conclude that neither [the Federal Circuit nor the district court] correctly applied the traditional four-factor framework that governs the award of injunctive relief, we vacate the judgment of the Court of Appeals⁶²

The unanimous opinion made two notable points about how courts should address these principles in regard to noncommercializing patent owners such as MercExchange.⁶³ First, regarding the district court’s rejection of an injunction based in part on MercExchange’s “lack of commercial activity in practicing the patent,”⁶⁴ the Court reiterated that there is no requirement for patentees to practice their inventions and stated:

[T]raditional equitable principles do not permit such broad classifications. For example, some 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.⁶⁵

Thus, the Court held that the district court’s “analysis c[ould not] be squared with the principles of equity adopted by Congress.”⁶⁶ Further, directly addressing the second question granted certiorari—namely, the soundness of the 1908 *Continental* holding that nonpracticing patentees are entitled to injunctive relief—the Court affirmed the principle and held that the district

See LAYCOCK, *supra* note 5, at 339 n.1 (arguing that there was “no ‘traditional’ four-part test” and that the Supreme Court majority’s citations supporting this test are misplaced in cases related to preliminary injunctions); Doug Rendleman, *The Trial Judge’s Equitable Discretion Following eBay v. MercExchange*, 27 REV. LITIG. 63, 76 n.71 (2007) (“Remedies specialists had never heard of the four-point test.”). *But see* Rachel M. Janutis, *The Supreme Court’s Unremarkable Decision in eBay Inc. v. MercExchange, L.L.C.*, 14 LEWIS & CLARK L. REV. 597, 597 (2010) (“*eBay* is not a remarkable break from equitable practice. Indeed, the principles outlined by the Court in its decision are neither novel [n]or surprising when viewed in light of previous precedents.”).

⁶¹ *eBay*, 547 U.S. at 392 (quoting 35 U.S.C. § 154(a)(1) (2000)).

⁶² *Id.* at 393–94 (citation omitted) (quoting *MercExchange, L.L.C. v. eBay, Inc.*, 401 F.3d 1323, 1338 (Fed. Cir. 2005)).

⁶³ *Holte, supra* note 6, at 700.

⁶⁴ *eBay*, 547 U.S. at 393 (quoting *MercExchange, L.L.C. v. eBay, Inc.*, 275 F. Supp. 2d 695, 712 (E.D. Va. 2003)).

⁶⁵ *Id.*

⁶⁶ *Id.*

court erred in categorically rejecting injunctive relief for nonpracticing patentees.⁶⁷

Chief Justice Roberts's concurring opinion consisted of only two paragraphs and focused on the history of injunctions in patent cases. After noting that the Court's majority holding rested on traditional notions of equity, he discussed that tradition vis-à-vis patent cases: "From at least the early 19th century, courts have granted injunctive relief upon a finding of infringement in the vast majority of patent cases."⁶⁸ In his opinion, this traditional practice was "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."⁶⁹ Chief Justice Roberts concluded his concurrence by citing Justice Holmes: "a page of history is worth a volume of logic" regarding the long history of injunctive relief in patent cases.⁷⁰

Justice Kennedy's three-paragraph concurring opinion⁷¹ supported the Court's opinion regarding the "well-established, four-factor test . . . in deciding whether to grant injunctive relief in patent cases."⁷² Justice Kennedy also agreed with Chief Justice Roberts about the "lesson of the historical practice" in determining injunctive relief.⁷³ But Kennedy's concurrence then sharply departed from Roberts's; specifically, Kennedy contended that "[b]oth the terms of the Patent Act and the traditional view of injunctive relief accept that the existence of a right to exclude does not dictate the remedy for a violation of that right."⁷⁴ It then asserted that modern patent cases often differed from historical patent litigation in several important ways, including the role

⁶⁷ *Id.* at 393–94; *see also* Holte, *supra* note 6, at 701 (noting that the *Continental* opinion states regarding a nonpracticing patent holder: "Standing alone, non-use is no efficient reason for withholding injunction. There are many reasons for non-use which, upon explanation, are cogent Anything but prevention takes away the privilege which the law confers upon the patentee." (alteration in original) (quoting *Cont'l Paper Bag, Co. v. E. Paper Bag Co.*, 210 U.S. 405, 427, 430 (1908))). Other commentators have argued that *eBay*'s generalities about equities stand in significant tension with the argument and holding from *Continental*. *See, e.g.*, Claey's, *supra* note 28, at 833.

⁶⁸ *eBay*, 547 U.S. at 395 (Roberts, C.J., concurring).

⁶⁹ *Id.*

⁷⁰ *Id.* (quoting *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)); *see also* Jay Dratler, Jr., *eBay's Practical Effect: Two Differing Visions*, 2 AKRON INTELL. PROP. J. 35, 43 (2008) ("The thrust of [Roberts's] concurrence was that the results of permanent-injunction hearings in patent cases need not change drastically as a result of the Court's unanimous insistence on a four-factor equitable analysis.").

⁷¹ *eBay*, 547 U.S. at 395–97 (Kennedy, J., concurring). Justice Kennedy characterized his concurrence as mere "observations" and cited only a single authority to support his views—a 2003 FTC report summarizing a panel discussion concerning "The Rise of Non-Practicing Entities" in the computer hardware industry. *Id.* at 396 (citing FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY 38–39 (Oct. 2003), <http://www.ftc.gov/sites/default/files/documents/reports/promote-innovation-proper-balance-competition-and-patent-law-and-policy/innovationrpt.pdf>).

⁷² *Id.* at 395.

⁷³ *Id.* at 396.

⁷⁴ *Id.*

of nonpracticing patentees who employ injunctive relief “as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent.”⁷⁵ Justice Kennedy also explained that injunctions may be inappropriate “[w]hen 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.”⁷⁶ Finally, Justice Kennedy pointed to the “burgeoning number of patents over business methods,” some of which allegedly suffered from “potential vagueness and suspect validity,” as another reason to potentially deny injunctive relief.⁷⁷

C. *Supreme Court Remand and Settlement*

While the landmark Supreme Court decision in *eBay* is fundamental to the post-2006 changes in patent injunction jurisprudence, the aftermath and conclusion of the *eBay* litigation itself seemingly played a significant role in the decision’s impact. Upon remand from the Supreme Court, and applying the four-factor test mandated by the Court’s decision, the Eastern District of Virginia court denied injunctive relief to MercExchange for a second time.⁷⁸ In July 2007, the district court issued a detailed decision finding that three of the four *eBay* equitable factors weighed against granting MercExchange an injunction.⁷⁹ The district court’s decision after remand was the final injunction decision in the case and has been widely cited by district courts when applying *eBay* to prevailing patentees in their courts.⁸⁰

⁷⁵ *Id.* Justice Kennedy’s conclusions about historical patent cases seem to conflict with recent scholarship understanding significant nineteenth-century nonpracticing patentee litigation. *See, e.g.*, Adam Mossoff, *Patent Licensing and Secondary Markets in the Nineteenth Century*, 22 GEO. MASON L. REV. 959, 961–62 (2015) (arguing that commercialization of patents through licensing, and ultimately nonuse, was a prevalent practice in the nineteenth century as illustrated by Thomas Edison, Charles Goodyear, and Elias Howe, Jr.); CHRISTOPHER BEAUCHAMP, *INVENTED BY LAW: ALEXANDER GRAHAM BELL AND THE PATENT THAT CHANGED AMERICA* 36 (2015) (arguing that the prevalence of nonuse in the nineteenth century is demonstrated by “industry leader[s]’ embracing innovation as a business strategy and using patents systemically to manage and control the [commercial] process”).

⁷⁶ *eBay*, 547 U.S. at 396 (Kennedy, J. concurring).

⁷⁷ *Id.* at 397; *see also* Holte, *supra* note 6, at 703 (“[G]iven that the Kennedy concurrence was self-described as ‘observations,’ the FTC report citation was simply a summary of testimony related to an off-subject discussion (computer hardware). The briefing and oral argument before the Court deeply considered injunctions for specific classes of patents, and the unanimous opinion of the Court explicitly affirmed *Continental*—the concurrence can truly only be considered a general ‘observation’ by a minority of the Court, with no precedential value or citation intended.”).

⁷⁸ *MercExchange, L.L.C. v. eBay, Inc.*, 500 F. Supp. 2d 556, 559 (E.D. Va. 2007).

⁷⁹ *Id.* at 569–91.

⁸⁰ *See* Holte, *supra* note 6, at 730 (noting that “Judge Friedman’s second denial of the injunction” after remand and MercExchange’s subsequent settlement left it as “the final opinion in the case”). The district court’s opinion denying a permanent injunction after remand in *eBay* has been cited in over eighty subsequent district court decisions as of July 2018, most of which involved permanent injunction requests.

A detailed analysis of the district court's reasoning on remand is beyond this Article's scope;⁸¹ however, it is nevertheless important to point out how the district court criticized Chief Justice Roberts's concurrence⁸² and made multiple references to Justice Kennedy's concurrence.⁸³ Among other things, the district court cited Justice Kennedy for the propositions that "[u]tilization of a ruling in equity as a bargaining chip suggests both that such party never deserved a ruling in equity and that money is all that such party truly seeks, rendering monetary damages an adequate remedy in the first instance" and that MercExchange's "post-trial attempt to sell off its intellectual property rights . . . lessens the impact of [its] plea for equitable relief."⁸⁴ As discussed in a previous article, the second injunction denial by the district court judge is perhaps not surprising⁸⁵ because "[a] review of the forty cases assigned to [Judge Friedman] while on the bench (November 1997 to August 2011) reveals a strong disfavor of patent holders."⁸⁶ Further, "[w]hile eBay was the longest patent case pending before Judge Friedman, of the other twelve cases pending for over 300 days on his docket, four were cases concluded through summary judgment of non-infringement, and eight cases were dismissed without substantive opinion."⁸⁷

In February 2008, after the district court's second injunction denial, but before a second Federal Circuit opinion, the *eBay v. MercExchange* case settled. eBay released the following statement:

WestlawNext, Citing References for *MercExchange, L.L.C. v. eBay, Inc.*, 500 F. Supp. 2d 556 (E.D. Va. 2007).

⁸¹ For further analysis of the district court's 2007 decision, see Holte, *supra* note 6, at 706–14 and Seaman, *supra* note 13, at 1967–68.

⁸² For instance, responding to the statement in Roberts's concurrence that "a page of history is worth a volume of logic" regarding permanent injunctions, the district court countered that "[t]he factual history of this matter indicates that MercExchange has never sought to defend its right to exclude," suggesting that it was "merely seeking an injunction as a bargaining chip to increase [its] bottom line." *MercExchange*, 500 F. Supp. 2d at 588.

⁸³ *Id.* at 574, 582, 586 (citing Kennedy's concurring opinion four times); *see also* Holte, *supra* note 6, at 711 ("Judge Friedman's take on Justice Kennedy's concurrence was far more agreeable [than that on Roberts's concurrence], if not precedential."); Rendleman, *supra* note 60, at 83 n.108 ("On remand, . . . the trial judge rejected MercExchange's renewed motion for a permanent injunction in a detailed and factual patent-specific opinion influenced by Justice Kennedy's injunction-skeptical concurring opinion.").

⁸⁴ *MercExchange*, 500 F. Supp. 2d at 582 (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 396 (2006) (Kennedy, J., concurring)); *see also* Robert I. Reis, *Rights and Remedies Post eBay v. MercExchange: Deep Waters Stirred*, 2 AKRON INTELL. PROP. J. 133, 150–52 (2008) (summarizing the district court's decision after remand regarding the first two *eBay* factors and citations to Justice Kennedy's concurrence).

⁸⁵ *See* Holte, *supra* note 6, at 712.

⁸⁶ *Id.* at 714 (reviewing all patent cases assigned to Judge Friedman while on the bench).

⁸⁷ *Id.* (footnotes omitted).

eBay Inc. announced today that it has agreed to a settlement with MercExchange, L.L.C. to dismiss all claims and appeals stemming from the patent lawsuit filed by MercExchange in September of 2001. . . .

As part of the settlement, eBay will purchase all three patents involved in the lawsuit, as well as some additional related technology and inventions and a license to another search-related patent portfolio that was not asserted in the lawsuit. These assets will allow eBay to further enhance its operations and trust and safety efforts on its ecommerce sites.

. . . [eBay Senior Vice President and General Counsel stated,] “In addition to resolving the litigation, this settlement gives us access to additional intellectual property that will help improve and further secure our marketplaces.”⁸⁸

D. *Other Notes on the eBay Dispute*

Soon after February 2008, other district courts considering permanent injunctions in patent infringement cases began to cite the *eBay* court’s postremand opinion and apply similar reasoning.⁸⁹ These courts’ reliance on both

⁸⁸ *eBay Inc. and MercExchange, L.L.C. Reach Settlement Agreement*, EBAY INC. (Feb. 28, 2008), <https://investors.ebayinc.com/news-releases/news-release-details/eBay-inc-and-mercexchange-llc-reach-settlement-agreement>.

⁸⁹ *E.g.*, *Open Text, S.A. v. Box, Inc.*, 36 F. Supp. 3d 885, 906 (N.D. Cal. 2014) (“Although the ‘quantum of evidence’ required to prove irreparable harm is unclear, case law is clear that the potential for loss of market share is insufficient.”); *Smith & Nephew, Inc. v. Interlace Med., Inc.*, 955 F. Supp. 2d 69, 78 (D. Mass. 2013) (explaining that the PTO’s preliminary rejection of the patents during reexamination weakens the plaintiff’s ability to show irreparable harm); *ePlus Inc. v. Lawson Software, Inc.*, 946 F. Supp. 2d 459, 467 (E.D. Va. 2013) (noting the overlap between the adequate remedy at law and irreparable harm factors in *eBay*), *vacated by* 789 F.3d 1349 (Fed. Cir. 2015); *Layne Christensen Co. v. Bro-Tech Corp.*, 871 F. Supp. 2d 1104, 1117 (D. Kan. 2012) (“[I]rreparable harm had not been shown in part because the patentee had consistently licensed the patent instead of engaging in commercial activity in practicing the patent.”); *Belden Techs., Inc. v. Superior Essex Commc’ns LP*, 802 F. Supp. 2d 555, 578 (D. Del. 2011) (differentiating between entities that use third-party licensing to bring concepts to market and those that “strategically utiliz[e] a patent to excise a tax from companies already participating in the market” (quoting *MercExchange*, 500 F. Supp. 2d at 583 n.24)); *Enpat, Inc. v. Budnic*, No. 6:11-CV-86, 2011 WL 1196420, at *3 (M.D. Fla. Mar. 29, 2011) (“However, ‘the [c]ourt is not blind to the reality that the nature of the right protected by a patent, the right to exclude, will frequently result in a plaintiff successfully establishing irreparable harm in the wake of establishing validity and infringement.’” (quoting *MercExchange*, 500 F. Supp. 2d at 568)); *Metso Minerals, Inc. v. Powerscreen Int’l Distrib. Ltd.*, 788 F. Supp. 2d 71, 74 (E.D.N.Y. 2011) (noting that “on remand from [the] Supreme Court, [the district court] declin[ed] to grant injunctive relief where it appeared that the patent holder was ‘merely seeking an injunction as a bargaining chip to increase the bottom line.’” (quoting *MercExchange*, 500 F. Supp. 2d at 588)); *ActiveVideo Networks, Inc. v. Verizon Commc’ns, Inc.*, 827 F. Supp. 2d 641, 648 (E.D. Va. 2011) (analogizing the patentee-in-suit to *MercExchange*, which both engaged in “a ‘consistent course of litigating or threatening litigation to obtain money damages’” and “‘utilized its patents as a sword to extract money rather than as a shield to protect . . . its market-share, reputation, goodwill, or name recognition’” (second alteration in original) (quoting *MercExchange*, 500 F. Supp. 2d at 572)), *denial of injunction rev’d*, 694 F.3d 1312 (Fed. Cir. 2012); *Arlington Indus., Inc. v. Bridgeport Fittings, Inc.*, No. 3:01-CV-0485, 2010 WL 817519, at *5 (M.D. Pa. Mar. 9, 2010) (stating that the public interest factor in *eBay* “typically ‘favors the patentee, given the public’s interest in maintaining the integrity of the patent system’” (quoting *MercExchange*, 500 F. Supp. 2d at 586)); *Joyal Prods., Inc. v. Johnson Elec. N. Am., Inc.*,

the *eBay* district court and Justice Kennedy's concurrence furthered the misinterpretation of the *eBay* majority holding.⁹⁰ This issue was compounded by the February 2008 settlement of the case, before the Federal Circuit had the opportunity to weigh in on the district court's second injunction denial, thus leaving the postremand decision as the final public word on the issue.⁹¹

A final point of interest in the *eBay* dispute is the voluminous media coverage the case garnered,⁹² which was overwhelmingly anti-"patent troll."⁹³ According to an empirical study by Lisa Dolak and Blaine Bettinger, press coverage of *eBay* coincided with the injunction appeal in *NTP v. Research in Motion*⁹⁴ from the same district,⁹⁵ which threatened to shut down Blackberry's then-popular messaging service.⁹⁶ The study also noted that "*eBay* received more coverage than any of the other Supreme Court cases pending or decided during the [two year] study period."⁹⁷ Although it is

No. 04-5172, 2009 WL 512156, at *11 (D.N.J. Feb. 27, 2009) (distinguishing the patentee-in-suit from entities like MercExchange "who widely licensed their patents"); *Trading Techs. Int'l, Inc. v. eSpeed, Inc.*, No. 04 C 5312, 2008 WL 4531371, at *2 (N.D. Ill. May 22, 2008) ("The *eBay* district court, along with numerous other courts, has since decided that no presumption can exist under relevant case law and the language of the Supreme Court's decision."); see also Holte, *supra* note 6, at 722 ("Simply looking at citations to Judge Friedman's 2007 denial of MercExchange's renewed motion for injunction reveals at least thirteen citations within cases considering permanent injunctions for unrelated patent infringement cases.").

⁹⁰ See Holte, *supra* note 6, at 721 ("In reviewing post-*eBay* injunction cases, many other scholars have concluded 'a review of post-*eBay* federal district court decisions shows that though it is not the opinion of the Court, [Justice] Kennedy's concurrence has proven to be highly persuasive.'" (quoting Jaideep Venkatesan, *Compulsory Licensing of Nonpracticing Patentees After eBay v. MercExchange*, 14 VA. J.L. & TECH. 26, 30 (2009)); *id.*, ("[D]istrict courts have responded in apparent lockstep to Justice Kennedy's concerns about trolls." (quoting John M. Golden, Commentary, "*Patent Trolls*" and *Patent Remedies*, 85 TEX. L. REV. 2111, 2113 (2007)); LAYCOCK, *supra* note 5, at 340 ("The only hint of what should have been the real issue in *eBay* comes in the penultimate paragraph of Justice Kennedy's concurring opinion.")).

⁹¹ Holte, *supra* note 6, at 730 ("Should MercExchange not have settled before the Federal Circuit had opportunity to reverse [the district court] a second time, perhaps the *eBay* Supreme Court opinion might be interpreted differently . . . as opposed to an anti-patentee district court judge having the final word.").

⁹² See Dolak & Bettinger, *supra* note 9, at 12 (explaining that among patent law-related articles in their dataset, "*eBay* received more coverage than any of the other Supreme Court cases pending or decided during the [2.5 year] study period").

⁹³ See Holte, *supra* note 6, at 703-06 (discussing press coverage of the *eBay* litigation); Edward Lee, *Patent Trolls: Moral Panics, Motions in Limine, and Patent Reform*, 19 STAN. TECH. L. REV. 113, 127-33 (2015) (conducting an empirical study of mass media coverage of nonpracticing patentees and finding that "the term 'patent troll' is, by far, the most frequently used term by the media" post-*eBay*).

⁹⁴ No. 3:01-CV-767, 2003 WL 23100881 (E.D. Va. Aug. 5, 2003), *aff'd in part, rev'd in part, vacated in part, and remanded*, 418 F.3d 1282 (Fed. Cir. 2005).

⁹⁵ Dolak & Bettinger, *supra* note 9, at 13, 20-26.

⁹⁶ *NTP*, 2003 WL 23100881 (granting permanent injunction to NTP but staying the injunction pending appeal), *aff'd in part, rev'd in part, vacated in part, and remanded*, 418 F.3d 1282 (Fed. Cir. 2005).

⁹⁷ Dolak & Bettinger, *supra* note 9, at 12 (footnote omitted). The study period included the 2005-06 and 2006-07 Supreme Court Terms. The patent cases in those terms are *KSR International Co. v.*

impossible to determine whether any Justices were aware of or influenced by media coverage of the *eBay* or *NTP* cases, as Dolak and Bettinger note, “[t]hat coverage . . . contained significant discussion of particular considerations that were potentially relevant to the resolution of the question at issue in *eBay*, and ultimately expressly regarded as relevant by four of the Justices” in Justice Kennedy’s concurrence.⁹⁸

II. PATENT REMEDIES CASE OUTCOMES AFTER EBAY

This Part reviews the impact of the *eBay* precedent on patent injunction motion decisions and appeals in the years following the Supreme Court’s 2006 decision. It begins with a summary of empirical analysis of district court decisions, most notably the massive swing by district courts away from granting injunctions to nonpracticing patent owners. It continues with a summary of empirical analysis of Federal Circuit opinions deciding appeals of district court injunction decisions, noting that the Federal Circuit appears to be more favorable to patentees than district courts when it comes to awarding injunctive relief. Finally, this section reviews the century of discussion and citation to the property rule–based *Continental* case, reaffirmed by *eBay* in 2006, but effectively lost in the lower courts before and since *eBay*.

A. Patent Case Injunction Decisions at District Courts After eBay

Looking at empirical case data post-*eBay* shows that the rate of permanent injunctions in patent infringement disputes has decreased dramatically. To begin with a baseline, a sampling of district court permanent injunction decisions between May 2003 and May 2005, just prior to *eBay*, revealed that between 100 percent and 94 percent of patentee motions for injunction were granted.⁹⁹ In great contrast, Professor Christopher Seaman’s comprehensive empirical study of district court injunction decisions for a seven-and-a-half-year period following the Supreme Court’s decision found that post-*eBay*, injunctions were granted in only 72.5 percent of district court decisions for

Teleflex Inc., 550 U.S. 398 (2007); *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006); *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006); and *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006). *Id.* at 2 n.10.

⁹⁸ Dolak & Bettinger, *supra* note 9, at 30–31.

⁹⁹ Eric Maughan, *Protecting the Rights of Inventors: How Natural Rights Theory Should Influence the Injunction Analysis in Patent Infringement Cases*, 10 GEO. J.L. & PUB. POL’Y 215, 224 (2012); Benjamin N. Simler & Scott McClelland, *A Model for Predicting Permanent Injunctions After eBay v. MercExchange*, BLOOMBERG LAW REPORTS (2011) (finding in the year prior to *eBay* that 100 percent of the courts to consider permanent injunctions granted the injunction).

all patentees.¹⁰⁰ Demonstrating even more significant change, for nonpracticing patentees, injunctions were granted only 16 percent of the time after *eBay*; while most patentees still obtain injunctive relief, patent assertion entities (“PAEs”) rarely do.¹⁰¹ Professor Seaman’s findings were statistically significant, even after controlling for other potential confounding factors, such as the field of technology of the infringed patent and the district court that decided the injunction request.¹⁰² As a result, this study concluded that “district courts appear to have adopted a de facto rule against injunctive relief for PAEs and other patent owners who do not directly compete . . . against an infringer.”¹⁰³ This de facto rule is, inconsistently, in direct tension with the unanimous Court’s conclusion in *eBay* that “the District Court erred in its categorical denial of injunctive relief”¹⁰⁴ to a nonpracticing patentee and reaffirmance of *Continental* that “[a]nything but prevention takes away the privilege which the law confers upon the patentee.”¹⁰⁵

B. *Patent Case Injunction Appeals at the Federal Circuit After eBay*

Turning to the Federal Circuit: a comprehensive 2017 study by this author and Professor Seaman looked at Professor Seaman’s original dataset of district court cases, further studying the cases and coding them for appeals.¹⁰⁶ This was the first comprehensive empirical study of the Federal Circuit’s permanent injunction decisions following *eBay*. The findings from the study indicate that the appellate court “is generally more favorable to prevailing patentees [in awarding] injunctive relief than the district courts following *eBay*.”¹⁰⁷ For cases involving a merits decision on injunctive relief, there was a sharp split in affirmance rates by the Federal Circuit depending on whether the district court granted or denied injunctive relief to the prevailing patent

¹⁰⁰ Seaman, *supra* note 13, at 1982–83 fig.1 (finding that injunctions were granted in 72.5 percent of district court decisions after *eBay*).

¹⁰¹ *Id.* at 1987–88 fig.3 (finding that injunctions were granted only 16 percent of the time for PAEs).

¹⁰² *Id.* at 1996–98 tbl.3 (finding that patentee’s status as PAE was statistically significant at the 5 percent level in the most predictive model, and noting that even this model “probably tend[s] to underestimate the strength of the relationship between PAE status and injunctive relief” due to collinearity with a similar variable).

¹⁰³ *Id.* at 1953.

¹⁰⁴ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006); *see also* Golden, *supra* note 90, at 2113–14 (2007) (asserting that “district courts’ post-*eBay* practice” of denying injunctive relief to PAEs “may be in some tension with the Supreme Court’s warning against the ‘categorical denial of injunctive relief’ to broad classes of patent holders”).

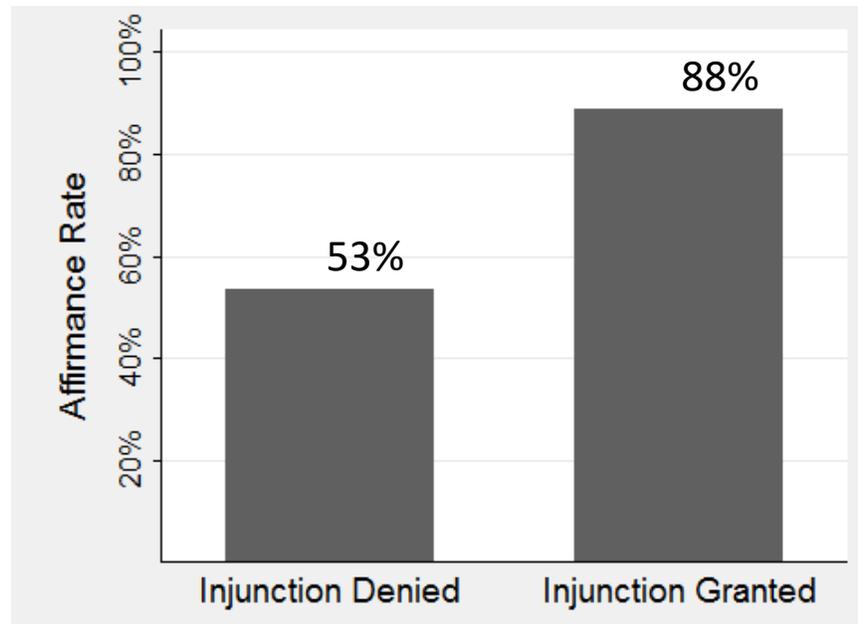
¹⁰⁵ *Cont’l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405, 430 (1908) (“From the character of the right of the patentee we may judge of his remedies. It hardly needs to be pointed out that the right can only retain its attribute of exclusiveness by a prevention of its violation. Anything but prevention takes away the privilege which the law confers upon the patentee.”).

¹⁰⁶ Holte & Seaman, *supra* note 16, at 145.

¹⁰⁷ *Id.* at 202.

owner. As shown in Figure 6 from that study, the Federal Circuit affirmed the district court's decision to grant a permanent injunction 88 percent of the time,¹⁰⁸ while it affirmed the district court's decision to deny injunctive relief only slightly over half the time at 53 percent.¹⁰⁹ This difference was statistically significant.¹¹⁰

2017 Holte & Seaman Study, Figure 6: Affirmance Rates - Permanent Injunction Decisions (All Merits Decisions)



Further, if summary affirmances under Rule 36 of the Federal Rules of Appellate Procedure are excluded (i.e., only written decisions by the Federal Circuit are considered), then affirmance rates also differ depending on whether the district court granted and denied an injunction, as illustrated in Figure 7 from that study. “For this subset of decisions, the Federal Circuit affirmed 77% of the time when the district court granted a permanent injunction (10 of 13), compared to only 33% of the time when the district court denied a permanent injunction (4 of 12). This difference remained statistically significant.”¹¹¹

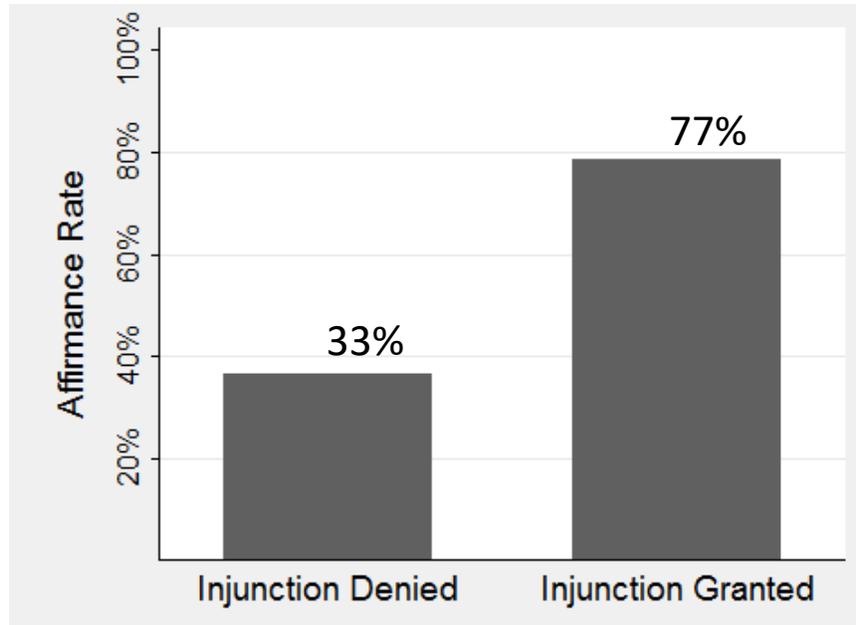
¹⁰⁸ *Id.* at 188 fig.6.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 192–93 (indicating statistical significance ($p < 0.05$) for the odds ratio for each independent variable).

¹¹¹ Holte & Seaman, *supra* note 16, at 188–89 figs. 6 & 7.

2017 Holte & Seaman Study, Figure 7: Affirmance Rates - Permanent Injunction Decisions (Excluding Rule 36 Summary Affirmances)



C. *The Continental Paper Bag Precedent Since 1908 and After eBay*

Beyond the empirical-outcome analysis of post-*eBay* injunction decisions, the second question answered in the Supreme Court's 2006 opinion—reaffirmance of the 1908 *Continental* precedent—is central to understanding the impact of *eBay* on injunction remedies and realizing the potential need to clarify *eBay*. In short, is *Continental* being treated by courts as good law? Further, the history of the 1908 decision, and Congress's numerous attempts at legislating reversal of the precedent, can perhaps shed light on the importance of the case while, conversely, raising questions about the lack of judicial recognition of the precedent.

1. Background of the *Continental Paper Bag* Dispute

The *Continental* Supreme Court story begins with the Eastern Paper Bag Company, cofounded in the early 1870s by the pioneering, bag-

manufacturing inventor¹¹² Margaret E. Knight.¹¹³ Knight was known at the time as the “woman Edison,”¹¹⁴ and she held twenty-seven original patents before her death in 1914.¹¹⁵ She began work in a cotton mill and was a first-time inventor of mill safety products by the age of twelve.¹¹⁶ Years after her mill-working days, the Eastern Paper Bag Company was founded on Knight’s advanced bag patents¹¹⁷ and became the dominant bag manufacturer of the era; the products were generally similar to modern brown grocery store bags with flat bottoms.¹¹⁸ Knight was also familiar with the role of patent litigation in the growth of Eastern Paper Bag. Nearly twenty-five years before the dispute with Continental Paper Bag, Knight successfully filed suit against Charles Annan, an individual alleged to have spied on Knight’s machinist employee to secure an identical patent.¹¹⁹ The court ruled in her favor, acknowledging the first of her many patented technologies¹²⁰ that ultimately replaced the work of thirty laborers and “attracted extraordinary attention in Europe and America.”¹²¹

¹¹² For an example of one of her inventions, see U.S. Patent No. 116,842 (issued July 11, 1871) (“The nature of this invention consists in the peculiar construction of a machine for the manufacture of flat or satchel-bottom bags from a continuous tube of paper fed from a roll over a former, and cut, folded, pasted, and delivered in the manner substantially as hereinafter described.”).

¹¹³ Michael Abrams, *Margaret Knight*, ASME.ORG (June, 2012), <https://www.asme.org/engineering-topics/articles/diversity/margaret-knight>.

¹¹⁴ *Margaret E. Knight: American Inventor*, ENCYCLOPAEDIA BRITANNICA ONLINE, <https://www.britannica.com/biography/Margaret-E-Knight> (last visited Aug. 18, 2018) [hereinafter *American Inventor*].

¹¹⁵ *Id.* Proud of her innovation abilities and her gender, Margaret Knight did not conceal her gender by patenting under only her first initials as was the custom for nineteenth-century female inventors. Henry Petroski, *The Evolution of the Grocery Bag*, 72 AM. SCHOLAR 99, 103–04 (2003).

¹¹⁶ *American Inventor*, *supra* note 114. Knight also may have held a comparative inventing advantage over her male peers due to her applied skills and not just a theoretical education. See B. Zorina Khan, “Not for Ornament”: *Patenting Activity by Nineteenth-Century Women Inventors*, 31 J. INTERDISC. HIST. 159, 167 (2000) (“Women who were already involved in commerce or a profession—like Margaret Knight, a machine operator who came up with an invention to manufacture ‘satchel-bottomed’ paper bags—might have had a comparative advantage in perceiving existing demand, in gaining the required skills, and in pursuing the patent application process.”).

¹¹⁷ Petroski, *supra* note 115, at 104 (“With her patent in hand, Knight found a partner, a Massachusetts businessman with whom she established the Eastern Paper Bag Company in Hartford, Connecticut. Her financial arrangements with Eastern gave her \$2,500 outright, plus royalties and company stock. Another of her patents, for an improvement in paper-bag machines, was issued in 1879 and assigned to Eastern.”).

¹¹⁸ See Abrams, *supra* note 113 (comparing flat-bottomed bags to the wrapping paper or envelopes used before their invention).

¹¹⁹ *Margaret E. Knight: 2006 Paper Industry International Hall of Fame Inductee*, PAPERDISCOVERYCENTER.ORG, <https://www.paperdiscoverycenter.org/inductees/margaret-e-knight/> (last visited Aug. 18, 2018) [hereinafter *Hall of Fame Inductee*].

¹²⁰ Petroski, *supra* note 115, at 102–03.

¹²¹ *Hall of Fame Inductee*, *supra* note 119 (quoting ANNE L. MACDONALD, FEMININE INGENUITY: HOW WOMEN INVENTORS CHANGED AMERICA 175 (1994)).

The competing Continental Paper Bag Company began operations two decades after Eastern Paper Bag, in the 1890s, and quickly began producing more than 1 million brown paper bags per day.¹²² At founding, Continental was a fast-growing manufacturer in the industry, but the company served a slightly different customer base than Eastern¹²³ and used an alternative method of production.¹²⁴

By the turn of the century, competition in the bag industry grew, and several independent firms developed and patented other modern methods for constructing the standup, paper grocery bag.¹²⁵ One 1896 patent, issued to William Liddell of Brooklyn, New York, gained notoriety for “Improvement in Paper-Bag Machines.”¹²⁶ Several firms had already both developed and patented modern methods for constructing the standup, paper grocery bag,¹²⁷ but Liddell’s patented technology moved beyond the standard, high-speed method of cutting, folding, and pasting.¹²⁸ Specifically, the machine improved on the method of folding by including a tube that “passes above a finger upon a movable forming-plate securely held at a short distance from the revolving cylinder and between which [the] cylinder . . . tube is guided.”¹²⁹

In an effort to protect market control for its own bags, but to continue using its own processes, Eastern Paper Bag purchased the Liddell patent around 1900.¹³⁰ Eastern did not intend to use the Liddell manufacturing

¹²² See Theodore Hawley, *The Continental Paper Bag Company: A Great and Growing Industry with a Capacity of Nearly 20,000,000 Bags per Day*, 18 BOARD TRADE J. 609, 609–10 (1905).

¹²³ See *id.* at 609, 613 (“The Continental Paper Bag Company of Rumford Falls is one of the best of the comparatively speaking recently established industries of Maine, but it ranks high among the corporations of the state, and Maine ranks first in the list of manufacturing states. . . . The International Paper Company at Ashland, N. H., the Washington Pulp and Paper Company, of Greenwich, N. Y., and the Paper and Pulp Company mills at Watertown, N. Y., are controlled by the company, and it has the exclusive sale of the manila and fibre paper made at Piercefield and Herkimer, N. Y. The combined business is very great, and it is essentially a Maine business, and one in which all Maine people may well be interested, and of which they can but feel proud.”)

¹²⁴ See *E. Paper Bag Co. v. Cont’l Paper Bag Co.*, 142 F. 479, 486 (D. Me. 1905) (“No machine was ever built for practical uses in accordance with the patent, but a model was constructed for this case.”).

¹²⁵ HERBERT HOVENKAMP, *THE OPENING OF AMERICAN LAW: NEOCLASSICAL LEGAL THOUGHT, 1870–1970* 193 (2015) (“Several firms acting independently had developed and patented technology for making the modern stand-up grocery bag.”).

¹²⁶ U.S. Patent No. 558,969 (issued Apr. 28, 1896).

¹²⁷ HOVENKAMP, *supra* note 125, at 193 (“Several firms acting independently had developed and patented technology for making the modern stand-up grocery bag.”).

¹²⁸ U.S. Patent No. 558,969, *supra* note 126 (discussing his patent’s improvements to paper-bag machines).

¹²⁹ *Id.*

¹³⁰ HOVENKAMP, *supra* note 125, at 193 (“He sold the patent to the Eastern Paper Bag Co., the dominant bag manufacturer, which was already using an alternative system that it regarded as equally good. Eastern then ‘shelved’ the Liddell patent, electing to stay with its existing technology.”).

technology, and it preferred its own manufacturing process, which it deemed in its best business interest.¹³¹ As described by the Supreme Court later:

It was the purpose to make more money with the existing . . . machines than could be made with new Liddell machines, when the cost of building the latter was taken into account. And this purpose was effective to cause the long and invariable non-use of the Liddell invention, notwithstanding that new Liddell machines might have produced better paper bags than the old [machines].¹³²

No new machines were ever constructed by Eastern Paper Bag under the newly acquired patent, but Eastern remained a direct competitor and market leader in the paper bag manufacturing marketplace.¹³³

Five years after Eastern licensed the Liddell patent, Continental Paper Bag began using a bag-manufacturing machine allegedly similar to that described in the patent. Eastern Paper Bag brought suit in the United States District Court for the District of Maine, alleging patent infringement.¹³⁴ Although the parties were unaware at the time of filing, the suit “secured the bag” for resolution of the ongoing nineteenth-century patent law issue of whether patent ownership, but nonuse, could be enforced through exclusion.¹³⁵ At the time, some judges saw patents “as utilitarian instruments for furthering innovation and making it available to the public,” and thus “the technology described in unused patents should be available to others.”¹³⁶ “The alternative view was that patents were property pure and simple, and could be used or not used at the owner’s will.”¹³⁷

¹³¹ *E. Paper Bag Co. v. Cont’l Paper Bag Co.*, 142 F. 479, 488 (D. Me. 1905) (“It cannot fairly be questioned that the solution of the problem of substituting a rotary movement for a reciprocation in a paper-bag machine intended for this peculiar bag, by whomsoever made the substitution . . . involved invention, and this covers the fact that this invention did not constitute an advance in the state of the art in such a sense that the complainant deemed it advisable to discard its old machinery and use Liddell’s.”).

¹³² *Cont’l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405, 428–29 (1908).

¹³³ *Id.* at 427–28 (“We have stated that no machine for practical manufacturing purposes was ever constructed under the Liddell patent. The record also shows that the complainant, so to speak, locked up its patent. It has never attempted to make any practical use of it, either itself or through licenses, and, apparently, its proposed policy has been to avoid this.”).

¹³⁴ *Eastern Paper Bag*, 142 F. at 486 (“This is a bill in equity alleging infringements of the first, second, and seventh claims of the patent to William Liddell, stated therein to be for, ‘an improvement in paper bag machines,’ No. 558,969, issued on April 28, 1896, on an application filed on February 6, 1896. In line with the frankness with which the court has been dealt with, the respondent stated at the hearing that these three claims are so near alike that the question of infringement is the same in respect to all of them, as is also the question of validity.”).

¹³⁵ Herbert Hovenkamp, *The Emergence of Classical American Patent Law*, 58 ARIZ. L. REV. 263, 287 (2016).

¹³⁶ HOVENKAMP, *supra* note 125, at 193 (describing the liberal view of patents).

¹³⁷ *Id.*

2. *Continental Paper Bag* District Court and Court of Appeals Decisions

As part of the infringement action and defenses, the district court addressed a variety of issues related to the Liddell patent, inventorship, and bag-manufacturing processes. Although Liddell secured the patent, the source of invention—whom among numerous inventors and colleagues—became the subject of dispute and discussion at trial.¹³⁸ The court found that Liddell legally secured the patent before his contributors, despite their involvement in its creation.¹³⁹ It reasoned: “[T]he fact that a stranger contributes to the mechanism necessary to make an invention operative . . . would not affect any claims in the patent which do not cover the mechanism thus supplied . . .”¹⁴⁰ In the end, the court found the patent not invalid, and enforceable,¹⁴¹ but noted that Liddell did not contribute all the mechanical details of the patent.¹⁴²

Despite the evidentiary challenges presented by the passage of “nearly a third of a generation” since the time of invention, with the Liddell patent found enforceable, the district court further held in favor of Eastern Paper Bag by entering a permanent injunction.¹⁴³ While perhaps frustrated by Eastern’s nonuse, the district court noted:

¹³⁸ See *Hall of Fame Inductee*, *supra* note 119.

¹³⁹ *Eastern Paper Bag*, 142 F. at 516 (“[T]he case has the very common aspect of one wherein two different inventive minds were working almost contemporaneously on the same conception, one of whom put it into definite form, so as to apply successfully for a patent thereon, before the other succeeded in accomplishing any complete result. In this way Liddell gained the position which we have already referred to . . .”).

¹⁴⁰ *Id.* at 503 (“We have in a general way observed that the fact that a stranger contributes to the mechanism necessary to make an invention operative, whether that contribution is such that a mechanic of ordinary skill in the art might be supposed to supply it or whether this involves invention, would not affect any claims in the patent which do not cover the mechanism thus supplied, either as a whole or in combination.”).

¹⁴¹ See *Eastern Paper Bag*, 142 F. at 488; HOVENKAMP, *supra* note 125, at 193 (“William Liddell had invented a device that folded the paper at the appropriate places.”).

¹⁴² *Eastern Paper Bag*, 142 F. at 503 (“As already said, it must be admitted that Hunter contributed to the application certain mechanical details, which, either through haste or through inability, Liddell had failed to supply. Beyond that, the respondent insists that all that Liddell invented was a forming-plate which rotated through the entire arc of the circle, and that the substitution in lieu therefor of an oscillating forming-plate, which revolved in performing its duty only through that portion of the circle where its duty was performed, after which it oscillated back to the point where its duty commenced, was contributed by Hunter.”).

¹⁴³ *Id.* at 517 (“The impressions which we had at the close of the trial of this case are substantially the same as the conclusions herein expressed. Nevertheless, as we fully understand the difficulties in the way of obtaining, in the light of the state of the art as it was nearly a third of a generation ago, a true perspective of novel and complicated mechanism which was not put into practical use at or near the time of its origin, we have carefully re-examined the record and briefs. On the whole, the result is that we are of the opinion that the record discloses nothing to meet the presumption of patentable invention with reference to claims 1, 2, and 7 of the patent in suit, and that the complainant has sustained the burden required on the issue of infringement. We are also of the opinion that the respondent has not sustained any

The record also shows that [Eastern Paper Bag Co.], so to speak, locked up its patent. It has never attempted to make any practical use of it, either itself or through licenses, and apparently its proposed policy has been to avoid this. In this respect, it has not the common excuse of a lack of means, as it is unquestioned that [Eastern Paper Bag Co.] is a powerful and wealthy corporation. We have no doubt that [Eastern Paper Bag Co.] stands in the common class of manufacturers who accumulate patents merely for the purpose of protecting their general industries and shutting out competitors.¹⁴⁴

Continental Paper Bag appealed to the First Circuit. At oral argument, counsel for Eastern Paper Bag was questioned about nonuse, to which he clarified, “We do not make these machines because we do not need them. We hold the patent to control.”¹⁴⁵ In fact, no machine had ever been attempted in accordance with the Liddell patent, making it “a paper proposition, and nothing more.”¹⁴⁶ In a three-page majority opinion, the court of appeals affirmed the district court. While there was some issue concerning the sufficiency of the briefing on whether nonuse precluded an injunction,¹⁴⁷ the majority held “the weight of [injunction] authority is in favor of [Eastern Paper Bag Co].”¹⁴⁸

In a twelve-page dissent, Circuit Judge Aldrich vehemently disagreed with the majority on the injunction issue. He summarized: “I agree to the conclusion that the patent in suit was infringed, but . . . I contend that injunction relief should not be granted because it is an infringement of a paper patent deliberately held in nonuse for a wrongful purpose.”¹⁴⁹ Before distinguishing a number of precedential cases, and explaining the anticompetitive nature of injunctions, Judge Aldrich explained:

The proposition involves the idea of a secondary monopoly maintained to stifle patent competition in the trades and industries, and thus contemplates a condition which at once contravenes the manifest purpose of the Constitution, and a monopoly of a kind and breadth and for a

of its special defenses according to the rules of evidence we have explained. Therefore on this record we must find for the complainant.”)

¹⁴⁴ *Id.* at 487.

¹⁴⁵ *Cont’l Paper Bag Co. v. E. Paper Bag Co.*, 150 F. 741, 747 (1st Cir. 1906) (Aldrich, J., dissenting).

¹⁴⁶ *Id.* (Aldrich, J., dissenting) (quoting appellant’s brief, “No machine was ever built under the Liddell patent prior to the beginning of this suit; and no machine claimed to be an infringement of the Liddell patent has ever yet been built by anybody, except that the defendant’s self-opening square paper bag machines were claimed in this suit to be such an infringement. When Mr. Stone gave his theoretical expert testimony upon the characteristics of the Liddell patent in January, 1903, no machine had ever existed anywhere which conformed to the mechanism described and delineated in that patent. That patent at that time was nearly seven years old, but it still remained what it had always been, a paper proposition, and nothing more.”).

¹⁴⁷ *Id.* at 743–44 (majority opinion) (“No reason for the nonuser appears in the evidence, so far as we can discover. The defendant’s machine has been an assured commercial success for some years. It was suggested at the oral argument that an unused patent is not entitled to the protection given by the extraordinary remedy of an injunction. This contention was not made in the defendant’s printed brief.”).

¹⁴⁸ *Id.* at 744.

¹⁴⁹ *Id.* (Aldrich, J., dissenting).

purpose in no sense ever contemplated by the statutory contract which safeguards the legal right to make, use, and vend under a particular patent.¹⁵⁰

3. The *Continental Paper Bag* Supreme Court Decision

The Supreme Court granted a writ of certiorari in 1907, likely because it had not yet directly addressed the issue of nonuse and because of the strong appellate dissent from Judge Aldrich. In affirming prior holdings, the Court held that exclusion of competitors for use of a patent is at the core of the rights conferred to a patent holder by law: “[S]uch exclusion may be said to have been of the very essence of the right conferred by the patent, as it is the privilege of any owner of property to use or not use it, without question of motive.”¹⁵¹ As noted previously, the Court understood that Eastern Paper Bag’s original plan in purchasing the Liddell patent was to never practice the invention.¹⁵² In addressing the nonuse point directly, the Court opined that “nonuse is no efficient reason for withholding injunction” because a patent holder maintains the right to use—or not to use—a patent, so long as it does not offend “public policy, the conscience of equity, [or] the very spirit and intention of the law,” which did not occur in this case.¹⁵³ Scholars at the time applauded the Court’s decision and noted the agreement with recent law for the entire British Empire.¹⁵⁴

¹⁵⁰ *Id.*

¹⁵¹ *Cont’l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405, 429 (1908).

¹⁵² *See supra* Section II.C.1.

¹⁵³ *Cont’l Paper Bag*, 210 U.S. at 427 (quoting *Cont’l Paper Bag*, 150 F. at 745 (Aldrich, J., dissenting)).

¹⁵⁴ For a complete discussion of early twentieth-century patent remedies jurisprudence, see Gilbert H. Montague, *The Sherman Anti-Trust Act and the Patent Law*, 21 YALE L.J. 433, 465 (1912) (discussing several cases regarding the rights of patent holders based on recent decisions, including *Continental*); Gilbert H. Montague, *The Supreme Court on Patents*, 21 YALE L.J. 583, 583–84, 597–98 (1912) (discussing the 1912 Supreme Court *Henry v. A.B. Dick* decision, which reaffirmed *Continental*, stating: “Not since the creation of the patent system . . . has the Supreme Court rendered a better considered decision affecting patent rights. . . . The decision of the Supreme Court in the Dick case lays down the same principles that were affirmed last year in a unanimous decision of the Lords of the Judicial Committee of the Privy Council which determined the law for the entire British Empire. The decision accords with the whole trend of previous judicial decision of the United States.” (footnote omitted)), and Marketa Trimble, *Patent Working Requirements: Historical and Comparative Perspectives*, 6 U.C. IRVINE L. REV. 483, 489 (2016) (“The Court concluded that Congress knew of working requirements that existed in other countries and consciously opted to adopt and maintain a different policy.”).

4. Congress's Failed Efforts to Reverse the *Continental Paper Bag* Precedent

After *Continental*, patent law property rules of exclusion were immediately realized.¹⁵⁵ To some in Congress, however, this was a turn for the worse, and just three years after *Continental*, in 1911, Congress considered the first of many proposals to legislatively reverse the Court's holding.¹⁵⁶ When the 1911 proposal failed to claim majority legislative support, Congress repeated the attempt in 1912.¹⁵⁷ Thereafter, on fifteen occasions before the end of World War II, Congress considered, and directly acknowledged plans to overturn, *Continental*, but each bill failed to raise sufficient support.¹⁵⁸ The proposed bills, coming from both the House of Representatives¹⁵⁹ and Senate,¹⁶⁰ attempted to gain Congress's support in overturning the specific *Continental* precedent of injunction availability for patent nonuse or to compose a patent compulsory license scheme. In an exemplar bill, aimed directly at both the decision in *Continental* and in *Henry v. A.B. Dick, Co.*¹⁶¹ (reaffirming *Continental* in 1912), Democrat Representative William Oldfield introduced a proposal to amend the Patent Act and include a "compulsory license clause" that would require the patent owner to "supply[] the subject matter of the patent to the public" within three or four years or "the patent right is forfeited."¹⁶² Rep. Oldfield failed to pass the proposal, and "[r]epeated attempts thereafter failed to introduce a general scheme for compulsory licensing into

¹⁵⁵ Hovenkamp, *supra* note 135, at 271 ("Supreme Court patent decisions such as *E. Bement & Sons v. National Harrow Co.* (1902) and *Continental Paper Bag Co. v. Eastern Paper Bag Co.* (1908), written during the heyday of *Lochner*-style hostility toward state-created monopolies, permitted cartelization of patented products and allowed patentees to enforce unused patents in such a way as to keep technology off the market rather than facilitate its development." (footnotes omitted)).

¹⁵⁶ H.R. 13,876, 62d Cong. (1911).

¹⁵⁷ H.R. 22,203, 62d Cong. (1912).

¹⁵⁸ Hovenkamp, *supra* note 135, at 288; Trimble, *supra* note 154, at 489.

¹⁵⁹ The following is a list of all twelve House bills from 1908 to 2018 regarding a reduction of patent injunction rights or compulsory licensing of patents. These searches represent a complete list of bills proposed on the subject matter; they were collected using the following databases: LexisNexis, Westlaw, ProQuest Legislative Insight, and ProQuest Congressional. H.R. 2795, 109th Cong. (2005); H.R. 2927, 106th Cong. (1999); H.R. 4151, 103d Cong. (1994); H.R. 2128, 84th Cong. (1955); H.R. 9304, 81st Cong. (1950); H.R. 6864 75th Cong. (1937); H.R. 15,989, 63d Cong. (1914); H.R. 19,188, 63d Cong. (1914); H.R. 1700, 63d Cong. (1913); H.R. 22,203, 62d Cong. (1912); H.R. 23,193, 62d Cong. (1912); H.R. 13,876, 62d Cong. (1911).

¹⁶⁰ The following is a list of all eight Senate bills from 1908 to 2018 regarding a reduction of patent injunction rights or compulsory licensing of patents. These searches represent a complete list of bills proposed on the subject matter; they were collected using the following databases: LexisNexis, Westlaw, ProQuest Legislative Insight, and ProQuest Congressional. S. 2491, 77th Cong. (1942); S. 383, 74th Cong. (1935); S. 290, 73d Cong. (1933); S. 22, 72d Cong. (1931); S. 203, 71st Cong. (1929); S. 705, 70th Cong. (1927); S. 3474, 69th Cong. (1926); S. 3325, 67th Cong. (1922).

¹⁶¹ 224 U.S. 1 (1912).

¹⁶² H.R. REP. NO. 62-1161, at 4 (1912).

U.S. patent law.”¹⁶³ The most recent legislative attempt to require compulsory licensing of patents was in 1999, and it was associated with a proposed affordable prescription drug bill.¹⁶⁴ The last congressional attempt to address patent injunctions generally was in 2005.¹⁶⁵

5. Treatment of the *Continental Paper Bag* Precedent—the Supreme Court and Lower Courts Since 1908

As noted above, almost immediately after *Continental*, the Supreme Court in 1912 reaffirmed its holding in *Henry v. A.B. Dick, Co.* regarding contributory infringement for the sale of unlicensed ink to be used in the A.B. Dick Co. mimeograph machine (a small-quantity copier, commonly used in early twentieth-century office environments).¹⁶⁶ In a pre-antitrust law decision, the Court held that patentees have the right to impose their own conditions and to prevent others from using their products or dealing in them at all; the Court cited *Continental*, stating, “In the *Paper Bag Patent Case* this right to exclude others from all use of the invention was held to be so comprehensive that a patentee was allowed to restrain, by injunction, one who was infringing his patent, although he had . . . neither used the invention himself, nor allowed others to use it.”¹⁶⁷

¹⁶³ Trimble, *supra* note 154, at 489. A version of Senator Oldfield’s bill was passed a half-century later and is now partly codified at 35 U.S.C. § 271(c) (2012), which makes contributory infringement actions unavailable for the independent sale of “a staple article or commodity of commerce suitable for substantial noninfringing use.” In addition to legislative proposals, the Roosevelt administration further mobilized the FTC and Department of Justice to use antitrust tools in combating patent rights, including by suggesting that the Sherman Act, in fact, repealed U.S. patent laws. These efforts all failed. See Steven Wilf, *The Making of the Post-War Paradigm in American Intellectual Property Law*, 31 COLUM. J.L. & ARTS 139, 202 (2008).

¹⁶⁴ H.R. 2927, 106th Cong. (1999). Also known as the Affordable Prescription Drug Act, this bill represented a proposed amendment to Title 35 of the United States Code to provide for compulsory licensing of certain patented health care inventions. The licensing scheme proposed was tailored to the prescription drug industry.

¹⁶⁵ H.R. 2795, 109th Cong. (2005). Also known as the Patent Reform Act of 2005, section 7 of this proposed Act stated: “In determining equity, the court shall consider the fairness of the remedy in light of all the facts and the relevant interests of the parties associated with the invention. Unless the injunction is entered pursuant to a nonappealable judgment of infringement, a court shall stay the injunction pending an appeal upon an affirmative showing that the stay would not result in irreparable harm to the owner of the patent.”

¹⁶⁶ *Henry v. A.B. Dick Co.*, 224 U.S. 1, 12 (1912) (noting that this particular issue has never been decided by the Supreme Court).

¹⁶⁷ *Id.* at 29 (citation omitted). The Court went on to acknowledge that there are limitations on the right to injunctive remedy, such as when “public safety or health” demands another form of remedy. *Id.*

After that 1912 decision, the Supreme Court cited *Continental* on twenty-seven additional occasions.¹⁶⁸ Of those twenty-seven citations, ten are related to discussion of the doctrine of equivalents or patent claim scope (so not injunction related).¹⁶⁹ However, ten citations support the notion that inventors retain rights to exclude through patent property rights,¹⁷⁰ and six

¹⁶⁸ These case searches represent a complete list of “Citing References” at each federal court level filtered between the years 1908 and 2018 that quoted, discussed, or examined *Continental* in the following databases: LexisNexis and Westlaw.

¹⁶⁹ *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S. 605, 608 (1950) (citing *Continental* to support invoking the doctrine of equivalents); *Halliburton Oil Well Cementing Co. v. Walker*, 329 U.S. 1, 13–14 (1946) (distinguishing *Continental* because there, “the claims structurally described the physical and operating relationship of all the crucial parts of the novel combination,” and “there had been an infringement of this adequately described invention.” (footnote omitted)); *Marconi Wireless Tel. Co. v. United States*, 320 U.S. 1, 23 (1943) (citing *Continental* to support the holding that “the specifications, which taken in their entirety are merely descriptive or illustrative of his invention,” meaning, essentially, that the claims measure the invention); *Williams Mfg. Co. v. United Shoe Mach. Corp.*, 316 U.S. 364, 367 (1942) (citing *Continental* to support respondent’s findings of fact regarding infringement at the lower court level, which should not to be disturbed unless “clearly wrong”); *Milcor Steel Co. v. George A. Fuller Co.*, 316 U.S. 143, 146 n.3 (1942) (citing *Continental* after noting that 35 U.S.C. § 33 required patent applicants to “particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery”); *Gen. Elec. Co. v. Wabash Appliance Corp.*, 304 U.S. 364, 369 (1938) (citing *Continental* to support the general rule that the claims measure the patent.); *Altoona Publix Theatres, Inc. v. Am. Tri-Ergon Corp.*, 294 U.S. 477, 487 (1935) (same); *Smith v. Snow*, 294 U.S. 1, 11 (1935) (same); *Hildreth v. Mastoras*, 257 U.S. 27, 36 (1921) (citing *Continental* to support invoking the doctrine of equivalents); *Abercrombie & Fitch Co. v. Baldwin*, 245 U.S. 198, 207 (1917) (same).

¹⁷⁰ *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 215 (1980) (not addressing the relevant injunction issues but citing *Continental* to support that the “essence of a patent grant is the right to exclude others from profiting by the patented invention”); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 135 (1969) (citing *Continental* to support that “[t]he heart of [the patent owner’s] legal monopoly is the right to invoke the State’s power to prevent others from utilizing his discovery without his consent”); *United States v. Line Material Co.*, 333 U.S. 287, 339 (1948) (citing *Continental* to support the following: “An inventor deprives the public of nothing which it enjoyed before his discovery, but gives something of value to the community by adding to the sum of human knowledge,” and additionally to support the monopolistic property rights held by a patent owner); *Hartford-Empire Co. v. United States*, 323 U.S. 386, 417 (1945) (citing *Continental* to support the following: “Under paragraph 24 (b) [of the legislation] a defendant hereafter acquiring a patent cannot set the price for its use by others, elect to use it himself and refuse to license it, or to retain it and neither use nor license it. These are options patent owners have always enjoyed.”); *United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 186 (1933) (citing *Continental* to support a patentee’s ownership rights in opposition to a monopoly: “[A] monopoly takes something from the people. An inventor deprives the public of nothing which it enjoyed before his discovery, but gives something of value to the community by adding to the sum of human knowledge.”); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (citing *Continental* in comparison to the rights of copyright owners in stating that an owner “may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property”); *Carbice Corp. of Am. v. Am. Patents Dev. Corp.*, 283 U.S. 27, 31 (1931) (citing *Continental* in support of patent owner’s rights to “prohibit entirely the manufacture, sale, or use of such packages”); *Crown Die & Tool Co. v. Nye Tool & Mach. Works*, 261 U.S. 24, 34–35 (1923) (dismissing this case because the conveying instrument did not give the respondent a right to sue in its own name, but summarizing *Continental* and describing it as having applied “clearly established principles” when the Court granted patent holders “the common law

citations address that there is no requirement for patentees to use or sell their inventions during the period of exclusivity.¹⁷¹ In short, for decades after the 1908 decision—and especially considering how few patent cases the Supreme Court hears—the Court reaffirmed the injunction and property rule holding regularly. The last Supreme Court citation to *Continental* was the 2006 *eBay* decision.¹⁷² The Supreme Court did recently cite *eBay* in *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*,¹⁷³ however. But that citation regarded patents only as property rights, not injunction issues, and the Court did not cite *Continental*.¹⁷⁴

Regarding patent appellate court citations—since the Federal Circuit was created in 1982, *Continental* has been used to support a variety of different legal principles on a handful of occasions. Most Federal Circuit

right of making, using and vending the invention”); *Bauer & Cie v. O’Donnell*, 229 U.S. 1, 10 (1913) (citing *Continental* for the following: “The right to make, use and sell an invented article is not derived from the patent law. This right existed before and without the passage of the law and was always the right of an inventor. The act secured to the inventor the *exclusive* right to make, use and vend the thing patented, and consequently to prevent others from exercising like privileges without the consent of the patentee.”); *United States v. Winslow*, 227 U.S. 202, 217 (1913) (citing *Continental* to support the general patent law concept that “the exclusion of competitors from the use of [the invention] is of the very essence of the right conferred by the patents”).

¹⁷¹ *Special Equip. Co. v. Coe*, 324 U.S. 370, 378–79 (1945) (not addressing any relevant injunction issues, but stating, “This Court has consistently held that failure of the patentee to make sure of a patented invention does not affect the validity of the patent.”); *Long v. Rockwood*, 277 U.S. 142, 149 (1928) (Holmes, J. dissenting) (citing *Continental* in support of the rights of a patent holder: “[t]he use made by the patentee may be not to make and sell the patented article, but simply to keep other people from doing so in aid of some collateral interest of his own”); *Woodbridge v. United States*, 263 U.S. 50, 55 (1923) (citing *Continental* to support that “a patentee is not obligated either to make, use, or vend his invention during the period of his monopoly”); *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 98 (1918) (citing *Continental* to support that “[t]he owner of a trade-mark may not, like the proprietor of a patented invention, make a negative and merely prohibitive use of it as a monopoly”); *United States v. United Shoe Mach. Co.*, 247 U.S. 32, 58 (1918) (citing *Continental* to support the general patent law notion that “the inventor does not get from the law a right to a use that he did not have before but he gets the right to an exclusive use,” and further reaffirming *Continental’s* holding that a patentee “may keep his invention out of use”); *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 510 (1917) (citing *Continental* to support the general patent law rule that a “patent . . . restrain[s] others from manufacturing, using, or selling that which he has invented,” and for the proposition that “patent law simply protects [the patent owner] in the monopoly of that which he has invented and has described in the claims of his patent”); *id.* (Holmes, J., dissenting) (citing *Continental* for the conclusion that “for whatever motive, [the patentee] may keep his device wholly out of use,” and stating, “Not only do I believe that the rule that I advocate is right under the Paper Bag Case, but I think that it has become a rule of property that law and justice require to be retained”).

¹⁷² As of July 17, 2018, the Supreme Court had not cited to *Continental Paper Bag v. Eastern Paper Bag Co.*, 210 U.S. 405 (1908) since *eBay*.

¹⁷³ 138 S. Ct. 1365 (2018).

¹⁷⁴ *Id.* at 1375. The Court cited *eBay* in support of this proposition: “The Patent Act provides that, ‘[s]ubject to the provisions of this title, patents shall have the attributes of personal property.’ This provision qualifies any property rights that a patent owner has in an issued patent, subjecting them to the express provisions of the Patent Act.” *Id.* (citation omitted) (quoting 35 U.S.C. § 261 (2012))

citations relate to noninjunction issues such as the scope of claim protection by the patent (seven occasions)¹⁷⁵ and the doctrine of equivalents (one occasion).¹⁷⁶ Injunction-related citations are minimal and relate to supporting the general rights of exclusion maintained by a patent owner (three occasions)¹⁷⁷

¹⁷⁵ *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (holding that a patentee is required to “define precisely what his invention is,” so it is “unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms” (quoting *Whitebar v. Dunbar*, 119 U.S. 47, 52 (1886)); *Johnson & Johnston Assocs. v. R.E. Serv. Co.*, 285 F.3d 1046, 1052 (Fed. Cir. 2002) (holding that “claims . . . give notice of the scope of patent protection”); *Bell Commc’ns Research, Inc. v. Vitalink Commc’ns Corp.*, 55 F.3d 615, 619 (Fed. Cir. 1995) (holding that the fundamental rule of claim construction is that “the language of the claim defines the scope of the protected invention”); *Atlantic Thermoplastics Co. v. Faytex Corp.*, 970 F.2d 834, 846 (Fed. Cir. 1992) (citing *Continental* to note that “the claims measure the invention”); *Charles Greiner & Co. v. Mari-Med Mfg.*, 962 F.2d 1031, 1036 (Fed. Cir. 1992) (noting the “fundamental principle that claims define the limits of patent protection” and quoting *Continental*: “The claims measure the invention”); *SRI Int’l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1122 (Fed. Cir. 1985) (“We may take it that, as the statute requires, the specifications just detailed show a way of using the inventor’s method and that he conceived that particular way described was the best one. But he is not confined to that particular mode of use since the claims of the patent, not its specifications, measure the invention.”); *Envtl. Designs, Ltd. v. Union Oil Co. of Cal.*, 713 F.2d 693, 699 (Fed. Cir. 1983) (“The claim, not the specification, measures the invention.”); *see also* *Decisioning.com, Inc. v. Federated Dep’t Stores, Inc.*, 527 F.3d 1300, 1318 (Fed. Cir. 2008) (Linn, J., concurring in part and dissenting in part) (stating the majority’s construction of the patent “violate[d] fundamental tenets of claim construction precedent” because “[t]he invention, of course, must be described and the mode of putting it to practical use, but the claims measure the invention” (quoting *Continental*, 210 U.S. at 419); *Atlantic Thermoplastics Co. v. Faytex Corp.*, 974 F.2d 1299, 1300 (Fed. Cir. 1992) (Rader, J., concurring in the denial of rehearing in banc) (“The claims ‘measure the invention.’”).

¹⁷⁶ *Tex. Instruments, Inc. v. U.S. Int’l Trade Comm’n*, 805 F.2d 1558, 1562–63 (Fed. Cir. 1986) (agreeing that “th[e] basic patent on a pioneering invention is entitled to be interpreted broadly” and noting that “[i]t has long been recognized that the range of permissible equivalents depends upon the extent and nature of the invention, and may be more generously interpreted for a basic invention than for a less dramatic technological advance”). In addition, two nonmajority opinions have cited *Continental* for similar points. *Hilton Davis Chem. Co. v. Warner-Jenkinson Co.*, 62 F.3d 1512, 1550 (Fed. Cir. 1995) (Lourie, J., dissenting) (“Most Supreme Court cases prior to *Graver* involved review of cases brought as bills in equity prior to the merger of law and equity.”), *rev’d and remanded* by 520 U.S. 17 (1997); *Pennwalt Corp. v. Durand-Wayland, Inc.*, 833 F.2d 931, 963 (Fed. Cir. 1987) (Newman, J. commentary) (stating that, in relation to limitations on the application of the doctrine of equivalents to pioneers, “[i]t is manifest, therefore, that it was not meant to decide that only pioneer patents are entitled to invoke the doctrine of equivalents, but that it was decided that the range of equivalents depends upon and varies with the degree of invention” (quoting *Continental*, 210 U.S. at 415)).

¹⁷⁷ *Lexmark Int’l, Inc. v. Impression Prods., Inc.*, 816 F.3d 721, 746 (Fed. Cir. 2016) (“The franchise which the patent grants, consists altogether in the right to exclude everyone from making, using, or vending the thing patented, without the permission of the patentee. This is all that he obtains by the patent.” (quoting *Bloomer v. McQuewan*, 55 U.S. (14 How.) 539, 549 (1852))), *rev’d and remanded* by 137 S. Ct. 1523 (2017); *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1115–16 (Fed. Cir. 2004) (“[T]he claims of a patent . . . define the invention. . . . In making his claim the inventor is at liberty to choose his own form of expression, and while the courts may construe the same in view of the specifications and the state of the art, they may not add to or detract from the claim.” (first alteration in original) (first quoting *Smith v. Snow*, 294 U.S. 1, 11 (1935); then quoting *Continental*, 210 U.S. at 419)); *Smith Int’l, Inc. v. Hughes Tool Co.*, 718 F.2d 1573, 1577 (Fed. Cir. 1983) (“The grant of a patent is the

and the enforcement of injunctions by nonpracticing patent owners (two occasions).¹⁷⁸ In comparison to the Supreme Court's use of the case, the Federal Circuit has cited *Continental* much less frequently for injunction issues by the Federal Circuit, especially in comparison to how many injunction issues are appealed to the court.¹⁷⁹

Even more significant than the lack of Federal Circuit citations is the fact that district courts have similarly overlooked the *Continental* precedent. A search of all district courts since 1908 showed that the *Continental* opinion has been cited only 103 times, with keywords "patent!" and "injunction!" included.¹⁸⁰

In comparison to the myriad Supreme Court citations to *Continental*, for lower courts, the lack of citation to the case, but pre-2006 routine grant of injunctions in almost 100 percent of cases (prior to *eBay*), may support a conclusion that district courts and the Federal Circuit were effectively following a "general rule" of granting patent owners injunctions, but without citation. Now—since *eBay*—the modern "routine denial of injunctive relief to non-practicing entities is in tension with the [Supreme] Court's century-

grant of the right to invoke the state's power in order to exclude others from utilizing the patentee's discovery without his consent.").

¹⁷⁸ *Broadcom Corp. v. Qualcomm Inc.*, 543 F.3d 683, 703 (Fed. Cir. 2008). In reviewing the lower court's application of the four-part *eBay* test, the Federal Circuit affirmed the grant of a permanent injunction and discussed the finding of irreparable injury, citing both *eBay* and *Continental*. The court stated, "Broadcom provided evidence of irreparable harm, despite the fact that it does not currently practice the claimed inventions. This result is consistent with *eBay*, in which the Supreme Court cautioned that 'traditional equitable principles do not permit such broad classifications' as presuming that a patentee cannot establish irreparable harm based on a patentee's 'willingness to license its patents' or 'its lack of commercial activity in practicing the patents.'" *Id.* (quoting *eBay v. MercExchange, L.L.C.*, 547 U.S. 388 (2006)). The Federal Circuit then cited a portion of *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1547 (Fed. Cir. 1995) (en banc), which in turn cited *Continental. Rite-Hite Corp.*, 56 F.3d at 1547 ("There is no requirement in this country that a patentee make, use, or sell its patented invention."). The second relevant case citing *Continental*, then, is *Rite-Hite Corp.*, 56 F.3d at 1547 (Fed. Cir. 1995) ("Kelley further asserts that, as a policy matter, inventors should be encouraged by the law to practice their inventions. This is not a meaningful or persuasive argument, at least in this context. A patent is granted in exchange for a patentee's disclosure of an invention, not for the patentee's use of the invention. There is no requirement in this country that a patentee make, use, or sell its patented invention."). One dissenting opinion also cited *Continental: King Instruments Corp. v. Perego*, 65 F.3d 941, 959–60 (Fed. Cir. 1995) (Nies, J., dissenting in part) (describing *Continental* as holding "that commercialization of an invention was not necessary for an injunction against infringement," so the court of appeals lacked the necessary information to affirm the finding that money damages were appropriate).

¹⁷⁹ *Holte & Seaman*, *supra* note 16, at 145 (discussing more than 200 patent injunction decisions appeals to the Federal Circuit in only a 7.5-year period).

¹⁸⁰ A search was conducted filtering district courts that cited *Continental* with terms "patent!" and "injunction!" included during the 1908–2018 timeframe. The WestlawNext total was 103; the Lexis total was 100. Citing References, *Cont'l Paper Bag v. E. Paper Bag Co.*, 210 U.S. 405 (1908) without narrowing by headnote. The citations were not analyzed; however, this number including the term "injunction!" should minimize the non-injunction related patent case citations.

old holding in *Continental Paper Bag*¹⁸¹ in addition to being in tension with *eBay*'s reaffirmance of *Continental*.¹⁸²

III. GROWING CONFUSION AND ARGUMENT AFTER A DECADE OF *EBAY*— A DIVERSITY OF SCHOLARLY VIEWS

The distinction between property rules and liability rules for enforcing legal rights—rights often called “entitlements”—traces back to Guido Calabresi and A. Douglas Melamed’s groundbreaking article, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*.¹⁸³ Under a property rule, an entitlement can be taken or transferred only with the owner’s consent through equitable remedies—such as injunctions—designed to prevent nonconsenting transfers, with enhanced damages also available to deter even attempts at nonconsenting transfers.¹⁸⁴ On the other hand, liability rules permit infringement or transfer when the entitlement owner refuses consent (or is not asked to consent), and such rules require the user “to pay an objectively determined value for it.”¹⁸⁵ Thus, unlike a property rule, “a liability rule denies the holder of the [entitlement] the power to exclude others.”¹⁸⁶ Injunctive relief is the primary means for enforcing a property-rule right, while proof of “objectively measured damages” is required for payment of a liability-rule right.¹⁸⁷

As Chief Justice Roberts emphasized in his *eBay* concurring opinion, prevailing patentees historically have been entitled to the property-rule remedy of injunctive relief: “From at least the early 19th century, courts have granted injunctive relief upon a finding of infringement in the vast majority of patent cases.”¹⁸⁸ However, as discussed in Parts I and II, *eBay* has caused a significant shift in that practice, so it is now left up for debate. As scholars noted even only five years after the *eBay* decision:

¹⁸¹ Seaman, *supra* note 13, at 2003; *see also* Holte, *supra* note 6, at 677.

¹⁸² *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 393–94 (2006).

¹⁸³ Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090 (1972).

¹⁸⁴ *See id.* at 1105 (explaining that under a “property rule,” “[n]o one can take the entitlement . . . unless the holder sells it willingly and at the price at which [the holder] subjectively values the property”); Kieff, *supra* note 19, at 27.

¹⁸⁵ Calabresi & Melamed, *supra* note 183, at 1092; Kieff, *supra* note 19, at 27.

¹⁸⁶ Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2091 (1997).

¹⁸⁷ Kieff, *supra* note 19, at 27. The line between property rules and liability rules is sometimes not completely clear. If monetary remedies are sufficiently high, they can operate like a property rule because users of an entitlement would be deterred from doing so due to the high cost. *See* Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1040–41 (1995) (“With such relatively high damages, potential takers would be deterred from nonconsensual takings, and the entitlement would be transferred only by consensual agreement.”).

¹⁸⁸ *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 395 (Roberts, C.J., concurring).

Some see [*eBay*] as having raised the bar for patentees seeking an injunction after . . . full adjudication of patent validity and infringement by injecting more discretion in the determination of essentially whether an injunction is in the broadly defined public interest. Others see the case as merely restating the established practice that an injunction should issue once validity and infringement have been decided in court.¹⁸⁹

This Part reviews those viewpoints vis-à-vis the *eBay* precedent: that post-*eBay* limitations on property-based remedies are not justified vs. that liability rules should now govern after *eBay*. Finally, a third viewpoint also emerges: that the *eBay* analysis itself was generally *all* wrong regarding enforcement of any legal right.

A. *Viewpoint One: Post-eBay Limitations on Property-Based Remedies Are Not Justified*

Soon after the *eBay* decision, many scholars began to see the risk of shifts in patent remedies law and argued against this. Professor Andrew Beckerman-Rodau maintained that any interpretation of *eBay* as allowing a “weakening or limiting of property-based remedies” was not justified due to numerous “countervailing policies and Supreme Court practice.”¹⁹⁰ Countervailing policies include the following: “inventors behind the patents asserted by non-practicing entities are often inventors who have been unsuccessful introducing an invention into the marketplace”; and allowing patent law modifications for the benefit of one industry (here, electronics and software) “would undermine the certainty and predictability of the law which is a major strength of the United States legal system.”¹⁹¹ In short, “reducing the economic value of a patent increases the incentive of existing enterprises to infringe the patent due to the lower economic penalties for such actions.”¹⁹² Regarding Supreme Court practice and precedent, Professor Beckerman-Rodau notes that “patent owners should be entitled to protect patent property rights from invasion of third parties without regard to whether the patent owner is injured by infringement.”¹⁹³ He further states that

a critical underlying policy of a well-respected legal system is adherence to precedent. . . . [W]ell-established legal rules should be overturned only if legitimate reasons exist for such a change. . . . [I]t is imperative that when the Supreme Court unilaterally eliminates a well-established and long-followed rule of law that it provide clear guidance in its judicial opinion explaining the rationale for its actions. . . .

¹⁸⁹ *E.g.*, Kieff, *supra* note 19, at 36.

¹⁹⁰ *See* Beckerman-Rodau, *supra* note 20, at 96.

¹⁹¹ *Id.* at 93–95.

¹⁹² *Id.* at 200.

¹⁹³ *Id.* at 88.

The majority decision in *eBay* failed to provide any explanation for its rejection of almost a century of precedent.¹⁹⁴

In another article soon after the *eBay* decision, Professor Richard Epstein argued that property rules must be applied particularly to patents for a number of broader policy reasons. Specifically, he noted that (1) “there are real difficulties in calculating the damages owed” to patent owners when property is infringed; (2) “any system of damages allows countless individuals to infringe the patent;” and (3) “systematic under-compensation during the limited life of a patent is likely to reduce the level of innovation while increasing the administrative costs of running the entire system.”¹⁹⁵ Agreeing with this broad weakening of patents, in a more recent article, Professor Eric Claeys noted:

If IP rights don’t generate . . . [an] expectation for injunctive relief, when IP holders litigate against infringement, they must introduce specific evidence showing why different forms of monetary relief won’t adequately compensate for disruption to their use and commercialization plans. That requirement seems likely to compromise the security of their IP.¹⁹⁶

Finally, in a comprehensive essay on property rules, liability rules, and the greater issue of technology contracting and coordination, Professor and former ITC Commissioner F. Scott Kieff made four points about why, in a post-*eBay* environment, courts should not favor liability rules over property rules.

First, while liability rules force deals, some deals just shouldn’t get done. Second, a rule that allows for liability rule intervention in those cases where the parties disagree on deal terms encourages disagreement and frustrates transactions. Third, and most importantly, liability rules make it significantly more difficult for owners of IP rights like patents to attract and hold the constructive attention of a potential contracting party (can’t hold-in the counterparty), and eliminate the patentee’s option to terminate the negotiations in favor of striking a deal with a different party (can’t hold-on to option). This problem hits small firms worse than large firms because large firms have an easier time keeping their contracting parties tethered to deals through various devices such as bargaining power, access to resources needed to finance litigation and its threat, and reputation effects. Fourth, liability rules actually help large

¹⁹⁴ *Id.* at 189–91 (footnotes omitted).

¹⁹⁵ Epstein, *supra* note 29, at 62; *see also* Kenneth W. Dam, *The Economic Underpinnings of Patent Law*, 23 J. LEGAL STUD. 247, 255 (1994) (“Remedies for infringement of a patent are, with limited exceptions, those appropriate for property. Injunctions . . . are available against infringers on proof of validity and infringement.”).

¹⁹⁶ Claeys, *supra* note 28, at 860–61; *see also* Depoorter, *supra* note 21, at 66 (“[S]cholars have traditionally presumed that the transaction costs involved in patent license negotiations are negligible compared with the information costs involved when courts apply compulsory licenses (liability rule protection) to patents. Accordingly, property rules provide better footing for consensual agreements in the area of patents, without having courts impose prices on innovation.”).

established firms to coordinate with each other in an anticompetitive fashion to keep out market entrants.¹⁹⁷

B. *Viewpoint Two: Liability Rules Should Govern Patent Cases After eBay*

Arguing in favor of applying practical liability rules to instances of patent infringement, one district court soon after *eBay* noted that “a violation of the right to exclude does not inevitably lead to the conclusion that a patent holder cannot be adequately compensated by remedies at law such as monetary damages”¹⁹⁸ Scholars agreed with this notion, including Professor Mark Lemley, who authored multiple articles the year after *eBay*, arguing in favor of applying liability rules to patent cases. Professor Lemley contended that “the threat of an injunction can enable a patent holder to negotiate royalties far in excess of the patent holder’s true economic contribution”¹⁹⁹ and that liability rules are preferable when injunctive relief cannot be narrowly tailored.²⁰⁰

Regarding the broader argument against property rules for patent cases, other scholars have maintained that “conventional wisdom [of property-rights scholars] is outdated” and liability rules should govern to prevent roadblocks in license negotiations.²⁰¹ These circumstances may include when transaction costs would prevent the parties from reaching a mutually beneficial agreement or when a patent owner uses the prospect of injunctive relief to extract compensation significantly in excess of the patent’s economic value, a situation referred to as a “holdup.” In a 2011 study on this issue, the Federal Trade Commission found: “An injunction’s ability to cause patent hold-up can support withholding injunctive relief in some situations. A manufacturer’s high switching costs combined with the threat of an injunction can allow a patent owner to obtain payments unrelated to the economic value

¹⁹⁷ Kieff, *supra* note 19, at 49.

¹⁹⁸ *z4 Techs., Inc. v. Microsoft Corp.*, 434 F. Supp. 2d 437, 441 (E.D. Tex. 2006).

¹⁹⁹ Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 1993 (2007).

²⁰⁰ Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783, 784 (2007); *see also* Daniel A. Crane, *Intellectual Liability*, 88 TEX. L. REV. 253, 255–56 (2009) (contending that “liability treatment for intellectual rights may be preferable” in cases where the right to exclude is less important). Some have also suggested liability rules being preferred in patent cases but only under limited circumstances. *See* Timothy R. Holbrook, *Equivalency and Patent Law’s Possession Paradox*, 23 HARV. J.L. & TECH. 1, 40–45 (2009) (proposing adoption of a liability rule for infringement under the doctrine of equivalents).

²⁰¹ Depoorter, *supra* note 21, at 66.

of its invention.”²⁰² Later researchers, however, have disagreed with this speculation, relying on empirical analysis.²⁰³

Finally, in a recent article, Professor Douglas Lichtman argued that applying liability rules to patent cases would offer additional procedural benefits, such as “slow[ing] down” patent cases.²⁰⁴ Professor Lichtman stated that extending patent litigation could “allow[] the Patent Office to participate in every case” and give infringer-defendants time to prepare better legal teams with “slower litigation clocks.”²⁰⁵

C. *Viewpoint Three: The eBay Factors Analysis for Injunctions Is Wrong*

Related to *eBay*’s impact, but without normative preferences for property or liability rules, is some non-patent remedies scholarship focusing directly on *eBay*’s reliance on “traditional equity practice.” These scholars argue that the *eBay* factors analysis is wrong, that it is not traditional equity practice at all, and that courts should return to rebuttable presumptions for irreparable injury.²⁰⁶ These scholars propose that the Supreme Court’s intent with the opinion was different: “Alternative language in *eBay*, especially the Court’s concluding disclaimer, suggests that a humbler reach for the opinion was intended.”²⁰⁷

²⁰² FED. TRADE COMM’N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION 26 (2011).

²⁰³ Other law-and-economics scholars have questioned whether holdup is a significant problem. *See, e.g.,* Einer Elhauge, *Do Patent Holdup and Royalty Stacking Lead to Systematically Excessive Royalties?*, 4 J. COMPETITION L. & ECON. 535, 535–37 (2008); J. Gregory Sidak, *Holdup, Royalty Stacking, and the Presumption of Injunctive Relief for Patent Infringement: A Reply to Lemley & Shapiro*, 92 MINN. L. REV. 714, 718–19 (2008); Alexander Galetovic, Stephen Haber & Ross Levine, *An Empirical Examination of Patent Holdup*, 11 J. COMPETITION L. & ECON. 549, 552–54, 570–72 (2015) (finding no empirical evidence to support the claim of holdup for standard-essential patents).

²⁰⁴ Douglas Lichtman, *supra* note 22, at 429.

²⁰⁵ *Id.* at 430.

²⁰⁶ *See* Gergen et al., *supra* note 5, at 206–08.; *id.* at 222–23 (regarding traditional understandings of injury: “From long before the advent of the twentieth century up to the time of the Supreme Court’s *eBay* decision, there have been presumptions of irreparable injury for various types of violations of property, contract, and intellectual property rights. Irreparable injury has been presumed in a case of a continuing physical intrusion on land, such as by an encroaching structure. It has been presumed for breach of a contract to buy or sell land. It has been presumed for violations of certain nonpossessory property rights. For example, irreparable injury has been presumed for a violation of a restrictive covenant. In the area of federal law, there have been well-established presumptions of irreparable injury for continuing violations of copyright or trademark.” (footnotes omitted))

²⁰⁷ *Id.* at 219 (footnote omitted). The so-called “disclaimer” in *eBay* was as follows: “We hold only that the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standard.” *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006).

In further concern over the *eBay* precedent, remedies scholars have noted the far-reaching impact of the muddied precedent outside patent law. In the trademark context, for example, Professor Lemley argues that “trademark courts have misinterpreted *eBay*, treating each of the four factors as a requirement rather than a consideration,” and “the Ninth Circuit’s ‘you must show evidence of all four factors’ approach has to go [because] [i]t isn’t how we apply any other multifactor test in IP law.”²⁰⁸ In areas beyond IP law, scholars note that “federal courts now commonly accept the *eBay* test as *the* test for injunctions in virtually all types of cases, from constitutional challenges under 42 U.S.C. § 1983, to actions under various federal regulatory or antidiscrimination statutes, to diversity actions centered on state tort, contract, or statutory law.”²⁰⁹ Indeed, in a 2010 review of cases—only four years after the opinion was issued—*eBay* had been cited more than 4,100 times.²¹⁰ “U.S. law has, it seems, entered a new world of injunctive relief in which the . . . language of *eBay* is king”;²¹¹ even enforcing Obamacare necessitated that the government’s arguing that a “declaratory judgment that the act is unconstitutional should not be deemed immediately effective without a holding that the *eBay* test was satisfied.”²¹² Given the far-reaching impact of the opinion, and looking back at the heightened media and amicus interest at the Supreme Court,²¹³ scholars have speculated that “[t]hose of suspicious mind might contend that, regardless of the Supreme Court’s protestations, *eBay* is a cog in a grander project of curtailing injunctive relief in general and possibly injunctive relief in institutional–reform and environmental litigation in particular.”²¹⁴

IV. RECENT LEGISLATIVE PROPOSALS TO CORRECT *EBAY*’S PRECEDENT

Over a decade after the Supreme Court’s *eBay* opinion, the changes in injunction outcomes have increased such that concerned members of

²⁰⁸ Lemley, *supra* note 27, at 1796, 1812.

²⁰⁹ Gergen, et al., *supra* note 5, at 215 (footnotes omitted).

²¹⁰ See LAYCOCK, *supra* note 5, at 340.

²¹¹ See Gergen et al., *supra* note 5, at 205.

²¹² *Id.* at 206 & n.11 (“rejecting [the] argument that, due to practical equivalence between injunction and declaratory judgment against federal government, [the] court had to ‘apply the familiar four-factor test’” (quoting *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1307, 1309, 1315)).

²¹³ See *supra* Section I.B.

²¹⁴ Gergen et al., *supra* note 5, at 205 n.7 (“generally tak[ing] at face value the motivations suggested by the express language of the *eBay* opinions [as] these motivations appear plausible, and their plausibility seems further supported by the Court’s unanimity”).

Congress, in both the House²¹⁵ and Senate,²¹⁶ have introduced bills to correct the precedent. The STRONGER Patents Act was introduced in the Senate in 2017.²¹⁷ A companion bill of the proposal was introduced in the House in 2018.²¹⁸ The proposals were directly related to “Restoration of Patents as Property Rights.”²¹⁹ Regarding injunctions, the bills would mandate:

INJUNCTION.—Upon a finding by a court of infringement of a patent not proven invalid or unenforceable, the court shall presume that (1) further infringement of the patent would cause irreparable injury; and (2) remedies available at law are inadequate to compensate for that injury.²²⁰

According to the House bill’s authors, the proposals were “designed to ‘strengthen the United States’ crippled patent system’ by restoring patents as property rights, making court standards uniform, and giving startups a better chance to protect their property from entities with much greater resources while also stemming abusive demand letters sent in bad faith.”²²¹ Both the 2018 House version and the 2017 Senate version of the STRONGER Patents

²¹⁵ *E.g.*, STRONGER Patents Act of 2018, H.R. 5340, 115th Cong. (2018) (sponsored by Rep. Steve Stivers (R-OH) and Rep. Bill Foster (D-IL)); Restoring America’s Leadership in Innovation Act of 2018, H.R. 6264, 115th Cong. (2018) (sponsored by Rep. Thomas Massie (R-KY)). HR. 6264 proposed:

SEC. 12. INJUNCTION. Section 283 of title 35, United States Code, is amended—

(1) by striking “The” and inserting the following: to read as follows:

“(a) IN GENERAL.—The”; and

(2) by adding at the end the following new subsection:

“(b) PERMANENT INJUNCTION.—

“(1) IN GENERAL.—Upon a finding of infringement of a patent, the court shall presume that further infringement of the patent would cause the patent owner irreparable harm. This presumption may be overcome only by a showing of clear and convincing evidence by the infringing party that the patent owner would not be irreparably harmed by further infringement of the patent. The patent owner is not required to make or sell a product covered by the patent to show irreparable harm.

“(2) PATENT OWNER DEFINED.—In this subsection, a ‘patent owner’ means the owner of the patent or an exclusive licensee of the patent.”

²¹⁶ STRONGER Patents Act of 2017, S. 1390, 115th Cong. (2017) (sponsored by Sen. Christopher A. Coons (D-DE)).

²¹⁷ *Id.*

²¹⁸ H.R. 5340. This bill is a related bill to S. 1390, 115th Cong. (2017) and identified as such by the Congressional Research Service.

²¹⁹ S. 1390, § 106.

²²⁰ *Id.*

²²¹ Steve Brachmann, *STRONGER Patents Act Introduced in House, Seeks to Strengthen a Crippled Patent System*, IPWATCHDOG (Mar. 26, 2018), <http://www.ipwatchdog.com/2018/03/26/stronger-patents-act-house/id=95188/> (describing that the proposal constitutes the “most recent comprehensive reforms to the U.S. patent system [since] the America Invents Act (AIA) enacted in 2011”); Alex Waldrop, *Making Patents STRONGER: The STRONGER Patents Act of 2017*, LEXOLOGY (Aug. 3, 2017), <https://www.lexology.com/library/detail.aspx?g=2662a8c9-72a2-4c7f-a5c9-88562638d5e6> (suggesting that the STRONGER Patents Act would reshape infringement—for example, by limiting the type and frequency of challenges to a patent holder’s claim).

Act have the same injunction language.²²² The House Judiciary Committee and the Senate Judiciary Committee are working with nonmembers regarding the bipartisan proposals.²²³

Cosponsors of the House's STRONGER Patents Act highlight the decline in patent protection in the United States by noting that if Edison were inventing today, he would "would likely spend most of his time in Alexandria, defending his patents at the PTAB, rather than in his research lab creating the lightbulb."²²⁴ According to the sponsors, the STRONGER Patents Act reflects the original goal of the AIA, which is to reform the PTAB to give inventors a "cheaper, faster, and fairer" patent system.²²⁵ Academics who support the bills have observed that "some American companies are even considering moving overseas to countries with stronger patent systems that will better protect their rights."²²⁶ Researchers Andrew J. Mass and David Winwood argue that "having a strong and dependable patent structure in our country is imperative to the ultimate success of the technologies developed at [their research university]."²²⁷

V. CONCLUSION—CLARITY IN REMEDIES FOR PATENT CASES

The summary of patent remedies discussion and the *eBay* case presented here is not meant to take a normative position on what the law should be. But there are significant areas of ambiguity in patent remedies law post-*eBay*, so this Article calls for the Supreme Court to revisit the issues presented. The

²²² H.R. 5340, § 106; S. 1390, § 106.

²²³ Brachman, *supra* note 221 (noting that while Rep. Steve Stivers (R-OH), cosponsor of the STRONGER Patents Act, "doesn't serve on the House Judiciary Committee, which will likely have a hand in crafting the final bill, he has met with members of that committee regarding the STRONGER Patents Act")

²²⁴ Steve Stivers and Bill Foster, *Protecting American Innovation*, THE HILL (Mar. 20, 2018, 12:30 PM), <http://thehill.com/blogs/congress-blog/economy-budget/379312-protecting-american-innovation> (arguing that "[s]ecuring 'injunctive relief' to make infringers stop the theft of intellectual property is now harder for patent owners. If he were inventing today, Edison would likely spend most of his time in Alexandria, defending his patents at the PTAB, rather than in his research lab creating the lightbulb").

²²⁵ *Id.*

²²⁶ Andrew J. Maas & David Winwood, *Letters: Country Needs Stronger Patents*, THE ADVOCATE (May 18, 2018, 6:00 PM), http://www.theadvocate.com/baton_rouge/opinion/letters/article_bcc249ce-5a15-11e8-b9fe-4f2c0bd67576.html. Andrew J. Mass, Assistant Vice President for Research at Louisiana State University, along with David Winwood, Associate Executive Director at Pennington Biomedical Research Center, also noted that intellectual property rights are at risk because of recent changes in U.S. patent law. Specifically, they are concerned with Louisiana State University's hundreds of patented technologies, which have significant commercial potential, stating: "[W]e cannot afford to lose the innovations that propel our economy and create potentially life-saving technologies. The STRONGER Patents Act is one way to strengthen the patent system that will protect inventors, startups and businesses so they can bring innovations to the market and improve our economy and our future." *Id.*

²²⁷ *Id.*

core of the patent remedies issue now is, most pressingly, whether the second question in *eBay* (about *Continental*) was answered affirmatively by the Court, and if it was, why only a minority of lower courts are following that precedent.

As discussed in this article, the *eBay* case suffered—both before and after the Supreme Court decision—from a confluence of influence that has now damaged patent remedy precedent. First, the significant legal battle that eBay waged against MercExchange, even after being found by a jury to be a willful infringer, caused monumental attention and external policy to be wrapped into the case injunction issue.²²⁸ The one-page Federal Circuit discussion on the injunction question, combined with the Blackberry phone injunction issue arising contemporaneously, resulted in a lack of clear analysis before the Supreme Court’s decision to grant certiorari, and more media attention on the case than any other that term.²²⁹ As others have noted, perhaps it was even enough media discussion to attract consideration from some members of the Court.²³⁰ In short, the case was a web of legal and policy confusion and has now created even greater precedent confusion.

Second, after the Court’s opinion, the case was remanded to a district court judge who was decidedly antipatent and who principally followed the reasoning of a concurring opinion, not the unanimous Court opinion, in denying the injunction a second time.²³¹ Due to a settlement offer from eBay to purchase the MercExchange patents before a second Federal Circuit decision, the second district court opinion became the final injunction review in the case, and it sparked other district courts to follow when interpreting *eBay*.²³²

Third, the 1908 *Continental* injunction precedent that the Court reaffirmed in *eBay* was precedent that had itself been rarely cited by lower courts. While Congress had on numerous occasions after 1908 attempted to legislatively reverse the Court’s holding and mandate compulsory licenses, the opinion itself was rarely cited in the decades before *eBay* by the Federal Circuit and district courts—the precedent was effectively treated as a general rule.²³³ This historical overlooking of *Continental* is ironic given the background of the conflict and the success of “the most famous nineteenth-

²²⁸ See *supra* Section I.A (regarding the *eBay* procedural background through the district court and Federal Circuit).

²²⁹ See *supra* Section I.D (regarding the voluminous media coverage of the *eBay* decision, drawing more attention than any other decision that term).

²³⁰ See *supra* Section I.D (regarding the influence of media coverage on the Court, specifically coverage which proved relevant by four Justices in Justice Kennedy’s concurrence).

²³¹ See *supra* Section I.C (regarding the review of all patent cases assigned to Judge Friedman while on the bench).

²³² See *supra* Section I.C (regarding the settlement announced by eBay Inc. before a second Federal Circuit opinion).

²³³ See *supra* Section II.C.5 (regarding citation to the *Continental* precedent by the Supreme Court, Federal Circuit and district courts before the *eBay* decision).

century American woman inventor”²³⁴ known as the “woman Edison,” who sustained her company through patent enforcement action and injunctive remedy.²³⁵ The overlooking of precedent is also perplexing given that the Supreme Court did, on numerous occasions in the decades after *Continental*, reaffirm and cite its injunction holding.

Fourth, while the *eBay* opinion was unanimous, and only applied self-described “traditional” and “well-established” law,²³⁶ its impact has been monumental. The decision and its four-factor analysis has been cited and applied thousands of times, to injunction cases and many other corners of the law.²³⁷ For patent cases, broad empirical data of all injunction cases post-*eBay* demonstrate that injunction grants went from effectively 100 percent pre-*eBay* to 72.5 percent across all patentees and 16 percent for nonpracticing patent owners.²³⁸ Further, the Federal Circuit has taken a statistically significant, different view than district courts and has been considerably more likely to affirm injunction grants over injunction denials.²³⁹ This decision’s impact on district courts, and not on the courts of appeals, alone should be empirical reason enough for the Supreme Court to realize the need for clarification.

Fifth, in contrast with the Supreme Court opinion’s limited tone, and reliance on historical practice, the amount of interest in the case before and after has no signs of limits. The case was the most media-covered of the term; there were thirty-one amicus briefs filed; and the case was argued by Supreme Court veterans Seth Waxman and Carter Phillips.²⁴⁰ While Supreme Court experts found little in legal precedent to write about soon after the opinion was issued,²⁴¹ the decision, and subsequent second denial of the injunction by the district court, resulted in a flurry of policy papers arguing both sides of precedent: the opinion would not change that traditional property rules for patent cases, versus liability rules, should now govern for some

²³⁴ Petroski, *supra* note 115, at 115.

²³⁵ See *supra* Section II.C.1 (regarding the history of the Eastern Paper Bag Company and inventor, Margaret E. Knight).

²³⁶ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390–91 (2006).

²³⁷ See *supra* Section I.A (regarding the prevalent use of the four-factor test espoused by the Court in *eBay*).

²³⁸ See *supra* Section II.A (regarding the impact of the *eBay* decision on patent case injunction decisions at the district court level).

²³⁹ See *supra* Section II.B (regarding the impact of the *eBay* decision on patent case injunction appeals at the Federal Circuit).

²⁴⁰ See *supra* Section I.A (regarding the high volume of media coverage throughout each stage of *eBay*).

²⁴¹ Kevin Russell, *eBay v. MercExchange: The Debate Continues*, SCOTUSBLOG (May 15, 2006, 1:52 PM), <http://www.scotusblog.com/2006/05/ebay-v-mercexchange-the-debate-continues/> (“The Court’s opinion in *eBay v. MercExchange* essentially affirmed the status quo. . . . [I]t is difficult to see how this opinion will effect a sea change in patent law.”); Kevin Russell, *More on eBay v. MercExchange*, SCOTUSBLOG (May 15, 2006, 8:49 PM), <http://www.scotusblog.com/2006/05/more-on-ebay-v-mercexchange/> (“[T]he court’s opinion is hardly a victory for *eBay* or a defeat for independent patent-owners.”).

patentees.²⁴² Further, regarding historical notions supporting the Court's holding and four-factor test, remedies scholars have strongly pushed back and argued that there is no basis for the factors; the rules outlined are not traditional equity practice; and there *should* be rebuttable presumptions for irreparable injury in patent infringement cases.²⁴³

Finally, while the recent legislative proposals discussed would bring clarity to remedies in patent cases, the history of *Continental* shows the numerous failed Congressional proposals to change that precedent and the reaffirmance of *Continental* in *eBay*; thus, legislative action should not be essential. The better fix—aimed directly at the source of ambiguity—is for the Supreme Court to again address remedies in patent cases and the *Continental* holding, just as the Court granted certiorari in *eBay*, but now with direct clarity. The legislative proposals would “restore” precedent that should not need restoration.²⁴⁴ Law cannot be overruled by time and misapplication. “Precedent’s power in the legal system relies on it carrying a weight,”²⁴⁵ and “it is imperative that when the Supreme Court unilaterally eliminates a well-established and long-followed rule of law that it provide clear guidance in its judicial opinion explaining the rationale.”²⁴⁶ *Continental* was precedent for almost a century in patent cases and no reading of *eBay* can explain the single decade of remedies change since the unanimous opinion. Accordingly, historical, descriptive, and empirical detail presented here call for a clarity in remedies for patent cases by the Supreme Court and clear guidance in a new opinion on the *Continental* precedent for lower courts to follow.

²⁴² See *supra* Section III.B (regarding countervailing arguments that surfaced immediately after *eBay* was again denied in the district court, supporting either traditional property rules or the application of liability rules for some patentees).

²⁴³ See *supra* Section III.C (regarding the scholarly argument against the *eBay* four-factor analysis in favor of a rebuttable presumption for irreparable injury).

²⁴⁴ Steve Brachman, *A Section-by-Section Look at the STRONGER Patents Act Introduced in the Senate*, IPWATCHDOG (June 29, 2017), <http://www.ipwatchdog.com/2017/06/29/stronger-patents-act-introduced-senate/id=85117/> (“Section 106, titled ‘Restoration of Patents as Property Rights,’ would adjust the language of 35 U.S.C. Section 283 to include a clause on injunctions which restores the presumption of injunctive relief upon a finding that a patent is both valid and infringed.”).

²⁴⁵ Melissa M. Berry, Donald J. Kochan & Matthew Parlow (writing as Berkolow), *Much Ado About Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-Percolation After Rapanos*, 15 VA. J. SOC. POL’Y & L. 299, 313 (2008).

²⁴⁶ Beckerman-Rodau, *supra* note 20, at 191.