Patent Injunctions: Speculating on the Future of eBay

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The immediate impact of eBay on the grant of injunctions in patent cases has been fairly clear thus far: a lack of direct competition between the patent holder and the infringer will often result in the denial of injunctive relief even after the patent has been found valid and infringed. But what else does the future hold for eBay? Two issues likely to be answered in the near future are the question of whether the presumption of irreparable harm survived eBay as a rebuttable presumption and the question of how deferentially the Federal Circuit will review denials of injunctive relief under the abuse of discretion standard.

Beyond these issues are other potentially important, if less likely, futures for the eBay. (1) Will the goals of the patent system, such as the promotion of innovation, play a role in determining grants of injunctive relief under the rubric of public policy concerns? Will infringement involving research tools, experimental use, and follow-on inventions be less likely to result in the issuance of permanent injunctions? (2) Will we see adaptations to patent practice and litigation in response to eBay? Will litigants seek out “injunction-friendly” fora? Will patent holders be able to artificially create direct competition? What role will collateral estoppel play in subsequent suits involving an infringed patent in which injunctive relief was denied in the first suit? (3) What stories will emerge to champion the strong property view of patents and injunctive relief? Will it be a non-practicing independent inventor faced with high entry costs or a non-practicing entity who is nonetheless in direct competition?