

EBAY'S EFFECT ON COPYRIGHT INJUNCTIONS: WHEN PROPERTY RULES GIVE WAY TO LIABILITY RULES

By Jake Phillips

Until recently, intellectual property rights plaintiffs were virtually guaranteed injunctions if they could show either a likelihood of success for preliminary injunctions or a likelihood of continued infringement for permanent injunctions. In 2006, *eBay Inc. v. MercExchange, L.L.C.*¹ changed the landscape of intellectual property remedies by mandating the application of traditional equity principles to determinations of injunctive relief. Although *eBay* specifically addressed permanent injunctions in the patent context, there has been much speculation about how it will affect other areas of intellectual property law. Justice Thomas, writing for a unanimous Court, devoted half a page in his five-page *eBay* opinion to the Copyright Act, analogizing the Copyright Act's language about injunctive relief to the Patent Act.² Specifically, Justice Thomas announced that the Supreme Court "has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed."³

This Note forecasts the likely impact of *eBay* on copyright law by applying a framework of entitlements based on a property rule/liability rule dichotomy. Part I provides background information on injunctive relief, addressing the historical and policy bases for injunctions. It also lays out a utilitarian framework for evaluating when injunctions should be denied. Part II summarizes the Supreme Court's decision in *eBay*. Part III examines *eBay*'s actual impact on copyright law to date, and then offers a paradigm for predicting which kinds of disputes are most likely to be affected by *eBay* in the future. To create this predictive model, the law and economics framework described in Part I is applied to the equitable principles mandated by the *eBay* Court, summarized in Part II. Part IV concludes that *eBay*'s mandate will not affect the outcome in the vast majority of copy-

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1. 547 U.S. 388 (2006).
2. *Id.* at 392-93.
3. *Id.*