

EBAY'S PRACTICAL EFFECT: TWO DIFFERING VISIONS

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When I first read the Supreme Court's pathbreaking decision in *eBay*,¹ I was pleased as punch. Not only was the Court's decision unanimous, but the unanimous opinion was short, general, and clear.² There was none of the dissension on the Court that I had become so accustomed to in cases outside my primary fields of intellectual property and antitrust law.

All this seemed, I thought, to augur well for the new Roberts Court. Gone were the multiple, prolix, tortuous opinions, filled with long footnotes—and sometimes whole paragraphs of text—in which the Justices argued with each other over the tiniest minutiae in an effort to prove to themselves and the public who was right. The *eBay* Court had spoken with one voice. That voice rang out succinctly and with suitable generality for the highest court in a large, diverse, and complex nation.

In that regard, the *eBay* decision reminded me of the many seminal decisions from the Warren Court that I had read in law school. The unanimous Court seemed collected, sure of itself, and conscious of its role at the top of a very large judicial pyramid. Maybe, I thought, Chief Justice Roberts had turned a new page in the Court's history, and maybe that change was for the better.

After more than a year of reflection, I'm not so sure. The Court *had* spoken with one voice on abstract principle. It had decreed that permanent injunctions in patent cases henceforth would issue only after due consideration of the traditional four equitable factors.³ No longer

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1. *eBay Inc. v. MercExchange, L.L.C.*, 126 S.Ct. 1837 (2006).

2. *See id.* at 1838-41 (less than four pages for unanimous opinion).

3. *See id.* at 1839 (reciting four factors, discussed *infra*); *id.* at 1841 (“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 standards.”).