

THE EFFECTS OF *EBAY*: DISCRETION, STATUTORY DAMAGES, AND PRIVATE ATTORNEYS-GENERAL

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If it were not already an apt time to consider the effects of the Supreme Court's *eBay v. MercExchange*¹ decision, several recent developments serve as reminders of the importance of the issues addressed in the case: In *Capitol v. Thomas*² the recording industry has succeeded in securing a \$222,000 judgment in statutory damages for copyright infringement, a software patent infringement suit was filed in October 2007 by IP Innovation and Licensing against Novell and Redhat³—seemingly the first suit to target Linux—and the PTO has rejected most of the claims in Amazon's 1-Click patent.⁴

The *eBay* decision appears to assert that the law of patent is not immune to general jurisprudential principles, and it may also be the first statement of a broad principle that peculiar tendencies exhibited by both patent and copyright law must either be justified or jettisoned. Thus, *eBay* leads to three different issues: the appropriate grounds for issuing injunctive relief, the justifications that underlie the remedial scheme, and the much broader issue of the role of the public interest in the law of

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

2. *Capital v. Thomas* 2007 WL 2957532 (Dist. Minn.)(Jury Verdict Form); Recording Industry vs. The People, http://recordingindustryvspeople.blogspot.com/2007/01/index-of-litigation-documents.html#Virgin_v_Thomas.

3. See, e.g., Groklaw.com, Patent Infringement Lawsuit Filed Against Red Hat & Novell - Just Like Ballmer Predicted, <http://www.groklaw.net/article.php?story=20071011205044141> (last visited January 21, 2008); Stephen Shankland, *Red Hat, Novell sued for patent infringement*, CNET News, Oct. 12, 2007, http://www.news.com/8301-13580_3-9796868-39.html.

4. See Peter Calvey, *Amazon One-Click Patent Rejected by the US Patent Office as a Result of my Request*, Igdmlgd, Oct. 16, 2007, <http://igdmlgd.blogspot.com/2007/10/amazon-one-click-patent-rejected-by-us.html>.