

NOTES

Weapon of Mass Coercion: How *eBay Inc. v. MercExchange, L.L.C.* Eliminated the Threat of Coercive Automatic Permanent Injunctive Relief and Restored Balance to the American Patent System

I. Introduction

The American patent system's success emanates from a symbiotic balance between the incentive to invent and the need to protect intellectual property that occurs when patent holders' "right to exclude others from making, using, offering for sale, or selling [their] invention"¹ acts as a means "[t]o promote the progress of science and [the] useful Arts."² This balance, however, is destabilized by patent holders who exploit their patent rights, such as the right to exclude, to protect questionable patents or stifle competition.³ The rapid expansion of technology and the accompanying proliferation of patents that began in the late 1990s facilitated the evolution of such a species of patent holders, commonly known as "patent trolls" or "Non-Producing Entities" (NPEs).⁴ Patent trolls "produce no products or services and have the sole purpose of obtaining money by licensing patents they own and winning infringement lawsuits against others."⁵ Patent trolls thrive by accusing others of infringing their right to exclude and then threatening to pursue costly litigation to enforce this right, often resulting in intimidated alleged infringers licensing patents of questionable validity.⁶ Patent trolls' coercive capabilities increased exponentially as a result of the Federal Circuit Court of Appeals' decision in *MercExchange, L.L.C. v. eBay Inc.*, which created a general rule that in patent infringement cases "a permanent injunction will issue once

1. 35 U.S.C. § 154(a)(1) (2000).

2. U.S. CONST. art. I, § 8, cl. 8.

3. See FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY, at Executive Summary 3 (2003), available at <http://www.ftc.gov/05/2003/10/innovationrpt.pdf> ("A failure to strike the appropriate balance between competition and patent law and policy can harm innovation.").

4. Steve Seidenberg, *Troll Control*, A.B.A. J., Sept. 2006, at 51, 51; see also FED. TRADE COMM'N, *supra* note 3, at 38 ("NPEs [Non-Practicing Entities] obtain and enforce patents against other firms, but either have no product or do not create or sell a product that is vulnerable to infringement countersuit by the company against which the patent is being enforced."); Terrence P. McMahon et al., *Who Is a Troll? Not a Simple Answer*, 7 SEDONA CONF. J. 159, 159 (2006)

5. Seidenberg, *supra* note 4, at 51.

6. See McMahon et al., *supra* note 4, at 160.