



The Long Shadow of the Blackberry Shutdown That Wasn't

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Introduction

In early 2006, there was widespread public interest in a seemingly arcane patent infringement litigation brought by a small IP licensing entity, NTP, Inc., against Research in Motion (or “RIM”), the maker of the then-ubiquitous Blackberry mobile communications device. The reason: NTP alleged that the Blackberry device and service infringed upon its patents relating to wireless email communications. In the district court litigation, NTP had secured a judgment of willful patent infringement against RIM, entitling NTP to treble damages, attorneys’ fees, and a permanent injunction (stayed pending appeal) that placed at risk the continued operation of the Blackberry service.¹

Given NTP’s success at the district court, and uncertainty surrounding RIM’s ability to design a non-infringing alternative, there seemed to be a material risk that the appeals court would sustain the lower court’s rulings and, most importantly, the injunction order. Faced with this predicament, RIM settled all claims with NTP in March 2006 for the impressive sum of \$612.5 million.²

In this contribution, I revisit the almost 15-year-old Blackberry litigation and its connection with both the Supreme Court’s 2006 decision in *eBay, Inc. v. MercExchange LLC*,³ which limited patent owners’ ability to secure injunctions, and ongoing infringement litigation (commenced in January 2020) involving Google and Sonos, a leading innovator and supplier of wireless audio systems. While the *eBay* decision may have deterred certain opportunistic uses of patent infringement litigation, there are growing indications that it has had a significant adverse effect on the innovation ecosystem.

The increasing normalization of patent infringement as a rational business strategy endangers the property-rights infrastructure behind important segments of the U.S. innovation economy.

The NTP/RIM litigation might just as plausibly illustrate how the patent system supports the ability of individual inventors to earn a return on their R&D efforts in a competitive landscape.

As illustrated by the Google/Sonos litigation, *eBay* and post-*eBay* case law has enabled incumbents that maintain key technology platforms and distribution pathways to infringe upon patent-protected technologies held by others at relatively modest legal and business risk. The increasing normalization of patent infringement as a rational business strategy endangers the property-rights infrastructure behind important segments of the U.S. innovation economy.

Blackberry and *eBay*: The “Patent Troll” Origins Story

The settlement of the Blackberry litigation was and is widely viewed as being an exorbitant payout to a “classic” patent troll. For example, Wikipedia states (without acknowledging any contrary view) that “NTP has been characterized as a patent troll because it is a non-practicing entity that aggressively enforces its patent portfolio against larger, well-established companies.”⁴ Given that NTP was partly founded by an individual inventor who was awarded about 50 U.S. patents for mobile email and other inventions and then sought to realize the value of those inventions by negotiating licenses with device makers and telecom carriers, it is not an especially obvious example of a patent troll.

Aside from differences in size, the activities of NTP are not clearly distinguishable from the technology transfer division of an academic research institution. Without further inquiry, the NTP/RIM litigation might just as plausibly illustrate how the patent system supports the ability of individual inventors to earn a return on their

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R&D efforts in a competitive landscape in which larger firms enjoy difficult-to-beat production, distribution and marketing capacities. For purposes of this historical discussion, however, it is appearances, not substance, that matter.

How the Blackberry Settlement Led to *eBay v. MercExchange*

Those appearances—that is, the predominant view that the Blackberry litigation represented the “shakedown” of a “real” company by an “aggressive” licensing operation—arguably provided the impetus for the Supreme Court’s *eBay* decision later that same year. The case involved a similar fact pattern in which a small IP licensing entity brought an infringement lawsuit against a large technology firm that was a dominant player in its market segment.

In the popular conversation, the Blackberry litigation was viewed as proof positive of a patent system gone haywire in which shell entities that hold patents of dubious quality can extract payouts from operational businesses that lack a feasible non-infringing design-around. Cash-rich firms that sold multi-component products or systems (such as RIM’s Blackberry device and service) that could not be easily re-engineered to avoid a patent infringement claim seemed to be especially exposed to this litigation strategy. Even the limited prospect of a shutdown injunction could compel these firms to agree to an excessive settlement amount, even if it were unlikely that the patent owner would have prevailed, or secured a comparable damages amount, at trial.

This context might explain why the Roberts Court took the uncharacteristically radical step of discarding the long-standing historical presumption that a patentee is entitled to an injunction once it shows validity and infringement, rather than relying on more surgical tools (such as shifting attorneys’ fees) to deter nuisance litigation or tailored injunctive remedies (such as phased-in enforcement) to

deter “holdup” litigation tactics in multi-component technology disputes. In place of the presumption favoring injunctions, the Court adopted a pliable multi-factor test that requires courts to weigh competing factors in determining whether to issue an injunction against future patent infringement.⁵

A concurring opinion authored by Justice Kennedy identified the motivation behind this move from a rule-like to a standard-like principle: “An industry has developed in which firms use patents not as a basis for producing and selling goods but instead primarily for obtaining licensing fees. . . . For these firms, an injunction . . . can be employed as a bargaining tool to charge exorbitant fees”⁶ While the majority opinion stated that a court may not deny an injunction because of a patentee’s “lack of commercial activity in practicing the patents,”⁷ the language of the Kennedy concurrence suggested that courts should take into account the type of entity that brought an infringement litigation in determining whether to grant injunctive relief.

“eBay+” in the Lower Courts

In the lower courts, the entity-specific approach endorsed by the Kennedy concurrence has prevailed. In particular, lower courts have applied the multi-factor test so as usually to deny injunctive relief to non-practicing entities such as the plaintiffs in the Blackberry and *eBay* litigations.⁸ Some courts have gone further and applied the eBay framework to deny injunctive relief even to practicing patent holders. In a headline patent litigation involving Apple and Samsung, the Northern District of California declined in 2012 to grant even a narrowly crafted injunction (with a “sunset” period during which enforcement would have been stayed) in an infringement dispute involving directly competing companies. Relying on the “irreparable harm,” “inadequacy of money damages,” and “public interest” factors in the *eBay* test, the district judge concluded that “the principles of equity do not support the issuance of an injunction.”⁹

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While the Federal Circuit ultimately vacated the denial of injunctive relief (after a two-year delay),¹⁰ the expansive application of the four-factor test to a direct competitor scenario by a prominent district court illustrates the significant after-effects of the *eBay* decision as a practical matter. Without legislative instruction, the federal judiciary has effectively instituted a qualified property-rights regime in which a patentee's best-case scenario is often reduced to a "reasonable royalty" payment as determined in court rather than in the marketplace.

***eBay v. MercExchange* and the Law of Unintended Consequences**

Generally speaking, the preponderance of opinion among the scholarly and much of the "tech" business community has endorsed both the *eBay* decision, insofar as it discarded the near-automatic issuance of injunctive relief following a finding of validity and infringement, and the broad application of *eBay* among the lower courts, which has engineered a two-tier patent system in which only operational entities have any reasonable chance of securing injunctive relief against infringing parties. (As illustrated by the denial and delay of injunctive relief in the Apple/Samsung litigation, even practicing entities in multi-component technology markets may not have a high likelihood of securing injunctive relief.)

Following this view, *eBay* and its progeny represent a prudent limitation to the patent franchise that screens out, and by anticipation deters, low-value infringement claims that run counter to the patent system's interest in promoting innovation. This screening effect purportedly protects both operational companies from nuisance infringement claims and, indirectly, consumers who ultimately bear at least part of the cost of settling those claims, whether in the form of higher prices or reduced innovation.

This understanding of *eBay* is fundamentally incomplete. In particular, it overlooks the extent to which judicial

limitations on injunctive relief have facilitated another form of opportunistic behavior by large, well-resourced entities that can, and sometimes do, make use of others' (often smaller firms') patented innovations with limited exposure to significant legal or business risk. The ongoing litigation involving Google, the world's dominant search engine company, and Sonos, a leading innovator in wireless home audio systems, illustrates how *eBay* and post-*eBay* case law has adversely impacted the innovation ecosystem and, in particular, has limited the ability of "stand-alone" innovators to capture returns in markets dominated by incumbent platforms.

The Sonos v. Google Litigation

To understand the current litigation between Sonos and Google, it is necessary to understand the preexisting business relationship between these two companies. This relationship follows a common template in which an upstream component supplier sells inputs to downstream "OEMs" (original equipment manufacturers) that assemble a systems-based product for distribution into a target retail market. This type of relationship exists widely in computing markets, in which branded OEMs such as Dell or HP assemble components from tens of upstream suppliers, and the automotive market, in which branded OEMs such as GM or Toyota maintain similar relationships with an even larger group of component makers.

In this case, Sonos innovated and supplied the wireless audio technology that Google has integrated, sometimes with and sometimes without Sonos's consent, in certain products and services for consumers. According to Sonos, Google acquired access to Sonos's technology as a result of the two companies' partnership in connection with the Google Play Music streaming service and subsequently copied patent-protected features of Sonos's speaker technology when developing the wireless audio functions in Google's Chromecast Audio, Home, Nest, and Pixel devices.¹¹ Absent the payment obligations that would otherwise apply under a contractual license with Sonos as the patent owner, Google enjoys reduced input costs and an increased profit margin on these products.

I do not purport in this discussion to take any view on the strength of Sonos's legal and factual claims or Google's responses to those claims. Rather, the critical point is to understand why Sonos's claimed predicament is not just plausible but *predictable* in a post-*eBay* IP regime.

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A Post-Injunction Innovation Ecosystem

If an IP right is akin to a type of property right, then it would appear that Sonos could simply have relied on the courts to remove an infringer from its patent-protected intellectual territory. As has often been observed, the “right to exclude” is the essence of a property right. Of course, that is no longer the case in a post-*eBay* world in which injunctive relief is a matter of case-by-case judicial discretion and courts have considerable leeway in denying such relief so long as the patentee is deemed to have been made whole through monetary damages.

In this legal regime, any right to exclude stands in doubt and therefore a component supplier, such as Sonos, lacks an especially credible threat of securing an injunction that would prevent a critical intermediate user, such as Google, from using its technology. While Sonos is a practicing patentee and therefore an injunction might nonetheless be thought to be a likely outcome (in the event it can demonstrate validity and infringement), this outcome is far from assured given the costs and delays involved in an infringement litigation and, as described above, some courts' willingness to deny injunctive relief to all patentees in multi-component technology markets.

The post-*eBay* legal regime not only limits the ability of patent owners to secure injunctive relief but, as a consequence, induces unauthorized users to avoid seeking a license from patent owners. If an injunction is no longer an assured outcome even following a finding of validity and infringement, then an OEM (or other intermediate user) might determine that its profit-maximizing course of action is to use the supplier's technology and wait for the supplier to sue for infringement (if at all). This is likely to be a preferred course of action so long as two conditions are met: (i) the OEM believes it can show that the patent is invalid, demonstrate lack of infringement, or avoid a finding of willful infringement (which would treble damages), and (ii) the OEM does *not* believe it will incur

significant reputational costs in the form of discounts and other protective terms demanded by other suppliers who fear the same treatment in the future.

This strategy becomes especially appealing if the OEM has the financial resources to sustain an extended litigation and occupies a critical point on the distribution pathway to the target consumer market. If those conditions are substantially satisfied, then the OEM's worst-case scenario would simply require it to pay damages approximately equal to the royalty it would have negotiated with the supplier in the first place, plus the legal fees incurred in the infringement suit. The latter amount is equivalent to a fee paid by the OEM for the opportunity to avoid having to pay anything at all in the event the OEM succeeds in defeating the patentee's infringement claim.

In practice, it is likely that the OEM and component supplier would reach some type of settlement in which both parties avoid the costs and uncertainties of litigation through a renegotiated license or other agreement. Any such renegotiation is likely to “recut the pie”—that is, the economic value attributable to the supplier's innovation—in a manner that advantages the OEM over the supplier. That is because the renegotiation process now takes place against the backdrop of a legal regime in which the patentee-supplier cannot credibly threaten to withhold its technology, especially (as in the Google/Sonos fact pattern) after the OEM's prior working relationship with the supplier has provided the OEM with the complementary know-how required to implement the technology. That is: the OEM's worst-case scenario is not the loss of all future sales of the contested product or service, but rather a far lesser amount equal to a percentage royalty that must be paid on those sales.

This last point is critical. Given the absence of any credible shutdown threat, a patentee may rationally agree to a settlement amount that forfeits much of the value of its technology but nonetheless exceeds the patentee's expected damages award in litigation net of legal fees. To the extent the patentee faces immediate cash-flow constraints, the significant delays inherent to civil litigation may reduce even further its “reservation price” in settlement negotiations with the infringer. This is effectively a redistribution of economic value in favor of entities that use innovations as part of a larger product, service, or system and at the expense of entities that develop those innovations in the first place.

As a matter of economic efficiency, the division of the “innovation pie” between technology innovators and implementers is a matter of indifference. Yet it is very much not a matter of indifference if a consistent pattern of one-sided revenue splits in favor of downstream intermediate users dissuades future entry by upstream innovators that have historically been a fruitful source of breakthrough technologies. Given that the long-term efficiency gains from innovating new technologies are generally assumed to exceed by a large measure the short-term efficiency gains from pushing the prices of existing technologies closer to cost,¹² the “property lite” regime put in place by *eBay* and post-*eBay* case law is likely to impact adversely not only innovators but the public in general.

The Inefficiency of “Efficient” Infringement

It is notable that the types of claims made by Sonos resemble claims that have been made periodically by other suppliers against dominant platforms in recent years. Sonos itself has separately made similar allegations against Amazon but stated that it could not bear the costs of pursuing litigations against both firms.¹³ Apple has been the target of two similar allegations from other firms. In 2018, Apple was sued for patent infringement by a scientist-founded firm that pioneered the development of dual-lens miniature cameras. The patentee, Corephotonics, Ltd., claims that Apple copied its technology after it was disclosed to Apple management in the course of negotiations over a potential licensing agreement.¹⁴ In 2017, Apple ended its relationship with Imagination Technologies, a firm that had supplied Apple with graphic processing units for iPhones and iPads, after hiring technical personnel from Imagination, apparently with the intention of developing an internal substitute technology.¹⁵

In the most striking illustration, Apple reportedly withheld royalty payments in the order of billions of dollars from Qualcomm, a critical chip supplier for Apple iPhones, in response to Qualcomm’s filing of a suit against Apple alleging patent infringement, breach of contract, and misappropriation of trade secrets. Without an injunction threat (in this case, due to the fact that U.S. courts generally treat the owners of standard-essential patents as having waived the right to pursue injunctive relief outside of limited circumstances),¹⁶ Qualcomm was powerless to demand any immediate payment for Apple’s continuing

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use of its patented technology while the litigation was pending for a period of approximately two years until being settled in 2017.¹⁷

Further inquiry would be required to rigorously assess the competing factual allegations made in these disputes. However, it can be observed at a minimum that these fact patterns are consistent with more general recent tendencies in technology markets. These tendencies in turn raise concerns about the extent to which the retreat of the injunction remedy has distorted the U.S. innovation ecosystem.

The Business Logic of “Efficient” Infringement

Certain portions of the “tech” business community have increasingly adopted and explicitly endorsed so-called “efficient infringement” strategies in which a large company makes use of technology in which other (usually smaller) entities have IP rights, waits to be sued (if at all), and then litigates or settles for an agreed-upon amount. As reported in *The Economist*, Apple’s former head of patenting candidly described this strategy: “[E]fficient infringement’, where the benefits outweigh the legal costs of defending against a suit, could almost be viewed as a ‘fiduciary responsibility,’ at least for cash-rich firms that can afford to litigate without end.”¹⁸

This strategic calculus simply reflects a rational response to a post-*eBay* legal regime in which an infringer’s worst-case scenario is often, if not typically, payment of a royalty, rather than a shut-down injunction that compels it to exit the market entirely. Given the courts’ generous application of *eBay*, the risk of an injunctive remedy is low if the patentee is either a non-practicing entity or, even in the case of operational entities, holds a patent relating to a component of a larger systems product (a common if not typical circumstance in information technology markets).

A “reverse Robin Hood” transfer of wealth from technology startups to platform incumbents is the unintended result of courts’ broad application of the eBay decision.

In these circumstances, the asymmetry that *eBay* sought to correct is effectively inverted. Rather than being threatened by a shutdown injunction, it is now the infringer that threatens the innovator with exorbitant litigation costs, an extended period of zero returns on its R&D investment, and the temporary or permanent denial of a critical access channel to the target consumer market. The practical implication is that it is now often the innovator, rather than the infringer, who faces the prospect of being shut out from the market.

The Social Illogic of “Efficient” Infringement

Calling this strategy “efficient” is a profound misnomer. While it is *privately* efficient for the infringer, which enjoys lower technology input costs (either due to lack of enforcement by the patentee or a favorably negotiated license fee), this strategy almost certainly fails to meet the test of *social* efficiency—that is, it is unlikely to result in an institutional environment that makes the innovation ecosystem better off in the aggregate over any policy-relevant time horizon. A legal regime in which an incumbent platform can expropriate the fruits of a startup’s technology investments, subject only to a royalty payment to be determined through a costly judicial process at considerable delay, does not offer an especially appealing environment for potential entrants or potential investors in those entrants.

If the IP regime does not enable the winners in innovation races to capture commensurate returns on their high-risk investment, then the business rationale for entering the race collapses. This gives rise to two adverse consequences: (i) private capital redeploys to non-innovation investment opportunities, or (ii) innovation shifts toward dominant platforms that can capture returns on R&D in a weak-IP environment through an internal financing, production, and distribution infrastructure. In either case, innovation resources are likely to be either “under-allocated” or “mis-

allocated” relative to the state of affairs that would prevail under a more secure IP environment.

This “reverse Robin Hood” transfer of wealth from technology startups to platform incumbents is the unintended result of courts’ broad application of the *eBay* decision to an increasingly large portion of the innovation ecosystem. While *eBay* and post-*eBay* case law may have deterred certain opportunistic litigation strategies, any cost-benefit analysis of this legal regime shift must take into account that it necessarily facilitates opportunistic infringement strategies that advantage incumbents over entrants. Post-*eBay* case law concerning the availability of injunctive relief has paid extensive attention to the former risk with virtually no consideration of the latter risk.

A more nuanced appreciation of this inherent tradeoff between opportunistic litigation, which tends to proliferate as IP rights are strengthened, and opportunistic infringement, which tends to proliferate as IP rights are weakened, might have led the lower courts to apply *eBay* more narrowly or might have led some Justices in *eBay* itself to have considered a more surgical set of policy tools to address the “holdup problem” that had been widely associated (accurately or inaccurately) with the Blackberry litigation.

Conclusion: eBay’s Problematic Legacy

Much has changed since the Blackberry service seemed to be at least momentarily endangered by a single infringement litigation in early 2006. The Supreme Court’s decision in *eBay* almost 15 years ago, and the post-*eBay* case law that has developed since that time, initiated a significant shift in the legal infrastructure behind U.S. innovation markets. Growing portions of the patentee population now operate under a regime of partial exclusivity in which the maximal remedy is monetary damages as determined by a court rather than market

These tendencies raise concerns about the extent to which the retreat of the injunction remedy has distorted the U.S. innovation ecosystem.

negotiation. Without a secure backstop of injunctive relief, an innovation economy inevitably moves from shifting capital to successful innovators on the basis of pricing signals, which reflect technical and commercial merit, to a system in which innovators are forced to have recourse to costly and lengthy judicial proceedings, which reflect in large part litigation skill and resources.

The Sonos/Google litigation, and other similar faceoffs between component suppliers and technology platforms, illustrate how limiting injunctive relief tends to favor downstream incumbents that have the resources to fund extended litigation, which in turn is liable to induce an across-the-board discount on the R&D inputs supplied by upstream innovators. Going forward, the latter group of firms may decline to enter the innovation tournament given the difficulty in capturing returns on R&D as a

It is now often the innovator, rather than the infringer, who faces the prospect of being shut out from the market.

stand-alone entity without independent production and distribution capacities. While the *eBay* decision may have shielded dominant platforms from the risk of nuisance litigation, it has concurrently exposed innovation specialists to the risk of opportunistic infringement. Absent some form of legislative intervention (which does not currently appear to be forthcoming), the increasing erosion of the injunctive remedy is liable to distort further the U.S. innovation ecosystem.

ENDNOTES

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