

INJUNCTIVE RELIEF AFTER EBAY V. MERCEXCHANGE

By

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On May 15, 2006, the United States Supreme Court wiped clean the Federal Circuit Court of Appeals' entire jurisprudence regarding the appropriateness of a permanent injunction to prohibit continued infringement by an adjudicated patent infringer. Given the importance of a patent owner's right to exclude, the Federal Circuit had evolved a "general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances." Henceforth, the Court will need to follow the four-factor test set out by the Supreme Court:

According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. *See, e.g., Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-312 (1982); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987).

eBay Inc. v. MercExchange L.L.C., 126 S.Ct. 1837, 1839 (2006).

The Supreme Court analyzed and rejected the application of the four-factor test by the district court in *MercExchange L.L.C. v. eBay Inc.*, 275 F.Supp.2d 695 (2003). The Supreme Court explicitly denounced the adoption of "expansive principles suggesting that injunctive relief could not issue in a broad swath of cases." Specifically, the Court rejected the notion that a "plaintiff's willingness to license its patents" and "its lack of commercial activity in practicing the patents" would be sufficient to preclude a finding of irreparable harm.

The Supreme Court provided little other guidance as to how the four-factor test is to be applied to patent infringement cases. The opinion gives a slight clue by stating that its approach to injunctive relief is consistent with the Court's treatment of injunctions in copyright cases. Since the *eBay* decision, the district courts have been on their own

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making interpretations of the four-factor test and applying it to patent infringement. As of this writing, we await the first word from the Federal Circuit as to how it will apply the test to permanent injunctions for patent infringement. There are numerous questions to be answered. Below are just a few.

1. Are all four factors required or is it a balancing test?

“All parties agree, as they must, that the “four-factor test” is a balancing test. *See, e.g., Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 & 546n. 12, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987).” *Canadian Lumber Trade Alliance v. United States*, 441 F.Supp.2d 1259,1264 (CIT 2006) Perhaps this is not clearly understood by all courts. The court in *Voda v. Cordis Corp.*, 2006 WL 2570614 (W.D.Okla. 2006), held “As plaintiff has failed to demonstrate either irreparable injury or that monetary damages are inadequate, the court denies his request for a permanent injunction.” No mention was made of balancing nor of the other two factors.

2. What is the difference between irreparable harm and inadequate remedies at law?

“Although stated as two separate prongs by the Court in *eBay*, whether something is “irreparable” requires, to a certain extent, a lack of alternative remedies.” *Canadian Lumber Trade Alliance v. United States*, 441 F.Supp.2d 1259,1264 n.4 (CIT 2006) Irreparable harm lies only where injury cannot be undone by monetary damages. *See Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981). While the courts will discuss these factors separately, there is a lot of overlap in the analysis and there is no clear distinction between the two

3. Can irreparable harm be presumed?

A case may be made for the presumption of irreparable harm. In an analysis of a request for a preliminary injunction, a likelihood of success on the merits with respect to validity and infringement produces a presumption of irreparable harm. This has been the law applied by the Federal Circuit to preliminary injunctions ever since *Smith International, Inc. v Hughes Tool Co.*, 718 F.2d 1573 (Fed.Cir. 1983). The Supreme Court’s decision in *eBay* related to permanent injunctive relief and thus did not eliminate the presumption of irreparable harm for preliminary injunctions upon a showing of validity and infringement. *Christiana Industries v. Empire Electronics, Inc.*, 443 F. Supp.2d 870, 884 (E.D.Mich. 2006) (Preliminary injunction issued upon finding of infringement under doctrine of equivalents.)

The question of whether irreparable harm can be presumed in a permanent injunction analysis will need to be addressed by the Federal Circuit. Post-*eBay*, the Federal Circuit appears to maintain the presumption of irreparable harm in preliminary injunction analyses. In *Abbott Laboratories v. Andrx Pharmaceuticals*, 452 F.3d 1331, 1347 (Fed.Cir. 2006), the court said “...Abbott has not established a likelihood of success on the merits. As a result, Abbott is no longer entitled to a presumption of irreparable

harm.” The vitality of the presumption of irreparable harm, at least for preliminary injunctions, was thus implied. Several courts have held that for a permanent injunction, no such presumption survives the Supreme Court *eBay* decision. While the analysis of these courts may ultimately prevail, the *eBay* decision provided ample room to maintain a presumption of irreparable harm, even in permanent injunction cases.

Judge Davis of the Eastern District of Texas was an early interpreter of the *eBay* decision. He relied upon the four-factor test itself to preclude a presumption of irreparable harm. “A plaintiff must demonstrate: (1) that it has suffered an irreparable injury...”*eBay*, 126 S.Ct. at 1839 “Accordingly, the Court does not apply a presumption of irreparable harm.” *z4 Technologies, Inc. v. Microsoft Corp.*, 434 F.Supp.2d 437, 440 (E.D. Tex. 2006); *Paice LLC v. Toyota Motor Corp.*, 2006 WL 2385139 (E.D. Tex.). This decision appears to have

The Federal Circuit is in a position to adopt such a presumption of irreparable harm for use in the four-factor test analysis. The court’s analysis in *z4 Technologies* ignored the district court decision in the *eBay* case. The district court had also applied the four-factor test and in addressing irreparable harm, the district court applied a rebuttable presumption of irreparable harm. The Supreme Court chastised the district court for adopting “expansive principles suggesting that injunctive relief could not issue in a broad swath of cases.” *eBay*, 126 S.Ct. at 1840. The presumption of irreparable harm, on the other hand, was left intact without comment by the Supreme Court.

Judge Davis’ contrary view is that “the Supreme Court indicated that an injunction may only issue “in accordance with the principles of equity” under both the patent and the copyright acts but does not in any way imply that a rebuttable presumption of irreparable harm should apply to permanent injunctions under either act.” *z4 Technologies*, 434 F.Supp.2d at 440. For explicit support for his view, Judge Davis looked to the Supreme Court decision in *Amoco Production Co. v. Gambell*, 480 U.S. 531, 545 (1987) for the proposition that “applying a presumption of irreparable harm in the context of an injunction ‘is contrary to traditional equitable principles.’” *z4 Technologies*, 434 F.Supp.2d at 440.

A closer look at the *Amoco* decision and other Supreme Court precedent suggests that the door may still be open for the Federal Circuit to maintain the presumption of irreparable harm. This case involved environmental rights, in particular the rights of aborigines in Alaska to subsistence uses of the land. The Court of Appeals presumed irreparable damage from the Interior department’s failure to evaluate thoroughly the environmental impact of the actions being taken in the Outer Continental Shelf. The Supreme Court chided the Court of Appeals as follows: “Instead, that court stated and relied on a presumption of irreparable harm which is contrary to traditional equitable principles, has no basis in ANILCA, and is unnecessary to fully protect the environment.” *Amoco Production Co. v. Gambell*, 480 U.S. 531, 545 (1987) While in the context of environmental protections the presumption may be improper, why can’t irreparable harm be presumed for violations of exclusive patent rights?

The Supreme Court has recognized the propriety of a presumption of irreparable harm in other contexts, particularly where constitutional rights are at stake. “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2689, 49 L.Ed.2d 547 (1976); *Deerfield Medical Center v. Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981). “[W]e agree with the district court that the plaintiff has shown a substantial likelihood of success on his Eighth Amendment claim. The district court therefore properly relied on the presumption of irreparable injury that flows from a violation of constitutional rights.” *Jolly v. Coughlin*, 76 F.3d 468, 482(2d Cir. 1996).

The Supreme Court is cognizant of the constitutional underpinnings of the patent right. “The securing to inventors of an exclusive right to their inventions, was deemed of so much importance, as a means of promoting the progress of science and the useful arts, that the constitution has expressly delegated to Congress the power to secure such rights to them for a limited period. The inventor has, during this period, a property in his inventions; a property which is often of very great value, and of which the law intended to give him the absolute enjoyment and possession.” *Ex parte Wood*, 22 U.S. 603 (1824). Thus, the Federal Circuit would be justified in presuming irreparable harm with regard to patent rights, even though similar treatment is denied to environmental or aboriginal rights. It remains to be seen how the Federal Circuit will apply the four-factor test.

In a first opportunity to address whether the presumption of irreparable harm survives the *eBay* decision, the Federal Circuit panel ducked the issue. “Because we conclude that the district court did not clearly err in finding that Sanofi established several kinds of irreparable harm, including irreversible price erosion, we need not address this contention [of whether a presumption of irreparable harm is in direct contravention to the *eBay* decision].” *Sanofi-Synthelabo v. Apotex, Inc.*, 2006 WL 3613616 (Fed. Cir. 2006)

4. How is the four-factor test applied?

a. Irreparable Harm

Presumption aside, irreparable harm may be most easily demonstrated by a patentee who sells the patented product. When continuing infringement will cause the patentee to lose sales and lose market share irreparable harm should most surely be found. For example, in *Wald v. Mudhopper Oilfield Services, Inc.*, 2006 WL 2128851 (W.D.Okla. 2006) irreparable harm was found where in addition to lost sales, plaintiff suffered loss of market share, inability to make their polymer stick an industry standard and damage to their reputation for innovation. The harm may be even easier to show in a market with “sticky customers,” where customers continue purchasing over the long term from the company from which they first obtained the product. *TiVo Inc. v. EchoStar Communications Corp.*, 446 F.Supp.2d 664 (E.D.Tex. 2006) The harm is particularly grievous for a new company in a nascent market as was the case for *TiVo*. Other factors supporting irreparable harm include loss of profits and loss of brand name recognition as mentioned in the *z4 Technologies* case.

Another argument that may be made in favor of irreparable harm was made by MercExchange. Continued infringement would deprive patentee of its “ability to either pursue the development of its inventions under the protection of its patent rights, or to have the exclusive right to license its patented technology to others on the most beneficial terms available.” *MercExchange*, 275 F.Supp.2d at 711. While this argument failed to persuade the district court in the first time around, other courts have recognized that “without the right to obtain an injunction, the right to exclude granted to the patentee would have only a fraction of the value it was intended to have, and would no longer be as great an incentive to engage in the toils of scientific and technological research.” *Telequip Corp. v. The Change Exchange*, 2006 WL 2385425 (N.D.N.Y.) (quoting *Honeywell Int’l, Inc. v. Universal Avionics Sys. Corp.*, 397 F.Supp.2d 537, 547 (D.Del. 2005)). Indeed, the reduced value of a licensing program may have a dramatic impact on a university or a self-made inventor, both of which were specifically called out by the Supreme Court in *eBay* as those who should not be categorically denied the opportunity to obtain an injunction. Thus, on the one hand, it appears that irreparable harm may be shown by impact on a licensing program. This argument may be aided by a showing that the invention contributed to science or technology and/or that the patentee’s work is important and relies on financial support from the patents. On the other hand, some district courts have denied that licensors can show irreparable harm, the district court in *eBay* being one of the first.

The Supreme Court in *eBay* held that willingness to license and lack of commercial activity in practicing the patents was not a bar to a showing of irreparable harm. The district court’s ruling along those lines was vacated. The Supreme Court held that “traditional equitable principles do not permit such broad classifications.” Nevertheless, Dr. Voda, inventor of an angioplasty guide catheter exclusively licensed to Scimed was denied an injunction against infringement by Cordis. *Voda v. Cordis Corp.*, 2006 WL 2570614 (W.D.Okla.) The court stated that any harm was to Scimed, not Voda and as Scimed did not join in the suit to enforce the patent rights, there was no personal harm to plaintiff. In *Paice LLC v. Toyota Motor Corp.*, 2006 WL 2385139 (E.D.Tex.), the plaintiff argued that the lack of an injunction was making it difficult or impossible to license the patents. The court held that irreparable harm had not been shown without mentioning the Supreme Court’s views on this matter. A countervailing factor in this case may have been evidence that it was Plaintiff’s misrepresentations and improper business tactics that were hampering the attempts to get licensees.

Another factor in the irreparable harm calculus might be whether plaintiff sought a preliminary injunction. This factor was mentioned by the district court in the *Merc Exchange v. eBay* case. Surely it would not be beneficial for our court system to encourage all plaintiffs to move for preliminary injunctions as a prerequisite to later obtaining a permanent injunction. Hopefully, courts will recognize that whether or not a preliminary injunction is requested is irrelevant to a permanent injunction.

The lack of lost profits, lost sales or loss of brand name recognition left z4 without irreparable harm. z4 sold product activation software. Microsoft included

infringing product activation software in its Windows and Office products, but did not compete with z4 in the product activation software market. Thus, the court was of the view that z4 could be adequately compensated with a reasonable royalty for future sales of the infringing software by Microsoft. The court held that there was no irreparable harm. *z4 Technologies v. Microsoft*, 434 F.Supp.2d 437 (E.D.Tex. 2006). Moreover, Microsoft was going to remove the offending software from its next generation of these products.

b. Availability of adequate remedy at law

Some courts show signs of adhering to historical proclivities to favor issuance of injunctions against patent infringement. As remarked by Justice Roberts in his concurrence in *eBay*, “there is a difference between exercising equitable discretion pursuant to the established four-factor test and writing on an entirely clean slate.” Thus, the Northern District of New York voiced doubts as to whether damages were an adequate remedy. “Moreover, courts have held that monetary damages are not an adequate remedy against future infringement because “ ‘the principal value of a patent is its statutory right to exclude.’” *Telequip Corp. v. The Change Exchange*, 2006 WL 2385425 (N.D.N.Y.) (quoting *Honeywell Int’l, Inc. v. Universal Avionics Sys. Corp.*, 397 F.Supp.2d 537, 546 (D.Del. 2005)) Likewise, in the Eastern District of New York, a compulsory license was not deemed adequate to compensate patentee competitor. An injunction issued even though the district court had twice invalidated the patent and was twice reversed. *Rosco, Inc. v. Mirror Lite Co.*, 2006 WL 284400 (E.D.N.Y. 2006) Moreover, as one court has said, “Relief in the form of monetary damages alone would not meet the ends of justice here because this remedy would allow the infringement to continue.” *Smith & Nephew v. Synthes*, 2006 WL 3543274 (W.D. Tenn.)

Other courts read *eBay* as eliminating the “right to exclude” as a consideration within the four-factor test. “Accordingly, a violation of the right to exclude does not inevitably lead to the conclusion that a patent holder cannot be adequately compensated by remedies at law such as monetary damages without first applying the principles of equity.” *z4 Technologies*, 434 F.Supp.2d at 441. In *z4*, plaintiff’s ability to market, sell and license its product activation software was unaffected by Microsoft’s use of the infringing technology. Given that Microsoft was not competing with *z4*, the court ruled that damages in the form of a reasonable royalty would not be difficult to calculate. The court distinguished this case from one in which infringement was causing loss of market share or damage to brand name recognition.

3M spent five years in litigation to stop Avery’s infringing sales of a marketing film. 3M’s determination to refuse to license its patent to Avery led to the court’s holding of irreparable harm and inadequacy of money damages. *3M Innovative Properties Co. v. Avery Dennison Corp.*, 2006 WL 2735499 (D. Minn.)

Those who are willing to license their patent rights have faced the greatest uncertainty with respect to injunctive relief. Despite the Supreme Court’s rejection of broad classifications adverse to injunctive relief for those willing to license, there are

courts who view damages as an entirely adequate remedy for such plaintiffs. Although recognizing that monetary damages could result in lower licensing rates for plaintiff's licensing program, the court in *Paice LLC* held that money damages would be adequate for a plaintiff who has a willingness to license. *Paice LLC*, 2006 WL 2385139. At one extreme, the court in the Western District of Oklahoma has gone so far as to find money damages adequate even for Dr. Voda, who only granted an exclusive license to his invention. *Voda*, 2006 WL 2570614. Query how the relationship between Voda and his exclusive licensee will be affected after the court authorizes defendant to sell in competition with the licensee? Will such licensee continue to willingly pay a royalty rate based on its being the exclusive provider of the product?

c. Balance of Hardships

In *Paice LLC*, the court addressed plaintiff's concern that its licensing plans would collapse if an injunction was not granted. The court found these concerns disingenuous because the finding of infringement and damages should equally encourage other infringers to take a license. Patentee's concerns were far outweighed by the significant impact on Toyota, its dealers and suppliers should the Prius and other hybrid vehicles be enjoined because they happened to contain an infringing transmission. Toyota's infringement was not willful. Also given the court's indication that other hybrid vehicles could satisfy the market demand. Toyota could have easily used a non-infringing technology if it were aware of the patent.

The court in *z4 Technologies* also weighed the balance of hardships in favor of the defendant. Microsoft would suffer significant hardship to redesign existing products. Turning off its product activation system would allow the market to become flooded with pirated software and would inhibit servicing of legitimate software copies. z4 on the other hand, given that Microsoft was only using infringing software and not selling it in competition with z4 could be compensated by money.

When patentee and the infringer compete, the balance tends to shift toward patentee. An infringer having ceased its infringement argued an injunction was unnecessary. But, immediate cessation of infringement was not a sufficient reason to deny an injunction to prevent infringement from resuming. *Wald v. Mudhopper Oilfield Services, Inc.*, 2006 WL 2128851 (W.D.Okla. 2006)

EchoStar argued the hardship imposed by an injunction. Software updates would need to be transmitted to all its devices to turn off the digital video recorder function. EchoStar distributors would also experience a sales disruption due to the injunction. The Court unforgivingly considered these a mere consequence of EchoStar's willful patent infringement. Plaintiff suffered lost sales on a daily basis due to infringement. The court found that the balance of hardships favored patentee. *TiVo Inc. v. EchoStar Communications Corp.* 446 F.Supp. 2d 664 (E.D. Tex. 2006)

3M was forced to first engage in litigation and was thus prevented from exercising its right to exclude for five years, amounting to more than 20 percent of the

limited term of the patent. The continuation of this harm was balanced against defendant's concerns that it would lose its customers and be unable to restart operations. A permanent injunction entered. *3M Innovative Properties Co. v. Avery Dennison Corp.*, 2006 WL 2735499 (D. Minn.)

d. Considerations of Public Interest:

"Finally, public interest would not be disserved by the entry of a permanent injunction because 'without the right to obtain an injunction, the right to exclude granted to the patentee would have only a fraction of the value it was intended to have, and would no longer be as great an incentive to engage in the toils of scientific and technological research.'" *Telequip Corp. v. The Change Exchange*, 2006 WL 2385425 (N.D.N.Y.) (quoting *Honeywell Int'l, Inc. v. Universal Avionics Sys. Corp.*, 397 F.Supp.2d 537, 547 (D.Del. 2005)) "The public has an interest in maintaining a strong patent system." *TiVo*, 446 F.Supp.2d at 670. The public interest served by a permanent injunction is heightened where the infringement was willful. *Black & Decker v. Robert Bosch Tool Corp.*, 2006 WL 3446144 (N.D.Ill.)

Given the public interest in patents, historically only important issues of public health, safety or security were sufficient to stave off an injunction. Courts may still follow that view. "This is a case about commercial graphics used for advertising, so concerns about public health or safety that could warrant denial of injunctive relief are not present. *3M Innovative Properties Co.*, 2006 WL 2735499.

On the other hand, in *z4 Technologies*, the Court considered the public's interest in retail markets. Widespread popularity of Windows and Office software suggests that an injunction would cause a disruption in the retail market harming computer retailers and consumers. The court was not made aware of any public interest in favor of granting an injunction. The injunction was denied. *z4 Technologies* 434 F. Supp.2d. 437.

The most recent pronouncement regarding the public interest factor has come from the Federal Circuit. "We have long acknowledged the importance of the patent system in encouraging innovation. Indeed, the 'encouragement of investment-based risk is the fundamental purpose of the patent grant, and is based directly on the right to exclude.' *Patlex Corp. v. Mossinghoff*, 758 F.2d 594, 599 (Fed.Cir.1985)" *Sanofi-Synthelabo v. Apotex*, 2006 WL 3613616 (Fed. Cir.).

5. Has compulsory licensing been approved?

The *eBay* decision makes no mention of compulsory licensing. Indeed, the patent statutes have no provision for compulsory licensing. "Compulsory licensing of patents often has been proposed, but it has never been enacted on a broad scale. Although compulsory licensing provisions were considered for possible incorporation into the 1952 revision of the patent laws, they were dropped before the final bill was circulated." *Dawson Chem. Co. v. Rohm and Haas Co.*, 448 U.S. 176 at n. 21 (1980) The Supreme Court has likewise refused to insert compulsory licensing into the US patent law

jurisprudence. “Compulsory licensing is a rarity in our patent system, and we decline to manufacture such a requirement.” *Dawson Chem. Co. v. Rohm and Haas Co.*, 448 U.S. 176, 215 (1980) Has the Supreme Court, on its own initiative, introduced compulsory licensing into the patent system with its decision in *eBay*? Clearly, some courts believe that is the case. We have yet to hear from the Federal Circuit.

In *eBay*, none of the justices said anything about a compulsory license nor of authorizing patent infringement. The Court was merely ruling on the decision to grant or deny an injunction. For example, in establishing the need for equitable discretion in granting injunctions the Court cited *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 102 S.Ct. 1798 (1982). In that case, the US Navy violated the Federal Water Pollution Control Act by discharging ordnance into waters without first obtaining a permit. The district court denied an injunction to force the Navy to cease the activity, but instead required the Navy to get a permit. “It temporarily, not permanently, allowed the Navy to continue its activities without a permit.” *Weinberger*, 102 S.Ct. at 1805. The discharge of ordnance had not polluted the waters. Nevertheless, the Circuit Court of Appeals ordered the Navy to cease its operations. The US Supreme Court vacated the Circuit Court’s injunction, but that did not authorize the Navy to ignore the Federal Water Pollution Control Act. Rather, the Supreme Court reinstated the district court’s remedy requiring the Navy to obtain permits as required by the law.

The best support for the notion of compulsory licensing appears to come from copyright law. “And as in our decision today, this Court has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that copyright has been infringed.” *eBay*, 126 S.Ct. at 1840. In a couple of the cited copyright cases, injunctions were denied in favor of future damages. *Dun v. Lumbermen’s Credit Assn.*, 209 U.S. 20 (1908) is particularly interesting in view of Justice Kennedy’s concurrence. Kennedy wrote, “When the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest.” *eBay*, 126 S.Ct. at 1842.

In *Dun*, defendant’s reference book of lists contained data on merchants, manufacturers and traders. Plaintiff’s reference book was more limited in scope. While it was determined that in compiling defendant’s book, some improper copying of information from plaintiff’s book occurred, the holding was “But the proportion is so insignificant compared with the injury from stopping appellee’s use of their enormous volume of independently acquired information that an injunction would be unconscionable.” *Dun*, 209 U.S. at 23.

Another situation in which injunctions have been denied in favor of future damages seems less applicable to patents. Copyright includes a statutory doctrine of fair use that provides an exception to the author’s exclusive rights. In close cases it appears that a court might find infringement but deny an injunction in view of the near showing of fair use.

Because the fair use enquiry often requires close questions of judgment as to the extent of permissible borrowing in cases involving parodies (or other critical works), courts may also wish to bear in mind that the goals of the copyright law, “to stimulate the creation and publication of edifying matter,” Leval 1134, are not always best served by automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use. *See* 17 U.S.C. § 502(a) (court “*may* ... grant ... injunctions on such terms as it may deem reasonable to prevent or restrain infringement”) (emphasis added); Leval 1132 (while in the “vast majority of cases, [an injunctive] remedy is justified because most infringements are simple piracy,” such cases are “worlds apart from many of those raising reasonable contentions of fair use” where “there may be a strong public interest in the publication of the secondary work [and] the copyright owner's interest may be adequately protected by an award of damages for whatever infringement is found”); *Abend v. MCA, Inc.*, 863 F.2d 1465, 1479 (CA9 1988) (finding “special circumstances” that would cause “great injustice” to defendants and “public injury” were injunction to issue), *aff'd sub nom. Stewart v. Abend*, 495 U.S. 207, 110 S.Ct. 1750, 109 L.Ed.2d 184 (1990).

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578, n. 10 (1994). It remains to be seen whether research use, doctrine of equivalents or a substantively close case will be factors in denials of permanent patent injunctions. It does not appear to comport with the statutory framework for patents, but times are changing.

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