

# Studying the Impact of *eBay* on Injunctive Relief in Patent Cases

Kirti Gupta and Jay P. Kesan

## Abstract

January 10, 2017

We find that the U.S. Supreme Court decision in *eBay v. MercExchange* has had a significant impact on injunctive relief in patent cases. Our extensive analysis with a significant dataset involving thousands of patent cases both pre- and post-*eBay* shows that the *eBay* decision has reduced, rather dramatically, both the level at which injunctive relief is sought in patent cases and the rate at which they are granted, particularly for preliminary injunctions. We find that all entities – practicing and non-practicing – are less likely to file for a motion of an injunction after *eBay*, and that this likelihood of filing for an injunction reduces at a higher rate for NPEs compared to PEs. Therefore, the fact that the rate at which injunctions are granted – calculated as a proportion of the total number of patent cases filed – is decreasing is clearly occurring due to the self-selection by patentees who are moving less often for an injunction.

We also study the impact of the *eBay* decision on the quality of patents for which injunctive relief is sought and the nature of the patent plaintiff (operating company vs. non-operating company) and their relative success rates with obtaining injunctive relief. We do find a statistically significant difference between some of the observable patent quality characteristics of the patents held by PEs vs. NPEs, for which a motion for an injunction is filed, but we find that NPEs tend to file a motion for an injunction for higher quality patents on average. We do not find that the overall quality characteristics of patents for which a motion for an injunction is filed has increased after *eBay*, which could have served as one potential mechanism of the self-selection by firms to seek injunctions only for slightly higher quality patents post-*eBay*.

By controlling for various patent and case level observable characteristics, we estimate whether or not the likelihood of obtaining an injunction varies across PEs and NPEs. We find that both for preliminary and permanent injunctions, NPEs are less likely to obtain an injunction, after controlling for patent characteristics and the length of the case (from filing to termination) throughout the 2000-2012 time period. We also find that the *eBay* ruling reduced the likelihood of all firms receiving either preliminary or permanent injunctions.

In order to understand whether or not the *eBay* ruling had a differential impact on PEs vs. NPEs, we utilize a diff-in-diff model. We find that the *eBay* ruling did not have a differential impact on the likelihood of NPEs to be granted a

preliminary injunction as compared to PEs – in other words – the likelihood of being granted a preliminary injunction reduced equally both for NPEs and PEs post *eBay*. However, we do find a differential impact of the *eBay* ruling on PEs vs. NPEs for permanent injunctions. We find that NPEs are less likely to be granted a permanent injunction post-*eBay* compared to PEs, after *eBay*. In sum, this study raises important policy questions about the current diminished role for injunctive relief in patent cases.