Tailoring Remedies to Spur Innovation

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In *eBay v. MercExchange*, the Supreme Court exhorted lower courts to engage in equitable balancing before awarding permanent injunctions to patent holders. The case followed a flare-up of concern over entities—sometimes termed "patent trolls"—that do not practice their patents, but demand what some consider exorbitant licensing fees from those who would. These entities introduce inefficiencies into the patent system that impede innovation. The eBay opinion purported to suggest a broadly applicable rule, but the concurrences focused on how to identify—and whether to deny relief to—such entities. In the wake of *eBay*, a number of lower courts have held that a patent holder's showing of significant loss of market share weighs heavily in favor of permanent injunctive relief, with courts concluding that patent holders without market share do not suffer irreparable injury and that money damages are adequate to compensate them. As a result, permanent injunctions are being denied to entities with no market share. However, by attempting to use a broadly applicable, equitable principle to address a narrow problem, the Court has contorted the purpose and application of that principle.

Although academics and practitioners hoped *eBay* would address particular instances in which innovation is hindered by the grant of an injunction, market share is an imperfect indicator of innovative activity. In addition, for the purpose of identifying entities that hinder innovation, market share is simultaneously over- and under-inclusive. It is over-inclusive because some of the business models that currently contribute the most to innovation lack market share. In order to protect these innovators, courts are contorting the emerging rule in order to grant these innovative companies permanent injunctions. It is under-inclusive because firms that possess high levels of market share have incentives not to bring innovation to market, and yet these incentives are not accounted for under the "market share" rule. As a result, the rule that increasing levels of market share support injunctive relief does not serve to identify parties deserving of injunctions and is at odds with antitrust theories about the negative effects of large amounts of market power on incentives to innovate.

A better rule, which finds some support in Justice Kennedy's *eBay* concurrence and in scattered district court opinions, would allow courts explicitly to evaluate the effects of permanent injunctions on incentives to innovate and bring that innovation to market under a public interest analysis. Although loss of market share should remain one measure of the need for injunctive relief to make a patent holder whole, its influence should be tempered by a serious analysis of the public's interest in encouraging innovation, on the one hand, and access to that innovation, on the other. This analysis will necessarily include information about market structure as well. This approach would allow courts to curtail remedies in situations likely to lead to holdups, while granting injunctions to entities with business models that rely on licensing fees to fund further research, thereby granting remedies tailored to the innovation and access goals that form the basis of the patent system.