

March 2016

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Recommended Citation

O'Melinn, Liam (2008) "The Effects of eBay: Discretion, Statutory Damages, and Private Attorneys-General," *Akron Intellectual Property Journal*: Vol. 2 : Iss. 1 , Article 6.

Available at: <https://ideaexchange.uakron.edu/akronintellectualproperty/vol2/iss1/6>

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THE EFFECTS OF *eBAY*: DISCRETION, STATUTORY DAMAGES, AND PRIVATE ATTORNEYS-GENERAL

*Liam O'Melinn**

If it were not already an apt time to consider the effects of the Supreme Court's *eBay v. MercExchange*¹ decision, several recent developments serve as reminders of the importance of the issues addressed in the case: In *Capitol v. Thomas*² the recording industry has succeeded in securing a \$222,000 judgment in statutory damages for copyright infringement, a software patent infringement suit was filed in October 2007 by IP Innovation and Licensing against Novell and Redhat³—seemingly the first suit to target Linux—and the PTO has rejected most of the claims in Amazon's 1-Click patent.⁴

The *eBay* decision appears to assert that the law of patent is not immune to general jurisprudential principles, and it may also be the first statement of a broad principle that peculiar tendencies exhibited by both patent and copyright law must either be justified or jettisoned. Thus, *eBay* leads to three different issues: the appropriate grounds for issuing injunctive relief, the justifications that underlie the remedial scheme, and the much broader issue of the role of the public interest in the law of

* Professor of Law, Ohio Northern University. I would like to thank Jay Dratler, Elizabeth Reilly, Jeff Samuels, Sam Oddi, and Tracy Thomas of the University of Akron School of Law for hosting the First Annual Intellectual Property Forum, Maria Denisiak for all her organizational work, and the Akron Intellectual Property Journal for publishing the forum pieces. I would also like to thank all of the participants at the forum for a very interesting and collegial exchange.

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

2. *Capital v. Thomas* 2007 WL 2957532 (Dist. Minn.)(Jury Verdict Form); Recording Industry vs. The People, http://recordingindustryvspeople.blogspot.com/2007/01/index-of-litigation-documents.html#Virgin_v_Thomas.

3. See, e.g., Groklaw.com, Patent Infringement Lawsuit Filed Against Red Hat & Novell - Just Like Ballmer Predicted, <http://www.groklaw.net/article.php?story=20071011205044141> (last visited January 21, 2008); Stephen Shankland, *Red Hat, Novell sued for patent infringement*, CNET News, Oct. 12, 2007, http://www.news.com/8301-13580_3-9796868-39.html.

4. See Peter Calveley, *Amazon One-Click Patent Rejected by the US Patent Office as a Result of my Request*, Igdmlgd, Oct. 16, 2007, <http://igdmldg.blogspot.com/2007/10/amazon-one-click-patent-rejected-by-us.html>.

patent and copyright. The decision offers an invitation which, if accepted, should lead to a reexamination of the extension of intellectual property law in a time of revolutionary change. If this seems too much to claim on behalf of a modest decision that emphasizes that it is maintaining tradition rather than departing from it, the implications of the case are potentially enormous for two reasons: in instructing lower courts to exercise genuine discretion in deciding whether to issue injunctions the case may also tacitly invite judges to reevaluate the bounds of the law in a more thorough way. Second, the case may refocus attention on the public interest at a time when an important segment of the public is poised to take part in a reconsideration of the premises of patent and copyright.

The time for such reconsideration is propitious. The extension of the law of intellectual property has led to a conflict which is reflected in the rejection of most of Amazon's 1-Click claims and IP Innovation's legal action against Novell and Redhat; it is a conflict that reveals a changing landscape in patent law and potentially in copyright law as well. Intellectual property law has been expanding nearly unchecked, in large measure because of an imaginary connection between conventional property rights and the rights afforded through patent and copyright law. Up to now, the revolution in the law of intellectual property has often been justified in the name of protection of property, and the revolutionaries have succeeded in drawing a simple division in which property must be protected against "piracy." Leaving aside the dubious legal precision of the language of piracy, the argument has been an easy one to make with public attention focused on illegal downloading of music.

The revolution has also depended on the insular character of the law, and the *eBay* decision would be important if it did nothing more than resist the tendency to treat the law of copyright and patent as *sui generis*. It promises to do more than this, though, for it comes at a time when important developments outside the law are creating an opportunity to subject both patent and copyright to some real justification. The "pirate" is an unattractive and often unsophisticated defendant, but more attractive and sophisticated defendants have been on the scene for some time. They include a worldwide network of people with expertise and interest in software, they are capable of representing the public interest in a way that was heretofore unheard of, and they are fully capable of taking advantage of *eBay*'s invitation to investigate the peculiar contours of patent and copyright.

I. WHICH PAGE OF HISTORY?

If it does nothing else, the *eBay* decision tells us that the Supreme Court believes that it is supreme even in matters of intellectual property. For some time the Court seemed to avoid hard cases in the area, and when it took hard cases, issued strangely unanimous opinions on issues that appeared divisive to almost everyone who did not sit on the Court. In the meantime, the Supreme Court's relationship to the Federal Circuit has sometimes been reminiscent of the relationship between the Supreme Court of Delaware and the Delaware Chancery in matters of corporate law; in each case it was permissible to wonder whether the lower court was in fact supreme within its realm. The *eBay* and *KSR* decisions put us on notice that the Supreme Court intends to assert and maintain its supremacy.

To what end? The three opinions leave room for uncertainty. Chief Justice Roberts with his "page of history" admonition seems to advise district courts that as long as their reasoning includes the appropriate four factors, then their decisions to issue injunctions will be upheld.⁵ Justice Kennedy, on the other hand, expresses reservations about the direction that patent law has taken in recent years.⁶ Justice Thomas suggests that the history of American equity is well enough settled to provide real guidance in issuing injunctive relief, so his opinion invites us back to a very early point, perhaps as early as the passage of the first patent and copyright acts in 1790.⁷

Given the fractured character of the decision it is tempting to conclude that *eBay* will not lead anywhere important. If any of the three opinions can be followed by lower courts, is *eBay* not a meaningless decision? Not at all; its insistence on a meaningful exercise of discretion means that lower courts *can* come to different results in deciding whether to order injunctive relief. When the law tells them that they have discretion, not only can they exercise it, but under *eBay* they are required to do so.⁸ That is to say, they can proceed along lines that seem sensible without fear of automatic reversal because of a failure to observe some semi-official canon of the law of intellectual property.

5. See *eBay* 126 S.Ct. at 1842.

6. *Id.*

7. *Id.* at 1839.

8. *Id.* at 1841.

Lower-court decisions since *eBay* have been mixed in their results,⁹ but it is clear that *eBay* (along with *KSR*) has given courts some pause. This has been true even in the Eastern District of Texas, the “renegade jurisdiction” of patent law; in *z4 techs v. Microsoft*¹⁰ Judge Davis refused to grant an injunction. Following *KSR*, Judge Davis also issued a judgment for defendants in *AdvanceMe v. Rapidpay*¹¹ on the basis of anticipation and obviousness. In the Federal Circuit, *LeapFrog Enterprises v. Fisher-Price*¹² suggests that *KSR*’s teaching on obviousness has been accepted, and *In Re Seagate Technology*¹³ has recast the standard for adjudication of willfulness leading to the imposition of enhanced damages. Of course, in a formal sense the Court’s teaching has to be accepted, but as Delaware’s Chancery has shown, when it comes to corporate law, it is one thing for a supreme court to say what the law is, and quite another to enforce it on a lower court with an (at least) equal claim to expertise and no small amount of pride. If both the Federal Circuit and the Eastern District of Texas are acknowledging the Supreme Court’s authority in a genuine fashion, whether grudgingly or gladly, that in itself suggests that the *eBay* decision is having a real effect.

Furthermore, given that the three opinions are concerned with the exercise of discretion, whether *eBay* commands reluctant courts to come to a particular outcome in a given case is not the only test of its influence. In fact, it may be more important to consider the effect of the case on lower courts that are already inclined to deny injunctions. Previously, they had been told to exercise their discretion in accord with a strong presumption in favor of injunctive relief, and an exercise of discretion in the wrong direction courted reversal. The vindication of the discretion of the lower courts is a very important result in the case, perhaps more important than any direct effect the case can have on either patent or copyright doctrine. One can see this influence in the *eBay* case on remand¹⁴ and in *Phelps v. Galloway*,¹⁵ a Fourth Circuit case that was

9. See Joe Miller, *Injunction, The Fire of Genius*, <http://www.thefireofgenius.com/injunctions> (last visited January 21, 2008) (cataloguing the relevant post-*eBay* injunction cases).

10. 434 F.Supp.2d 437, 444 (E.D. Tex. 2006). I am grateful to Teresa McCall for bringing this case to my attention very shortly after it was decided, and I note that she was arguing then that *eBay* would have a real influence.

11. 2007 WL 2350644 (E.D. Tex. 2007).

12. 485 F.3d 1157, 1161 (Fed. Cir. 2007).

13. See generally, 497 F.3d 1360 (Fed. Cir. 2007).

14. *MercExchange v. eBay*, 500 F.Supp.2d 556, 592 (E.D. Va. 2007).

15. 492 F.3d 532, 535 (4th Cir. 2007). (superseding *Phelps v. Galloway*, 477 F.3d 128 (4th Cir. 2007)).

decided shortly after *eBay* and then decided again on rehearing. Both of these cases provide instances of a real and unusual spirit of inquiry, suggesting that one immediate effect of the case is to leave judges free to engage in serious reasoning in arriving at a judgment.

It should be no surprise that Judge Friedman, having denied the request for injunctive relief in *eBay* the first time around, did not have a change of heart on remand. Nonetheless, his remand opinion shows a more serious and robust consideration of the four factors. Additionally, the opinion provides interesting treatment of MercExchange's use of its patent, the nature of the patent (business method), and the public interest. Also, on remand Judge Friedman starkly altered a preliminary observation he had made initially, a change obviously commanded by the Supreme Court's decision. Previously, he had noted that the plaintiffs enjoyed a presumption to injunctive relief,¹⁶ and in the remand opinion, he (no doubt happily) observed that there was no such presumption.¹⁷ Next, where he had formerly stated that the nature of the patent at issue was relevant, now he expressed a more strident and thoroughgoing skepticism. Friedman noted the "questionable nature of many business method patents," which had prompted the adoption of second level review by the PTO as well as words of caution from a "four member panel of the Supreme Court."¹⁸ In the first opinion, Judge Friedman noted a "growing concern" over business method patents and the implementation of second level review, but concluded that the public interest favored neither party.¹⁹ On remand, the public interest factor favored eBay.

The influence of *eBay* can be seen in another case in which the court did what it had done previously, but this time proceeding without fear of authority. *Phelps v. Galloway* is an architectural copyright case decided in the Fourth Circuit which relies on *eBay*, and which also provides an interesting analysis of whether an injunction should issue to prevent the sale of a home that infringes an architectural copyright.²⁰ The case was decided again on rehearing; the first decision rested in part on an interesting but legally questionable ruling based on the first sale doctrine. (The original *Phelps* decision also refers to *eBay*, but the later opinion shows signs that the Supreme Court's instructions had received

16. MercExchange, LLC v. eBay, Inc., 275 F.Supp.2d 695, 711-12 (E.D. Va. 2003).

17. *eBay II*, 500 F.Supp.2d at 568.

18. *Id.* at 574.

19. *eBay I*, 275 F.Supp.2d at 713-14.

20. *Phelps*, 492 F.3d at 546.

more mature consideration.)²¹ Interestingly (and perhaps impossibly), the court suggested that plaintiff Phelps had satisfied the first two prongs of the inquiry, irreparable harm and inadequacy of monetary damages, but ruled that the injunction to prohibit resale which it sought would not be granted based upon weighing the balance of harms and public policy.²²

The court asserted that architect-plaintiff Phelps had been fully compensated for the infringement, while an injunction against the sale of the house would work a real hardship on Galloway.²³ More interestingly, the opinion also stated that the architectural work possesses a “predominantly functional character.”²⁴ To a certain extent, the court was repackaging its first sale argument, but the implications are large, given the reservation that they seem to express about the copyrightability of buildings. According to the court, functionality prevented buildings from receiving copyright protection until a very late date, and the opinion hints that they should never have received such protection.²⁵ Further, in the court’s view, longstanding public policy against restricting alienation commands a similar result, and as in *eBay* on remand, the intrusion of public policy into the decision of whether to grant injunctive relief is notable.

Each court appears to have discovered in the *eBay* decision an invitation to engage in serious reasoning as well as permission to find the appropriate result. It is a reasonable objection that in both cases the courts wound up doing what they would have done anyway. But what is remarkable is that now they were able to do it with the permission of the law. Now, courts may engage in nuanced reasoning in order to come to a sensible conclusion, rather than bowing to an unavoidable consequence of the special character of intellectual property. In this connection it is interesting that the *Phelps* decision noted that other injunctive relief might be available, such as destruction of the infringing plans or their return to Phelps, despite the denial of the injunction against Galloway’s sale of the house.²⁶

21. *Phelps v. Galloway*, 477 F.3d 128 (4th Cir. 2007) *abrogated on rehearing*, 492 F.3d 532 (4th Cir. 2007).

22. *Phelps*, 492 F.3d at 544.

23. *Id.*

24. *Id.*

25. *Id.* at 544-45.

26. *Id.* at 546-47.

II. THE PUBLIC CHARACTER OF THE REMEDIAL SCHEME: THE PLAINTIFF AS PRIVATE ATTORNEY-GENERAL

In denying injunctive relief, the *eBay* case on remand also mentions the possibility of enhanced damages for patent infringement,²⁷ which raises the next issue that the Supreme Court's decision should implicate. The decision in *In Re Seagate*, which changes the standard by which willfulness is established, strongly suggests that the Federal Circuit has understood *eBay* as a warning that is not confined to injunctions.²⁸ The next question is whether the warning extends to copyright, where the analogue to enhanced damages is the award of statutory damages, which range in general from a minimum of \$750 for each infringement to a maximum of \$30,000. The recording industry's war against downloading has brought this issue to the forefront in recent years, as the industry has been seeking and receiving statutory damages without having to prove harm as a consequence of infringement. In a related vein, the recording industry has also succeeded in several instances on a theory that equates distribution under 106(3) with "making available" songs to others, even without proof that anyone actually downloaded the songs that were made available.

The awards of enhanced damages in patent and statutory damages in copyright law would seem to be insular features that defy general principles of jurisprudence. Thus, an important consequence of the *eBay* decision should be to focus attention on the justification, or lack thereof, for a remedial regime which approves damages that are unrelated to harm. The recent award of \$222,000 in *Capitol v. Thomas*,²⁹ a case involving online filesharing of songs, brings the question into sharp relief: What did defendant Jammie Thomas do that warranted a judgment of this size?³⁰

The easy answer is probably that the award is designed to protect a property right threatened by the specter of "piracy." However, this answer is very similar to the one that the *eBay* Court rejected as to why injunctive relief should issue as a matter of course in cases of patent infringement. The property answer also betrays a certain insouciance because it rests on rather imprecise notions of the nature of the property

27. *MercExchange v. eBay*, 500 F.Supp.2d 556, 581 (E.D. Va. 2007).

28. *In re Seagate*, 497 F.3d 1360, 1371 (Fed. Cir. 2007).

29. *See Capitol v. Thomas* 2007 WL 2957532 (Dist. Minn. 2007).

30. The argument on statutory damages is based largely on Liam Séamus O'Melinn, *Software and Shovels: How the Intellectual Property Revolution is Undermining Traditional Concepts of Property*, 76 U. Cin. L. Rev. 143 (2007).

at issue and depends to an undue extent on an ill-defined conflict between property and piracy. This is an area of the law in which, after all, the imputation of piracy can substitute for a careful inquiry into whether the pirate actually engaged in activity prohibited by law. Apparently, statutory damages are easily justified by a general recognition that bad things should happen to bad people.

An interesting test of this theory—that statutory damages are quietly accepted because they happen to bad people—is provided in *BMG v. Gonzalez*,³¹ a Seventh Circuit decision with an opinion written by Judge Easterbrook. BMG was awarded statutory damages without a jury trial. It is curious that Judge Easterbrook, who has more than an ordinary interest in jurisprudential questions, showed little interest in the justification for statutory damages. Rather, he gleefully awarded them, hinting along the way that the award was based not only on the 30 songs that actually formed the basis of BMG’s motion for summary judgment, but on another 1300 downloads that were not at issue.³²

Judge Easterbrook might not show the same indignation if faced with a defendant who had breached a contract. Indeed, the efficient breacher might well win the Judge’s acclaim. Although we might think that the difference is that copyright infringement involves the violation of a property right rather than a breach of contract, in the Easterbrook court, at least, such an explanation should be insufficient. After all, Easterbrook is a prominent spokesman for a very powerful school of thought that claims that law is a matter of contract, and that statutes are simply default terms which contractors are free to negotiate around.³³

It is a general jurisprudential principle that the plaintiff who proves a breach of contract must also prove damages. As a threshold matter, the plaintiff who is unable to articulate particular concrete injury is typically denied standing. The lack of an articulated connection between statutory damages and any assertion of actual harm in copyright law calls for real justification.

Why is relief not tied to a showing of harm in copyright, and why is harm presumed once copying has been shown? For the answer to these questions there is no better place to turn than to a little-noted article written by David Ladd, former Register of Copyrights, entitled “The Harm of the Concept of Harm in Copyright Law.”³⁴ According to Ladd,

31. 430 F.3d 888 (7th Cir. 2005).

32. *Id.* at 889.

33. Frank H. Easterbrook, *The Court and the Economic System*, 98 HARV. L. REV. 4, 15 (1984).

34. David Ladd, *The Harm of the Concept of Harm in Copyright Law*, 30 J. COPYR. SOC’Y

it is inappropriate in copyright law to require the plaintiff to show harm because copyright law serves a critical social interest by preserving a delicate system which encourages efforts by authors and publishers that result in a harvest of knowledge.³⁵

The concept of the harvest of knowledge is a common one which enjoyed its most famous exposition in *Harper & Row v. Nation Enterprises*.³⁶ Ladd's explanation of the dangers of adding a harm requirement to copyright law casts the metaphor in a new light. In his view, a connection between harm and standing would threaten a delicate public balance and would mistakenly impose a private law standard in an area of public law.³⁷ To be clear, Ladd might not endorse the precise wording here. In particular, he might object to characterizing copyright as public law, but that is the import of his argument.

Strikingly, even public law usually requires some proof of harm, a fact which calls attention to the extraordinary character of the remedial structure of intellectual property. In constitutional law, for example, harm is generally required in order to establish standing. The contrast is instructive and points away from the private property understanding that is often advanced in support of intellectual property rules. The standing rule in copyright appears similar to the unusual case in constitutional law in which the mere enactment of an unconstitutional measure is presumed to inflict harm. Apparently, the reason for the constitutional law exception is the same one Ladd offers for copyright: when a delicate social balance is at issue, as in some First Amendment Establishment Clause cases, the rules change regarding the requirement of injury. It is not clear that the law is completely consistent on this point, but it is not too much to say that "First Amendment values" are so important and so easily trampled that we cannot wait for them to be invaded before allowing restrictive measures to be challenged.

What this says for the copyright plaintiff is a surprising departure from the Lockean justification that seems often to lurk just below the surface of the law, a justification which creates enormous pressure to allow plaintiffs to protect their property at all costs. The copyright plaintiff whose claim stems from the importance of the harvest of knowledge is more like a private attorney-general than a disappointed Lockean laborer. The statute that provides for significant damages even in the absence of demonstrated harm would appear to be tougher than

421 (1983).

35. *Id.* at 422-23.

36. 471 U.S. 539 (1985).

37. Ladd, *supra* note 34, at 422.

the statute that serves merely as a default rule for contractors. The rather unusual nature of intellectual property remedies calls for a more nuanced appreciation of the public interest in copyright and patent law.

If the copyright plaintiff is better conceived as a public attorney-general than as a disappointed Lockean laborer, then perhaps the patentee who qualifies for enhanced damages enjoys a similar status. One might object that patent law is different in this regard because the famous *Continental Paper Bag*³⁸ case long ago rejected a theory that the patentee is a quasi-trustee of the public interest. The Supreme Court insisted that the patent conferred a property right that did not have to be exercised in the public interest.

Yet, such a simple and categorical argument does not seem to satisfy the standards set out for injunctive relief in *eBay*. The *Continental Paper Bag* era is presumably the page in history to which Chief Justice Roberts would direct our attention, but it is only one page among many. Moreover, given that *eBay* allows lower courts to take more serious account of questions concerning what constitutes irreparable injury, the adequacy of money damages, balancing of hardships, and public policy, what is to stop such reasoning from reaching beyond the question of injunctive relief and into other matters of obvious public concern?

In declaring that injunctive relief must be awarded carefully and on the basis of traditional legal principles, *eBay* would seem to say the same with respect to statutory damages in copyright law and enhanced damages in patent law. Indeed, as suggested above, the Federal Circuit has changed its view of what constitutes willfulness in the setting of enhanced damages. Clearly, it is time to consider the issue more deeply, because if it is correct to conclude that the copyright or patent plaintiff is a private attorney-general, then some important consequences should follow.

III. THE PUBLIC INTEREST IN INTELLECTUAL PROPERTY: *EBAY*'S FUTURE EFFECTS

To say that the copyright or patent plaintiff is a private attorney-general is to issue an implicit challenge to the view that equates copyright with conventional property. Even if the *Continental Paper Bag* Court was correct in asserting that a patentee is not a quasi-trustee of the public good in the sense that it was under a requirement to use its

38. *Continental Paper Bag Company v. Eastern Paper Bag Company*, 210 U.S. 405, 424 (1908).

patent in accord with the public interest, the law nevertheless should recognize that the remedial scheme of copyright and patent appear to award a rather elevated status to the plaintiff.

This recognition has a practical implication. If the holders of copyrights, for example, benefit from a relaxed rule of standing and are relieved of the burden of proving damages because of the important social interests that are promoted by the Copyright Act, but are not required to act in the public interest, it seems that *someone* ought to be allowed to stand for those interests. If plaintiffs benefit from a doctrine that equates infringement with harm, why should defendants in such cases not also be able to benefit from a doctrine that resembles the overbreadth doctrine that is often applied in First Amendment cases? In other words, the remedial scheme of copyright law leads to the conclusion that greater attention should be paid not only to the rights of actual defendants, but to the rights of a broader range of people whose interests are to be affected by a decision in the case. Such an approach would not be entirely new to the law of copyright, for it was the approach taken implicitly by the Supreme Court in *Sony*³⁹ when the court excused infringing uses on the basis of non-infringing uses.

IV. EBAY AS A SIGN OF THE TIMES AND A PORTENT

To overemphasize the influence of the *eBay* case is unwarranted. Apparently, there are still more decisions granting injunctive relief than denying it.⁴⁰ Additionally, some commentators reasonably argue that neither *eBay* nor *KSR* signals a real change in the law. Yet the decision deserves consideration from another point of view—that *eBay* is a sign of the times. Justice Kennedy's suspicion of the business method patent is widely shared and raises an issue that goes far beyond remedies for infringement. As noted above, it may be that *eBay* offers judges the opportunity and perhaps permission to manifest skepticism in a manner that is consistent with the public interest. This skepticism is merited and calls for real inquiry into the nature of the rights at issue—as opposed to a summary declaration that the right being protected is a property right.

The rejection of twenty-one out of twenty-six of Amazon's 1-Click patent claims,⁴¹ the recent decisions by the Federal Circuit that watermark signals are not patentable⁴² and that an attempt to patent

39. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

40. Miller, *supra* note 9.

41. Calveley, *supra* note 4.

42. Eric Yeager, *Watermark Signals are Not Patentable Subject Matter Under Any Section*

mental processes leading to arbitration seeks “to patent the use of human intelligence in and of itself”⁴³ suggest that change is afoot at many levels. Indeed, Judge Friedman’s reasoning in the *eBay* remand was affected by the fact that one of the patents at issue, the ‘265 patent,’ might be invalidated given the interim office rejection of each of its claims subsequent to the first decision but pre-*KSR*.⁴⁴

The observation that many believe the patent system is broken is nothing new. What is new and has perhaps not been sufficiently observed is the increasing importance of activity from a segment of the public calling for reform and helping to achieve it. If the *eBay* decision has the effect of calling for a greater consideration of the public interest, then that may be its most important long-term consequence. Once the public is invited to the intellectual property table, there are formidable interests which can represent it admirably. The assault on Amazon’s 1-Click patent claims was brought about largely by New Zealand blogger/actor Peter Calveley.⁴⁵ Calveley is not a lawyer, but he notes that he thought *KSR* might be decided as it was and thus in his request for reexamination he discussed two of the cases eventually cited by the Supreme Court.⁴⁶ Calveley raised the reexamination fee via contributions from people who read his blog.

Likewise, many of the difficulties encountered by SCO in its litigation against IBM derived from the involvement of a world of programmers connected via the web.⁴⁷ The suit has been policed and publicized vigorously by the Groklaw.net website,⁴⁸ a site which was created and maintained by Pamela Jones. It appears that SCO was counting on a traditional private dispute and was unprepared for public scrutiny. What transpired was a much more modern public dispute in which the eyes of the world—or at least the programming part of the world—were upon the matter. As people involved in free and open source software like to say, with many eyes all software bugs are shallow. We are now learning that many eyes can also have a salutary

101 *Category*, 74 PAT., TRADEMARK, AND COPYRIGHT J. 631 (Sept. 28, 2007) (discussing *In re Nuijten*, 500 F.3d 1346 (Fed. Cir. 2007)).

43. Eric Yeager, *Mental Processes for Arbitration are Unpatentable, Abstract Ideas*, 74 PAT., TRADEMARK, AND COPYRIGHT J. 633 (Sept. 28, 2007) (quoting *In re Comiskey*, 499 F.3d 1365, 1979 (Fed. Cir. 2007)).

44. *MercExchange v. eBay*, 500 F.Supp.2d 556, 575 (E.D. Va. 2007).

45. Calveley, *supra* note 4.

46. *Anderson’s-Black Rock, Inc. v. Pavement Salvage Co.*, 396 U. S. 57 (1969); *Sakraida v. AG Pro, Inc.*, 425 U. S. 273 (1976). *See also*, Peter Calveley, *KSR v Teleflex etc*, Igdmlgd, May 2, 2007, <http://igdmlgd.blogspot.com/2007/05/ksr-v-teleflex-etc.html>.

47. *See* www.groklaw.net.

48. *Id.*

effect on the law by detecting deep bugs that would once have gone unnoticed.

With the filing of a patent infringement suit in the Eastern District of Texas by IP Innovation and Technology Licensing against Redhat and Novell,⁴⁹ a battle that has been foreshadowed for some time by the Microsoft/Novell patent peace accord, appears to have been joined. A very wide variety of interests will likely be implicated and the public is poised to take part to an unprecedented extent, in no small measure because of the interest of a group of programmers. The fact that many of those programmers are members of the free and open source software movements means that a serious new influence has arrived. They have previously been consigned to the rank of “hacker” and often associated with anarchy. The extension of intellectual property rights has been aided in an important way by the convenience of having defendants who can easily be characterized as “pirates.” The argument that a respect for property in general requires heightened attention to the demands of intellectual property is an easy case to make when the issue is framed in terms of online downloading of copyrighted material by lawless anarchists and pirates. It is a more difficult one to make when the defendants include notable programmers and major corporations.

The *eBay* decision threatens to be important for two principle reasons. It tells judges that they are to use their discretion wisely and it tells them to do so on the eve of a new kind of legal conflict. Now, the “anarchists” are poised to bring the public to the intellectual property table, perhaps for the first time in history. The outcome of the conflict is by no means certain, but they have a very good chance of reintroducing the concept of the public interest to a body of law that has threatened to forget that the public is worth considering. If the further-reaching implications of the *eBay* decision materialize, the case will have contributed to one of the most remarkable developments in modern law by aiding in the introduction of the public to patent and copyright law.

Such an outcome is not a shabby result to emerge from a fractured decision.

49. *Supra* note 3.

