

No. 11-704

IN THE
Supreme Court of the United States

PERFECT 10, INC.,
Petitioner,

v.

GOOGLE, INC.,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

In this suit alleging copyright infringement, the district court denied the petitioner's motion for a preliminary injunction, finding, among other things, no likelihood of success on the merits and no likelihood of irreparable harm. Joining every other circuit that has considered the question, the Ninth Circuit held on appeal that, under this Court's decision in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), a party seeking a preliminary injunction in a copyright case is not entitled to a presumption of irreparable harm. The question presented is:

Whether a party in a copyright case who seeks the extraordinary remedy of a preliminary injunction must, like parties seeking injunctions in other kinds of cases, show a likelihood of irreparable harm.

CORPORATE DISCLOSURE STATEMENT

Respondent Google, Inc. is a publicly traded company, and no company owns 10% or more of its stock.

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BRIEF FOR RESPONDENT IN OPPOSITION

This interlocutory petition for a writ of certiorari represents the petitioner's latest effort to breathe life into copyright infringement claims that both the district and circuit courts have found to be meritless on multiple occasions. The Ninth Circuit's decision is consistent with the decisions of every court of appeals to have addressed the question presented; resolution of the question in petitioner's favor would not affect the outcome of petitioner's case; and the decision below was plainly correct. There is no plausible basis for certiorari.

STATEMENT

1. Petitioner Perfect 10, Inc. (“Perfect 10” or “P10”) is in the business of making, purchasing, and distributing photographs of nude women. In 2004, Perfect 10 sued Respondent Google, Inc. (“Google”), alleging various forms of copyright infringement. The essence of petitioner’s case is that Google should be held liable for the presence of unauthorized copies of petitioner’s photographs on the Internet. Although Perfect 10 has never made money from its subscription-based soft-core pornography trade, it has asserted, without evidentiary support, that its business would flourish if Google would take certain steps that petitioner demands.

2. In 2005, petitioner moved for a preliminary injunction to enjoin Google’s alleged copyright infringement, which the district court denied in part and granted in part. On appeal, the Ninth Circuit court of appeals vacated the injunction, holding that the petitioner was unlikely to succeed on the merits of its primary claims because Google’s activities did not constitute direct infringement and were otherwise likely to be fair use. The court of appeals remanded petitioner’s contributory infringement claim because the district court had not resolved factual disputes concerning Google’s defenses under the safe harbor provisions of the Digital Millennium Copyright Act (the “DMCA”). *See Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1173 (9th Cir. 2007). The DMCA exempts Internet service providers from most forms of copyright liability, provided that, among other things, they respond expeditiously to so-called “takedown notices,” which must meet certain statutory guidelines. *See* 17 U.S.C. § 512(c); Pet. App. 3a.

3. For three years after remand, petitioner did not renew its motion for preliminary injunction on the basis of alleged contributory infringement or on any other basis. In July 2009, Google filed motions for partial summary judgment regarding its DMCA defenses. In July 2010, the district court issued an order granting in part and denying in part Google's motions. The district court found that there was no genuine dispute of material fact that the vast majority of petitioner's takedown notices were defective under the terms of the DMCA. With respect to a small portion of petitioner's claimed infringements, the district court found that genuine disputes of material fact did exist. Those allegations are the subject of ongoing discovery and additional motion practice before the district court, with a jury trial scheduled for January 2013 on any issues that ultimately remain unresolved.

4. In 2010, while Google's DMCA summary judgment motions were pending, petitioner filed a second motion for a preliminary injunction. In denying that motion, the district court held that each of the four equitable factors to be considered in preliminary injunction applications weighed against petitioner. It found that petitioner is unlikely to succeed on any of its copyright infringement claims. Pet. App. 44a. With regard to irreparable harm, the district court explained that "P10 is not entitled to a presumption of irreparable harm (even if such a presumption still applies after *Winter [v. Natural Resources Defense Council, Inc.]*, 555 U.S. 7, 20 (2008)), since it has not demonstrated a likelihood of success on the merits of its copyright claims." Pet. App. 45a n.12 (emphasis added). The court then assessed the evidence and found:

P10 has failed to establish that it will suffer irreparable harm in the absence of preliminary relief. It offers evidence of its recent financial woes, but it fails to tie those financial difficulties in any meaningful way to Google’s conduct. Nothing indicates that injunctive relief against Google will help to alleviate P10’s financial concerns. Thus, P10 has not established irreparable harm in the absence of preliminary relief.

Pet. App. 45a (record citations omitted).

As the district court also observed, petitioner had failed even to address the two remaining preliminary injunction factors—the balance of the equities and the public interest—in its opening and reply brief. Pet. App. 45a. The district court considered them in any event and found that they weighed against an injunction. Pet. App. 45a-46a.

5. Petitioner took an interlocutory appeal, not only challenging the district court’s ruling on the preliminary injunction, but also seeking to bootstrap into the appeal a challenge to the otherwise non-final partial summary judgment order. To that end, petitioner devoted its brief almost entirely to an argument that the district court had erred in finding that petitioner was unlikely to succeed on the merits of its various copyright claims.

6. In a unanimous decision, the Ninth Circuit (Ikuta, J., joined by Kozinski, C.J. and Hawkins, J.) affirmed the denial of the preliminary injunction. Pet. App. 1a. The court of appeals rejected petitioner’s assertion that it would be entitled to a presumption of irreparable harm if it could show likely success on the merits. The court observed that this Court’s decision in *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), “warned against reliance on

presumptions or categorical rules.” Pet. App. 5a-6a. In agreeing with every other court of appeals to address the issue, the Ninth Circuit reasoned that *eBay* is not limited to the patent context, pointing out that, in *eBay*, this Court had “relied on and clarified its prior decisions under the Copyright Act.” Pet. App. 7a. The court of appeals further recognized that in *eBay* this Court relied on the parallels between the Copyright Act and the Patent Act, neither of which “evinced a congressional intent to depart from traditional equitable principles.” Pet. App. 7a (quoting and citing *eBay*, 547 U.S. at 392). The Ninth Circuit thus hewed to this Court’s “consistent[] reject[ion of] invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed.” Pet. App. 8a (quoting *eBay*, 547 U.S. at 392-93 (citing *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 505 (2001))).

After rejecting any blanket presumption, the court of appeals next ruled that “the district court did not abuse its discretion in concluding that Perfect 10 failed to establish that Google’s operations would cause it irreparable harm.” Pet. App. 11a. The court reasoned that Perfect 10 has never made money, and there was no evidence that Google is responsible for Perfect 10’s financial woes. Pet. App. 11a. The court of appeals thus concluded that “Perfect 10 has not shown a sufficient causal connection between irreparable harm to Perfect 10’s business and Google’s operation of its search engine.” Pet. App. 11a. “Because Perfect 10 has failed to satisfy this necessary requirement for obtaining preliminary injunctive relief, the district court’s ruling was not an abuse of discretion.” Pet. App. 12a (citing *Winter*, 555 U.S. at 20).

After the Ninth Circuit's decision affirming denial of the second preliminary injunction motion, Perfect 10 dismissed in the district court all of its non-copyright claims, including non-copyright claims on which it had moved for a preliminary injunction. Proceedings on the remaining copyright infringement claims continue. The district court has set a pre-trial schedule with fact and expert discovery to be completed in early summer 2012, and additional summary judgment motions are due by July 2012. A jury trial is set for January 2013.

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THAT OF EVERY OTHER CIRCUIT TO ADDRESS THE QUESTION

The Ninth Circuit held that, after *eBay*, a copyright plaintiff seeking an injunction must, like other applicants for injunctive relief, demonstrate a likelihood of irreparable harm in order to prevail. Every circuit court of appeals to consider this issue has reached the same result.

In *Salinger v. Colting*, the Second Circuit held that in copyright actions, as in other cases, a court deciding a preliminary injunction motion "must actually consider the injury the plaintiff will suffer if he or she loses on the preliminary injunction but ultimately prevails on the merits, paying particular attention to whether the 'remedies available at law, such as monetary damages, are inadequate to compensate for that injury.'" 607 F.3d 68, 80 (2d Cir. 2010) (quoting *eBay*, 547 U.S. at 391, and citing *Winter*, 555 U.S. at 22 and 11A Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 2948.1 (2d ed. 1995)).

Writing for a unanimous panel, Judge Calabresi explained that, “nothing in the text or the logic of *eBay* suggests that its rule is limited to patent cases” and that, “[o]n the contrary, *eBay* strongly indicates that the traditional principles of equity it employed are the presumptive standard for injunctions in any context.” *Id.* at 78-79. The Second Circuit further observed that the two main cases cited by this Court in the relevant section of *eBay* were not even patent cases. *Id.* at 79; see *eBay*, 547 U.S. at 391 (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-13 (1982) and *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987)).

Similarly, in *Bethesda Softworks, L.L.C. v. Interplay Entertainment Corp.*, the Fourth Circuit rejected a plaintiff’s assertion that, even after *eBay*, irreparable harm should be presumed at the preliminary injunction stage in a copyright case once the plaintiff has shown a likelihood of success on the merits. No. 11-1860, 2011 WL 5084587, at *2 (Oct. 26, 2011) (per curiam). The court explained that, “[a]lthough *eBay* concerned a patent dispute, the Supreme Court observed that its approach was ‘consistent with our treatment of injunctions under the Copyright Act,’ noting that the Court ‘has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed.’” *Id.* at *2 (quoting *eBay*, 547 U.S. at 392-93).

And in *Robert Bosch LLC v. Pylon Manufacturing Corp.*, a patent case, the Federal Circuit stated broadly, “[w]e take this opportunity to put the question to rest and confirm that *eBay* jettisoned the presumption of irreparable harm as it applies to

determining the appropriateness of injunctive relief. In so holding, we join at least two of our sister circuits that have reached the same conclusion as it relates to a similar presumption in copyright infringement matters.” 659 F.3d 1142, 1149 (Fed. Cir. 2011) (citing the decision below and *Salinger*, 607 F.3d at 76-78).¹

No court of appeals has ruled to the contrary, and none of these decisions generated so much as a dissenting vote.²

Unable to find even a dissenting opinion, let alone a conflicting decision from another circuit, the best that petitioner can muster is a supposedly conflicting law review article—from which petitioner appears to have drawn its entire argument.³ That is plainly not a circumstance warranting this Court’s review.

¹The First Circuit has similarly applied eBay’s logic to discard that Circuit’s presumption in the trademark context. *Voice of the Arab World, Inc. v. MDTV Med. News Now, Inc.*, 645 F.3d 26, 34 (1st Cir. 2011).

²Despite Petitioner’s intimations (Pet. 21 n.9), the Sixth Circuit’s decision in *Bridgeport Music, Inc. v. Justin Combs Publishing*, 507 F.3d 470 (6th Cir. 2007), is not to the contrary. That case does not discuss the *eBay* decision, never mentions a “presumption” and turns entirely on a “showing of past infringement and a substantial likelihood of future infringement,” which is not present here. *Id.* at 492. Here, after the district court evaluated Perfect 10’s “assorted claims” on its second preliminary injunction motion, it determined that Perfect 10 was unlikely to succeed on any of its copyright infringement claims. Pet App. 44a.

³See H. Tomás Gómez-Arostegui, *What History Teaches Us About Copyright Injunctions and the Inadequate-Remedy-at-Law Requirement*, 81 S. CAL. L. REV. 1197 (2008).

II. THIS CASE IS NOT A PROPER VEHICLE FOR RESOLVING THE QUESTION PRESENTED

This case also does not merit review because no decision by this Court could change this case's outcome. *First*, Petitioner is seeking the benefit of a rule that a “showing of a reasonable likelihood of success on the merits in a copyright infringement claim raises a presumption of irreparable harm.” Pet. 6 (quotation mark omitted). But the district court found that petitioner is unlikely to succeed on the merits, Pet. App. 44a, a determination that was well within its discretion.⁴

If this Court did wish to consider the question whether there should be a presumption of irreparable harm for copyright holders who have shown a likelihood of success on the merits, the appropriate vehicle would be a case in which a copyright holder has actually shown a likelihood of success on the merits. In this case petitioner would not qualify for any such presumption, rendering any opinion from this Court advisory.

Second, even if petitioner had established a likelihood of success on the merits, any presumption of irreparable harm would have been rebutted. The pre-*eBay* presumption that petitioner seeks is a rebuttable one. *See, e.g., Cadence Design Sys., Inc. v. Avant! Corp.*, 125 F.3d 824, 829 (9th Cir. 1997)

⁴ As this Court has recognized, “[a] preliminary injunction is an extraordinary remedy never awarded as of right,” but is rather determined by district courts “exercising their sound discretion.” *Winter*, 555 U.S. at 24 (citing *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) and quoting *Amoco Prod. Co.*, 480 U.S. at 542).

("[T]he presumption is rebutted where the plaintiff has not been harmed, where any harm is *de minimis*, or where the defendant acted with innocent intent, relying on lack of copyright notice."). The district court found that "[n]othing indicates that injunctive relief against Google will help to alleviate P10's financial concerns." Pet. App. 45a. That is because petitioner failed to demonstrate any relationship between respondent's activities and petitioner's claimed financial woes. Pet. App. 11a, 45a. Petitioner has made no showing that this conclusion was incorrect, let alone an abuse of the district court's "sound discretion." *Winter*, 555 U.S. at 24. The district court's finding would rebut a presumption of irreparable harm if it applied.

Moreover, petitioner never even *addressed* the balance of the equities or the public interest factors when bringing its motion, and the district court found that those important factors weighed in respondent's favor. Pet. App. 45a-46a. A ruling that there should be a presumption of irreparable harm would not make any difference in this case.

III. THE DECISION BELOW WAS CORRECT

A. The Court Of Appeals Correctly Applied This Court's Decisions

The petition should be denied for the additional reason that the decision below neither made new law nor misapplied existing law in applying the four equitable factors outlined in *eBay* to a preliminary injunction in a copyright case. Independent of *eBay*, this Court has found the same four equitable factors to be equally applicable to preliminary injunctions as they are to permanent injunctions. *Winter*, 555 U.S. at 20; *see also Amoco Prod. Co.*, 480 U.S. at 546 n.12 ("The

standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.”). Nor is there anything to suggest that *eBay* should not be applicable to copyright cases. In that regard, the court of appeals simply followed *eBay*: “[T]he Court has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows from a determination that a copyright has been infringed.” Pet. App. 7a-8a (quoting *eBay*, 547 U.S. at 392-93); see also *Salinger*, 607 F. 3d at 78 (“[I]t seems clear that the Supreme Court did not view patent and copyright injunctions as different in kind, or as requiring different standards.”).

B. The Decision Below Does Not Contradict Statutory Language Or Conflict With Congressional Intent

Nor does anything in the decision below contradict the language or purpose of the statute. The Copyright Act states that a court “may ... grant temporary and final injunctions on such terms as it may deem reasonable.” 17 U.S.C. § 502(a). As the court below observed, “this permissive language does not evince a congressional intent to depart from traditional equitable principles.” Pet. App. 7a. To the contrary, this statutory language expresses a clear purpose to place the availability of injunctive relief in the equitable discretion of the district court; that is why this Court has “consistently rejected invitations to replace traditional equitable considerations with a rule that automatically follows a determination that a copyright has been infringed,” *eBay*, 547 U.S. at

392-93. Nor does anything in the statute suggest that Congress intended a “major departure from the long tradition of equity practice...” *Id.* at 391 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982)).

Traditional principles of equity require a party seeking a preliminary injunction to “establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter*, 555 U.S. at 20. A rule that presumes irreparable harm once likelihood of success on the merits has been established abrogates the equitable requirement that the plaintiff establish all four factors and is contrary to this Court’s characterization of injunctive relief as “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Id.* at 22. Such categorical rules do not, therefore, comport with “traditional equitable principles [which] do not permit such broad classifications.” *eBay*, 547 U.S. at 393.

Petitioner asserts that the court of appeals failed to undertake a proper historical analysis to determine whether the presumption of irreparable harm was consistent with the history of equity practice in copyright cases. *See* Pet. 11-12. Such an inquiry, petitioner argues, would have revealed “that the presumption of irreparable harm in copyright infringement cases was part of traditional equity practice going back to before the adoption of the Constitution.” Pet. 12. Consequently, petitioner concludes, the presumption is actually part of the equitable tradition that Congress is presumed to have endorsed, rather than contrary to it. Pet. 12-13.

As explained in the Second Circuit’s *Salinger* opinion, on which the Ninth Circuit expressly relied, the historical argument has no merit. Citing the same law review article that petitioner invokes, the Second Circuit pointed out that this “historical tendency to issue preliminary injunctions readily in copyright cases may reflect” nothing more than the fact that “most copyright plaintiffs who have shown a likelihood of success on the merits would [] be irreparably harmed absent preliminary injunctive relief.” *Salinger*, 607 F. 3d at 82 (citing Gómez-Arostegui, *supra* n.3, at 1201). Several of the Justices who joined the unanimous *eBay* decision were likewise cognizant of the historical tendency to issue injunctions in patent infringement cases, but observed that “[t]his historical practice, as the Court holds, does not entitle a patentee to [an] ... injunction or justify a general rule that such injunctions should issue.” *eBay*, 547 U.S. at 395 (Roberts, C.J., concurring). Petitioner, therefore, is wrong to suggest that the courts confronting the question presented have not considered the relevant historical record—and is equally mistaken about what that record actually reveals.

CONCLUSION

The petition for a writ of certiorari should be denied.

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