

Court of Appeals Docket Number 10-56316

Decided August 3, 2011

Before the Honorable Alex Kozinski, Chief Judge, Michael Daly Hawkins
and Sandra S. Ikuta, Circuit Judges

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

PERFECT 10, INC.,

Plaintiff-Counter-Defendant-Appellant,

v.

GOOGLE, INC.

Defendant-Counter-Claimant-Appellee.

Appeal from the United States District Court, Central District of California,
Hon. A. Howard Matz, USDC No. CV 04-9484 AHM (SHx)

**PETITION FOR PANEL REHEARING AND FOR
REHEARING *EN BANC***

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff-Appellant Perfect 10, Inc. certifies that it has no parent or subsidiary corporations, and that no publicly held corporation owns 10% or more of its stock. Perfect 10, Inc. has not issued shares to the public.

Dated: August 17, 2011

Respectfully submitted,

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TABLE OF CONTENTS

I. INTRODUCTION.....	1
A. Statement of Counsel.....	1
B. Reasons For Petition.....	3
II. THE PANEL RELIED UPON <i>eBAY</i> TO REVERSE LONGSTANDING PRECEDENT WITHOUT ENGAGING IN THE VERY ANALYSIS REQUIRED BY <i>eBAY</i>	5
A. The <i>eBay</i> Decision.....	6
B. The <i>eBay</i> Court Specifically Declined To Address The Presumption At Issue In This Case.	8
C. An Historical Analysis Of Copyright Law Establishes That The Presumption Of Irreparable Harm Was Part Of A Long Tradition Of Equity Practice, Going Back To The 17th Century.	10
D. The Panel’s Opinion Conflicts With Congressional Intent Regarding The Presumption Of Irreparable Harm.	13
E. The Presumption Of Irreparable Harm Is Not Equivalent To The Categorical Rule Rejected In <i>eBay</i>	14
F. The Patent Act Specifically Provides For Application Of Equitable Principles, While The Copyright Act Does Not.	16
G. The Preliminary Injunction At Issue Here Is Not Comparable To The Permanent Injunction At Issue In <i>eBay</i>	16
III. THE PANEL’S OPINION IS CONTRARY TO THE PRINCIPLES ESPOUSED IN THIS COURT’S <i>ROOMMATES</i> DECISION.	18
IV. THE PANEL’S OPINION CONFLICTS WITH THIS COURT’S OPINION IN <i>MARLYN</i>	19
V. THE OPINION’S RULING REGARDING IRREPARABLE HARM OVERLOOKED MATERIAL POINTS OF FACT AND LAW.	20
VI. CONCLUSION.....	23

TABLE OF AUTHORITIES

Cases

<i>Abbott Labs. v. Andrx Pharms., Inc.</i> , 452 F.3d 1331 (Fed. Cir. 2006)	17
<i>American Metropolitan Enterprises, Inc. v. Warner Bros. Records</i> , 389 F.2d 903 (2d Cir. 1968)	13
<i>Ankenbrandt v. Richards</i> , 504 U.S. 689 (1992).....	2, 13, 14
<i>Apple Computer, Inc. v. Formula International, Inc.</i> , 725 F.2d 521 (9th Cir. 1984).....	5
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994).....	9
<i>Christiana Industries v. Empire Electronics, Inc.</i> , 443 F.Supp.2d 870 (E.D.Mich.2006)	18
<i>Consol. Rail Corp. v. Gottshall</i> , 512 U.S. 532 (1994)	2, 13
<i>Dun v. Lumbermen’s Credit Ass’n</i> , 209 U.S. 20 (1908).....	9
<i>eBay Inc. v. MercExchange, L.L.C.</i> , 547 U.S. 388 (2006)	<i>passim</i>
<i>Eisai Co., Ltd. v. Teva Pharms. USA, Inc.</i> , 2008 WL 1722098 (D.N.J., Mar. 28, 2008).....	17
<i>Fair Housing Council of San Fernando Valley v. Roommates.Com</i> , <i>LLC</i> , 521 F.3d 1157 (9th Cir. 2008) (<i>en banc</i>).....	2, 18, 19
<i>Fleet Wholesale Supply Co. v. Remington Arms Co.</i> , 846 F.2d 1095 (7th Cir. 1988).....	9
<i>Fonovisa, Inc. v. Cherry Auction, Inc.</i> , 76 F.3d 259 (9th Cir. 1996)	18
<i>Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.</i> , 527 U.S. 308 (1999).....	11
<i>Hogg v. Kirby</i> , 8 Ves. Jr. 215, 32 Eng. Rep. 336 (Ch. 1803)	11
<i>Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.</i> , 571 F.3d 873 (2009).....	3, 19
<i>N.Y. Times Co. v. Tasini</i> , 533 U.S. 483 (2001).....	9
<i>Powell v. Home Depot U.S.A., Inc.</i> , 2009 WL 3855174 (S.D.Fla., Nov. 17, 2009).....	14
<i>United States Department of Labor v. Wolf Run Mining Co.</i> , 452 F.3d 275 (4th Cir. 2006)	17

<i>Weinberger v. Romero-Barcelo</i> , 456 U.S. 305 (1982)	7, 13
<i>Youngstown Sheet & Tube Co. v. Sawyer</i> , 343 U.S. 579 (1952).....	9

Statutes

17 U.S.C. §502.....	13, 16
17 U.S.C. §512.....	4
35 U.S.C. §283.....	16

Other Authorities

H. Tomás Gómez-Arostegui, <i>What History Teaches Us About Copyright Injunctions and The Inadequate-Remedy-At-Law Requirement</i> , 81 S. Cal.L.Rev. 1197, 1208 & n.35 (2008)	<i>passim</i>
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Rules

FRAP 35.....	1, 2, 3
FRAP 40.....	1, 3

I. INTRODUCTION.

A. Statement of Counsel.

The undersigned counsel states that in his judgment, the following situations exist which warrant rehearing and rehearing *en banc*:

1) The Panel overruled this Circuit's longstanding rule that a showing of a reasonable likelihood of success on the merits in a copyright infringement claim raises a presumption of irreparable harm for purposes of preliminary injunctive relief. The Panel relied upon the United States Supreme Court's decision in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) ("*eBay*") to overrule this precedent, without engaging in an analysis of historical practice or Congressional intent, as required by *eBay*. This is a question of exceptional importance regarding the availability of injunctive relief in copyright infringement claims. (FRAP 35(b)(1)(B)). In so ruling, the Panel overlooked material points of fact and law. (FRAP 40(a)(2)).

2) The Panel's holding that the United States Supreme Court's decision in *eBay* overrules this Circuit's application of the presumption of irreparable harm to preliminary injunctions involving copyright infringement claims conflicts both with the *eBay* decision, which specifically declined to

address this issue, and with contrary decisions of other courts. (FRAP 35(b)(1)(A),(B)).

3) The Panel’s overruling of this Circuit’s longstanding rule applying the presumption of irreparable harm to copyright infringement claims, even though this rule was in effect when Congress adopted the Copyright Act of 1976, conflicts with the Supreme Court’s long espoused principle that Congress is deemed to legislate against the backdrop of judicial precedent and to adopt long-established practices, unless Congress clearly indicates otherwise in the statute or legislative history. *See Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542-44 (1994); *Ankenbrandt v. Richards*, 504 U.S. 689, 700-01 (1992). (FRAP 35(b)(1)(A)).

4) The Panel’s Opinion makes it significantly more difficult for copyright owners to enforce their rights, at a time when copyright infringement on the Internet is epidemic. The Panel’s Opinion gives Internet thieves an even greater advantage. It thus conflicts with this Circuit’s decision in *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1164 n.15 (9th Cir. 2008) (*en banc*) (“*Roommates*”), which states that Internet businesses should not be given

“an unfair advantage over their real-world counterparts.” (FRAP 35(b)(1)(A)).

5) The Panel’s Opinion conflicts with this Court’s decision in *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873 (2009) (“*Marlyn*”), which continued to apply the presumption of irreparable harm to trademark infringement claims after *eBay*. (FRAP 35(b)(1)(A)).

6) Material points of fact and law were overlooked in the Panel’s decision that Perfect 10 had not established that it would suffer irreparable harm in the absence of injunctive relief. (FRAP 40(a)(2)).

B. Reasons For Petition.

Plaintiff-Appellant Perfect 10, Inc. (“Perfect 10” or “P10”) petitions for rehearing and rehearing *en banc* because the Panel’s Opinion overruled the presumption of irreparable harm in copyright infringement cases only by misconstruing the Supreme Court’s *eBay* decision. The Panel failed to consider that the presumption historically has been part of traditional equitable practice for centuries, as well as Congressional intent in passing the Copyright Act of 1976. The Panel also ignored significant differences between: (i) permanent and preliminary injunctions; (ii) the language of the Copyright and Patent Act; and (iii) the categorical rule at issue in *eBay* and

the presumption at issue here. Moreover, the Panel overlooked material evidence establishing that Perfect 10 has been irreparably harmed by Google's conduct. As a result, the Panel failed to address critical errors in the district court's substantive rulings.¹

The Panel's new requirement that copyright holders demonstrate irreparable harm to obtain preliminary injunctive relief alters long-settled expectations and disrupts a remedial scheme that has been operating for hundreds of years. Because of the Panel's ruling, it is now nearly impossible for copyright holders to enjoin the theft of their intellectual property. Furthermore, copyright holders have no guidance as to what constitutes a compliant DMCA notice or how they can protect their intellectual property without it being republished on the Internet. The Congressional International Anti-Piracy Caucus has estimated that global copyright

¹ Such errors include rulings that: (i) copies of infringed images do not identify those images for purposes of §512(c)(3)(a)(ii) of the DMCA [RB20-23;OB36-41;RB10;RB13;RB15]; (ii) Google need not use image-recognition to find and remove infringing images, despite evidence that Google can readily do so [ER20092-94¶¶23-24;OB56]; and (iii) Google is not contributorily liable for forwarding DMCA notices to chillingeffects.org and then creating thousands of links to the infringing images in those notices [RB32-35;ER20082-88¶¶10-15;ER20113-142]. Opinion at 10123.

infringement costs American companies over \$25 billion in lost sales annually.² Rehearing is necessary so that this Circuit may address this ever-growing problem of Internet piracy. At the very least, before this Circuit takes the monumental step of eliminating the presumption of irreparable harm, it should permit the parties and *amici* to brief the issue further.

**II. THE PANEL RELIED UPON *eBAY* TO REVERSE
LONGSTANDING PRECEDENT WITHOUT ENGAGING IN
THE VERY ANALYSIS REQUIRED BY *eBAY*.**

The Panel recognized that this Circuit has long followed the rule that, for purposes of a preliminary injunction, “[a] showing of a reasonable likelihood of success on the merits in a copyright infringement claim raises a presumption of irreparable harm.” Opinion at 10125, *quoting Apple Computer, Inc. v. Formula International, Inc.*, 725 F.2d 521, 525 (9th Cir. 1984). The Panel stressed that this Circuit has “repeated and relied on this rule numerous times in the nearly three decades since *Apple Computer*.” *Id.*

² *See*

http://hatch.senate.gov/public/index.cfm/releases?ContentRecord_id=b109414b-1b78-be3e-e0b8-34869d0477c4&ContentType_id=7e038728-1b18-46f4-bfa9-f4148be94d19&Group_id=e5b4c6c5-4877-493d-897b-d8ddac1a9a3e&MonthDisplay=5&YearDisplay=2010

Nevertheless, the Panel held that its “longstanding rule” was “clearly irreconcilable with the reasoning” of the Supreme Court’s decision in *eBay*, “and has therefore been effectively overruled.” Opinion at 10128 (citation and quotation omitted).

The Panel’s ruling is actually contrary to *eBay*’s reasoning. Moreover, the Panel failed to apply the very analysis required by *eBay*. As explained below, the Panel’s reliance upon *eBay* to overrule the presumption of irreparable harm in copyright infringement claims is incorrect, for at least six reasons.

A. The *eBay* Decision.

In *eBay*, the Supreme Court considered a decision holding that MercExchange was entitled to a permanent injunction in its patent infringement action against eBay. *eBay*, 547 U.S. at 391. The Federal Circuit had applied its rule that “a permanent injunction will issue once infringement and validity have been adjudged.” *Id.* at 393-94. The Supreme Court reversed, holding that “the traditional four-factor framework that governs the award of injunctive relief” applies to “disputes under the Patent Act” and that a permanent injunction in a patent infringement case may issue only in accordance with “traditional principles of equity.” *Id.* at 394. The

Court stressed that “a major departure from the long tradition of equity practice should not be lightly implied.” *Id.* at 391, *quoting Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982).

Moreover, seven justices, in concurring opinions, stressed the importance of historical traditions in determining how to apply the four-factor test for injunctive relief. Chief Justice Roberts, joined by Justices Scalia and Ginsberg, stressed that

there is a difference between exercising equitable discretion pursuant to the established four-factor test and writing on an entirely clean slate. Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike.

When it comes to discerning and applying those standards, in this area as others, **a page of history is worth a volume of logic.**

Id. at 395 (quotations and citations omitted; emphasis added). Justice Kennedy likewise noted in his concurrence that historical practice “is most helpful and instructive when the circumstances of a case bear substantial parallels to litigation the courts have confronted before.” *Id.* at 396. Justice

Kennedy appeared most concerned with granting automatic injunctions to so-called patent trolls, who do not manufacture or sell products employing the patent, but merely license the patent. *Id.* at 396-97.

B. The *eBay* Court Specifically Declined To Address The Presumption At Issue In This Case.

The Panel's holding that *eBay*'s reasoning effectively overrules this Circuit's presumption of irreparable harm ignores the fact that the *eBay* Court specifically chose not to address such a presumption. In addition to the Federal Circuit's rule that a permanent injunction must issue once infringement and validity of the patent have been adjudged, the parties also asked the *eBay* Court to address the Federal Circuit's narrower rule that irreparable harm is irrebuttably presumed in such cases. The *eBay* Court declined to address this rule, never once stating that a presumption of irreparable harm in intellectual property cases (rebuttable or not) is contrary to traditional equitable principles. *See* H. Tomás Gómez-Arostegui, *What History Teaches Us About Copyright Injunctions and The Inadequate-Remedy-At-Law Requirement*, 81 S.Cal.L.Rev. 1197, 1208 & n.35 (2008)

(“*Copyright Injunctions*”), found at Attachment 3 hereto.³ As Professor Gómez-Arostegui notes, the Supreme Court could not have made such a statement, because it did not undertake any analysis of the role the presumption of irreparable harm played in early patent or copyright cases. *Id.* Furthermore, none of the three copyright cases cited by the *eBay* Court dealt with the presumption of irreparable harm.⁴

³ Although Professor Gómez-Arostegui sometimes uses the phrase “inadequate-remedy-at-law requirement,” this term is essentially synonymous with the requirement of irreparable harm. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584-85 (1952) (“these two contentions are here closely related, if not identical”); *Fleet Wholesale Supply Co., Inc. v. Remington Arms Co., Inc.*, 846 F.2d 1095, 1098 (7th Cir. 1988) (“a conclusion that the injury is irreparable necessarily shows that there is no adequate remedy at law. To say that the injury is irreparable means that the methods of repair (remedies at law) are inadequate.”) (citation omitted).

⁴ In two cases, the Court stated that copyright injunctions should not automatically issue upon a finding of infringement when the public interest weighs against issuance. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1994); *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 504-05 (2001). In the third case, the Court affirmed the denial of an injunction mainly on the ground that the balance of hardships tipped in defendant’s favor. *Dun v. Lumbermen’s Credit Ass’n*, 209 U.S. 20, 22-23 (1908). *See Copyright Injunctions, supra*, 81 S.Cal.L.Rev. at 1208 n.38.

C. An Historical Analysis Of Copyright Law Establishes That The Presumption Of Irreparable Harm Was Part Of A Long Tradition Of Equity Practice, Going Back To The 17th Century.

The Panel’s Opinion stresses that, under *eBay*, “courts must analyze each statute separately to determine whether Congress intended to make ‘a major departure from the long tradition of equity practice’ and create a statutory presumption or categorical rule for the issuance of injunctive relief.” Opinion at 10128 n.2, *quoting eBay*, 547 U.S. at 391. The Panel never engaged in such analysis, however. Nor, as explained above, did the *eBay* Court.⁵ The Supreme Court has never stated, in *eBay* or any other case, that a presumption of irreparable harm in copyright infringement cases runs counter to traditional equitable principles. Professor Gómez-Arostegui’s detailed analysis in *Copyright Injunctions*, discussed below, demonstrates that the presumption of irreparable harm in copyright infringement cases was part of traditional equity practice going back to at

⁵ *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010), upon which the Panel relied [Opinion at 10127], likewise failed to undertake such analysis.

least the 17th Century.

The Supreme Court has held that “the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act” – approximately 1789. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999). In 1789, and in all preceding years in which the Chancery heard infringement cases, the requirement of irreparable harm “played no active role in deciding whether to issue a copyright injunction. ... On the contrary, the historical record suggests that in copyright cases, legal remedies were deemed categorically inadequate.” *Copyright Injunctions, supra*, at 1201.

Moreover, “cases continued to reject any objection that an adequate remedy could be had at law in copyright cases late into the nineteenth century.” *Id.* at 1277. For example, an 1803 case, *Hogg v. Kirby*, 8 Ves. Jr. 215, 225, 32 Eng. Rep. 336, 340 (Ch. 1803), held that the principle of granting injunctive relief in copyright cases was that a damages remedy was inadequate per se. *Id.*

Based on his detailed historical analysis, Professor Gómez-Arostegui concludes that

[t]he historical record shows that legal remedies were deemed categorically inadequate in copyright cases, and that by 1789, the Chancery’s jurisdiction to issue copyright injunctions had become concurrent and incontestable. The Supreme Court could thus hold today, without running afoul of traditional equitable principles, that a copyright injunction can issue without regard to the adequacy of legal remedies.

Id. at 1197-98. Professor Gómez-Arostegui further concludes that “federal courts must consider eliminating the inadequate-remedy-at-law requirement as a threshold requirement for all copyright injunctions ... **Eliminating the inadequacy requirement would thus bring courts in line with traditional equitable principles, rather than running afoul of them.**” *Id.* at 1280 (emphasis added).

In short, the analysis of traditional equity practice required by *eBay* establishes that this Circuit’s longstanding rule, that a showing of reasonable likelihood of success on the merits in copyright infringement claims raises a presumption of irreparable harm, is consistent with such practice, and should not have been overruled.

**D. The Panel's Opinion Conflicts With Congressional Intent
Regarding The Presumption Of Irreparable Harm.**

The Supreme Court has held that where there is no indication that Congress intended to change the meaning courts have given to a statute, courts must presume that Congress did not intend a change. *Gottshall*, 512 U.S. at 542-44; *Ankenbrandt*, 504 U.S. at 700-01. Section 502 of the Copyright Act, enacted in 1976, neither mentions equitable principles nor specifically prohibits the presumption of irreparable harm. The presumption of irreparable harm clearly existed before Congress adopted the 1976 Act. *See, e.g., American Metropolitan Enterprises, Inc. v. Warner Bros. Records*, 389 F.2d 903, 905 (2d Cir. 1968). Congress is presumed to have been aware of this presumption when it adopted Section 502 in the 1976 Act. *See Weinberger*, 456 U.S. at 313 (“considerations applicable to cases in which injunctions are sought in the federal courts reflect a ‘practice with a background of several hundred years of history,’ a practice of which Congress is assuredly well aware”). Nowhere in the 1976 Act, however, did Congress disapprove of this presumption. On the contrary, the legislative history of the 1976 Act indicates that Congress did not intend to alter the law or previous practices of the courts. *Copyright Injunctions, supra*, at 1205-06

n.20. The Panel’s Opinion overruling the presumption thus conflicts with Congressional intent and the Supreme Court’s *Gottshall* and *Ankenbrandt* decisions.

E. The Presumption Of Irreparable Harm Is Not Equivalent To The Categorical Rule Rejected In *eBay*.

The Panel mistakenly concluded that the *eBay* Court’s analysis applied to both categorical rules and presumptions. Opinion at 10125. Because the *eBay* Court’s reasoning is inapplicable to presumptions, courts have concluded that **“the presumption of irreparable harm in the context of preliminary injunctions should survive *eBay*.”** *Powell v. Home Depot U.S.A., Inc.* , 2009 WL 3855174, *13 (S.D.Fla., Nov. 17, 2009) (emphasis added). As the *Powell* court explained:

[T]he presumption of irreparable harm in preliminary injunctions is not inconsistent with *eBay* because the presumption does not constitute the “automatic” approach in granting injunctive relief in patent cases. What concerned the *eBay* Court was the categorical approach in *granting or denying injunctive relief* without properly considering the equities. *See eBay*, 547 U.S. at 393-94 (“Just as the District Court erred in its

categorical denial of injunctive relief, the Court of Appeals erred in its *categorical grant of such relief*.”) ... The presumption of irreparable harm, however, does not mean and is not equal to automatically granting injunctive relief after finding infringement and validity of patent, because the presumption only shifts the burden to the infringer for rebuttal. ... Moreover, the presumption does not ignore the other two necessary steps in the preliminary injunction analysis: balance of hardships and public interest. Because the likely infringer may or may not successfully rebut the presumption of irreparable harm, and because the balance of hardships and public interest may or may not outweigh the irreparable harm, the presumption itself does not force any court to automatically grant or deny a preliminary injunction. Therefore, the presumption is not inconsistent with *eBay*.

Id. Rehearing is thus necessary to address the Panel’s incorrect attempt to equate the presumption of irreparable harm with “a rule that an injunction automatically follows a determination that a copyright has been infringed.” Opinion at 10127, *quoting eBay*, 547 U.S. at 392-93.

**F. The Patent Act Specifically Provides For Application Of
Equitable Principles, While The Copyright Act Does Not.**

The Panel's reliance upon *eBay* was flawed because the language of the current Copyright Act is different than the Patent Act. The Patent Act specifically requires the application of equitable principles, providing that courts "may grant injunctions **in accordance with the principles of equity** to prevent the violation of any right secured by patent, on such terms as the court deems reasonable." 35 U.S.C. §283 (emphasis added). By contrast, the Copyright Act provides only that courts "may" grant injunctive relief "on such terms as [they] may deem reasonable to prevent or restrain infringement of a copyright." 17 U.S.C. §502(a).

**G. The Preliminary Injunction At Issue Here Is Not
Comparable To The Permanent Injunction At Issue In
eBay.**

Policy reasons further compel a distinction between the permanent injunction addressed in *eBay* and preliminary injunctive relief:

Unlike a permanent injunction, which resolves the merits of a claim and imposes an equitable remedy because a legal one is inadequate [citing *eBay*], a preliminary injunction maintains a

particular relationship between the parties **in anticipation** of a decision on the merits, pending completion of the litigation.

United States Department of Labor v. Wolf Run Mining Co., 452 F.3d 275, 280 (4th Cir. 2006)(emphasis added). Preliminary injunctions are considered when a lawsuit’s factual development is limited and are meant to preserve the status quo pending trial. They are temporary and will expire once the case’s merits are decided. Accordingly, plaintiffs should not have to prove irreparable harm at the preliminary injunction stage. Indeed, courts have applied the presumption of irreparable harm to preliminary injunctions after *eBay*, even in the patent context. *See, e.g., Abbott Labs. v. Andrx Pharms., Inc.*, 452 F.3d 1331, 1347 (Fed. Cir. 2006) (“we conclude that 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.”); *Eisai Co., Ltd. v. Teva Pharms. USA, Inc.*, 2008 WL 1722098, *10 (D.N.J., Mar. 28, 2008)(“Aside from the fact that this is a *preliminary* injunction, this Court observes that the standard rejected by the Supreme Court in *eBay* was one in which the Federal Circuit applied a presumption that the *injunction* should issue, not a presumption that one of the four prongs-irreparable harm-

exists.”); *Christiana Industries v. Empire Electronics, Inc.*, 443 F.Supp.2d 870, 884 (E.D.Mich.2006)(“eBay did not invalidate the presumption.”).

III. THE PANEL’S OPINION IS CONTRARY TO THE PRINCIPLES ESPOUSED IN THIS COURT’S ROOMMATES DECISION.

This Circuit has emphasized that Internet businesses that violate the law should not receive preferential treatment over regular merchants:

The Internet ... has become a dominant – perhaps the preeminent – means through which commerce is conducted. And its vast reach into the lives of millions is exactly why **we must be careful not to ... give online business an unfair advantage over their real-world counterparts, which must comply with the laws of general applicability.**

Roommates, 521 F.3d at 1164 n.15 (emphasis added). Similarly, during oral argument, Chief Justice Kozinski cautioned Google’s counsel “not to rely on the difference between physical space and cyber space” in attempting to distinguish this case from *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996). Transcript, 34:23-35:13, found at Attachment 2 hereto.

By making it substantially more difficult, if not impossible, for

copyright holders to enjoin infringement of their intellectual property on the Internet, the Panel's Opinion contravenes the above principles and significantly increases the gap between cyberspace and the real world. A brick-and-mortar business whose property is stolen may turn to the police for immediate assistance. The damage suffered by such real-world theft is presumed. Here, by contrast, it is no longer presumed that the massive theft of intellectual property on the Internet irreparably harms copyright holders such as Perfect 10. Rehearing is necessary, because the Panel's Opinion undermines *Roommates* and effectively "create[s] a lawless no-man's-land on the Internet." *Roommates*, 521 F.3d at 1164.

**IV. THE PANEL'S OPINION CONFLICTS WITH THIS COURT'S
OPINION IN MARLYN.**

The Panel's overruling of the presumption of irreparable harm in copyright infringement cases conflicts with *Marlyn*. In *Marlyn*, decided after *eBay*, this Court continued to apply the presumption of irreparable harm to a trademark infringement claim. 571 F.3d at 877. The Panel failed to address this conflict. Opinion at 10128 n.2.

Application of the presumption of irreparable harm to trademark claims, but not copyright claims, is neither reasonable nor logical. Both

copyrights and trademarks are intangible, intellectual property rights.

Accordingly, rehearing *en banc* is necessary to resolve the conflict created by the Panel's Opinion.

V. THE OPINION'S RULING REGARDING IRREPARABLE HARM OVERLOOKED MATERIAL POINTS OF FACT AND LAW.

The Panel erred in ruling that Perfect 10 had not established that it was likely to suffer irreparable harm because it “has not shown a sufficient causal connection between irreparable harm to Perfect 10's business and Google's operation of its search engine.” Opinion at 10130. This erroneous ruling overlooked material points of fact and law:

1) Perfect 10 submitted an enormous amount of evidence of ongoing harm to its business as a result of Google's conduct, including: (i) Google's current display of over 22,000 Perfect 10 thumbnails [ER20186-90¶¶6-7;ER30001-16]; (ii) use of those thumbnails by Google users to view or download **tens of millions** of infringing full-size P10 Images from websites to which Google links these thumbnails [OB80-81;ER20249¶86;ER40200-210;ER60233¶66;ER80181-185]; (iii) millions of downloads of full-size P10 Images using unauthorized passwords freely

available from Google [FER78-113;OB15;ER20193-194¶12;ER30024-29;ER20247-249¶85;ER40196-199]; and (iv) Google’s ongoing republication and display of tens of thousands of P10 Images from Perfect 10’s DMCA notices, thereby making those images permanently available for free on the Internet. OB74-76;ER20082-88¶¶10-15;ER20113-142. Such evidence, which Google failed to refute, was never addressed by the Panel.⁶

2) Instead of considering the above evidence, the Panel unrealistically focused on Perfect 10’s “fail[ure] to submit a statement from even a single former subscriber who ceased paying for Perfect 10’s service because of the content freely available via Google.” Opinion at 10129. A statement from one former Perfect 10 subscriber is significantly weaker than Perfect 10’s evidence, which demonstrates that **hundreds of millions** of Google users have no reason to join perfect10.com, because Google offers for free virtually everything Perfect 10 sells. ER20186-190¶¶6-7;ER30001-30016;ER20191-20201¶¶11-16;ER30017-30076. Moreover, this statement would be difficult to obtain because it would force the former subscriber to

⁶ Instead, the Panel apparently accepted the mistaken and unsupported assertion of Google’s counsel that “there’s nothing left to enjoin.” Transcript, 24:25-25:1; 32:11-12.

admit he was committing copyright infringement.

3) The Panel mistakenly relied upon Dr. Zada's alleged acknowledgment that "search engines other than Google contribute to making Perfect 10 images freely available." Opinion at 10129. Such reliance is improper for at least two reasons. First, the startling implication of the Panel's analysis is that if numerous parties, including Google, are all engaging in copyright infringement by making P10 Images freely available without Perfect 10's consent, Perfect 10 cannot obtain injunctive relief against any of these parties, even though they are all responsible for the harm suffered by Perfect 10. This conclusion would turn copyright law on its head and effectively prevent copyright holders from obtaining relief for infringement of their works on the Internet. Second, the Panel misused the language quoted from Dr. Zada's declaration, which was included to show that Dr. Zada had sufficient expertise to testify regarding Google's operations, not that there was massive infringement by other search engines. ER20182. The Panel's reliance upon Dr. Zada's viewing of websites such as Yahoo! is particularly inappropriate, because Perfect 10 submitted evidence that Yahoo! took only three days to process DMCA notices that Google refused to process. ER20246-247¶83;ER40180;40182;40185-189.

4) The Panel appeared to erroneously assume that monetary damages sufficient to compensate Perfect 10 for the harm it has suffered are available. As a result of the Panel's failure to address any aspect of the merits of Perfect 10's copyright claims [Opinion at 10130 n.3], any such remedy is years away. Because the district court incorrectly ruled that all of Perfect 10's Group C notices are deficient and made many other critical errors, Perfect 10 is now forced to try the remaining small portion of the case, once again appeal the district court's ruling, and then retry the case if it receives a favorable ruling on appeal. The evidence suggests that Perfect 10 may not be able to survive to reach that point [ER20076-77¶2;ER20186-190¶¶6-7;ER30001-16;ER20201-204¶17;ER30077-98;ER20082-85¶¶10-11;ER20113-20125].

VI. CONCLUSION.

For the foregoing reasons, Perfect 10 respectfully requests that this Court grant its petition for rehearing and rehearing *en banc*.

Dated: August 17, 2011

Respectfully submitted,

By: Jeffrey N. Mausner

Jeffrey N. Mausner

David N. Schultz

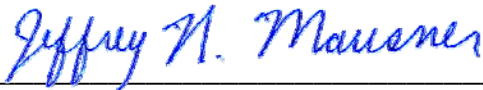
Law Offices of Jeffrey N. Mausner
Attorneys for Plaintiff-Appellant
Perfect 10, Inc.

**CERTIFICATE OF COMPLIANCE PURSUANT TO
CIRCUIT RULES 35-4 and 40-1**

I certify that pursuant to Circuit Rules 35-4 and 40-1, the attached PETITION FOR PANEL REHEARING AND FOR REHEARING EN BANC is proportionately spaced, has a typeface of 14 points, and contains 4,197 words (petitions and answers must not exceed 4,200 words).

Dated: August 17, 2011

Respectfully submitted,

By: 
Jeffrey N. Mausner
Law Offices of Jeffrey N. Mausner
Attorneys for Plaintiff-Appellant
Perfect 10, Inc.

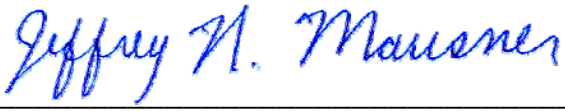
CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Petition for Panel Rehearing and for Rehearing *En Banc* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 17, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: August 17, 2011

Respectfully submitted,

By 

Jeffrey N. Mausner
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Attorneys for Plaintiff-Appellant
Perfect 10, Inc.