Injunctions

I. General definitions

- It is a remedy which restrains a party from doing certain acts or requires a party to act in a certain way. It is generally only available when there is no other remedy at law and irreparable harm will result if the relief is not granted. The purpose of this form of relief is to prevent future wrong[1].
- It is a court order that directs a party to perform or refrain from performing a particular action-is an exceptionally potent and far-reaching remedy, the grant or denial of which often leads to a cascade of serious consequence[2].
  a) Preliminary injunctive relief: although Civil Procedure Rule 65 provides parties with the procedural mechanism and notice requirements for requesting preliminary injunctive relief before a trial on the merits, it does not prescribe any criteria for the courts to apply in assessing a party's request for preliminary injunctive relief. Rule 65 continues equity's tradition of delegating the decision to grant or deny injunctive relief to the court's discretion. Although individual circuits and states vary in both the way they formulate their respective tests and the weight they apply to individual factors, nearly all courts consider some variation of the following four factors: (1) the movant's likelihood of success on the merits; (2) the likelihood of irreparable harm absent preliminary injunctive relief; (3) the balance of harms between the movant and non-movant; and (4) the public interest. These tests partially, but only partially, negate the fear that injunctive relief will be arbitrarily impose[3].
     Nearly every judicial opinion addressing a request for preliminary injunctive relief recognizes the historic principle that such relief is a drastic remedy to be granted sparingly and only in cases of urgent necessity. For example, injunctions are regularly granted as a remedy for misappropriation of trade secrets; infringement of patents, copyrights, or trademarks; violations of antitrust laws or covenants not to compete; and other kinds of unfair competition. A review of published opinions issued in 2003 and 2004 reflects that, on average, federal district courts granted or partially granted nearly 40 percent of all motions for preliminary injunctions [4]
  b) Permanent injunction: The U.S. Supreme Court in *eBay Inc. v. MercExchange, L.L.C*. declared the existence of a “well established” four-factor test for when district court may grant a permanent injunction. The court stated that to obtain such an injunction the movant must show: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and

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[1] https://www.law.cornell.edu/wex/injunction

[2] Bradford E. Dempsey, Nancy L. Dempsey and Kirstin L. Stoll-DeBell. Using Presumptions to Tip the Balance for Injunctive Relief. Litigation, Fall 2006, Vol. 33, No. 1, BALANCING, pp. 15-19 Published by: American Bar Association. https://www-jstor-org.proxy.lib.duke.edu/stable/pdf/29760601.pdf?ab_segments=0%2FSYC-5917%2Fcontrol&refreqid=fastly-default%3A25a39d681f15127d00f5d6ae6eba762d

[3] Bradford E. Dempsey, Nancy L. Dempsey and Kirstin L. Stoll-DeBell. Using Presumptions to Tip the Balance for Injunctive Relief. Litigation, Fall 2006, Vol. 33, No. 1, BALANCING, pp. 15-19 Published by: American Bar Association. https://www-jstor-org.proxy.lib.duke.edu/stable/pdf/29760601.pdf?ab_segments=0%2FSYC-5917%2Fcontrol&refreqid=fastly-default%3A25a39d681f15127d00f5d6ae6eba762d

[4] Bradford E. Dempsey, Nancy L. Dempsey and Kirstin L. Stoll-DeBell. Using Presumptions to Tip the Balance for Injunctive Relief. Litigation, Fall 2006, Vol. 33, No. 1, BALANCING, pp. 15-19 Published by: American Bar Association. https://www-jstor-org.proxy.lib.duke.edu/stable/pdf/29760601.pdf?ab_segments=0%2FSYC-5917%2Fcontrol&refreqid=fastly-default%3A25a39d681f15127d00f5d6ae6eba762d

defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.
Within a half decade, the four-factor test from eBay has, in many federal courts, become the test for whether a permanent injunction should issue, regardless of whether the dispute in question centers on patent law, another form of intellectual property, more conventional government regulation, constitutional law or state tort or contract law.[5]

II. Aspects to consider in a possible regulation

a) Presumptions about irreparable injury

In many situations, courts have presumed irreparability on the nature of a rights violation. As Gideon Par Stein have noted, numerous circuits developed a “continual infrigment' doctrine," under which an owner of copyright, patent, or trademark rights would presumptively obtain "an injunction upon showing the defendant's continual infringement. For other rights, a presumption of irreparable injury in a case of continuing infringement is best explained by a mix of considerations, including the narrowness and clarity of the right in question, the likelihood that infringement is willful, and the likelihood that resulting harm will be immeasurable.[6]

It can be considered the possibility of granted them when there is an irreparable harm. For example, in intellectual property cases, courts have applied a "presumption of irreparable harm” and thereby relieved movants from their burden of establishing this factor. [7]
Where courts have not established their own presumptions of irreparable harm, some state legislatures have enacted legislation instructing courts to presume such harm in certain cases. Obviously, a presumption of irreparable harm makes a substantial difference in the outcome of motions for preliminary injunctive relief. More preliminary injunctions are granted in constitutional cases, which may enjoy a presumption of irreparable harm, than in labor cases, which do not. [8]

When a statute authorizes or requires courts to issue injunctive relief, the court's traditional role of balancing the equities is supplanted by the affirmative obligation to follow the statute and legislative policy objectives contained within the statute. When parties invoke statutes authorizing injunctive relief, courts need not take into account the equitable principles, such

[5] Mark P. Gergen, John M. Golden and Henry E. Smith. The Supreme Court's accidental revolution? the test for permanent injunctions. Columbia Law Review, March 2012, Vol. 112, No. 2,pp. 203-249. Published by: Columbia Law Review Association, Inc. https://www.jstor.org/stable/4135477

[6] Mark P. Gergen, John M. Golden and Henry E. Smith. The Supreme Court's accidental revolution? the test for permanent injunctions. Columbia Law Review, March 2012, Vol. 112, No. 2, pp. 203-249. Published by: Columbia Law Review Association, Inc. https://www.jstor.org/stable/4135477

[7] Bradford E. Dempsey, Nancy L. Dempsey and Kirstin L. Stoll-DeBell. Using Presumptions to Tip the Balance for Injunctive Relief. Litigation, Fall 2006, Vol. 33, No. 1, BALANCING, pp. 15-19 Published by: American Bar Association. https://www-jstor-org.proxy.lib.duke.edu/stable/pdf/29760601.pdf?ab_segments=0%2FSYC-5917%2Fcontrol&refreqid=fastly-default%3A25a39d681f15127d00f5d6ae6eba762d

[8] Bradford E. Dempsey, Nancy L. Dempsey and Kirstin L. Stoll-DeBell. Using Presumptions to Tip the Balance for Injunctive Relief. Litigation, Fall 2006, Vol. 33, No. 1, BALANCING, pp. 15-19 Published by: American Bar Association. https://www-jstor-org.proxy.lib.duke.edu/stable/pdf/29760601.pdf?ab_segments=0%2FSYC-5917%2Fcontrol&refreqid=fastly-default%3A25a39d681f15127d00f5d6ae6eba762d

as irreparable injury or the existence of an adequate remedy at law. If the statutory requisites are met, an injunction will issue. [9]

Two modern developments have created a countercurrent that has altered the principle that injunctive relief is an extraordinary remedy, and has made such relief more readily obtainable. These developments are (1) the recent explosion of legislation authorizing and sometimes requiring courts to issue injunctions; and (2) the courts' application of a presumption of irreparable harm in certain categories of cases. [10]

Although federal and state courts generally adhere to overarching principles relating to injunctive relief, the specific standards and balancing applied by the courts of different circuits or states can significantly affect the outcome. A party seeking a mandatory injunction has a more difficult burden in the Second, Ninth, and Tenth Circuits than in the Sixth Circuit. [11]

b) Presumptions About Undue Hards
Even when denial of an injunction will result in irreparable injury to the right holder and such injury completes a prima facie case for injunctive relief, courts have traditionally refused to issue an injunction when such relief will place an undue hardship on the right violator. The undue-hardship defense to injunctive relief (balancing the equities) enables a right violator to rebut a prima facie case for an injunction by showing that an injunction will inflict on its target hardship that is "disproportionate to any benefit plaintiff will derive."[12]

c) About the relationship between injunctions and damages.
The prerequisite of injunction to give damages should depend on the harm. For example, there are cases when the recover of damages is permitted only after first obtaining an injunction that has been violated. The trouble with such a prerequisite is that it could block some of the cases that most deserve compensation. Take, for example, someone who has suffered identity theft leading to tangible financial loss—an injunction would have limited effect after the fact, yet compensation would not be available if the injunction is not violated.[13]

d) About the efficiency of private audits:
The FTC has regularly held up its consent orders as an essential pillar of its privacy enforcement activities. A consent order typically imposes a 20-year period of FTC oversight and requires companies to implement privacy and security programs and perform regular

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[9] Bradford E. Dempsey, Nancy L. Dempsey and Kirstin L. Stoll-DeBell. Using Presumptions to Tip the Balance for Injunctive Relief. Litigation, Fall 2006, Vol. 33, No. 1, BALANCING, pp. 15-19 Published by: American Bar Association. https://www-jstor-org.proxy.lib.duke.edu/stable/pdf/29760601.pdf?ab_segments=0%2FSYC-5917%2Fcontrol&refreqid=fastly-default%3A25a39d681f15127d00f5d6ae6eba762d

[10] Bradford E. Dempsey, Nancy L. Dempsey and Kirstin L. Stoll-DeBell. Using Presumptions to Tip the Balance for Injunctive Relief. Litigation, Fall 2006, Vol. 33, No. 1, BALANCING, pp. 15-19 Published by: American Bar Association. https://www-jstor-org.proxy.lib.duke.edu/stable/pdf/29760601.pdf?ab_segments=0%2FSYC-5917%2Fcontrol&refreqid=fastly-default%3A25a39d681f15127d00f5d6ae6eba762d

[11] Bradford E. Dempsey, Nancy L. Dempsey and Kirstin L. Stoll-DeBell. Using Presumptions to Tip the Balance for Injunctive Relief. Litigation, Fall 2006, Vol. 33, No. 1, BALANCING, pp. 15-19 Published by: American Bar Association. https://www-jstor-org.proxy.lib.duke.edu/stable/pdf/29760601.pdf?ab_segments=0%2FSYC-5917%2Fcontrol&refreqid=fastly-default%3A25a39d681f15127d00f5d6ae6eba762d

[12] Mark P. Gergen, John M. Golden and Henry E. Smith. The Supreme Court's accidental revolution? the test for permanent injunctions. Columbia Law Review, March 2012, Vol. 112, No. 2, pp. 203-249. Published by: Columbia Law Review Association, Inc. https://www.jstor.org/stable/4135477

[13] Cameron F. Kerry, John B. Morris, Jr. Bridging the gaps. A path forward to federal privacy legislation. June 2020.

independent assessments of the company's data practices. As we know some injunctions in judicial cases consist in private audits. It is important to consider the following problems about private audits in current FTC consent orders[14]:

- Consent decrees have been unable to set limits on companies' data practices. These orders simply create box-checking exercises without protecting anyone's privacy
- Privacy audits are one area where a lack of transparency has hidden serious problems with privacy consent orders. These are nothing like "audits" as commonly understood. Instead, the consent orders speak of privacy "assessments," which are not as rigorous as a formal audit. Audits measure compliance against predefined criteria, while an assessment simply certifies compliance with a standard set by the assessed company itself.
- In comments to the Uber consent decree, Bob Gellman warned that an "assessment can be worthless if it allows the company being assessed too much control over the review."
- Megan Gray was extremely critical of the existing assessment process. She noted that privacy assessments can be circular. For example, if a company asserts it has a reasonable privacy program, an assessor can certify that a company has a reasonable privacy program based on the company's own assertion. She warns that this model will fail to identify or uncover a company's privacy blind spots, which seems to presciently capture PwC's inability to flag what ails Facebook.
- In "Understanding and Improving privacy "audits" under FTC orders"[15], Megan Gray explains the following:
    - The audits are not actually audits as commonly understood. Instead, because the FTC order language only requires third-party "assessments," the companies submit reports that are "attestations." Attestations rely on a few vague privacy program aspects that are self-selected by the companies themselves.
    - While the FTC could reject attestation-type assessments, the agency could also insist the companies bolster certain characteristics of the attestation assessments to make them more effective and replicate audit attributes. For example, the FTC could require a broader and deeper scope for the assessments. The agency could also require that assessors evaluate Fair Information Practices, data flows, notice/consent effectiveness, all company privacy assurances, and known order violations.
    - The agency could also pursue a more dramatic course correction. For example, the commission could release unredacted assessments, have assessors directly report to the agency (instead of the company being assessed), more concretely encourage those reporting violations, create incentives for companies to self-report violations, impose Board of Director responsibility for assessments, clarify that a third-party assessment is not a safe harbor, and build an internal task force to fully evaluate privacy order provisions, especially of course the third-party assessment.

III. Cases:

- Mc Donald v. Kiloo A/S (N.D. Cal. Sept. 24, 2020) the Northern District of California approved an injuctive relief only settlement: change defendants' practices in ways that should improve privacy protections for children[16].

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[14] https://iapp.org/news/a/can-ftc-consent-orders-police-privacy/

[15] http://cyberlaw.stanford.edu/blog/2018/04/understanding-improving-privacy-audits-under-ftc-orders. Megan Gray

[16] Dempsey, James, Rubinstein Ira S, Strandburg Katherine. Breaking the Privacy Gridlock: a Broader Look at Remedies. April 2021

- Adkins v. Facebook, Case No. CV-18-05982 WHA (N.D. Cal. Nov. 15, 2020), the court approved a settlement imposing "a battery of security commitments to prevent future similar attacks." Compliance with these commitments will be assessed annually by an "unbiased, independent third-party vendor selected by Facebook," though with class counsel's approval. The results will be shared with the Court and an expert retained to verify compliance, but otherwise will remain confidential. "Given Facebook has already voluntarily implemented the security measures, this external oversight becomes the real value for the class."[17]
- A preliminary order in In Re Facebook Biometric Information Privacy Litigation, No. 15-CV-03747-JD, Dkt. No. 456 (N.D. Cal. June 4, 2020), denied settlement approval because, inter alia, the settlement required no additional changes to Facebook's business practices and left unclear what specific changes Facebook would be making. The order re final approval, In Re Facebook Biometric Information Privacy Litigation, No. 15-CV-03747-JD, (N.D. Cal, Feb. 26,2021), noted several such changes in Facebook's policies including the company setting its "Face Recognition" default user setting to "off" for all users who have not affirmatively opted in or consented to biometric scans; deleting all existing and stored face templates for class members unless Facebook obtains a class member's express consent after a separate disclosure about how Facebook will use the face templates; and deleting the face templates of any class members who have had no activity on Facebook for three years.[18]
- In re: Clearview AI, Inc. Consumer Privacy Litigation, Case No. 1:21-cv-00135 (N.D. Ill)[19]: Plaintiffs requested that the court issue a preliminary injunction enjoining Clearview's business practices. In order for the Plaintiffs to demonstrate they were entitled to a preliminary injunction in the litigation, it was required that they establish four elements: "(1) they have a reasonable likelihood of success on the merits; (2) no adequate remedy at law exists; (3) they will suffer irreparable harm, which, absent injunctive relief, outweighs the irreparable harm [Clearview] will suffer if the injunction is granted; and (4) the requested injunction will not harm the public interest." The court's opinion was that the consumers ***failed*** to demonstrate a likelihood of irreparable harm in the absence of injunctive relief. Their motion for a preliminary injunction was denied.
  The court found that the failure of the Plaintiffs to show that irreparable harm is likely in the absence a preliminary injunction was "dispositive." The court commented that "Plaintiffs base their irreparable harm argument on what they call the Clearview defendants' 'lax security practices' and two past data breaches of Clearview's electronic systems." However, the court found that "*Plaintiffs' general arguments about the possibility of future data breaches and Clearview's lax security practices suggest a mere possibility of irreparable harm, not that they will likely suffer irreparable harm*."

IV. Advantages[20]

[17] Dempsey, James, Rubinstein Ira S, Strandburg Katherine. Breaking the Privacy Gridlock: a Broader Look at Remedies. April 2021

[18] Dempsey, James, Rubinstein Ira S, Strandburg Katherine. Breaking the Privacy Gridlock: a Broader Look at Remedies. April 2021

[19] https://www.natlawreview.com/article/consumers-denied-preliminary-injunction-clearview-data-privacy-litigation-court

[20] Mark P. Gergen, John M. Golden and Henry E. Smith. The Supreme Court's accidental revolution? the test for permanent injunctions. Columbia Law Review, March 2012, Vol. 112, No. 2, pp. 203-249. Published by: Columbia Law Review Association, Inc. https://www.jstor.org/stable/4135477

- To hire a privacy officer or audit firm can prevent future infringement and stop irreparable harms.
- Injunctions are used where the defendant is engaged in repeated acts and the injunction can prevent a multiplicity of lawsuits
- Injunctions are used to prevent threatened harm, and again a threat of continuous or repeteated action. Likewise, in areas such as patent law, a history of continued infringement might suggest that the stakes in the infringement are high, that further infringement is likely, or that the right holder has no effective self-help remedies. It also suggests that the infringer might be willing to take its chances with damages because they are likely to be undercompensatory.
- Repeated or continuing - and as will be seen, willful - violation of rights is likely to demoralize right holders more than other violations, and these demoralization costs are difficult to include in the measure of damages, again making a presumption for injunctions plausible in such situations. As a result, there can be sense in the traditional equitable approach of adopting a presumption of irreparable injury - and thus a presumption of injunctive relief - for repeated or continuing violations, at least as long as that presumption is subject in turn to defenses like those based on undue hardship or the public interest. Situations involving repeated, continuing, or threatened violations are a subset of recurrent fact patterns that have been accepted as tending to establish irreparable injury.
- Opportunism concerns can motivate a conclusion that a legal remedy of damages is inadequate. Likewise, the antiopportunism theme is barried forward through injunctive remedies that prevent a person from profiting from her own. Thus, one who murders in order to prevent the victim from changing a will is not allowed to take under the will or as an heir at law. In such situations, injunctions are used to force people to do the right thing, or sometimes a court in equity will perform ministerial acts that opportunistic parties refuse to do.
- Injunctions tend to be particularly appropriate for bad-faith violators.
- Injunctions and the threat behind them are used to protect the court's authority and the integrity of its process. Indeed, this goal is central to preliminary injunctions, but it can inform the decision to grant a permanent injunction as well. If a party cannot be trusted to respect rights in the future, that is a reason to grant the other party an injunction.
- Hence, although equitable relief might be view as in some sense exceptional, a presumption of injunctive relief when certain rights are violated can give a sense of enhanced security.

V. **Disadvantages**

- For example, an order to hire a privacy officer or audit firm (third party) could be work better for “large data holders” and not for small and medium businesses because these lasts should be exempt from obligations with overly significant compliance costs[21].
- In theory the burden is on the proponent to make the case for an injunction.

[21] Cameron F. Kerry, John B. Morris, Jr. Bridging the gaps. A path forward to federal privacy legislation. June 2020.