

Presumption of Irreparable Harm in Trademark Infringement Suits

In *North American Med. Corp. v. Axiom Worldwide, Inc.*, the 11th U.S. Circuit Court of Appeals recently questioned whether a finding of likelihood of confusion in a trademark infringement case is sufficient to establish irreparable harm for purposes of a preliminary injunction.

On April 7, 2008, the Court of Appeals affirmed in part, and vacated in part, a District Court's issuance of a preliminary injunction in favor of plaintiffs, North American Medical Corp. ("NAM") and Adagen Medical International, Inc. ("Adagen"). The District Court had prohibited defendant, Axiom Worldwide, Inc. ("Axiom"), from using NAM's trademarks within metatags in the promotion of Axiom's competing product. The Court of Appeals affirmed the District Court's finding of likelihood of confusion but vacated the preliminary injunction with respect to the trademark infringement claim and remanded the case to the district court to decide whether to apply the presumption that irreparable harm results from trademark infringement.

The Court of Appeals suggested that, in light of the Supreme Court case, *eBay Inc. v. MercExchange, L.L.C.*, the time was ripe to determine whether courts should presume irreparable harm upon a finding of likelihood of confusion in the trademark infringement setting. In 2006, the Supreme Court in *eBay* held that injunctions should not be automatically issued based on a finding of patent infringement. Rather, district courts should have the equitable discretion to decide whether to grant or deny injunctive relief. The impact of this *eBay* decision on trademark infringement cases was unclear. Although most trademark infringement cases extended a presumption of irreparable harm once a plaintiff had established likelihood of confusion, some did not.

The Court of Appeals ultimately declined to opine on how *eBay* would affect this case and left it to the District Court to decide the issue. Nevertheless, the Court of Appeals observed that "a strong case can be made that *eBay*'s holding necessarily extends to the grant of preliminary injunctions under the Lanham Act." Whether the District Court will apply *eBay* on remand and dispose of the irreparable injury presumption remains to be seen. If the District Court does so, and the Court of Appeals affirms, courts in other circuits will have to take a serious look at the issue. This could lead to a circuit split and possible Supreme Court intervention in the future. If the presumption of irreparable harm is no longer applied, parties seeking a preliminary injunction will have to articulate specific ways in which a defendant's conduct is causing irreparable harm.

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