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CONGRESS RESTORES THE PRESUMPTION OF IRREPARABLE HARM FOR INJUNCTIONS IN TRADEMARK CASES

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A portion of the COVID relief bill passed by Congress in late December of 2020 has had a substantial impact on obtaining injunctions in trademark infringement cases. To obtain a preliminary injunction in a civil action involving the Lanham Act, the moving party, generally the plaintiff in the case, has the burden to prove several factors, including a showing of irreparable harm. "Irreparable harm" is harm that would not be adequately compensated by monetary damages or an award of damages. Prior to 2006, courts routinely held that, in an action for trademark infringement, irreparable harm was presumed. This changed in 2006, as a result of the Supreme Court's decision in eBay, Inc. v. MercExchange, 547 U.S. 388 (2006), where the Court ruled that patent owners were not entitled to a presumption, and instead, must prove irreparable harm to obtain an injunction.

While eBay was in the patent context, after that decision, most courts began applying eBay to trademark cases as well. However, the COVID relief bill passed in late December of 2020 contained the Trademark Modernization Act (the "TMA") which explicitly revived the presumption of irreparable harm by amending Section 34(a) of the Lanham Act, 15 U.S.C. § 1116(a), with the addition of the following language:

A plaintiff seeking any such injunction shall be entitled to a rebuttable presumption of irreparable harm upon a finding of a violation identified in this subsection in the case of a motion for a permanent injunction or upon a finding of likelihood of success on the merits for a violation identified in this subsection in the case of a motion for a preliminary injunction or temporary restraining order.

While the newly-reinstated presumption is rebuttable, the TMA has made it *easier* for a plaintiff in the trademark infringement case to get a preliminary injunction, it is not completely fatal to defendants, as the plaintiff will still have to prove *all* factors for obtaining an injunction.

If you have any questions related to trademarks, Intellectual Property, or any other legal issues, Marks & Klein, LLP is here to help. Please contact us by phone at **732.747.7100** or by email info@marksklein.com if we can assist in any way.

Brent “Giles” Davis counsels and represents clients on intellectual property, complex commercial litigation, and entertainment matters. As trial counsel, he has obtained favorable verdicts for his clients in jury and bench trials in both state and federal courts and settlements in a wide variety of trademark, copyright, and trade secrets cases. Giles can be reached at brent@marksklein.com

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