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The Presumption of Irreparable Harm After the Trademark Modernization Act of 2020: Have All Issues Been Resolved?

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"On December 27, 2020, the Trademark Modernization Act of 2020 (TMA) became law after Congress and the President passed and signed it, respectively, as part of the year-end Consolidated Appropriations Act for 2021. An important component of that legislation was the codification in Section 34(a) of the Lanham Act of the long-standing common-law principle that a trademark owner seeking injunctive relief in actions for trademark infringement and unfair competition under Sections 32 and 43 of the Lanham Act is entitled to a rebuttable presumption of irreparable harm. The presumption arises upon the movant demonstrating liability at the proof stage, or a showing of a likelihood of liability in the context of motions for expedited relief seeking a temporary restraining order or a preliminary injunction.

The prevailing wisdom in enacting legislation confirming the existence of the presumption of irreparable harm in cases of trademark infringement and unfair competition is that it would eliminate the forum shopping in which many litigants engaged for many years after a number of courts called the existence of the presumption into question following two decisions by the U.S. Supreme Court. However, even with the TMA's confirmation of the presumption's existence, the probability that litigants will continue forum shopping remains high. Since the enactment of the TMA, courts have struggled with the weight to be given to the presumption and the evidence necessary to rebut that presumption. And in cases in which the presumption is deemed rebutted, courts have further struggled with the weight properly accorded evidence of actual harm proffered by trademark owners to establish the irreparable harm element of the preliminary injunction analysis.

This article reviews the history of the presumption of irreparable harm. It then discusses whether the presumption shifts the burden of proof or burden of production, the amount of evidence that triggers the presumption, the weight that courts give the presumption, the evidence introduced by defendants to rebut the presumption, other factors affecting the irreparable harm analysis, courts' awareness of the TMA, and the presumption's effect on the balance-of-harms element of the preliminary injunction analysis."

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