

NOTES

PRESS PLAY TO PRESUME: THE POLICY BENEFITS BEHIND THE TRADEMARK MODERNIZATION ACT'S RESURRECTION OF THE IRREPARABLE HARM PRESUMPTION IN FALSE ADVERTISING CASES

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INTRODUCTION

Advertisements are prevalent everywhere today, and consumers often do not even realize it. Advertising industry experts estimate that most Americans see a staggering 4,000 to 10,000 advertisements every day through various forms of media.¹ In the iconic film *E.T. the Extra-Terrestrial*, the main character lures the loveable alien over with Reese's Pieces candy.² The decision to use Reese's Pieces was a form of deliberate advertising—and a very successful one—as Reese's Pieces sales increased by 65 percent within two weeks of the film's release.³

The sheer amount of product information projected on consumers every day naturally raises concerns about which advertisements are false or deceptive. Serious harm exists in false advertising because it induces consumers to purchase products or services predicated on inaccurate information.⁴ Aside from the obvious economic injury to customers who purchase goods and do not receive the product as advertised, there are far greater risks as well. For example, someone who decides to buy a specific medication based on false information might not get their desired relief or may experience serious side effects that the advertisements deliberately hid from them. Fortunately, federal false advertising law steps in to save the day. False advertising law seeks not only to protect businesses, but also to assemble a shield to defend consumers.⁵ Under the Lanham Act, a plaintiff can bring a cause of action against companies that promote either deceptive or confusing advertisements, or advertisements

1. Jon Simpson, *Finding Brand Success in the Digital World*, FORBES (Aug. 25, 2017, 8:00 AM), <https://www.forbes.com/sites/forbesagencycouncil/2017/08/25/finding-brand-success-in-the-digital-world/?sh=1370a19f626e> [<https://perma.cc/GF3J-URNY>].

2. *10 Iconic Product Placement Examples in Films*, ORCHARD (Mar. 29, 2022), <https://www.orchard.co.uk/blog/10-iconic-product-placement-examples-in-films-23902.aspx> [<https://perma.cc/6K6A-VAU7>].

3. *Id.*

4. See Max Dillan, Note, *Keeping the Status Quo: Why Continuing to Recognize the Presumption of Irreparable Harm in False Comparative Advertising Protects the Market*, 20 FORDHAM J. CORP. & FIN. L. 933, 940-42 (2015).

5. See *id.* at 939-40 (“[T]he [Lanham Act] seeks to protect the commercial interests of a company targeted by a false advertisement ... [and] to protect against consumer deception.”).

that misrepresent the qualities of the plaintiff's or the defendant's products or services.⁶

Injunctions remain highly effective tools at a plaintiff's disposal in a Lanham Act lawsuit. Injunctions are court orders that prevent a party from continuing an action.⁷ For example, a court granted Ty, Inc., the producer of the (formerly) popular Beanie Babies stuffed animals, an injunction against a company that was producing knock-off Beanie Babies to stop all sales of the infringing products.⁸ Courts grant permanent injunctions after a final judgment on the merits, and typically issue preliminary injunctions before a trial, making them temporary.⁹ In the context of false advertising litigation, a plaintiff seeks an injunction to stop the defendant from continuing to engage in the alleged false advertising.¹⁰ In deciding whether to grant or deny an injunction, an essential factor in a court's analysis is whether the plaintiff will suffer irreparable harm in the absence of the injunction.¹¹ Plainly put, the court will grant an injunction if, without one, the injured party will continue to suffer harm and no other remedy can cure the injury.¹²

Recently, controversy erupted over the appropriate standard courts should use to determine irreparable harm in an injunction analysis. This debate ignited in 2006 as a result of the Supreme Court's ruling in *eBay v. MercExchange*.¹³ In that case, the Court struck down the presumption of irreparable harm when evaluating

6. 15 U.S.C. § 1125(a)(1).

7. *Injunction*, BLACK'S LAW DICTIONARY (11th ed. 2019).

8. *See Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1169 (7th Cir. 1997).

9. *Permanent Injunction, Preliminary Injunction*, BLACK'S LAW DICTIONARY (11th ed. 2019).

10. Dillan, *supra* note 4, at 933 (explaining that in situations where a plaintiff seeks an injunction, "before the underlying false advertisement claim is ever argued, a plaintiff will first seek to preliminarily enjoin the defendant from broadcasting the advertisement"); *see* Robert S. Thompson, *False Advertising and Unfair Competition: Claims for Injunctive Relief Under the Lanham Act*, 53 No.2 FOR DEF., 52, 76 (Feb. 2011) ("Often, these types of [false advertising] cases are determined on the merits at the preliminary injunctions stage.").

11. *See* Beatrice C. Franklin, *Irreparability, I Presume? On Assuming Irreparable Harm for Constitutional Violations in Preliminary Injunctions*, 45 COLUM. HUM. RTS. L. REV. 623, 629 (2014).

12. *See id.*; Shane K. Blank, *Preliminary Versus Permanent Injunctions: A Focused Look at the Distinctions Between Them*, 72 J. MO. B. 254, 255 (2016) ("The elements ... for permanent injunction include: (1) irreparable harm, and (2) lack of an adequate remedy at law." (quotations omitted)).

13. 547 U.S. 388, 390-94 (2006).

whether a permanent injunction was an appropriate remedy during a patent infringement trial, holding that the presumption does not exist just because a party achieves success on the merits.¹⁴ The *eBay* Court declared that lower courts should grant injunctions only if traditional equitable principles are satisfied, and the plaintiff shows that they would suffer irreparable harm without the injunction.¹⁵ Essentially, a plaintiff may no longer rely on a presumption of irreparable harm and must affirmatively prove that such harm exists.¹⁶

Two years later, more fuel was dumped on the fire. In *Winter v. Natural Resources Defense Council, Inc.*, a case involving the Navy's use of a sonar device off the coast of California, the Supreme Court held that there is no presumption of irreparable harm without a showing of *likely* harm, not just a possibility of harm.¹⁷ The Court emphasized that preliminary injunctions are an "extraordinary remedy," and therefore the standard for showing irreparable harm must reflect this principle through a clear showing of likely harm.¹⁸ In the years after *eBay* and *Winter*, uncertainty ensued in the federal court system as to whether these two rulings applied across the board to all cases considering injunctions.¹⁹

This confusion seemed to be at least somewhat resolved in late 2020, when Congress amended the Lanham Act through the passage of the Trademark Modernization Act (TMA).²⁰ The TMA resurrected the rebuttable presumption of irreparable harm for Lanham Act claims seeking both permanent and preliminary injunctions.²¹

14. *Id.*

15. *Id.*

16. *See id.*

17. 555 U.S. 7, 22 (2008).

18. *Id.*

19. *Compare* Ferring Pharms., Inc. v. Watson Pharms., Inc., 765 F.3d 205, 206 (3d Cir. 2014) (holding a party bringing a claim under the Lanham Act is not entitled to the presumption of irreparable harm), *and* AFL Telecomm., LLC v. SurplusEZ.com, Inc., No. CV 11-1086-PHX-DGC, 2011 WL 5547855, at *1, *3 (D. Ariz. Nov. 15, 2011) (failing to find error in a trial court decision that required a showing of likely harm to grant an injunction), *with* Irwin Indus. Tool Co. v. Worthington Cylinders Wis., LLC, 747 F. Supp. 2d 568, 581-82, 584 (W.D.N.C. 2010) (presuming irreparable harm in a false advertising case).

20. *See* 15 U.S.C. § 1116(a).

21. *Id.* The Lanham Act's subject matter covers only trademark and false advertising, meaning that the TMA's passage does not affect other cases involving injunctions, such as patent or copyright. *See id.*

Although the amendment appears to have quelled the confusion in the realm of trademark and false advertising cases, some federal courts have continued to apply *eBay* and *Winter* to their rulings on injunctions in Lanham Act cases.²²

Beyond these inconsistent rulings, a critical question is whether the resurrection of the irreparable harm presumption is a beneficial policy choice. Congress certainly believed that the presumption was favorable when they amended the Lanham Act to strike back against the Supreme Court's rulings against the presumption.²³ However, this Note demonstrates that this issue is not so clear-cut by analyzing the policy effects that the irreparable harm presumption has from legal, practical, and consumer perspectives. Part I of this Note provides background information on the history and principles surrounding injunctions generally, the Supreme Court's rulings in *eBay* and *Winter*, federal courts' rulings after these decisions, and the Trademark Modernization Act of 2020. Part II presents anti-presumption advocates' arguments against the presumption due to longstanding equitable concerns and because, in their view, requiring a showing of irreparable harm is not too difficult. Lastly, Part III discusses why the irreparable harm presumption in the TMA serves as beneficial policy by presenting counterarguments to anti-presumption reasoning and additional benefits of the presumption.

I. INJUNCTION, INJUNCTION: WHAT'S YOUR FUNCTION?

A. A Brief History of Injunctions

Like many of the foundational principles of the American legal system, injunctions originated in medieval England, specifically in

22. See *Dynatemp Int'l, Inc. v. R421A, LLC*, No. 5:20-CV-142-FL, 2021 WL 3284799, at *1, *10-11 (E.D.N.C. July 30, 2021) (applying *Winter* and saying that “[a] party seeking a preliminary injunction must make a ‘clear showing’ of irreparable harm”); *Sec. USA Servs., LLC v. Invariant Corp.*, No. 1:20-cv-01100 KWR-KRS, 2021 WL 2936612, at *1, *5 (D.N.M. July 13, 2021) (rejecting the idea that the plaintiff can simply presume irreparable harm in a Lanham Act claim).

23. H.R. REP. NO. 116-645, at 19 (2020) [hereinafter House Report] (“To rectify this circuit split and resulting confusion, H.R. 6196 confirms that the historical practice of applying a rebuttable presumption of irreparable harm is the appropriate course for claims under the Lanham Act.”).

the Court of Chancery.²⁴ A chancery court is a court of equity, which means that it is a judiciary that does not award damages (unlike a court of law), but rather grants injunction orders commanding a party to cease or perform some specific conduct.²⁵ Notably, injunctions are not an option for parties that can achieve full relief through awarded damages; instead, they are issued only when a party does not have “an adequate remedy in a court of law.”²⁶ Because of this restriction, preliminary injunctions are an “extraordinary remedy” that courts do not issue lightly.²⁷ Unlike monetary damages, where a court orders a party to pay another party, injunctions govern a party’s conduct with the “backing of [the court’s] full coercive powers,” therefore making them a more extreme measure than ordering monetary damages.²⁸ This significant principle continues to exist in American jurisprudence today.²⁹

During the nineteenth century, courts adopted a uniform standard to solve the problem of when exactly to issue a preliminary injunction.³⁰ Over time, the general four-prong test that we know today emerged as the universal standard. Namely, for a preliminary injunction to be issued, the plaintiff must satisfy four factors: (1) the

24. Franklin, *supra* note 11, at 626.

25. *See id.* *See generally* Hon. Marcia S. Krieger, “*The Bankruptcy Court is a Court of Equity*”: *What Does That Mean?*, 50 S.C. L. REV. 275, 280 (1999) (describing how American federal courts do not operate in the same way English courts of equity do: “[i]n the federal system ... [the] adoption of the Federal Rules of Civil Procedure [in 1938 state that] equitable and legal claims [are] merged into a single civil action, subject to a single set of procedural rules”).

26. Franklin, *supra* note 11, at 626 (quoting Anthony DiSarro, *Freeze Frame: The Supreme Court’s Reaffirmation of the Substantive Principles of Preliminary Injunctions*, 47 GONZ. L. REV. 51, 56 (2011)); Rachel A. Weisshaar, *Hazy Shades of Winter: Resolving the Circuit Split Over Preliminary Injunctions*, 65 VAND. L. REV. 1011, 1019 (2012).

27. Franklin, *supra* note 11, at 624; *see* Bethany Bates, *Reconciliation After Winter: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM. L. REV. 1522, 1526 (2011); Weisshaar, *supra* note 26, at 1021-22 (“[A]n injunction is an ‘extraordinary’ remedy ... [t]his notion is derived from equity’s origins.”); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 24 (2008).

28. *Nken v. Holder*, 556 U.S. 418, 428 (2009).

29. *See* Franklin, *supra* note 11, at 628; Kirti Gupta & Jay P. Kesan, *Studying the Impact of eBay on Injunctive Relief in Patent Cases* 12 (U. of Ill. Coll. of L., Rsch. Paper No. 17-03), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2816701 [<https://perma.cc/S7J3-82SG>] (detailing a study conducted between 2006 to 2012, which shows that out of 908 preliminary and permanent injunctions sought in patent cases, only 290 were granted, highlighting that courts grant injunctions roughly 31.9 percent of the time).

30. Franklin, *supra* note 11, at 627; Bates, *supra* note 27, at 1526.

plaintiff will likely suffer irreparable harm in the absence of the injunction; (2) there is a likelihood of success on the merits; (3) the balance of equities tips in the plaintiff's favor; and (4) the injunction is in the public interest.³¹ One important goal of granting a preliminary injunction is to preserve the status quo of the parties as it was immediately prior to the defendant's alleged bad conduct.³² The test is similar for permanent injunctions, except the plaintiff does not need to show a likelihood of success on the merits, because permanent injunctions are awarded after a judgment in the plaintiff's favor.³³

This Note focuses on the irreparable harm factor of the injunction analysis, in part because it remains the most controversial, but also because it often represents the critical threshold that plaintiffs must cross to obtain an injunction.³⁴ Allowing or disallowing a presumption of irreparable harm has a multitude of impacts on not only the litigating parties, but also on the public at large.

B. The eBay and Winter Decisions and Subsequent Court Rulings

Before the Supreme Court's 2006 ruling in *eBay*, courts considering intellectual property and false advertising permanent injunction motions generally presumed the plaintiff satisfied the irreparable harm prong upon success on the merits at trial, even without the plaintiff showing specific proof of harm.³⁵ In addition,

31. See *Winter*, 555 U.S. at 20; *Bates*, *supra* note 27, at 1522-23; *Franklin*, *supra* note 11, at 628.

32. See *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held."); *Asa v. Pictometry Int'l Corp.*, 757 F. Supp. 2d 238, 243 (W.D.N.Y. 2010) ("[T]he court's task when granting a preliminary injunction is generally to restore, and preserve, the status quo ante, *i.e.*, the situation that existed between the parties immediately prior to the events that precipitated the dispute."); *Gates v. Detroit & Mackinac Ry. Co.*, 115 N.W. 420, 421 (1908) ("The object of preliminary injunctions is to preserve the status quo, so that upon the final hearing the rights of the parties may be determined without injury to either.").

33. See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390-91 (2006).

34. See Brief for Int'l Trademark Ass'n as Amici Curiae Supporting Appellant at 3-4, *Ferring Pharms., Inc. v. Watson Pharms., Inc.*, 765 F.3d 205 (3d Cir. 2014) (No. 13-2290) [hereinafter *Amici Curiae Supporting Ferring*] (explaining that the irreparable harm prong requires a greater burden of proof).

35. Ronald T. Coleman, Jr., Trishanda L. Treadwell & Elizabeth A. Loyd, *Applicability of the Presumption of Irreparable Harm After eBay*, 32 *FRANCHISE L.J.* 3, 3 (2012); *e.g.*,

courts typically also presumed irreparable harm for preliminary injunctions upon a showing of a likelihood of success on the merits.³⁶ This came to a screeching halt after the landmark ruling in *eBay v. MercExchange*. In that case, technology development and online auction company MercExchange held many patents, and alleged that eBay had infringed one by operating their popular online marketplace business.³⁷ At trial, the jury agreed, finding that eBay had infringed one of MercExchange's patents and awarded damages.³⁸ However, the district court denied MercExchange's motion for a permanent injunction to stop eBay from continuing to use their patented technology.³⁹ The court of appeals reversed this decision and granted the permanent injunction, presuming irreparable harm based on the jury's finding of infringement.⁴⁰

On appeal, the United States Supreme Court subsequently reversed the court of appeals ruling, holding that there is no presumption of irreparable harm even when the plaintiff's case succeeds on the merits; the plaintiff must still show that this harm exists.⁴¹ Although MercExchange had proved patent infringement, the Court concluded that because MercExchange did not actively practice their patent in the marketplace, irreparable harm could not be presumed based on the infringement alone, and the infringement could not be used to justify an injunction.⁴² Instead, the Court reiterated that the irreparable harm factor in the injunction test must still be shown and that "a major departure from the long tradition of equity practice should not be lightly implied."⁴³

While *eBay* struck down the irreparable harm presumption for permanent injunctions, two years later, *Winter* affirmed that for courts to grant a preliminary injunction, there also must be a

McNeilab, Inc. v. Am. Home Prods. Corp., 848 F.2d 34, 38 (2d Cir. 1988) ("[T]he district court did not err in presuming harm from a finding of false or misleading advertising.").

36. *E.g.*, Calvin Klein Cosms. Corp. v. Lenox Lab'ys, Inc., 815 F.2d 500, 505 (8th Cir. 1987) ("The court correctly noted that it could presume irreparable injury from a finding of probable success in proving likelihood of confusion.").

37. *eBay*, 547 U.S. at 390.

38. *Id.* at 391.

39. *Id.*

40. *Id.*

41. *Id.* at 393-94.

42. *Id.* at 393.

43. *Id.* at 391 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982)).

showing of likely irreparable harm, and courts cannot presume such harm.⁴⁴ In *Winter*, the Natural Resources Defense Council sued the United States Navy over the Navy's training of a sonar device off the coast of California.⁴⁵ The plaintiffs alleged that the device posed serious danger to marine wildlife and habitats, and they sought a preliminary injunction to stop the use of the device.⁴⁶ Although the plaintiffs presented no evidence that wildlife had been harmed, the court of appeals upheld the preliminary injunction.⁴⁷ The appellate court reasoned that when the plaintiff can make a showing of a strong likelihood of success on the merits, a preliminary injunction may be granted based off of the mere possibility of irreparable harm alone.⁴⁸

After granting certiorari, the Supreme Court reiterated that the traditional test for preliminary injunctions must be met in order to grant such equitable relief.⁴⁹ But the Court further held that the plaintiff fails to meet the irreparable harm factor by only showing a possibility of harm.⁵⁰ Instead, the plaintiff must demonstrate that there is *likely* irreparable harm.⁵¹ In doing so, the Court emphasized that a possibility standard is "too lenient."⁵² Thus, *eBay* and *Winter* built directly off of each other and created a new standard for granting preliminary injunctions: the movant can no longer merely rely on a presumption of irreparable harm.⁵³ In addition, there must be a showing of *likely* harm, not just a possibility of harm.⁵⁴

Following these two milestone cases, a dispute emerged regarding whether the rulings on the irreparable harm presumption applied across the board to all types of lawsuits in which a plaintiff sought an injunction, including in false advertising cases, or solely in

44. See *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

45. *Id.* at 15-17.

46. *Id.* at 12.

47. *Id.*

48. *Id.* at 21.

49. *Id.* at 20.

50. *Id.* at 22.

51. *Id.*

52. *Id.*

53. See *id.* While this Note shows that this rule does not apply to Lanham Act lawsuits anymore, the rule still applies to patent and possibly other intellectual property lawsuits. See *Coleman et al.*, *supra* note 35, at 4-5.

54. *Winter*, 555 U.S. at 22.

patent infringement cases.⁵⁵ Some federal courts applied these rulings to false advertising cases, while others did not.⁵⁶

For example, in *AFL Telecomm. v. SurplusEZ.com, Inc.*, a district court denied a preliminary injunction in a false advertising lawsuit because the plaintiff did not allege sufficient facts to demonstrate irreparable harm.⁵⁷ The court explained that *eBay* and *Winter* “suggest[] a lack of favor with *any* presumption of irreparable harm when issuing preliminary or permanent injunctions.”⁵⁸ Additionally, the court noted that *eBay*’s repudiation of the presumption of irreparable harm extends beyond just patent cases.⁵⁹

The Third Circuit followed suit in *Ferring Pharms., Inc. v. Watson Pharms., Inc.* and held that a plaintiff is not entitled to a presumption of irreparable harm when seeking a preliminary injunction pursuant to a Lanham Act false advertising claim.⁶⁰ The *Ferring* court reasoned that *eBay*’s ruling applies in contexts other than patent infringement cases, including false advertising litigation.⁶¹ The court based this decision on the Lanham Act’s injunctive relief section, which states that an injunction should be determined by traditional principles of equity, and the presumption of irreparable harm “deviates” from these equitable principles.⁶²

However, not all federal courts followed *eBay* and *Winter*’s holdings. In *Irwin Industrial Tool Co. v. Worthington Cylinders Wisconsin, LLC*, the District Court for the Western District of North Carolina granted a permanent injunction in a false advertising case after the plaintiff showed that the defendant’s “advertisement was

55. Compare *Ferring Pharms., Inc. v. Watson Pharms., Inc.*, 765 F.3d 205, 206 (3d Cir. 2014), and *AFL Telecomm., LLC v. SurplusEZ.com, Inc.*, No. CV 11-1086-PHX-DGC, 2011 WL 5547855, at *1 (D. Ariz. Nov. 15, 2011), with *Irwin Indus. Tool Co. v. Worthington Cylinders Wis., LLC*, 747 F. Supp. 2d 568, 582 (W.D.N.C. 2010).

56. See *Ferring Pharms.*, 765 F.3d at 206; *AFL Telecomm.*, 2011 WL 5547855, at *1 (requiring a showing of likely harm to grant injunction). But see *Irwin Indus. Tool Co.*, 747 F. Supp. 2d at 582 (presuming irreparable harm in a false advertising case).

57. 2011 WL 5547855, at *1.

58. *Id.* at *2.

59. See *id.*

60. 765 F.3d at 216.

61. *Id.* at 214.

62. *Id.* at 214-16 (“The several courts vested with jurisdiction of civil actions arising under this chapter shall have power to grant injunctions, according to the principles of equity and upon such terms as the court may deem reasonable.”) (quoting the Lanham Act, 15 U.S.C. § 1116(a)).

literally false.”⁶³ Although the defendant had ceased using the false advertisements at the time of trial, the court still granted the permanent injunction because of the possibility that the defendant could resume using the false advertisement at any time.⁶⁴ The court stated that, because of the judgment showing the advertisement was literally false, “a presumption arises that [the plaintiff] has suffered irreparable harm.”⁶⁵

These three cases paint a vivid picture of federal courts’ vastly different interpretations as to the applicability of the irreparable harm presumption in false advertising cases. This uncertainty was not meant to last, however, because Congress acted quickly to fix the problem.⁶⁶

C. *The Trademark Modernization Act of 2020*

In December 2020, Congress passed the Trademark Modernization Act (TMA), which amended the Lanham Act.⁶⁷ Perhaps the most impactful part of the TMA is the section regarding false advertising and trademark injunctions, which states that

[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.⁶⁸

63. 747 F. Supp. 2d 568, 582 (W.D.N.C. 2010).

64. *Id.*

65. *Id.*

66. See Patrick M. Bergin, *New Trademark Act Restores Presumption of Irreparable Harm, Helps Clear Dead Wood*, NAT’L. L. REV. (May 2, 2022), <https://www.natlawreview.com/article/new-trademark-act-restores-presumption-irreparable-harm-helps-clear-dead-wood> [https://perma.cc/7UMG-TLPJ] (“The TMA has resolved the split among the courts.”).

67. Kyle R. Kroll, *Trademark Litigators: Congress Reinstated the Presumption of Irreparable Harm in Lanham Act Cases*, A.B.A. (Sept. 15, 2021), <https://www.americanbar.org/groups/litigation/committees/commercial-business/practice/2021/congress-presumption-irreparable-harm-lanham-act-cases/> [https://perma.cc/3AA2-EBUS].

68. 15 U.S.C. § 1116(a) (emphasis added). This section applies to false advertising claims, but also more broadly to any trademark violation too. *See id.*

After a tumultuous on-again, off-again relationship with federal courts following *eBay* and *Winter*, the TMA reinstated the irreparable harm presumption for plaintiffs seeking injunctive relief in false advertising and trademark cases.⁶⁹ To move for a permanent injunction, a plaintiff can now point to a judgment showing that the defendant engaged in false advertising in order to achieve the presumption.⁷⁰ Similarly, to request a preliminary injunction, a plaintiff achieves the presumption by satisfying the likelihood of success on the merits prong.⁷¹ Importantly, a defendant still retains the ability to rebut the presumption by providing evidence attacking the existence of irreparable injury.⁷²

II. THE CASE FOR ELIMINATING THE PRESUMPTION OF IRREPARABLE HARM

The TMA appears to be a stark rebuke to the Supreme Court's rulings in *eBay* and *Winter*. But now that the irreparable harm presumption rule has dramatically changed in the false advertising context, questions have arisen about who this change benefits and whether it is logical from both a legal and policy perspective. This Part details arguments supporting the elimination of the irreparable harm presumption in false advertising claims and why the TMA may be unfavorable policy. While there is certainly merit to this reasoning, the case for eliminating the presumption of irreparable harm ultimately remains too vulnerable to pro-presumption arguments that are presented in Part III of this Note.⁷³

69. See Kroll, *supra* note 67. Because the Lanham Act only governs trademark and false advertising, *eBay* and *Winter* still remain precedent for patent cases and other possible subject matter. See *id.*

70. See 15 U.S.C. § 1116(a).

71. *Id.*

72. See *id.*

73. See *infra* Part III.

A. *The Presumption Violates Traditional Principles of Equity*

1. *Injunctions Are an Extraordinary Remedy*

From the medieval English Court of Chancery to modern Supreme Court jurisprudence, injunctions have been characterized as an “extraordinary remedy.”⁷⁴ In this way, injunctions are an option of last resort: courts will only grant them if monetary damages cannot adequately provide full relief for the injury.⁷⁵ Some scholars argue that there are several considerations justifying this characterization, specifically for preliminary injunctions.

First, preliminary injunctions are, by definition, granted before a full trial or final judgment can take place.⁷⁶ The court acts without witness testimony at trial, and essentially relies on motions and affidavits alone to inform its decision.⁷⁷ Courts, therefore, grant preliminary injunctions without the full record of facts and arguments that are presented at trial.⁷⁸ This can have serious implications for a defendant who is ordered by a preliminary injunction to cease running an allegedly false advertisement.⁷⁹ For example, if a defendant is ordered to stop a nationwide advertisement for a heart disease medication and then months later a jury trial concludes that their advertisement was not—and was not ever—false, the defendant would suffer months of potential lost revenue.

Second, anti-presumption scholars point to arguments that injunctions should be treated as an extraordinary remedy because of the public consequences that can follow their issuance.⁸⁰ Typically, monetary damages directly affect only the defendants themselves,

74. See Weisshaar, *supra* note 26, at 1021.

75. See Franklin, *supra* note 11, at 626.

76. See Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 728 (1990).

77. See *id.* (“The reasons a court may be cautious in awarding preliminary relief are clear. The court must act without a full trial, sometimes with only sketchy motion papers and affidavits to guide its decision.”).

78. *Id.*

79. *Id.*

80. See Kathleen K. Olson, *Injunctions and the Public Interest in Fair Use Cases After eBay*, 17 COMM. L. & POL’Y 235, 250-51 (2012); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (“In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in [issuing an] injunction.”) (citing *R.R. Comm’n v. Pullman Co.*, 312 U.S. 496, 500 (1941)).

because only the party being sued in court must pay the plaintiff.⁸¹ Conversely, preliminary injunctions in false advertising cases discontinue advertising campaigns that presumptively reach a plethora of consumers.⁸² In the above heart disease medication example, for instance, a preliminary injunction would affect heart disease patients who could not see the advertisement and then could possibly be deprived of buying a legitimate product to help their condition.

Granted, the public interest is just one prong of the four-part injunction test; however, the Supreme Court has maintained that “the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff.”⁸³ For anti-presumption advocates, this ruling demonstrates that the judiciary is reluctant to grant injunctions even if it may be to the detriment of plaintiffs.⁸⁴ In fact, this reluctance was partly why the Court in *Winter* deemed it necessary to assert that the standard for showing irreparable harm is based on likely injury in the absence of an injunction, rather than on a possibility of injury.⁸⁵ In *Winter*, the Court reiterated that preliminary injunctions are an extraordinary measure and, as a result, the lower court failed to adequately consider the public’s interest in preserving the Navy’s activities.⁸⁶

Additionally, anti-presumption activists emphasize that *eBay* and *Winter*’s impact on litigation is apparent. In 2017 and 2018, requests for preliminary injunctions in patent infringement cases endured less success than in the past.⁸⁷ Attorneys believe this is

81. Will Kenton, *What Are Civil Damages? Definition, Types, and Example Scenarios*, INVESTOPEDIA (Aug. 27, 2021), <https://www.investopedia.com/terms/c/civil-damages.asp> [<https://perma.cc/9S7B-7XYU>] (“Civil damages are owed to a winning plaintiff by the losing defendant in a civil case tried in a court of law.”).

82. Malla Pollack, *Suing for False Advertising Under Federal Lanham Act*, 111 AM. JUR. TRIALS 303, § 23 (2009) (“In false advertising cases, the standard remedy is an injunction limiting the future advertising of the offending party.”).

83. See *Weinberger*, 456 U.S. at 312-13; *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008); *Bates*, *supra* note 27, at 1522-23; *Franklin*, *supra* note 11, at 628.

84. See *Weinberger*, 456 U.S. at 312-13.

85. See *Winter*, 555 U.S. at 22.

86. *Id.* at 24.

87. Ryan Davis, *Patent Injunctions Drop Sharply in 2018*, LAW360 (Jan. 31, 2019, 10:03 PM), <https://www.law360.com/articles/1121976/patent-injunctions-drop-sharply-in-2018> [<https://perma.cc/8HPC-VAEJ>] (showing data that only nine preliminary injunctions were granted in 2017 while forty-one were denied. Meanwhile, in 2016, twenty-one were granted

because “patent owners face an uphill climb with such motions, since they are required to show *both* that they are suffering harm and that they are likely to prove infringement.”⁸⁸ Therefore, anti-presumption proponents point to this trend as demonstrating that the required showing of irreparable harm has had its intended effect of keeping injunctions an extraordinary remedy.⁸⁹

2. *No Shortcuts in the Four-Part Test*

Anti-presumption advocates maintain that courts should never deviate from the four-prong test. In *eBay* and *Winter*, the Supreme Court reiterated the four-prong test for both preliminary and permanent injunctions.⁹⁰ These are not balancing tests, and courts held long before *eBay* and *Winter* that “satisfying one requirement does not necessarily affect the analysis of the other requirements.”⁹¹

These scholars argue that presuming irreparable harm simply by satisfying one of the other distinct prongs of the analysis directly clashes with requiring a four-factor equitable test.⁹² In other words, these theorists believe that an irreparable harm presumption essentially allows plaintiffs to take a shortcut in the injunction analysis.⁹³ Showing irreparable harm is one thing, and showing a likelihood of success on the merits, or proving that no adequate remedy at law exists, is another—they are separate factors that each require their own analysis.⁹⁴ Lumping them together undermines traditional

and twenty-two were denied. This puts the success rate for a preliminary injunction at 18 percent in 2017 and roughly 50 percent in 2016).

88. *Id.* (emphasis added).

89. William Atkins & Richard Kirkpatrick, *New TM Act's Irreparable Harm Presumption Is Not a Panacea*, LAW360 (Mar. 4, 2021, 2:55 PM), <https://www.law360.com/articles/1360651/new-tm-act-s-irreparable-harm-presumption-is-not-a-panacea> [<https://perma.cc/P5MH-ZFH4>].

90. See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *Winter*, 555 U.S. at 32.

91. *Defense Distributed v. U.S. Dep't of State*, 838 F.3d 451, 457 (5th Cir. 2016).

92. *Id.* (“Such a presumption of the balance of harm factor would not comport with the discretionary and equitable nature of the preliminary injunction in general and of the balance of harm factor in particular.”) (citing *Southern Monorail Co. v. Robbins & Myers, Inc.*, 666 F.2d 185 (5th Cir. 1982)).

93. See *id.*

94. See Pamela Samuelson & Krzysztof Bebenek, *Why Plaintiffs Should Have to Prove Irreparable Harm in Copyright Preliminary Injunction Cases*, 6 I/S: J.L. & POL'Y FOR INFO. SOC'Y 67, 74 (2010) (noting that there is “no intrinsic link between a plaintiff’s likelihood of success on the merits and the need for the plaintiff to show irreparable harm”).

notions of equity and the principle that injunctions are an extraordinary remedy.⁹⁵

Further, anti-presumption advocates emphasize that equity is unique in the legal world and can be viewed as “moderat[ing] the rigid and uniform application of law by incorporating standards of fairness and morality into the judicial process.”⁹⁶ Its purpose encompasses practicality and offers “relief from hardship.”⁹⁷ Viewed against this backdrop, presuming irreparable harm without a showing of such harm appears incompatible with the notion of curing a hardship. How can you treat an injury that never existed? The *eBay* case displayed this principle when the defendant infringed the plaintiff’s patents, but because the plaintiff did not license or practice the patents at issue, the plaintiff did not actually suffer any irreparable harm.⁹⁸

Given the foregoing, anti-presumption activists believe that requiring a showing of irreparable harm is consistent with “courts hav[ing] long recognized the distinction between right and remedy, and that invasion of a right does not give rise to a right to injunctive relief.”⁹⁹ In their view, the irreparable harm presumption bypasses the four-factor test by providing a shortcut for plaintiffs to prove only a likelihood of success on the merits (or just rely on the defendant’s liability) for permanent injunctions.¹⁰⁰ It is therefore inconsistent with longstanding traditional principles of equity.¹⁰¹ However, a closer look reveals that the presumption does not ignore traditional equity principles and specifically allows for a rebuttal by the defendant, which greatly weakens the shortcut theory.¹⁰²

95. *See id.*

96. Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 430 (2003).

97. *Id.*

98. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 393 (2006). It is important to note that the Court did not say that a plaintiff who does not license or practice their patents can never make a showing of irreparable harm—only that in this case, the district court found that the plaintiff did not make such a showing. *See id.*

99. Rachel M. Janutis, *The Supreme Court’s Unremarkable Decision in eBay Inc. v. MercExchange, L.L.C.*, 14 LEWIS & CLARK L. REV. 597, 619 (2010).

100. *See Samuelson & Bebenek, supra note 94, at 72.*

101. *See id.* at 74 (“Plaintiffs cannot meet their evidentiary burdens on both factors by proving only [likelihood of success on the merits].”).

102. *See infra* notes 128-46 and accompanying text. The rebuttal means that plaintiffs do not automatically satisfy the irreparable harm prong even with the presumption. *See id.*

B. *The Claim that Showing Irreparable Harm is Not Too Hard*

1. *Types of Harms that Can Arise in False Advertising Cases*

In addition to arguments from a legal perspective, anti-presumption proponents offer a practical case that showing irreparable harm is not too difficult. Under the Lanham Act, a plaintiff can sue an advertiser for any “false or misleading description of fact, or false or misleading representation of fact, which ... misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities.”¹⁰³ Typically, plaintiffs are the defendants’ direct competitors, and will argue that because of the defendants’ false advertisements, consumers are likely to or have chosen the defendants’ products or services over the plaintiffs’.¹⁰⁴ Under the Lanham Act, a plaintiff can also assert that the alleged false advertisements do not necessarily target them directly, but still give the defendant an unfair advantage in the market.¹⁰⁵ Particularly, plaintiffs may claim injuries such as the loss of sales or good will.¹⁰⁶ Good will refers to a company’s reputation, and, when claimed as an injury in false advertising contexts, it means that the false advertisement has damaged the plaintiff’s reputation in an unlawful way.¹⁰⁷

While a textbook case might involve a defendant’s advertisement falsely claiming that their product is five times more effective than a competitor’s, other cases show that false advertising injuries exist in less obvious situations as well. For example, in *Incarcerated Entertainment, LLC v. Warner Bros. Pictures*, a company that owned the rights to an individual’s life story sued Warner Brothers based on false marketing and comments made by actors starring in the

103. 15 U.S.C. § 1125(a)(1).

104. See Pollack, *supra* note 82, § 8.

105. See *id.*

106. See *id.* § 10.

107. *Goodwill*, BLACK’S LAW DICTIONARY (11th ed. 2019); see RUDOLF CALLMANN, THE LAW OF UNFAIR COMPETITION AND TRADE-MARKS 24-26 (2d ed. 1950) (“Good will ... connotes more than just good credit, honesty, fair name and reliability.... Good will can no more be separated from a business than reputation from a person.... [It] is the business as it is viewed by others.”); Pollack, *supra* note 82, § 10; *Retractable Tech., Inc. v. Dickinson & Co.*, 919 F.3d 869, 882 (5th Cir. 2019).

movie *War Dogs*.¹⁰⁸ The film, based on Efraim Diveroli's memoir, detailed his life as an arms dealer and his eventual criminal conviction.¹⁰⁹ While the memoir recounted actual facts of Diveroli's life, the film took several artistic liberties and added events that did not occur.¹¹⁰ However, the film's marketing described it as a true story, and cast interviews used in the film's advertisements extolled that the movie was "one of the craziest movies I've ever been in ... [a]nd it's all true."¹¹¹ The plaintiff sued Warner Brothers over the misleading advertisements, alleging that the film diverted book sales from the plaintiff's customers because they were more likely to buy a ticket to the film instead of purchasing the plaintiff's memoir, based on the assumption that the film was a true story.¹¹² The district court agreed that these amounted to valid injuries because of the plaintiff's potential lost sales and a loss of good will.¹¹³ Anti-presumption advocates, therefore, may point to *Incarcerated Entertainment* as an example of the fact that there is plenty of harm to go around in false advertising litigation.

2. How to Make a Showing of Irreparable Harm

As previously shown, false advertising harms can arise in many situations, and according to anti-presumption thinkers, it is not too rigid of a requirement for courts to demand that plaintiffs make a showing of irreparable harm. This theory is best illustrated by the fact that, in false advertising cases, even without the presumption of irreparable harm, the nature of a plaintiff's injury often results in a showing of irreparable harm.¹¹⁴ For instance, in *CJ Products LLC v. Snuggly Plushez LLC*, the plaintiff sold plush pillows in the shape of animals known as "Pillow Pets."¹¹⁵ The defendants distributed similar products, but used marks resembling the registered "Pillow Pets" mark and even purchased software allowing them to redirect potential customers to their own website when customers

108. 261 F. Supp. 3d 1220, 1225-26 (M.D. Fla. 2017).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 1233.

113. *Id.*

114. Coleman et al., *supra* note 35, at 8.

115. 809 F. Supp. 2d 127, 139 (E.D.N.Y. 2011).

searched for “Pillow Pets.”¹¹⁶ The court granted a preliminary injunction on behalf of the plaintiff based on the showing that the defendants’ product sales “would certainly impact the sale of another party’s product.”¹¹⁷ In addition, the court found that “[p]rospective loss of this good will alone is sufficient to support a finding of irreparable harm.”¹¹⁸ Thus, while the court did not presume irreparable harm, the plaintiffs satisfied this prong of the analysis simply by pointing to the defendants’ sales.¹¹⁹

A similar outcome of a case involving a request for a permanent injunction occurred in *Fresh Del Monte Produce Inc. v. Del Monte Foods Co.*¹²⁰ The court applied *eBay* to the case and explained that even without the irreparable harm presumption, “[i]n most cases, after a full trial finding false advertisements, a final injunction is appropriate.”¹²¹ Although the jury concluded that the plaintiff had zero dollars in lost sales due to the false advertising, the plaintiff still demonstrated irreparable harm because the parties were competitors and the defendants’ profits represented “a rough measure of the plaintiff’s damages.”¹²² Both of these cases support the argument that the irreparable harm requirement is often easy to satisfy, with or without the presumption.

This conclusion is further bolstered by the fact that consumer surveys are an effective way to demonstrate irreparable harm.¹²³ These surveys show the likelihood of deception resulting from false advertisements and serve as evidence proving the irreparable harm that follows from such deception.¹²⁴ Surveys demonstrate harm by capturing consumers’ reactions to the false advertisement at issue by asking them how they feel about the plaintiff’s product after

116. *Id.* at 139-40.

117. *Id.* at 149.

118. *Id.* (quoting *New York City Triathlon, LLC v. NYC Triathlon Club, Inc.*, 704 F. Supp. 2d 305, 343 (S.D.N.Y. 2010)).

119. *See id.*; *Coleman et al.*, *supra* note 35, at 8.

120. *See* 933 F. Supp. 2d 655, 658 (S.D.N.Y. 2013).

121. *Id.* at 660 (quoting 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS § 27:37 (4th ed. 2012) (alteration in original)).

122. *Id.* at 664 (quoting MCCARTHY, *supra* note 121, § 30:59).

123. *See* Christopher A. Cole & Jason M. Crawford, *Not as Easy as Advertised: New Challenges in Bringing a Successful § 43(a) False Advertising Case*, ANTITRUST SOURCE, 8 (Aug. 2013), https://www.americanbar.org/content/dam/aba/publishing/antitrust-magazine-online/aug13_full_source.pdf [<https://perma.cc/96KX-MMF4>].

124. *See id.* at 7.

seeing the defendant's advertisement.¹²⁵ For example, if a defendant's advertisement falsely claimed that their migraine medication worked faster than the plaintiff's Excedrin product, and consumers answered in a survey that after viewing the advertisement they are more likely to buy the defendant's product instead of Excedrin, then this would provide reliable evidence to show a potential loss of sales for the plaintiff.

In sum, anti-presumption advocates present a case centered around tradition and the purported feasibility of showing irreparable harm.¹²⁶ But their arguments are far from bulletproof and fail to see the bigger picture benefits of the presumption, as discussed in the following Part of this Note.

III. WHY THE REINSTITUTION OF THE IRREPARABLE HARM PRESUMPTION IS ULTIMATELY BENEFICIAL POLICY

As detailed in the previous Part, the arguments against the irreparable harm presumption stem from a desire not to violate traditional principles of equity and from a practical standpoint positing that false advertising harms can readily be shown, and thus that a presumption of harm is unnecessary.¹²⁷ However, while this reasoning certainly has legitimacy, this Part advances arguments in favor of the presumption of irreparable harm and concludes that allowing the presumption is better policy than prohibiting it, at least in the context of false advertising cases. First, this Part presents counterarguments to anti-presumption advocates' main talking points that the presumption violates traditional principles of equity and that making a showing of irreparable harm is not difficult. It then addresses additional considerations such as protecting the consumer and the TMA's uniformity benefits.

125. See E. Deborah Jay, *Ten Truths of False Advertising Surveys*, 103 TRADEMARK REP. 1116, 1117-18 (2013).

126. See *supra* Part II.

127. See *supra* Part II.

A. The Irreparable Harm Presumption Conforms with Equitable Principles

While some scholars argue that the irreparable harm presumption does not align with equitable principles, a careful analysis shows that it does in fact conform with these principles.¹²⁸ These anti-presumption scholars are eager to point out that injunctions remain an extraordinary remedy and judges are already cautious when granting them.¹²⁹ Although this notion is not in dispute here, the argument that the presumption specifically violates this principle is ripe for attack. First, anti-presumption advocates contend that because preliminary injunctions occur at the preliminary stage of litigation and before all the evidence at trial is presented, a defendant eventually found non-liable faces tremendous consequences when preliminary injunctions are granted.¹³⁰ And they contend that presuming irreparable harm makes this harm all the more likely.¹³¹ Reality, however, does not reflect this thinking. Looking at over 1,300 false advertising cases, one study showed that the number of cases where a court grants a plaintiff's preliminary injunction but the plaintiff ultimately does not prevail on the merits is low.¹³² When analyzed in the actual courtroom, the data suggests that this concern is overblown because the plaintiff typically will eventually receive a judgment in their favor.¹³³ Put simply, if a court grants the plaintiff a preliminary injunction, the defendant is likely to be found liable for running a false advertisement.¹³⁴

128. See *supra* notes 74-103 and accompanying text (detailing anti-presumption arguments).

129. See *supra* notes 74-87 and accompanying text (outlining the history and arguments supporting injunctions being an extraordinary remedy).

130. See *supra* notes 74-80 and accompanying text (providing the example of an injunction granted for the defendant's heart disease medication advertisement).

131. See *supra* notes 74-80 and accompanying text.

132. Deborah R. Gerhardt, Kevin T. McGuire & Mark P. McKenna, *An Empirical Study of False Advertising Claims Under the Lanham Act* 17-18 n.54 (2013), https://law.duke.edu/sites/default/files/fac/workshop/Gerhardt_paper.pdf [<https://perma.cc/HH4X-3Q8R>]. While this footnote does not provide the exact number of these low cases, it states that "it is possible that a plaintiff whose preliminary injunction motion is granted will ultimately not prevail on the merits. But our follow up research suggests that the number of such cases is small." *Id.*

133. *Id.*

134. See *id.*

Anti-presumption scholars also argue that the public consequences that follow injunctions are another reason why the presumption violates the extraordinary principle.¹³⁵ However, this reasoning is misconceived. Again, the public concern prong of the injunction test remains undisputed, but it is irrelevant to the presumption of irreparable harm debate in the first place. A court presumes irreparable harm based either on a likelihood of success on the merits (in preliminary injunctions) or an actual success on the merits (in permanent injunctions).¹³⁶ The public interest factor has little to no bearing on the irreparable harm factor and involves an entirely different analysis.¹³⁷ Further, while public consequences are certainly an important factor leading to caution when granting injunctions, this argument only looks at one half of the problem. Public consequences also arise when courts are less lenient to grant injunctions, most notably the manipulation of innocent consumers.¹³⁸ Thus, although injunctions remain an extraordinary remedy in the court system, anti-presumption advocates misguidedly bolster this principle when criticizing the presumption of irreparable harm, while ignoring the public consequences on everyday consumers when injunctions are not granted.

Anti-presumption proponents also suggest that the presumption creates a shortcut around the four-factor test.¹³⁹ Thankfully, the TMA is well equipped to handle this criticism. One crucial aspect of the TMA's restoration of the presumption is that a defendant can rebut the presumption, meaning that the irreparable harm factor is not automatically proven by a false advertisement violation or likelihood of success on the merits.¹⁴⁰ The presumption, therefore,

135. See *supra* notes 80-86 and accompanying text.

136. See, e.g., *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

137. See *Samuelson & Bebenek*, *supra* note 94, at 72-73 (“The Court in *eBay* specifically said that plaintiffs ‘must demonstrate’ that they have satisfied *each of the four factors* to qualify for issuance of an injunction.”) (emphasis added); *Weisshaus v. Cuomo*, 512 F. Supp. 3d 379, 390 (E.D.N.Y. 2021) (“[T]he favorable presumption of irreparable harm arises only *after* a plaintiff has shown a likelihood of success on the merits.”) (quoting *Page v. Cuomo*, 478 F. Supp. 3d 355, 364 (N.D.N.Y. 2020)).

138. See *infra* notes 170-83 and accompanying text (detailing in depth how consumers are vulnerable to false advertising and how the presumption of irreparable harm hands them a defensive shield).

139. See *supra* notes 92-95 and accompanying text.

140. See 15 U.S.C. § 1116(a).

can be understood not as a way of dodging satisfaction of the four-factor equitable test, but rather as a burden-shifting device that puts the ball in the defendant's court to demonstrate that irreparable harm does not exist.¹⁴¹ Even with the presumption, plenty of opportunity remains for a defendant to demonstrate that the plaintiff suffered no such irreparable harm, and the plaintiff must still satisfy the other three factors.¹⁴² The presumption, therefore, still ensures that the four-factor test and equitable principles remain intact and not offended.

Another reason why the presumption remains consistent with equitable principles is that equity invites uniformity. In fact, a main reason for the creation of the traditional equitable principles was to have a consistent test for judges to apply.¹⁴³ While equitable rulings generally involve a judge's discretion, establishing a uniform standard reigned in some of this discretionary power to allow more transparency in the judicial system.¹⁴⁴ But uniformly reimposing the irreparable harm presumption still affords judges powerful discretion in considering the injunction test factors.¹⁴⁵ Along with the reasons articulated later in Part III.D, the restoration of the irreparable harm presumption in the TMA also provides the sort of uniformity that helps guide judges' discretionary decision-making and allows for consistent application of the traditional principles of equity.¹⁴⁶

141. See Dillan, *supra* note 4, at 963 (“[T]he presumption is consistent with *Winter* because it is not a speculative burden requirement itself, but rather a burden shifting mechanism based on established norms.”).

142. See Andrew F. Spillane, *The Continuing Vitality of the Presumption of Irreparable Harm in Copyright Cases*, 15 MARQ. INTELL. PROP. L. REV. 257, 287 n.215 (2011) (“A rebuttable presumption does not remove the plaintiff’s burden to prove that injunctive relief generally is appropriate because the plaintiff still must sufficiently demonstrate that the three other *eBay* factors support permanent relief. The presumption only relieves plaintiffs of the burden of proving the first factor.”).

143. See Bates, *supra* note 27, at 1526 (“This focus on general principles governing the standard for granting a preliminary injunction was born in part out of the need for uniform decisions among the more numerous judges.”).

144. See *id.*

145. See *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179, 1183-84 (8th Cir. 1998) (recognizing that irreparable harm is presumed on a showing that the advertisement tended to deceive, as well as maintaining that “[a] district court has broad discretion when ruling on requests for preliminary injunctions”).

146. Part III.D goes into more depth about the TMA’s uniformity benefits. The uniformity benefits are briefly mentioned here because of the overlap of uniformity and equity principles.

B. In Reality, Demonstrating Irreparable Harm Remains Difficult

Absent the irreparable harm presumption, a plaintiff frequently struggles to make a showing of such harm in false advertising cases.¹⁴⁷ Anti-presumption advocates contend the opposite of this: that the showing is easy even without the presumption.¹⁴⁸ However, this Section demonstrates the true burden of proving such harm in the courtroom.

Anti-presumption proponents point to the wide array of case law and situations where false advertising violations occur.¹⁴⁹ However, simply focusing on the variety of contexts that constitute false advertising only leads to the conclusion that more cases can be brought to the courtroom.¹⁵⁰ Court dockets filled with increasing false advertising litigation have no bearing on the difficulty, and therefore practicality, of showing irreparable harm.¹⁵¹ In other words, just because more cases may be brought does not mean that it becomes easier to prove harm and ultimately succeed.¹⁵²

The harms caused by false advertisements, such as a loss of good will or sales, are often hard to quantify and present, specifically at the preliminary injunction stage.¹⁵³ It remains difficult to demonstrate how a business's loss of sales is proximately caused by a defendant's false advertisement, as many factors can affect lost sales.¹⁵⁴ For example, imagine a scenario in which a defendant's advertisement falsely claims that its product is more effective than the plaintiff's product, but at the same time a third party launches a similar product to both of them. The plaintiff would struggle with showing how much, if any, of their lost sales are attributable to the defendant's false advertisement (as opposed to the third party's

147. See Dillan, *supra* note 4, at 944.

148. See *supra* notes 103-13 and accompanying text.

149. See *supra* notes 103-13 and accompanying text.

150. In fact, the example case of *Incarcerated Ent. v. Warner Bros. Pictures* in Part III.B.1 was just a motion to dismiss opinion. See 261 F. Supp. 3d 1220, 1224 (M.D. Fla. 2017).

151. See Gerhardt et al., *supra* note 132, at 19 (explaining that empirical results indicating low wins for plaintiffs' injunctions are "consistent with suggestions many scholars have made that false advertising claims are quite difficult to win").

152. See *id.*

153. See Anne G. LaLonde & Jerome Gilson, *Adios! To the Irreparable Harm Presumption in Trademark Law*, 107 TRADEMARK REP. 913, 921 (2017); Amici Curiae Supporting Ferring, *supra* note 34, at 21.

154. See Dillan, *supra* note 4, at 944.

product in the marketplace) and would fail at making a showing of irreparable harm because they could not show certainty of the harm.¹⁵⁵

This problem is exacerbated when a plaintiff tries to demonstrate a loss of good will. While lost sales caused by a false advertisement can be hard to prove, they at least can be boiled down to a number representing a lost dollar amount. Loss of good will, on the other hand, remains a much more abstract harm to try to quantify.¹⁵⁶ However, the presumption of irreparable harm provides a solution to this issue. A prime example of this occurred in *McNeilab, Inc. v. American Home Products Corp.*, in which the producers of Tylenol sued the producers of Advil because the defendants ran an advertisement saying, “nothing is better than Advil. Not even Tylenol.”¹⁵⁷ The court discussed how a defendant’s misleading comparative advertisement, when aimed at a plaintiff’s specific competing product, diminishes the plaintiff’s good will because it decreases the reputation and value of the product in consumers’ minds.¹⁵⁸ It subsequently held that because of this obvious loss of good will, irreparable harm could be presumed without demonstrating a quantifiable injury resulting from loss of good will.¹⁵⁹

Critics of the presumption are quick to assert that even if showing irreparable harm remains an obstacle, courts often still conclude there is irreparable harm in false advertising cases.¹⁶⁰ However, as discussed in the next Section, a primary purpose of false advertising law is protecting consumers.¹⁶¹ If anti-presumption advocates

155. *See id.*; Amici Curiae Supporting Ferring, *supra* note 34, at 7.

156. *See* LaLonde & Gilson, *supra* note 153, at 957 (“[I]t is virtually impossible to ascertain the precise economic consequences of intangible harms, such as damage to reputation and loss of good will.”); Amici Curiae Supporting Ferring, *supra* note 34, at 7 (“[D]amage to good will and/or reputation ... are intangible because they are not capable of measurement with any certainty, and therefore that such harms are inherently irreparable.”).

157. 848 F.2d 34, 36 (2d. Cir. 1988) (showing that the court additionally found that the plaintiff’s advertisements misled consumers by alleging that Advil was less risky than Tylenol).

158. *Id.* at 38.

159. *See id.*

160. *See supra* notes 117-22 and accompanying text (showing in *CJ Products LLC* that the court found irreparable harm by “[p]rospective loss of this good will alone” and in *Fresh Del Monte Produce Inc.* that the court found the defendant’s profits were a “rough measure of the plaintiff’s damages”).

161. *See* Amici Curiae Supporting Ferring, *supra* note 34, at 8; *infra* notes 165-83 and accompanying text.

believe that there is almost always irreparable harm in false advertising violations, then a presumption of such harm furthers the goal of protecting consumers.¹⁶² Put plainly, the general irreparable harm found in false advertising violations, combined with the difficulty of quantifying and showing such harm, makes the presumption necessary to maximize the ultimate goal of protecting consumers.¹⁶³ And if anti-presumption advocates still cry out that not all false advertising violations create irreparable harm, a refresher that the presumption is rebuttable should quell any remaining fears.¹⁶⁴

C. The Ultimate Goal: Protecting the Consumer

At its core, the Lanham Act's purpose is to protect consumers from false and misleading advertisements.¹⁶⁵ The irreparable harm presumption directly contributes to this goal.¹⁶⁶ This is best understood by looking at false advertising law through the lens of one of the fundamental freedom of speech principles—the marketplace of ideas. Under the marketplace of ideas principle, advertisements are made through “private economic decisions” and “[i]t is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed.”¹⁶⁷ Truthful advertisements, with the exception of puffery, lead consumers to make informed decisions about what they purchase, generating a healthy economic market.¹⁶⁸

162. See Carolyn Ward, *The Role of the First Amendment in False Advertising: How the Supreme Court's Decision in Pom Wonderful, LLC v. Coca-Cola, Inc. Supports a Future of Expanded Protection*, 13 FIRST AMEND. L. REV. 554, 580 (2015) (explaining that “consumer safety is a great area of concern” in false advertising cases).

163. See *Amici Curiae Supporting Ferring*, *supra* note 34, at 7-8.

164. *Id.* at 9 (“[The] presumption is rebuttable to allow a defendant to avoid the evidentiary presumption in the rare cases where the facts show the harm is not irreparable.”).

165. See *id.* at 8.

166. Dillan, *supra* note 4, at 963-64 (“The Lanham Act’s goal of protecting the market by promoting a truthful one pushes in favor of a presumption that would give assistance to a party with interests aligned with that goal.”).

167. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976).

168. See *id.*; see also *Intermountain Stroke Ctr., Inc. v. Intermountain Health Care, Inc.*, 638 F. App’x 778, 786-89 (10th Cir. 2016) (explaining that puffery is “used to characterize those vague generalities that no reasonable person would rely on as assertions of particular facts.” Puffery does not pose a threat to consumers because it is “not relied on by rational adults” and therefore will not make consumers ill-informed like false advertisements do. Nor is it actionable under the Lanham Act) (emphasis omitted).

When consumers are ill-informed and make poor purchasing decisions, the results are wasted money or something much worse, such as not knowing the negative side effects of a product.¹⁶⁹ Thus, the harm caused by false and misleading advertisements remains “likely to be one that is both ‘grave and imminent’” to consumers.¹⁷⁰ Adequately addressing this harm thus directly promotes the goal of consumer protection.¹⁷¹

The irreparable harm presumption constructs a shield to protect consumers in the marketplace of ideas by allowing injunctions to issue even when such harm cannot necessarily be shown.¹⁷² In the case of permanent injunctions, if a defendant is found liable for false advertising, but the plaintiff cannot prove that the harm is not too speculative or remote, then without the irreparable harm presumption, a court will not grant an injunction.¹⁷³ This creates a possible situation where a defendant is not enjoined from running the proven false advertisement, and “[i]n the absence of injunctive relief, the marketplace would be subject to infiltration by false and deceptive messages thereby undermining the Lanham Act’s policy goals.”¹⁷⁴ The advertising market then becomes the Wild West, with the false advertising bandits preying on the townspeople consumers. But just like a spaghetti Western, the irreparable harm presumption cowboy steps in to save the day. By presuming irreparable harm through a finding of liability, the court orders the defendant to stop running the false advertisement, protecting consumers from the dangers of exposure to false or misleading information.¹⁷⁵

The argument remains the same for preliminary injunctions: when a plaintiff shows a likelihood of success on the merits, the court presumes irreparable harm and orders the defendant to cease displaying the advertisement, allowing consumers to make well-informed decisions without a false advertisement circulating.¹⁷⁶

169. Nicole LaMarco, *Negative Effects of False Advertising*, CHRON. (Dec. 3, 2018), <https://smallbusiness.chron.com/negative-effects-false-advertising-25679.html> [<https://perma.cc/D6EU-HHH5>].

170. Ward, *supra* note 162, at 580.

171. *Id.*

172. See Dillan, *supra* note 4, at 963-64.

173. See LaLonde & Gilson, *supra* note 153, at 918.

174. Dillan, *supra* note 4, at 941.

175. See *id.* at 939-40, 963-64.

176. See *Amici Curiae Supporting Ferring*, *supra* note 34, at 8-9.

Difficulty ensues when attempting to show likely irreparable harm at this pre-trial stage because the court does not have access to all the facts and arguments that would normally be presented at trial.¹⁷⁷ The presumption substantially provides relief to plaintiffs and protects consumers when there may be insufficient evidence at that stage in litigation to adequately demonstrate irreparable harm.¹⁷⁸

Legal standing requirements for bringing a false advertising lawsuit present another challenge that the presumption assists with. While consumers are clearly harmed by false advertisements, they cannot bring a Lanham Act action unless they allege “an injury to a commercial interest in reputation or sales.”¹⁷⁹ In other words, a plaintiff must be a business or someone akin to the plaintiff in the *War Dogs* case discussed previously.¹⁸⁰ Because consumers cannot sue as a class, the irreparable harm presumption guards them from the dangers of false advertising by allowing for a more practical granting of injunctions.¹⁸¹ Without the presumption, consumers risk continued exploitation and have an increasingly arduous time protecting their interests.¹⁸² In this way, the irreparable harm presumption serves the Lanham Act’s purpose of protecting consumers—the recipients of advertisements.¹⁸³

177. See LaLonde & Gilson, *supra* note 153, at 920-21.

178. See *id.* at 920 (“Legal presumptions are useful when there is insufficient evidence or it is difficult or impracticable for a court to draw a definite conclusion.”).

179. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 131-32 (2014) (noting further that “[a] consumer who is hoodwinked into purchasing a disappointing product may well have an injury-in-fact ... but he cannot invoke the protection of the Lanham Act”).

180. See *Incarcerated Ent., LLC v. Warner Bros. Pictures*, 261 F. Supp. 3d 1220, 1233 (M.D. Fla. 2017) (showing that the plaintiff, an individual, had standing to sue because he suffered direct financial loss resulting from the false advertisement).

181. See Dillan, *supra* note 4, at 964 (“[I]f the market interests are to be duly supported, the recognition of the presumption will provide the first line of defense in guarding those interests.”). See generally *Lexmark*, 572 U.S. at 131-32 (discussing that consumers without commercial or reputational harm cannot recover under the Lanham Act).

182. See generally Arthur Best, *Controlling False Advertising: A Comparative Study of Public Regulation, Industry Self-Policing, and Private Litigation*, 20 GA. L. REV. 1, 68-70 (1985) (suggesting a more direct method to protect consumers—simply giving them standing to sue).

183. See *Amici Curiae Supporting Ferring*, *supra* note 34, at 8.

D. The TMA Solves Practical Uniformity Concerns

As discussed in Part I.B, confusion initially reigned over the divided federal courts concerning whether to apply the *eBay* and *Winter* holdings to cases involving false advertisements.¹⁸⁴ Fortunately, the TMA's reinstatement of the presumption of irreparable harm solves the pandemonium that arose from the court splits.¹⁸⁵

1. The TMA Discourages Forum Shopping

Forum shopping is a litigation strategy in which one party chooses and initiates a lawsuit in a specific jurisdiction or venue solely for the purpose of achieving a favorable outcome.¹⁸⁶ While the strategy is not new, it remains widely condemned, with courts and prominent scholars having written extensively about “the evil[s] of forum shopping.”¹⁸⁷ That may seem melodramatic, but its horrors are real: forum shopping attacks the integrity of the courts by allowing parties to manipulate what should be a true, consistent, and impartial legal system.¹⁸⁸ Consequently, the strategy negatively impacts the judiciary as a whole by creating a risk that courts are not applying the law equally in all relevant jurisdictions.¹⁸⁹

Because of the disparity in federal court decisions regarding the presumption before the TMA's passage, plaintiffs engaged in forum shopping by filing lawsuits in courts that still adhered to the presumption.¹⁹⁰ For example, prior to the TMA's passage, the Ninth

184. See *supra* notes 56-66 and accompanying text.

185. See House Report, *supra* note 23, at 19.

186. Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1677 (1990) [hereinafter *Forum Shopping Reconsidered*].

187. *Id.* at 1681 (quoting Henry J. Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634, 641 (1974)).

188. See *id.* at 1685 (“Consistency of outcomes is a fundamental tenet of virtually any legal system.”); Markus Petsche, *What's Wrong with Forum Shopping? An Attempt to Identify and Assess the Real Issues of a Controversial Practice*, 45 INT'L LAW. 1005, 1017 (2011) (“[F]orum shopping ‘goes against the principle of consistency of outcomes, apparently a fundamental tenet of virtually any legal system.’”) (citation omitted).

189. See *Forum Shopping Reconsidered*, *supra* note 186, at 1685-86; Petsche, *supra* note 188, at 1017-18.

190. See Adam Powell & Stephen Larson, *Trademark Modernization Act Could Reshape Litigation*, LAW360 (Feb. 1, 2021, 4:05 PM), <https://www.law360.com/articles/1350075> [<https://perma.cc/78YM-9KM2>].

Circuit would not recognize the irreparable harm presumption, and some legal commentators believe that this directly contributed to forum shopping because plaintiffs would seek out other appropriate forums that allowed the presumption.¹⁹¹ The TMA discourages any forum shopping attempts because it gives a uniform rule regarding the irreparable harm presumption: the presumption is here to stay in false advertising cases.¹⁹² The TMA's uniform framework eliminates incentives to sue only in courts that recognize the presumption because now all federal courts must apply it.¹⁹³ Restricting forum shopping safeguards a healthy legal system that has a uniform applicability of the law.¹⁹⁴

2. *The TMA Encourages Predictability*

The principle of applying the law equally also lends itself to the strong desire to ensure predictability in the law.¹⁹⁵ Predictability in the legal system “helps assure consistency in judicial decisions, giving people a greater sense of certainty in the way the courts will resolve disputes ..., ... lend[ing] strength and legitimacy to a rule-of-law system.”¹⁹⁶ A lack of predictability creates more than just a headache for practicing attorneys. Rather, it greatly interferes with their ability to adequately advise clients and prepare for litigation because they cannot confidently predict how a court will decide or even apply the law.¹⁹⁷ Because of the overwhelming positive effects of predictability, American jurisprudence generally regards it as an “essential factor in judicial decision-making.”¹⁹⁸

By creating a uniform irreparable harm presumption in all false advertising cases, the TMA helps ensure predictability in litigation. It solves the issue of federal courts' inconsistency in applying (or not

191. *See id.*

192. *See* 15 U.S.C. § 1116(a).

193. *See* Powell & Larson, *supra* note 190.

194. *See Forum Shopping Reconsidered*, *supra* note 186, at 1685.

195. Petsche, *supra* note 188, at 1018-19 (“[F]orum selection only makes predictability more difficult.”).

196. Kem Thompson Frost, *Predictability in the Law, Prized Yet Not Promoted: A Study in Judicial Priorities*, 67 BAYLOR L. REV. 48, 51 (2015).

197. *See* George G. Bailey, *Predictability of the Law; Its Relation to Respect for Law*, 66 W. VA. L. REV. 1, 2 (1963).

198. Frost, *supra* note 196, at 51.

applying) the irreparable harm presumption by asserting that all courts deciding false advertising cases must administer the rebuttable presumption.¹⁹⁹ While Congress passed the TMA only recently, it is a safe bet that with the presumption back in action, attorneys and advertisers can breathe a sigh of relief. Because of the TMA, they will not have to guess whether a court will apply the presumption of irreparable harm and can adequately prepare for litigation without wasting valuable time and resources.

CONCLUSION

Advertisements do more than just convey information to the public: they represent something deeper. As the well-known fictional advertising icon Don Draper explained, “[y]ou are the product. You feel something. That’s what sells.”²⁰⁰ While the best advertisements are often highly creative and take risks, it remains immensely important to ensure that those advertisements do not cross the line into false advertising. False advertisements betray our trust and prey on consumers instead of courting us in the marketplace of ideas like honest advertisements should.²⁰¹

Luckily, the TMA’s resurrection of the irreparable harm presumption is a front-line defense helping to mitigate the dangers of false advertising. It ushers in a new era for false advertisement rights and litigation. Most notably, it reestablishes the presumption of irreparable harm that was put in functional purgatory after the Supreme Court’s rulings in *eBay* and *Winter*.²⁰² Although some scholars have suggested that irreparable harm should not be presumed when granting an injunction, the arguments supporting the presumption far outweigh its prohibition.²⁰³ Most importantly, the presumption protects consumers, who are often the unheard victims

199. See *supra* notes 56-66 and accompanying text; 15 U.S.C. § 1116(a); House Report, *supra* note 23, at 19.

200. Erika Giles, *The 20 Best Don Draper Quotes on Advertising and Life to Help Hit Your Goals*, BLULEADZ (Aug. 31, 2020), <https://www.bluleadz.com/blog/10-marketing-quotes-from-don-draper-what-we-learned-from-them> [<https://perma.cc/FVK2-34TE>].

201. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976) (discussing how the marketplace of ideas principle guides commercial speech).

202. See *supra* Part I.B.

203. See *supra* Part III.

of false advertisements.²⁰⁴ Additionally, anti-presumption arguments remain vulnerable to attack and fail to meet the same persuasiveness that backs the irreparable harm presumption.

Although the TMA is in its infancy, consumers, lawyers, and businesses will likely see the positive effects of it in action soon. Specifically, the reinstatement of the irreparable harm presumption should foster a more fair and informed market for consumers to make intelligent decisions about the products they want to purchase.²⁰⁵ Whether you are deciding between two brands of gum at the store register or choosing between a Toyota and a Honda, accurate advertisements make sure that you get the best bang for your buck.

*Daniel Stephen**

204. See *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 131-32 (2014).

205. See *Amici Curiae Supporting Ferring*, *supra* note 34, at 8-9.

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