The "Cutting Edge" of Irreparable Harm and Trademark Law

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Before the Supreme Court’s 2006 decision in *eBay Inc. v. MercExchange, L.L.C.*, it was axiomatic that, upon a showing of a likelihood of success on the merits, a trademark owner was entitled to a presumption of irreparable harm when moving for preliminary injunctive relief. But after *eBay*, there was no such presumption in patent cases, leaving the question open whether the presumption would apply in trademark cases. Just a few weeks ago, on October 6, 2014, the Supreme Court denied certiorari in *Herb Reed Enters., LLC v. Florida Entm. Mgmt., Inc.*, in which the Ninth Circuit held that trademark owners are not entitled to a presumption of irreparable harm simply by making a preliminary showing of a good case on the merits. Accordingly, the Supreme Court has left it to the circuits to resolve the presumption question in trademark cases, at least for now, causing litigants to query what evidence will suffice to establish irreparable harm without the presumption and to consider the prevailing law in the various circuits when choosing a forum.

This is not a mere academic discussion. In *Cutting Edge Solutions, LLC v. Sustainable Low Maintenance Grass, LLC*, No. 3:14-cv-02770-WHO (N.D. Cal. Oct. 20, 2014), the federal district court in San Francisco denied the plaintiff’s request for a preliminary injunction. Cutting Edge Solutions, LLC, a seller of plant fertilizers and nutrients, sought to enjoin Sustainable Low Maintenance Grass, LLC (SLMG), from using the trademark “Cutting Edge” on a state of the art grass seed mix. The court’s opinion denying relief comprehensively discusses, among other things, the standards for a preliminary injunction in trademark law, as well as the proof required to show trademark infringement. In doing so, the opinion teaches three important lessons with respect to irreparable harm.

First, a trademark owner should be familiar with the preliminary injunction standards for trademark cases in its chosen forum. Because the Ninth Circuit, following the rationale in *eBay*, eliminated the presumption in trademark cases, evidence of irreparable harm must be presented above and beyond evidence on the merits, and “broad or vague” claims of loss of good will or consumer confusion will not suffice. The plaintiff in *Cutting Edge Solutions* claimed generally that the alleged infringement would injure its good will and result in loss of control over its reputation, but did not back up those general claims with specific evidence. While the plaintiff pointed to some negative reviews on the internet about the defendant’s product and argued that those reviews would harm the plaintiff’s reputation, such evidence was deemed deficient because some negative reviews can be expected for any product and there was no evidence the plaintiff’s potential customers would associate those reviews with the plaintiff.

Second, the Court’s opinion addresses irreparable harm first, even though irreparable harm traditionally is addressed after the merits. When defending against a preliminary injunction where the movant has weak claims of irreparable harm, litigants should consider structuring the opposition arguments in a non-traditional way to bring those weaknesses to the forefront.
Third, the difficulty of obtaining preliminary injunctive relief increases in proportion to the time between when a plaintiff should have known of the alleged infringement and the plaintiff’s request for injunctive relief. In this case, for example, the Court found that the plaintiff should have known of the alleged infringement eighteen months before it filed suit, a factor that weighed heavily against a finding of irreparable harm. Where delay is present, it seriously undermines a claim of irreparable harm and should always be part of the story.

1 Nutter represented SLMG, the prevailing party, in this case.

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