

3-4-2021

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Recommended Citation

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**“TRADITIONAL PRINCIPLES OF EQUITY?” HOW
SEVENTH CIRCUIT FALSE ADVERTISING
PRECEDENT MINIMIZES THE BURDEN ON
PLAINTIFFS WHO MOVE FOR PRELIMINARY
INJUNCTIONS**

JOSEPH P. TRUNK*

Cite as: Joseph P. Trunk, *“Traditional Principles of Equity?” How Seventh Circuit False Advertising Precedent Minimizes the Burden on Plaintiffs Who Move for Preliminary Injunctions*, 14 SEVENTH CIRCUIT REV. 1 (2018), at <https://www.kentlaw.iit.edu/sites/ck/files/public/academics/jd/7cr/v14/trunk.pdf>.

INTRODUCTION

Imagine you are the advertising executive at a dairy production company who just spent \$30 million on a new advertising campaign,¹ a campaign that includes both print and digital media advertisements.² You created your campaign to market your additive-free cheese, and

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¹ Elaine Watson, *Arla Foods defends ‘Live unprocessed’ campaign as rBST maker sues over allegedly ‘blatantly and egregiously false’ claims*, FOODNAVIGATOR-USA, <https://www.foodnavigator-usa.com/Article/2017/06/06/Arla-Foods-urges-court-to-toss-rBST-lawsuit-over-Live-Unprocessed-ads> (last visited Oct. 3, 2018).

² Alexandra Jardine *Kids Imagine What Food Additives in Adorable Animations for Arla*, ADAGE, <https://adage.com/creativity/work/arla-rbst/51592> (last visited Oct. 3, 2018).

you incorporated into the advertisements what children think of food additives.³ Advertising critics have called the campaign “adorable” and have said that it “communicates [your] message clearly,” precisely your goal.⁴ However, the manufacturer of the artificial food additive you proudly proclaim is absent from your food is not pleased. The food-additive manufacturer sues you, and before reaching the merits of your case, a federal judge stops from using your “adorable” advertisements that you invested millions of dollars in.⁵ Exactly one year later, a panel of federal appeals judges upholds this decision.⁶ How will you recover?

Unfortunately, this is reality for one company. The Seventh Circuit recently upheld a preliminary injunction in *Eli Lilly & Co. v. Arla Foods, Inc.*, a Lanham Act false advertising case.⁷ The plaintiff, Elanco, a subsidiary of Eli Lilly, is the sole producer of the hormone recombinant bovine somatotropin (“rbST”), the food additive discussed above, which it sells under the registered trademark Posilac®.⁸ The defendant, Arla Foods, a Danish dairy conglomerate, started an advertising campaign titled “Live Unprocessed™” by which it advertised its cheeses made from rbST-free milk.⁹ Elanco took issue, among other things, with the way in which Arla was portraying rbST and subsequently filed a false advertising suit under 15 U.S.C. § 1125(a)(1)(B), or § 43(a) of the Lanham Act.¹⁰ The district court

³ *Id.*

⁴ *Id.*

⁵ Elaine Watson, *Judge orders Arla Foods to halt Live unprocessed’ campaign: ‘Ads create false impression that rbST is something foreign and dangerous,’* FOODNAVIGATOR-USA, <https://www.foodnavigator-usa.com/Article/2017/06/15/Judge-orders-Arla-Foods-to-halt-Live-unprocessed-campaign#> (last visited Oct. 3, 2018); see Jardine, *supra* note 2.

⁶ See *Eli Lilly & Co. v. Arla Foods, Inc.*, 893 F.3d 375 (2018).

⁷ *Id.* at 384.

⁸ *Id.* at 379.

⁹ *Id.*

¹⁰ *Id.*

granted Elanco's motion for a preliminary injunction,¹¹ and Arla appealed.¹²

The Lanham Act explicitly provides injunctive relief as a remedy in trademark and unfair competition actions.¹³ Courts have the power to restrict the content of advertisements that are allegedly false or misleading.¹⁴ For a court to grant a preliminary injunction, the plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."¹⁵

While considered an equitable remedy, there is room to view the preliminary injunction through an economic lens. Judge Richard Posner, with inspiration from Professor John Leubsdorf, proposed an alternative method of determining when a court should grant a preliminary injunction.¹⁶ Judge Posner's preliminary injunction standard does not rid the court of the traditional preliminary injunction factors; instead, it offers a way for courts to better understand the

¹¹ *Eli Lilly & Co. v. Arla Foods Inc.*, No. 17-C-703, 2017 WL 4570547, at *10 (E.D. Wis. June 15, 2017).

¹² Arla also argued that Elanco had not made a proper showing of causation. *Eli Lilly & Co. v. Arla Foods, Inc.*, 893 F.3d 375, 383 (2018). The Seventh Circuit upheld the district court's decision on this issue. *Id.* at 384. Further, Arla also argued that the injunction was "vague and overbroad" and that it did "not meet various formal requirements of [Federal Rule of Civil Procedure 65(d)]." *Id.* at 381. The court affirmed the district court with respect to these arguments. *Id.* at 385.

¹³ 15 U.S.C. § 1116(a) (West 2018) ("The several courts vested with jurisdiction of civil actions arising under this chapter shall have the power to grant injunctions, according to the principles of equity and upon such terms as the court may deem reasonable . . . to prevent a violation under subsection (a), (c), or (d) of section 1125 of this title."). This portion of the Lanham Act is also referred to as § 43.

¹⁴ *See generally* 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §30:30 (5th ed. 2018).

¹⁵ *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citing *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008); *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12 (1982)).

¹⁶ *See Am. Hosp. Supply Corp. v. Hosp. Prods., Ltd.*, 780 F.2d 589, 593 (7th Cir. 1986).

relationship between the factors, leading to more economically efficient outcomes for both parties.¹⁷ As noted by Judge Posner, a district court judge's job is to "minimize the costs" of mistakenly granting or denying preliminary injunctive relief.¹⁸ This is especially important in false advertising and unfair competition cases, where advertisers and media personnel need to make strategic decisions so as to avoid litigation. To minimize these costs, the Seventh Circuit should reverse its prior precedent in Lanham Act cases at the preliminary injunction stage. First, it should no longer presume the plaintiff has suffered irreparable harm. Second, the Seventh Circuit should require Lanham Act plaintiffs to show proof of actual consumer confusion or deception at the preliminary injunction stage.

This Comment includes three parts. Part I provides a broad overview of the preliminary injunction standards as applied across the circuits. Further, it provides an analysis of Judge Posner and Professor John Leubsdorf's economic model, which can be used as a vessel toward economically efficient outcomes. Part II will provide an analysis of the Eastern District of Wisconsin and Seventh Circuit decisions in *Eli Lilly & Co. v. Arla Foods, Inc.* Finally, Part III will provide commentary on *Eli Lilly*, arguing that Seventh Circuit precedent may be inhibiting economically efficient outcomes at the preliminary injunction stage in false advertising cases.

¹⁷ *Id.* "[The formula] is not offered as a new legal standard; it is intended not to force analysis into a quantitative straitjacket but to assist analysis by presenting *succinctly the factors that the court must consider* in making its decision and by articulating the relationship among the factors." (emphasis added).

¹⁸ *Id.*

BACKGROUND

A. *The Preliminary Injunction Standard*1. *Winter v. Natural Resources Defense Council, Inc.*

The Supreme Court has said that a preliminary injunction is an “extraordinary remedy” that is “never awarded as of right.”¹⁹ In an effort to create unity among the circuits, the Court announced factors courts should apply: “[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in his favor, and that an injunction is in the public interest.”²⁰ In *Winter*, the Natural Resources Defense Council filed suit under numerous environmental acts, seeking to enjoin the United States Navy from using “mid-frequency active” sonar because the waves from that sonar allegedly injured marine mammals.²¹ The Navy was testing the sonar off the coast of Southern California, where various species of dolphins, whales, and other marine mammals reside.²²

The district court granted the Natural Resources Defense Council’s motion for a preliminary injunction, and the Ninth Circuit affirmed.²³ The Supreme Court reversed, finding that, contrary to Ninth Circuit law, which only requires a *possibility* of irreparable injury, “[o]ur frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the

¹⁹ *Winter*, 555 U.S. at 24 (“In each case, courts ‘must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.’”) (quoting *Amoco Prod. Co. v. Vill. of Gambell, Ala.*, 480 U.S. 531, 542 (1987)).

²⁰ *Winter*, 555 U.S. at 20 (citing *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008); *Amoco Prod. Co. v. Vill. of Gambell, Ala.*, 480 U.S. 531, 542 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12 (1982)).

²¹ *Winter*, 555 U.S. at 13-14.

²² *Id.*

²³ *Id.* at 17.

absence of an injunction.”²⁴ The Court found the preliminary injunction burdened the Navy by restricting its ability to train with mid-frequency action sonar.²⁵ Moreover, the preliminary injunction had an adverse impact on the “public interest in national defense.”²⁶

Winter had a direct impact on the preliminary injunction standard as it was applied in the Ninth Circuit. Thus, although the Court was applying its “frequently reiterated standard,” more than one circuit interpreted the factor language differently.²⁷ It is puzzling, then that circuits are still using different language post-*Winter*, despite the binding Court precedent.

2. Overview of Preliminary Injunction Standards Used by the United States Courts of Appeals²⁸

In theory, *Winter* made clear the standard federal courts should apply when a plaintiff moves for a preliminary injunction.²⁹ Yet, there is still confusion and uncertainty amongst litigants; “[e]ach circuit has developed its own test for deciding whether or not to grant preliminary injunctive relief.”³⁰ Commentators have pointed to these inconsistencies for some time. For example, Professor John Leubsdorf noted the “dizzying diversity of formulations,” and he argued that

²⁴ *Id.* at 22 (“We agree with the Navy that the Ninth Circuit’s ‘possibility’ standard is too lenient.”) (emphasis in original).

²⁵ *Id.* at 24.

²⁶ *Id.*

²⁷ *Id.* 22.

²⁸ While not discussed in the Comment, the Federal Circuit “defer[s] to the law of the regional circuit when addressing substantive legal issues over which [it] [does] not have exclusive subject matter jurisdiction.” *Payless Shoesource, Inc. v. Reebok Int’l, Ltd.*, 988 F.2d 985, 987-88 (Fed. Cir. 1993) (applying preliminary injunction standard from the Tenth Circuit).

²⁹ *Winter*, 555 U.S. at 20 (citing *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008); *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12 (1982)).

³⁰ 3 ANNE GILSON LALONDE, GILSON ON TRADEMARKS §14.02(3)(b)(0i) (2018).

courts do not provide "any explanation for choosing one [standard] instead of another."³¹

Moreover, U.S. Magistrate Judge Morton Denlow has gone even further, arguing that even though the courts use a common set of factors, the courts apply the factors differently: "[w]hile courts may disagree on a uniform standard, possibly due to varying degrees of risk and urgency of the injunction, most courts have agreed on the underlying factors that govern the decision whether to grant or deny a preliminary injunction. It is the discord in applying those factors that generates an unclear standard."³² It is one thing to say a standard is *uniform*; it is another thing to say the same standard is *applied uniformly*.

Most of the circuits apply some variation of the *Winter* factors, including the First,³³ Third,³⁴ Fourth,³⁵ Fifth,³⁶ Sixth,³⁷ Eighth,³⁸

³¹ John Leubsdorf, *The Standard for Preliminary Injunctions*, 91. HARV. L. REV. 525, 526 (1978).

³² United States Magistrate Judge Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 REV. LITIG. 495, 508 (2003).

³³ See *Arborjet, Inc. v. Rainbow Treecare Sci. Advancements, Inc.*, 794 F.3d 168, 171 (1st Cir. 2015) ("To grant a preliminary injunction, a district court must find the following four elements satisfied: (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm absent interim relief, (3) a balance of equities in the plaintiff's favor, and (4) service of the public interest.") (citing *Voice of the Arab World, Inc. v. MDTV Med. News Now, Inc.*, 645 F.3d 26, 32 (1st Cir. 2011) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

³⁴ See *Groupe SEB U.S., Inc. v. Euro-Pro Operating LLC*, 774 F.3d 192, 197 (3d Cir. 2014) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.") (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

³⁵ See *Metro. Reg'l Infor. Sys. v. Am. Home Realty Network, Inc.*, 722 F.3d 591, 595 (4th Cir. 2013) ("Parties seeking a preliminary injunction must demonstrate that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm, (3) the balance of hardships tips in their favor, and (4) the injunction is in the public interest.") (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

Ninth,³⁹ Tenth,⁴⁰ Eleventh,⁴¹ and D.C. Circuits.⁴² These circuits use language similar to, if not identical to, language used by the *Winter*

³⁶ See *Anderson v. Jackson*, 556 F.3d 351, 360 (5th Cir. 2009) (Plaintiff moving for a preliminary injunction must show “(1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to the defendant, and (4) that granting the preliminary injunction will not disserve the public interest.”) (quoting *Canal Auth. v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974)).

³⁷ See *Southern Glazer’s Distribs. of Ohio, LLC v. Great Lakes Brewing Co.*, 860 F.3d 844, 849 (6th Cir. 2017) (“Four factors guide the decision to grant a preliminary injunction: ‘(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable harm absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction.’”) (quoting *Bays v. City of Fairborn*, 668 F.3d 814, 818-19 (6th Cir. 2012)).

³⁸ See *Coyne’s & Co. Inc. v. Enesco, LLC*, 553 F.3d 1128, 1131 (8th Cir. 2009) (“Whether a preliminary injunction should issue turns upon: (1) the probability of the movant succeeding on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between this harm and the injury in granting the injunction will conflict on the non-movant; and (4) the public interest.”) (citing *Dataphase Sys. Inc., v. CL Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc)).

³⁹ See *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1144 (9th Cir. 2011) (“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”) (quoting *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008)).

⁴⁰ See *Fish v. Kobach*, 840 F.3d 710, 723 (10th Cir. 2016) (“Four factors must be shown by the movant to obtain a preliminary injunction: (1) the movant ‘is substantially likely to succeed on the merits; (2) [[the movant]] will suffer irreparable injury if the injunction is denied; (3) [[the movant’s]] threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction would not be adverse to the public interest.”) (quoting *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009)).

⁴¹ See *Osmose, Inc. v. Viance, LLC*, 612 F.3d 1298, 1307-308 (11th Cir. 2010) (“[[A]] district court may grant a preliminary injunction only if the movant establishes the following: (1) a substantial likelihood of success on the merits of the underlying case, (2) the movant will suffer irreparable harm in the absence of an injunction, (3) the harm suffered by the movant in the absence of an injunction would exceed the harm suffered by the opposing party if the injunction issued, and

Court. This is important, as there appears to be a trend by some circuits to embrace the *Winter* decision. There are some differences in the language used⁴³ as well as other nuances particular to each circuit.⁴⁴ The confusion across the circuits arises not only because of the varying language, but because of inconsistent application of the preliminary injunction factors.⁴⁵ All courts should employ and use the factors in the exact same way because the Court announced the factors in *Winter*.

The Second Circuit's view, while clearly incorporating the factors from *Winter*, is a more complex, involved standard when compared to the traditional four-factor standards discussed above. In order for a court in the Second Circuit to grant a motion for a preliminary injunction, the plaintiff must establish "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation

(4) an injunction would not disserve the public interest.") (quoting *N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1217 (11th Cir. 2008)).

⁴² See *Archdiocese of Wash. V. Wash. Metro. Area Transit Auth.*, 897 F.3d 314, 321 (D.C. Cir. 2018) ("The moving party must make a 'clear showing that four factors, taken together, warrant relief: likely success on the merits, likely irreparable harm in the absence of preliminary relief, a balance of the equities in its favor, and accord with the public interest.'") (quoting *League of Women Voters v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016)).

⁴³ For example, as to the likelihood of success factor, the Fifth Circuit requires a "substantial likelihood of success on the merits," see *Paulsson Geophysical Servs. Inc. v. Axel M. Sigmar*, 529 F.3d 303, 309 (5th Cir. 2008), while the Sixth Circuit looks to whether the moving party has a "strong likelihood of success on the merits," see *Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross and Blue Shield Ass'n*, 110 F.3d 318, 322 (6th Cir. 1997).

⁴⁴ This is not a Comment about preliminary injunctions, nor will it provide an in-depth analysis on the varying standards used by the circuits. See *McCarthy*, *supra* note 14, at § 30:32 for a more nuanced analysis of these standards in the context of Lanham Act cases.

⁴⁵ See *Denlow*, *supra* note 32, at 508.

and a balance of hardships tipping decidedly toward the moving party requesting the preliminary relief.”⁴⁶

Like the Second Circuit, the Seventh Circuit has described the standard in different ways. For example, the Seventh Circuit in *Abbot Laboratories v. Mead Johnson & Co.* described the preliminary injunction standard using the following language:

As a threshold matter, a party seeking a preliminary injunction must demonstrate (1) some likelihood of succeeding on the merits, and (2) that it has “no adequate remedy at law” and will suffer “irreparable harm” if preliminary relief is denied. If the moving party cannot establish either of these prerequisites, a court's inquiry is over, and the injunction must be denied. If, however, the moving party clears both thresholds, the court must then consider: (3) the irreparable harm the non-moving party will suffer if preliminary relief is granted, balancing that harm against the irreparable harm to the moving party if relief is denied; and (4) the public interest, meaning the consequences of granting or denying the injunction to non-parties.⁴⁷

The Seventh Circuit referred to this as a “sliding scale approach”: the more likely the plaintiff will succeed on the merits, the less the balance of irreparable harms need weigh towards its side; the less likely it is the plaintiff will succeed, the more the balance need weigh towards its side.”⁴⁸ Moreover, one reading this standard is likely to interpret it as a two-step approach; if the moving party does not

⁴⁶ *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*, 696 F.3d 206, 215 (2d Cir. 2012) (quoting *UBS Fin. Servs., Inc. v. W. Va. Univ. Hosps., Inc.*, 660 F.3d 643, 648 (2d Cir. 2011)).

⁴⁷ 971 F.2d 6, 11-12 (7th Cir. 1992) (citing *Lawson Prods. V. Avnet, Inc.*, 782 F.2d 1429, 1433 (7th Cir. 1986); *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 387-88 (7th Cir. 1984)).

⁴⁸ *Abbott Labs.*, 971 F.2d at 12 (citing *Dignet, Inc. v. Western Union ATS, Inc.*, 958 F.2d 1388, 1393 (7th Cir. 1992); *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 387 (7th Cir. 1984)).

meet the first two "threshold" requirements, the inquiry will end, a test contrary to *Winter*.⁴⁹ The *Winter* Court made no reference to a two-step or threshold style approach. The Seventh Circuit phrased its preliminary injunction standard in simpler terms in *Eli Lilly & Co. v. Arla Foods, Inc.*:

To win a preliminary injunction, the moving party must establish that (1) without preliminary relief, it will suffer irreparable harm before final resolution of its claims; (2) legal remedies are inadequate; and (3) its claim has some likelihood of success on the merits. If the moving party makes this showing, the court balances the harms to the moving party, other parties, and the public.⁵⁰

The preliminary injunction standard should be described and applied uniformly as set out by the Court in *Winter* and not in the apparent threshold way the Seventh Circuit describes it. The Court tried to clarify the standard in *Winter*, but the circuits, especially the Seventh Circuit, still have internal inconsistencies. Also, the Seventh Circuit only requires "some" likelihood of success on the merits.⁵¹ The Seventh Circuit has further defined this threshold as a "greater than negligible chance of winning."⁵² This intra-circuit inconsistency is troublesome and there does not appear to be a reason why the Seventh Circuit uses different language for the same standard, especially in light of *Winter*.

Regardless of the way the factors are phrased, specific Seventh Circuit Lanham Act precedent prevents district courts from making all the necessary considerations under that Act. This begs the question as to whether there is a more effective way to evaluate the merits of a case when the plaintiff moves for a preliminary injunction, while still

⁴⁹ *Abbott Labs.*, 971 F.2d at 11.

⁵⁰ 893 F.3d 375, 381 (7th Cir. 2018) (citing *BBL, Inc. v. City of Angola*, 809 F.3d 317, 323-24 (7th Cir. 2015)).

⁵¹ *Abbott Labs.*, 971 F.2d at 11.

⁵² *AM Gen. Corp. v. Daimlerchrysler Corp.*, 311 F.3d 796, 804 (7th Cir. 2002).

considering the traditional factors, especially in false advertising cases. The Court's preliminary injunction jurisprudence sheds an important light on the troublesome nature of the Seventh Circuit's Lanham Act precedent.

3. The Economic View

Judge Richard Posner has been at the forefront of incorporating economic principles into legal analysis,⁵³ especially due to his extensive writing on the subject.⁵⁴ Thus, it is not surprising that Judge Posner created his own economic model by which a court could evaluate a case at the preliminary injunction stage.⁵⁵ While Judge Posner presented the economic theory, the analysis has roots in a law review article authored by Professor John Leubsdorf of Rutgers Law School.

Professor Leubsdorf argued that “preliminary injunction standards should aim to minimize the *probable irreparable loss of rights* caused by errors incident to hasty decision.”⁵⁶ He stressed that the analysis should focus on the respective parties' loss of rights should the court issue an injunction.⁵⁷ Thus, Professor Leubsdorf proposed the following economic view of preliminary injunctions to guide courts to

⁵³ See Michael J. Perry, *What is 'Morality' Anyway?*, 45 VILL. L. REV. 69, 70 (2000) (referring to Judge Posner as a “founding father of ‘law and economics’”); Daniel J. Morrissey, 4 WM. & MARY BUS. L. REV. 1, 21 (2013) (referring to Judge Posner as the “founder of Law and Economics”).

⁵⁴ See, e.g., RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (9TH ED. 2014); WILLIAM A. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* (2003).

⁵⁵ See *Am. Hosp. Supply Corp. v. Hosp. Prods., Ltd.*, 780 F.2d 589, 593 (7th Cir. 1986).

⁵⁶ See Leubsdorf, *supra* note 31, at 541 (emphasis added).

⁵⁷ *Id.* (“If [a court] does not grant prompt relief, the plaintiff may suffer a loss of his lawful rights that no later remedy can restore. But if the court does not grant immediate relief, the defendant may sustain precisely the same loss of his rights.”)

the decision that "inflict[s] the smallest probable irreparable loss of rights."⁵⁸

The court, in theory, should assess the probable irreparable loss of rights an injunction would cause by multiplying the probability that the defendant will prevail by the amount of the irreparable loss that the defendant would suffer if enjoined from exercising what turns out to be his legal right. It should then make a similar calculation of the probable irreparable loss of rights to the plaintiff from denying the injunction. Whichever course promises the smaller probable loss should be adopted.⁵⁹

Importantly, Professor Leubsdorf stressed that his model "provides a coherent analysis" for deciding when to issue a preliminary injunction, and that "[t]he model goes beyond the current approach by specifying the relationship between [irreparable injury, probability of success, and the balance of convenience] and the goal of minimizing unavoidable legal injuries."⁶⁰

Judge Posner was certainly influenced by Professor Leubsdorf's viewpoint on the economic rationale of minimizing losses associated with granting and denying motions for preliminary injunctions. Judge Posner adopted the view created by Professor Leubsdorf in one of his Seventh Circuit opinions.⁶¹ There, Judge Posner offered the following formula: "grant the preliminary injunction if but only if $P \times H_p > (1-P) \times H_d$."⁶² This means that a district court would grant an injunction:

Only if the harm to the plaintiff if the injunction is denied [H_p], multiplied by the probability that the denial would be in

⁵⁸ *Id.*

⁵⁹ *Id.* at 542.

⁶⁰ *Id.* at 544.

⁶¹ *Am. Hosp. Supply Corp. v. Hosp. Prods., Ltd.*, 780 F.2d 589, 593 (7th Cir. 1986).

⁶² *Id.*

error (that the plaintiff, in other words, will win at trial) [P], exceeds the harm to the defendant if the injunction is granted [Hd], multiplied by the probability that granting the injunction would be an error [1-P].⁶³

Contrary to some critics,⁶⁴ Judge Posner's view "is intended not to force the analysis into a quantitative straightjacket but to assist by presenting succinctly the factors that the court must consider in making its decision and by articulating the relationship among the factors."⁶⁵ Further, "[t]he formula is new; *the analysis it capsulizes is standard*."⁶⁶ While the viewpoints of Professor Leubsdorf and Judge Posner are unique and understandably not widely-adopted, they shed an important light on the qualitative economic impact that a preliminary injunction may have on a Lanham Act litigant in the Seventh Circuit.

⁶³ *Id.* In simpler terms, "[t]he left side of the formula is simply the probability of an erroneous denial weighted by the cost of denial to the plaintiff, and the right side simply the probability of an erroneous grant weighted by the cost of grant to the defendant." *Id.*

⁶⁴ *Id.* at 610 (Swygert, J., dissenting) ("Moreover, the majority's formula invites members of the Bar to dust off their calculators and dress their arguments in quantitative clothing.").

⁶⁵ *Id.* at 593.

⁶⁶ *Id.* at 594 (emphasis added). It should be noted that Judge Posner himself never fully articulated and incorporated the formula in his analysis in *American Hospital Supply Corp.* To the contrary, he used the variables as part of the analysis. The formula does not and would not assume the role of the preliminary injunction factors. Judge Swygert is therefore correct that "the majority never attempts to assign a numerical value to the variables of its own formula." *Id.* at 610 (Swygert, J., dissenting). The "value" of each variable depends on the unique facts of each case. *See id.* at 596-99 ("We conclude that there was a threat of irreparable harm to the plaintiff; and although the dollar amount of that harm is not known with any precision and we hesitate to call it great, it seems substantial.") ("The district judge was persuaded that Hospital Products, not American Hospital Supply had broken the contract, thus implying a very high P.").

ELI LILLY & CO. V. ARLA FOODS, INC.

A. Facts

The plaintiff in this case, Eli Lilly and Company and its subsidiary Elanco ("Elanco") sell rbST, the genetically engineered version of the naturally occurring bovine somatotropin ("bST") hormone, under the brand name Posilac®.⁶⁷ Posilac® is the only FDA-approved artificial bST hormone.⁶⁸ bST is "a naturally occurring hormone in the pituitary glands of cattle which funnels nutrients toward the production of milk."⁶⁹ rbST "has been designed to prolong the lactation period of dairy cows and increase milk production."⁷⁰ Elanco has the exclusive right to sell rbST to dairy farmers and producers, who administer the hormone to their cows, collect milk, and sell it to manufacturers who make dairy products found on the shelves of grocery stores across the country.⁷¹

The defendant, Arla Foods, Inc. ("Arla"), is a Danish dairy conglomerate owned by at least twelve-thousand farmers across seven countries.⁷² Arla manufactures and markets its cheese and cream cheese in the United States at various stores, including Costco, Sam's Club, and Kroger.⁷³ Arla began a new advertising campaign in the United States on April 25, 2017 titled "Live Unprocessed.TM"⁷⁴ This advertising campaign "feature[d] a television buy across more than 20 national cable networks, advertisements in print and digital media, in-

⁶⁷ *Eli Lilly & Co. v. Arla Foods Inc.*, No. 17-C-703, 2017 WL 4570547, at *1 (E.D. Wis. June 15, 2017).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at *2.

⁷³ *Id.*

⁷⁴ *Id.*

store advertising, social media outreach, promotional videos, and a website.”⁷⁵

Part of Arla’s business model involves food safety and milk composition.⁷⁶ Thus, it was not surprising the company asked children to explain what they thought rbST was.⁷⁷ In one of Arla’s thirty-second commercials,⁷⁸ a seven-year-old girl described rbST as a “large six-eyed monster” with “razor sharp teeth and is so tall it can eat clouds.”⁷⁹ Moreover, this rbST monster has electric fur.⁸⁰ A narrator then makes the following statement: “‘Actually rbST is an artificial growth hormone given to some cows, but not the cows that make Arla cheese. No added hormones. No weird stuff.’”⁸¹ Notably, the following message appeared toward the end of the commercial: “‘Made with milk from cows not treated with r[[b]]ST. No significant difference has been shown between milk derived from r[[b]]ST-treated cows.’”⁸² This commercial appeared on Arla’s Twitter, Facebook, Instagram, and YouTube pages, and at the time it was running, consumers could have seen the advertisement on the Food Network, the Hallmark Channel, and Bravo, among other channels.⁸³

Elanco sued Arla Foods, alleging, among other things, that Arla violated 15 U.S.C. § 1125(a)(1) because Arla made “false or misleading descriptions of fact” in its commercial, a key part of Arla’s “Live Unprocessed™ campaign.”⁸⁴ Shortly thereafter, Elanco moved for a preliminary injunction and asked the court to “order corrective

⁷⁵ *Id.*

⁷⁶ *Id.* (“Arla asserts that its business model is based in part on ‘Arlagården®,’ a farm quality assurance program with four cornerstones: 1) milk composition, 2) food safety, 3) animal welfare, and 4) environmental considerations.”).

⁷⁷ *Id.*

⁷⁸ See Jardine, *supra* note 2 to view the advertisement.

⁷⁹ *Eli Lilly*, 2017 WL 4570547, at *2.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at *3.

advertising to address more than a month's worth of false advertising."⁸⁵

B. False and Deceptive Statements

1. The Law

The Lanham Act prohibits a party from making a "false or misleading description of fact" or a "false or misleading representation of fact"⁸⁶ which "in commercial advertising or promotion, misrepresents the nature, characteristics, [or] qualities . . . of another person's goods."⁸⁷ To prevail on a false or deceptive advertising claim under § 43(a) of the Lanham Act, plaintiffs in the Seventh Circuit must show that: "(1) the defendant made a false statement of material fact in a commercial advertisement; (2) the false statement actually deceived or had the tendency to deceive a substantial segment of its audience; and (3) the plaintiff has been or is likely to be injured as a result of the false statement."⁸⁸

These false or misleading statements are typically part of one of the following categories: "(1) commercial claims that are *literally false* as a factual matter; or (2) claims that may be *literally true or ambiguous*, but which implicitly convey a false impression, are misleading in context, or likely to deceive consumers."⁸⁹

When the statement in question is actually false, the plaintiff need not show that the statement either actually deceived customers or was likely to do so. In contrast, when the statement is literally true or ambiguous, the plaintiff must

⁸⁵ *Id.*

⁸⁶ 15 U.S.C. § 1125(a)(1) (West 2018).

⁸⁷ 15 U.S.C. § 1125(a)(1)(B) (West 2018).

⁸⁸ *Eli Lilly & Co. v. Arla Foods, Inc.*, 893 F.3d 375, 381-82 (7th Cir. 2018) (citing *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 819 (7th Cir. 1999)).

⁸⁹ *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 820 (7th Cir. 1999) (emphasis added).

prove that the statement is misleading in context by demonstrated actual consumer confusion.⁹⁰

Literally false statements are “bold-faced, egregious, undeniable, [and] over the top.”⁹¹ Hence, no evidence of consumer confusion is necessary.⁹² On the other hand, proof of consumer confusion is necessary for true but misleading statements; at trial, plaintiffs typically present the court with consumer surveys.⁹³ However, when a defendant is making true but misleading statements in an advertisement, plaintiffs *need not* produce consumer surveys *potentially* showing actual confusion at the preliminary injunction stage.⁹⁴ This rule is advantageous to plaintiffs in the Seventh Circuit.

C. District Court Decision

Elanco moved for a preliminary injunction, arguing that Arla, through its “Live Unprocessed™” campaign, made false or misleading statements about rbST and its brand-name drug Posilac®.⁹⁵ The district court applied the “sliding-scale” standard in considering whether to grant the preliminary injunction, akin to that in *Abbott*.⁹⁶

⁹⁰ *Id.*

⁹¹ Schering-Plough Healthcare Prods., Inc. v. Schwarz Pharma, Inc., 586 F.3d 500, 513 (7th Cir. 2009).

⁹² *Eli Lilly*, 893 F.3d at 382 (citing Schering-Plough Healthcare Prods., Inc. v. Schwarz Pharma, Inc., 586 F.3d 500, 513 (7th Cir. 2009)).

⁹³ *Eli Lilly*, 893 F.3d at 382.

⁹⁴ *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 15 (“The fact that Abbot did not conduct any full-blown consumer surveys to prove actual consumer confusion does not help Mead, for such proofs are not required the preliminary injunction stage.”) (citing *Vaughan Mfg. Co. v. Brikam Int’l, Inc.* 814 F.2d 346, 349 (7th Cir. 1987); *A.J. Canfield Co. v. Vess Beverages, Inc.*, 796 F.2d 903, 908 (7th Cir. 1986)).

⁹⁵ *Eli Lilly & Co. v. Arla Foods Inc.*, No. 17-C-703, 2017 WL 4570547, at *1 (E.D. Wis. June 15, 2017).

⁹⁶ *Id.* at *5 (“To obtain a preliminary injunction, the moving party must show that it has (1) no adequate remedy at law and it will suffer irreparable harm if a preliminary injunction is denied and (2) some likelihood of success on the merits.”)

First, the district court had to make a finding as to whether rbST was actually safe for humans before it could decide whether preliminary injunctive relief was appropriate because “[if] milk from rbST-treated cows is less safe than milk from non-rbST-treated cows, it would not necessarily be false or misleading to imply this in fact . . . in a television commercial.”⁹⁷ The district court answered this question with relative ease, as the United States Food and Drug Administration (“FDA”) has on multiple occasions determined that there is no harmful impact on human health when milk from cows given rbST is consumed by humans.⁹⁸

With the safety issue resolved, the district court went on to evaluate the case using the preliminary injunction factors. First, the court found that Elanco had shown a likelihood of success on the merits because Arla made “misleading misrepresentations of fact” in its commercial.⁹⁹ The court noted that “[w]hen the entire commercial is watched in context, it first creates the false impression that rbST is something foreign and dangerous, and then repeatedly emphasizes the notice that consumers should buy Arla cheese precisely because it

(quoting *Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir 2011) (“If this showing is made, ‘the court weighs the competing harms to the parties if an injunction is granted or denied and also considers the public interest.’”) (quoting *Korte v. Sebelius*, 735 F.3d 654, 665 (7th Cir. 2013))).

⁹⁷ *Eli Lilly*, 2017 WL 4570547, at *6.

⁹⁸ See Interim Guidance on the Voluntary Labeling of Milk Products from Cows that Have Not Been Treated with Recombinant Bovine Somatotropin, 59 Fed. Reg. 6279-04, 6279-80 (Feb. 10, 1994) (finding “that milk from rbST-treated cows is safe for human consumption”). This finding was confirmed by the FDA in 2016. See Bernadette M. Dunham, D.V.M., Ph.D., *Citizen Petition Denial Response from FDA CDER to the Cancer Prevention Coalition et al*, 16 (Mar. 21, 2016), <https://www.regulations.gov/document?D=FDA-2007-P-0119-0007>, (rejecting petition to suspend Posilac® or require placing a warning label on dairy products manufactured with milk from cows given Posilac® because “the drug is safe and effective for its intended uses and there is no significant difference between milk from cows treated with [rbST] and untreated cows.”). The district court also considered expert opinions from both Arla and Elanco but found that “there is no quantifiable difference between milk from cows treated with rbST and those that have not been treated with rbST.” *Eli Lilly*, 2017 WL 4570547, at *8.

⁹⁹ *Eli Lilly*, 2017 WL 4570547, at *9.

comes from cows untreated with rbST and does not contain any ‘weird stuff.’”¹⁰⁰

The court only *briefly* analyzed the remaining preliminary injunction factors. As to irreparable harm, the Seventh Circuit noted and applied the presumption of irreparable harm in Lanham Act cases.¹⁰¹ Although Arla’s commercial never mentioned Posilac®, “Elanco is the only FDA-approved producer of rbST, thus, a reputational attack on rbST is necessarily a reputational attack on Posilac®.”¹⁰² Moreover, Elanco produced evidence that one cheese producer decided to stop buying milk from cows given the rbST hormone,¹⁰³ and that the public interest favored weighing an injunction, given the stance of the FDA.¹⁰⁴ Finally, even though Arla claimed it would lose \$6.5 million in media commitments and \$9.9 million to create new advertisements, the court found that balance of the hardships tipped in Elanco’s favor.¹⁰⁵ Consequently, the court issued the preliminary injunction, restricting the content of Arla’s advertisements.¹⁰⁶

¹⁰⁰ *Id.* at *9. The court rejected Arla’s position that the claims it made in the commercial were “puffery” and therefore not in violation of § 43(a) of the Lanham Act. *See* McCarthy, *supra* note 14, at § 27:38 (“Puffing can consist of grossly exaggerated advertising claims such as blustering and boasting which no reasonable buyer would believe was true.”); *see also* Clorox Co. P.R. v. Procter & Gamble Commercial Co., 228 F.3d 24, 38 (2d Cir. 2000) (finding “vague, unspecified boasting” statements in promotional advertising to be puffery).

¹⁰¹ *Eli Lilly*, 2017 WL 4570547, at *10 (citing *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 16 (7th Cir. 1992)).

¹⁰² *Id.* at *10.

¹⁰³ *Id.*

¹⁰⁴ *Id.* (“While continued scientific research as to the safety of rbST certainly benefits the public, fear-mongering does not.”).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* The court required Elanco to pay a security bond worth \$500,000. *See* FED. R. CIV. P. 65(c). Per the court’s order, Arla was prohibited from any of the following: 1. Disseminating the advertisements attached to the plaintiffs’ Amended Complaint (ECF No. 10), and any other advertisement substantially similar thereto; 2. Claiming, either directly or by implication, in any advertising, website, social media, or any other type of public communication that: (a) rbST or Posilac®, or

D. *Seventh Circuit Decision*

Arla's main argument on appeal was that Elanco had failed to produce enough evidence showing it had a likelihood of success on the merits of its § 43(a) claim.¹⁰⁷ Since Arla made no *literally false* statements in its advertisement, the Seventh Circuit did not address the arguments on that category of statements.¹⁰⁸ The court thus analyzed whether Arla had made true but misleading statements in its commercial.¹⁰⁹ To do this, the court looked at the evidence presented by Elanco: (1) the advertisement itself; (2) opinions of the FDA regarding the safety of rbST; and (3) the evidence that one cheese producer stopped buying rbST milk.¹¹⁰ The court looked at this evidence but actually relied on the law in the Seventh Circuit; consumer surveys "are not required at the preliminary injunction stage."¹¹¹

As to the content of the advertisement itself, the Seventh Circuit agreed with the district court: "[t]he ad draws a clear contrast between Arla cheese (high quality, nutritious) and cheese made from rbST-

dairy products made from milk of cows supplemented with rbST or Posilac®, are dangerous or unsafe; (b) dairy products made from milk of cows supplemented with rbST or Posilac® are of lesser quality or less wholesome than, or substantially compositionally different from, other dairy products; (c) rbST or Posilac® is an ingredient added to some dairy products or milk; (d) rbST or Posilac® is "weird" and/or dairy products made from milk of cows supplemented with rbST or Posilac® contain "weird stuff"; and (e) consumers should not feel "good about eating" or "serving to [their] friends and family" dairy products made from milk of cows supplemented with rbST or Posilac®. *Id.* at *11.

¹⁰⁷ *Eli Lilly & Co. v. Arla Foods, Inc.*, 893 F.3d 375, 381 (7th Cir. 2018). The Seventh Circuit reviews the district court's decision to issue an injunction for abuse of discretion. *See BBL, Inc. v. City of Angola*, 809 F.3d 317, 324 (7th Cir. 2005).

¹⁰⁸ *Eli Lilly*, 893 F.3d at 382.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* (quoting *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 15 (7th Cir. 1992)).

treated cows (impure, unwholesome).”¹¹² The court found that Arla’s statements were misleading in part because of the monster depiction and the “[n]o weird stuff” language.¹¹³ It appears the court wanted to make *some* connection to consumers, but this was its only means of making such a connection. The Seventh Circuit also agreed that the science behind the safety of rbST milk was well-settled.¹¹⁴

Finally, the Seventh Circuit found that Elanco had shown a likelihood of success on the merits in part because of the evidence that one cheese producer stopped using milk from cows treated with rbST.¹¹⁵ The court noted this was not evidence of actual consumer confusion, but found that the cheese producer has an “economic incentive to accurately predict consumer demand.”¹¹⁶ After taking all the evidence under consideration, the Seventh Circuit agreed with the district court that Elanco had shown a likelihood of success on the merits, or a “greater than negligible chance,”¹¹⁷ of its Lanham Act claim.¹¹⁸

ARGUMENT AND COMMENTARY

The Seventh Circuit reached the right conclusion in *Eli Lilly & Co. v. Arla Foods, Inc.* given the state of the court’s precedent in Lanham Act cases. Nevertheless, if the court reversed this precedent, it might reach different outcomes in false advertising cases in the future. The Seventh Circuit should adopt the preliminary injunction factors

¹¹² *Id.* at 383.

¹¹³ *Id.*

¹¹⁴ *Id.* The court noted that Arla included the FDA-recommended disclaimer in the advertisement. However, it found that the disclaimer did resolve the fact that parts of the advertisement were misleading.

¹¹⁵ *Id.*

¹¹⁶ *Id.* (“[The cheese producer’s] concern about the ad campaign’s impact on consumers supports the judge’s conclusion that the ads convey a misleading message about rbST.”).

¹¹⁷ *AM Gen. Corp. v. Daimlerchrysler Corp.*, 311 F.3d 796, 804 (7th Cir. 2002).

¹¹⁸ *Id.*

from *Winter*. Also, it should incorporate the considerations expressed above by Professor John Leubsdorf and Judge Richard Posner; *it need not rely on mathematical formulae*. Their approach was not meant to assume the role of the factors. To make more economically-informed decisions at the preliminary injunction stage and in an effort to minimize losses among the parties from the granting or denial of a motion for preliminary injunction, the Seventh Circuit should no longer presume irreparable harm in Lanham Act cases. Furthermore, it should require proof of actual consumer confusion or deception at the preliminary injunction stage.

*A. The Seventh Circuit Should Not Presume
Irreparable Harm in Lanham Act Cases*

1. The Seventh Circuit

The Seventh Circuit recognizes a presumption of irreparable harm in Lanham Act cases.¹¹⁹ *Abbott Laboratories v. Mead Johnson & Co.* was a false advertising case between two competing oral electrolyte maintenance solution ("OES") producers.¹²⁰ Mead, the manufacturer of the Ricelyte OES solution, started an advertising campaign "designed to convince physicians and nurses to recommend Ricelyte over Pedialyte," Abbot's product.¹²¹ Mead stated the carbohydrates in its products came from rice, while the carbohydrates in Abbott's product were from glucose.¹²² However, Mead's campaign "[played] up Ricelyte's association with rice" by "[forging] a direct link between Ricelyte and rice" and "at times directly [stating] that Ricelyte's link

¹¹⁹ *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 18 (7th Cir. 1992).

¹²⁰ *Id.* at 9 ("Oral electrolyte maintenance solutions are over-the-counter medical products used to prevent dehydration in infants suffering from acute diarrhea or vomiting.").

¹²¹ *Id.* at 10.

¹²² *Id.*

to rice makes it superior to Pedialyte.”¹²³ As a result, Abbott filed suit under § 43(a)(2) of the Lanham Act and sought injunctive relief.¹²⁴

The court went on to address the preliminary injunction factors. Notably, the court struggled with the preliminary injunction standard: “[d]espite our recent efforts to clarify the law of preliminary injunctions . . . confusion persists, as demonstrated by the contrasting spins both parties place upon the four-part preliminary injunction standard.”¹²⁵ While the court analyzed the other factors, of notable importance was its analysis on the presumption of irreparable harm. Irreparable harm is often presumed in Lanham Act cases because intangible harms, “such as damage to reputation and loss of goodwill,” are hard to calculate.¹²⁶

The district court found that the presumption of irreparable harm had been rebutted in this case in part because, without Ricelyte on the market, Pedialyte had a monopoly.¹²⁷ Further, the district court reasoned that “Abbott’s reputational damage will have no tangible economic impact because Pedialyte will have regained its monopoly, leaving those who need OES products with no other choice.”¹²⁸ The Seventh Circuit disagreed with the district court’s finding because the district court did not “address the possibility of ordering [other] intermediate forms of relief after a full trial on the merits.”¹²⁹ Despite its lengthy analysis of the presumption in the context of the facts of this case, the court still found the presumption to be “well-

¹²³ *Id.*

¹²⁴ *Id.* at 11. Like Eli Lilly, Abbot sought “modifications in Mead’s advertising and promotional materials.” *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 16.

¹²⁷ *Id.* at 16 (“Any injunction, entered after a full trial, would remove Ricelyte from the market, thereby restoring Pedialyte’s monopoly and lost market share.”).

¹²⁸ *Id.*

¹²⁹ *Id.* at 17-18. The Seventh Circuit found the district court failed to consider other forms of relief, including “an order prohibiting Mead from purveying the false ‘rice claims’ and directing it to issue corrective advertisements and brochures.” *Id.* at 17 (“These less severe remedies would leave Ricelyte a viable, albeit somewhat discredited, competitor with at least part of its current market share.”).

established,” that it applies “absent a showing of business loss,” and was “in this case unchallenged.”¹³⁰ Thus, the presumption of irreparable harm has and continues to be the law of the Seventh Circuit.

2. Shifting Away from the Presumption: *eBay v. MercExchange, L.L.C.*

eBay v. MercExchange, L.L.C. involved patent law, another area of intellectual property law. eBay is the owner of a website where sellers can list and sell their goods.¹³¹ MercExchange holds “a business method patent for an electronic market designed to facilitate the sale of goods between private individuals by establishing a central authority to promote trust among participants.”¹³² After failed attempts to license its patent to eBay, MercExchange sued eBay, alleging patent infringement.¹³³ A jury returned a verdict for MercExchange, finding that its patent was valid and infringed by eBay.¹³⁴ The jury awarded money damages.¹³⁵

MercExchange moved for a permanent injunction; the district court denied this motion.¹³⁶ The Federal Circuit disagreed with the district court’s decision, citing that circuit’s “general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances.”¹³⁷ Specifically, the Federal Circuit stated “that a permanent injunction will issue once infringement and validity have been adjudged.”¹³⁸ The Supreme Court, in its pre-*Winter*

¹³⁰ *Id.* at 18.

¹³¹ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390 (2006).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 390-91.

¹³⁵ *Id.* at 391.

¹³⁶ *Id.*

¹³⁷ *Id.* (quoting *MercExchange, L.L.C. v. eBay, Inc.*, 401 F.3d 1323, 1339 (Fed. Cir. 2005)).

¹³⁸ *eBay*, 547 U.S. at 393-394 (quoting *MercExchange*, 401 F.3d at 1338).

decision, began its analysis by reciting the four-factor test district courts use in determining whether to grant a *permanent* injunction.¹³⁹

The Court noted that injunctive relief is available under the patent laws.¹⁴⁰ The Court ultimately vacated the decision below, finding that “neither court below correctly applied the traditional four-factor framework that governs the award of injunctive relief.”¹⁴¹ The Court found that the Federal Circuit’s rule was a “categorical rule” that “cannot be squared with the principles of equity adopted by Congress.”¹⁴² In criticizing both the district court and the Federal Circuit, the Supreme Court clearly stressed the importance of equity and rejected the application of general rules in the decision to grant injunctive relief.¹⁴³

3. Post-eBay: The Third Circuit

The Seventh Circuit can rid itself of the presumption of irreparable harm by following the reasoning and holding of the Third Circuit in *Ferring Pharmaceuticals Inc., v. Watson Pharmaceuticals,*

¹³⁹ *eBay*, 547 U.S. at 391 (“According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.”) (citations omitted). Note the minor differences in this standard compared to that used by district courts when hearing motions for preliminary injunctions.

¹⁴⁰ *Id.* at 392 (citing 35 U.S.C. § 283) (West 2018) (“The several courts having jurisdiction of cases under this title may grant injunctions *in accordance with the principles of equity* to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.”) (emphasis added).

¹⁴¹ *eBay*, 547 U.S. at 394.

¹⁴² *Id.* at 393.

¹⁴³ *Id.* at 394. (“We hold only that the decision whether to grant or deny injunctive relief rests within the *equitable discretion* of the district courts, and that such discretion must be exercised consistent with *traditional principles of equity*, in patent disputes *no less than in other cases governed by such standards.*”) (emphasis added).

Inc. In *Ferring*, the Third Circuit held that “a party seeking a preliminary injunction in a Lanham Act case is not entitled to a presumption of irreparable harm but rather is required to demonstrate that she is likely to suffer irreparable harm if an injunction is not granted.”¹⁴⁴ An analysis of the facts and reasoning of *Ferring* will show that the court’s reasoning is equally applicable to the facts of *Eli Lilly & Co. v. Arla Foods, Inc.*

Ferring and *Watson*, two pharmaceutical companies, produce rival prescription progesterone products.¹⁴⁵ Women produce progesterone, “a hormone that plays a key role in helping women become pregnant and maintain their pregnancies,” naturally.¹⁴⁶ Women who pursue assisted reproductive technology (“ART”) often need progesterone supplementation.¹⁴⁷ *Ferring* manufactures *Endometrin*; *Watson* manufactures *Crinone*.¹⁴⁸

Ferring filed a Lanham Act suit under § 43(a) and moved for a preliminary injunction, arguing that *Watson* made false and misleading statements about *Endometrin* at a presentation by a consultant *Watson* hired to present to doctors and other healthcare professionals at two presentations.¹⁴⁹ *Watson* hired this consultant to give presentations on its progesterone supplement, *Crinone*.¹⁵⁰ *Ferring* alleged that its § 43(a) claim arose out of three statements made by the consultant: “(1)

¹⁴⁴ *Ferring Pharms., Inc. v. Watson Pharms., Inc.*, 765 F.3d 205, 217 (3d Cir. 2014). The *Ferring* court is not the only court to get rid of the presumption of irreparable harm in Lanham Act cases. See *Herb Reed Enters., LLC v. Fla. Entm’t Mgmt., Inc.*, 736 F.3d 1239, 1249 (9th Cir. 2013) (finding that, in light of *eBay*, plaintiffs moving for a preliminary injunction in trademark infringement cases must show irreparable harm). The presumption has also been overruled in the copyright context as well. See *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 998 (9th Cir. 2011) (“We conclude that presuming irreparable harm in a copyright infringement case is inconsistent with, and disapproved by, the Supreme Court’s opinions in *eBay* and *Winter*.”).

¹⁴⁵ *Ferring*, 765 F.3d at 206.

¹⁴⁶ *Id.* at 207.

¹⁴⁷ *Id.* One example of ART is in vitro fertilization.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 207, 209.

¹⁵⁰ *Id.* at 207.

he referenced a ‘Black Box’ warning on Endometrin’s package insert; (2) he discussed a patient preference survey comparing Crinone and Endometrin; and (3) he mischaracterized the results of certain studies of Endometrin’s effectiveness in women over the age of thirty-five.”¹⁵¹

Ferring moved for a preliminary injunction. The district court denied this motion, finding that “Ferring was not entitled to a presumption of irreparable harm in seeking a preliminary injunction.”¹⁵² The district court then looked at the evidence available to it at the preliminary injunction stage, and the district court found that there was not enough evidence of irreparable injury to justify granting a preliminary injunction.¹⁵³ Ferring appealed, arguing that the presumption should apply to Lanham Act cases in the Third Circuit.¹⁵⁴

The Third Circuit began its analysis by noting that it “has never held that a plaintiff seeking a preliminary injunction pursuant to a Lanham Act false advertising claim is entitled to a presumption of irreparable harm.”¹⁵⁵ The Third Circuit ultimately decided that there was no presumption of irreparable harm when a plaintiff moves for a preliminary injunction in false advertising cases filed under the Lanham Act.¹⁵⁶ Two Supreme Court decisions helped the court reach this conclusion: *Winter* and *eBay*. The *Ferring* court relied on *Winter*, where the Court found that “[i]ssuing a preliminary injunction based solely on a *possibility* of irreparable harm is inconsistent with our

¹⁵¹ *Id.*

¹⁵² *Id.* at 209.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 210.

¹⁵⁵ *Id.* at 210-11 (“The justification for applying this presumption, therefore, is twofold: (1) a misleading or false comparison to a specific competing product necessarily causes that product harm by diminishing its value in the mind of the consumer, similar to trademark infringement cases; and (2) the harm necessarily caused to reputation and goodwill is irreparable because it is virtually impossible to quantify in terms of monetary damages.”).

¹⁵⁶ *Id.* at 216 (“Because a presumption of irreparable harm deviates from the traditional principles of equity, which require a movant to demonstrate irreparable harm, we hold that there is no presumption of irreparable harm afforded to parties seeking injunctive relief in Lanham Act cases.”).

characterization of injunctive relief as an *extraordinary remedy* that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”¹⁵⁷

It is hard to reconcile the Court’s decision with the Seventh Circuit’s continued reliance on the presumption of irreparable harm in Lanham Act cases. If a *possibility* of irreparable harm was no longer possible after *Winter*, it stands to reason that a blanket “general rule” presuming irreparable harm should certainly not be possible either.

Further, the *Ferring* court considered the *eBay* decision, a case where the Court found that lower courts cannot adopt categorical rules and should consider “traditional principles of equity” in deciding whether or not to grant a motion for injunctive relief.¹⁵⁸ Even though *eBay* involved patents, the Court’s “rationale is easily applicable . . . in cases arising under the Lanham Act.”¹⁵⁹ First, the court compared the language of the relevant injunction sections of both the Lanham Act and the Patent Act; both require courts to consider principles of equity when deciding to grant the relief.¹⁶⁰ Second, the Third Circuit noted that the *eBay* Court explicitly stated that its holding was applicable to areas of law outside of patent law.¹⁶¹

The majority in *eBay* also stressed, and the Third Circuit recognized, that “the decision whether to grant or deny injunctive

¹⁵⁷ *Id.* at 213; *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (emphasis added).

¹⁵⁸ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006).

¹⁵⁹ *Ferring Pharms., Inc. v. Watson Pharms., Inc.*, 765 F.3d 205, 214 (3d Cir. 2014).

¹⁶⁰ *Id.*; see also 15 U.S.C. § 1116(a) (West 2018) (“The 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, to prevent the violation of any right . . . or to prevent a violation under subsection (a) . . . of section 1125 of this title.”); 35 U.S.C. § 283 (West 2018) (“The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.”).

¹⁶¹ *Ferring*, 765 F.3d at 215-216 (“In addition . . . we believe the logic of *eBay* is not limited to patent cases but rather is widely applicable to various different types of cases.”).

relief rests within the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles of equity.”¹⁶² Taking all of this into consideration, including the Court’s *binding* preliminary injunction jurisprudence, the *Ferring* court found that there was no presumption of irreparable harm in Lanham Act cases.¹⁶³

4. Impact on *Eli Lilly & Co. v. Arla Foods, Inc.*

The Court in *eBay* rejected categorical, general rules applied by lower courts in deciding to issue preliminary injunctions and held that district courts should use “traditional principles of equity” in deciding motions for injunctive relief.¹⁶⁴ Shortly after that decision, the *Winter* court explicitly rejected a more lenient interpretation of the preliminary injunction factors, stating that this more lenient standard “is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”¹⁶⁵

In the words of the *Ferring* court, “[p]resuming irreparable harm would relieve the plaintiff of her burden to make such a [clear] showing.”¹⁶⁶ Thus, unless the Seventh Circuit reverses its prior precedent and requires a Lanham Act plaintiff to meet her burden and show irreparable harm, it will not be able to accurately consider the “irreparable loss of rights to the plaintiff from denying the injunction,” thereby raising questions of whether the court effectively minimized the potential costs of making the wrong decision.¹⁶⁷

¹⁶² *Id.* at 215 (quoting *eBay*, 547 U.S. at 394).

¹⁶³ *Ferring*, 765 F.3d at 217. The court also analyzed the facts of the case without the presumption, but still found that “the District Court did not clearly err in finding that *Ferring* dialed to demonstrate that it would likely suffer irreparable harm in the absence of preliminary injunctive relief.” *Id.* at 219.

¹⁶⁴ *eBay*, 547 U.S. at 394.

¹⁶⁵ *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam)).

¹⁶⁶ *Ferring*, 765 F.3d at 217.

¹⁶⁷ See Leubsdorf, *supra* note 31, at 542.

The *Eli Lilly* district court recognized the presumption of irreparable harm.¹⁶⁸ Despite applying the presumption, the court found that Elanco would “continue to suffer *unquantifiable reputational and financial damage* for the length of [Arla’s advertising] campaign.”¹⁶⁹ Even though Arla never mentioned Eli Lilly, Elanco, or Posliac® in the advertisements themselves, “Elanco is the only FDA-approved producer of rbST in the United States, thus, a reputational attack on rbST is necessarily a reputational attack on Posliac®.”¹⁷⁰

Moreover, the district court emphasized that a single cheese producer no longer sourced milk from cows that were given rbST, partly because of the way the Arla portrayed the rbST hormone in its advertisements.¹⁷¹ Thus, despite the presumption, the district court found that Elanco had suffered irreparable harm.¹⁷² Notably, the Seventh Circuit did not even address the irreparable harm factor in its opinion, focusing its analysis solely on the likelihood of success on the merits factor.

It is possible that the presumption of irreparable harm hurt Arla in this case, thus, according to Judge Posner, increasing the value of Hd, the harm to the defendant if the injunction is granted.¹⁷³ The presumption almost certainly gives plaintiffs an edge and weakens their burden when moving for a preliminary injunction. There appears to be an apparent dichotomy in that, in order to “win a preliminary injunction, [the plaintiff] *must establish . . . it will suffer irreparable harm [without preliminary relief] before final resolution of its claims,*” but this burden disappears in Lanham Act cases.¹⁷⁴

¹⁶⁸ *Eli Lilly & Co. v. Arla Foods Inc.*, 2017 WL 4570547, at *10 (E.D. Wis. June 15, 2017) (citing *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 16 (7th Cir. 1992)).

¹⁶⁹ *Eli Lilly*, 2017 WL 4570547, at *10. (emphasis added).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Am. Hosp. Supply Corp. v. Hosp. Prods., Ltd.*, 780 F.2d 589, 593 (7th Cir. 1986).

¹⁷⁴ *Id.* (emphasis added).

It is hard to tell if, given the record before it, the Seventh Circuit would have reached the same decision even without the presumption of irreparable harm. According to the court, the harm is easily traceable to Elanco given the fact that it is the sole producer of the FDA-approved rbST hormone Posliac®. This point certainly weighs in Elanco's favor. The fact that one cheese producer stopped purchasing of milk from cows given rbST is also telling. But the mere fact that Elanco is the only FDA-approved manufacturer of rbST should not carry the day. It is possible consumers do not even know that fact, nor would they know it, after seeing the advertisement.

Without the injunction, there is a strong argument that more dairy-product producers would also stop purchasing rbST milk out of fear that consumers themselves would be turned away by the hormone and no longer purchase dairy products made with milk from cows given rbST. But the question remains whether, given this *one* piece of evidence, Elanco suffered harm that was in fact irreparable. If there is little to no irreparable harm but the injunction is still granted, the value of (1-P), "the probability that granting the injunction would be an error," also increases.¹⁷⁵ Thus, the district court judge might be making the wrong decision.

This erroneous decision making is exactly the problem Judge Posner and Professor Leubsdorf set out to resolve.¹⁷⁶ Without actually showing what irreparable harm, if any, a plaintiff like Elanco suffered, it is possible a district court judge would mistakenly make the wrong decision in granting a preliminary injunction.¹⁷⁷ Mistakenly granting a preliminary injunction can be especially costly for a defendant like

¹⁷⁵ *Id.* As Judge Posner puts it, another way to think about "P" is that it is the probability the "plaintiff . . . will win at trial." *Id.*

¹⁷⁶ See Leubsdorf, *supra* note 31, at 541 ("preliminary injunction standards should aim to minimize the *probable irreparable loss of rights* caused by errors incident to hasty decision.") (emphasis added).

¹⁷⁷ *Am. Hosp. Supply Corp.*, 780 F.2d at 593 ("A district judge is asked to decide whether to grant or deny a preliminary injunction must choose the course of action that will minimize the costs of being mistaken. Because he is forced to act on an incomplete record, the danger of a mistake is substantial. And a mistake can be costly.").

Arla, who already spent upwards of \$30 million dollars on its advertising campaign.¹⁷⁸ Further, Arla likely lost \$6.5 million in media commitments and would need to spend \$9.9 million to create new advertisements.¹⁷⁹

If this injunction was mistakenly granted, “the judge commits a mistake whose gravity is measured by the irreparable harm, if any, that the injunction causes the defendant while it is in effect.”¹⁸⁰ Therefore, the Seventh Circuit should no longer presume irreparable harm in false advertising cases. Without the presumption, the district courts can make an efficient inquiry into the facts of each case.

B. The Seventh Circuit Should Require Proof Of Actual Consumer Confusion or Deception at the Preliminary Injunction Stage

The Seventh Circuit should reverse prior precedent and require plaintiffs who make false advertising claims under the Lanham Act and move for preliminary injunctions to present evidence of actual consumer confusion or deception. For some statements, this type of evidence is not necessary. But for other statements, whether or not plaintiffs must show evidence of actual consumer confusion or deception depends on what stage the litigation is in. For *literally false* statements, the plaintiff need not ever show evidence of consumer confusion because “[a] literally false statement will necessarily deceive consumers.”¹⁸¹ On the other hand, when a defendant makes *literally true but misleading* statements about a plaintiff’s product, the plaintiff need only present such evidence of consumer confusion or

¹⁷⁸ See Watson, *supra* note 1.

¹⁷⁹ Eli Lilly & Co. v. Arla Foods Inc., No. 17-C-703, 2017 WL 4570547, at *10 (E.D. Wis. June 15, 2017).

¹⁸⁰ *Am. Hosp. Supply Corp.*, 780 F.2d at 593.

¹⁸¹ Eli Lilly & Co. v. Arla Foods, Inc., 893 F.3d 375, 382 (7th Cir. 2018) (citing Schering-Plough Healthcare Prods., Inc. v. Schwarz Pharma, Inc., 586 F.3d 500, 513 (7th Cir. 2009)).

deception at trial.¹⁸² Most plaintiffs obtain this information from responses to consumer surveys.¹⁸³

However, plaintiffs who move for a preliminary injunction need not present proof of actual consumer confusion.¹⁸⁴ The Seventh Circuit has justified this rule in part because “[i]t is not feasible to require a Lanham Act plaintiff to conduct full-blown consumer surveys in the truncated timeframe between filing suit and seeking a preliminary injunction.”¹⁸⁵ Again, this broad categorical rule is inhibiting the district courts from thoroughly analyzing the unique facts of each false advertising case that comes before them. *Eli Lilly & Co. v. Arla Foods, Inc.* is one such case. The Court in *eBay* made clear that the decision to issue a preliminary injunction should conform to the “traditional principles of equity” and not according to broad rules.¹⁸⁶ If a Lanham Act plaintiff must show evidence of consumer confusion at trial, she too should have to show the same evidence at the preliminary injunction stage in order to show that she has a *likelihood* of success on the merits, an arguably low standard in the Seventh Circuit.¹⁸⁷

Courts have said that “[t]he purpose of the false-advertising provisions of the Lanham Act is to protect sellers from having their consumers lured away from them by deceptive ads.”¹⁸⁸ The court should then want to have feedback from consumers at any stage of

¹⁸² *Eli Lilly*, 893 F.3d at 375.

¹⁸³ *Id.*

¹⁸⁴ *Abbott Labs., Inc. v. Mead Johnson & Co.*, 971 F.2d 6, 15 (7th Cir. 1992) (“The fact that [Plaintiff] did not conduct any full-blown consumer surveys to prove actual consumer confusion does not help [Defendant], for such proofs are not required at the preliminary injunction stage.”) (citing *Vaughan Mfg. Co. v. Brikam Int’l, Inc.* 814 F.2d 346, 349 (7th Cir. 1987); *A.J. Canfield Co. v. Vess Beverages, Inc.*, 796 F.2d 903, 908 (7th Cir. 1986)).

¹⁸⁵ *Eli Lilly*, 893 F.3d at 382.

¹⁸⁶ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006).

¹⁸⁷ The Seventh Circuit requires “some” likelihood of success, *Abbott*, 971 F.2d at 11, which is a “greater than negligible chance of winning.” *AM Gen. Corp. v. Daimlerchrysler Corp.*, 311 F.3d 796, 804 (7th Cir. 2002).

¹⁸⁸ *Schering-Plough Healthcare Prods., Inc. v. Schwarz Pharma, Inc.*, 586 F.3d 500, 512 (7th Cir. 2009).

litigation, because the consumers are the ones who are important. If they are not deceived or misled by the statements made in the advertisements, and this evidence was shown at trial, a plaintiff would likely lose, as their claims would have no merit.

If the consumers would have the same opinion at the preliminary injunction stage, there is no way a plaintiff could show a likelihood of success on the merits, thereby rendering her unable to meet her burden. This in turn reinforces the point of the economic view that "preliminary injunction standards should aim to minimize the probable irreparable loss of rights caused by errors incident to hasty decision."¹⁸⁹

A review of the facts of *Eli Lilly & Co. v. Arla Foods, Inc.* reinforces this point. Arla's commercial was narrated by a seven-year-old.¹⁹⁰ The commercial featured an *animated* monster with "razor sharp teeth" that is "so tall it can eat clouds."¹⁹¹ Moreover, the monster is depicted as having electric fur.¹⁹² Additionally, Arla included the required FDA disclosure at the end of its advertisement.¹⁹³ Both the district court¹⁹⁴ and the Seventh Circuit¹⁹⁵ noted that, since Arla's statements were true but misleading, Elanco did not have to show evidence of actual consumer confusion or deception since Elanco was moving for a preliminary injunction. If the rule were otherwise, there is a strong argument that no reasonable consumer would be misled by the juvenile and comical way in which Arla depicted rbST.

The district court noted Arla's argument that "the fantastical elements make clear to a reasonable cheese consumer that he should not take any of the statements about rbST seriously."¹⁹⁶ This argument

¹⁸⁹ See Leubsdorf, *supra* note 31, at 541.

¹⁹⁰ *Eli Lilly & Co. v. Arla Foods Inc.*, No. 17-C-703, 2017 WL 4570547, at *2 (E.D. Wis. June 15, 2017).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Eli Lilly & Co. v. Arla Foods, Inc.*, 893 F.3d 375, 383 (7th Cir. 2018).

¹⁹⁴ *Eli Lilly*, 2017 WL 4570547, at *9.

¹⁹⁵ *Eli Lilly*, 893 F.3d at 382.

¹⁹⁶ *Id.*

goes precisely to the point of why the court should require evidence of actual consumer confusion or deception at the preliminary injunction stage. If this evidence is the key to succeed at trial, it should be required at the preliminary injunction stage as a way to show a likelihood of success on the merits.

The Seventh Circuit concluded that “[c]onsumer surveys were unnecessary” because “rbST-derived dairy products are no different than other dairy products . . . the ads themselves, the FDA’s regulatory guidance, and the evidence of decreased demand” all show that Elanco would succeed at trial.¹⁹⁷ The court did not consider any consumer feedback. There remains the possibility that consumers would have watched Arla’s ads, not taken them seriously, and continued to buy whatever cheese products they purchased prior to seeing a thirty-second, animated commercial where they are told that the FDA finds no difference in milk from cows given the rbST hormone and milk from those that are not given the hormone. The evidence cited by the Seventh Circuit appears to only reach a “possibility” of success on the merits threshold, a threshold that was explicitly rejected by the Court in *Winter*.¹⁹⁸

The Seventh Circuit justified the rule in part because of the “truncated timeframe between filing a lawsuit and seeking a preliminary injunction.”¹⁹⁹ But its these unsubstantiated “hasty” decisions and the resulting errors which Professor Leubsdorf warned against.²⁰⁰ Further, “[a] district judge is asked to decide whether to grant or deny a preliminary injunction must choose the course of action that will minimize the costs of being mistaken.”²⁰¹ It is impossible to even remotely calculate “the probability that [denying the preliminary injunction] would be in error,” thus hurting the

¹⁹⁷ *Id.* at 383.

¹⁹⁸ *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (“We agree with the Navy that the Ninth Circuit’s ‘possibility’ standard is too lenient.”) (emphasis in original).

¹⁹⁹ *Eli Lilly*, 893 F.3d at 382.

²⁰⁰ *See Leubsdorf*, *supra* note 31, at 541.

²⁰¹ *Am. Hosp. Supply Corp. v. Hosp. Prods., Ltd.*, 780 F.2d 589, 593 (7th Cir. 1986).

defendant, without any evidence of what consumers think of the advertisements.²⁰²

The Seventh Circuit's broad rule whereby a plaintiff need not show evidence of actual consumer confusion or deception at the preliminary injunction stage is preventing it from even considering the economic consequences of its decision. If the consumer's feedback is important at trial, it should be important at other stages of litigation as well. The consumers should have their voices heard, as they are the ones protected by the Lanham Act's false advertising provisions.

CONCLUSION

Despite binding Court precedent, courts still apply various versions of the preliminary injunction factors, particularly in the Seventh Circuit. Scholars proposed a supplementary approach, whereby a court could consider the economic impact of the decision to grant or deny preliminary injunctive relief. Those defending Lanham Act false advertising claims in the Seventh Circuit have an even steeper hill to climb. Seventh Circuit precedent makes it easier for plaintiffs in these cases to get injunctions issued in their favor. This precedent prevents the court from taking into consideration the economic impact of these decisions, thereby increasing the chances that the court erroneously issues preliminary injunctions.

²⁰² *Id.*