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SECOND CIRCUIT REAFFIRMS “SERIOUS QUESTION” STANDARD FOR PRELIMINARY INJUNCTION

**Holds that long-standing doctrine survives
recent Supreme Court case**

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In a recent decision, the Second Circuit reaffirmed its “serious question” standard for preliminary injunctions, rejecting an argument that it was inconsistent with recent Supreme Court precedent.

In *Citigroup Global Markets, Inc. v. VCG Special Opportunities*, the Second Circuit affirmed the district court’s grant of a preliminary injunction that prohibited arbitration, applying the serious question standard, which permits the movant to demonstrate—in lieu of a likelihood of success on the merits—a serious question that makes the merits a fair ground for trial combined with a balance of hardships that tip decidedly in plaintiff’s favor. No. 08-6090-cv (2d Cir. Mar. 10, 2010).

Although this standard is long-established in the Second Circuit, the defendant here challenged its continued validity in light of the Supreme Court’s 2008 decision in *Winter v. Natural Resources Defense Council*, which articulated the traditional four-factor balancing test for preliminary injunctions:

- (1) A likelihood of success on the merits; (2) a likelihood of suffering irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the moving party’s favor; and (4) that an injunction is in the public interest.

129 S. Ct. 365, 374 (2008). Specifically, the defendant argued that the Court’s omission of the serious question standard precluded its use as an alternative to demonstrating a likelihood of success on the merits.

The Second Circuit rejected this argument, stating that the serious question standard, in combination with a balance of hardships that tip decidedly in the movant’s favor, is no less rigorous than the likelihood of success standard. It explained that the serious question standard is flexible enough for complex litigation, and allows for a preliminary injunction when the court cannot “determine with certainty that the moving party is more likely than not to prevail on the merits of the underlying claims, but where the costs outweigh the benefits of not granting the injunctions.” The court further

noted that *Winter* did not by its terms prohibit in all cases the grant of preliminary injunctions on less than a preponderance “likelihood” showing, nor had the Court done so in two other recent cases involving preliminary injunctions.

Although the *Citigroup* case involved arbitration, the standard for granting preliminary injunctions applies generally to civil litigation, including intellectual property cases in the fields of copyright, trademark, and false advertising.¹ In some such cases, the serious question standard may be outcome determinative. For example, a preliminary injunction on copyright claims was granted in *Tradescape.com v. Shivaram*, 77 F. Supp. 2d 408 (S.D.N.Y. 1999), with the court finding a serious question but noting that it was “too early to ascertain whether plaintiff is likely to succeed on the merits.” *Id.* at 419. And in a trademark case, the district court ruled in the alternative that the movant had satisfied the serious question standard in addition to showing a likelihood of success. *Bear U.S.A. v. Kim*, 71 F. Supp. 2d 237, 257 (S.D.N.Y. 1999).

The Second Circuit standard is more flexible than that in the neighboring Third Circuit, which has rejected the serious question standard. *In Re Arthur Treacher’s Franchisee Litig.*, 689 F.2d 1137, 1147 (3d Cir. 1982).

In many intellectual property cases, venue is appropriate in more than one court. This is especially true in the greater New York area, which straddles the Second and Third Circuits. With the Second Circuit adhering to a more flexible standard for the grant of preliminary injunctions than the Third Circuit, plaintiffs that plan to seek a preliminary injunction should consider this difference when selecting the most favorable forum in which to file.

¹ The Federal Circuit applies its own standard to the grant of preliminary injunctions in patent cases. *Hybritech Inc. v. Abbott Labs.*, 849 F.2d 1446, 1451 (Fed. Cir. 1988) (holding that standard for grant of preliminary injunctions in patent cases is governed by Federal Circuit law, not regional circuit law). The Federal Circuit uses the same four-factor balancing test as in *Winter* for preliminary injunctions in patent cases. *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1350 (Fed. Cir. 2001).