

## Job Creation: Campaign slogan and patent infringement defense?

By [Tom Kohler](#) on January 26, 2012

In an opinion by the New Jersey District Court in December, the Court found that a requested preliminary injunction against infringement of [US Patent No. 6,293,731](#) could shut down a port dredging project and jeopardize the creation of 2,000 projected jobs and \$ 12 million in tax revenue . “Therefore, the public interest weighs in favor of denying the preliminary injunction.” [Weeks Marine, Inc. v. TDM America, LLC, 2-11-cv-03850 \(NJD December 14, 2011, Order\) \(Salas, M.J.\)](#) (The full opinion is available on [pacer](#), or you can [email me](#) for a copy).

The basic requirements for granting a [preliminary injunction](#) are the same in patent cases as in any case:

- 1) likelihood of success on the merits at trial
- 2) irreparable harm to the plaintiff absent the preliminary injunction
- 3) balance of harm weighs in favor of the injunction and
- 4) consideration of the public interest.

In this case, the Court found that all four factors tilted for the defendant, but it was the analysis of number four that caught my eye.

Preliminary injunctions can have a major impact on the outcome of a case. In fact, cases often settle based on whether a preliminary injunction is granted or denied. As a result, in many cases, defeating the preliminary injunction can be at least part of an effective defense against patent infringement. With most preliminary injunction motions, the decision to grant or deny the injunction turns on factors one or two. Factor three usually follows one and two, and factor four is almost always an afterthought, supported by arguments along the lines of “the public has an interest in patents being respected” or “the public has an interest in not being constrained by invalid patents.” These arguments are usually squeezed into the last page of the brief so as not to exceed the page limit.

The patent owner made just such an argument in this case: “There is simply no public interest that is served by permitting patent infringement.” And it was on page 39 of a 40-page brief. But the accused infringer had a state senator , a mayor and the economy on its side. In finding that the public interest weighed against the preliminary injunction , the Court highlighted [quotations from these public officials](#), describing the dredging project as “the largest economic development project that the county has ever undertaken” and “a great opportunity to create jobs and economic vitality in all of the

towns surrounding this region.” The court also quoted a [county press release](#) setting forth the jobs and tax estimates for the project.

This case presents an interesting twist to the public interest factor in fighting off a preliminary injunction. Does the accused conduct create jobs or increase tax revenue? How many new jobs are enough? A lot of accused infringing activities have the potential to create new jobs. Any time a company expands its product line or adopts a new process, there is the potential to employ more people. Selling more products increases revenue and increased revenue usually means more taxes paid as well. In some communities, the loss of far less than 2,000 jobs can be “[devastating](#).”

The current economic situation must have been a factor in the Court’s decision, even if not expressly stated. How much of an influence could current events have had as well with daily news reports of presidential candidates trying to one up each other on their job creation record? The time is clearly ripe for a job creation defense.