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Raising the Bar and the Public Interest: On Prior Restraints, Traditional Contours, and Constitutionalizing Preliminary Injunctions in Copyright Law

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Note

Raising the Bar and the Public Interest: On Prior Restraints, “Traditional Contours,” and Constitutionalizing Preliminary Injunctions in Copyright Law

John M. Newman^{*}

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ABSTRACT

Until very recently, a great deal of confusion existed among courts regarding the correct standard to apply in granting preliminary injunctions, particularly in copyright-infringement lawsuits. While two recent U.S. Supreme Court decisions have at least begun to clarify the proper approach, the myriad methods of analyzing the separate factors of the Court's test—as well as the Ninth Circuit's persistence in applying its own alternative formulation—make it difficult for lawyers and litigants to predict outcomes.

This Article begins by detailing the potential harms that arise from applying an overbroad preliminary-injunction standard. It then seeks to demonstrate that the Court's proffered test for granting such relief, which requires plaintiffs to demonstrate each of four individual factors, should be applied uniformly by lower courts deciding copyright preliminary-injunction requests. Through a close examination of recent Supreme Court precedent, I posit that the Court is attempting two primary aims: (1) raising the bar for copyright plaintiffs requesting preliminary injunctions, in order to reduce the irreparable harms inflicted by the current, overly lenient standard; and (2) drawing the four-factor test into the "traditional contours" of copyright law, in an attempt to stave off potential conflict between copyright protections and the First Amendment's guarantee of freedom of speech.

Unfortunately, the Court has been vague on how lower courts should apply its new standard in order to achieve these ends. As to the first, I argue that the presumptions that formerly governed copyright preliminary injunctions should be discarded. I then address the question of whether the Court's approach can sufficiently account for free-speech concerns, particularly the potential—raised persuasively by Professors Lemley and Volokh—that the prior-restraint doctrine should apply to copyright law. I argue in response that, despite the theoretical appeal of this argument, the Court's traditional-contours approach is a practical reality. Thus, the question becomes how best to serve the interests of both the First Amendment and copyright law while operating within the framework currently governing copyright-preliminary-injunction jurisprudence. I contend that free-speech concerns may be mitigated through careful application of the Court's new four-factor standard for granting preliminary injunctions, particularly under the public-interest inquiry dictated by the new standard. I conclude by setting forth a factor-by-factor analysis of how the standard should be applied in order to raise the bar faced by copyright plaintiffs and preserve copyright's constitutionality.

I. INTRODUCTION

There stands a great divide between the rhetoric surrounding preliminary injunctions and the practical reality they inhabit. In copyright-infringement lawsuits, perhaps above all others, this rift is startlingly evident. On the one hand, courts continue to pay lip service to the oft-repeated maxim that preliminary injunctive relief is an “extraordinary remedy,” best used sparingly—if at all.¹ The reality, however, is that such injunctions are handed down to copyright plaintiffs almost as of right, upon a mere showing of some likelihood that they will later succeed in proving infringement at trial.

Such divides between rhetoric and reality are common in the law,² and many are entirely benign. This one is not. The coercive nature of preliminary injunctive relief alone should make judges wary to employ it. If issued erroneously, a preliminary injunction carries the perverse potential of irreparably harming parties—the very evil it was designed to prevent. Yet, because decisions regarding such relief are interlocutory, they are generally made on an undeveloped factual record, heightening the probability of erroneous judgments. Furthermore, multiple standards for granting preliminary injunctions, and myriad approaches to applying those standards, have emerged, plunging the entire process into confusion. Perhaps most serious, however, is the possibility that preliminary injunctions in copyright cases may be unconstitutional prior restraints on speech—crushing the individuality and creativity of those accused of copyright infringement.

The Supreme Court has recently cleared up some of this confusion, yet it has left many questions unanswered. This Article attempts to answer some of those questions by first filling in the gaps in the Court’s holdings, then offering guidance as to how lower courts should proceed in the future. Part II begins by outlining the coercive nature of preliminary injunctions, as well as the potential they carry for causing irreparable harms (and, conversely, irreparable benefits) to litigants. Part III briefly examines the split between rhetoric and reality in copyright preliminary injunctions; it concludes that the reality of preliminary injunctions—at least in copyright-infringement suits—has become the polar

¹ See *infra* notes 41-47 and accompanying text.

² See generally, e.g., Patricia E. Dilley, *Taking Public Rights Private: The Rhetoric and Reality of Social Security Privatization*, 41 B.C. L. Rev. 975 (2000); Marie Corcoran, Note, *Rhetoric Versus Reality: The Jurisdiction of Rape, the Indian Child Welfare Act, and the Struggle for Tribal Self-Determination*, 15 Wm. & Mary J. Women & L. 415 (2009); Julianne Harper, Comment, *Defining Torture: Bridging the Gap Between Rhetoric and Reality*, 49 Santa Clara L. Rev. 893 (2009).

opposite of the rhetorical ideal still espoused by courts. Part IV explores the various standards courts employ in determining whether to grant injunctions, including the “traditional” four-factor standard recently espoused by the Court.

Part V examines two recent Supreme Court decisions, *eBay Inc. v. MercExchange, LLC*³ and *Winter v. Natural Resources Defense Council*,⁴ and begins to connect the logic of the two holdings. Part VI then posits that these two holdings together evidence the Court’s intention to pursue twin aims in its copyright-injunction jurisprudence: (1) raising the bar for copyright plaintiffs by enacting a more stringent standard, and (2) drawing the four-factor test into the fold of copyright’s “traditional contours” to forestall the possibility of copyright preliminary injunctions being granted in violation of the First Amendment. As to the first aim, I argue that courts should abandon the presumptions (both *de jure* and *de facto*) that have essentially collapsed the standards for copyright preliminary injunctions into one factor, likelihood of success on the merits. As to the second aim, I begin by examining the argument, attributed largely to Professors Lemley and Volokh,⁵ that copyright preliminary injunctions frequently constitute prior restraints on speech, thus violating the First Amendment. I maintain that, despite the theoretical appeal of this argument, the Court’s traditional-contours approach—and not direct First Amendment scrutiny—is the practical reality dominating current copyright jurisprudence. Such injunctions do, however, hold the potential to restrict freedom of speech. Thus, I propose that, to preserve the constitutionality of copyright injunctions, courts should apply a balancing-of-the-interests test under the “public interest” prong of the four-factor standard. Part VI then concludes by analyzing how courts should apply each of the four factors in turn, given the implications of the Court’s twin aims for future copyright-injunction jurisprudence.

II. “ENDING THE BALLGAME”: THE COERCIVE NATURE OF PRELIMINARY INJUNCTIONS

An “injunction” is a court order that commands or prevents a party to perform or desist from performing some act,⁶ and a “preliminary injunction” is an injunction of temporary duration that a trial judge issues either before or

³ *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006).

⁴ *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008).

⁵ Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 *Duke L.J.* 147, 150 (1998).

⁶ *Black’s Law Dictionary* 800 (9th ed. 2009).

during a trial on the merits.⁷ What may not be apparent until entering actual practice, however, is just how important these remedies are. The grant or denial of a preliminary injunction is often the most crucial decision a trial judge can make, one that has the frequent effect of completely ending litigation.⁸ As Judge Friendly declared, “Experience tells us how often the grant or denial of a temporary injunction is the end of the ball game; the parties simply cannot await the results of a full trial.”⁹

This effect is due to the immensely powerful nature of the remedy itself. District courts have wielded the force of preliminary injunctions in a broad swath of scenarios, ranging from halting the U.S. Navy’s use of sonar during training exercises¹⁰ to ordering Bernard Madoff to cease all fraudulent activities related to his infamous Ponzi scheme.¹¹ In the realm of copyright law, preliminary injunctions have banned a novel’s publication and distribution,¹² prevented the airing of a television broadcast,¹³ prohibited the displaying of a film,¹⁴ and outlawed the performance of a play,¹⁵ all without the defendant being afforded a full trial to determine the merits of the plaintiff’s allegations. The enormous power of injunctive relief, combined with the all-or-nothing stakes of a trial on the merits, frequently forces preliminarily enjoined defendants to negotiate settlements—even where they might have raised a meritorious defense at trial.¹⁶

In addition to a preliminary injunction’s ability to command or restrain conduct, it serves a “signaling” function, assisting the parties in reaching settlement agreements. Because the plaintiff’s likelihood of success on the merits constitutes one factor of the court’s decision whether to grant preliminary

⁷ See *id.* (defining “injunction” and “preliminary injunction”).

⁸ 6 William F. Patry, *Patry on Copyright* § 22.7 (2007).

⁹ Henry J. Friendly, *Indiscretion About Discretion*, 31 *Emory L.J.* 747, 774 (1982); see also *Winter*, 129 S. Ct. at 381 (“Plaintiffs confirmed at oral argument that the preliminary injunction was ‘the whole ball game’ . . .”).

¹⁰ *Natural Res. Def. Council v. Winter*, 527 F. Supp. 2d 1216, 1221–22 (C.D. Cal. 2008).

¹¹ *SEC v. Madoff*, No. 08 Civ.-10791(LLS), 2009 WL 721712, at *1–2 (S.D.N.Y. Feb. 9, 2009). The scheme, which allegedly defrauded investors out of some fifty billion dollars, may have been the largest in history. See Thomas Zambito & Greg B. Smith, *Feds Say Bernard Madoff’s \$50 Billion Ponzi Scheme Was Worst Ever*, *NY Daily News*, Dec. 13, 2008, http://www.nydailynews.com/news/ny_crime/2008/12/13/2008-12-13_feds_say_bernard_madoffs_50_billion_ponz.html.

¹² E.g., *Salinger v. Colting*, 641 F. Supp. 2d 250, 269 (S.D.N.Y. 2009); *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 924 F. Supp. 1559, 1576 (S.D. Cal. 1996).

¹³ *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 26 (2d Cir. 1976).

¹⁴ *Universal City Studios, Inc. v. Film Ventures Int’l, Inc.*, 543 F. Supp. 1134, 1142 (C.D. Cal. 1982).

¹⁵ *Douglas Int’l Corp. v. Baker*, 335 F. Supp. 282, 286 (S.D.N.Y. 1971).

¹⁶ Patry, *supra* note 8, § 22.7.

injunctive relief,¹⁷ an interlocutory order either granting or denying an injunction signals to the parties the court's initial view of the merits.¹⁸ By thus increasing the amount of shared information the parties bring to the bargaining table, an order regarding the plaintiff's motion for a preliminary injunction often facilitates settlement¹⁹—again ending litigation before a final judgment issues.

A. Preliminary Injunctive Relief's Potential for Inflicting Irreparable Harm

Although this signaling function can conserve the resources of both the litigants and the court system by encouraging settlement, it becomes problematic if the standard for granting preliminary injunctions is set either too low or too high. As an initial matter, injunctions can issue “wrongfully.”²⁰ A defendant is wrongfully enjoined “when it turns out that [it] had the right all along to do what it was enjoined from doing.”²¹ Conversely, a plaintiff is, at least in some cases,²² wrongfully denied a preliminary injunction if she then successfully obtains (or would have obtained) a permanent injunction at trial. In issuing preliminary injunctive relief, then, “the task for the district judge . . . is to minimize errors”²³ By producing such errors, a faulty standard for granting preliminary injunctions creates the risk that a trial judge will send parties a false signal regarding her perception of the strength of their respective cases.

If the standard applied by courts in deciding whether to grant preliminary injunctive relief is too low, it will grant plaintiffs who would ultimately have lost at a trial on the merits undeserved bargaining power—the shield becomes a sword. Settlement negotiations present a bilateral monopoly; each party can deal only with the other; there is no outside competition.²⁴ The “formidable,

¹⁷ See *infra* Part IV (outlining the various standards used by courts in granting preliminary injunctive relief).

¹⁸ Patry, *supra* note 8, § 22.7.

¹⁹ Douglas Lichtman, *Uncertainty and the Standard for Preliminary Relief*, 70 U. Chi. L. Rev. 197, 202 n.14 (2003).

²⁰ See 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 14.06[A][6][c] (2006) (noting that parties may be “wrongfully enjoined,” thereby suffering harm).

²¹ *Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc.*, 16 F.3d 1032, 1036 (9th Cir. 1994), cert. denied, 513 U.S. 822 (1994).

²² Of course, in some cases, a plaintiff may simply fail to demonstrate some element required for receiving preliminary injunctive relief; in such instances, it cannot be said that denial of her request was “wrongful.”

²³ *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 388 (7th Cir. 1984).

²⁴ Richard A. Posner, *Economic Analysis of Law* § 21.4, at 597 (7th ed. 2007).

undeserved leverage” given to a plaintiff by an erroneous decision to grant a plaintiff a preliminary injunction,²⁵ in tandem with the economically isolated nature of settlement negotiations,²⁶ allows the plaintiff to exercise a form of “market power”²⁷ via a court-sanctioned monopoly. If, on the other hand, the standard is too high, it will unduly discourage plaintiffs whose claims are meritorious from pursuing a final verdict at trial.

Even if a single standard for granting preliminary injunctions were clearly correct and universally applied, erroneous rulings would produce similarly flawed results in at least some cases. While a certain degree of judicial error is present in any decision—judges are only human, after all—the peculiar circumstances presented by a request for a preliminary injunction exacerbate the risk of error in a given case. Typically, having been presented with only an incomplete record, courts are called upon to assess the strength of the plaintiff’s case, that is, the probability that the plaintiff will ultimately prevail at a trial on the merits. In fact, a court may be forced to hold the evidentiary hearing on a request for a preliminary injunction only one day after the plaintiff’s filing of the initial complaint.²⁸ And at the farthest end of the “incomplete record” spectrum, courts may grant preliminary injunctions without even holding an evidentiary hearing.²⁹ Error costs arise where the trial court rules wrongly.³⁰ Posner argues

²⁵ Patry, *supra* note 8, § 22.7.

²⁶ Posner, *supra* note 24, at 597 (“The plaintiff can settle only with the defendant and the defendant only with the plaintiff, and each party is eager to engross as much as possible of the surplus that settlement will generate over litigation.”).

²⁷ “Market power” generally refers to the ability of a producer to set prices above marginal costs. Massimo Motta, *Competition Policy: Theory and Practice* 40–41 (2004). A monopolist exerts maximum market power, allowing it to raise prices far above marginal costs, to the detriment of consumers. *Id.* at 41. I use the term here to describe the ability of a plaintiff with a weak case who has nevertheless been awarded a preliminary injunction to secure a settlement in excess of what she would have otherwise received.

²⁸ See *Sole v. Wyner*, 551 U.S. 74, 84 (2007). In *Sole*, the plaintiffs requested a preliminary injunction to prevent the Florida Department of Environmental Protection from enforcing a “Bathing Suit Rule” requiring patrons of Florida parks “to wear, at a minimum, a thong and if female, a bikini top.” *Id.* at 78. By necessity, the trial court had held a preliminary-injunction hearing only one day after the plaintiffs filed their complaint, a time-frame that (naturally) did not allow for discovery, proper document review, or presentation of witnesses. *Id.* at 84. While this example falls at the far end of the spectrum, it certainly lays bare the potential for judicial error that can arise when a judge is asked to assess the plaintiff’s probability for success while the record remains undeveloped.

²⁹ Nimmer & Nimmer, *supra* note 20, § 14.06[A][6][a], at 14-152 (“An evidentiary hearing is not necessarily required prior to granting a preliminary injunction, if the required facts are established by affidavit or deposition.”).

that judges contemplating whether to award preliminary injunctive relief can reduce these error costs by comparing the ratios of each party's likelihood of success to the amount of irreparable harm each can be expected to suffer.³¹ All loss-minimization techniques aside, however, "[b]ecause the judge is being asked to rule in a hurry, on the basis of incomplete information, the risk of error is great."³²

By definition, wrongfully denying a preliminary injunction—whether caused by application of an incorrect standard or by judicial error—likely causes an irreparable harm to the plaintiff.³³ This is so because, to receive a preliminary injunction, a plaintiff must show likelihood that she will suffer irreparable harm absent interim relief, at least in a jurisdiction that does not presume such harm.³⁴ In any event, the likelihood of irreparable harm nominally exists. If the judge does, in fact, wrongly deny the requested relief, it follows that the plaintiff will probably suffer an irreparable injury as a result. The inverse is also true, at least in some cases.³⁵ Take, for example, one possibility noted above—the plaintiff wrongfully receives a preliminary injunction, and the resulting leverage allows her to force the defendant to enter into an unfair settlement agreement. Since the case will never go to trial, the resulting harm to the defendant will not be remedied; it too is "irreparable."³⁶

B. Preliminary Injunctive Relief's Potential for Imparting Irreparable (and Undeserved) Benefits

Professor Lichtman identifies the frequently overlooked flip side of this dynamic: both irreparable harms *and* "irreparable benefits" (essentially, undeserved windfalls) arise in each erroneous decision regarding a preliminary

³⁰ Posner, *supra* note 24, § 21.1, at 593.

³¹ *Id.* § 21.3, at 595–96. This approach places judges in the unfortunate position of having to affix value to harms that are, by definition, "irreparable."

³² *Id.* § 21.3, at 596.

³³ Douglas Lichtman, *Irreparable Benefits*, 116 *Yale L.J.* 1284, 1289–90 (2007). As used here, "wrongful" denotes either (1) denying an injunction to a plaintiff who would have ultimately prevailed at a trial on the merits and received a permanent injunction, or (2) granting an injunction to a plaintiff who would not have prevailed at trial.

³⁴ See *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008) ("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.").

³⁵ Lichtman, *supra* note 33, at 1290 ("[A] wrongful injunction might irreversibly harm the defendant in a distributional sense . . .").

³⁶ See *id.* (noting the possibility of erroneous injunctions causing irreparable harm to defendants).

injunction.³⁷ If, for example, the trial court were to wrongfully deny a plaintiff a preliminary injunction, that single decision would cause not only an irreparable harm to the plaintiff, but also an irreparable benefit to the copyright-infringing defendant.³⁸ Again, the inverse is also true. Unfortunately, despite recent efforts toward clarification by the Supreme Court,³⁹ the current standard for granting preliminary injunctions in copyright-infringement suits remains unclear.⁴⁰

C. A Tale of Two Remedies

Given the uncertain standard, the high potential for judicial error, and the irreparable nature of the harms and benefits that can arise from wrongful decisions, the rhetoric surrounding preliminary injunctions is unsurprising. “A preliminary injunction is an extraordinary remedy never awarded as of right,”⁴¹ runs the familiar invective. “[It] is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.”⁴² This characterization is no recent development—as early as 1824, the Court began to identify injunctions as “extraordinary” remedies.⁴³ Judge Baldwin may have summarized the depiction most eloquently, stating: “There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or is more dangerous in a doubtful case, than the issuing of a preliminary injunction.”⁴⁴

Within the realm of copyright law, the rhetoric is much the same—more than one court adjudicating a copyright-infringement suit has referred to the preliminary injunction as “one of the most drastic tools in the arsenal of judicial

³⁷ *Id.* at 1289–90.

³⁸ See *id.*

³⁹ E.g., *Winter*, 129 S. Ct. at 375–76; *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006).

⁴⁰ Compare *Salinger v. Colting*, 641 F. Supp. 2d 250, 254 (S.D.N.Y. 2009) (applying a two-factor standard for granting preliminary injunctions), with *Reed v. Town of Gilbert, Ariz.*, 587 F.3d 966, 973–74 (9th Cir. 2009) (four-factor standard).

⁴¹ *Winter*, 129 S. Ct. at 376; accord *Munaf v. Geren*, 128 S. Ct. 2207, 2219 (2008).

⁴² *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (alteration in original) (internal quotation marks omitted) (quoting 11A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2948, at 129–30 (2d ed. 1995)).

⁴³ *Osborn v. Bank of the United States*, 22 U.S. 738, 802 (1824) (“Mere general principles, upon which Courts of equity may have proceeded a certain length in interposing by injunction, will not warrant the extending this extraordinary remedy still further.”).

⁴⁴ *Bonapart v. R.R. Co.*, 1 Baldw. 205.

remedies.”⁴⁵ “The preliminary injunction is an extraordinary remedy,” courts opine, one that “will be granted only if the movant has clearly carried the burden”⁴⁶ The Supreme Court avers that it “has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed.”⁴⁷ The preliminary injunction of copyright-law rhetoric is a powerful tool, an “extraordinary remedy,” wielded with caution by judges to protect only those few plaintiffs who can successfully clear the many hurdles along the way. It is somewhat akin to one of Plato’s “Forms,”⁴⁸ a perfect, otherworldly exemplar, of which only flawed representations exist in reality.

In reality, an entirely different remedy exists—the relatively humble, physical manifestation of the ideal. Unlike its dignified cousin, the preliminary injunction is “pretty much granted as a matter of course” in intellectual-property disputes across the United States.⁴⁹ Although courts continue to repeat the “extraordinary remedy” mantra in describing preliminary injunctions, “their issuance is actually quite ordinary, even commonplace,” in actual copyright litigation.⁵⁰ This practice stands in stark contrast to the lofty preliminary injunction idolized in rhetoric, a device “which is at best used sparingly, if at all.”⁵¹

Such a divergence between rhetoric and reality did not always exist. Historical research reveals that early American courts refused to grant preliminary injunctions in many, if not most, copyright-infringement cases.⁵² Thus, for example, when a court made a statement to the effect that “[a]

⁴⁵ *Berlent v. Focus Features, LLC*, No. 06 Civ. 2834(SCR), 2006 WL 1594478, at *2 (S.D.N.Y. June 8, 2006) (quoting *Hanson Trust PLC v. SCM Corp.*, 774 F.2d 47, 60 (2d Cir. 1985) (internal quotation marks omitted)).

⁴⁶ *Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458, 1462 (5th Cir. 1990); *Miss. Power & Light Co. v. United Gas Pipe Line*, 760 F.2d 618, 621 (5th Cir. 1985).

⁴⁷ *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 392-93 (2006).

⁴⁸ Plato described his conception of the existence of Forms in, among other works, *The Republic*. See 2 *The Dialogues of Plato* 431 (Benjamin Jowett trans., 1907) (“[A]ll the poets . . . are only imitators; they copy images of virtue and the like, but the truth they never reach[.]”). His Forms occupied the perfect reality and were far superior to the material representations with which we interact empirically. See *id.*

⁴⁹ Lemley & Volokh, *supra* note 5, at 233.

⁵⁰ Nimmer & Nimmer, *supra* note 20, § 14.06[A], at 14-141.

⁵¹ *Religious Tech. Ctr. v. F.A.C.T.NET, Inc.*, 901 F. Supp. 1519, 1523 n.1 (D. Colo. 1995). The court based this premise on its observation that the “emergency nature” of a preliminary injunction does not allow for the “careful consideration afforded by the deliberative processes of a trial.” *Id.*

⁵² Lemley & Volokh, *supra* note 5, at 154–55.

preliminary injunction will not be awarded except in a plain case,”⁵³ the trial judge was rarely indulging in mere rhetoric—he often did not issue the injunction.⁵⁴ On the contrary, when granting preliminary injunctive relief to copyright plaintiffs, courts exercised great caution—with some frequency, it seems, courts would refer cases to special masters to provide a more developed analysis of the merits of plaintiffs’ claims.⁵⁵ Merely demonstrating a likelihood of success on the merits was not enough for a copyright plaintiff to receive a preliminary injunction,⁵⁶ whereas that showing may be all that a modern district court requires—even if the non-moving party has raised a plausible defense.⁵⁷ In fact, some modern courts have twisted this standard so as to require only a “better than negligible chance” of success,⁵⁸ a requirement that can sometimes be satisfied even where the court finds that the plaintiff is “very unlikely” to succeed at trial.⁵⁹ In short, the reality is that preliminary injunctions—at least in copyright-infringement suits—have become the polar opposite of the rhetorical ideal still espoused by courts.

⁵³ *Harper v. Holman*, 84 F. 224, 225 (C.C. Pa. 1897).

⁵⁴ See, e.g., *id.* (C.C. Pa. 1897) (refusing to grant a preliminary injunction on a theory of copyright-infringement).

⁵⁵ See, e.g., *Story v. Holcombe*, 23 F. Cas. 171, 172 (1847) (enjoining defendants’ “abridgement” of, ironically, Justice Story’s *Commentaries on Equity Jurisprudence*); *Story v. Derby*, 23 F. Cas. 171, 171 (1846) (describing the use of a special master in a similar case). It should be noted that using a special master is not unheard-of in modern copyright suits. See, e.g., *Johnson Controls, Inc. v. Phoenix Control Systems, Inc.*, 886 F.2d 1173, 1176 (9th Cir. 1988) (noting that the Federal Rules of Civil Procedure allow trial judges discretion in appointing special masters).

⁵⁶ See *Lemley & Volokh*, *supra* note 5, at 156 (“Early American copyright plaintiffs also faced substantial burdens in demonstrating that the balance of hardships favored an injunction, even when success on the merits was likely.”).

⁵⁷ *Nimmer & Nimmer*, *supra* note 20, § 14.06[A], at 14-133.

⁵⁸ E.g., *QRSOft, Inc. v. Rest. Tech., Inc.*, No. 06 C 2734, 2006 WL 2990432, at *2 (N.D. Ill. Oct. 19, 2006). The Seventh Circuit nominally appears to be moving toward a standard that would require a plaintiff to show a “reasonable likelihood of success on the merits.” *Id.*; see also *Coronado v. Valleyview Pub. Sch. Dist.* 365-U, 537 F.3d 791, 794–95 (7th Cir. 2008) (“A party seeking a preliminary injunction must demonstrate that he is reasonably likely to succeed on the merits . . .”). However, it may still apply the (arguably) lower standard by simply defining a “reasonable likelihood” as “better than negligible.” E.g., *QRSOft, Inc. v. Rest. Tech., Inc.*, No. 06 C 2734, 2006 WL 2990432, at *2 (N.D. Ill. Oct. 19, 2006). Furthermore, the better-than-negligible standard is still very much alive. See, e.g., *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States of America, Inc.*, 549 F.3d 1079, 1100 (7th Cir. 2008).

⁵⁹ *Girl Scouts*, 549 F.3d at 1100.

III. THE STANDARDS FOR GRANTING PRELIMINARY INJUNCTIONS IN MODERN COPYRIGHT LAW

An in-depth exploration of the diverse approaches used by modern courts in determining whether to grant preliminary injunctive relief in copyright cases would present no small task. Thankfully, it is one that has largely been undertaken by quite able scholars,⁶⁰ and a smaller-than-treatise-sized summary will serve here. The variety displayed in the standards applied by courts, as well as the assortment of modifications made to individual factors within those standards, demonstrates the urgent need for a clear standard—and clear direction on how to apply that standard. And as with any solution, the first step is identifying the problem.

A. The Collapsible Tests of the Second and Ninth Circuits

Broadly speaking, in the Second Circuit and (usually) the Ninth Circuit, courts have considered three common factors in determining whether to grant preliminary injunctive relief to a copyright holder: (1) the likelihood of her success on the merits, (2) whether she has demonstrated that she will suffer an irreparable harm absent interim relief, and (3) whether the “balance of hardships” tips in her favor.⁶¹ Neither Circuit’s approach creates an absolute requirement that the plaintiff demonstrate a likelihood of success on the merits.⁶² Both offer plaintiffs who cannot do so the option of showing the existence of “serious questions” going to the merits.⁶³ Beyond that, however, the two Circuits diverge.

1. The Second Circuit

The Second Circuit’s formulation of the standard for whether to grant a

⁶⁰ Goldstein, Nimmer, and Patry each provide thorough—and, to a degree, different—views on the current approaches used by the various circuits and the Supreme Court. Compare 2 Paul Goldstein, *Goldstein on Copyright* § 13.1.2.2 (3d ed. 2008) (containing perhaps the least editorializing of the three), and Nimmer & Nimmer, *supra* note 20, § 14.06[A][2], at 14-133 (identifying the two-factor test as predominant), with Patry, *supra* note 8, § 22.15, at 22-54 (“The two-factor standard is not, however, the dominant standard as [Nimmer] asserts.”).

⁶¹ Goldstein, *supra* note 60, § 13.1.2.2, at 13:12. For an example from each circuit, see *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 713–14 (9th Cir. 2007), and *MyWebGrocer, LLC v. Hometown Info, Inc.*, 375 F.3d 190, 192 (2d Cir. 2004).

⁶² Compare, e.g., *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 476 (2d Cir. 2004) (identifying the Second Circuit’s formulation), with, e.g., *LGS Architects, Inc. v. Concordia Homes of Nev.*, 434 F.3d 1150, 1155 (9th Cir. 2006) (stating the Ninth Circuit’s test).

⁶³ Compare sources cited, *supra* note 62.

preliminary injunction is as follows:

[A] court may issue a preliminary injunction in a copyright case only if the plaintiff has demonstrated “either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the [plaintiff’s] favor.” Second, the court may issue the injunction only if the plaintiff has demonstrated “that he is likely to suffer irreparable injury in the absence of an injunction.” . . . Third, a court must consider the balance of hardships between the plaintiff and defendant and issue the injunction only if the balance of hardships tips in the plaintiff’s favor. Finally, the court must ensure that the “public interest would not be disserved” by the issuance of a preliminary injunction.⁶⁴

Thus, copyright plaintiffs must essentially demonstrate four things: (1) likely irreparable harm, (2) a likelihood of success *or* “serious questions” and a “decidedly” favorable balance of hardships, (3) a favorable balance of hardships, and (4) a favorable public-interest inquiry.

a. Irreparable Harm

Today, the Second Circuit test requires a copyright plaintiff to demonstrate, at an irreducible minimum, that she will likely suffer irreparable harm absent preliminary injunctive relief. Until quite recently, however, the Second Circuit had followed the view that, where a copyright plaintiff can make a *prima facie* case of infringement, courts should generally presume irreparable harm.⁶⁵ In the preliminary-injunction context, a showing of likely success on the merits sufficed to give rise to this presumption.⁶⁶ Given this dynamic, the “requirement” of showing irreparable harm essentially collapsed into the likelihood-of-success alternative.⁶⁷ The only adverse consequence faced by plaintiffs who failed to demonstrate irreparable harm was foreclosure of the confusing and rarely invoked serious-questions-and-balance-of-hardships option.

Salinger v. Colting, decided April 30, 2010, finally explicitly rejected the presumption-of-irreparable-harm approach formerly applied the Second Circuit.

⁶⁴ *Salinger v. Colting*, 607 F.3d 68, 79–80 (2d Cir. 2010) (citations omitted) (alteration in original) (quoting multiple Second Circuit and U.S. Supreme Court opinions).

⁶⁵ *Random House, Inc. v. Rosetta Books LLC*, 283 F.3d 490, 491 (2d Cir. 2002).

⁶⁶ *Id.*

⁶⁷ *Nimmer & Nimmer*, supra note 20, § 14.06[A][2][c], at 14-137.

Judge Calabresi, applying Supreme Court precedent (namely, *eBay* and *Winter*), firmly stated that, when faced with a request for a preliminary injunction, “[t]he court must not adopt a ‘categorical’ or ‘general’ rule or presume that the plaintiff will suffer irreparable harm.”⁶⁸

b. Likelihood of Success

Under the Second Circuit’s pre-*Salinger* approach, the importance of this factor was paramount—a copyright plaintiff who could satisfy the likelihood-of-success prong was essentially guaranteed a preliminary injunction. In the copyright context, demonstrating a likelihood of success on the merits requires a plaintiff to prove that it holds a valid copyright and that the defendant infringed.⁶⁹ As in an actual trial, the defendant can defeat such a showing by raising a defense—for example, that the fair use doctrine protected their copying.⁷⁰ Exactly how likely is a “likelihood” of success? Courts are remarkably reticent on the subject. When a standard is elucidated, it is generally of little value; a “substantial” likelihood appears to be higher than a negligible one, but still allows plenty of room for the existence of disputed facts and plausible defenses.⁷¹ The few courts who have dared to elaborate have fixed a “likelihood” at “better than fifty percent,”⁷² a measure that appears to negatively impact plaintiffs’ typically high chances of receiving a preliminary injunction⁷³—except in the copyright context.⁷⁴

⁶⁸ *Salinger*, 607 F.3d at 80.

⁶⁹ *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 476 (2d Cir. 2004).

⁷⁰ *Id.*

⁷¹ See, e.g., *Midway Mfg. Co. v. Bandai-Am., Inc.*, 546 F. Supp. 125, 141 (D.N.J. 1982) (“Acknowledgement that disputed fact issues exist does not preclude a court from granting a plaintiff preliminary [sic] relief. Similarly, the existence of a plausible defense in a copyright case is no barrier to the issuance of a preliminary injunction as long as the movant shows a substantial likelihood of success” (citation omitted)).

⁷² E.g., *Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985); *BigStar Entm’t, Inc. v. Next Big Star, Inc.*, 105 F. Supp. 2d 185, 191 (S.D.N.Y. 2000).

⁷³ See *Wali*, 754 F.2d 1015 (denying a preliminary injunction to inmates who wished to receive copies of reports on conditions at the Attica prison); *BigStar Entm’t, Inc.*, 105 F. Supp. 2d 185 (denying a preliminary injunction to halt alleged trademark infringement). But see *Esbin & Alter, LLP v. Zappier*, No. 08 Civ. 313, 2010 WL 391830, at *2, *6 (S.D.N.Y. Feb. 4, 2010) (setting the standard at fifty percent, yet granting a preliminary injunction to a copyright plaintiff).

⁷⁴ See *Esbin*, 2010 WL 391830.

c. Serious Questions and the Balance of Hardships

Despite nominally applying *eBay* and *Winter* in full force to requests for preliminary injunctive relief in copyright cases, the Second Circuit's *Salinger* opinion still identified the "serious-questions" prong as an alternative to showing a likelihood of success.⁷⁵ At best, this holding is puzzling; at worst, it is incomprehensible. In both *eBay* and *Winter*, the Court clearly mandated the application of the "traditional" four-factor standard—without so much as mentioning the "serious-questions" inquiry.⁷⁶

Regardless of whether applying it is wrong as a matter of precedent, this alternative to demonstrating a likelihood of success on the merits has been roundly criticized.⁷⁷ The definition of "sufficiently serious questions going to the merits to make them a fair ground for litigation"⁷⁸ is enormously vague. It can be safely said that mere "generalized assertions" are not sufficiently serious to meet this standard.⁷⁹ Furthermore, the sufficiently-serious-questions standard suggests something less than a likelihood; if it were the equivalent, it would not be an alternative.⁸⁰ It follows that the plaintiff may demonstrate a lower-than-fifty-percent chance of success (the highest percentage courts are willing to assign to "likelihood"), yet still show sufficiently serious questions.⁸¹ Beyond that, attempts to pin down the standard are futile. This is, of course, problematic, for "[i]t becomes rather difficult for anyone to form a reasonable expectation as to what will constitute a serious question in the eyes of the judges in the Second Circuit."⁸²

⁷⁵ *Salinger v. Colting*, 607 F.3d 68, 79 (2d Cir. 2010).

⁷⁶ See, e.g., *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008) (stating the four factors).

⁷⁷ See, e.g., Patry, *supra* note 8, § 22.16, at 22-58 ("[I]t is past time for the court of appeals to abandon its test."); Linz Audain, Of Posner, and Newton, and Twenty-First Century Law: An Economic and Statistical Analysis of the Posner Rule for Granting Preliminary Injunctions, 23 Loy. L.A. L. Rev. 1215, 1237-38 (1990) ("Perhaps the most obvious difficulty with this standard is that literally an infinite number of 'factors' are subsumed within a 'serious question.'").

⁷⁸ *Corning Inc. v. Picvue Elec., Ltd.*, 98 F. App'x 39, 40 (2d Cir. 2004).

⁷⁹ *Wireless TV Studios, Inc. v. Digital Dispatch Sys., Inc.*, No. 07 CV 5103(RJD)(RER), 2008 WL 2474626, at *1 (E.D.N.Y. June 19, 2008) (denying a preliminary injunction to a copyright plaintiff who failed to demonstrate either likelihood of success or the existence of sufficiently serious questions).

⁸⁰ Audain, *supra* note 77, at 1238 n.126.

⁸¹ See *id.*; cf. *Esbin & Alter, LLP v. Zappier*, No. 08 Civ. 313, 2010 WL 391830, at *2 (S.D.N.Y. Feb. 4, 2010) (granting preliminary injunction to copyright plaintiff).

⁸² Audain, *supra* note 77, at 1238.

The second half of this alternative requires a copyright plaintiff to demonstrate that the balance of hardships tips “decidedly” in her favor.⁸³ Undoubtedly due in large part to the uncertainty and apparently *de minimis* standard of the serious-questions prong, the analysis tends to collapse into this balance-of-hardships inquiry—courts may mention “serious questions” by rote, but tend to skip straight to the balance of hardships when a plaintiff fails to show a likelihood of success.⁸⁴ Courts at least occasionally invoke the balance of hardships to deny preliminary injunctions in copyright cases,⁸⁵ but such occurrences are rare.⁸⁶

d. The Public Interest

In the past, the Second Circuit generally ignored the public’s interest in granting injunctive relief. The *Salinger* decision in 2010, however, at least nominally requires plaintiffs to demonstrate a favorable public interest in order to receive a preliminary injunction. Given that “the public’s interest has not in the past been a formal factor in [the Second Circuit’s] standard for when to issue copyright injunctions,”⁸⁷ it remains to be seen how this factor will be applied.

2. The Ninth Circuit

The Ninth Circuit’s approach is similar to, yet arguably even more problematic than, the test used by the Second Circuit. It requires the plaintiff to show “either: (1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tilt in the plaintiff’s favor.”⁸⁸ Immediately, it is apparent

⁸³ E.g., *Lapham v. Porach*, No. 06-Civ-6861 (CM), 2007 WL 1224924, at *4 (S.D.N.Y. Apr. 25, 2007); *Oriental Art Printing, Inc. v. Goldstar Printing Corp.*, 175 F. Supp. 2d 542, 545 (S.D.N.Y. 2001); *Ottoman’s v. Sunshine State Labs.*, No. 92 CIV. 5386 (JES), 1992 WL 212473, at *1 (S.D.N.Y. Aug. 24, 1992).

⁸⁴ See, e.g., *Lapham*, 2007 WL 1224924, at *1 (“Because, on the record before the court, plaintiff has not shown that he is likely to succeed on the merits, or that the balance of hardships tips decidedly in plaintiff’s favor, plaintiff’s motion for a preliminary injunction is denied.”); *Ottoman’s*, 1992 WL 212473, at *1 (“[E]ven assuming arguendo that there are fair grounds to litigate the merits . . . plaintiff has not shown that the balance of hardships tips decidedly in plaintiff’s favor.”).

⁸⁵ E.g., *Ottoman’s*, 1992 WL 212473, at *1. In *Ottoman’s*, the district court held that, where both parties participated in trade shows, the hardships were, at best, equal—the potential harm to the plaintiff caused by denying the injunction was balanced by the harm that would be caused to the defendants by granting it. *Id.*

⁸⁶ *Nimmer & Nimmer*, *supra* note 20, § 14.06[A], at 129–30.

⁸⁷ *Salinger v. Colting*, 607 F.3d 68, 80 n.8 (2d Cir. 2010).

⁸⁸ *Elvis Presley Enter., Inc. v. Passport Video*, 349 F.3d 622, 627 (9th Cir. 2003).

that a plaintiff need not demonstrate even the *possibility* of irreparable harm to receive a preliminary injunction, although such harm is the traditional touchstone for injunctive relief.⁸⁹

Further complicating matters is the Ninth Circuit's tendency to treat the first half of its formulation as a "sliding scale."⁹⁰ As such, the higher the probability of success a plaintiff could demonstrate, the lower the degree of irreparable harm she was required to show, and vice versa.⁹¹ Coupled with the presumption of irreparable harm that the Ninth Circuit recognizes upon a showing of likely success,⁹² the opposite ends of this continuum present untenable possibilities. A plaintiff could show a high likelihood of success on the merits, creating a presumption of irreparable harm, and thereby collapse the inquiry into a single factor. Conversely, a plaintiff could show a great deal of irreparable harm and be granted an injunction where she shows only a negligible likelihood of success,⁹³ calling into question the sources and nature of the harm itself—the very predicate upon which the grant of the injunction is (or should be⁹⁴) based. How minimal a showing of likely success can still satisfy the sliding-scale standard is unclear—must success be "probable?"⁹⁵ Only "reasonable?"⁹⁶ The upshot of the flexibility built into the very structure of this test, exacerbated by the lack of workable definitions for its various requirements, is that district court judges in the Ninth Circuit have traditionally exercised nearly unbridled discretion in granting preliminary injunctions to copyright plaintiffs.

⁸⁹ *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506–07 (1959) ("The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.").

⁹⁰ E.g., *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001).

⁹¹ See, e.g., *id.*

⁹² E.g., *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1118 (9th Cir. 1999); *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1109 (9th Cir. 1998).

⁹³ See Patry, *supra* note 8, § 22.20, at 22-63 (citing *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005), and *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001), as examples of such a scenario).

⁹⁴ *Beacon Theatres*, 359 U.S. at 506–07.

⁹⁵ See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1158 (9th Cir. 2007) (identifying the standard as "probable success on the merits" (quoting *A&M Records*, 239 F.3d at 1013 (internal quotation marks omitted))).

⁹⁶ See *Cadence Design Systems, Inc. v. Avant! Corp.*, No. 99-15048, 1999 WL 561261, at *1 (9th Cir. 1999). The court stated that "[i]n a copyright case, if a plaintiff can establish a reasonable likelihood of success on the merits, irreparable harm is presumed." *Id.* Since, as noted above, the presumption would collapse the nominally two-part analysis, a "reasonable" likelihood of success would be enough for a preliminary injunction to issue in such a case.

B. The “Traditional” Four-Factor Standard

Arguably the most widely used standard in modern copyright lawsuits,⁹⁷ the four-factor test requires courts to consider: (1) the plaintiff’s likelihood of success on the merits, (2) the likelihood that she will suffer irreparable harm absent preliminary relief, (3) the balance of hardships to the parties, and (4) the public interest.⁹⁸ Even the circuits that apply these factors vastly diverge in how they do so,⁹⁹ and, in general, confusion and disorder have run rampant.¹⁰⁰ The foundational question of whether a plaintiff is required to demonstrate all four factors or whether the entire test (or some portion thereof) consists of a balancing act has been met with a variety of answers.¹⁰¹ In addressing the likelihood-of-success factor, most circuits recognize a presumption of irreparable harm upon a showing of likelihood of success—yet the Fifth Circuit has expressly rejected this view.¹⁰² As to the question of how likely a “likelihood” must be, the Seventh Circuit currently requires only a “better than negligible” chance of success.¹⁰³ The Eighth Circuit recently toyed with a standard that is, if possible, equally esoteric: requiring plaintiffs to show a “fair chance” that they will succeed.¹⁰⁴

⁹⁷ See Patry, *supra* note 8, § 22.21, at 22-64 (stating that the four-factor test is “used by the Supreme Court and all circuits other than the Second and Ninth . . .”). But see *Nimmer & Nimmer*, *supra* note 20, § 14.06[A], at 14-133, 135 (referring to the Ninth Circuit’s formulation as “the predominant test”).

⁹⁸ See, e.g., *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008) (stating the four factors as independent requirements).

⁹⁹ See Patry, *supra* note 8, §§ 22.22–31 (surveying the various methods of application among the circuits); see generally Arthur D. Wolf, *Preliminary Injunctions: The Varying Standards*, 7 W. New Eng. L. Rev. 173 (1984) (arguing for a clearer standard for granting general-law preliminary injunctions).

¹⁰⁰ See generally *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 382 (7th Cir. 1984) (“Each party is able to cite numerous decisions in support of its view of the proper standard, simply because the relevant case law is in disarray in both this and other circuits.”).

¹⁰¹ See Goldstein, *supra* note 60, § 13.1.2, at 13:14–15 (“Most courts treat the first three factors . . . as variable and interrelated.”); Patry, *supra* note 8, § 22.21, at 22-65 (“[B]eyond shared use of the same factors, application and weighing of [the factors] varies importantly among the circuits . . .”).

¹⁰² E.g., *Plains Cotton Co-op. Ass’n of Lubbock, Tex. v. Goodpasture Computer Serv., Inc.*, 807 F.2d 1256, 1261 (5th Cir. 1987) (rejecting the presumption of irreparable injury).

¹⁰³ See, e.g., *Lineback v. Spurlino Materials, LLC*, 546 F.3d 491, 502-3 (7th Cir. 2008) (quoting *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1568 (7th Cir. 1996) (espousing better-than-negligible standard); *Sofinet v. I.N.S.*, 188 F.3d 703, 707 (7th Cir. 1999) (citing *Roland*, 749 F.2d at 387) (stating that, although there is “a minimum threshold for likelihood of success . . . it is a low one”).

¹⁰⁴ *Heartland Acad. Cmty. Church v. Waddle*, 335 F.3d 684, 690 (8th Cir. 2003) (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)). But see *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 731–32 (8th Cir. 2008) (quoting *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975)).

Even among courts that nominally require a plaintiff to demonstrate all four factors to receive a preliminary injunction, the “individual” factors have often collapsed. The Fourth Circuit, for example, holds that where a plaintiff demonstrates irreparable harm and a favorable balance of hardships, the likelihood-of-success requirement defaults to a serious-questions standard.¹⁰⁵ As noted above, this standard is of little practical import.¹⁰⁶ Fourth Circuit courts admit as much, stating that only where “the balance of hardships is substantially equal” does “the probability of success begin[] to assume real significance.”¹⁰⁷ The Seventh Circuit’s better-than-negligible standard is particularly problematic. The defendant typically has a better-than-negligible chance of succeeding, or else she would have settled the case as soon as possible rather than incurring litigation costs. Plaintiffs who have only a negligible chance of winning at trial would very rarely bring suit in the first place. Thus, in nearly every case, *both* parties could presumably satisfy this requirement, rendering the standard largely superfluous. What is worse, by creating an artificial incentive for such plaintiffs to bring suits seeking preliminary injunctions—which, if awarded, give plaintiffs a powerful bargaining chip—such a standard needlessly creates excess litigation¹⁰⁸ and runs the risk of irreparably harming defendants.¹⁰⁹

Generally speaking, the multiple factors tend to be subsumed into the likelihood-of-success requirement. As noted above, nearly all the circuits adopted a presumption of irreparable harm in cases where a copyright plaintiff has shown a likelihood of success.¹¹⁰ The presumption is at least nominally rebuttable.¹¹¹ Where, for instance, a defendant demonstrates that the plaintiff’s copyright-protected product is “no longer on the market,” at least one court has held the presumption to have been overcome.¹¹² This result makes perfect sense, given the obvious lack of harm that would accrue to such a plaintiff before the

(enacting a “more rigorous standard” requiring plaintiffs to demonstrate that they are “likely to prevail on the merits”).

¹⁰⁵ *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 271 (4th Cir. 2002) (trademark case).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 271 (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 808 (4th Cir. 1991) (internal quotation marks omitted)).

¹⁰⁸ *Nimmer & Nimmer*, *supra* note 20, § 14.06[A], at 14-130 n. 36.9.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See, e.g., *Cadence Design Sys., Inc. v. Avant! Corp.*, 125 F.3d 824, 828–29 (9th Cir. 1997) (giving examples of situations in which defendants could rebut the presumption).

¹¹² *Marisa Christina, Inc. v. Bernard Chaus, Inc.*, 808 F. Supp. 356, 359 (S.D.N.Y. 1992).

conclusion of a full trial on the merits.¹¹³

In the typical copyright case, however, the presumption essentially folds irreparable harm into likelihood of success, leading at least one court to note that there is “no need actually to prove irreparable harm when seeking an injunction against copyright infringement.”¹¹⁴ The same could generally be said regarding the public-interest prong. The official party line is that “the public interest is the interest in upholding copyright protections.”¹¹⁵ As a result, it has unsurprisingly become “virtually axiomatic” that copyright plaintiffs who have demonstrated a likelihood of success on the merits have also satisfied the public-interest inquiry.¹¹⁶ The argument is summarized thus:

Since Congress has elected to grant certain exclusive rights to the owner of a copyright in a protected work, it is virtually axiomatic that the public interest can only be served by upholding copyright protections Preliminary injunctions are necessary to preserve the integrity of the copyright laws which seek to encourage individual effort and creativity by granting valuable enforceable rights.¹¹⁷

Similarly, courts that use the four-factor test typically hold that the balance of hardships—at first blush a separate requirement—is linked to a plaintiff’s satisfying the likelihood-of-success factor,¹¹⁸ although this approach is not universal. In the Fourth Circuit, balance of hardships sometimes appears to be a threshold factor, one which must be satisfied before the court will even consider

¹¹³ Other such situations to which courts have pointed are frequently less logically coherent, one notable example being cases where a copyright plaintiff delayed unreasonably in bringing suit after learning of the alleged infringement. E.g., *Forry, Inc. v. Neundorfer, Inc.*, 837 F.2d 259, 267 (6th Cir. 1988) (“It has been held that an unreasonable delay between the time when a plaintiff is first apprised of the infringing acts and the time of filing suit will rebut the presumption of irreparable harm.”). These examples often crumple under closer scrutiny, however, as does the *Forry* court’s—neither case the court cites to support its statement actually held the presumption to be rebutted.

¹¹⁴ *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 612 (1st Cir. 1988).

¹¹⁵ *Taylor Corp. v. Four Seasons Greetings, LLC*, 403 F.3d 958, 968 (8th Cir. 2005) (quoting *Autoskill, Inc. v. Nat’l Educ. Support Sys., Inc.*, 994 F.2d 1476, 1499 (10th Cir. 1993) (internal quotation marks omitted)).

¹¹⁶ See *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1066 (7th Cir. 1994) (quoting *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1255 (3d Cir. 1983) (internal quotation marks omitted)); *Concrete Mach.*, 843 F.2d at 612 (same).

¹¹⁷ *Shaw Bros. Co. v. Foxcard Inc.*, No. 3:03 CV-783-R, 2004 WL 2055845 (W.D. Ky. Jan. 16, 2004) (citations omitted).

¹¹⁸ Goldstein, *supra* note 60, § 13.1.2, at 13:22.

likelihood of success.¹¹⁹ Emphasizing the balance of hardships is, however, the exception, not the rule. Thus, the favorable balance of hardships, public interest, and irreparable harm standards tend to be quite low, if not illusory. If it is possible to distill a general principle from this patchwork of precedent, it is that copyright plaintiffs who have demonstrated some degree of probability of success at trial have, for all practical purposes, satisfied all the prongs of the four-factor test and will therefore receive preliminary injunctive relief.

IV. THE COURT WEIGHS IN: *EBAY*, *WINTER*, AND A MEASURE OF CLARITY

In the past, the Supreme Court has not been particularly helpful in clearing up the confusion surrounding preliminary injunctions in copyright cases.¹²⁰ Illustrative is one three-year period, from 1973 to 1975, in which the Court wavered between at least four different standards.¹²¹ Outside the copyright context, the four factors gradually emerged as the relevant considerations,¹²² but it remained somewhat unclear whether the plaintiff was required to demonstrate each factor.¹²³ In *Weinberger*, for instance, the Court referred to the balance-of-hardships analysis as flexible—“the court ‘balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction.’”¹²⁴ The burden of demonstrating that the public interests favored granting an injunction similarly did not seem to rest

¹¹⁹ E.g., *Candle Factory, Inc. v. Trade Assoc. Group, Ltd.*, 23 F. App'x. 134, 137 (4th Cir. 2001) (stating that, in applying the four-factor test, courts must first balance the likelihood of harms to the respective parties). Upon a demonstration of a favorable balance of harms, the standard for success is lowered to the serious-questions level. *Id.* Outside the copyright context, Fourth Circuit courts have explicitly identified the balance-of-hardships factor as the most important aspect of deciding whether to grant preliminary injunctions. See *Hughes Network Systems, Inc. v. InterDigital Commc'ns Corp.*, 17 F.3d 691, 693 (4th Cir. 1994) (“The ‘balance of hardships’ reached by comparing the relevant harms to the plaintiff and defendant is the most important determination, dictating, for example, how strong a likelihood of success showing the plaintiff must make.”).

¹²⁰ See Audain, *supra* note 77, at 1234 (“Much of the responsibility for the existing variations in preliminary injunction standards lies with the United States Supreme Court.”).

¹²¹ See Wolf, *supra* note 99, at 182 (citing examples of the Court using two-, three-, and four-factor tests within the stated three-year time period).

¹²² Compare *Sampson v. Murray*, 415 U.S. 61, 83–84, n.53 (1974) (referring to the four factors adopted by the District of Columbia Court of Appeals in the case below as “the traditional standards governing more orthodox ‘stays’”), with *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312–13 (1982) (considering four factors in granting a preliminary injunction).

¹²³ See *Weinberger*, 456 U.S. at 312–13.

¹²⁴ *Id.* at 312 (quoting *Yakus v. United States*, 321 U.S. 414, 440 (1944)).

on plaintiffs.¹²⁵

Quite recently, however, the Court issued two decisions that may grant a measure of clarity amidst the disarray. In 2006, *eBay Inc. v. MercExchange, LLC* announced that a plaintiff seeking a permanent injunction in a patent-infringement case now bears the burden of demonstrating the four factors.¹²⁶ Two years later, in *Winter v. Natural Resources Defense Council*, the Court overturned the grant of a preliminary injunction forbidding the U.S. Navy from using a certain form of sonar during training exercises.¹²⁷ In doing so, the Court broadly stated that plaintiffs seeking preliminary injunctions—like those seeking permanent relief—must also demonstrate all four factors.¹²⁸ At first glance, these two cases present unlikely candidates for the task of clarifying the standard for granting preliminary injunctive relief to copyright plaintiffs. Neither case involved copyright infringement, and although *eBay* at least implicated intellectual-property law, it dealt with a permanent (not preliminary) injunction.¹²⁹ In neither case did the Court expressly state that the holdings apply to copyright law, which has traditionally occupied a peculiar space in the arena of equitable relief.¹³⁰ As a result, no small amount of uncertainty yet remains as to what impact these cases will or should have on copyright jurisprudence. An examination of the Court's reasoning in *eBay* and *Winter* reveals that both do hold important implications for copyright law. Both, however, raise at least as many questions as they answer.

A. On *eBay*, and Applying the Four Factors to Patent (and Copyright?)
Plaintiffs Seeking Permanent Injunctions

In *eBay*, the Court considered an appeal from a Federal Circuit decision applying a “general rule” that, absent extraordinary circumstances, courts should grant permanent injunctions to successful patent plaintiffs.¹³¹ Referring to the

¹²⁵ See *id.* (“In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.”).

¹²⁶ *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).

¹²⁷ *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 382 (2008).

¹²⁸ *Id.* at 374.

¹²⁹ *eBay*, 547 U.S. at 391.

¹³⁰ See generally 2 Jay Byrnes, Jr., *Intellectual Property Law: Commercial, Creative, and Industrial Property* § 13.01, at 13-2.1 (2004) (“Injunctive relief is a crucial remedy for infringement of intellectual property rights. The very foundation of intellectual property is exclusivity, and no amount of money, by itself, can provide that exclusivity.” (citation omitted)).

¹³¹ *eBay*, 547 U.S. at 391 (quoting *MercExchange, LLC v. eBay Inc.*, 401 F.3d 1323, 1339 (Fed. Cir. 2005)).

four-factor test for permanent injunctions¹³² as part of the “well-established principles of equity,” the Court held that it applies to patent-infringement suits.¹³³ The majority also clearly placed the burden on the plaintiff to demonstrate that each of the four factors is met.¹³⁴ Upon those principles, the Court flatly rejected the Federal Circuit’s general rule that permanent injunctions nearly always follow a showing of patent infringement.¹³⁵

Interestingly, the Court analogized to copyright law, resting heavily on the questionable statement that its approach was consistent with the Court’s repeated rejection of a rule that injunctions should automatically issue to successful copyright plaintiffs.¹³⁶ For support, the *eBay* majority looked to three cases: *New York Times Co. v. Tasini*, *Campbell v. Acuff-Rose Music Co.*, and *Dun v. Lumbermen’s Credit Association*.¹³⁷

The *Tasini* Court upheld the Second Circuit’s grant of summary judgment in favor of plaintiff–authors who sued several publishers, claiming that the defendants allowed LEXIS/NEXIS to place their articles on its searchable database in violation of copyright laws.¹³⁸ In doing so, the Court mentioned that it did not follow from its decision that an injunction “must issue” in such cases and remanded the case to the district court for resolution of all remedial questions.¹³⁹

In *Campbell v. Acuff-Rose*, a seminal case for modern fair-use analysis, the Court also (very) briefly discussed copyright injunctions. *Campbell* involved a ribald 2 Live Crew parody that borrowed from Roy Orbison’s relatively subdued hit, “Oh, Pretty Woman.”¹⁴⁰ Having found that the parody constituted fair use,

¹³² As formulated by the *eBay* Court, the test requires a plaintiff to show:

(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.

Id.

¹³³ *Id.* (“These familiar principles apply with equal force to disputes arising under the Patent Act.”).

¹³⁴ *Id.*

¹³⁵ *Id.* at 394 (“[T]he Court of Appeals erred in its categorical grant of [injunctive] relief.”).

¹³⁶ *Id.* at 392-93

¹³⁷ *Id.* at 392.

¹³⁸ *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 483–84 (2001).

¹³⁹ *Id.* at 505-06.

¹⁴⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 571–72 (1994).

the district court granted summary judgment in favor of 2 Live Crew.¹⁴¹ The Sixth Circuit reversed, holding that the commercial nature of the parody gave rise to a presumption against a finding of fair use.¹⁴² Although the vast majority of the Court's opinion devoted itself to the remedial question at bar—whether summary judgment for the defendants was appropriate—the twenty-five-page opinion also contained a footnote that briefly discussed copyright injunctions.¹⁴³ In it, the Court stated that “courts may . . . wish to bear in mind that the goals of the copyright law . . . are not always best served by automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use.”¹⁴⁴

Only the final case cited by the *eBay* Court, *Dun v. Lumberman's Credit Association*, represents an instance in which the Court was faced with deciding whether an injunction was an appropriate remedy in a copyright-infringement lawsuit.¹⁴⁵ In *Dun*, the publisher of a reference book containing the credit ratings of thousands of merchants and manufacturers sued the publisher of a work with a similar aim, although the defendant's book contained more detailed information about a narrower range of businesses.¹⁴⁶ The evidence suggested that the defendant had infringed on a small amount of the plaintiff's copyrighted material.¹⁴⁷ Agreeing with the trial court that the nature of the infringed work and the adverse consequences an injunction would inflict upon the defendants both counseled against granting such relief, the Court “remit[te]d the [plaintiffs] to a court of law to recover such damage as they might there prove that they had sustained.”¹⁴⁸

Thus, the *eBay* Court's copyright analogy rests on unsteady ground. *Dun* was decided in 1908, nearly one hundred years before *eBay*, yet it made no mention of a four-factor test (or any test, for that matter). The equivocality and narrow scope of the footnote¹⁴⁹ in *Campbell*—not to mention its status as pure

¹⁴¹ *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1158–59 (M.D. Tenn. 1991).

¹⁴² *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1436–37 (6th Cir. 1992).

¹⁴³ *Campbell*, 510 U.S. at 578 n.10.

¹⁴⁴ *Id.*

¹⁴⁵ *Dun v. Lumbermen's Credit Ass'n*, 209 U.S. 20, 21, 24 (1908).

¹⁴⁶ See *id.* at 21 (“The appellee is a corporation engaged in preparing and publishing a similar book, limited, however, to those engaged in the lumber and kindred trades.”).

¹⁴⁷ *Id.* at 23.

¹⁴⁸ *Id.* at 24.

¹⁴⁹ *Campbell*, 510 U.S. at 578 n.10, 600 (“[I]n cases involving parodies (or other critical works), courts may also wish to bear in mind that the goals of the copyright law . . . are not always best served by

dicta in an opinion that did not otherwise mention injunctions—speak for themselves. Finally, the brief mention in *Tasini* was perhaps even more confined, and likewise appeared within a decision that was not addressing the question of whether to grant injunctive relief.¹⁵⁰

Questionable precedent aside, however, the *eBay* Court was free to speak for itself—and it did so, clearly stating that plaintiffs seeking permanent injunctions must satisfy the four-factor test.¹⁵¹ It definitively held that patent plaintiffs were subject to this requirement.¹⁵² Although not faced with a copyright issue, the Court indicated that its holding was “consistent with [its] treatment of injunctions under the Copyright Act.”¹⁵³ This discourse on copyright law, unnecessary as it was to the discussion at hand, was also grounded on a shaky premise. Why, then, the argument by analogy? It seems doubtful that the Court’s army of clerks merely got its history wrong, and even more improbable that the Justices were blissfully unaware of the disorder surrounding copyright injunctions. Rather, although faced directly with a patent-law dispute, the Court appears to have taken the opportunity to attempt to clear up some of the confusion in copyright law. By devoting a large portion of its opinion to the copyright-law analogy, the *eBay* Court made fairly clear its belief that, as part of the “well-established principles of equity,” the four-factor test should apply in copyright cases.¹⁵⁴

The Court left unanswered several important questions, however, one being whether the differences between preliminary and permanent injunctions are so great that *eBay*’s holding applies only to the latter. Although the Federal Circuit decision on appeal in *eBay* had expressly noted that preliminary and permanent injunctions “are distinct forms of equitable relief that have different prerequisites and serve entirely different purposes,”¹⁵⁵ the *eBay* Court failed to address this distinction. Thus, assuming *eBay*, or at least its rationale, applies to copyright-

automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use.” (citation omitted)).

¹⁵⁰ See generally *N.Y. Times Co. v. Tasini*, 533 U.S. 483 (2001).

¹⁵¹ *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).

¹⁵² *Id.* (“These familiar principles apply with equal force to disputes arising under the Patent Act.”).

¹⁵³ *Id.* at 392.

¹⁵⁴ See *id.* at 391–93 (relying largely on an analogy to copyright law in holding that neither of the lower courts applied the four-factor test correctly).

¹⁵⁵ *MercExchange, LLC v. eBay, Inc.*, 401 F.3d 1323, 1339 (Fed. Cir. 2005) (quoting *Lerner Germany GmbH v. Lerner Corp.*, 94 F.3d 1575, 1577 (Fed. Cir. 1996) (internal quotation marks omitted)). The Federal Circuit thereby rejected the lower court’s reasoning that MercExchange’s failure to seek preliminary injunctive relief favored denying it a permanent injunction. *Id.*

infringement suits, it remained unclear whether the four-factor test must be satisfied by copyright plaintiffs seeking preliminary, rather than permanent, injunctions. In 2008, the Court may have supplied the answer.

B. On *Winter*, and Applying the Four-Factor Test to
Preliminary Injunctions Generally

The factual and procedural history surrounding the *Winter* case is fairly complex.¹⁵⁶ Broadly speaking, the dispute involved a complaint filed by several environmental groups against the U.S. Navy, alleging that the Navy's use of a certain type of sonar was causing undue environmental disruption, particularly to marine mammals.¹⁵⁷ The U.S. District Court for the Central District of California granted a preliminary injunction against the Navy, finding that the plaintiffs had demonstrated both a "probability of success" and "at least a possibility of irreparable harm."¹⁵⁸ The Ninth Circuit Court of Appeals concurred, twice upholding the district court's determination that preliminary injunctive relief was appropriate.¹⁵⁹ The Supreme Court, however, did not agree, flatly stating, "The Court of Appeals was wrong, and its decision is reversed."¹⁶⁰

On the issue of whether the four-factor standard should be applied to requests for preliminary injunctions, the Court was emphatic: "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."¹⁶¹ The Court further disagreed with the lower courts on *how* the individual factors should apply, both generally and as to the case at bar.

With regards to the "possibility" standard for irreparable harm, the *Winter*

¹⁵⁶ The Court itself admitted as much. See *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 371 (2008) ("The procedural history of this case is rather complicated.").

¹⁵⁷ See *id.* at 371–74 (detailing at some length the attenuated path the *Winter* case took before finally reaching the Supreme Court).

¹⁵⁸ *Id.* at 372 (internal quotation marks omitted). The district court in fact found that plaintiffs had exceeded this low standard, having demonstrated that irreparable injury to the environment was nearly certain. *Id.*

¹⁵⁹ *Natural Res. Def. Council, Inc. v. Winter*, 508 F.3d 885, 886–87 (9th Cir. 2007) (holding that a preliminary injunction was appropriate, but remanding to the district court with orders to more narrowly tailor the scope of the injunction); *Natural Res. Def. Council, Inc. v. Winter*, 518 F.3d 658, 703 (9th Cir. 2008) (upholding the revised injunction).

¹⁶⁰ *Winter*, 129 S. Ct. at 370.

¹⁶¹ *Id.* at 374.

Court found it “too lenient” as a general matter.¹⁶² The Court stressed that a plaintiff seeking a preliminary injunction bears the burden of demonstrating that irreparable harm is “likely” absent injunctive relief,¹⁶³ relying on the familiar characterization of such relief as an “extraordinary remedy” for support.¹⁶⁴ While it was unclear whether applying the incorrect standard actually affected the lower courts’ decisions—particularly given their findings that the “plaintiffs had established a ‘near certainty’ of irreparable harm”¹⁶⁵—the Court ultimately rested its decision elsewhere.

In applying the final two factors (balance of hardships and the public interest) to the case at bar, Chief Justice Roberts, writing for the *Winter* majority, found the lower courts’ analysis to be lacking.¹⁶⁶ Having held that the plaintiffs failed to demonstrate that either factor favored granting a preliminary injunction, the Court held that the trial court abused its discretion—and cautioned that the lower court granting a permanent injunction on these facts would lead to the same result.¹⁶⁷ Accordingly, the *Winter* Court did not reach the likelihood-of-success-on-the-merits factor.¹⁶⁸

Although a dispute over the effects of sonar usage on beaked whales and bottlenose dolphins seems an unlikely source for guidance on copyright injunctions, several relevant guidelines do emerge from *Winter*. Foremost is the proposition that the four-factor test applies to cases involving preliminary, as well as permanent, injunctions. The obvious objection is that, read narrowly, this holding does not apply directly to copyright law—but be that as it may, the Court expressly deigned to qualify its statement on the matter. Rather, the broad

¹⁶² *Id.* at 375 (“We agree with the Navy that the Ninth Circuit’s ‘possibility’ standard is too lenient.”).

¹⁶³ *Id.* (citing *Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983); *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 441 (1974); *O’Shea v. Littleton*, 414 U.S. 488, 502 (1974)).

¹⁶⁴ See *id.* at 375–76 (“Issuing a preliminary injunction based only on a possibility of irreparable harm 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 *Id.* at 376 (quoting *Natural Res. Def. Council, Inc. v. Winter*, 518 F.3d 658, 696–97 (9th Cir. 2008)).

¹⁶⁶ See, e.g., *id.* at 377 (“In this case, the District Court and the Ninth Circuit significantly understated the burden the preliminary injunction would impose on the Navy’s ability to conduct realistic training exercises, and the injunction’s consequent adverse impact on the public interest in national defense.”); *id.* at 378 (“Despite the importance of assessing the balance of equities and the public interest in determining whether to grant a preliminary injunction, the District Court addressed these considerations in only a cursory fashion.”).

¹⁶⁷ *Id.* at 381.

¹⁶⁸ See *id.* (“While we have authority to proceed to such a decision at this point, doing so is not necessary here.” (citation omitted)).

language used by the Court dictates that all plaintiffs seeking injunctive relief bear the burden of demonstrating each of the four factors.¹⁶⁹ Thus, in *Winter*'s wake, "[a] plaintiff" seeking a preliminary injunction must satisfy the four-factor test.¹⁷⁰ Given the Court's repeated statements that preliminary and permanent injunctions are analyzed nearly identically,¹⁷¹ coupled with the *eBay* Court's none-too-subtle analogizing to copyright law,¹⁷² a promising baseline principle appears:

The four-factor test should apply to copyright plaintiffs seeking preliminary injunctions.

C. The New Reality—or at Least the Near Future—of Preliminary Injunctions in Copyright-Infringement Claims

The reaction to *eBay* and *Winter* by lower courts subsequently adjudicating copyright claims has been mixed at best, illustrating once again the discrepancies and confusion that have become the hallmarks of copyright preliminary-injunctive jurisprudence. A few courts appear to have taken the Court's admonitions to heart, giving real teeth to the individual factors of the test set forth in both *eBay* and *Winter*.¹⁷³ In the majority of copyright proceedings, however, the effects have been disappointingly minimal.¹⁷⁴ At least some courts in the Ninth Circuit, for instance, have continued to apply the Circuit's two-pronged test and its presumption of irreparable injury after *eBay*.¹⁷⁵ Thus, it

¹⁶⁹ *Id.* at 374.

¹⁷⁰ *Id.*

¹⁷¹ See *id.* at 381–82 (“[O]ur analysis of the propriety of preliminary relief is applicable to any permanent injunction as well.”); *id.* at 381 (quoting *Amoco Production Co. v. Village of Gambell*, Alaska, 480 U.S. 531, 546 n.12 (1987)) (“The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a *likelihood* of success on the merits rather than actual success.” (emphasis added)).

¹⁷² *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 392–93 (2006).

¹⁷³ See, e.g., *Christopher Phelps & Assoc., LLC v. Galloway*, 492 F.3d 532, 543 (4th Cir. 2007) (“Insofar as [Plaintiff] suggests that it is *entitled* to injunctive relief, we reject the argument.” (citing *eBay*, 547 U.S. 388)). In weighing the plaintiff's copyright-infringement claim and request for a permanent injunction, the Fourth Circuit proceeded to analyze each of the four factors in turn, and found that the plaintiff had failed to demonstrate that either the balance of hardships or the public interest favored granting the injunction. *Id.* at 544.

¹⁷⁴ See Jake Phillips, Note, *eBay's Effect on Copyright Injunctions: When Property Rules Give Way to Liability Rules*, 24 Berk. Tech. L.J. 405, 420 (2009) (arguing that *eBay's* impact on copyright claims has proven to be largely negligible).

¹⁷⁵ See, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 713–14 (9th Cir. 2007); *Jacobsen v. Katzer*, 535 F.3d 1373 (Fed. Cir. 2008) (applying Ninth Circuit law). But see, e.g., *Summit Entm't*,

remains possible (depending on the particular district court chosen as venue) for a copyright plaintiff in the Ninth Circuit to receive a preliminary injunction after demonstrating only one of the four factors—likelihood of success on the merits.¹⁷⁶ District courts in the Second Circuit have similarly failed to uniformly adhere to the four-factor test.¹⁷⁷ In 2009, for example, J. D. Salinger brought suit in the Southern District of New York, alleging copyright infringement of *Catcher in the Rye* (1951).¹⁷⁸ Expressly distinguishing *eBay* on the grounds that it's holding applied only to patent law¹⁷⁹ (and omitting entirely any reference to

LLC v. Beckett Media, LLC, No. CV 09-8161 PSG (MANx), 2010 WL 147958, at *2 (C.D. Cal. Jan. 12, 2010) (“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.”) (emphasis added) (quoting *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009)); cf. *Protectmarriage.com v. Courage Campaign*, No. CIV. S-10-132 LKK/DAD, 2010 WL 3255571, at *1 (E.D. Cal. Jan. 20, 2010) (applying the four-factor test in a trademark-infringement suit).

¹⁷⁶ See *Sony BMG Music Entm't v. Cody*, No. 1:08-cv-00590-LJO-SMS, 2009 WL 3650923, at *6 (E.D. Cal. Oct. 27, 2009). The district court aptly (if unintentionally) demonstrated the vast disparity between the two-pronged approaches and the four-factor test, stating:

Generally a party seeking a preliminary injunction must show either a likelihood of success on the merits and the possibility of irreparable injury, or that serious questions going to the merits were raised and the balance of hardships tips sharply in its favor; however, because in a copyright infringement claim a showing of a reasonable likelihood of success on the merits raises a presumption of irreparable harm, a plaintiff need only show a likelihood of success on the merits to obtain a preliminary injunction.

Id. (citing *Micro Star v. Formgen, Inc.*, 154 F.3d 1107, 1109 (9th Cir. 1998)). Notably, the opinion ignores not only the clear holding of the *Winter* Court that the Ninth Circuit's “possibility of irreparable injury” standard was too low, but also Ninth Circuit precedent recognizing *Winter*'s applicability to requests for preliminary injunctive relief. See *Am. Trucking Ass'ns*, 559 F.3d at 1052 (“[W]e must follow the Supreme Court's recent expatiation on the proper standard for granting or denying [preliminary injunctions].”) (citing *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008)).

¹⁷⁷ See, e.g., *Esbin & Alter, LLP v. Zappier*, No. 08 Civ. 313, 2010 WL 391830, at *2 (S.D.N.Y. Feb. 4, 2010) (granting a preliminary injunction after applying the Second Circuit's test (discussed supra)).

¹⁷⁸ Complaint at 4, *Salinger v. Colting*, 641 F. Supp. 2d 250 (S.D.N.Y. 2009), vacated, 607 F.3d 68 (2d Cir. 2010).

¹⁷⁹ See *Salinger*, 641 F. Supp. 2d at 268 n.6 (“[*eBay*] dealt only with the presumption of irreparable harm in the patent law context, and thus is not controlling in the absence of Second Circuit precedent applying it in the copyright context.”).

Winter) the court granted Salinger's request for a preliminary injunction,¹⁸⁰ using the traditional Second Circuit test.¹⁸¹ The Second Circuit, however, reversed on appeal, holding instead that *eBay* applies equally to requests for preliminary injunctive relief in copyright-infringement suits.¹⁸²

The Second Circuit's *Salinger* decision reflects the general trend among federal courts dealing with requests for copyright preliminary injunctions toward adopting the four-factor test espoused by the Court in *eBay* and *Winter*.¹⁸³ Even if district courts are not already legally bound by Supreme Court precedent to apply the four-factor test to requests for copyright injunctions, they will likely be so bound in the immediate future. The Court's apparently renewed interest in elucidating a uniform standard for injunctive relief,¹⁸⁴ coupled with its strong indication in *eBay* that it does not consider the field of intellectual property to constitute an exception to that standard,¹⁸⁵ warrant the prediction that, when the Court squarely faces the question, it will hold that copyright plaintiffs seeking preliminary injunctions must demonstrate each of the four factors.

Setting aside for the moment the question of how well the four-factor test is suited to addressing the practical and constitutional concerns raised by blanket granting of preliminary copyright injunctions, the likelihood that the formerly myriad approaches used by trial courts will continue to unify in the near future should be viewed as a positive development. Similarly situated copyright defendants will no longer be subjected to different standards depending upon which jurisdiction they are hauled into—and conversely, copyright plaintiffs will not be quite so encouraged to engage in forum-shopping.¹⁸⁶ At the same time, applying one test will, at least theoretically, increase uniformity and

¹⁸⁰ *Id.* at 269.

¹⁸¹ *Id.* at 254. Thus, the district court (nominally) required Salinger to demonstrate irreparable harm and either likelihood of success or "sufficiently serious questions" and "a balance of hardships tipping decidedly in [his] favor." *Id.* (quoting *Bronx Household of Faith v. Bd. of Educ. of New York*, 331 F.3d 342, 349 (2d Cir. 2003)).

¹⁸² See *Salinger v. Colting*, 607 F.3d 68, 74-75 (2d Cir. 2010).

¹⁸³ See Phillips, *supra* note 174, at 423 n.133 (noting that lower courts have, after *eBay*, applied "traditional equitable principles"—i.e., the four-factor test—in 71.4% of all copyright-infringement cases).

¹⁸⁴ See generally *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008).

¹⁸⁵ *Cf. eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006) ("These familiar principles apply with equal force to disputes arising under the Patent Act.").

¹⁸⁶ *Cf. Rumsfeld v. Padilla*, 542 U.S. 426, 428 (2004) (referring to the prevention of forum-shopping as an "important purpose" of a rule requiring prisoners to file habeas claims in the district wherein they are incarcerated).

predictability across the circuits.¹⁸⁷ Since an efficient market requires all participants to have perfect information, uncertainty necessarily breeds inefficiencies; thus, increasing predictability will reduce the deadweight losses inflicted on society by uncertainty.¹⁸⁸ Beyond the socioeconomic advantages inherent in any uniformly applied standard, by requiring plaintiffs to demonstrate each of the factors—in contrast to the alternative-factor structure of the Second and Ninth Circuit formulations—the four-factor test also seems to present a better framework for reducing the frequency with which courts dispense preliminary injunctions in copyright-infringement lawsuits. Given the potential for irreparable harm caused by the overbroad granting of preliminary injunctions, such a reduction should be viewed positively.

Unfortunately, even the four-factor standard is sufficiently murky that it allows courts to issue injunctions upon a relatively minimal showing by copyright plaintiffs. The burden-shifting presumptions discussed *supra* have not disappeared, and they can give rise—even after *eBay* and *Winter*—to bizarre applications of the test. *Summit Entertainment*, a trademark- and copyright-infringement suit filed in the Central District of California, provides a striking example of the confused logic now employed by some district courts:

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. Plaintiff need only establish a likelihood of success on the merits of its copyright and trademark claims to support the requested injunction.¹⁸⁹

These two sentences cannot coexist; they present a facially apparent cognitive dissonance. Only by employing the Orwellian concept of doublethink, whereby one may simultaneously accept two mutually contradictory premises as

¹⁸⁷ These twin aims represent one of the highest goals of an efficient legal system. See *Lassiter v. Dep't of Soc. Serv. of Durham Cnty., N.C.*, 452 U.S. 18, 50 (1981) (referring to “the predictability and uniformity that underlie our society’s commitment to the rule of law”).

¹⁸⁸ Cf. Robert John Grubb II, Note, *Attorneys, Accountants, and Bankers, Oh My! Primary Liability for Secondary Actors in the Wake of Stoneridge*, 62 *Vand. L. Rev.* 275, 304 (2009) (“Certainty and predictability would be the hallmarks of such a unitary standard, and national uniformity would increase economic efficiency . . .”).

¹⁸⁹ *Summit Entm't, LLC v. Beckett Media, LLC*, No. CV 90-8161 PSG (MANx), 2010 WL 147958, at *2 (C.D. Cal. Jan. 12, 2010) (quoting *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (internal quotation marks and headings omitted)).

correct,¹⁹⁰ could this passage emerge as a coherent statement. Again we see the divide between rhetoric and reality—the district court ostensibly recognized the holding of *Winter* as applying to copyright law (the first sentence is, in fact, a direct quote from the *Winter* majority), yet it immediately reverts to a collapsed, single-factor analysis, appearing to dismiss the possibility that the Court’s *Winter* ruling holds any real-world implications for copyright claims.

Thus, while it seems likely that in the near future, courts in all circuits faced with copyright plaintiffs’ requests for preliminary injunctions will nominally shift to applying the four-factor test, it seems equally unlikely that this shift will affect the outcome of more than a few isolated cases. Was this the Court’s only goal—to force the circuits into uniformly applying (or at least paying lip service to) one test for preliminary injunctions? While a national standard would certainly hold at least some social benefits,¹⁹¹ recall the *eBay* Court’s core holding—that a “general rule” that an injunction should issue following a finding of patent infringement is inappropriate¹⁹²—as well as its statement rejecting such a rule in copyright law.¹⁹³ Recall also the *Winter* Court’s rejection of the Ninth Circuit’s “possibility of irreparable harm” standard in favor of the more stringent “probability” now required.¹⁹⁴ An ideal beyond all federal courts merely paying lip service to uniform application of the four-factor standard is at play in these decisions, though it is not—as the confusion among subsequent district-court rulings demonstrates—readily apparent. Understanding the Court’s aims requires stepping back for a moment to survey the broader scope of copyright jurisprudence.

V. WHAT’S *REALLY* GOING ON HERE? THE TWIN AIMS OF THE COURT’S NEW COPYRIGHT-PRELIMINARY-INJUNCTION JURISPRUDENCE

The commonplace granting—almost as a matter of right—of preliminary injunctions in copyright-infringement suits is problematic in multiple regards. The likelihood of an undeveloped factual record present in requests for

¹⁹⁰ George Orwell, 1984 214 (Signet Classic 1950) (1949) (“*Doublethink* means the power of holding two contradictory beliefs in one’s mind simultaneously, and accepting both of them.”) (emphasis original).

¹⁹¹ See *supra* notes 184, 187 and accompanying text.

¹⁹² *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 393–94 (2006).

¹⁹³ *Id.* at 392–93.

¹⁹⁴ See *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 375 (2008) (“We agree with the Navy that the Ninth Circuit’s ‘possibility’ standard is too lenient.”).

preliminary injunctive relief uniquely exacerbates the risk of judicial error.¹⁹⁵ The negligible standard for granting such relief almost certainly grants “formidable, undeserved leverage” to copyright plaintiffs.¹⁹⁶ Defendants are thus made to suffer irreparable harm, a cruel irony given that the very purpose of preliminary injunctive relief is to *prevent* such harm. While the split between rhetoric and reality is problematic in itself, as any such duplicity reduces respect for the judicial system and the rule of law, this conceptual divide also produces these more tangible societal costs. Surveying the landscape of decisions, the feeling is almost instinctive that something is broken—we (as well as, presumably, the Court) recognize the pitfalls of universally granting preliminary injunctions, yet their wholesale issuance continues.

Unfortunate as they might be, the inefficiencies and inequities produced by the current over-generous standard might not represent its most pernicious effects. The First Amendment’s deep distrust of prior restraints on speech may pose a more serious problem. Since copyright infringement often concurrently exists as an individual’s speech, instances of infringement would seem, at least in some cases, to warrant protection under the First Amendment. In the realm of preliminary injunctions, this possibility is doubly apparent—no concept is more central to free-speech jurisprudence than that prior restraints on speech are generally inconsistent with First Amendment freedoms.¹⁹⁷

These two distinctly problematic areas, I posit, are what the Court attempted to target with its recent holdings addressing the proper standard for preliminary injunctive relief. The mandated use of the four-factor test, coupled with laying the burden of proving each factor squarely on the plaintiff’s shoulders, addresses the first grouping of problems by raising the bar for plaintiffs seeking preliminary injunctions. The public-interest inquiry under the four-factor standard holds the potential for addressing the First Amendment concerns implicated by the second.

A. Raising the Bar: The Four-Factor Test as a More Stringent Standard

The Court’s adoption of the four-factor test essentially erects higher and more numerous hurdles for copyright plaintiffs who request preliminary injunctive relief to clear. As noted above, the commonality of the approaches used by the Second and Ninth Circuits—in which a vastly disproportionate

¹⁹⁵ See *supra* note 5 and accompanying text.

¹⁹⁶ See Patry, *supra* note 8, § 22.7.

¹⁹⁷ See *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

number of copyright lawsuits are initiated¹⁹⁸—is that neither approach creates an absolute requirement that the plaintiff demonstrate a likelihood of success on the merits;¹⁹⁹ instead, both offer copyright plaintiffs who cannot do so the option of showing merely the existence of “serious questions” going to the merits.²⁰⁰ Both offer prongs with alternatives, rather than strict requirements, so that although both standards do contemplate three individual factors, neither requires plaintiffs to demonstrate all three.²⁰¹ Given the presumption of irreparable harm still applied in the Ninth Circuit, even the remaining two factors may essentially collapse into one—a far cry from the four factors copyright plaintiffs are (at least nominally) required to demonstrate under the Court’s newly adopted test. Furthermore, the Ninth Circuit’s standard does not require plaintiffs to demonstrate that the public interest favors granting a preliminary injunction,²⁰² a deficiency discussed in greater detail *infra*.²⁰³ Thus, it can safely be said that the four-factor test—which, at least on its face, requires a plaintiff to separately demonstrate each of the four factors—increases the number of obstacles in the path of a copyright plaintiff. Whether its application (given the framework in which it currently operates) will result in fewer preliminary injunctions actually being issued is a more questionable proposition.²⁰⁴

In both *eBay* and *Winter*, however, the Court strove to alter not only the test used, but also the accompanying framework within which lower courts apply it. The *eBay* majority flatly rejected the notion that an injunction “automatically follows a determination that a copyright has been infringed,”²⁰⁵ calling into serious question the continuing legitimacy of the presumption of irreparable

¹⁹⁸ A recent WestLaw search for “copyright /s infringing! /p complaint” yielded 3,257 hits from the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, D.C. and Federal Circuits combined. The same search yields 2,750 results from the Second and Ninth Circuits alone—thus, under this (admittedly) crude methodology, nearly 46% of all copyright-infringement lawsuits are brought in those two circuits.

¹⁹⁹ Compare, e.g., *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 476 (2d Cir. 2004) (identifying the Second Circuit’s formulation), with, e.g., *LGS Architects, Inc. v. Concordia Homes of Nev.*, 434 F.3d 1150, 1155 (stating the Ninth Circuit’s test).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ See *infra* note 197 and accompanying text.

²⁰⁴ *Id.*

²⁰⁵ *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 392–93 (2006).

harm. Commentators have been equivocal on the question,²⁰⁶ although to the extent a general trend in scholarship may be derived, the tendency seems to be to view *eBay* as peacefully coexisting with the presumption.²⁰⁷ Until *Salinger* in the Second Circuit, no Circuit Court had squarely addressed the issue;²⁰⁸ district courts have been divided.²⁰⁹ Taken by itself, the *eBay* Court's repeated emphasis on the plaintiff bearing the burden of establishing each of the four factors²¹⁰ militates in favor of the view that, if it has not already done so, the Court would (given the opportunity) overrule the presumption of irreparable harm in both patent and copyright law.²¹¹ When the *Winter* opinion is taken into account, however, the argument becomes even stronger—there, the Court rejected the Ninth Circuit's possibility-of-irreparable-harm standard,²¹² making it clear that it envisions the heavier burden of proving a "probability" of harm as being placed squarely on the shoulders of plaintiffs.²¹³

Although the possibility has attracted less attention, *eBay* (and, to a degree, *Winter*) also cast considerable doubt on courts' traditional practice of essentially

²⁰⁶ E.g., Ted L. Field, Improving the Federal Circuit's Approach to Choice of Law for Procedural Matters in Patent Cases, 16 Geo. Mason L. Rev. 643, 670 n.205 (2009) (citing various commentators on the issue); Edward D. Manzo, 7 J. Marshall Rev. Intell. Prop. L. 44, 51 (2007) (identifying a split among district courts on whether the presumption of irreparable harm survived *eBay*).

²⁰⁷ See, e.g., John M. Golden, Principles for Patent Remedies, 88 Tex. L. Rev. 505, 578–82 (2010) (noting that the Court "has elsewhere made clear that courts can apply presumptions in favor of a party who bears the burden of persuasion," and arguing that "the case for pro-injunction presumptions is substantial"); see also Ho-Sung Chung, Note, The Supreme Court Unjustly Declares Open Season on Patent Dealers, 2009 U. Ill. J.L. Tech. & Pol'y 227, 247 (2009) ("[W]hen district courts go through the first *eBay* factor (irreparable harm), they can—and should—apply the presumption of irreparable harm unless the infringer can prove otherwise."); Miranda Jones, Note, Permanent Injunction, a Remedy by Any Other Name Is Patently Not the Same: How *eBay v. MercExchange* Affects the Patent Right of Non-Practicing Entities, 14 Geo. Mason L. Rev. 1035, 1065 (2007) (arguing that "[s]ince Court in *eBay* did not disturb [the] foundation for the presumption of irreparable harm, it should still stand").

²⁰⁸ The Eleventh Circuit came close to deciding the question in ruling on a lower court's grant of a preliminary injunction, albeit in the trademark context. See *N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1229 (11th Cir. 2008) (remanding the question to the district court).

²⁰⁹ See generally Manzo, *supra* note 206, at 51 (detailing the post-*eBay* split).

²¹⁰ *eBay*, 547 U.S. at 391 (stating that "a plaintiff seeking a permanent injunction" must demonstrate each of the four factors).

²¹¹ See generally 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, 90–91 (2010) (arguing against the presumption of irreparable harm).

²¹² *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 375 (2008).

²¹³ Finally, as discussed *infra*, the supplementary requirement that courts measure the public interest in each case further buttresses this argument.

ignoring the balance-of-hardships and public-interest prongs. The logic of this proposition is much the same as that for the demise of the irreparable-harm presumption: the Court has evidenced its desire to end the widespread, almost automatic, issuance of preliminary injunctions in intellectual-property cases. Doing so requires not only additional, but also higher, hurdles—ones that will not collapse upon a singular showing of likely success. Where courts have analyzed the balance-of-hardships, they have generally dismissed the possibility that, despite a plaintiff's showing of likely success on the merits, the balance of hardships may tip in favor of denying the preliminary injunction.²¹⁴ Thus, the burden arguably does not currently rest on plaintiffs, and even if it nominally does, it disappears upon a showing of likelihood of success.²¹⁵ Likewise, in the rare event that courts devote any ink to the public-interest factor, they tend to summarily dismiss the argument that granting a preliminary injunction would *not* enhance the public interest by simply repeating that “the public interest is always served by upholding copyrights”²¹⁶ Since *eBay* and *Winter* counsel against the automatic issuance of injunctions upon a showing of likely success, and in support of requiring plaintiffs to actually demonstrate each of the four factors individually,²¹⁷ the Court appears to disapprove of the current copyright-law framework surrounding both the balance-of-hardships and the public-interest factors. The pre-*eBay* and *Winter* analytical structure created additional presumptions as to these two factors that universally benefit copyright plaintiffs, presumptions that should now find themselves out of favor.

Thus, it appears that the Court is attempting to effect a sea change in the realm of preliminary injunctions—and particularly in the area of intellectual-property injunctions—back toward the ideal that has, of late, existed only in rhetoric. Recognizing the problems that uniquely inhere in overbroad granting of preliminary injunctive relief, problems caused largely by the undeveloped factual record upon which courts must operate in adjudicating such requests and the

²¹⁴ See Goldstein, *supra* note 60, § 13.1.2(c) (“[M]ost courts connect balance of hardships to probability of success on the merits”); Nimmer & Nimmer, *supra* note 20, § 14.06[A], at 14-129–39 (“The second factor—balance of hardships—is also not usually invoked in copyright cases.” (citation omitted)).

²¹⁵ Goldstein, *supra* note 60, § 13.1.2(c) (“[M]ost courts . . . will usually tip the balance of hardships in the plaintiff's favor to the extent that it has shown a likelihood of success on the merits.”).

²¹⁶ *Janel Russell Designs, Inc. v. Mendelson & Assocs., Inc.*, 114 F. Supp. 2d 857, 861 (D. Minn. 2000); *Signcad Tech. Corp. v. Signcad Systems, Inc.*, No. Civ. 02-4786(JRT/FLN), 2003 WL 465801, at *6 (D. Minn. 2003).

²¹⁷ See *infra* notes 210, 212 and accompanying text.

highly coercive nature of the remedy itself, the Court has endeavored to re-raise the bar. The four-factor test is, at least on its face, more conducive to achieving this goal. Unfortunately, the framework in which courts apply the test largely erodes any positive effects the transition to universal application of the four-factor test may have otherwise had.²¹⁸ Admittedly, neither *eBay* nor *Winter* was sufficiently clear on the question of *how* to apply the new²¹⁹ test. The spirit of both rulings, however, militates against continued application of the presumptions that give rise to the collapsible-factor approach still used by some courts in applying principles of equity to copyright law.

B. Prior Restraints and “Traditional Contours”

Although they may seem to agree on little else, modern legal scholars have come to universally regard copyright law as fairly unique in that it regulates—and, in many cases, stifles—what would otherwise be protected speech under the First Amendment.²²⁰ This premise traces its roots to a seminal article published

²¹⁸ Effects, that is, aside from the procedural benefits (e.g., reducing forum-shopping, creating at least *some* degree of predictability and certainty) that tend to accrue from adopting a universal standard.

²¹⁹ The Court, of course, seems to allude to the four-factor test as a “traditional” equitable principle. Whether it was applied historically is a fairly doubtful proposition, but the Court very well may have intended its nod to the “traditional” principles of equity to refer to the broader (and more established) tenet that injunctive relief should be regarded an extraordinary remedy, to be granted rarely; under this understanding, the more stringent standards of the four-factor test would seem to align more closely with tradition.

²²⁰ For just a handful of the myriad works espousing this view, see Howard B. Abrams, *Law of Copyright* § 1:21 (2009) (“Copyright . . . does restrict any speech or other form of communication that wishes to use the protected expression of copyrighted work without authority of the copyright owner.”); Shyamkrishna Balganesh, *Debunking Blackstonian Copyright*, 118 *Yale L.J.* 1126, 1151 (2009) (noting that, historically, “copyright has always suppressed some amount of speech”); Christina Bohannon, *Copyright Infringement and Harmless Speech*, 61 *Hastings L.J.* 1083, 1085 (2010) (“As copyright law prohibits more and more uses of copyrighted expression, it necessarily encroaches upon the ability of others to express themselves through the use of copyrighted material.”); Shubha Ghosh, *Exclusivity: The Roadblock to Democracy?*, 50 *St. Louis U. L.J.* 799, 825 (2006) (“In the marketplace of ideas, copyright can act to inhibit speech”); Steven J. Horowitz, *A Free Speech Theory of Copyright*, 2009 *Stan. Tech. L. Rev.* 2, ¶ 7 (“In short, the copyright system enables pervasive restrictions on speech.”); David S. Olson, *First Amendment Interests and Copyright Accommodations*, 50 *B.C. L. Rev.* 1393, 1396 (2009) (noting the “restrictions on speech that copyright owners impose by charging for copies of their works, or even withholding their works”); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 *Yale L.J.* 535, 537 (2004) (“[C]opying may sometimes be an instance of free speech even when it is also copyright infringement.”).

in 1970 by Professor Melville Nimmer.²²¹ Although cognizant of the tension between copyright law and free speech, Nimmer concluded that copyright's internal "safety valves," particularly the idea-expression dichotomy (and, to a lesser extent, the limited duration of copyright terms), largely defuse potential conflicts with the First Amendment.²²² Many disagreed.²²³ It took nearly thirty years, however, for scholars to recognize one particularly problematic application of copyright law in light of the reconceptualization of copyright as a speech restriction—the area of preliminary injunctions.²²⁴

Professors Lemley and Volokh offer a compelling argument that the constitutional-law doctrine condemning prior restraints on speech should apply to copyright law, rendering the grant of preliminary injunctions in copyright-infringement lawsuits frequently violative of the First Amendment.²²⁵ Courts, however, have been loath to apply direct free-speech scrutiny to copyrights. Those that have addressed even the possibility of a conflict have tended to dismiss it.²²⁶ The same goes for courts that have directly addressed the argument that copyright preliminary injunctions are, or at least can be, unconstitutional prior restraints.²²⁷ As Professor Goldstein has noted, the free-speech critique of

²²¹ Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. Rev. 1180 (1970).

²²² *Id.* at 1192–96.

²²³ See, e.g., Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 Wash U. L. Rev. 969, 990 (2007) ("[A]llowing a copyright owner to suppress criticism or expression of a different viewpoint would be detrimental to First Amendment interests."); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 Stan. L. Rev. 1, 37–48 (2001) (arguing that courts should apply First Amendment scrutiny to copyright law as a "content-neutral" speech regulation); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 Vand. L. Rev. 1, 12 (1987) (contending that the evolution of modern copyright law, particularly the "corruption" of the fair-use defense, "created a conflict between copyright and free speech rights").

²²⁴ The article in which the possibility was broached is *Freedom of Speech and Injunctions in Intellectual Property Law*, by Professors Mark A. Lemley and Eugene Volokh. See Lemley & Volokh, *supra* note 5.

²²⁵ *Id.*

²²⁶ Goldstein, *supra* note 60, § 12.3, at 12:76. But see *Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1378 (2d Cir. 1993) (noting that First Amendment protections might come into play in an "extraordinary" case).

²²⁷ See, e.g., *Dr. Seuss Enters. L.P. v. Penguin Books*, 109 F.3d 1394, 1403 n.11 (9th Cir. 1997) ("We reject outright [the defendants'] claim that the injunction in this case constitutes a prior restraint in violation of free speech guaranteed by the United States Constitution."); see also *Ty, Inc. v. Publ'ns Int'l, Ltd.*, 81 F. Supp. 2d 899, 902 (N.D. Ill. 2000) ("Those [free-speech] challenges [to copyright law] that are made have been summarily dismissed."). Perhaps the most oft-quoted argument in favor of this position is the Fifth Circuit's statement that "[t]he first amendment is not a license to trammel

copyright law has amounted to “a tempest in a very small teapot.”²²⁸ At least one Circuit Court of Appeals, however, has given serious credence to the argument, holding that the issuance of a preliminary injunction violated “the shared principles of the First Amendment and the copyright law, acting as a prior restraint on speech”²²⁹

I argue that at least part of what the U.S. Supreme Court attempted in *eBay* was to forestall an inevitable conflict between copyright preliminary injunctions and the prior-restraint doctrine. To lay the groundwork for this proposition, a brief discussion of the doctrine forbidding prior restraints on speech, as well as a short summary of Lemley and Volokh’s argument that it should apply to copyright law, follows. I then turn to the Court’s current position regarding the interplay between the First Amendment and copyright law, embodied by its oft-cited “traditional contours” statement in *Eldred v. Ashcroft*,²³⁰ to shed new light on the *eBay* opinion. In the final section of Part IV, I begin by analyzing and partially rejecting the argument that the prior-restraint doctrine should apply in copyright law, then propose an alteration to the current spectrum of speech restrictions that would account for the unique nature of copyrights. I conclude by evaluating whether the Court’s approach can offer a satisfactory means for courts deciding copyright cases to avoid violating the principles embodied in the First Amendment.

1. The Prior Restraint Doctrine and Copyright Law

There is no idea more central to free-speech jurisprudence than that so-called “prior restraints” on speech are contrary to the freedoms guaranteed by the Constitution. A “prior restraint” is essentially a restriction of speech prior to its dissemination.²³¹ As early as 1907, the Court recognized that preventing “previous restraints” on speech was central to the aims of the First Amendment;²³² antecedent state supreme courts interpreting similar provisions had reached the same conclusion as early as 1788.²³³ In fact, it was not until 1919

on legally recognized rights in intellectual property.” *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Poster, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979).

²²⁸ Goldstein, *supra* note 60, § 12.3, at 12:76.

²²⁹ *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1277 (11th Cir. 2001).

²³⁰ *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

²³¹ *Black’s Law Dictionary* 1232 (8th ed. 2004) (defining “prior restraint” as “[a] governmental restriction on speech or publication before its actual expression.”).

²³² *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

²³³ *Respublica v. Oswald*, 1 Dall. 319, 325 (Pa. 1788) (freedom of the press); see also *Commonwealth v. Blanding*, 20 Mass.304, 313–14 (Mass. 1825).

that the Court directed First Amendment scrutiny toward any speech restriction *other than* a prior restraint.²³⁴ Thus, it has become widely accepted that prior restraints are “the most serious and the least tolerable infringement on First Amendment rights.”²³⁵ A heavy presumption of unconstitutionality attaches to all such restraints,²³⁶ and the Court has repeatedly overturned them as a result.²³⁷

To take a step back for a moment,²³⁸ under the U.S. Constitution, all speech might be said to fall into one of two categories: it is either “protected” by the First Amendment, in which case it cannot be constitutionally restrained, or “unprotected,” in which case it can.²³⁹ Speech that is “obscene,” for instance, has been deemed to fall outside the umbrella of First Amendment protection.²⁴⁰ While the Court has arguably retreated from a strictly categorical approach to defining what constitutes “protected” or “unprotected” speech,²⁴¹ this general dichotomy remains in effect.

Within the realm of copyright law also exists speech that is protected and speech that is unprotected. In *Harper & Row*, the Court touched upon this distinction in rejecting the defendant’s claim that its use of copyrighted material pertaining to a matter of great public concern implicated the First Amendment.²⁴²

²³⁴ The Court, in *Schenck v. United States*, 249 U.S. 47 (1919), first recognized the possibility of a less narrowly confined First Amendment, stating: “It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose” *Id.* at 51–52.

²³⁵ *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976).

²³⁶ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”); *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (quoting *Bantam Books* for the same proposition).

²³⁷ E.g., *Bantam Books*, 372 U.S. at 70–72 (holding that Rhode Island’s creation of a “Commission to Encourage Morality in Youth,” which essentially functioned to censor publications it deemed objectionable, was an unconstitutional prior restraint on protected speech).

²³⁸ This discussion owes a heavy debt to I Rodney A. Smolla, *Smolla & Nimmer on Freedom of Speech* (2009).

²³⁹ See generally *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (“[F]reedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil” (citation omitted)).

²⁴⁰ *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (“[T]he primary requirements of decency may be enforced against obscene publications.”); cf. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 506 (1952) (“[I]t is not necessary for us to decide . . . whether a state may . . . prevent the showing of obscene films. That is a very different question from the one now before us.” (citing *Near*, 283 U.S. at 716)).

²⁴¹ Smolla, *supra* note 238, § 2:70, at 2-69 (contending that the Court has abandoned a “mechanical” approach to classifying speech as protected or unprotected).

²⁴² *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555–56 (1985).

The Court identified two internal copyright doctrines, the idea-expression dichotomy and fair use, as “First Amendment protections.”²⁴³ The distinction between uncopyrightable “ideas” and copyrightable “expressions” emerged as a particularly attractive tool for serving this function. Since an author cannot copyright her ideas (or, in the same vein, facts she has discovered), the Court reasoned, the Copyright Act allows the “free flow of information”²⁴⁴ that is at the heart of the First Amendment. Thus, direct copying of another’s expression that does not qualify as a fair use is “unprotected” speech; it may therefore be constitutionally restricted.

A simple hypothetical illustrates the operation of this logic. Jane Smith reads Engels’ *Anti-Dühring*, which is (again, hypothetically) still protected by the U.S. Copyright Act.²⁴⁵ Greatly impressed with the tenets of socialism, Jane decides to set pen to paper to express her newfound love for all things Engelsian. In doing so, she may express some of the very same *ideas* Engels espoused—for example, his argument that capitalist production systems, and not just distribution systems, ought to be rejected—in a different manner than Engels used, yet her work will absolutely be protected by the First Amendment. If, however, Jane is so enraptured with Engels’ prose that she decides to merely copy and paste it neatly into her own “work,” her speech likely loses its protected status,²⁴⁶ and a court could constitutionally hold her liable for copyright infringement. The First Amendment’s concern in promoting the uninhibited flow of information is not harmed by this dynamic, for Jane remains free to re-word the idea and publish her work. Furthermore, even if Jane decides the hassle of creating original expression is not worth it and gives up her dream of publishing, the public is none the worse off—we are still left with Engels’ original.

All of that is fairly uncontroversial, at least in practice (if not in theory).²⁴⁷ It would seem that scholars could line up copyright infringement alongside other

²⁴³ Id. at 560.

²⁴⁴ Id. at 558 (quoting *Iowa State Univ. Research Found. Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 61 (2d Cir. 1980)).

²⁴⁵ *Anti-Dühring* having been published in the latter half of the nineteenth century, this is (of course) not the case in reality.

²⁴⁶ Putting aside the possibility that Jane’s use is “transformative” enough to qualify as a fair use. See generally *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (placing heavy weight on the degree of “transformativeness” embodied by the defendant’s work in deciding whether to hold that the work constitutes a fair use of the plaintiff’s copyrighted work).

²⁴⁷ Not all scholars would agree. Rebecca Tushnet, for example, argues that naked copying itself “serves multiple speech values.” Tushnet, *supra* note 220, at 546.

such unprotected “exceptions” to the First Amendment (e.g., obscenity²⁴⁸). Here, however, is where the prior-restraint problem arises. As Professors Lemley and Volokh note, even though obscenity is unprotected speech,²⁴⁹ the constitutional concern with protecting the right to speak is so great that the Court has erected the prior-restraint doctrine as a prophylactic guard against possible restrictions of protected (i.e., non-obscene) speech.²⁵⁰ Similarly, although libelous speech may be constrained or punished after a full adjudication determining that the speech in question is, in fact, libelous, the rule forbidding prior restraints still protects libel defendants during the interlocutory phase of litigation.²⁵¹ Copyright defendants, however, receive no such protection,²⁵² despite the overwhelming likelihood that, in at least some cases, an erroneously granted preliminary injunction will silence their protected speech.²⁵³ This is the aberration around which Lemley and Volokh centered their argument.²⁵⁴ They ultimately concluded that, in copyright-infringement cases, preliminary injunctions quite frequently act as unconstitutional prior restraints on speech.²⁵⁵

²⁴⁸ Smolla, *supra* note 238, § 2:71, at 2-71.

²⁴⁹ While Lemley and Volokh view obscenity as merely one of an “unprotected” class of speech categories, Smolla’s treatise argues otherwise, generally taking the view that the Court is abandoning category-based distinctions in its free-speech jurisprudence. See *id.* (“The one class of speech from *Chaplinsky* that continues to be treated as outside of the First Amendment is “obscene speech.”).

²⁵⁰ Lemley & Volokh, *supra* note 5, at 173–74.

²⁵¹ See *id.* at 149.

²⁵² But see *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1277 (11th Cir. 2001) (“[T]he issuance of the [preliminary] injunction was at odds with the shared principles of the First Amendment and the copyright law, acting as a prior restraint on speech . . .”).

²⁵³ This likelihood exists because of the requirement that copyright plaintiffs prove only a “likelihood” of success on the merits—the converse, of course, is the likelihood that (given the undeveloped factual record) courts sometimes grant preliminary injunctions to plaintiffs who would ultimately have lost at trial. Where the defendant would have ultimately prevailed by invoking the idea-expression defense, it would follow that the preliminary injunction acted as a prior restraint on her constitutionally protected speech.

²⁵⁴ It should be noted that, as does this Article, Professors Lemley and Volokh focused on preliminary (not permanent) injunctions. Lemley & Volokh, *supra* note 5, at 170. As they noted, permanent injunctions (having followed a “final determination that the speech is unprotected”) do not raise the specter of the prior-restraint doctrine. *Id.*

²⁵⁵ See generally *id.* at 241 (“We believe that under the Court’s prior restraint jurisprudence many intellectual property preliminary injunctions are therefore unconstitutional.”).

2. The “Traditional Contours” Approach to Saving Copyright’s Constitutionality

Despite the intellectual appeal of such arguments, courts have generally tended to reject invitations to apply direct First Amendment scrutiny to the Copyright Act.²⁵⁶ This reluctance is understandable—for a variety of reasons, engaging in such an exercise would be quite problematic.²⁵⁷ In 2003, however, the U.S. Supreme Court in *Eldred v. Ashcroft* gave lower courts and legal scholars a glimpse—the first in almost twenty years²⁵⁸—of its view on how the First Amendment and copyright law may coexist peacefully.²⁵⁹ In *Eldred*, the Court initially noted that, given the close temporal proximity between the ratification of the U.S. Constitution (which grants Congress the power to enact copyright laws²⁶⁰) and the passage of the First Amendment,²⁶¹ the Framers must have conceived of the two as compatible.²⁶² Since copyright law is designed to

²⁵⁶ Goldstein, *supra* note 60, § 12.3, at 12:76 (“Most courts that have addressed the [conflict between copyright and the First Amendment] have summarily dismissed the possibility of any such conflict.”). But see *SunTrust Bank*, 268 F.3d at 1277 (holding that a preliminary injunction violated “the shared principles of the First Amendment and the copyright law”); *Twin Peaks Prods., Inc. v. Publ’ns. Int’l, Ltd.*, 996 F.2d 1366, 1378 (2d Cir. 1993) (noting that First Amendment concerns might supersede copyright’s internal free-speech safeguards (here, the fair-use defense) in an “extraordinary” case).

²⁵⁷ Perhaps most notably, copyright law does not seem to fit the paradigmatic suppression of free speech contemplated by the First Amendment, for it suppresses some speech in order to encourage the speech of others. Thus, the Copyright Act seems to be, at the very least, an unusual candidate for direct First Amendment scrutiny. See David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 U. Pitt. L. Rev. 281, 300–01 (2004) (“[S]etting the First Amendment against copyright produces a conflict between speech interests, rather than between speech and some other interest, such as reputation or order. The First Amendment does not provide premises that can resolve such conflicts.”).

²⁵⁸ The last case addressing, albeit briefly, the intersection of the two bodies of law was *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985). There, the Court affirmed the Second Circuit’s view that “copyright’s idea/expression dichotomy ‘strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.’” *Harper & Row Publishers, Inc.*, 471 U.S. at 556 (alteration in original) (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 203 (2d Cir. 1983)).

²⁵⁹ *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

²⁶⁰ See U.S. Const. art. I, § 8, cl. 8. (giving Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).

²⁶¹ The Constitution was adopted in 1787; the Bill of Rights (containing the First Amendment) was ratified four years later, in 1791.

²⁶² *Eldred*, 537 U.S. at 219 (“[I]n the Framers’ view, copyright’s limited monopolies are compatible with free speech principles.”).

advance free expression, Justice Ginsburg reasoned, the two are not as inapposite as they may appear,²⁶³ although it would be overreaching to hold that copyrights are categorically immune from First Amendment challenges.²⁶⁴ Thus, the Court adopted the “traditional contours” approach to saving copyright’s constitutionality, stating that “when . . . Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.”²⁶⁵ This reasoning seems fairly sound—broadly speaking, the Framers probably viewed the First Amendment and copyright laws as capable of peaceful coexistence, particularly given that the Bill of Rights was enacted only one year after the first Copyright Act.

Of course, actually unearthing just what the “traditional contours” of copyright were may be problematic—copyright law has changed a great deal in the two hundred-plus years of its existence.²⁶⁶ Witness, for instance, the breathtaking increase in the length of copyright terms. Narrowly speaking, the traditional-contours argument appears somewhat flawed in this regard. While it may stand to reason that U.S. copyright law, as originally conceived, did not encroach on the First Amendment, it does not necessarily follow that the same holds true today. On the contrary, given the considerable expansion of copyright protections over the past two centuries,²⁶⁷ the *Eldred* Court’s approach—based as it is on the premise that “First Amendment scrutiny is unnecessary” when “Congress has not altered the traditional contours of copyright protection”—would appear problematic, for (at least under a narrow understanding) Congress has clearly done so. The Court, however, appears instead to have taken a fairly broad view of copyright’s traditional contours,²⁶⁸ one that is focused on

²⁶³ *Id.*

²⁶⁴ *Id.* at 221 (rejecting the lower court’s statement to that effect in *Eldred v. Reno*, 239 F.2d 372, 376 (D.C. Cir. 2001)).

²⁶⁵ *Id.*

²⁶⁶ Compare 11 Stat. 138 (1856) (adding public performance right in dramatic works), with 29 Stat. 481 (1897) (same for musical works), and 35 Stat. 1075, 1076 (1909) (same for works prepared for oral delivery), and 66 Stat. 752 (1952) (same for nondramatic literary works).

²⁶⁷ The First Amendment’s sphere of protection has, of course, correspondingly expanded since its inception, further increasing the potential for a collision between the two. Aaron Perzanowski, Comment, Relative Access to Corrective Speech, 94 Cal. L. Rev. 833, 851 n.122 (2006).

²⁶⁸ If this were not the case, it would strain the imagination to hold that the Copyright Term Extension Act (“CTEA”) at issue in *Eldred* was within these traditional contours. The original Copyright Act, passed in 1790, set the term limits of copyrights at fourteen years, renewable once for another fourteen years. See 1 Stat. 124 (1790). In comparison, the CTEA extended copyright protection to the author’s entire lifespan, plus an additional seventy years post mortem. See 17 U.S.C. § 302(a) (2006).

preserving copyright's core principles and internal safeguards. The core principle identified by the *Eldred* is that copyright law exists to "spur[] the creation and publication of new expression."²⁶⁹ It also noted the internal speech safeguards embedded in copyright jurisprudence: the idea-expression dichotomy and the fair-use defense.²⁷⁰ Thus, while extending the length of copyrights or adding a derivative-works right does alter the "traditional contours" of copyright protections in a narrowly read sense of the phrase, it does not do so in the way the *Eldred* Court contemplated.

The "traditional contours" approach, adopted by the *Eldred* Court just three years before *eBay* was decided, may offer the only satisfactory explanation for the *eBay* Court's reliance on its shaky copyright-law analogy.²⁷¹ Recall that in *eBay*, the Court referred to the four-factor test as the "traditional" test,²⁷² part of the "well-established principles of equity."²⁷³ It then alluded to the notion that these "traditional principles of equity" historically governed how courts treated injunctions under the Copyright Act,²⁷⁴ which is (at the very least) questionable.²⁷⁵ The Court, however, may very well have been referring to the broader notion that copyright injunctions should not issue "automatically,"²⁷⁶ but instead should be issued only in "extraordinary" cases, a proposition more in line with the "traditional contours" of courts' treatment of copyright law.²⁷⁷ It seems at least plausible, then, that the *eBay* Court's repeated references to "traditional" equitable principles²⁷⁸ were in fact an attempt to draw the four-factor test for injunctive relief (and, more generally speaking, a higher bar for copyright plaintiffs seeking such relief) into the "traditional contours" of copyright law.

Whether universal application of the four-factor test can avoid First Amendment conflicts, however, will depend largely on how courts decide to apply it. Taking into account the combined weight of *eBay* and *Winter*, the Court has strongly indicated that the preliminary injunction is a remedy best used

²⁶⁹ *Eldred*, 537 U.S. at 219.

²⁷⁰ *Id.*

²⁷¹ See supra notes 259, 262-65, 269-70 and accompanying text.

²⁷² *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 390 (2006).

²⁷³ *Id.* at 391.

²⁷⁴ *Id.* at 392 ("This approach is consistent with our treatment of injunctions under the Copyright Act.").

²⁷⁵ See supra notes 52, 219 and accompanying text.

²⁷⁶ Indeed, that proposition might be characterized as the core (albeit vague) holding of *eBay*.

²⁷⁷ See supra notes 41-47 and accompanying text.

²⁷⁸ Including both concurring opinions, the *eBay* Court used the word "traditional" a total of twelve times.

sparingly, after careful consideration of each individual tine of the four-factor test. Should courts follow this tenet, the percentage of cases in which preliminary injunctions are granted—particularly in copyright lawsuits, wherein such relief has traditionally been available almost as of right—should decrease. Furthermore, as suggested above, this trend strongly suggests that courts should do away with the presumption of irreparable harm, as well as the “presumptions” that the balance of hardships and public interest always favor copyright plaintiffs (and granting injunctions).²⁷⁹ Again, requiring copyright plaintiffs to demonstrate these factors will almost certainly reduce the number of preliminary injunctions granted.²⁸⁰ There is a difference, however, between alleviating the *number* of potential First Amendment violations and entirely accounting for their possibility.²⁸¹ The following section explores how the four-factor test, as a newly minted part of the “traditional contours” of copyright law, can allow courts to do just that.

3. Can It Work? Balancing the Interests and the Public-Interest Inquiry of the Four-Factor Test

Given that courts have been so reluctant to apply direct First Amendment scrutiny to copyright law, it is extremely unlikely that they will choose to apply the prior-restraint doctrine to requests for preliminary injunctions in copyright-infringement cases. The argument that the doctrine should so apply has theoretical appeal, but little realistic likelihood of succeeding in the courts. Instead, application of the four-factor standard announced in *eBay* and reiterated

²⁷⁹ See *supra* notes 65–68, 92 and accompanying text.

²⁸⁰ As noted above, courts rarely even considered these factors in the past. Any attention given them would hold a substantially likelihood of a reduction in the overall number of preliminary injunctions granted. Take the balance-of-hardships inquiry, for example. The platitude that the balance of hardships always tips in favor of the plaintiff (for her copyright is being infringed) seems glaringly unsound—why should a copyright plaintiff be any different from other plaintiffs? Certainly, some copyright holders would suffer no great harm should a preliminary injunction be refused. In the case of complementary works (such as, arguably, the sequel to *Catcher in the Rye* enjoined in *Salinger v. Colting*, 641 F. Supp. 2d 250 (S.D.N.Y. 2009)), the grant of a preliminary injunction would actually harm the *plaintiff* by reducing sales of her copyrighted work. Since it would also harm the defendant (by eliminating her potential profits), the balance of hardships in such a case would seem clearly to tip in favor of denying the injunction.

²⁸¹ So as not to denigrate the advantages inherent in any reduction in the number of preliminary injunctions issued, it bears reiterating that such a reduction—particularly in the injunction-happy field of copyright law—will likely create benefits not only from a free-speech perspective, but also from the standpoint of maximizing social utility.

in *Winter*, will—and should—become widespread. Thus, from a practical standpoint, the question becomes how best to apply the four-factor standard to account for the possibility of harming First Amendment values.

From the First Amendment perspective, the interests at stake are (1) cultivating a thriving marketplace of ideas and (2) protecting speakers' personal integrity.²⁸² The interest copyright law sought to serve is, of course, identified in the Constitution: "To promote the Progress of Science and useful Arts."²⁸³ As the Court has stated: "[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."²⁸⁴ The similarity this goal bears to the marketplace-of-ideas free-speech interest is striking. And the Court has stated that the personal-integrity interest bears less heavily in copyright-infringement litigation,²⁸⁵ further simplifying the task of balancing. Conflict between copyright preliminary injunctions and the First Amendment could be mitigated by weighing two competing concerns: (1) any harm to the defendant's personal-integrity interest caused by granting the preliminary injunction, and (2) whether granting the injunction would promote progress in the marketplace of ideas.

The Court has stated that "[t]he First Amendment securely protects the freedom to make—or decline to make—one's own speech; it bears less heavily when speakers assert the right to make other people's speeches."²⁸⁶ Given this, and taking into account that the purpose of copyright law's grant of exclusive rights to authors is supposed to be promoting progress, it would seem that the balance of the interests would quite frequently favor granting plaintiffs preliminary injunctions. This is not necessarily the case, however, for two reasons.

First, use of others' speech can take place to a variety of degrees. At one end lies direct, extensive, noncreative copying—here, the second clause in Court's statement appears more relevant, for here (at least in one sense) the copier is asserting "the right to make other people's speeches."²⁸⁷ At the other extreme lies copying a minimal amount of material that is incorporated into an

²⁸² See *supra* notes 220–23 and accompanying text.

²⁸³ U.S. Const., art. I, § 8, cl. 8.

²⁸⁴ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

²⁸⁵ See *supra* notes 195–96, 214–15, 222–23 and accompanying text. Many scholars, of course, would not agree.

²⁸⁶ *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

²⁸⁷ *Id.*

otherwise highly original work. Here, the copying seems more likely to implicate the statement's first clause—that "[t]he First Amendment securely protects the freedom to make . . . one's own speech."²⁸⁸ The more transformative an allegedly infringing work is, the more heavily the downstream user's speech interest is implicated.²⁸⁹

Second, copyright law may not always promote progress. In fact, in certain areas (for example, the exclusive right to prepare derivative works), it may fail to do so with some frequency.²⁹⁰ Furthermore, a preliminary injunction may not always be necessary to uphold the Copyright Act or further the interests the Act is designed to effectuate—it is merely one remedy allowable under the Act.²⁹¹ Quite likely, in at least some cases, an award of damages would be a perfectly sufficient redress.²⁹² Finally, even in cases where granting the injunction would promote progress to some degree, cases may very well arise wherein denying the injunction would do even more to further progress in the marketplace of ideas. Take, for instance, the example of an author who has steadfastly refused to license either his copyrighted work or the right to prepare derivatives of it, and

²⁸⁸ *Id.*

²⁸⁹ See Samuelson & Bebenek, *supra* note 211, at 90–91 (“Insofar as transformative and non-transformative use of speech interests lie along a spectrum, the speech interest of follow-on creators will typically increase as these uses becomes [sic] more transformative and the creative contribution of the second creators is more extensive.”). It is worth noting that, the further toward the transformative end of the spectrum a defendant's work lies, the greater the probability that it constitutes a “fair use” of the copyrighted work. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (“The central purpose of [the fair-use] investigation is to see . . . whether and to what extent the new work is ‘transformative.’” (quoting Pierre N. Laval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990))). Thus, the fair-use doctrine, part of copyright law's “built-in First Amendment accommodations,” *Eldred*, 537 U.S. at 219, can assist here in safeguarding speech interests—since success on the merits is unlikely to the extent a defendant establishes a viable fair use defense, a plaintiff would not be able to satisfy that prong of the four-factor test. As a result, preliminary injunctions will not issue in such cases.

²⁹⁰ See, e.g., John M. Newman, Note, *Holden Caulfield Grows Up: Salinger v. Colting, the Promotion-of-Progress Requirement, and Market Failure in a Derivative-Works Regime*, 96 Iowa L. Rev. (forthcoming, 2011).

²⁹¹ See 17 U.S.C. § 502(a) (2006). Other remedies allowed by the Act include permanent injunctions, ordering the impounding and disposition of infringing articles, under § 503(a)(1)(A)–(C), and damages (either actual or statutory), under § 504(a).

²⁹² For instance, cases involving direct copying of a work with a readily ascertainable market, wherein the defendant appears unlikely to continue infringement post-trial, a damages award would be easily calculable; better, by making the plaintiff whole, it would not disturb the *ex ante* incentive structure of copyright law—all while avoiding the risk of unconstitutionality associated with prior restraints.

has stated that he will never prepare his own derivative work.²⁹³ A secondary author then prepares a derivative work that draws enough from the original to constitute infringement, yet the derivative also includes a fair amount of the secondary author's original expression. In such a case, where the Copyright Act's derivative-works right does not seem to effect copyright law's constitutionally mandated purpose, denying the injunction would almost certainly further the shared values of copyright law and free-speech to a greater extent than would enjoining the secondary work—it would leave the public with two works where there would otherwise have been only one. Thus, although balancing the interests in copyright lawsuits requesting preliminary injunctions may frequently favor promoting progress in the marketplace of ideas over the personal-integrity speech interest of the defendant, it will not always favor granting the injunction itself. Most importantly, this balancing-of-interests inquiry would assist in accounting for potential First Amendment violations, rather than merely reducing their quantity.

The Court's four-factor test is uniquely well-situated to allow for the application of such an inquiry. Unlike the approaches used by the Ninth Circuit (and, until recently, the Second Circuit), the four-factor test applied in *Winter* and *eBay* mandates that a plaintiff seeking a preliminary injunction must demonstrate that the public interest favors granting the injunction.²⁹⁴ The first three factors are logically related; they serve the essential function of a preliminary injunction—"to preserve the relative positions of the parties until a meaningful trial on the merits can be held."²⁹⁵ The first factor, irreparable harm to the plaintiff absent interlocutory injunctive relief, ensures that granting the injunction is necessary (given the availability of other remedies, such as damages). The second two, likelihood of success on the merits and a favorable balance of hardships, create a sort of algebraic formula for determining when a preliminary injunction is appropriate.²⁹⁶ Thus, the judge must weigh how likely

²⁹³ This fact pattern is drawn from the case of *Salinger v. Colting*, 641 F. Supp. 2d 250, 269 (S.D.N.Y. 2009).

²⁹⁴ *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008); *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).

²⁹⁵ *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

²⁹⁶ In his *Economic Analysis of the Law*, Posner states the formula thus: "Grant [a preliminary injunction] if but only if $P(H_p) > (1 - P)H_d$. . ." P represents the plaintiff's likelihood of success; H_p is the amount of irreparable harm plaintiff will suffer absent relief; $(1 - P)$ denotes the defendant's likelihood of success; and H_d is the amount of harm a defendant will suffer if the injunction issues. Posner, *supra* note 24, § 21.3, at 595.

the plaintiff is to succeed against the probability and magnitude of harm that will be suffered by both parties—the respective harms that would be inflicted on a wrongfully enjoined defendant or on a wrongfully denied plaintiff.

These first three factors operate on an internal level; the relevant concerns are those of the parties in the instant case. The fourth factor, which requires consideration of the public interest, is analytically separate from the first three. The scope of relevant interests under a public-interest inquiry is broader than the scope of the other three factors; the public-interests factor is—unlike the other three factors—not focused on preserving a meaningful trial on the merits. In fact, whether the injunction would serve the interest of the public has little or nothing to do with that aim. As a result, the public-interest factor provides a workable conduit for applying the balancing-of-interests test described above. The interests of copyright law and the First Amendment necessarily emerge as the predominant public interests in a request for a preliminary injunction against copyright infringement, and these twin aims should be balanced under the public-interest inquiry—the fourth factor announced by the Court in *eBay* and *Winter*—in order to preserve the constitutionality of the Copyright Act.

C. The New Standard: How Future Courts Should Apply the Four-Factor Test

As an initial matter, courts applying the four-factor test should lay the burden of proving all four factors on the plaintiff.²⁹⁷ With regards to the first factor, whether the plaintiff will suffer irreparable harm absent preliminary injunctive relief, it seems clear that courts should do away with the currently prevalent presumption of irreparable harm. In addition to the concerns noted above, where the plaintiff will suffer no irreparable harm absent a preliminary injunction, a court granting her the injunction runs the risk of unnecessarily harming the defendant's speech interests. Furthermore, presuming harm impairs the role played by the first three factors, i.e., ensuring that injunctions issue only where necessary in order to preserve a meaningful trial on the merits.²⁹⁸ For similar reasons, courts should reject the position that the balance-of-hardships factor always favors granting preliminary injunctions to copyright plaintiffs.

With regards to the second factor, likelihood of success on the merits, it should be noted that defendants' speech interests, while *relatively* minimal, are

²⁹⁷ See, e.g., *Winter*, 129 S. Ct. at 374 (“A plaintiff seeking a preliminary injunction must establish [the four factors].”).

²⁹⁸ See Patry, *supra* note 8, § 22.10, at 22-38 (refuting the preserving-the-status-quo approach and arguing that preliminary injunctions serve instead to preserve a meaningful trial on the merits).

still of great import.²⁹⁹ The importance of all free-speech values, as evidenced by the heightened levels of scrutiny and procedural safeguards (such as the prior-restraint rule) characteristic of First Amendment jurisprudence, is strong in any case that carries a likelihood of erroneously restraining protected speech. Thus, a copyright-preliminary-injunction regime that deals effectively with First Amendment interests should require at least a reasonable degree of likelihood of success in lieu of a trial on the merits. The sufficiently-serious-questions test, never of great value, should be discarded entirely.³⁰⁰ A greater-than-fifty-percent standard would seem a logical replacement, given that it is the same standard to which a plaintiff is held in proving her case at trial. Thus, while some chance of erroneously restraining protected (i.e., uninfringing) speech remains, such a standard would serve far more effectively than a mere sufficiently-serious-questions requirement. This middle-ground approach also would seem befitting, given copyright's unique status in First Amendment law. It is also worth noting that the few courts bold enough to quantify this factor have fixed the requirement such that plaintiffs must demonstrate a greater-than-fifty-percent chance of success.³⁰¹

Finally, courts should do away with the "presumption" that the public interest always favors granting preliminary injunctions to copyright plaintiffs, and instead engage in the balancing approach outlined above. The often-cited rationale for applying the presumption, that "the public interest is always served by upholding copyrights,"³⁰² is questionable at best.³⁰³ Worse, it is frustratingly enthymematic; it omits the necessary minor premise: "Granting preliminary injunctions always upholds copyrights." Stated as such, the argument reveals its fallacious nature—even granting that "the public interest is always served by upholding copyrights," it does not follow that *preliminary injunctions* are always necessary to uphold copyrights. Preliminary injunctive relief is but one remedy available to courts. Due to the risks uniquely inherent in preliminary injunctions, courts should not grant them unless necessary. Furthermore, as noted above, it is

²⁹⁹ Smolla, *supra* note 238.

³⁰⁰ See *supra* notes 75-86 and accompanying text.

³⁰¹ See *supra* note 72-74, 81 and accompanying text.

³⁰² See, e.g., *Janel Russell Designs, Inc. v. Mendelson & Assocs., Inc.*, 114 F. Supp. 2d 857, 861 (D. Minn. 2000); *Signcad Tech. Corp. v. Signcad Sys., Inc.*, No. Civ. 02-4786(JRT/FLN), 2003 WL 465801, at *6 (D. Minn. 2003).

³⁰³ See generally Newman, *supra* note 290 (arguing that the Copyright Act's grant of an exclusive derivative-works right frequently fails to fulfill copyright's utilitarian goal, rendering it frequently unconstitutional as a result).

simply not the case that the relevant public interests always favor granting preliminary injunctions.³⁰⁴ Instead of uniformly finding that this factor favors copyright plaintiffs, courts should balance the relevant interests—the shared interest in promoting progress in the marketplace of ideas, as well as the defendant’s personal-integrity interest in speaking—to determine whether injunctive relief is appropriate.

VI. CONCLUSION

While the conflict between the First Amendment and copyright law is certainly larger than the potential prior-restraint problem identified by Professors Lemley and Volokh, the possibility of erroneously silencing protected speech on an undeveloped factual record presents a particularly serious concern. Meanwhile, the costs to society of handing out preliminary injunctions to copyright plaintiffs as a matter of course should give jurists (at the very least) great pause.

The Court, in handing down its *eBay* and *Winter* decisions, appears to have attempted two primary goals. The first, reducing the overall number of preliminary injunctions issued, arises from the standpoint of social utility—it seeks to address the problematic over-application, seemingly endemic to copyright law, of such a coercive remedy. Universal implementation of the four-factor test, likely to occur in the near future, will go some distance toward achieving this goal. However, doing away with the copyright-specific presumptions (both *de jure* and *de facto*) that reduce the four-factor inquiry to a one-factor test is an essential element of following the spirit of the Court’s recent holdings—and of affecting its aim.

The second, avoiding conflicts between the First Amendment and the Copyright Act, cannot be achieved merely by a wholesale reduction in the number of injunctions issued, regardless of whether such a reduction is accomplished under the “traditional contours” mantle. In a perfect world, at least as envisioned by most modern copyright scholars, perhaps courts would apply direct First Amendment scrutiny to copyright law. Given that the traditional-contours approach is a practical reality, however, courts must consider how best to serve the interests embodied in both the Copyright Act and the First Amendment. Fortunately, the public-interest inquiry under the Court’s four-factor test provides an excellent avenue for courts to account for free-speech concerns by balancing copyright and free-speech values.

³⁰⁴ See *supra* notes 302-03 and accompanying text.

The reality of copyright preliminary injunctions still diverges sharply from the judicial rhetoric surrounding them. By universally applying the four-factor test within the analytical framework described above, however, the two may yet be realigned. Perhaps more importantly, the very same framework can allow for ensuring both the furtherance of copyright law's core aim, the promotion of progress, and the continued protection of one of our most cherished liberties—the freedom of speech.