

WHAT’S THE [IRREPARABLE] HARM?:  
INCENTIVIZING CREATIVITY THROUGH PRELIMINARY  
INJUNCTIONS IN COPYRIGHT LAW

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“[I]rreparable harm is ‘the sine qua non of injunctive relief.’”<sup>1</sup>

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<sup>1</sup> Ne. Fla. Chapter of Ass’n of Gen. Contractors of Am. v. City of Jacksonville, 896 F.2d 1283, 1285 (11th Cir. 1990) (quoting *Frejlach v. Butler*, 573 F.2d 1026, 1027 (8th Cir. 1978)).

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## INTRODUCTION

Equitable principles have long mandated that in order to prevail on a motion for a preliminary injunction, the plaintiff must clearly demonstrate that she is entitled to such relief because she will suffer irreparable harm without it.<sup>2</sup> This is one of four factors that the plaintiff must establish before the court may grant her motion for a preliminary injunction.<sup>3</sup> The irreparable harm requirement reflects the judicial understanding that preliminary relief is an extraordinary remedy.<sup>4</sup> As such, the court should only issue this type of relief when it will prevent the defendant from harming the plaintiff until a full trial on the merits is held, and when the plaintiff's harm cannot be remedied by a damages award after-the-fact.<sup>5</sup> The Supreme Court reinforced this understanding in *eBay, Inc. v. MercExchange, L.L.C.* by eradicating a longstanding presumption of irreparable harm in the context of intellectual property law, thereby requiring plaintiffs to independently prove this factor in order to obtain a preliminary injunction.<sup>6</sup> Consequently, *eBay* ushered

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<sup>2</sup> 42 AM. JUR. 2D *Injunctions* § 35 (2017). The plaintiff must also demonstrate irreparable harm before a court may grant a permanent injunction. *Id.*; WILLIAM F. PATRY, 6 PATRY ON COPYRIGHT § 22:50 (2016).

<sup>3</sup> For a discussion of the other three factors of the traditional four-prong test for preliminary injunctions, see *infra* Section I.A.

<sup>4</sup> *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008) (“A preliminary injunction is an ‘extraordinary and drastic remedy.’ It should never awarded as of right . . . .” (citation omitted)); Christina Bohannon, *Copyright Harm and Injunctions*, 30 CARDOZO ARTS & ENT. L.J. 11, 15 (2012) (“The requirement of irreparable harm reflects the severity of the injunctive remedy.”). Preliminary relief is considered drastic for various reasons, including, but not limited to, the fact that it constitutes an “intrusion on [the] defendant’s liberty” and imposes a burden on the court for enforcement. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 381 (4th ed. 2010). Even though the plaintiff may prevail in an action for copyright infringement absent a showing of harm (and indeed she often does), she is required to show, and the court is required to find, a likelihood of harm before enjoining activity prior to a full trial. See CHRISTINA BOHANNAN & HERBERT HOVENKAMP, CREATION WITHOUT RESTRAINT: PROMOTING LIBERTY AND RIVALRY IN INNOVATION 161 (2012).

<sup>5</sup> ASHLEY PACKARD, DIGITAL MEDIA LAW 18 (2d ed. 2013) (“If a trial later shows that the preliminary injunction was warranted, the court will replace it with a *permanent injunction*.”).

<sup>6</sup> *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006); see also *infra* Section I.B. But see *infra* note 61.

in a transformative era for the irreparable harm factor in intellectual property cases, which has been characterized by judicial efforts to define the boundaries of irreparable harm in copyright law.<sup>7</sup>

In the wake of *eBay*,<sup>8</sup> courts have wrestled with the now more onerous, fact-intensive task of determining what constitutes legally cognizable irreparable injury in copyright cases.<sup>9</sup> In arguably two of the most controversial copyright cases in recent years, the Second and Ninth Circuits—home to the most prominent entertainment, software, and publishing companies, and thus, leaders in copyright law<sup>10</sup>—confronted this challenge.<sup>11</sup> These two cases—*American Broadcasting Companies, Inc. v. Aereo, Inc.*<sup>12</sup> and *Garcia v. Google, Inc.*<sup>13</sup>—are instructive in highlighting the present lack of uniformity amongst circuit courts in their treatment of irreparable injury. In the former, the court granted the plaintiffs’ motion for a preliminary injunction;<sup>14</sup> in the latter, the court denied it.<sup>15</sup> And in both cases, harm—albeit, different types of harm—was, allegedly, suffered.<sup>16</sup>

In *Garcia*, the Ninth Circuit explored the extent to which the plaintiff’s asserted injuries must be connected to the underlying claim of copyright infringement. The court imposed an elevated requirement that the harm be sufficiently related to the constitutional purpose of copyright law for the plaintiff to obtain a preliminary injunction.<sup>17</sup> In

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<sup>7</sup> See Bohannon, *supra* note 6, at 15 (“Recent cases emphasize the need for courts to think seriously about harm in deciding whether to grant injunctions.”); see also *infra* Section I.C.

<sup>8</sup> At least two scholars have explored copyright harm in the context of injunctive relief after *eBay*. See Bohannon, *supra* note 6; David McGowan, *Irreparable Harm*, 14 LEWIS & CLARK L. REV. 577 (2010). This Note expands upon the existing literature on this topic through an analysis of recent cases, comment on divergent standards developing in different circuits, and contribution of a proposal that will aid courts in achieving a more uniform and well-rounded understanding of irreparable harm in copyright cases.

<sup>9</sup> BOHANNAN & HOVENKAMP, *supra* note 4, at 178 (“Courts have struggled with this problem in good faith, but defining copyright harm poses both conceptual and practical challenges.”). For purposes of this Note, harm and injury are used interchangeably.

<sup>10</sup> See JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 277 (4th ed. 2015) (“These circuits . . . tend to be leaders in the copyright field . . .”).

<sup>11</sup> See *infra* Sections I.C.1–2.

<sup>12</sup> WNET v. Aereo, Inc. (*Aereo II*), 712 F.3d 676 (2d Cir. 2013); Am. Broad. Cos. v. Aereo, Inc. (*Aereo III*), 134 S. Ct. 2498 (2014); Am. Broad. Cos. v. Aereo, Inc. (*Aereo IV*), Nos. 12-cv-1540, 12-cv-1543, 2014 WL 5393867 (S.D.N.Y. Oct. 23, 2014); Am. Broad. Cos. v. Aereo, Inc. (*Aereo I*), 874 F. Supp. 2d 373 (S.D.N.Y. 2012); see also *infra* Section II.A.1.

<sup>13</sup> *Garcia v. Nakoula* (*Garcia I*), No. CV 12-08315-MWF (VBKx), 2012 WL12878355 (C.D. Cal. Nov. 30, 2012); *Garcia v. Google, Inc.* (*Garcia II*), 766 F.3d 929 (9th Cir. 2014) (2-1 decision), *rev’d en banc*, 786 F.3d 733 (9th Cir. 2015); *Garcia v. Google, Inc.* (*Garcia III*), 786 F.3d 733 (9th Cir. 2015) (en banc); see *infra* Section II.A.2.

<sup>14</sup> *Aereo IV*, 2014 WL 5393867, at \*1.

<sup>15</sup> *Garcia III*, 786 F.3d at 747.

<sup>16</sup> See *infra* Sections I.C.1–2.

<sup>17</sup> See, e.g., *Garcia III*, 786 F.3d at 744–46 (stating that copyright’s function is to supply copyright holders with the pecuniary incentive to create and disseminate works by protecting

contrast, other circuits have remained silent regarding any required connection between the plaintiff's asserted harms and copyright law's underlying justifications.<sup>18</sup> Particularly, the Second Circuit—which has had various opportunities to define the scope of irreparable harm in copyright cases since *eBay*<sup>19</sup>—has never entertained this consideration. In fact, the Second Circuit has granted preliminary injunctions to plaintiffs in copyright actions whose alleged injuries had little to no connection to the substance of the Copyright Act.<sup>20</sup>

As a result, there is presently a lack of national uniformity in the way that federal courts assess irreparable harm, and in turn, apply the test for preliminary relief, in copyright cases.<sup>21</sup> As copyright law adapts in response to new media and technologies,<sup>22</sup> courts will inevitably face more requests for injunctive relief,<sup>23</sup> notably given the relative ease of infringement made possible by these mediums.<sup>24</sup> Accordingly, the varying legal landscape in this area may result in inconsistent decisions and impact litigants' choice of forum moving forward.<sup>25</sup>

To determine what should constitute actionable irreparable injury to a copyright plaintiff seeking a preliminary injunction, this Note

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their commercial interests through granting them a marketable right to their expression); see also *infra* Section I.C.1.

<sup>18</sup> No other circuit court has stated that to obtain a preliminary injunction in a copyright case, the plaintiff must demonstrate that her claimed injuries are related in some way to the underlying substantive law. This may be because the other circuit courts do not consider such a connection to be a necessary component of the irreparable harm inquiry, or because they have not yet encountered a fact pattern that presented the appropriate opportunity to impose such a requirement, as the Ninth Circuit did in *Garcia v. Google*. See *infra* Section I.C.1. At least one district court—the Middle District of Florida—has required a connection, albeit a relatively loose one, between the plaintiff's alleged injury and substantive copyright law in the context of preliminary injunctions. See *Bollea v. Gawker Media, L.L.C.*, 913 F. Supp. 2d 1325, 1329 (M.D. Fla. 2012) (“[The plaintiff must] suffer irreparable harm *in the copyright sense* absent a preliminary injunction.” (emphasis added)); see also *infra* note 210.

<sup>19</sup> See Section I.C.2.

<sup>20</sup> See, e.g., *Aereo IV*, Nos. 12-cv-1540, 12-cv-1543, 2014 WL 5393867 (S.D.N.Y. Oct. 23, 2014); *Aereo II*, 712 F.3d 676 (2d Cir. 2013), *Aereo I*, 874 F. Supp. 2d 373 (S.D.N.Y. 2012); see also *infra* Section I.C.2.

<sup>21</sup> Compare *Aereo II*, 712 F.3d 676, and *Aereo I*, 874 F. Supp. 2d 373, with *Garcia III*, 786 F.3d 733 (9th Cir. 2015). For further discussion of these cases, see *infra* Section I.C.

<sup>22</sup> See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 430 (1984) (“[T]he law of copyright has developed in response to significant changes in technology.”); see also COHEN, *supra* note 10, at 277; Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460, 463 (2015).

<sup>23</sup> Ronald T. Coleman Jr. et al., *Applicability of the Presumption of Irreparable Harm After eBay*, 32 FRANCHISE L.J. 3, 3 (2012) (“Intellectual property cases often involve requests for injunctive relief . . . [as] stopping the infringing conduct often is the plaintiff's most important business objective.”).

<sup>24</sup> See COHEN, *supra* note 10, at 27–31; John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 543 (“We are, technically speaking, a nation of constant infringers.”).

<sup>25</sup> See *infra* note 182 and accompanying text.

explores *Aereo*, *Garcia*, and other post-*eBay* cases in the Second and Ninth Circuits, and it argues that both irreparable harm standards fail to effectuate an appropriate normative vision. Unlike the Second Circuit's approach, there should be a link between the nature of the plaintiff's injury and the constitutional purposes of copyright law, and only such "copyright harms" should be actionable; but unlike the Ninth Circuit's approach, copyright harm should encompass not only injury to a plaintiff's commercial interests, but injury to her expressive incentives as well.<sup>26</sup> While this theory of harm accepts that the primary justification for copyright law is utilitarianism,<sup>27</sup> it also recognizes that copyright owners are not motivated exclusively by the promise of financial reward; rather, they are also motivated to create artistic works by intrinsic, personal, and noneconomic forces.<sup>28</sup> Therefore, in furtherance of copyright law's utilitarian rationale, this Note posits that injury to both economic and noneconomic incentives should be cognizable because both forms of injury stifle artistic progress.<sup>29</sup> This proposal furthers the objectives of copyright law by supplementing the present consequentialist framework with a legal mechanism to protect a wider range of relevant motivations for creativity.<sup>30</sup>

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<sup>26</sup> The theory of expressive incentives offered in this Note was first advanced by Professor Jeanne C. Fromer in her 2012 Law Review Article entitled *Expressive Incentives in Intellectual Property*. Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745 (2012). Professor Fromer argues that American intellectual property laws should incentivize authors by expanding utilitarianism to encompass personhood interests in creative works, rather than merely pecuniary interests. *Id.* This Note applies Professor Fromer's theory to preliminary injunctions. For further discussion of Professor Fromer's Article, see Part III.

<sup>27</sup> See U.S. CONST. art. I, § 8, cl. 8; *Mazer v. Stein*, 347 U.S. 201, 207–08 (1954). Utilitarian theory maintains that the primary function of copyright is to incentivize artists to innovate by providing them with a marketable right to their creative expression. See generally BOHANNAN & HOVENKAMP, *supra* note 4; ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* (2011); Shyamkrishna Balganes, *The Normative Structure of Copyright Law*, in *INTELLECTUAL PROPERTY AND THE COMMON LAW* 313 (Shyamkrishna Balganes ed. 2013). For further discussion of utilitarianism, see *infra* notes 229–34 and accompanying text.

<sup>28</sup> See generally Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WIS. L. REV. 141 (2011); Rochelle Cooper Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590 (1987); Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945 (2006); Jessica Silbey, *Harvesting Intellectual Property: Inspired Beginnings and "Work-Makes-Work," Two Stages in the Creative Processes of Artists and Innovators*, 86 NOTRE DAME L. REV. 2091 (2011); see also *infra* note 236 and accompanying text.

<sup>29</sup> See Fromer, *supra* note 26.

<sup>30</sup> See Kwall, *supra* note 28, at 1947 ("[O]ur legal structure must reflect a fuller comprehension of the creative being . . . [T]he law can, and should, be shaped in response to all relevant forces motivating creativity, not just those concerned with economic reward."); Balganes, *supra* note 27, at 314 ("[A]s a normative theory (of optimal incentivization) [the economic account of copyright law] remains constitutively incomplete."); see also *infra* Part II. *Garcia* demonstrates that copyright law's presently narrow view of creativity falls short of

Part I of this Note discusses the traditional four-factor test for preliminary injunctions, with an emphasis on the irreparable harm factor. It examines the evolution of this legal standard in both the Second and Ninth Circuits following *eBay*, using *Garcia* and *Aereo* as the leading cases. Part II highlights the differences between the two circuits' approaches to irreparable harm by exploring how the cases might come out if the approaches used by each circuit were switched. This Part then criticizes both the Second and Ninth Circuits' approaches to irreparable harm by examining their shortcomings in promoting copyright law's utilitarian aim of incentivizing artists<sup>31</sup> to generate creative expression. In doing so, this Part explores existing literature that proposes adding a harm requirement to other areas of copyright law and incorporates it in a normative framework that brings injuries to copyright owners' pecuniary,<sup>32</sup> as well as nonpecuniary, interests within the scope of irreparable harm.

Part III offers such an all-encompassing theory of irreparable copyright harm and illustrates that this proposal is a middle ground between the Second and Ninth Circuits' present approaches—the Ninth Circuit's requirement that the injury be related to the constitutional purposes of copyright law is preserved, but the scope of this requirement is expanded beyond the realm of pecuniary harms to include injury to expressive incentives as well. After addressing critiques of this proposal, Part III concludes that it would best achieve a uniform and equitable system of preliminary relief in copyright law.

## I. BACKGROUND: PRELIMINARY INJUNCTIONS IN COPYRIGHT LAW

The Intellectual Property Clause of the Constitution of the United States (IP Clause)<sup>33</sup> gives Congress the authority, which Congress has exercised through the Copyright Act of 1976 (Act),<sup>34</sup> to grant artists a

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protecting artists' nonpecuniary interests in an increasingly digital world. *See infra* Section I.C.1.

<sup>31</sup> When this Note uses the term “artist,” “creator,” “copyright holder,” or “copyright owner,” it refers to an individual or entity that produces a copyrightable work of authorship.

<sup>32</sup> When this Note uses the term “pecuniary” or “commercial,” it refers to the copyright-relevant aspects of the artist's commercial or pecuniary interests, and not necessarily all of the artist's commercial or pecuniary interests, as not all commercial interests are copyright interests.

<sup>33</sup> U.S. CONST. art. I, § 8, cl. 8 (“To 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[.]”).

<sup>34</sup> 17 U.S.C. §§ 101–810 (2012).

bundle of exclusive rights over their works of authorship.<sup>35</sup> Through these rights, copyright law aims to encourage innovation and ultimately advance societal progress by incentivizing artists to engage in creative activities.<sup>36</sup> Copyright owners bear the burden of enforcing their exclusive rights,<sup>37</sup> which empower them to maintain their temporary monopolies over their works.<sup>38</sup> Yet, the Act's monetary damages provisions<sup>39</sup> are often an insufficient solution for artists to ensure that their rights remain exclusive.<sup>40</sup>

Accordingly, the availability of injunctive relief is critical for the copyright holder.<sup>41</sup> Injunctions arm creators with the legal artillery to protect their rights,<sup>42</sup> thereby incentivizing them to produce their works in the first place (*ex ante*), and ultimately, pursue future creative endeavors.<sup>43</sup> Unauthorized uses of their work harms their incentives by undermining their willingness to invest in creative activity, which is

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<sup>35</sup> 17 U.S.C. § 106 (granting copyright holders specific exclusive rights to their copyrighted works); *see generally* BOHANNAN & HOVENKAMP, *supra* note 4; *see also* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) ("The Supreme Court is fond of saying that 'the right to exclude others' is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979))).

<sup>36</sup> *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 477 (1984).

<sup>37</sup> 17 U.S.C. § 501(b) ("The legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it.").

<sup>38</sup> *See, e.g., Mazer v. Stein*, 347 U.S. 201, 206 (1954); *see also* Alina Ng, *Copyright's Empire: Why the Law Matters*, 11 MARQ. INTELL. PROP. L. REV. 337, 343–45 (2007).

<sup>39</sup> 17 U.S.C. § 504.

<sup>40</sup> *See* Andrew F. Spillane, Comment, *The Continuing Vitality of the Presumption of Irreparable Harm in Copyright Cases*, 15 MARQ. INTELL. PROP. L. REV. 257, 282–85 (2011). For instance, the value that an author places upon the sticks in her exclusive bundle of property rights may not be reducible to a numerical value; thus, a damage award will not fully compensate or make her whole. In addition, monetary awards "run[] the risk of judicially licensing infringement," and damage judgments may act as mere deterrents, rather than providing the copyright owner with the finality she desires. *Id.* at 284–85. The threat of future infringement always remains in the case of damage awards, and alongside this, the threat of endless litigation. *See* JOSEPH STORY, 2 COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 931, at 121 (Isaac F. Redfield rev. 1836) ("[I]f no other remedy could be given in cases of . . . copyrights than an action at law for damages, the . . . author might be ruined by the necessity of perpetual litigation, without ever being able to have a final establishment of his rights.").

<sup>41</sup> Recognizing the importance of such relief, Congress provided for private causes of action to enjoin infringement in the Copyright Act. *See* 17 U.S.C. § 502(a). While the Copyright Act confers upon courts the authority to grant injunctive relief, Congress's legislation provides little guidance as to how they should exercise that authority. *See* Spillane, *supra* note 40, at 262.

<sup>42</sup> *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) ("The owner of the copyright, if he pleases, may . . . exercis[e] the right to exclude others from using his property.").

<sup>43</sup> *See* Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1574 (2009); Mary W. S. Wong, *Toward an Alternative Normative Framework for Copyright: From Private Property to Human Rights*, 26 CARDOZO ARTS & ENT. L.J. 775, 780 (2009). *But see* BOHANNAN & HOVENKAMP, *supra* note 4, at x.

detrimental to the progress and public welfare envisioned by the IP Clause.<sup>44</sup> Given the high value that creators place upon their intangible, exclusive rights, courts as far back as the English Courts of Equity<sup>45</sup> have readily granted preliminary injunctions in copyright cases.<sup>46</sup>

In today's world of advanced technologies, the availability of preliminary injunctive relief has grown evermore essential to copyright owners, while the harm that they face has grown evermore untraditional. The Internet enables creators to share their works with the world more expeditiously and inexpensively, and at a high level of quality.<sup>47</sup> But the ease of distributing and acquiring content has been accompanied by a rapid growth in Internet piracy.<sup>48</sup> Unlicensed parties have a greater ability to exploit creative works than ever before,<sup>49</sup> leading to a greater sense of urgency to justify seeking preliminary relief.<sup>50</sup> Yet, such relief must be limited to a certain extent in order to achieve an appropriate balance between ownership and First Amendment values, particularly in the context of copyright cases.<sup>51</sup>

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<sup>44</sup> See Christopher Sprigman, *Copyright and the Rule of Reason*, 7 J. TELECOMM. & HIGH TECH. L. 317, 320 (2009).

<sup>45</sup> See F.W. MAITLAND, *EQUITY* 1–7 (2d rev. ed., Cambridge Univ. Press 1969) in LAYCOCK, *supra* note 4, at 378–80; Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 151–52 (1998).

<sup>46</sup> See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394–95 (2006) (Roberts, C.J., concurring) (“Th[e] ‘long tradition [of granting injunctions in intellectual property cases]’ is not surprising, given the difficulty of protecting a right to *exclude* through monetary remedies . . .”); H. Tomás Gómez-Arostegui, *What History Teaches Us About Copyright Injunctions and the Inadequate-Remedy-At-Law Requirement*, 81 S. CAL. L. REV. 1197 (2008); see also *infra* Section I.A.

<sup>47</sup> See COHEN, *supra* note 10, at 30.

<sup>48</sup> DAVID PRICE, *SIZING THE PIRACY UNIVERSE* 3 (2013), [http://illusionofmore.com/wp-content/uploads/2013/09/NetNames-Sizing\\_Piracy\\_Universe-Report-2.5.pdf](http://illusionofmore.com/wp-content/uploads/2013/09/NetNames-Sizing_Piracy_Universe-Report-2.5.pdf). According to this 2013 report that studied “the shape and size of the piracy universe,” Internet piracy is becoming more profitable and is the most difficult form of piracy to police. *Id.* at 2. About twenty-four percent of all Internet bandwidth in North America, Europe, and Asia was used to access infringing content, and almost twenty-six percent of all Internet users in these regions—or 1,026,000,000 unique users—explicitly sought such content during January 2013. *Id.* at 3.

<sup>49</sup> See COHEN, *supra* note 10, at 30.

<sup>50</sup> See *id.* at 8 (“The development of networked digital technologies has affected—and, according to some, jeopardized—the efficacy of the [copyright holder’s] exclusive rights.”); see also *supra* notes 23–24 and accompanying text.

<sup>51</sup> See Bohannon, *supra* note 6, at 14 (“[B]ecause copyright regulates words and other creative expression, it burdens First Amendment speech.”). For further discussion of this balance, see Section III.C.



### A. *Traditional Legal Standard*

Although courts retain considerable discretion in determining whether to grant preliminary relief,<sup>52</sup> courts have historically employed a four-factor test in doing so: a plaintiff must establish that (1) she is likely to succeed on the merits (likely to succeed prong); (2) she will suffer irreparable injury if the injunction is not granted (irreparable harm prong);<sup>53</sup> (3) the balance of hardships tips in her favor; and (4) granting the injunction would be in the public interest (collectively, the traditional test).<sup>54</sup> Over time, courts began to view irreparable harm as inherent in an act of infringement itself.<sup>55</sup> Thus, courts eliminated the plaintiff's burden to independently prove irreparable harm, causing the likely to succeed prong to become the dispositive inquiry.<sup>56</sup> Naturally, copyright plaintiffs benefited from this presumption of irreparable injury because preliminary relief became more easily attainable in copyright cases.<sup>57</sup>

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<sup>52</sup> See *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982); see also *eBay*, 547 U.S. at 397 (Roberts, C.J., concurring) (“[T]he equitable discretion over injunctions . . . is well suited to allow courts to adapt to the rapid technological and legal developments . . .”). The standard of review for a district court’s decision to grant or deny injunctive relief is abuse of discretion. *eBay*, 547 U.S. at 391 (majority opinion).

<sup>53</sup> At least two circuits have explicitly stated that the irreparable harm prong is the most important of the four prongs. See *Faiveley Transp. Malmö AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (“A showing of irreparable harm is ‘the single most important prerequisite for the issuance of a preliminary injunction.’” (quoting *Rodriguez v. DeBuono*, 175 F.3d 227, 234 (2d Cir. 1999))); *Port City Props. v. Union Pac. R.R. Co.*, 518 F.3d 1186, 1190 (10th Cir. 2008).

<sup>54</sup> See Lemley & Volokh, *supra* note 45, at 158.

<sup>55</sup> *Id.* For a criticism of this presumption of irreparable harm, see PATRY, *supra* note 2, § 22:50.

<sup>56</sup> See Lemley & Volokh, *supra* note 45, at 159 (“The ostensibly four-factor test collapse[d] . . . to a simple inquiry into likelihood of success on the merits.” (citing 2 PAUL GOLDSTEIN, COPYRIGHT § 11.1.1, at 11:11–12 n.29 (1995))). Thus, a plaintiff seeking preliminary injunctive relief against an alleged infringer of her copyright merely needed to establish a likelihood of infringement, and courts would subsequently presume the existence of irreparable injury. *Id.*; see e.g., *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 627 (9th Cir. 2003); *Video Trip Corp. v. Lightning Video, Inc.*, 866 F.2d 50, 51–52 (2d Cir. 1989). In many circuits, the four factors evolved into a balancing test or a sliding scale, upon which a plaintiff with a stronger showing on one factor of the test could compensate for a weaker showing on another. See LAYCOCK, *supra* note 4, at 444.

<sup>57</sup> See Coleman, *supra* note 23, at 3; Anthony DiSarro, *A Farewell to Harms: Against Presuming Irreparable Injury in Constitutional Litigation*, 35 HARV. J.L. & PUB. POL’Y 743, 747 (2012) (“Presuming irreparable harm . . . eliminate[s] what is usually the most difficult element for a plaintiff to satisfy.”).

### B. Legal Standard After eBay

In *eBay, Inc. v. MercExchange, L.L.C.*, a 2009 patent infringement case, the Supreme Court held that a plaintiff seeking a permanent injunction must engage in an independent analysis of each of the four separate prongs.<sup>58</sup> Contrary to prevailing practice, the Court clarified that injunctions do not categorically follow from a likelihood of success on the merits.<sup>59</sup> *eBay* thus notably emphasized the discrete importance of the irreparable harm prong by requiring courts to analyze the existence of such harm, even if a likelihood of infringement is clear.<sup>60</sup>

While its scope and effect have been debated,<sup>61</sup> most agree that *eBay* abolished the irreparable injury presumption<sup>62</sup> in both permanent and preliminary injunctions,<sup>63</sup> and well beyond the patent law context.<sup>64</sup>

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<sup>58</sup> 547 U.S. 388, 393–94 (2006); see Mark P. Gergen et al., *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 210 (2012) (“The eBay test has arguably revolutionized the law on injunctions by presenting its four factors as separately required prongs of a true ‘test,’ rather than as mere factors in an overall balancing analysis.”). Although the *eBay* case involved a permanent injunction, and therefore employed a slightly different four-factor test than the test for preliminary injunctions, the only distinguishing factor that the Court identified between the two was that the plaintiff must demonstrate actual success on the merits when moving for a permanent injunction, as opposed to a likelihood of success. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546, n.12 (1987). In *Winter v. Natural Resources Defense Council, Inc.*, the Supreme Court reinforced *eBay*’s abrogation of the presumption in a case involving a preliminary injunction. 555 U.S. 7 (2008); see *infra* note 67.

<sup>59</sup> *eBay Inc.*, 547 U.S. at 392–93. Rather, the Court ruled that the failure to evaluate the presence of irreparable harm was a drastic departure from traditional equitable principles, which was unwarranted in the absence of congressional intent for such a departure. *Id.* at 391–92.

<sup>60</sup> See *supra* notes 58–59 and accompanying text.

<sup>61</sup> Some have argued that the presumption of irreparable harm has survived *eBay* and *Winter*. Compare Coleman, *supra* note 23, with Spillane, *supra* note 40, at 279–82 (“[T]he Supreme Court did not address whether its eBay decision intended to abrogate the presumption of irreparable harm.”); see also Gómez-Arostegui, *supra* note 46, at 1208–09.

<sup>62</sup> See, e.g., *CoxCom, Inc. v. Chaffee*, 536 F.3d 101, 112 (1st Cir. 2008); Christopher Phelps & Assocs., L.L.C. v. Galloway, 492 F.3d 532, 543 (4th Cir. 2007); Peter Letterese & Assocs., Inc. v. World Inst. Of Scientology Enters. Int’l, 533 F.3d 1287, 1323 (11th Cir. 2008). Copyright scholar Melville Nimmer recognized the eradication of the presumption in his treatise. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.06[A][5] (2016); *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 999 (9th Cir. 2011) (“[T]he Supreme Court’s decision in *eBay* caused a new day to dawn. . . . No longer applicable is the presumption of irreparable harm, which allowed the collapse of factors that plaintiff must prove down to one.” (quoting NIMMER, *supra* § 14.06[A][5], at 14–149 (footnotes omitted))).

<sup>63</sup> See *Flexible Lifeline Sys., Inc.*, 654 F.3d at 996 (“If we harbored any doubts about the applicability of *eBay* in the preliminary injunction context, they have been dispelled by the Supreme Court’s decision in *Winter*.”).

<sup>64</sup> See, e.g., *id.* at 996 (holding that “*eBay* applies with equal force” to preliminary and permanent injunction cases, and “a presumption of irreparable harm is equally improper” in copyright and patent infringement cases); *Salinger v. Colting*, 607 F.3d 68, 78 n.7 (2d Cir. 2010) (“[W]e see no reason that *eBay* would not apply with equal force to an injunction in any type of

Accordingly, both the Second and Ninth Circuits have explicitly eliminated the presumption in copyright cases following *eBay*.<sup>65</sup>

Two years after *eBay*, the Supreme Court reaffirmed the independent significance of the irreparable harm prong in *Winter v. National Resources Defense Council, Inc.*<sup>66</sup> The Court held that plaintiffs seeking preliminary injunctions must establish not only that irreparable injury is merely possible, but that it is also *likely*, in the absence of an injunction before a decision on the merits can be rendered.<sup>67</sup> In these two cases, the Court made clear that a likelihood of irreparable harm is a necessary and unwavering prerequisite for injunctive relief.<sup>68</sup> Together, *eBay* and *Winter* have made it more challenging for plaintiffs to obtain injunctive relief by requiring them to make an independent showing of irreparable harm.<sup>69</sup>

### C. The Irreparable Harm Prong

The Supreme Court has not identified the precise type of harm to a copyright plaintiff that would render a preliminary injunction the appropriate remedy.<sup>70</sup> There is no universally recognized definition for

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case.”); BOHANNAN & HOVENKAMP, *supra* note 4, at 185 n.76 (“[T]he Court reasoned by analogy to copyright injunctions.”); Coleman, *supra* note 23, at 5 (“District courts have generally . . . refused to apply a presumption of irreparable harm in copyright cases based on *eBay*.”).

<sup>65</sup> See, e.g., *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 981 (9th Cir. 2011) (“[The] presumption of irreparable harm ‘is clearly irreconcilable with the reasoning’ of the Court’s decision in *eBay* and has therefore been ‘effectively overruled.’” (quoting *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc))); *Flexible Lifeline Sys., Inc.*, 654 F.3d at 995; *Salinger*, 607 F.3d at 79–80 (“[I]n light of *Winter* and *eBay*, we hold that . . . the court must not . . . presume that the plaintiff will suffer irreparable harm. . . . [but] must actually consider the injury the plaintiff will suffer if he or she loses on the preliminary injunction but ultimately prevails on the merits . . .” (footnotes and citations omitted)). This Note adopts the Second and Ninth Circuit view that the *eBay* ruling applies to preliminary injunctions in copyright law.

<sup>66</sup> 555 U.S. 7 (2008).

<sup>67</sup> *Id.* at 21–23. Although *Winter* is a case about environmental law, it has been cited by subsequent courts deciding cases involving various areas of law, including intellectual property cases. See *infra* Sections I.C.1–2.

<sup>68</sup> See *Flexible Lifeline Sys., Inc.*, 654 F.3d at 998 (“We conclude that presuming irreparable harm in a copyright infringement case is inconsistent with, and disapproved by, the Supreme Court’s opinions in *eBay* and *Winter*.” (citing *Google, Inc.*, 653 F.3d at 980–81)); Wade B. Gentz, *Coping Without the Presumption*, LANDSLIDE (Am. Bar Ass’n., Chicago, Ill.) May/June 2010, at 14, 15 (“If *eBay* intimated that irreparable harm could no longer be presumed . . . *Winter* shouted from the rooftops: ‘the presumption is dead.’”).

<sup>69</sup> See Gentz, *supra* note 68.

<sup>70</sup> Yet the Court has provided guidance as to the features that generally distinguish irreparable from repairable injury. For instance, speculative or unfounded fears of “merely trifling” distant injury will not suffice. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982); see also *Winter*, 555 U.S. at 22. In the preliminary injunction context, legal remedies—whether

the term irreparable harm,<sup>71</sup> partly due to the nature of the term itself,<sup>72</sup> as well as the fact that harm can be irremediable for countless reasons that may be difficult to identify.<sup>73</sup> Determining whether the particular injury constitutes irreparable harm is especially challenging in copyright cases,<sup>74</sup> as many injuries that result from infringement are associated with the loss of exclusive rights and are thus intangible in nature.<sup>75</sup>

Since *eBay*, courts have had the opportunity to develop their respective approaches to irreparable harm in intellectual property cases. Some courts have further elevated the plaintiff's burden in satisfying the now independent irreparable harm prong by requiring that there be a strong causal relationship between the alleged injury and the defendant's infringing conduct.<sup>76</sup> In addition to requiring a strong causal connection,<sup>77</sup> the Ninth Circuit has gone so far as to mandate that

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compensatory damages or a permanent injunction—must be deemed inadequate to rectify the plaintiff's injury at the conclusion of a trial on the merits. *See* *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 506–07 (1959). Further, federal courts have generally agreed on other identifying features of irreparable harm, such as injuries that are difficult to measure and quantify, like market-based harms, and injuries that are difficult to value, like certain reputational harms and lost business opportunities. *See* *John B. Hull, Inc. v. Waterbury Petroleum Prods., Inc.*, 588 F.2d 24 (2d Cir. 1978); Bohannon, *supra* note 6, at 20–22; DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* 46 (1991).

<sup>71</sup> *See* BOHANNAN & HOVENKAMP, *supra* note 4, at 162 (“[H]arm has been so poorly defined that the concept has become circular.”).

<sup>72</sup> *Id.* at 180 (recognizing the challenge faced when attempting to articulate “a useful and appropriate definition” of copyright harm); Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969, 977 (2007) (“The underlying problem is that ‘harm’ is an abstract legal construct.”). Aptly, the term “irreparable harm” has been referred to as “notably porous.” Douglas Rendleman, *The Trial Judge's Equitable Discretion Following eBay v. MercExchange*, 27 REV. LITIG. 63, 74 (2007).

<sup>73</sup> *Salinger v. Colting*, 607 F.3d 68, 81 (2d Cir. 2010).

<sup>74</sup> *See* Bohannon, *supra* note 72, at 977; BOHANNAN & HOVENKAMP, *supra* note 4, at 178.

<sup>75</sup> *See* BOHANNAN & HOVENKAMP, *supra* note 4, at 178–80; LAYCOCK, *supra* note 4, at 389.

<sup>76</sup> For instance, in 2012, the United States Court of Appeals for the Federal Circuit imposed a heightened “causal nexus” requirement in patent infringement cases. In *Apple Inc. v. Samsung Electric Co.*, 695 F.3d 1370 (Fed. Cir. 2012), the court held that “to satisfy the irreparable harm factor in a patent infringement suit, a patentee must establish both of the following requirements: 1) that absent an injunction, it will suffer irreparable harm, and 2) that a sufficiently strong causal nexus relates the alleged harm to the alleged infringement.” *Id.* at 1374. Thus, in a case where only a small number of the many features of an accused product are infringing, a patentee must demonstrate that “the harm is sufficiently related to the infringement,” and a risk of irreparable harm to the patentee will, alone, be insufficient to justify injunctive relief. *Id.*; *see also* *Apple, Inc. v. Samsung Elec. Co.*, 678 F.3d 1314, 1324 (Fed. Cir. 2012) (“To show irreparable harm, it is necessary to show that the infringement caused harm in the first place.”). For further discussion of different circuits’ irreparable harm causation standards, *see* COHEN, *supra* note 10, at 814.

<sup>77</sup> *See* *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 982 (9th Cir. 2011); *see also infra* note 85 and accompanying text.

the plaintiff's injury be compatible with copyright law's constitutional purpose in order to satisfy the irreparable harm prong.<sup>78</sup>

While the Second Circuit certainly requires a relationship between the harm asserted and the defendant's infringing use, it has not articulated any requirement that the plaintiff demonstrate a connection between the irreparable injury sought to be prevented and the purposes of copyright law.<sup>79</sup> Therefore, only irremediable injuries that hinder the constitutional objectives of copyright (copyright harms) justify a finding of irreparable harm in the Ninth Circuit,<sup>80</sup> whereas harms that fall outside the scope of copyright's purpose (non-copyright harms) suffice in the Second Circuit.<sup>81</sup> *Aereo*<sup>82</sup> and *Garcia*,<sup>83</sup> two of the most noteworthy copyright cases in recent times, illustrate both approaches and provide a useful framework for analyzing the contemporary landscape of preliminary injunctive relief in these Circuits.<sup>84</sup>

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<sup>78</sup> See *Garcia III*, 786 F.3d 733 (9th Cir. 2015) (en banc). The Ninth Circuit identifies the purpose of copyright law to be "the engine of free expression." *Id.* at 744; see also *infra* Section I.C.1.

<sup>79</sup> Compare *Salinger v. Colting*, 607 F.3d 68, 81 (2d Cir. 2010) (holding that irreparable harm must occur to the plaintiff's "property interest in the copyrighted material"); *Esbin & Alter, L.L.P. v. Sabharwal, Globus, & Lim, L.L.P.*, 403 F. App'x 591, 593 (2d Cir. 2010) (holding that the plaintiff's competitive harm must arise or "flow from" the defendant's infringing conduct), *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275 (2d Cir. 2012) (holding that drastic changes that threaten to destabilize an entire industry which is dependent upon the plaintiffs' copyrighted material constitutes irreparable harm), and *Aereo II*, 712 F.3d 676 (2d Cir. 2013) (affirming the district court's findings that the threat *Aereo* poses to the plaintiffs' control over their content and the future of the cable television subscription model constitutes irreparable harm), with *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 982 (9th Cir. 2011) (holding that the plaintiff did not demonstrate a "sufficient causal connection" between Google's actions and the irreparable harm to plaintiff's business), *Fox Broad. Co. v. Dish Network L.L.C. (Fox II)*, 747 F.3d 1060, 1072-73 (9th Cir. 2013) (holding that the harms the plaintiff allegedly suffered, including a loss of control over its programming, flowed from the greater *AutoHop* program, rather than the particular copies of the plaintiff's programming in question), and *Garcia III*, 786 F.3d 733, 736 (9th Cir. 2015) (en banc) (holding that irreparable harm in copyright cases must "stem from" copyright's commercial function and thus relate to the marketability of the work in question).

<sup>80</sup> See *infra* Section I.C.1.

<sup>81</sup> See *infra* Section I.C.2.

<sup>82</sup> *Aereo III*, 134 S. Ct. 2498 (2014); *Aereo II*, 712 F.3d 676; *Aereo IV*, Nos. 12-cv-1540, 12-cv-1543, 2014 WL 5393867 (S.D.N.Y. Oct. 23, 2014); *Aereo I*, 874 F. Supp. 2d 373 (S.D.N.Y. 2012); see also *infra* Section I.C.2.

<sup>83</sup> *Garcia III*, 786 F.3d 733; *Garcia II*, 766 F.3d 929 (9th Cir. 2014), *rev'd en banc*, 786 F.3d 733; *Garcia I*, No. CV 12-08315-MWF (VBKx), 2012 WL12878355 (C.D. Cal. Nov. 30, 2012); see also *infra* Section I.C.1.

<sup>84</sup> An understanding of the procedural history of each case and the precise holdings of the lower courts, including the merits of the copyright claim in question, as well as the cases that laid the groundwork in both circuits, are essential to the analysis in this Note, and are accordingly set forth, in turn, below.

1. Ninth Circuit: *Garcia*

The Ninth Circuit's reaction to *eBay* was not only to abrogate the presumption of irreparable harm, but also to increase the copyright plaintiff's burden by imposing additional requirements for establishing such harm. The court introduced this elevated standard in *Perfect 10, Inc. v. Google, Inc.*, which turned on the plaintiff's failure to demonstrate the requisite causal connection between the alleged injuries and the underlying claim of infringement.<sup>85</sup> This case, and other post-*eBay*, pre-*Garcia* copyright cases,<sup>86</sup> laid the groundwork upon which the Ninth

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<sup>85</sup> *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 982 n.3 (9th Cir. 2011) ("Because Perfect 10 has failed to show irreparable harm, we need not address its likelihood of success on the merits."). In *Perfect 10*, the court affirmed the district court's denial of the plaintiff's motion for a preliminary injunction. *Id.* at 982. This preliminary injunction would have barred defendant Google from obtaining copies of plaintiff's copyrighted images of nude models from its subscription-based website and using them in its search index, thereby facilitating access to the infringing images. *Id.* The plaintiff claimed that Google's services destroyed its business model and caused it financial hardship, as it derived virtually all of its revenue from subscribers to its website who would no longer be willing to pay a monthly fee for material that is freely accessible on the Internet. *Id.* at 981.

The court ruled that Google's operations did not necessarily cause the plaintiff's recent losses, noting that the plaintiff may never have been financially stable to begin with, that other search engines contributed to the availability of the images on the Internet, and that there was no proof that anyone abandoned their subscription to plaintiff's service because of the accessibility of the images on Google. *Id.* at 981–82. Accordingly, the court denied the preliminary injunction, concluding that the plaintiff did not demonstrate a "sufficient causal connection" between Google's actions and the irreparable harm to plaintiff's business, as was required. *Id.* at 982.

<sup>86</sup> For instance, in *Fox Broadcasting Co. v. Dish Network, L.L.C. (Fox I)*, 905 F. Supp. 2d 1088 (C.D. Cal. 2012), the district court denied the plaintiff broadcaster's motion for a preliminary injunction to enjoin the defendant television service provider from creating copies of its copyrighted programming in order to enable its customers to skip over commercials using defendant's new AutoHop technology. The district court held that the plaintiff was likely to succeed on its claim that certain "quality assurance" copies of plaintiff's programming that the defendant made to properly implement AutoHop constituted copyright infringement. *Id.* at 1108.

On appeal, the Ninth Circuit—without ruling on the likely to succeed prong—affirmed the district court's subsequent finding that the plaintiff did not sufficiently demonstrate a likelihood of irreparable harm caused by these quality assurance copies absent an injunction. *Fox II*, 747 F.3d 1060, 1072–73 (9th Cir. 2013). In addition to finding that monetary damages were calculable and could compensate the plaintiff, the court found that the harms the plaintiff allegedly suffered, including a loss of advertising revenue and control over its programming, flowed from the greater AutoHop technology, rather than these particular quality assurance copies themselves. *Id.* at 1072. Although the court noted that the activity the plaintiff sought to enjoin need not have been the exclusive cause of the injury, it nevertheless found that the copies in question were not a cause of the plaintiff's injury at all. *Id.* at 1073 (citing *M.R. v. Dreyfus*, 697 F.3d 706, 728 (9th Cir. 2012)).

Circuit would build its demanding present-day standard, culminating in *Garcia*.<sup>87</sup>

Cindy Lee Garcia, an aspiring actress, was cast for a minor role in what she was led to believe was an action-adventure thriller entitled *Desert Warrior*.<sup>88</sup> Garcia later learned that the film was actually a crude, anti-Islamic production entitled *Innocence of Muslims* when the director uploaded its trailer to YouTube.<sup>89</sup> In the trailer, Garcia discovered that her two-sentence performance was dubbed over with a voice, which made her appear to be asking, “Is your Mohammed a child molester?”<sup>90</sup> Outrage ensued across the Middle East, including violent protests,<sup>91</sup> which spread to other parts of the world,<sup>92</sup> and an Egyptian cleric even issued a fatwa against anyone associated with the film.<sup>93</sup> Garcia personally received numerous death threats.<sup>94</sup>

Garcia filed multiple takedown notices and pleaded with Google to remove *Innocence of Muslims*, but Google refused to do so, principally on First Amendment grounds.<sup>95</sup> Garcia then filed suit, alleging that YouTube’s broadcast of the film infringed her copyright in her performance, and moved for a preliminary injunction to prevent Google from posting the video on any of its websites.<sup>96</sup> She argued that an injunction would protect her from unauthorized promotion of a hateful

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<sup>87</sup> Although the plaintiff’s copyright claim was ultimately unsuccessful in *Garcia*, see discussion *infra* notes 118–19, this case informs this Note’s analysis due to the plaintiff’s unique injuries and the ensuing debate over irreparable harm between the panel and the *en banc* courts.

<sup>88</sup> *Garcia III*, 786 F.3d 733, 736 (9th Cir. 2015) (en banc).

<sup>89</sup> *Id.* at 736–37 (stating that Garcia was “bamboozled” upon learning of the film’s content).

<sup>90</sup> *Id.* at 737.

<sup>91</sup> See Dan Martland, *Cindy Lee Garcia on ITV Daybreak*, YOUTUBE (Sept. 26, 2012), <https://www.youtube.com/watch?v=HKnZHx5HhKA>.

<sup>92</sup> See Rick Gladstone, *Anti-American Protests Flare Beyond the Mideast*, N.Y. TIMES (Sept. 14, 2012), <http://www.nytimes.com/2012/09/15/world/middleeast/anti-american-protests-over-film-enter-4th-day.html>; *Over 100 Arrested in Protest of Anti-Islam Film Outside U.S. Embassy in Paris*, N.Y. DAILY NEWS (Sept. 15, 2012, 5:10 PM), <http://www.nydailynews.com/news/world/100-protest-anti-islam-film-u-s-embassy-paris-article-1.1160497>.

<sup>93</sup> *Garcia II*, 766 F.3d 929, 932 (9th Cir. 2014), *rev’d en banc*, 786 F.3d 733. A “fatwa” is a decree issued by an Islamic leader. *Fatwa*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/fatwa> (last visited Mar. 6, 2017). The fatwa issued in *Garcia* “call[ed] upon the ‘Muslim Youth in America[] and Europe’ to ‘kill the director, the producer[,] and the actors and everyone who helped and promoted this film.’” *Garcia III*, 786 F.3d at 738 (alterations in original).

<sup>94</sup> *Garcia III*, 786 F.3d at 738; *Garcia II*, 766 F.3d at 932.

<sup>95</sup> *Garcia III*, 786 F.3d at 738; *Garcia II*, 766 F.3d at 932; see also Howard Mintz, *Google, YouTube Win First Amendment Fight over Anti-Muslim Video*, MERCURY NEWS (Ca.) (Aug. 12, 2016, 3:24 AM), <http://www.mercurynews.com/2015/05/18/google-youtube-win-first-amendment-fight-over-anti-muslim-video>; Michael Phillips, *A Controversial YouTube Video Haunts Free Speech Again*, NEW YORKER (Mar. 4, 2014), <http://www.newyorker.com/tech/elements/a-controversial-youtube-video-haunts-free-speech-again>.

<sup>96</sup> *Garcia III*, 786 F.3d at 738; *Garcia II*, 766 F.3d at 932.

film, damage to her career and reputation, and most importantly, death.<sup>97</sup> Google countered that Garcia was not entitled to an injunction because she did not have a copyright interest in the entire film.<sup>98</sup>

The United States District Court for the Central District of California denied Garcia's motion for a preliminary injunction,<sup>99</sup> concluding that she was unlikely to succeed on the merits of her copyright claim.<sup>100</sup> The court further held that Garcia failed to show that a preliminary injunction would prevent her alleged injuries, as the film's trailer had already been on YouTube for five months.<sup>101</sup>

On appeal, a Ninth Circuit panel, with a two-member majority, controversially found that the lower court abused its discretion and reversed its decision.<sup>102</sup> The majority concluded that Garcia was likely to succeed on her copyright claim because she may have had an independent copyrightable interest in the creative elements of her contribution to the film.<sup>103</sup> After finding the likely to succeed prong of

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<sup>97</sup> Reply Brief of Appellant at 18, *Garcia v. Google, Inc.*, 786 F.3d 733 (2015) (No. 12-57302), 2013 WL 950496, at \*18.

<sup>98</sup> *Garcia II*, 766 F.3d at 933–36.

<sup>99</sup> Garcia moved for an order to show cause on a preliminary injunction on her copyright claim, and the district court treated Garcia's application as a motion for a preliminary injunction. *Garcia I*, No. CV 12-08315-MWF (VBKx), 2012 WL12878355, at \*1 (C.D. Cal. Nov. 30, 2012).

<sup>100</sup> The court came to this conclusion largely because Garcia granted the directors of *Innocence of Muslims* an implied license to use her performance in the indivisible film. *Id.* at \*2

<sup>101</sup> *Id.* at \*1. Therefore, the district court ruled that Garcia unduly delayed in bringing her lawsuit, which weighed against her claim of irreparable harm. *Id.*; see also *Garcia II*, 766 F.3d at 932–33. *But see Garcia II*, 766 F.3d at 938.

<sup>102</sup> *Garcia II*, 766 F.3d at 940. The panel ordered Google to remove all copies of the film from all of its platforms within twenty-four hours. Paul M. Azzi, Comment, *Two Wrongs Don't Make a Copyright: The Dangerous Implication of Granting a Copyright in Performance Per Se*. (*Garcia v. Google*, 743 F.3d 1258 (9th Cir. 2014)), 83 U. CIN. L. REV. 529, 541 (2014). *Garcia II* refers to Judge Kozinski's amended opinion, which was published nearly five months after his original opinion, *Garcia v. Google, Inc.*, 743 F.3d 1258 (9th Cir. 2014).

<sup>103</sup> *Garcia II*, 766 F.3d at 935. Much of the online and legal community was astonished by this decision. See Joyce Cutler, *New Technologies, Court Decisions Muddying Copyright, E-Commerce Landscape*, BLOOMBERG BNA: NEWS (June 19, 2014), <http://www.bna.com/new-technologies-court-n17179891421> (“Tom Rubin of Microsoft Corp. called it ‘one of the most surprising, shocking, interesting cases that I’ve seen in my career studying copyright law.’”); Mintz, *supra* note 95 (“These Internet giants argued that the ruling carved out unprecedented copyright protections for actors with even a bit role in every movie or video produced . . .”). In his lone dissent, Judge Smith accused the majority of fabricating new law in holding that an actress can own a copyright interest in her performance. *Garcia II*, 766 F.3d at 941 (Smith, J., dissenting) (“[T]he majority makes new law in this circuit in order to reach the result it seeks.”). In reversing this decision, the *en banc* court referred to this as a “dubious and unprecedented theory of copyright.” *Garcia III*, 786 F.3d 733, 747 (9th Cir. 2015) (*en banc*). In addition, it is important to note the *Garcia II* panel's holding that although Garcia granted the film director an implied license to her performance, the unauthorized inclusion of it in *Innocence of Muslims* exceeded the scope of this license, and was therefore infringing use. *Garcia II*, 766 F.3d at 938.



the traditional test satisfied, the majority moved on to an independent analysis of the irreparable harm prong.<sup>104</sup> The majority noted that Garcia was forced to relocate her home and business, and she continued to take significant security measures in order to protect herself from threats against her life.<sup>105</sup> The panel held that if Garcia were not granted a preliminary injunction, these threats would be ongoing, serious, and immediate enough to constitute irreparable harm.<sup>106</sup>

Citing *Perfect 10*, the majority then stated that Garcia must demonstrate an adequate causal connection between her asserted injuries and the defendant's conduct, and the injunction must reduce the risk that such harms occur.<sup>107</sup> Since Garcia brought this cause of action under copyright law, the majority held that she must establish a link between her alleged injury and the infringement of her copyright.<sup>108</sup> According to the majority, Garcia adequately demonstrated that removing *Innocence of Muslims* from YouTube could diminish the likelihood of her receiving death threats and suffering physical harm to her person.<sup>109</sup> Moreover, removal of the film would enable Garcia to detach her identity from its hateful message and therefore curb her risk of injury.<sup>110</sup> Highlighting that the injury Garcia sought to avoid was death or actual bodily harm,<sup>111</sup> the majority decided in favor of

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<sup>104</sup> *Garcia II*, 766 F.3d at 938 (“Irreparable harm isn’t presumed in copyright cases.”).

<sup>105</sup> *Id.* The majority deemed these ongoing security concerns real, “concrete harms.” *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* (“Beyond establishing that she faces an imminent harm, Garcia must show a ‘sufficient causal connection’ between that harm and the conduct she seeks to enjoin such that the injunction would effectively curb the risk of injury.” (citing *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 981–82 (9th Cir. 2011))).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 939. That the video hosting website in question was YouTube appeared to be of particular significance to the majority, which mentioned that YouTube is “a prominent online platform” and the one that first displayed *Innocence of Muslims*. *Id.*

<sup>110</sup> *Id.* In so holding, the majority rejected Google’s argument that Garcia’s alleged harm derives not from Google’s hosting of the film, but rather from her participation in it. *Id.* at 938–39. It also discarded Google’s contention that given the many other platforms that were hosting the film, removing it from YouTube would be ineffective, because Google did not provide any evidence in support of this argument. *Id.* at 939.

<sup>111</sup> *Id.* at 939 (“It is not irrelevant that the harm Garcia complains of is death or serious bodily harm . . . . Death is an ‘irremediable and unfathomable’ harm, and bodily injury is not far behind.” (citation omitted)). Protection against threats of physical harm are not unheard of in the context of copyright law. In fact, copyright law has its roots in tort law. See Bohannon, *supra* note 72, at 974. Historically, an author would bring an action for trespass on the case—a common law writ for the indirect invasion of an interest, derived from English copyright principles—in order to vindicate her copyright interest and was required to demonstrate physical or pecuniary harm to recover. See *id.* at 974–75.

protecting her from these dangers,<sup>112</sup> and the panel ruled that the district court abused its discretion in holding otherwise.<sup>113</sup>

On rehearing en banc,<sup>114</sup> however, a majority of the Ninth Circuit dissolved the panel's preliminary injunction against Google<sup>115</sup> and denied Garcia's motion.<sup>116</sup> Labeling Garcia's theory—previously accepted by a divided panel of the court<sup>117</sup>—as “copyright cherry picking,”<sup>118</sup> a majority of the court rejected Garcia's claim that she had a copyright interest in her performance.<sup>119</sup>

Although the Ninth Circuit acknowledged that it did not need to continue its analysis once it determined Garcia had no copyright interest in her performance, the court proceeded to address the irreparable harm prong because of the nature of the case before it.<sup>120</sup>

<sup>112</sup> *Garcia II*, 766 F.3d at 938. Powerfully, the panel majority concluded its irreparable harm analysis stating: “To the extent the irreparable harm inquiry is at all a close question, we think it best to err on the side of life.” *Id.* at 939.

<sup>113</sup> *Id.* at 940.

<sup>114</sup> Google's petition for en banc review of the panel's controversial decision incited an overwhelming response from various Internet providers, technology companies, Hollywood film studios, and many other interested parties. Indeed, ten of these parties filed amicus briefs with the court, exemplifying the importance of the court's decision for the entertainment and media industries. See Alison Frankel, *Kozinski Amends Opinion in 9th Circuit 'Innocence' Case v. Google*, REUTERS (July 15, 2014), <http://blogs.reuters.com/alison-frankel/2014/07/15/kozinski-amends-opinion-in-9th-circuit-innocence-case-v-google>.

<sup>115</sup> *Garcia III*, 786 F.3d 733, 737 (9th Cir. 2015) (en banc).

<sup>116</sup> *Id.* at 747.

<sup>117</sup> See *Garcia II*, 766 F.3d 929.

<sup>118</sup> *Garcia III*, 786 F.3d at 737.

<sup>119</sup> *Id.* at 744. The court found that the law does not clearly favor Garcia's position. *Id.* The court imposed this higher “clearly favor” burden upon Garcia, rather than a mere likelihood of success, because she sought a mandatory injunction requiring Google to take affirmative action. *Id.* at 740. The Copyright Office's rejection of Garcia's copyright application influenced this conclusion, as it took place during the interim between the Ninth Circuit panel decision and its subsequent en banc decision. See *id.* at 741–42; see also *Garcia II*, 766 F.3d at 935 (recognizing the Copyright Office's denial of Garcia's copyright registration in amended opinion). Given the two Circuits being explored in this Note, it is worth pointing out that the Second Circuit recently considered whether copyright subsists in one's contribution to a film in *16 Casa Duse, L.L.C. v. Merkin*, 791 F.3d 247 (2d Cir. 2015). The court, citing *Garcia*, aligned with the Ninth Circuit and held that the director of the film at issue did not have copyright ownership over his fragmented “contributions to a film.” *Id.* at 255, 258 (“Filmmaking is a collaborative process typically involving artistic contributions from large numbers of people, including—in addition to producers, directors, and screenwriters—actors, designers, cinematographers, camera operators, and a host of skilled technical contributors. If copyright subsisted separately in each of their contributions to the completed film, the copyright in the film itself, which is recognized by statute as a work of authorship, could be undermined by any number of individual claims.”). However, the procedural posture of the case at the summary judgment stage did not afford the district court or the Second Circuit the opportunity to consider the preliminary injunction factors. *Id.*

<sup>120</sup> *Garcia III*, 786 F.3d at 744 (“Although we could affirm the district court solely on the copyright issue, we address irreparable harm because the grave danger Garcia claims cannot be discounted and permeates the entire lawsuit.” (citation omitted)). Had the court determined

The court began its inquiry by recognizing that because Garcia brought a copyright action, the dangers she sought to remedy must stem from copyright law.<sup>121</sup> Concluding that they did not, the court held that there was no correlation between Garcia's underlying copyright claim and her alleged personal and reputational injuries.<sup>122</sup> The court determined that such injuries did not constitute harm to her commercial interests as a performer, which is required to satisfy its irreparable harm standard.<sup>123</sup>

In its decision, the Ninth Circuit engaged in a novel discussion of the purpose of copyright law,<sup>124</sup> never before undertaken in an irreparable harm analysis. The court began by asserting its understanding of the constitutional purpose of the nation's copyright laws, which it limited to the encouragement of free expression by providing authors with economic incentives to create, thereby protecting their *commercial* interests,<sup>125</sup> and ultimately, the promotion of public access to their works.<sup>126</sup> The court found that the injuries Garcia complained of were largely grounded in the personal pain she suffered as a result of her manipulated inclusion in *Innocence of Muslims*<sup>127</sup> and noted that, unfortunately for Garcia, American copyright law does not provide damages for emotional distress,<sup>128</sup> nor does it protect against moral rights violations in film.<sup>129</sup> Accordingly, the

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that Garcia's harms satisfied the irreparable harm prong, this would not affect the merits of her copyright claim, which the court had already found to be weak. Thus, the injunction would still not have issued, and the court unnecessarily revised its irreparable harm standard in this case. In his concurrence, Judge Watford criticized the majority's decision for doing "more than we need[ed] to." *Id.* at 747 (Watford, J., concurring). Although a weak copyright claim was fatal to Garcia's case, this Note attributes the court's comprehensive irreparable harm analysis to the Ninth Circuit and treats it as the court's holding because the Ninth Circuit was sitting en banc.

<sup>121</sup> *Id.* at 744 (majority opinion) ("Garcia's harm must stem from copyright . . .").

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 745–46.

<sup>124</sup> *Id.* at 744 ("Looking to the purpose of copyright underscores the disjunction Garcia's case presents.").

<sup>125</sup> *Id.* at 744–45 ("In keeping with copyright's function, 'the justification of the copyright law is the protection of the *commercial* interest of the [ ]author. It is not to . . . protect secrecy, but to stimulate creation by protecting its rewards.'" (citing *Salinger v. Colting*, 607 F.3d 68, 81 n.9 (2d Cir. 2010) (alteration in original))).

<sup>126</sup> *Id.* at 745. Against this backdrop, the court distinguished copyright law from privacy law. *Id.* (noting that the protection of privacy is not copyright law's role).

<sup>127</sup> *Id.* at 746 ("[T]he gravamen of Garcia's harm is untethered from her commercial interests as a performer, and instead focuses on the personal pain caused by her association with the film.").

<sup>128</sup> *Id.* at 745 (maintaining that copyright damages are solely economic and thus must be related to "the value and marketability of [an author's] work[]," rather than the author's personal objections to distortion of it).

<sup>129</sup> *Id.* at 746; *see also* 17 U.S.C. § 106(a) (2012). The court additionally mentioned that American copyright law does not include a "right to be forgotten," and recognized that Garcia might have prevailed on her copyright claim in many European countries under this legal principle. *Garcia III*, 786 F.3d at 745–46.

Ninth Circuit majority concluded that Garcia's injuries were too attenuated from copyright law's purpose<sup>130</sup> and commercial function<sup>131</sup> to justify a finding of irreparable harm to her legal interests as the purported copyright owner of her performance.<sup>132</sup> The court concluded its analysis by suggesting that if Garcia had established a strong copyright claim, it might have taken the harms she alleged into account as collateral consequences, reasonably justifying the injunction.<sup>133</sup>

Thus, *Garcia* imposed upon copyright plaintiffs seeking preliminary relief in the Ninth Circuit the additional requirement that they demonstrate that their alleged injuries relate to their commercial interests as creators and are therefore compatible with the purpose of copyright law.<sup>134</sup> In contrast, the Second Circuit has never articulated such a requirement.

## 2. Second Circuit: *Aereo*

The court in *Salinger v. Colting* set the modern-day stage for preliminary injunctions in Second Circuit copyright jurisprudence by officially eradicating the presumption of irreparable harm and labeling the type of harm that courts should find to satisfy the irreparable harm prong.<sup>135</sup> According to the court, only injury to a plaintiff's legal

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<sup>130</sup> *Id.* at 744–46.

<sup>131</sup> *Id.* at 745 (“[Garcia’s] harms are untethered from—and incompatible with—copyright and copyright’s function as the engine of expression.”). In reaching this conclusion, the court cited several Supreme Court cases for the proposition that copyright’s justification is purely economic, serving merely to reward authors for their creations by providing them with a marketable right to their works. *Id.* at 744–45 (citing *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985)).

<sup>132</sup> *Garcia III*, 786 F.3d at 746. *Id.* at 744–46. Judge Watford concurred in the judgment, stating that while “[u]nlike the majority, [he was] willing to assume that the risk of death qualifies as irreparable injury,” her claim fails to establish that an injunction against YouTube “would likely eliminate (or at least materially reduce) the risk of death posed by issuance of the fatwa,” which would probably not be lifted if the film were removed. *Id.* at 748 (Watford, J., concurring). Not surprisingly, Judge Kozinski dissented, devoting his passionate opinion to Garcia’s entitlement to copyright protection, and concluding with a citation to his panel opinion’s finding of irreparable harm, noting that after all, “[i]t’s her *life* that’s at stake.” *Id.* at 753 (Kozinski, J., dissenting).

<sup>133</sup> *Id.* An injunction may be reasonable in certain circumstances to restrain infringement, see 17 U.S.C. § 502 (2012), but given the absence of such circumstances, the court did not entertain the last two prongs of the traditional test. *Garcia III*, 786 F.3d at 746. Moreover, the court found that the district court did not abuse its discretion in ruling that Garcia’s failure to seek relief when the film debuted on the Internet undercut her claim of irreparable harm. *Id.*

<sup>134</sup> *Garcia III*, 786 F.3d at 746.

<sup>135</sup> *Salinger v. Colting*, 607 F.3d 68, 81–82 (2d Cir. 2010). In *Salinger*, the defendant Colting published a novel in 2009 that identified itself as a sequel to J.D. Salinger’s renowned 1951 novel, *The Catcher in the Rye*. *Id.* at 70–72. However, Colting never sought nor obtained Salinger’s permission to do so. *Id.* at 71. In fact, Salinger made it a point to prohibit any

interests suffices.<sup>136</sup> In this case, J.D. Salinger's legal interest was his property interest in the copyrightable expression of *The Catcher in the Rye*.<sup>137</sup> But identifying the appropriate legal interest at stake can be a more complex inquiry, particularly in cases involving new media and technologies. For example, in *Aereo*, the Second Circuit affirmed that injuries alleged by corporate plaintiffs resulting from the defendant's broadcasts of their programming using a new technology constituted irreparable harm, without any mention of how these injuries related to the underlying purposes of copyright law.<sup>138</sup>

Aereo was a technology service founded in 2012 that enabled subscribers to stream near live and time-shifted television programming on devices connected to the Internet.<sup>139</sup> Through assigned antennas, Aereo's customers held the power to stream and record programming of their choice.<sup>140</sup> Despite the many proponents of its advanced technology,<sup>141</sup> Aereo's fatal flaw was its failure to pay retransmission fees to broadcast networks for their content that Aereo saved on its server to be streamed live or recorded for later viewing by its paying subscribers.<sup>142</sup>

In March 2012, the major broadcast networks in the New York area sought to preliminarily enjoin Aereo from retransmitting their

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adaptations of his works. *Id.* Colting's novel, entitled *60 Years Later: Coming Through the Rye*, told the story of Holden Caulfield sixty years after his adventures in Salinger's novel, and his interaction with Salinger himself. *Id.* at 71–72. The Second Circuit affirmed the district court's ruling that Salinger was likely to succeed on the merits of his copyright infringement claim, since the two novels were substantially similar. *Id.* at 83. However, the court vacated the district court's grant of a preliminary injunction and remanded the case, instructing the lower court that in accordance with *eBay*, Salinger must demonstrate that the absence of an injunction would "actually cause" irreparable harm to his property interest in *The Catcher in the Rye*, and the court must not simply presume it. *Id.* at 82. The defendants then agreed to the entry of a permanent injunction against their publication or distribution of *60 Years Later*. The final disposition of the case was a Judgment on Consent issued by the Southern District of New York. Permanent Injunction and Final Order on Consent, *Salinger v. Colting*, No. 09 Civ. 05095 (DAB) (S.D.N.Y. Dec. 14, 2010).

<sup>136</sup> *Salinger*, 607 F.3d at 81 ("[T]he relevant harm is the harm that . . . occurs to the [author's] legal interests . . .").

<sup>137</sup> *Id.* ("The plaintiff's interest is, principally, a property interest in the copyrighted material.")

<sup>138</sup> *Aereo II*, 712 F.3d 676, 696 (2d Cir. 2013).

<sup>139</sup> Johanna R. Alves-Parks, *Adapt or Die: Aereo, IVI, and the Right of Control in an Evolving Digital Age*, 34 LOY. L.A. ENT. L. REV. 33, 43 (2014). This innovative, over-the-top, transmissions company functioned through a central warehouse that housed thousands of miniature antennas. *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> Gary Shapiro, Opinion, *Aereo Ruling Big Loss for Consumers: Column*, USA TODAY (June 25, 2014, 7:01 PM), <http://www.usatoday.com/story/opinion/2014/06/25/gary-shapiro-supreme-court-aereo-ruling/11376815>.

<sup>142</sup> See Samuel J. Dykstra, Note, *Weighing Down the Cloud: The Public Performance Right and the Internet After Aereo*, 46 LOY. U. CHI. L.J. 989, 1015–16 (2015).

copyrighted programming while it was still being broadcast.<sup>143</sup> According to the plaintiffs, this conduct violated their exclusive right to perform their works publicly.<sup>144</sup> Given their increasing reliance upon retransmission fees and advertising revenue in the face of new technologies,<sup>145</sup> the plaintiffs feared that Aereo might threaten the future of their business models.<sup>146</sup> Aereo contended that its user-specific system of antennas constituted private transmissions to its subscribers.<sup>147</sup> Among other arguments,<sup>148</sup> Aereo maintained that an injunction against it would have grave consequences for cloud computing technologies and innovation more generally.<sup>149</sup>

Reluctantly,<sup>150</sup> the United States District Court for the Southern District of New York denied the plaintiffs' motion for a preliminary injunction, determining that the plaintiffs were unlikely to prevail on the merits of their copyright claim.<sup>151</sup> The court recognized that further analysis was unnecessary because the likely to succeed prong was not

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<sup>143</sup> Christopher S. Stewart, *Networks Sue Aereo Streaming Start-Up*, WALL STREET J. (Mar. 1, 2012, 9:15 PM), <http://www.wsj.com/articles/SB10001424052970203753704577255911262609628>. At the time of this writing, a similar television streaming service, FilmOn, is in the midst of a comparable legal battle in various courts around the country. See John Eggerton, *Judges Probe FilmOn, Networks on Copyright Issue*, BROADCASTING & CABLE (Mar. 17, 2017, 3:48 PM), <http://www.broadcastingcable.com/news/washington/judges-probe-filmon-networks-copyright-issue/164193>.

<sup>144</sup> Brief for Plaintiffs at 31–33, *Aereo II*, 712 F.3d 676 (2d Cir. 2013) (Nos. 12-2786-cv, 12-2807-cv), 2012 WL 4338880.

<sup>145</sup> For instance, Comcast's NBCUniversal "earns the majority of its revenue from advertising and re-transmission," and expects these numbers to increase in 2017 as a result of its new content distribution deals. Shirley Pelts, *What's the Outlook for Comcast's NBCUniversal Business in 2017?*, MKT. REALIST (Jan. 31, 2017, 4:54 PM), <http://marketrealist.com/2017/01/whats-the-outlook-for-comcasts-nbcuniversal-business-in-2017>.

<sup>146</sup> *Id.* at 46–48; see also Andrew Fraser, Note, *Television a la Carte: American Broadcasting Cos. v. Aereo and How Federal Courts' Interpretations of Copyright Law are Impacting the Future of the Medium*, 20 B.U. J. SCI. & TECH. L. 132, 133 (2014).

<sup>147</sup> Brief for Defendant at 53, *Aereo II*, 712 F.3d 676 (2d Cir. 2013) (Nos. 12-2786-cv, 12-2807-cv), 2012 WL 5303659. Aereo sought protection under *Cartoon Network LP v. CSC Holdings, Inc. (Cablevision)*, 536 F.3d 121 (2d Cir. 2008), which established that user-specific, individual copies of broadcast programming amounted to private—as opposed to public—performances, and therefore did not fall within the scope of the Copyright Act, which only finds a performance infringing if it is "to the public." *Aereo I*, 874 F. Supp. 2d 373, 385–87 (S.D.N.Y. 2012); see also 17 U.S.C. § 101 (2012).

<sup>148</sup> For Aereo's additional arguments, see Brief for Defendant, *supra* note 147.

<sup>149</sup> See Dykstra, *supra* note 142, at 1028–29.

<sup>150</sup> *Aereo I*, 874 F. Supp. 2d at 375 ("But for *Cablevision's* express holding regarding the meaning of . . . the transmit clause . . . Plaintiffs would likely prevail on their request for a preliminary injunction."). The court explicitly stated that it held this way because Second Circuit precedent left it with no choice. See Sam Méndez, Article, *Aereo and Cablevision: How Courts Are Struggling to Harmonize the Public Performance Right with Online Retransmission of Broadcast Television*, 9 WASH. J.L. TECH. & ARTS 239, 241, 256 (2014).

<sup>151</sup> *Aereo I*, 874 F. Supp. 2d at 396–97.

satisfied;<sup>152</sup> but nevertheless, given the significance of the legal questions at hand, it went on to address the remaining three factors of the traditional test.<sup>153</sup> The court accepted the plaintiffs' arguments that Aereo's service would impair their ability to negotiate in their business relationships: first, with advertisers in monetizing their programming, as Aereo will artificially lower plaintiffs' Nielsen ratings;<sup>154</sup> and second, with cable or other companies that license plaintiffs' content in retransmission agreements,<sup>155</sup> as these companies will demand concessions as a result of this artificial decrease in viewership.<sup>156</sup> Highlighting the notorious difficulty in quantifying such declines in advertising revenue and inferior bargaining positions and proving the source to which these harms are attributable, the court concluded that the plaintiffs demonstrated a substantial threat of irreparable harm.<sup>157</sup>

The court also found that Aereo's technology might cause the plaintiffs to lose viewers due to cord cutting<sup>158</sup> and subject the plaintiffs

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<sup>152</sup> *Id.* at 396 (“[T]he court could conclude its analysis here.”). The likely to succeed prong is dispositive when it is unsatisfied, and courts need not consider the remaining three prongs of the traditional test. *See Pope v. County of Albany*, 687 F.3d 565, 570 & n.2 (2d Cir. 2012); *DISH Network Corp. v. FCC*, 653 F.3d 771, 776–77 (9th Cir. 2011).

<sup>153</sup> *Aereo I*, 874 F. Supp. 2d at 396–402. The court explained the motivation behind its decision to continue its analysis, noting the significance of the legal questions at hand, the importance of a fully developed record on appeal, and the common practice of district courts to “consider alternative bases for their holdings, even if they find that one or more of the preliminary injunction factors would itself dispose of the case.” *Id.* at 396–97.

<sup>154</sup> Nielsen Corporation is a global information, data, and measurement company that “provides clients the most complete understanding of what consumers watch and buy.” *About Us*, NIELSEN, <http://www.nielsen.com/us/en/about-us.html> (last visited Feb. 1, 2017). Nielsen measures audiences of content to gain information about viewing and listening habits across various platforms. *See id.* “Since the 1950s, Nielsen has been the sole supplier of national television network ratings in the United States.” JAMES WEBSTER ET AL., RATINGS ANALYSIS: AUDIENCE MEASUREMENT AND ANALYTICS 33 (4th ed. 2014). Nielsen “remains the primary measure by which TV advertising is bought and sold,” despite the inherent challenges it now faces to continue to produce reliable data with drastic changes in media consumption. Jeanine Poggi, *Nielsen at a Tipping Point? Accelerating Change Confronts Methodical Researchers*, ADVERT. AGE (Dec. 8, 2014), <http://adage.com/article/media/nielsen-struggles-media-change/296054>. Nielsen was not capable of measuring viewership on Aereo; therefore, when viewers switched from traditional distribution channels to Aereo's service, their viewership was unaccounted for. *Aereo I*, 874 F. Supp. 2d at 397–98.

<sup>155</sup> *Id.* at 398.

<sup>156</sup> *Id.* The court cited testimony from network executives stating that such renegotiations are already taking place and concession demands are highly certain to ensue. *Id.* at 398. Thus, the court found that the harms were not speculative. *Id.*

<sup>157</sup> *Id.* at 399 (“Plaintiffs’ showing of imminent irreparable harm is substantial, but not overwhelming.”). The court pointed out that while none of these injuries had yet to take place, Aereo's operations were already expanding rapidly in the New York area, and the company itself recognized that its technology was likely to lead cable subscribers to cancel their subscriptions. *Id.* Therefore, the court concluded that the plaintiffs demonstrated a threat of irreparable harm. *Id.*

<sup>158</sup> *Id.* at 399. “Cord cutting,” short for cutting the cable cord, refers to the phenomenon in which increasing numbers of American households have ended their cable and satellite

to a loss of control over their content.<sup>159</sup> Specifically, it pointed out that Aereo may threaten the success of the plaintiffs' own websites, which they use to stream and market their content, conduct research, and build goodwill with viewers and business partners.<sup>160</sup> However, the court rejected the plaintiffs' additional arguments—including the possibility that cable companies will abandon their business models in order to implement a service like Aereo's in the future;<sup>161</sup> the plaintiffs' ability to enter the mobile viewing market;<sup>162</sup> the capacity of Aereo's users to damage plaintiffs' relationships with local broadcasters or advertisers;<sup>163</sup> and the risk of widespread infringement<sup>164</sup>—on the grounds that their evidence did not establish that these harms are imminent, non-speculative, and likely to occur during the pendency of the litigation.<sup>165</sup> In rejecting these claims of irreparable injury, the district court did not mention any incompatibility between the asserted harms and the underlying purposes of the substantive law.<sup>166</sup>

On appeal, a panel of the Second Circuit affirmed the district court's denial of the plaintiffs' motion for a preliminary injunction, agreeing that the plaintiffs were unlikely to prevail on their copyright claim.<sup>167</sup> The court noted that the parties did not dispute the district court's factual finding of irreparable harm, and concluded that the district court did not abuse its discretion in determining that the plaintiffs were likely to suffer such harm on the basis of these findings.<sup>168</sup>

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television subscriptions in favor of the many digital streaming services now available. See Mathew Ingram, *Almost a Million People Cut the Pay TV Cord in the Last Three Months*, FORTUNE: TECH (Aug. 31, 2016), <http://fortune.com/2016/08/31/pay-tv-cord-cutting>. The district court in *Aereo* pointed to evidence establishing Aereo's recognition—and its CEO's vision—that the technology would cause cable subscribers to cancel their subscriptions, and the difficulty of determining why consumers choose to cut the cord. *Aereo I*, 874 F. Supp. 2d at 399.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 399. The court further pointed out that Aereo had the ability to impair the plaintiffs' relationships with such entities by causing the plaintiffs to violate their existing agreements. *Id.*

<sup>161</sup> *Id.* at 399–400 (“Plaintiffs have not demonstrated that this shift is likely to occur before this case is disposed of on the merits.”).

<sup>162</sup> *Id.* at 400. In dismissing this claim, the court indicated that it might have found such injury to qualify as irreparable harm if the plaintiffs had produced evidence that Aereo's service prompted them to abandon their plans to launch such mobile viewing platforms, or threatened the success of this venture. *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 399–400.

<sup>165</sup> *Id.* at 399.

<sup>166</sup> For a discussion of how the Ninth Circuit might have evaluated these alleged harms if it had presided over a case factually similar to *Aereo*, see *infra* Section II.A.1.

<sup>167</sup> *Aereo II*, 712 F.3d 676, 695 (2d Cir. 2013).

<sup>168</sup> *Id.* at 696.



Thus, the Second Circuit found no clear error in the district court's irreparable harm analysis.<sup>169</sup>

The Supreme Court granted certiorari in *Aereo* and reversed and remanded the case.<sup>170</sup> The Court held that not only did Aereo perform the plaintiffs' works,<sup>171</sup> but it performed them publicly within the meaning of the Copyright Act.<sup>172</sup> However, the Court's opinion merely focused on the likely to succeed prong of the traditional test, and thus did not analyze the lower courts' findings of irreparable harm.<sup>173</sup>

On remand, the Southern District of New York granted the plaintiffs' motion for a nationwide preliminary injunction.<sup>174</sup> Although the court addressed several additional arguments raised by Aereo in opposition,<sup>175</sup> it declined to reconsider its earlier conclusions about irreparable harm because Aereo did not file an interlocutory cross-appeal of its preliminary findings of fact on this issue.<sup>176</sup> Regardless, the court noted that its other findings—including the plaintiffs' loss of subscribers, control over content, and damage to business relationships—remained uncontested, and were themselves substantial enough evidence of irreparable harm to justify its ruling.<sup>177</sup>

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<sup>169</sup> *Id.*

<sup>170</sup> *Aereo III*, 134 S. Ct. 2498, 2511 (2014).

<sup>171</sup> *Id.* at 2507.

<sup>172</sup> *Id.* at 2510.

<sup>173</sup> The fact that the Supreme Court granted certiorari in *Aereo* has no bearing on the subject of this Note because the Court did not address the irreparable harm prong. The Court's opinion is only relevant insofar as it denied the plaintiffs' preliminary injunction because the likely to succeed prong was dispositive.

<sup>174</sup> *Aereo IV*, No. 12-CV-1540, 2014 WL 5393867, at \*9–10 (S.D.N.Y. Oct. 23, 2014).

<sup>175</sup> One of these arguments was that there was no present basis for the court's earlier findings of imminent irreparable harm to the plaintiffs' retransmission negotiations and ratings. *Id.* at \*7.

<sup>176</sup> *Id.* at \*9–10. Aereo likely did not cross-appeal the district court's earlier findings of irreparable harm because it prevailed on the plaintiffs' motion for a preliminary injunction in the same 2012 decision. *See supra* notes 151–53 and accompanying text.

<sup>177</sup> *Id.* In a post-*eBay* but pre-*Aereo* case with similar facts to *Aereo*, the Second Circuit found similar harms to satisfy the irreparable harm prong. In *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275 (2d Cir. 2012), an Internet streaming service retransmitted the plaintiffs' copyrighted television programming live without their consent. *Id.* at 277. The Second Circuit held that in addition to the difficulties associated with measuring the harm, the defendant's practices, if continued, would harm the plaintiffs' retransmission and advertising revenue by substantially diminishing the "live" value of the plaintiffs' programming, as well as their control over it. *Id.* at 285–86 ("ivi's retransmissions would dilute plaintiffs' programming and their control over their product."). According to the court, failing to grant the preliminary injunction would encourage other services to "follow ivi's lead." *Id.* at 286. These actions would disrupt the plaintiffs' business model and threaten to destabilize the industry, warranting a finding of irreparable harm. *Id.* at 286–87 ("[T]he harms affect the operation and stability of the entire industry . . .").

## II. ANALYSIS: IRREPARABLE HARM

A. *Divergent Approaches*

*Garcia*, *Aereo*, and their post-*eBay* predecessors demonstrate that the Second and Ninth Circuits' approaches to irreparable harm are developing inconsistently.<sup>178</sup> The Ninth Circuit requires a showing not only of irreparable harm, but irreparable harm of the sort that copyright law is intended to remedy, whereas the Second Circuit merely requires a showing of irreparable harm, regardless of its connection to copyright law's constitutional purpose.<sup>179</sup> As a result, non-copyright harm may satisfy the irreparable harm prong in the Second Circuit;<sup>180</sup> whereas in the Ninth Circuit, only copyright harm suffices.<sup>181</sup> Therefore, plaintiffs that file motions for preliminary injunctions in the Second Circuit are more likely to make a showing of irreparable harm than if they had filed their motions in the Ninth Circuit.<sup>182</sup>

While *Garcia* and *Aereo* involved two very different fact patterns and diverse parties and issues, they exemplify the important role that preliminary injunctions play in an increasingly digital world<sup>183</sup> and the need for uniform application of the traditional test across circuits.<sup>184</sup> A standard conception of irreparable harm is a good place to start. This Note analyzes the present inconsistencies in the Circuits' approaches and proposes a solution that involves narrowing the Second Circuit's and expanding the Ninth Circuit's conception of irreparable harm in copyright cases, thereby moving both Circuits towards a middle ground.

To find this middle ground, it is helpful to further explore the differences in the approaches by applying each Circuit's standard to the

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<sup>178</sup> Compare *Aereo I*, 874 F. Supp. 2d 373 (S.D.N.Y. 2012) (finding the existence of irreparable harm, without mention of copyright's constitutional purpose), and *Aereo II*, 712 F.3d 676 (2d Cir. 2013) (affirming the district court's finding), with *Garcia III*, 786 F.3d 733, 746 (9th Cir. 2015) (en banc) (finding the absence of irreparable harm in light of a missing connection between the alleged harm and copyright's constitutional purpose).

<sup>179</sup> See *supra* note 178.

<sup>180</sup> This inference is drawn from the absence of any requirement that the plaintiff's alleged irreparable injury must be related to the constitutional underpinnings of copyright law to obtain a preliminary injunction in Second Circuit copyright cases. See *supra* Section I.C.2.

<sup>181</sup> See *Garcia III*, 786 F.3d at 744–46.

<sup>182</sup> See *supra* Sections I.C.1–2. If copyright plaintiffs come to recognize that the Second Circuit's irreparable harm standard is more favorable to them, they could possibly engage in "forum shopping" as a result, which has customarily been judicially criticized. See Emil Petrossian, Recent Development, II. In *Pursuit of the Perfect Forum: Transnational Forum Shopping in the United States and England*, 40 LOY. L.A. L. REV. 1257, 1263 n. 25 (2007).

<sup>183</sup> See *supra* notes 22–24 and accompanying text; see also *supra* notes 47–50 and accompanying text.

<sup>184</sup> See *supra* Part I.

facts of a case that was decided in the other. This section will engage in this exercise, exploring some of the broadcasters' claims in *Aereo* through the Ninth Circuit's framework, and Garcia's claims in *Garcia* through the Second Circuit's framework. In doing so, this Note disregards the merits of the copyright claim in question, and merely assesses the injuries that the plaintiffs alleged to have suffered.<sup>185</sup> This exercise will demonstrate that given their current standards, the Circuits might reach a different result on the same set of facts.

### 1. *Aereo* in the Ninth Circuit

If the post-*Garcia* Ninth Circuit presided over a case factually similar to *Aereo*, it would possibly reach a different conclusion than the Second Circuit did because it would assess the connection between the asserted harm and the purpose of copyright law, in accordance with *Garcia*. When analyzed through the Ninth Circuit's lens, it becomes clear that some of the injuries alleged by the *Aereo* plaintiffs constitute copyright harms, while others constitute non-copyright harms. In *Garcia*, the Ninth Circuit resolved that the constitutional purpose of copyright is to provide copyright owners with the economic incentive to create and disseminate works to the public, and that in light of this purpose, only harm to a plaintiff's commercial interests in the copyrighted material can constitute irreparable harm.<sup>186</sup>

Accordingly, the Ninth Circuit would likely agree with the Second Circuit that the *Aereo* plaintiffs' first two claimed injuries—(1) harm to their negotiations with advertisers; and (2) retransmission agreements with licensees<sup>187</sup>—were copyright harms. This is because Nielsen's inability to measure *Aereo*'s viewership would negatively impact the plaintiffs' ability to monetize their content and obtain satisfactory prices from advertisers.<sup>188</sup> Consequently, artificially lower ratings might have hindered the plaintiffs' ability to both recoup their expenses and make a profit, which motivate them to continue producing their content.<sup>189</sup>

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<sup>185</sup> For purposes of this exercise, the reader should assume that the plaintiffs in both cases have made out a strong copyright claim, even though the Ninth Circuit, sitting en banc, rejected Garcia's claim to copyright ownership over her performance. See *supra* Section I.C.1.

<sup>186</sup> See *Garcia III*, 786 F.3d at 744–45.

<sup>187</sup> *Aereo I*, 874 F. Supp. 2d 373, 397–98 (S.D.N.Y. 2012); see also *supra* notes 154–57 and accompanying text.

<sup>188</sup> See *Aereo I*, 874 F. Supp. 2d at 397–98.

<sup>189</sup> See Brian Stelter, *As TV Ratings and Profits Fall, Networks Face a Cliffhanger*, N.Y. TIMES (May 12, 2013), <http://www.nytimes.com/2013/05/13/business/media/tv-networks-face-falling-ratings-and-new-rivals.html> (“[R]atings for the Big Four broadcasters . . . are dropping more precipitously than ever. Even their biggest hits . . . are fading fast. Advertisers are moving more

Thus, by maintaining a licensing scheme that prevents commercial impediments to their creation of new content, granting the plaintiffs an injunction against Aereo would be compatible with the Ninth Circuit's view of copyright's constitutional objectives.<sup>190</sup>

However, the Ninth Circuit would likely find that many of the plaintiffs' other claimed injuries fall outside the scope of copyright's commercial function and therefore do not constitute irreparable harm.<sup>191</sup> For instance, the Second Circuit accepted the broadcasters' argument that Aereo's existence may interfere with the opportunities for marketing, research, and building goodwill that they derive from their own websites, finding such alleged injuries to satisfy the irreparable harm prong.<sup>192</sup> But a decrease in traffic to the broadcast networks' websites during the pendency of a trial would not diminish the pecuniary incentives that drive them to produce their programming in the first place, as the broadcasters' revenue derives from distribution of their content across many other and more profitable platforms.<sup>193</sup> Further, it is unlikely that the plaintiffs' inferior marketing and research efforts on their own websites would prevent their content from reaching the eyes of their viewers.<sup>194</sup> In fact, Aereo might have even made the broadcasters' programming more accessible to the public, thereby increasing their viewership and enhancing their ability to market it.<sup>195</sup>

The Second Circuit rejected several of the *Aereo* plaintiffs' alleged injuries on the basis of speculation and timing.<sup>196</sup> But the Ninth Circuit might reject these same alleged injuries on the more particular ground that they are non-copyright harms, or not sufficiently connected to copyright's constitutional objectives to justify a finding of irreparable harm. For example, the Ninth Circuit would likely find that the

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cash to cable, cutting into the networks' quarterly profits. New technologies are making it easier to skip those ads, anyway. . . . The newest threat comes from Aereo. . . .").

<sup>190</sup> See *Garcia III*, 786 F.3d at 744–46.

<sup>191</sup> *Id.*

<sup>192</sup> *Aereo I*, 874 F. Supp. 2d at 399; *Aereo II*, 712 F.3d 676 (2d Cir. 2013) (affirming the district court's decision).

<sup>193</sup> NORMAN J. MEDOFF & BARBARA K. KAYE, *ELECTRONIC MEDIA: THEN, NOW, AND LATER* 54 (2d ed. 2011).

<sup>194</sup> *What Happens if Broadcasters Lose the Aereo Case?*, FORTUNE (Apr. 21, 2014), <http://fortune.com/2014/04/21/what-happens-if-broadcasters-lose-the-aereo-case/> (“[T]he broadcasters might be better off accepting Aereo, as it could mean more eyeballs [on their content].”).

<sup>195</sup> BOHANNAN & HOVENKAMP, *supra* note 4, at 183–84 (maintaining that unauthorized copying often has positive effects upon the original work). According to Bohannan and Hovenkamp, this argument weighs against the plaintiffs' claim that they would suffer irreparable copyright harm in the absence of a preliminary injunction because “[c]opyright law does not serve its constitutional purpose when it deprives the public of the benefit of using copyrighted works in ways that do not harm the copyright holders' incentives.” *Id.* at 143.

<sup>196</sup> *Aereo I*, 874 F. Supp. 2d at 399–400; see *supra* Section I.C.2.

plaintiffs' hindered ability to enter the mobile viewing market<sup>197</sup> would not affect the inherent value or marketability of their content,<sup>198</sup> nor their pecuniary incentives to produce it. And for the Ninth Circuit, the plaintiffs' personal objections to Aereo's impact upon the traditional broadcast model, aside from its financial implications, would not qualify as harms to their commercial interests as broadcasters.<sup>199</sup>

## 2. *Garcia* in the Second Circuit

Unlike the Ninth Circuit, the Second Circuit does not assess whether a plaintiff's alleged injuries are connected to copyright law's constitutional function, and thus does not draw distinctions between copyright and non-copyright harms.<sup>200</sup> Accordingly, if faced with a fact pattern similar to *Garcia*, the Second Circuit would likely find *Garcia*'s threatened and realized injuries to constitute irreparable harm because they flow directly from the copyright infringement claim in question.<sup>201</sup>

The Ninth Circuit found *Garcia*'s alleged threats of bodily harm and death, reputational damage, emotional distress, and forced promotion of a hateful film to be clear instances of non-copyright harms that are too attenuated from the objectives of copyright law to be legally

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<sup>197</sup> *Aereo I*, 874 F. Supp. 2d at 400.

<sup>198</sup> See *Garcia III*, 786 F.3d 733, 745 (9th Cir. 2015) (en banc); *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 285–86 (2d Cir. 2012).

<sup>199</sup> *Garcia III*, 786 F.3d at 745. For instance, the Ninth Circuit would likely regard the plaintiffs' argument that Aereo may cause more of their viewers to cut the cord, see *supra* note 158, as Schumpeterian creative destruction, rather than the sort of substitutionary displacement that copyright law is intended to remedy. See W. Michael Cox & Richard Alm, *Creative Destruction*, LIBR. ECON. & LIBERTY, <http://www.econlib.org/library/Enc/CreativeDestruction.html> (last visited Jan. 30, 2017). While innovative technologies like Aereo disrupt existing markets for the plaintiffs, new media distribution models certainly have benefits for social welfare. *Id.* As such, the Ninth Circuit may view the implications of Joseph Schumpeter's theory to be that cord cutting is not necessarily the kind of loss that copyright law concerns itself with; in other words, it is a non-copyright harm.

<sup>200</sup> Compare *Garcia III*, 786 F.3d at 744 (ruling that irreparable harm in copyright cases must “stem from” copyright's commercial function and thus relate to the marketability of the work in question), with *Salinger v. Colting*, 607 F.3d 68, 81 (2d Cir. 2010) (ruling, more broadly, that irreparable harm must occur to the plaintiff's “property interest in the copyrighted material”), *Esbin & Alter, L.L.P. v. Sabharwal, Globus, & Lim, L.L.P.*, 403 F. App'x 591, 593 (2d Cir. 2010) (ruling, even more broadly, that irreparable harm must arise or “flow from” the defendant's infringing conduct), *WPIX, Inc.*, 691 F.3d at 286 (ruling that drastic changes that threaten to destabilize an entire industry which is dependent upon the plaintiffs' copyrighted material constitutes irreparable harm), and *Aereo IV*, Nos. 12-cv-1540, 12-cv-1543, 2014 WL 5393867, at \*7 (S.D.N.Y. Oct. 23, 2014) (ruling that “loss of subscribers due to cord cutting, loss of control over copyrighted content, and damage to relationships with [relevant parties]” constitutes irreparable harm).

<sup>201</sup> *Esbin & Alter, L.L.P.*, 403 F. App'x at 593 (holding that the plaintiff's competitive harm must “flow from” the defendant's use and distribution of the software).

cognizable.<sup>202</sup> But the Second Circuit would likely conclude that because these injuries flow directly from Google's failure to remove *Innocence of Muslims* from YouTube, they are sufficient if they are imminent and non-speculative so long as the video remains on the Internet.<sup>203</sup> The Second Circuit would probably find that the continued presence of the film on YouTube,<sup>204</sup> and Garcia's inability to control its content,<sup>205</sup> would cause her the loss of potential future acting roles<sup>206</sup> and a tarnished reputation. As an actress, these threatened injuries would occur to Garcia's property interests in her performance<sup>207</sup>—in other words, to her exclusive rights over the copyrightable expression in her role<sup>208</sup>—and the Second Circuit would accordingly find her injuries to satisfy the irreparable harm prong.

### B. Problematic Approaches

The previous exercise not only demonstrates that the Second and Ninth Circuits' standards differ in their breadth, but also illustrates that both approaches are problematic for opposite reasons: the former is improperly broad, while the latter is improperly narrow. The Second Circuit has granted preliminary injunctions without demonstrating that the injuries asserted are the type that copyright law is intended to remedy.<sup>209</sup> With such a broad conception of harm, the Second Circuit may grant injunctive relief even when the injuries alleged by a plaintiff are unrelated to the law under which she brought the claim.<sup>210</sup> On the

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<sup>202</sup> *Garcia III*, 786 F.3d at 745.

<sup>203</sup> *Aereo I*, 874 F. Supp. 2d 373, 400 (S.D.N.Y. 2012) (finding that irreparable injury must be imminent and non-speculative); *Esbin & Alter, L.L.P.*, 403 F. App'x at 593 (finding that irreparable harm must "flow from" the defendant's infringing conduct).

<sup>204</sup> See Antonia Blumberg, *Anti-Islam Film Returns to YouTube, and These Muslim Leaders Want You to Ignore it*, HUFFINGTON POST (May 20, 2015, 3:23 PM), [http://www.huffingtonpost.com/2015/05/20/innocence-of-muslims-youtube\\_n\\_7344344.html](http://www.huffingtonpost.com/2015/05/20/innocence-of-muslims-youtube_n_7344344.html).

<sup>205</sup> *Garcia III*, 786 F.3d at 746; *WPIX, Inc.*, 691 F.3d at 285–86 (finding that plaintiffs' loss of control over their copyrighted programming as a result of ivi is difficult to measure and diminishes the value of the programming, and thus constitutes irreparable injury).

<sup>206</sup> *Salinger v. Colting*, 607 F.3d 68, 81 (2d Cir. 2010) (stating that a "loss that one should not be expected to suffer" can qualify as irreparable harm).

<sup>207</sup> *Id.* ("[T]he relevant harm is the harm that . . . occurs to the [plaintiff's] legal interests . . ."). Economic loss alone does not constitute irreparable damage for purposes of a preliminary injunction in the Second Circuit. See *Johnpoll v. Thornburgh*, 898 F.2d 849, 851 (2d Cir. 1990).

<sup>208</sup> See *supra* note 137 and accompanying text.

<sup>209</sup> See *supra* Section I.C.2.

<sup>210</sup> One increasingly common copyright claim that is particularly susceptible to these types of injuries—that is, injuries that are unrelated to the copyright claim in question—is known as "revenge porn." See Jeanne C. Fromer, *Should the Law Care Why Intellectual Property Rights Have Been Asserted?*, 53 HOUS. L. REV. 549, 563 (2015); see also *Garcia III*, 786 F.3d at 745

other hand, the Ninth Circuit has denied preliminary relief when the injuries asserted are not closely enough related to its particular understanding of copyright law's underlying purpose.<sup>211</sup>

Copyright law remedies should not be used beyond the precise reasons for their existence because the Act aims to just barely incentivize authorship by achieving a careful balance between creative incentives and public access.<sup>212</sup> To the extent that copyright holders use preliminary relief to protect interests that are not relevant to copyright's incentive-based justification, they obstruct social welfare because everything that copyright gives to an artist it takes away from the public by imposing costs on users and other creators.<sup>213</sup> Therefore, if preliminary relief is granted to copyright plaintiffs based on non-copyright harms, the result is detrimental to society because it is a barrier to progress. But human welfare suffers if copyright under-protects copyright holders' interests. If copyright's harm calculus for determining the availability of preliminary relief does not recognize circumstances in which copyright holders have meaningful incentives to create, then artists' interests are insufficiently recognized, and the balance that copyright law seeks to attain is out of harmony.<sup>214</sup>

In *Creation Without Restraint*, Professors Christina Bohannon and Herbert Hovenkamp propose a theory of intellectual property harm in the context of infringement.<sup>215</sup> Professors Bohannon and Hovenkamp argue that intellectual property injury should be modeled after the antitrust injury doctrine and recognize only those harms that the the

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("[Plaintiff, Hulk Hogan, has] produced no evidence demonstrating that he will suffer irreparable harm *in the copyright sense* absent a preliminary injunction. The only evidence in the record reflecting harm to [Hogan] relates to harm suffered by him personally and harm to his professional image due to the 'private' nature of the Video's content[,] [which the defendants posted to their website, documenting his sexual encounter with a woman that is not his wife]. This evidence does not constitute irreparable harm in the context of copyright infringement." (emphasis added) (quoting *Bollea v. Gawker Media, L.L.C.*, 913 F. Supp. 2d 1325, 1329 (M.D. Fla. 2012)).

<sup>211</sup> See *supra* Section I.C.1.

<sup>212</sup> See Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CALIF. L. REV. 111, 125 (1999) ("[T]he goal of intellectual property [law] is only to provide the 'optimal incentive,' not the largest incentive possible.").

<sup>213</sup> See Christopher Buccafusco & David Fagundes, *The Moral Psychology of Copyright Infringement*, 100 MINN. L. REV. 2433, 2439–41 (2016) ("Rights are granted solely for the purpose of incentivizing creative production, but, given the costs these rights generate, they must be limited to that purpose only. As a matter of economic theory, any copyright protection that exceeds the minimum necessary to encourage creativity is costly to social welfare.").

<sup>214</sup> *Id.*

<sup>215</sup> See generally BOHANNAN & HOVENKAMP, *supra* note 4. But note that in her 2012 Article, Professor Bohannon explores copyright harm in the context of injunctive relief. See generally Bohannon, *supra* note 6.

Act is intended to prevent.<sup>216</sup> They would criticize the Second Circuit's approach because it provides the court with enough leeway to grant preliminary injunctions where a defendant's acts would likely not harm the plaintiff's ex ante incentive to produce creative works.<sup>217</sup> The mere existence or threat of an injury, without some relationship to the Act, is not enough to constitute legally cognizable irreparable harm in copyright cases and justify granting the extraordinary remedy of a preliminary injunction.<sup>218</sup> The Second Circuit fails to recognize that only harm related to the policies underlying the substantive law is legally relevant, and only a legally relevant injury can warrant a finding of irreparable harm.<sup>219</sup>

On the other hand, in *Garcia*, the Ninth Circuit recognized that there must be a relationship between a plaintiff's asserted injuries and the Act.<sup>220</sup> But many intellectual property law scholars would agree that the Ninth Circuit's view of this relationship is inadequate because it fails to account for the many noncommercial interests of copyright holders.<sup>221</sup> The *Garcia* opinion rests upon the assumption that every

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<sup>216</sup> BOHANNAN & HOVENKAMP, *supra* note 4, at 47–55. The antitrust injury doctrine, which was developed by the Supreme Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), requires that plaintiffs “prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.” BOHANNAN & HOVENKAMP, *supra* note 4, at 50 (quoting *Brunswick*, 429 U.S. at 487–89). Plaintiffs must prove antitrust injury in actions for damages as well as requests for injunctions, even though the relevant statute does not mandate it. *Id.* Thus, courts can imply a similar requirement that there be a connection between the nature of the injury and copyright’s purpose of incentivizing innovation, even though the Act does not mandate it. *Id.*

<sup>217</sup> BOHANNAN & HOVENKAMP, *supra* note 4, at 55–56. The primary economic justification for intellectual property protection is ex ante because it aims to “influence behavior that occurs before the right comes into being.” Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 130 (2004). In other words, the focus of intellectual property protection is on the incentives to develop new works of authorship in the first place, rather than on the incentives to manage existing works after their creation. *Id.*

<sup>218</sup> BOHANNAN & HOVENKAMP, *supra* note 4, at 34 (“[The] substantive doctrine must be revised to bring the law into alignment with the underlying policy.”).

<sup>219</sup> See John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 541–52 (1978) (“Not even all irreparable harm, but only irreparable harm to legal rights, should count. . . . The court can look only to the policies of the applicable law for an answer.”); Balganesch, *supra* note 43, at 1577 (“Limiting a party’s liability or entitlement by reference to its underlying purpose is hardly novel. Tort law routinely does this.”). *But see* OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978); Douglas Laycock, *Injunctions and the Irreparable Injury Rule*, 57 TEX. L. REV. 1065, 1067 (1979) (reviewing FISS, *supra*) (stating that Fiss’s book maintains that “one can evaluate remedies independently of the substantive rights for which they are invoked”).

<sup>220</sup> *Garcia III*, 786 F.3d 733, 737 (9th Cir. 2015) (en banc); see also *supra* Section I.C.1.

<sup>221</sup> Buccafusco & Fagundes, *supra* note 213, at 2434 (“The past decade has seen a flood of legal scholarship devoted to . . . challeng[ing] the assumption that money plays much of a role at all in motivating artistic production, suggesting instead that the desire for subcultural status or the intrinsic enjoyment of the creative process are stronger drivers of creative production.”); see also *infra* note 236.



artist's sole motivation to innovate is economic; that the engine of free expression is fueled solely by the market; and that in turn, the only legally cognizable harm to an author's property interest in her work is commercial.<sup>222</sup> The court incorrectly assumes that all artists create and publish their works only for monetary gain, and that there are no other motivations driving an artist's decision to engage in her craft.<sup>223</sup> The Ninth Circuit fails to recognize that artists may have noneconomic interests in their copyrightable expression,<sup>224</sup> and that an invasion of such interests can and should qualify as irreparable harm. Thus, its conception of copyright harm is inappropriately constricted.<sup>225</sup> This is particularly problematic given that noncommercial harms are less likely to be compensable by money damages because the plaintiff's interest is not financially driven, and, as a result, an injunction may be the only possible remedy for plaintiffs suffering these harms. This Note proposes that courts adopt a conception of irreparable harm that is neither too broad nor too narrow; in other words, a standard that lies between the two poles currently occupied by each Circuit.

### III. PROPOSAL: FINDING MIDDLE GROUND

The IP Clause is written broadly, which provides Congress with significant leeway to draft copyright laws that implement the Constitution's vision of encouraging progress in changing times.<sup>226</sup> But at its core, the IP Clause is incentives-driven.<sup>227</sup> Although there is no single correct rationale for providing authors with temporary monopolies over their works,<sup>228</sup> the principal justification for American

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<sup>222</sup> *Garcia III*, 786 F.3d at 744–46.

<sup>223</sup> Bohannan, *supra* note 6, at 22–25.

<sup>224</sup> See Balganes, *supra* note 43, at 1576; Jeanne C. Fromer, *A Psychology of Intellectual Property*, 104 NW. U. L. REV. 1441, 1483 (2010) (“Evidence shows that creatively inclined individuals feel compelled to create, regardless of whether an intellectual property regime exists to protect their completed works. Moreover, psychologists emphasize that ‘[p]eople will be most creative when they feel motivated primarily by the interest, enjoyment, satisfaction, and challenge of the work itself—not by external pressures.’” (alteration in original) (footnotes omitted)). *But see* Warner Bros. Pictures v. Columbia Broad. Sys., 216 F.2d 945, 950 (9th Cir. 1954) (“Authors work for the love of their art no more than other professional people work in other lines of work for the love of it. There is the financial motive as well.”).

<sup>225</sup> See PATRY, *supra* note 2, § 22:37 (“[In *Garcia*], Judge McKeown focused on the requirement that irreparable harm in a case involving solely a copyright claim must be based on the economic interests of the plaintiff as an author, rather than on other, even serious harms.”).

<sup>226</sup> U.S. CONST. art. I, § 8, cl. 8; *see also* COHEN, *supra* note 10, at 49.

<sup>227</sup> Balganes, *supra* note 43, at 1617; Fromer, *supra* note 26, at 1777 (stating that incentives are “the underpinning of intellectual property”).

<sup>228</sup> *See* BOHANNAN & HOVENKAMP, *supra* note 4, at x.

copyright law is utilitarianism.<sup>229</sup> This theory maintains that the primary function of copyright is to incentivize creators to produce creative works for public consumption, and thereby encourage progress, by providing them with a marketable right to their creative expression.<sup>230</sup> Utilitarianism provides that infringement upon an author's exclusive rights may diminish her ability to profit from her creations, which would deprive her of the incentive to invest time, resources, and money into future innovation, and would thus result in the underproduction of creative works.<sup>231</sup> Utilitarianism's goal—to provide the lowest possible pecuniary incentive to authors in exchange for their maximal valuable contributions to society<sup>232</sup>—depends largely upon a cost-benefit analysis that is grounded in economics.<sup>233</sup> Traditionally, nonpecuniary motivations fall outside of this consequentialist framework.<sup>234</sup>

While the utilitarian account of copyright law is indisputably its dominant justification,<sup>235</sup> many intellectual property scholars maintain that this theory is incomplete to the extent that it is driven purely by pecuniary interests and ignores the various nonpecuniary forces that stimulate creative activity.<sup>236</sup> This Note agrees with such scholars that

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<sup>229</sup> See COHEN, *supra* note 10, at 7; see also Fromer, *supra* note 26, at 1762.

<sup>230</sup> See COHEN, *supra* note 10, at 7; BOHANNAN & HOVENKAMP, *supra* note 4, at x (“The Constitution’s IP Clause . . . is based on economic incentives rather than some alternative theory such as natural rights.”).

<sup>231</sup> See Fromer, *supra* note 26, at 1751–52. Utilitarianism seeks to stimulate innovation at the lowest possible cost to society. Ng, *supra* note 38, at 343. However, utilitarianism does not necessarily rest upon the premise that artists create new works solely for financial rewards. See COHEN, *supra* note 10, at 7.

<sup>232</sup> See Fromer, *supra* note 26, at 1760.

<sup>233</sup> *Id.* at 1751–52. Professor Fromer maintains that traditional pecuniary incentives are costly for society to provide to creators. *Id.* at 1748.

<sup>234</sup> See BOHANNAN & HOVENKAMP, *supra* note 4, at 186. See generally Kwall, *supra* note 28.

<sup>235</sup> See discussion *supra* notes 27–28. For a discussion of how the economic account of copyright law became its principal justification, see Balganes, *supra* note 27, at 316–17.

<sup>236</sup> See BOHANNAN & HOVENKAMP, *supra* note 4, at x (“[P]eople compose music, write poetry, and even invent new products for noneconomic motives . . . .”); Wendy J. Gordon, *The Concept of “Harm” in Copyright*, in INTELLECTUAL PROPERTY AND THE COMMON LAW 452, 461 (Shyamkrishna Balganes ed., 2013) (“[E]conomics is not all of copyright law.”); Dreyfuss, *supra* note 28, at 591 (“[A]ttention to nonpecuniary, author-based interests is necessary in order to take full advantage of the talents of the creative and to, in the words of the Constitution, ‘promote the Progress of Science and useful Arts.’” (quoting U.S. CONST. art. I, § 8, cl. 8)); Bohannan, *supra* note 6, at 24–25; Buccafusco & Fagundes, *supra* note 213, at 2438 (“Copyright law’s market-oriented consequentialism . . . presents an impoverished view of authors’ true motivations . . . . The reasons that authors create and the reasons that they object to uses of their works extend far beyond pecuniary considerations.”); Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 515 (2009) (“Psychological and sociological concepts can do more to explain creative impulses than classical economics.”). See generally MERGES, *supra* note 27 (exploring noneconomic bases for intellectual property); *supra* notes 27–28 and accompanying text. The Supreme Court has even indicated that this view is inappropriately limited. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (holding that copyright owners may exercise their exclusive rights without licensing

utilitarianism achieves its highest potential when it recognizes the manifold reasons that artists create. Although inducing creativity is central to copyright's consequentialist framework,<sup>237</sup> the current legal system does little to give effect to this framework by inducing creativity in practice.<sup>238</sup> Technological developments that make copyrighted works more accessible on digital platforms have hindered artists' abilities to adequately protect their exclusive rights to their creations.<sup>239</sup> Copyright law would benefit from doctrinal reform to broaden its consequentialist framework and adopt a more complete and realistic view of creativity.<sup>240</sup> A more robust theory of irreparable harm would implement this view in practice by creating a stronger link between injunctive relief and the underlying purpose of the IP Clause.<sup>241</sup>

Presently, courts most often articulate the notion of copyright harm when assessing the fourth fair use factor.<sup>242</sup> But scholars have advocated for the imposition of a harm requirement in different areas of

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their works for any commercial purpose). The Court has recognized that copyright owners need not be compensated for the use of their works, as they may have pecuniary as well as nonpecuniary interests in exercising their exclusive rights. *See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 446 n.28 (1984) ("The copyright law does not require a copyright owner to charge a fee for the use of his works, and . . . the owner of a copyright may well have economic or noneconomic reasons for permitting certain kinds of copying to occur without receiving direct compensation from the copier."). *But see* BOHANNAN & HOVENKAMP, *supra* note 4, at 186 ("Whether copyright should provide a remedy for [nonpecuniary] harm begs fundamental questions about the nature of copyright protection . . .").

<sup>237</sup> *See Universal City Studios, Inc.*, 464 U.S. at 450 ("The purpose of copyright is to create incentives for creative effort.").

<sup>238</sup> Balganes, *supra* note 43, at 1577–82 (stating that "courts do surprisingly little to give effect to the way in which copyright's incentive structure is meant to influence creativity" and incentives rarely play more than a "rhetorical role" at present); Bohannan, *supra* note 6, at 25 ("[I]f we are taking incentives seriously, we have to acknowledge that in rare cases an author's perceived harm to his or her natural rights can actually decrease his or her incentives to create or distribute copyrighted works.").

<sup>239</sup> *See* U.S. DEP'T OF COMMERCE INTERNET POLICY TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 5–9 (2013), <https://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf> (discussing both the unprecedented opportunities and complex issues that new digital technologies have posed for copyright law and proposing initiatives to combat challenges, such as rampant piracy); BOHANNAN & HOVENKAMP, *supra* note 4, at 34 ("IP law continually confront[s] new and poorly understood phenomena.").

<sup>240</sup> *See* Buccafusco & Fagundes, *supra* note 213, at 2447 ("For copyright law to best achieve its consequentialist aims, of course, its descriptive account of human motivation should be accurate."). *See generally* Kwall, *supra* note 28.

<sup>241</sup> BOHANNAN & HOVENKAMP, *supra* note 4, at 34 (stating that like antitrust injury, IP injury should be "sufficiently related to the underlying goals of [the IP] laws").

<sup>242</sup> 17 U.S.C. § 107(4) (2012). This factor requires courts to consider "the effect of the [defendant's] use upon the potential market for or value of the copyrighted work." *Id.* In the fair use context, the Supreme Court has stated that the relevant and "cognizable harm is market substitution," a purely economic inquiry about usurpation. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591–92 (1994).

copyright law, beyond this affirmative defense.<sup>243</sup> They have proposed theories of harm to achieve various objectives, including to limit copyright's reach,<sup>244</sup> realign it with its utilitarian rationale,<sup>245</sup> or for other deontological reasons.<sup>246</sup> What all of these theories have in common, however, is their understanding that only those injuries that are likely to diminish a plaintiff's incentives to innovate should be recognized as copyright harms.<sup>247</sup> This understanding is consistent with the constitutional mandate of encouraging creativity by promoting public access to works of authorship, thereby allowing other potential artists to build upon them.<sup>248</sup> Imputing this notion of copyright harm into the irreparable harm prong will further the objectives of the IP Clause by limiting the availability of preliminary injunctions to those copyright holders that have been injured, or threatened with injury, of a kind and degree that could realistically affect their decision to produce creative works in the first place.<sup>249</sup>

Not all uses of copyrighted materials are damaging in the copyright sense,<sup>250</sup> and such uses should not be enjoined.<sup>251</sup> Courts should ask

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<sup>243</sup> Most of the existing literature proposes that plaintiffs be required to prove IP injury in order to establish a prima facie infringement claim. See, e.g., BOHANNAN & HOVENKAMP, *supra* note 4, at 159–60 (“[C]opyright law needs a more robust theory of harm if it is to serve its constitutionally mandated purpose to incentivize expression . . .”); Gordon, *supra* note 236, at 452, 483 (maintaining that the role of harm is “understated” and should be “given a more prominent place in the world of copyright” by placing the burden on copyright holders to prove actual harm in order to make out a claim of infringement); Sprigman, *supra* note 44, at 317 (criticizing the present legal system for imposing copyright liability without any demonstration of harm). This Note introduces theories of copyright harm into the context of injunctive relief because harm to nonpecuniary interests is particularly concerning when money damages are inadequate to repair them.

<sup>244</sup> See BOHANNAN & HOVENKAMP, *supra* note 4, at 48.

<sup>245</sup> See Sprigman, *supra* note 44, at 317–24.

<sup>246</sup> See Gordon, *supra* note 236, at 461–62.

<sup>247</sup> See BOHANNAN & HOVENKAMP, *supra* note 4, at 15 (arguing that like antitrust injury must relate to the incentive to compete, IP injury must relate to the incentive to innovate); Sprigman, *supra* note 44, at 320 (“[C]opyright ‘harm’ arises from any use that threatens to suppress author incentives significantly below the optimal level . . .”).

<sup>248</sup> See BOHANNAN & HOVENKAMP, *supra* note 4, at 15 (stating that the right kind of IP injury is “actual injury-in-fact of a kind that diminishes the ex ante incentive to innovate”); Balganes, *supra* note 43, at 1633 (stating that copyright’s theory of incentives “attempts to bring about ex ante behavioral modification among individuals” and a theory of foreseeable copying will “better align creators’ creative decisionmaking with their incentives”).

<sup>249</sup> BOHANNAN & HOVENKAMP, *supra* note 4, at 152 (“uses that are unlikely to harm a copyright holder’s incentives to produce the original work” should not be enjoined); Bohannan, *supra* note 6, at 25 (“Arguably, if an author could show that he really would have stopped working or would not have published a particular work, etc., then he should be able to get an injunction. Of course, the evidence would have to be very convincing, because many authors might say this but very few would actually do it.”).

<sup>250</sup> BOHANNAN & HOVENKAMP, *supra* note 4, at 180.

<sup>251</sup> *Id.* at 181 (“Where there is no harm, there is no legitimate reason to suppress the defendant’s use—whatever it is.”).

whether the type of harm that the plaintiff complains of is sufficiently related to the purpose of the IP Clause in that the defendant's activity would diminish the copyright holder's pecuniary or nonpecuniary incentives to create her copyrighted work.<sup>252</sup> Since damages for infringement are available without proof of harm to the copyright holder, the drastic remedy of injunctive relief should only be available to plaintiffs that can prove, through evidence, that the defendant's continued unauthorized use of their copyrighted material would undermine their incentive to pursue artistic endeavors.<sup>253</sup>

For instance, in *Garcia*, the defendant's manipulation of Garcia's performance, resulting in threats against her life and a damaged professional reputation,<sup>254</sup> would likely impact Garcia's ex ante decision to participate in the film in the first place, and moving forward, will likely affect her inclination to pursue future acting roles. Similarly, if an author can prove that the defendant's unauthorized use of her work is likely to cause her such anguish that she will stop writing or refuse to publish her book, then this should qualify as cognizable injury, satisfying the irreparable harm prong and bringing the plaintiff one step closer to a preliminary injunction.<sup>255</sup> This argument has already been successful in the Southern District of New York, resulting in preliminary relief to renowned author J.K. Rowling against a company seeking to publish a *Harry Potter* encyclopedia containing a great deal of material, often in the form of verbatim quotations, from her books.<sup>256</sup>

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<sup>252</sup> See generally BOHANNAN & HOVENKAMP, *supra* note 4.

<sup>253</sup> *Id.*

<sup>254</sup> See *supra* Section I.C.1.

<sup>255</sup> Bohannan, *supra* note 6, at 25 (“[I]f we are taking incentives seriously, we have to acknowledge that in rare cases an author’s perceived harm to his or her natural rights can actually decrease his or her incentives to create or distribute copyrighted works.”). Professor Buccafusco and Professor Fagundes term this type of harm “incentive-based” harm. Buccafusco & Fagundes, *supra* note 213, at 2485 (“If the nature of an author’s objection to unauthorized use of her work suggests that such a use undermines her desire to create new works, this is a harm relevant to her incentives to create . . .”).

<sup>256</sup> In *Warner Brothers Entertainment Inc. v. RDR Books*, 575 F. Supp. 2d 513 (S.D.N.Y. 2008), two years after the *eBay* case, the Southern District of New York permitted such a theory of irreparable harm. *Id.* at 552; see also Bohannan, *supra* note 6, at 24–25 (describing the harm to J.K. Rowling’s incentives as “psychic injury that deprives her of the motivation to continue working”). In that case, J.K. Rowling sought to enjoin the defendant’s unauthorized publication of a *Harry Potter* encyclopedia called “The Lexicon,” which she claimed infringed upon her copyright ownership of the *Harry Potter* series by unlawfully appropriating material from her books, often containing verbatim language without quotations. *RDR Books*, F. Supp. 2d at 527–34. Rowling provided evidence that she had planned to write her own *Harry Potter* encyclopedia prior to the Lexicon. *Id.* at 552. Rowling testified that publication of the Lexicon would “destroy her ‘will or heart to continue with [writing her own] encyclopedia’ (Tr. (Rowling) at 54:9-12.)” and that the ability of others to “draw[] freely from her works” reduced her incentives to pursue this project. *Id.* The court accepted this testimony as evidence of irreparable harm. *Id.* However, many disagree with the court’s holding in this case, including

Adoption of this theory of harm will eliminate unauthorized uses of copyrighted works that threaten artistic progress,<sup>257</sup> as it arguably did in the case of J.K. Rowling.<sup>258</sup>

This Note argues that courts should expand their conceptions of irreparable harm in copyright cases to account for injuries to creators' "expressive incentives,"<sup>259</sup> rather than merely accounting for their pecuniary incentives.<sup>260</sup> By recognizing artists' personal motivations for creativity, this more holistic and realistic understanding of irreparable harm would encourage copyright owners to not only create works, but to disseminate them using new technologies that may threaten their exclusive rights.<sup>261</sup> According to Professor Jeanne C. Fromer, the incentives currently offered to copyright owners by America's intellectual property laws<sup>262</sup> are under-inclusive, and can be strengthened by broadening them to encompass this greater range of interests that artists value just as highly, if not more than their commercial interests.<sup>263</sup>

#### A. *Expressive Incentives*

Professor Fromer terms such interests "expressive incentives," and defines them as valuable incentives that go beyond the pecuniary to

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copyright scholar William F. Patry. PATRY, *supra* note 2, § 22:37 (declaring that Rowling's testimony is "[t]he most absurd type of alleged irreparable harm I have seen . . ."). Similarly, the Second Circuit has also accepted injury to a performing group's theatrical reputation as irreparable harm due to the detrimental impact that the defendant's mutilation of the plaintiffs' work would have upon their ability to attract an audience. See *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 25 (2d Cir. 1976).

<sup>257</sup> See U.S. CONST. art. I, § 8, cl. 8.

<sup>258</sup> See *RDR Books*, 575 F. Supp. at 551.

<sup>259</sup> See Fromer, *supra* note 26, at 1747. For a description of expressive incentives, see *infra* Section III.A.

<sup>260</sup> See COHEN, *supra* note 10, at 7.

<sup>261</sup> See, e.g., David Byrne, *David Byrne: "The Internet will Suck All Creative Content out of the World,"* GUARDIAN (Oct. 11, 2013, 10:53 AM), <http://www.theguardian.com/music/2013/oct/11/david-byrne-internet-content-world>; Joint Statement, Am. Fed'n of Musicians, Am. Fed'n of Television & Radio Artists, Dirs. Guild of Am., Screen Actors Guild, Writers Guild of Am., Internet Piracy Hurts Individual Creators, Not Just "Industries," Say the Entertainment Unions (Jan. 25, 2005, 12:01 PM), <http://www.sagaftra.org/content/internet-piracy-hurts-individual-creators-not-just-industries-say-entertainment-unions> ("[A]n artist's work—when distributed in an unprotected digital format . . . is easily altered and exploited . . . . If the work of creators is not protected . . . it is very likely that, in the end, neither the creator nor the copyright holder will be able to continue to make this work available.").

<sup>262</sup> Professor Fromer applies her proposal to both copyright and patent law; however, this Note only focuses on its application to copyright law.

<sup>263</sup> Fromer, *supra* note 26, at 1747–48.

protect creators'<sup>264</sup> personhood interests,<sup>265</sup> which stimulate innovation<sup>266</sup> at a minimal cost to society.<sup>267</sup> While Professor Fromer acknowledges that American copyright law does not protect moral rights,<sup>268</sup> she argues that it does contain author-centered, moral rights rhetoric within its utilitarian framework,<sup>269</sup> and that artists typically place a higher value upon protecting their personhood than their pecuniary interests.<sup>270</sup> Thus, she contends that utilitarian and moral rights theories can—and should<sup>271</sup>—exist harmoniously,<sup>272</sup> particularly

<sup>264</sup> Professor Fromer recognizes the modern-day prevalence of corporations in the creative industries, but maintains that her theory is not outdated because of firm copyright ownership. *Id.* at 1776–77. Rather, she argues that firms provide employees with a great deal of personal autonomy in the realm of creative production, and thus still rely upon the individual visions of creators in collaborative corporate environments. *Id.* at 1779–80. Further, Professor Fromer suggests that incentives motivate firms, which in turn, encourage their employees to focus their time and effort on creative production, even though such employees are divested of their copyright ownership of their works. *Id.* at 1776–77, 1779–80. Therefore, she contends that her proposal can apply across all contexts. *Id.* at 1779. This confirms the applicability of this Note's proposal to corporations that own the copyright in creative content, such as broadcast networks, like the plaintiffs in *Aereo*.

<sup>265</sup> *Id.* at 1753–56. According to Professor Fromer, personhood theory is grounded in moral rights, which are largely unprotected by American intellectual property laws, with the exception of the scant attribution and integrity rights granted to certain authors of artistic works in the Visual Artists' Rights Act of 1990. *See* 17 U.S.C. § 106A (2012); Fromer, *supra* note 26, at 1756. Personhood theories view works of authorship as reflections of their creator's personality and self-concept, and therefore proceed with the understanding that creators should have the liberty to exercise control over their works. Fromer, *supra* note 26, at 1755. Professor Fromer recognizes that artists hold strong personhood and interests in their works of authorship. *Id.* at 1765. Therefore, she argues that to optimize incentives that motivate an artist to create, the true intrinsic motivation of the artist—whether it be her emotion, message, reputation, or other conviction—should be identified and incorporated into the incentive structure offered to the artist. *Id.* at 1765–71, 1777. While Professor Fromer also incorporates labor-desert theories into her conception of expressive incentives, such theories are not addressed in this Note.

<sup>266</sup> *Id.* at 1760.

<sup>267</sup> *Id.* at 1747–48.

<sup>268</sup> *Id.* at 1756 (“Congress, federal courts, and commentators tend to disclaim any significant presence of moral-rights protection within American copyright . . . law . . .”).

<sup>269</sup> Fromer, *supra* note 26, at 1756–59 (discussing Oren Bracha's theory regarding the “injection” of author centrality into American copyright law).

<sup>270</sup> *Id.* at 1777. If artists' deeply-held moral rights dominate their interest in pecuniary incentives, Professor Fromer states, “they might be more of a lure to creators” and “cheaper for society to provide.” *Id.* at 1778. *But see infra* note 311 and accompanying text.

<sup>271</sup> Fromer, *supra* note 26, at 1760 (“[U]tilitarians ought to be deeply occupied with giving weight in intellectual property laws to creators' moral-rights interests in appropriate circumstances.”); *id.* at 1763 (“[U]tilitarianism and moral rights can be and ought to be in greater confluence than the conventional wisdom would have us believe.”).

<sup>272</sup> *Id.* at 1759 (“[T]heories of utilitarianism and moral rights are not disjoint, as conventional wisdom tends to suggest.”). Professor Fromer cites the work of various legal scholars that have agreed with the proposition that utilitarian and moral rights theories can overlap in copyright law, and that economic considerations are insufficient on their own. *See id.* at 1761–64. Some even believe that moral rights principles already exist in American copyright law. *See, e.g.,* Ty, Inc. v. GMA Accessories, 132 F.3d 1167, 1173 (7th Cir. 1997) (Posner, C.J.) (“[T]he doctrine of ‘moral right’ . . . is creeping into American copyright law.”); Gordon, *supra*

because appreciation for copyright holders' interests can incentivize them to produce works, or optimize their quality,<sup>273</sup> in ways that pecuniary incentives may not.<sup>274</sup> By working in tandem with the conventional pecuniary incentives of utilitarianism,<sup>275</sup> Professor Fromer concludes that protecting expressive incentives would optimize copyright law's ability to fulfill its constitutional purpose of maximizing social welfare by protecting the interests of not only the public, but of creators as well.<sup>276</sup>

Professor Fromer highlights that this incentive structure will only work from a utilitarian standpoint—which it should<sup>277</sup>—if one caveat is met: the societal benefits of granting expressive incentives to copyright holders must outweigh their societal costs.<sup>278</sup> In her Article, Professor Fromer engages in a normative discussion of several areas of copyright law to illustrate the ways that expressive incentives might successfully achieve this balance.<sup>279</sup>

### B. *Application to Preliminary Injunctions*

This Note agrees with Professor Fromer's proposition that expressive incentives should play a greater role in copyright law in order to advance the Constitution's goal of encouraging the production of socially valuable works.<sup>280</sup> Activities that fail to recognize creators' personhood interests may harm their expressive incentives and have a destructive impact upon the proliferation of artistic works.<sup>281</sup> Therefore, irreparable injury to a copyright plaintiff's economic or expressive incentives should justify a finding of irreparable harm. In other words, courts should find that a copyright plaintiff seeking a preliminary

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note 236, at 461 n.43 (“There are echoes of moral entitlement even in the Federalist Papers,” and that “the government’s IP powers . . . simultaneously serve consequentialist (e.g., economic) and nonconsequentialist (e.g., deontological) ends.”).

<sup>273</sup> *Id.* at 1759, 1762–63.

<sup>274</sup> *Id.* at 1760. Further, Professor Fromer argues that expressive incentives can even enhance utilitarian incentives to innovate. *Id.* at 1763, 1823.

<sup>275</sup> *Id.* at 1759–60.

<sup>276</sup> *Id.* at 1752.

<sup>277</sup> *Id.* at 1748 (“Moral-rights interests ought to yield to the utilitarian calculus whenever there is a conflict between the two . . .”).

<sup>278</sup> *Id.* at 1748, 1779. Professor Fromer states that in this theorized intellectual property system, the costs and benefits to society of all the incentives that motivate the creative production must be considered, as well as the desirability of such incentives to creators. *Id.* at 1778.

<sup>279</sup> These areas include attribution, copyright's structure of duration, right of reversion, and originality requirement. *Id.* at 1790–1810.

<sup>280</sup> *Id.* at 1777, 1784.

<sup>281</sup> *Id.*



injunction has satisfied the irreparable harm prong when her alleged irreparable injuries demonstrably threaten any of her pecuniary or nonpecuniary motivations to pursue creative endeavors.

This conception of copyright harm lies between the Second and Ninth Circuits' approaches: it restricts the Second Circuit's excessively broad standard<sup>282</sup> to a framework that focuses on the incentives behind the production of creative works, and expands the Ninth Circuit's excessively narrow standard<sup>283</sup> to bring injury to both artists' pecuniary and expressive interests within the scope of the irreparable harm prong. By implementing a mix of incentive structures,<sup>284</sup> courts can achieve a balance between the Second and Ninth Circuits' current approaches while advancing copyright law's constitutional objective to maximize artistic output.<sup>285</sup> This proposal recognizes that while a plaintiff's injury may not impact her commercial incentives to create, it may nevertheless impact her expressive incentives to do so, and both forms of harm should be legally cognizable if adequately supported by the evidence.

Preliminary injunctions can serve as an expressive incentive by protecting the possessory interests of artists to produce works of authorship. Creators consider the right to maintain control over their works to be highly desirable, particularly in today's digital world.<sup>286</sup> Like the Act's right of reversion,<sup>287</sup> preliminary injunctions enable an artist to regain control over her work, and in doing so, restore it with her personhood.<sup>288</sup> Similar to attribution rights,<sup>289</sup> preliminary injunctions can better protect artists, like Garcia,<sup>290</sup> by empowering them to maintain a link between their creations and their sense of self when unauthorized uses threaten their reputations or professional opportunities.<sup>291</sup> Like the structure of copyright duration,<sup>292</sup> preliminary

<sup>282</sup> See *supra* Section I.C.2.

<sup>283</sup> See *supra* Section I.C.1.

<sup>284</sup> Fromer, *supra* note 26, at 1824 (“[T]he ultimate goal of this line of inquiry is to illuminate the ideal mix of pecuniary and expressive incentives.”).

<sup>285</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>286</sup> Fromer, *supra* note 26, at 1791.

<sup>287</sup> *Id.* at 1805–807. Copyright law's right of reversion, now known as termination, empowers an author or statutory heir to terminate any grant of the copyright between thirty-five and forty years of the grant date, so long as notice requirements are met. 17 U.S.C. § 203 (2012); see also Fromer, *supra* note 26, at 1806.

<sup>288</sup> Fromer, *supra* note 26, at 1806–07 (“Rights in works that, to the author, are intimately linked with the author's being can be reunited, so to speak, with the author. With this right, then, copyright law might be understood as offering the expressive incentive of control . . .”).

<sup>289</sup> *Id.* at 1790–98. Attribution rights, which the Act only affords to visual artists in a small subset of works, create a link between an author and her work. *Id.* at 1790, 1796.

<sup>290</sup> See *supra* Section I.C.1.

<sup>291</sup> *Id.* at 1790.

<sup>292</sup> *Id.* at 1798–1805. Copyright duration refers to the amount of time that copyright endures from the time of a work's creation, including renewal terms. *Id.* at 1798–1801.

injunctions can shield works from uses that are contrary to the creator's personhood interests, thereby enabling her to manage her work's visibility to the public.<sup>293</sup>

A hypothetical fact pattern is useful at this point. Consider the situation of Jane Doe, a plaintiff that would benefit from this proposal. During the 2016 election season, Jane, a recreational artist and fervent opposer of President Donald Trump's candidacy, decided to channel her emotions into politically-charged art in hopes of spreading her anti-Trump message before election day. Jane, who often paints her work before crowds at the Union Square subway station in New York City, became well-known amongst New Yorkers for her unique style of painting portraits, which often drew crowds on the street. Jane began to paint portraits of now-President Trump in her recognizable style, but included several of his crudest remarks surrounding him on the canvas, with the title "AMERICA IS ALREADY GREAT" running across the top, making her political stance obvious. Several weeks after she debuted her paintings at the Union Square station, Jane received a phone call from an old acquaintance who said that he was walking down Fifth Avenue near Trump Tower when a familiar image on a mannequin's shirt in a store window caught his eye, and that he was disgusted that Jane would support Trump's candidacy. To Jane's dismay, she later found out that the store had copied her one-of-a-kind portrait of Trump and reproduced it on various items of clothing, but did not include any of the controversial quotations that accompanied her own painting. Instead, the store included several of Trump's policy objectives surrounding him, as well as his campaign slogan, "MAKE AMERICA GREAT AGAIN." Upon visiting the store, which turned out to be a pro-Trump pop-up shop run by The Trump Organization, Jane found several three-dimensional figurines of her Trump portrait, which a salesperson told her were produced by the latest 3D Printer. Discouraged, Jane decided to stop painting her portraits and did not display her Trump portraits again.

Without recognizing Jane Doe's expressive incentives, it is not clear that a court would grant her a preliminary injunction against The Trump Organization, the infringer of her copyright. The harm that the infringer inflicted upon Jane is largely expressive rather than pecuniary, as Jane did not suffer a loss in sales, but rather a loss in the artistic value of her particular style of painting, her personhood interest, and reputational injury, among other likely nonpecuniary injuries. On the other hand, the nature of the infringer's behavior is largely for profit. Jane is the ideal plaintiff for this Note's proposal because if a court does

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<sup>293</sup> *Id.* at 1802.

not recognize her nonpecuniary interest in her art, she may actually stop creating, which would hinder artistic progress.<sup>294</sup> Jane is a high value creator with purely political, noncommercial motives, who suffered harm to her expressive incentives as a result of an arguably valueless infringer's actions. Thus, society cares about protecting her more than it cares about the infringer. Finally, the irreparable harm prong is fulfilled because unlike monetary damages, injunctive relief will remedy the harm, and a preliminary injunction will prevent it before a trial on the merits is held.

Professor Fromer's theory of expressive incentives can and should be incorporated into the irreparable harm prong by expanding the role that incentives play in courts' assessments of copyright harm.<sup>295</sup> This would provide artists with a tool to maintain control over their works at a time when they are increasingly susceptible to copyright infringement.<sup>296</sup> Making preliminary injunctions more author-centered would send a powerful message to copyright owners that they should continue engaging in their crafts, pursue additional creative endeavors, and make their works available to as many people as possible,<sup>297</sup> because equitable principles will protect their wide range of interests.<sup>298</sup> The societal benefits of affording this protection to artists that take advantage of new distribution models exceed the harm to society posed by enjoining what a court finds, more likely than not, to be unauthorized uses of such artists' works before a full trial on the merits.<sup>299</sup>

### C. *Objections*

Critics of this Note's proposal might argue that using injunctive relief to safeguard creators' expressive incentives would be detrimental to artistic progress,<sup>300</sup> in violation of the IP Clause. Such critics would maintain that adding this additional layer of protection for artists will harm society by enabling them to enjoin public use of their works when

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<sup>294</sup> See *supra* note 255 and accompanying text.

<sup>295</sup> See Balganes, *supra* note 43, at 1617; Fromer, *supra* note 26, at 1777, 1783–84.

<sup>296</sup> See PRICE, *supra* note 48, at 3.

<sup>297</sup> See COHEN, *supra* note 10, at 7.

<sup>298</sup> Fromer, *supra* note 26, at 1802, 1806–07; see also Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 360–61 (1996).

<sup>299</sup> Fromer, *supra* note 26, at 1779. For a brief discussion of these societal harms, see *infra* Section III.C.

<sup>300</sup> This is reminiscent of Aereo's argument that enjoining its business would hurt society at large by stifling innovation. See Brief for Respondent at 20, 48–50, *Aereo III*, 134 S. Ct. 2498 (2014) (No. 13-461), 2014 WL 1245459.

such use does not accord with their vision, which would stifle innovation by hindering the ability of subsequent artists to build upon such works.<sup>301</sup> According to these critics, this danger is particularly threatening in the context of injunctive relief because equitable remedies are overprotective of the original authors' interests, to the exclusion of other artists and the detriment of the public domain.<sup>302</sup> On a similar note, critics might argue that this proposal would expand the accessibility of injunctive relief—an extraordinary remedy<sup>303</sup>—to an unwarranted degree.<sup>304</sup> This raises First Amendment concerns, as it increases the risk that preliminary injunctions will wrongfully suppress speech, and may result in the chilling of activity that would otherwise be considered fair use.<sup>305</sup>

These critics overlook an important proposition upon which this Note's proposal rests. As previously discussed, Professor Fromer's theory of expressive incentives should not apply in any situation in which the costs of offering the incentives outweigh the benefits to society of implementing them.<sup>306</sup> If other artists that plan to build upon

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<sup>301</sup> Professor Fromer recognizes this potential danger by warning against the application of her theory in contexts that would broaden it too far. Fromer, *supra* note 26, at 1820–21 (“[T]he competing expressive tugs of original authors . . . interests and subsequent authors’ interests in using or modifying existing works to society’s benefit illustrate the dangers of granting expressive incentives that are too broad in certain contexts.”); *see also* Bohannan, *supra* note 6, at 23 (“[U]sing copyright law to prohibit uses of copyrighted material that the author or copyright holder would find objectionable threatens to impede the dissemination of competing ideas and creative discourse.”); Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263 (2009).

<sup>302</sup> Fromer, *supra* note 26, at 1821; *see also* *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1513–16 (9th Cir. 1993) (Kozinski, J., dissenting) (“Overprotection stifles the very creative forces it’s supposed to nurture. . . . This is why intellectual property law is full of careful balances between what’s set aside for the owner and what’s left in the public domain for the rest of us . . . . [The doctrines that ensure these careful balances] diminish an intellectual property owner’s rights. . . . But all are necessary to maintain a free environment in which creative genius can flourish.”); BOHANNAN & HOVENKAMP, *supra* note 4, at 161 (“Copyright’s protections must be broad enough to give authors sufficient incentive to create, yet limited enough to allow others to use and build upon those works.”).

<sup>303</sup> *See supra* note 4 and accompanying text.

<sup>304</sup> *See* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1994) (“[T]he goals of the copyright law . . . are not always best served by automatically granting injunctive relief . . . .”); *White*, 989 F.2d at 1514 (Kozinski, J., dissenting) (“Intellectual property rights aren’t . . . absolute guarantees protected against all kinds of interference . . . . The very point of intellectual property laws is that they protect only against certain specific kinds of appropriation.”).

<sup>305</sup> DEP’T OF COMMERCE INTERNET POLICY TASK FORCE, *supra* note 239, at iii (“[C]opyright law [must] continue[] to strike the right balance between protecting creative works and maintaining the benefits of the free flow of information.”); BOHANNAN & HOVENKAMP, *supra* note 4, at 172–76, 199 (maintaining that to achieve a proper balance between the First Amendment and the IP Clause, copyright holders must have “sufficient incentives [to create.] but not absolute control [over them]”).

<sup>306</sup> *See* Fromer, *supra* note 26, at 1748, 1778–79.

a copyrighted work can prove that they will suffer as a result of a court's decision to enjoin its use, the original author's personhood interest in such work must give way to the societal benefit, and a preliminary injunction should not issue.<sup>307</sup> Additionally, this proposal does not overprotect copyright holders at the expense of the public domain, but rather achieves a balance between making preliminary injunctions too readily available and too difficult to obtain in the small number of copyright cases that are implicated by it.<sup>308</sup> Furthermore, these critics overlook that the irreparable harm prong is only one prong of the four-part traditional test. Before the court may grant a preliminary injunction, it must also conclude that the balance of hardships tips decidedly in the plaintiff's favor, and that a preliminary injunction would not disserve the relevant public interest.<sup>309</sup> These last two prongs will ensure that this proposal is reserved only for those cases when preliminary relief is necessary and appropriate.<sup>310</sup>

The flexibility of the traditional test also addresses the concern that courts will not know which plaintiffs to trust when they argue that the defendant's unauthorized use of their work harms their expressive incentives such that preliminary relief is the appropriate remedy. Courts are in a position to assess the nature of the plaintiff bringing the claim, the nature of the work, and the available evidence, and make realistic yet challenging judgments about whether the requisite emotional bond is present between the individual or entity and the work at issue.

Critics might also contend that this proposal is ineffective because even though noneconomic motivations may play a role in creativity, artists' *primary* incentive to create is for profit,<sup>311</sup> and therefore, noneconomic motivations are unnecessary to encourage innovation. Although it is not entirely clear to what extent artists' personal motivations influence their decisions to engage in creative activity,<sup>312</sup> it is clear that for some artists, they do nonetheless,<sup>313</sup> so the law should take such interests into account in those particular circumstances.

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<sup>307</sup> See *id.*; see also *supra* text accompanying notes 277–78.

<sup>308</sup> See *supra* Section II.B.

<sup>309</sup> See *supra* Section I.A.

<sup>310</sup> See *Woods v. Universal City Studios, Inc.*, 920 F. Supp. 62, 65 (S.D.N.Y. 1996) (“[A]n injunction is not the automatic consequence of infringement and equitable considerations are always germane to the determination of whether an injunction is appropriate.” (citing *New Era Publ'ns Int'l v. Henry Holt, Co.*, 884 F.2d 659, 661 (2d Cir. 1989))).

<sup>311</sup> See BOHANNAN & HOVENKAMP, *supra* note 4, at x (“[N]oneconomic motives . . . have not played a particularly important role in the process by which the law encourages innovation. . . . [A]lthough noneconomic incentives readily explain why people innovate some things, it does not explain why they seek out and later enforce legal powers to exclude.”).

<sup>312</sup> Silbey, *supra* note 28, at 2093 (“There are, in fact, few empirical studies describing how and why artists . . . do what they do and whether or how the law has a role in their activities.”).

<sup>313</sup> See *supra* note 28.

Courts can determine the right circumstances by implementing Professor Fromer's suggestion to personalize incentive packages to individual artists.<sup>314</sup> The right incentives that drive artistic expression vary depending on the artist and the circumstances,<sup>315</sup> so some artists may value financial rewards more than expressive incentives, and vice versa.<sup>316</sup> Courts can choose the extent of a plaintiff's protection from a menu of incentive packages,<sup>317</sup> thereby maximizing the incentive's value in accordance with the individual artists' needs, at a minimal cost to society.<sup>318</sup> This will ensure that the law implements the optimal incentive per artist, rather than the greatest possible incentive for all.<sup>319</sup>

### CONCLUSION

Copyright law must accept that artists pursue creative endeavors for commercial as well as noncommercial reasons<sup>320</sup> and recognize that injury to artists' deeply held, nonpecuniary interests in their works can constitute irreparable harm. By providing creators with the incentive of exclusionary control over their works,<sup>321</sup> preliminary injunctions can protect copyright holders from injuries to the expressive incentives that motivate them in addition to financial rewards.<sup>322</sup> This proposal will also give greater doctrinal effect to copyright's utilitarian justification.<sup>323</sup> Bringing Professor Fromer's theory of expressive incentives within the scope of the interests sought to be protected by preliminary relief<sup>324</sup> will

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<sup>314</sup> Fromer, *supra* note 26, at 1823 (“[I]t might be sensible to provide creators with a menu of incentive packages from which to choose as to the extent of their protection. . . . In an ideal world, each incentive package would be carefully calibrated to offer maximal societal benefits at minimal cost.”).

<sup>315</sup> Balganesch, *supra* note 43, at 1617.

<sup>316</sup> Fromer, *supra* note 26, at 1823 (“For example, one incentive package might be heavily pecuniary with little expressive reward, another might be principally expressive with little pecuniary incentive . . . and another might be a tempered mix of the two.”).

<sup>317</sup> *Id.* (“Creators—presumably knowing what they need—can then choose the incentive package that best fits their needs, thereby maximizing the utility of the incentive.”).

<sup>318</sup> *Id.*

<sup>319</sup> Lemley, *supra* note 212, at 125.

<sup>320</sup> See sources cited in *supra* note 236.

<sup>321</sup> See Balganesch, *supra* note 43, at 1573 (“[C]opyright exists primarily (if not entirely) to provide creators with an incentive to produce creative expression through the promise of limited exclusionary control over their creative work.”).

<sup>322</sup> See *supra* note 236.

<sup>323</sup> See Balganesch, *supra* note 43, at 1577 (“[I]n spite of [copyright law’s] avowed adherence to this theory of incentives, its internal doctrinal devices do little to give effect to its theoretical basis.”).

<sup>324</sup> See *supra* Section III.B.

enable the creative industries to thrive notwithstanding the high risk of infringement posed by emerging technologies.<sup>325</sup>

This is a middle ground between the Second and Ninth Circuits' present approaches: in order for a copyright plaintiff to demonstrate irreparable harm, she must show that her alleged injuries are the type that copyright law is intended to remedy, unlike the Second Circuit;<sup>326</sup> however, she need not restrict this showing to conventional economic injuries, unlike the Ninth Circuit.<sup>327</sup> Rather, the plaintiff may demonstrate a sufficient connection between her injuries and the objectives of copyright law by proving that they are copyright harms, which encompasses injury to both economic and expressive interests.<sup>328</sup> This expansive and more realistic approach to irreparable harm will bring courts one step closer to alignment in their determinations of when preliminary injunctions should issue in copyright cases.<sup>329</sup>

In 2015, America's core copyright industries<sup>330</sup> added significant value to the country's gross domestic product, accounting for 6.88% of the U.S. economy and outpacing the rest of the economy in relative growth.<sup>331</sup> Copyright's doctrinal devices must evolve in order to keep up with changing times and maintain this increasingly important position in our economy. In order to effectuate the Constitution's vision for progress and the federal government's vision for achieving it,<sup>332</sup> copyright law must embody a more well-rounded view of creativity. Such a view will ensure that copyright law safeguards and nurtures creativity while evolving with the contemporary state of technology in a uniform manner.

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<sup>325</sup> See *supra* notes 22–24 and accompanying text.

<sup>326</sup> See *supra* Section I.C.2.

<sup>327</sup> See *supra* Section I.C.1.

<sup>328</sup> See *supra* Parts II, III.

<sup>329</sup> See *supra* notes 22–24 and accompanying text.

<sup>330</sup> America's core copyright industries refers to creative industries "whose primary purpose is to create, produce, distribute or exhibit copyright materials," including television production and broadcasting, motion pictures, recorded music, books, periodicals, and all forms of software, including video games. STEPHEN E. SIWEK, INT'L INTELLECTUAL PROP. ALL., COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2016 REPORT 4 (2016), <http://www.iipawebsite.com/pdf/2016CpyrtRptFull.PDF>.

<sup>331</sup> *Id.* at 2–4.

<sup>332</sup> See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (noting that through the Act, Congress purports to motivate the creative genius of authors in accordance with its constitutional underpinning in the IP Clause); see also *supra* notes 226–34 and accompanying text.