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## Copyright Essentialism and the Performativity of Remedies

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## COPYRIGHT ESSENTIALISM AND THE PERFORMATIVITY OF REMEDIES

ANDREW GILDEN\*

### ABSTRACT

*This Article critically examines the interrelationship between substantive copyright protections and the remedies available for infringement. Drawing from constitutional remedies scholarship and poststructural theories of performativity, it argues that a court's awareness of the likely remedy award in a particular dispute—combined with its normative view of how future actors should address similar disputes—“reaches back” and shapes the determination of the parties' respective rights.*

*Copyright scholars have long sought to limit the availability of injunctive relief, and several recent court decisions have adopted this reform. For example, in *Salinger v. Colting* the Second Circuit vacated a preliminary injunction against a critical reinterpretation of *The Catcher in the Rye*, setting forth a new preliminary injunction standard that expressly requires a court to consider the First*

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*Amendment interests of the parties and the public. In the same opinion, however, the court in a single paragraph affirmed “in the interest of judicial economy” the district court’s widely derided rejection of Fredrik Colting’s fair use defense. This Article suggests that this was no coincidence. It demonstrates that limits on available remedies have the potential to lead to the expansion of substantive rights, further entrenching dominant interests within the copyright system under the guise of protecting free speech and expression.*

TABLE OF CONTENTS

INTRODUCTION . . . . . 1126

I. REMEDY REFORM PROPOSALS . . . . . 1134

*A. First Amendment Approaches: Remedies as  
    Procedural Safeguards* . . . . . 1135

*B. Law and Economics Approaches:  
    From Property Rule → Liability Rule* . . . . . 1141

II. THE RIGHTS/REMEDY RELATIONSHIP . . . . . 1145

III. THE PERFORMATIVITY OF REMEDIES . . . . . 1154

IV. RIGHTS ESSENTIALISM IN MOTION:

    THE REEMERGENCE OF THE FOUR-FACTOR TEST . . . . . 1161

*A. eBay v. MercExchange* . . . . . 1161

*B. Salinger v. Colting* . . . . . 1164

*C. Splitting the Baby* . . . . . 1169

V. WHAT IS THE HARM? . . . . . 1173

*A. Distributional Consequences and  
    Chilling Effects* . . . . . 1173

*B. Lack of Transparency* . . . . . 1178

CONCLUSION . . . . . 1182

## INTRODUCTION

In declaring that a “statutory right to exclude” is “distinct from the provision of remedies for violations of that right,” the Supreme Court revealed and further entrenched a rights/remedy problem in copyright law.<sup>1</sup> By viewing remedies principally as a means of addressing the real-world consequences of a predicate rights violation, this distinction overlooks the role of remedies in establishing and shaping substantive rights. Although the interplay between rights and remedies has been well explored in constitutional law,<sup>2</sup> and scholars in other areas of private law have grappled with the rights/remedy distinction,<sup>3</sup> intellectual property scholarship has, for the most part, lacked critical insight into the relationship between “the creation of a right” and the “provision of remedies.”<sup>4</sup> This Article (1) shows how the conventional framing of copyright remedies overlooks the interrelationship between rights and remedies and (2) develops a “performative” theory of remedies to explain how limitations on remedies in the name of the First Amendment might actually serve to reinforce rights-holder dominance within the copyright system.

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1. *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392 (2006) (vacating permanent injunction in patent case and stating that its “approach is consistent with our treatment of injunctions under the Copyright Act”); *see also Salinger v. Colting*, 607 F.3d 68, 78 (2d Cir. 2010) (quoting *eBay*, 547 U.S. at 391-93).

As this Article will show, by suggesting there is a rights/remedy problem, I do *not* mean that copyright law lacks effective remedies for violations of its statutory rights. *See, e.g.*, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1489 (1987) (“It therefore seems evident that at least in some cases, blanket government immunity from liability conflicts with the Constitution’s structural principle of full remedies for violations of legal rights against government.”); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778 (1991) (“When, if ever, does the Constitution require particular remedies for constitutional violations? Must there be an effective remedy for every such violation—and if so, what, exactly, does ‘effective’ mean in this setting?”).

2. *See, e.g.*, John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999); David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199.

3. *See, e.g.*, H. Brian Holland, *Tempest in a Teapot or a Tidal Wave? Cybersquatting Rights and Remedies Run Amok*, 10 U. FLA. J. TECH. L. & POLY 301 (2005) (focusing on Internet law); Stephen A. Smith, *The Structure of Unjust Enrichment Law: Is Restitution a Right or a Remedy?*, 36 LOY. L.A. L. REV. 1037 (2003) (describing unjust enrichment law).

4. *eBay*, 547 U.S. at 392.

Many copyright scholars have invoked the First Amendment<sup>5</sup> and related concepts<sup>6</sup> to rein in both the substantive and remedial dimensions of copyright. In response to widely perceived overreach by industrial copyright holders, these scholars have put forth competing normative visions of our copyright system that would push back against the steady accretion of rights and limit the consequences of infringement through a scaled-back remedial regime. For example, even if a particular use of a copyrighted work is not sufficiently “transformative” to be considered fair use, a court could deny the copyright holder’s request to enjoin the distribution of the infringing work and ensure the public’s access to a socially valuable good.<sup>7</sup>

Although efforts to rein in the “substantive” expansions of copyright—the unlawfulness of a wider range of activities for a longer period of time—have been largely unsuccessful,<sup>8</sup> remedy reform efforts in recent years have proven remarkably fruitful.<sup>9</sup> In

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5. See, e.g., C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891 (2002); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on the Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CALIF. L. REV. 283 (1979); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001).

6. See, e.g., LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY*, at xvi (2004) (“free culture”); William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168, 193 (Stephen R. Munzer ed., 2001) (“semiotic democracy”); Jed Rubenfeld, *Freedom of Imagination: Copyright’s Constitutionality*, 112 YALE L.J. 1 (2002) (“freedom of imagination”).

7. See, e.g., Goldstein, *supra* note 5, at 1030.

8. See, e.g., *Golan v. Holder*, 132 S. Ct. 873, 892-94 (2012) (rejecting First Amendment challenge to section 514 of the Uruguay Round Agreements Act, which restored copyright protection to certain foreign works that had entered the public domain); *Eldred v. Ashcroft*, 537 U.S. 186, 218-21 (2001) (rejecting First Amendment challenge to Copyright Term Extension Act); *Kahle v. Gonzales*, 487 F.3d 697 (9th Cir. 2007) (“[T]raditional First Amendment safeguards such as fair use and the idea/expression dichotomy are sufficient to vindicate the speech interests affected.”), *cert. denied sub nom. Kahle v. Mukasey*, 128 S. Ct. 958 (2008); *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622, 626 (9th Cir. 2003) (“First Amendment concerns in copyright cases are subsumed within the fair use inquiry.... [I]f the use ... is not fair use, there are no First Amendment prohibitions against granting a preliminary injunction.”); *Chi. Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 631 (7th Cir. 2003) (“The First Amendment adds nothing to the fair use defense.”).

9. Seemingly successful opposition to the Stop Online Privacy Act—a statute that would

2006, the Supreme Court in *eBay v. MercExchange* prohibited categorical rules entitling a patent owner to an injunction,<sup>10</sup> and the Second Circuit in *Salinger v. Colting* extended *eBay* to copyright.<sup>11</sup> In the wake of *Salinger*, *eBay*, and other appellate decisions adopting their approach,<sup>12</sup> copyright's remedial structure has shifted away from the reflexive issuance of preliminary and permanent injunctions<sup>13</sup> toward a more rigorous analysis of the various interests impacted by the requested relief.<sup>14</sup> Increasingly, the question of

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widely expand the "remedies" available for infringement but purports not to expand the "substantive" reach of copyright—is perhaps another example of this trend. See H.R. 3261, 112th Cong. § 2(a)(2) (2011) ("Nothing in title I shall be construed to enlarge or diminish liability, including vicarious or contributory liability, for any cause of action available under title 17, United States Code, including any limitations on liability under such title.").

10. *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 393-94 (2006).

11. 607 F.3d 68, 77 (2d Cir. 2010).

12. See, e.g., *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 979 (9th Cir. 2011) (rejecting plaintiff's argument that it was entitled to a presumption of irreparable harm and affirming denial of preliminary injunction), *cert. denied*, 132 S. Ct. 1713 (2012); *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 990 (9th Cir. 2011) (vacating preliminary injunction against use of plaintiff's drawings in Air Force contract bids where district court relied on presumption of irreparable harm); *Christopher Phelps & Assocs. v. Galloway*, 492 F.3d 532, 543 (4th Cir. 2007) (rejecting argument that plaintiff was entitled to injunctive relief because there was a threat to continuing copyright infringement).

13. Although the focus of this Article is on the trend toward limiting injunctive relief as opposed to potential limitations on damages awards, I suspect that many of its insights—in particular the inverse relationship between the breadth of rights and the scope of available remedies—apply in large measure to monetary relief. Scholars have argued that the prospect of exorbitant statutory damages, like the prospect of an injunction, chills the use of and engagement with copyrighted works, and they have accordingly sought a clawback in available monetary damages. See, e.g., Alan E. Garfield, *Calibrating Copyright Statutory Damages to Promote Speech*, 38 FLA. ST. U. L. REV. 1, 16-18 (2010) (noting how high statutory damages discourages use of copyrighted works); Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009) (discussing excessive damage awards and arguing for reform). To the extent that such a clawback would lessen the perceived consequences of an infringement finding, for the reasons explored in Part III, the lowered "costs" of such a finding may lead a court to comfortably find infringement where it previously might have hesitated. The issue of exorbitant statutory damages awards and potential due process limits has also been the subject of several notable recent decisions. See *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 488-90 (1st Cir. 2011) (reinstating \$675,000 damages award and remanding for consideration of common law remitter), *cert. denied*, 132 S. Ct. 2431 (2012); *Capitol Records, Inc. v. Thomas-Rasset*, 799 F. Supp. 2d 999, 1001 (D. Minn. 2011) (reducing a \$1.5 million jury award to \$54,000).

14. This trend is not, of course, universal. Eric Goldman has tracked a number of district court orders that have issued extremely broad injunctions covering numerous third-party search engines and domain name registries. See Venkat Balasubramani & Eric Goldman, *Egregious/Overreaching Ex Parte Orders for Rightsowners Keep Coming—Deckers and*

injunctive relief no longer collapses into a mere determination of likely success on the merits but instead requires a structured, sequential consideration of the merits of a plaintiff's claims, irreparable harm, balance of hardships, and the public interest.<sup>15</sup> As a result, several copyright scholars have celebrated the *eBay* and *Salinger* standards as ways to counteract some of copyright's most flagrant First Amendment abuses.<sup>16</sup>

*Salinger* demonstrates, however, the risks of advancing remedy reform while paying little attention to the relationship between the determinations of rights and remedies. Although the Second Circuit expressly championed *eBay* as providing a First Amendment-sensitive standard for injunctive relief, it nonetheless breezily approved the district court's highly derided<sup>17</sup> conclusion that the novel *60 Years Later: Coming Through the Rye* was not a fair use of Salinger's *The Catcher in the Rye*.<sup>18</sup> Notwithstanding *60 Years Later's* deeply critical commentary on both Holden Caulfield—who appeared as a seventy-six-year-old—and Salinger himself—who also

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Richemont, TECH. & MARKETING L. BLOG (Jan. 17, 2012, 11:49 AM), [http://blog.ericgoldman.org/archives/2012/01/two\\_more\\_ex\\_par.htm](http://blog.ericgoldman.org/archives/2012/01/two_more_ex_par.htm), and cases cited/cross-posted therein. These injunctions have generally been issued ex parte with the defendant in default.

15. *eBay*, 547 U.S. at 391 (“[P]laintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.”); *see also* *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008) (“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”).

16. *See, e.g.*, Arlen W. Langvardt & Tara E. Langvardt, *Caught in the Copyright Rye: Freeing First Amendment Interests from the Constraints of the Traditional View*, 2 HARV. J. SPORTS & ENT. L. 99, 152-54 (2011) (celebrating *Salinger* and *eBay* as advancing free speech interests in copyright injunctions); Jessica Silbey, *Comparative Tales of Origins and Access: Intellectual Property and the Rhetoric of Social Change*, 61 CASE W. RES. L. REV. 195, 233 (2010) (citing *eBay* as a move toward more communitarian understanding of intellectual property); *see also* Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 757-58 (2011) (citing *Salinger* as part of “growing judicial skepticism toward copyright holder rights”).

17. *See, e.g.*, Langvardt & Langvardt, *supra* note 16, at 155 (opining that the Second Circuit erred in upholding the district court's determination that the fair use defense would likely fail); Kate O'Neill, *The Content of Their Characters: J.D. Salinger, Holden Caulfield, Fredrik Colting*, 59 J. COPYRIGHT SOC'Y U.S.A. 291, 318-19 (2012) (criticizing district court's interpretation of Colting's novel).

18. *See Salinger v. Colting*, 607 F.3d 68, 83 (2d Cir. 2010).

appeared in the novel<sup>19</sup>—the Second Circuit affirmed the rejection of fair use in a single paragraph.<sup>20</sup> The consequences of being deemed an infringer may be mitigated through the *Salinger* approach, but *Salinger* itself substantially increases the number of individuals potentially deemed infringers for critically reinterpreting copyrighted works. After *Salinger*, rights holders may not be able to obtain a quick and easy injunction against such uses, but they may be able to effect the same outcome with a demand for compensation and/or the threat of money damages.<sup>21</sup> Indeed, shortly after the Second Circuit's ruling, Colting agreed not to distribute *60 Years Later* in the United States.<sup>22</sup>

The *Salinger* and *eBay* decisions' underlying assumption about the ontological independence of rights—and the derivativeness of the remedial determination from those rights—obscures the role of remedies in the production of “substantive” entitlements.<sup>23</sup> When viewed in isolation from its discussion of fair use, the *Salinger* court's discussion of injunctive relief appears to be an unqualified check against copyright overreach. When the two portions are viewed together, however, the heightened injunction standard appears to have reformulated the overall calculus of adjudicating both remedies *and* rights. Vacating the injunction seemingly renders the fair use analysis less consequential, in turn allowing the court to both champion the First Amendment interests in accessing Colting's book and strongly signal to the *Salinger* estate that it would be entitled to compensation.<sup>24</sup> The *Salinger* standard may be celebrated as a First Amendment safeguard, but the litigation

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19. See O'Neill, *supra* note 17, at 303-04.

20. *Salinger*, 607 F.3d at 83.

21. See O'Neill, *supra* note 17, at 340-42.

22. See, e.g., Andrew Albanese, *J.D. Salinger Estate, Swedish Author Settle Copyright Suit*, PUBLISHERS WKLY. (Jan. 11, 2011), <http://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/45738-j-d-salinger-estate-swedish-author-settle-copyright-suit.html>.

23. The notion that the merits determination is “substantive” indicates that the infringement/rights/merits determination exists on its own. See RENÉ DESCARTES, PRINCIPLES OF PHILOSOPHY 23 (Valentine Rogers Miller & Reese P. Miller trans., D. Reidel Publ'g Co. 1984) (1644) (“By ‘*substance*’, we can understand nothing other than a thing which exists in such a way that it needs no other thing in order to exist.”). I accordingly refer to the substance/procedure and rights/remedies binaries for the sake of convenience only and without any fealty to their conceptual underpinnings.

24. See Langvardt & Langvardt, *supra* note 16, at 154.

nonetheless resulted in a copyright holder successfully blocking the U.S. distribution of a largely original work. The court's rhetoric expresses sensitivity toward free speech interests—and its new four-part test appears much fairer than automatically enjoining infringing works—but the decision itself does little to dislodge the permissions-based norms that prompted remedy reforms in the first place.<sup>25</sup>

Part I of this Article will document the remarkable consensus within copyright scholarship about the need to scale back injunctive relief. It will first review a long line of scholarship seeking a more explicit role for the First Amendment in copyright law. This scholarship has repeatedly advocated a heightened standard, or unavailability, of injunctive relief as a last line of defense to ensure public access to creative expression that is nonetheless deemed infringing.<sup>26</sup> It will then briefly survey similar law and economics proposals to shift from a property rule—with readily available injunctive relief—to a liability rule—with an expectation of monetary relief—in order to lower transaction costs and facilitate transparent, efficient bargaining.<sup>27</sup>

Part II will argue that these lines of copyright scholarship have largely adopted an “essentialist” view of remedies, whereby a determination of rights precedes and thus is unaffected by the determination of remedies that appears to occur later in time. Although copyright scholarship has largely overlooked the ways in which the scope of available remedies may be inversely related to the scope of substantive protections, this interplay has been explored in other legal contexts. Constitutional law scholars have pointed out that narrowing the remedies available for a violation of a constitutional right—for example, through the doctrines of qualified immunity and nonretroactivity—effectively “lowers the cost” of constitutional innovation, allowing courts to expand the scope of constitutional protections without needing to deplete government coffers or set free large numbers of inmates. Although this dynamic may lead to more robust civil liberties in the constitu-

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25. See O'Neill, *supra* note 17, at 340-41 (discussing how the decision “expand[ed] copyright’s scope as an exclusive property right”).

26. See *infra* Part I.A.

27. See *infra* Part I.B.

tional context, in the copyright context, the narrowed scope of remedies can serve to lower the cost of the further expansion of copyright. If the whole point of narrowing the availability of injunctive relief is to push back against copyright overreach and protect First Amendment interests, the lesser consequences of a court concluding that a particular use is infringing would seem to undermine this effort.

Part III will build upon the remedies scholarship in Part II and set forth a “performative” approach to remedies. In the same way that speech can be performative by producing the phenomenon it names,<sup>28</sup> a remedy is performative to the extent it shapes the right it implements. Although remedies scholarship provides a useful taxonomy of the various ways rights and remedies may interact, it lacks the conceptual tools to expose the normative thrust behind a particular rights/remedy configuration. Poststructural theories of performativity, however, can illustrate how a court’s normative preference for the ultimate outcome of a particular dispute—and similar future disputes—“reaches back” and sets into motion a decision-making process designed to justify those normative ends. Although rights appear to come “before” and remedies “after,” copyright protections only come into existence through their iteration in a particular remedy, and the linear sequencing of copyright litigation masks the ontological significance of the remedial determination. Remedies may be curtailed ostensibly to protect downstream First Amendment interests, but cordoning off the rights determination allows status quo industrial norms to remain intact, albeit with a new veneer of fairness.

Part IV will then survey judicial decisions that have embraced the essentialist approach to remedies in the process of limiting injunctive relief. As with the scholarship surveyed in Part I, these courts conceptualize remedies as distinct from rights and temporally posit the question of remedies after the determination of respective rights.<sup>29</sup> By employing these conceptual and temporal distinctions,

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28. See, e.g., J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 4-11 (1962); JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 136-41 (1969). For example, a court’s pronouncement that a defendant is “guilty” or that a couple is “man and wife” produces the convict and married couple, respectively, it is addressing.

29. See *infra* Part IV.A-B.

several courts have “split the baby” by ruling in favor of the rights holder at the merits stage but then switching direction and ruling in favor of the defendant at the remedies stage.<sup>30</sup>

Applying the insights from remedies and performativity scholarship, Part V will explain why the split-the-baby approach is a problem. Although the shift away from strong property-like protection for copyright holders has some clear benefits for those entities regularly litigating copyright issues, for those operating more in the “shadow” of copyright law—individual authors, artists, documentary filmmakers, and nonprofits—the emergent split-the-baby liability rule materially expands the specter of infringement. For these individuals and entities, the threat of damages may be just as likely to chill their speech and expression as the threat of an injunction, and the expansion of substantive protections gives copyright holders firmer ground to target noncommercial uses, for example through takedown notices under the Digital Millennium Copyright Act (DMCA). To the extent that remedy reform has sprung from normative desires for a more populist, speech-protective copyright system, this dynamic should be cause for concern. It is particularly concerning given that this expansion of substantive copyright protections is not a product of careful, deliberate thought or even of political debate, but instead stems from courts ostensibly giving each party to a copyright lawsuit a little bit of what it wants, regardless of the collateral, precedential consequences to third parties or the public at large.

The purpose of this Article is not to argue that *eBay* and *Salinger* erred in raising the bar for preliminary and permanent injunctions, or that the *eBay* standard represents a complete overhaul of copyright injunction. In many cases, the continued availability of statutory damages can deter a court from embracing an unboundedly hawkish approach to copyright enforcement,<sup>31</sup> and there are many circumstances in which a copyrighted work is unquestionably infringed but an injunction should nonetheless not lie, such as the infringement of architectural works<sup>32</sup> or widespread integration into

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30. See *infra* Part IV.C.

31. See Langvardt & Langvardt, *supra* note 16, at 154.

32. See, e.g., *Christopher Phelps & Assocs. v. Galloway*, 492 F.3d 532, 543 (4th Cir. 2007) (interpreting *eBay* to prohibit a presumption of irreparable harm); *Allora, L.L.C. v.*

derivative works.<sup>33</sup> Nevertheless, in complex, novel, or close cases—or where the alleged infringer can easily absorb a damages award—courts should be aware that, even though the denial of an injunction may mitigate the consequences of infringement, the corresponding expansion of the copyright entitlement may be to the detriment of a large number of individuals infrequently able to assert their defenses in court.

More broadly, this Article seeks to raise questions about the potential ideological commitments embedded in the remedies determination and to push back against the assumption that remedies can be neatly divorced from the normative underpinnings of substantive entitlements. Remedies play an integral part in the shaping of rights, and overlooking this function risks further entrenching the norms embedded in both. The *eBay* standard perhaps has gained traction not because it furthers the First Amendment concerns of copyright scholarship but instead because it is an effective vehicle for dominant interests to appear more “proximally just” while expanding and entrenching control over speech and expression.

### I. REMEDY REFORM PROPOSALS

Scholars and advocates have long sought both substantive and remedial limits on the reach of copyright law. Numerous scholars have argued that the steady expansion in the scope of substantive copyright protection—including term extensions, the DMCA, and contractions in fair use—has stretched well beyond its mandate to promote the progress of useful arts and sciences. Moreover, the near-automatic availability of injunctive relief plus substantial money damages has given copyright holders the potential power to shut down cutting-edge web services, block the deployment of new technologies, and delay the release of a book or motion picture. Many scholars have proposed a substantially scaled-back remedial

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Brownstone, Inc., No. 1:07CV87, 2007 WL 1246448, at \*5, \*8 (W.D.N.C. Apr. 27, 2007) (declining to presume irreparable harm following a prima facie showing of copyright infringement).

33. See, e.g., *Abend v. MCA, Inc.*, 863 F.2d 1465, 1479 (9th Cir. 1988) (observing that an injunction “would cause a great injustice” to the owners of the derivative film), *aff’d sub nom. Stewart v. Abend*, 495 U.S. 207 (1990).

regime, including substantial limitations on injunctive relief. This Part will first look at remedy reform proposals that have developed in response to First Amendment concerns with copyright injunctions and then turn to law and economics proposals to limit injunctive relief as part of an overall shift from a property to a liability rule.

*A. First Amendment Approaches: Remedies as Procedural Safeguards*

For decades, copyright scholars have put forward a variety of proposals for limiting the availability of injunctive relief in order to better ease the tensions between copyright law and the First Amendment.<sup>34</sup> A fairly consistent theme throughout, however, is a conceptual and temporal distinction between the determination of rights—including copyrightability, duration, and infringement—and remedies available for infringement.

In his seminal 1970 article *Copyright and the First Amendment*, Paul Goldstein argued that copyright outlawed socially valuable speech otherwise protected by the First Amendment, both in its statutory monopoly and in its delegation of quasi-censorship powers to the content industries.<sup>35</sup> To better accommodate constitutional values of free speech, he proposed two “accommodative principles” that distinguish between the rights adjudication and the determination of available remedies.<sup>36</sup> The first accommodative principle would excuse infringement when the challenged use furthers the public interest.<sup>37</sup> The second accommodative principle would require, among other things, “that actual damages be demonstrated by the plaintiff, and that the granting of legal, not equitable, relief be the general rule when the plaintiff prevails.”<sup>38</sup> Goldstein observed that “recourse to injunctive relief in copyright cases is not uncom-

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34. For proposals to limit injunctive relief in addition to those discussed herein, see Floyd Abrams, *First Amendment and Copyright*, 35 J. COPYRIGHT SOC'Y U.S.A. 1, 3, 12 (1987); James L. Oakes, *Copyrights and Copyremedies: Unfair Use and Injunctions*, 18 HOFSTRA L. REV. 983, 994-96 (1990); see also 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.06[B][1][b][i] (Matthew Bender, rev. ed. 2012) (discussing the modern trend toward limiting injunctions).

35. Goldstein, *supra* note 5.

36. *Id.* at 988.

37. *Id.*

38. *Id.*

mon, and it is in the administration of this remedy that copyright doctrine departs most notably from the requirements of the second accommodative principle.”<sup>39</sup>

In a similarly influential article two decades later, Judge Pierre Leval set forth a powerful critique of the then-dominant approaches to the fair use defense, which placed insufficient value on the “transformative” works that since have become central to the doctrine’s protections.<sup>40</sup> Although the bulk of Judge Leval’s efforts focused on the scope of infringement as circumscribed by the fair use defense, his proposals viewed the injunctive-relief inquiry as an additional backstop for many of the same public interests.<sup>41</sup> He observed that “[o]ne of the most unfortunate tendencies in the law surrounding fair use is the notion that rejection of a fair use defense necessarily implicates the grant of an injunction.”<sup>42</sup> In arguing that the presumption of irreparable harm was improper in cases presenting a colorable fair use defense, Leval lamented that “[l]egal rhetoric has dulled thought on the injunction remedy.”<sup>43</sup> He continued:

Historians, biographers, critics, scholars, and journalists regularly quote from copyrighted matter to make points essential to their instructive undertakings. Whether their takings will pass the fair use test is difficult to predict. It depends on widely varying perceptions held by different judges. Yet there may be a strong public interest in the publication of the secondary work. And the copyright owner’s interest may be adequately protected by an award of damages for whatever infringement is found.<sup>44</sup>

In order to acknowledge and properly accommodate all these potential interests, Leval proposed that “[w]hen a court rejects a fair use defense, it should deal with the issue of the appropriate remedy

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39. *Id.* at 1033. Portending doctrinal developments to come, Goldstein’s article “implicitly endorses a scheme of compulsory licensing.” *Id.* at 1034.

40. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990); *see, e.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (citing Leval, *supra*, at 1111).

41. Leval, *supra* note 40, at 1132-35.

42. *Id.* at 1130-31.

43. *Id.* at 1132.

44. *Id.*

on its merits. The court should grant or deny the injunction *for reasons*, and not simply as a mechanical reflex to a finding of infringement.”<sup>45</sup> Accordingly, to adequately vindicate the interests served by the fair use inquiry, Leval advocated a sequential approach that first looks to the merits of the fair use defense itself and then afterwards limits injunctive relief for the close cases that nonetheless slip through to the remedies stage.<sup>46</sup>

Although seemingly advocating a two-stage, sequential approach to the infringement and remedies questions, Leval hinted at the interrelationship between the availability of injunctive relief and the scope of the substantive copyright entitlement. He suggested that “the tendency toward the automatic injunction can harm the interests of plaintiff copyright owners” because “[c]ourts may instinctively shy away from a justified finding of infringement if they perceive an unjustified injunction as the inevitable consequence.”<sup>47</sup> In a revealing footnote, Judge Leval admitted that “[a]n example of such confusion, I confess, may be my own opinion in *Salinger v. Random House, Inc.*]. With hindsight, I suspect my belief that the book should not be enjoined made me too disposed to find fair use where some of the quotations had little fair use justification.”<sup>48</sup> This reciprocal relationship between narrow right and broad remedy, apparently leading to an initial finding of fair use in the earlier *Salinger* case, presaged an inversion of that relationship in the Second Circuit’s *Salinger* decision nearly a generation later.<sup>49</sup>

The next major wave of proposals came at the turn of the millennium following controversial copyright-protectionist laws such as the DMCA<sup>50</sup> and the Sonny Bono Copyright Term Extension Act (CTEA).<sup>51</sup> These legal developments, combined with the proliferation of digital media, gave rise to a robust body of scholarship

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45. *Id.* at 1133 (footnote omitted).

46. *See id.* at 1133-34.

47. *Id.* at 1131.

48. *Id.* at 1131 n.114; *see also* *Salinger v. Random House, Inc.*, 650 F. Supp. 413, 426 (S.D.N.Y. 1986) (finding fair use in publication of Salinger’s unpublished personal letters in an unauthorized biography of the author), *rev’d*, 811 F.2d 90 (2d Cir. 1987). As in the later *Salinger* decision, Leval, in retrospect, would have denied both fair use and injunctive relief. *See* Pierre N. Leval, *Fair Use or Foul*, 36 J. COPYRIGHT SOC’Y U.S.A. 167, 179 (1989).

49. *See Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010) (vacating an injunction but denying fair use defense).

50. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

51. Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified in scattered sections of 17 U.S.C.).

questioning the priorities of our copyright system and seeking to better align copyright with the transformed cultural landscape of the digital age.<sup>52</sup> Although the nature and full extent of these proposals are far beyond the scope of this Article, the issues of remedies generally—and injunctive relief specifically—have figured prominently in this scholarship. For example, in developing a limitation on copyright based upon the “freedom of imagination,” Jed Rubenfeld argued that “the First Amendment requires special remedy rules for copyright holders’ derivative works rights and performance rights.”<sup>53</sup> If an alleged infringement is “not a reproduction but a derivative work, neither an injunction nor damages should be available,” and the remedy should be limited to an allocation of defendant’s profits.<sup>54</sup> Similarly, Neil Netanel argued that the First Amendment requires modification of the fair use doctrine through (1) giving greater weight to the defendant’s critical expression and purpose, (2) shifting some of the burden of proof to the plaintiff, and (3) “where the defendant presents a colorable but unsuccessful claim of fair use, [courts should generally] award damages in the amount of a reasonable license fee instead of enjoining the use.”<sup>55</sup>

In a much-cited article from this era, Mark Lemley and Eugene Volokh called for the application of the First Amendment’s prior restraint doctrine to copyright preliminary injunctions.<sup>56</sup> Drawing from the general prohibition on enjoining the dissemination of speech before a full adjudication on the merits, Lemley and Volokh argued that “preliminary injunctions should ... generally be prohibited in cases involving nonliteral copying.”<sup>57</sup> They noted that

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52. Prominent examples include: YOCHAI BENKLER, *THE WEALTH OF NETWORKS* (2006); JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS (1996); LESSIG, *supra* note 6; JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001).

53. Rubenfeld, *supra* note 6, at 57-58.

54. *Id.* at 55; see also Alex Kozinski & Christopher Newman, *What’s So Fair About Fair Use?*, 46 J. COPYRIGHT SOC’Y U.S.A. 513 (1999) (arguing that both injunctive relief and fair use should be unavailable for derivative works and that the remedy should be limited to a pro rata accounting of profits and actual damages); John Tehranian, *Whither Copyright? Transformative Use, Free Speech, and an Intermediate Liability Proposal*, 2005 BYU L. REV. 1201 (proposing that transformative uses be subject only to an accounting of profits, not damages or injunctive relief).

55. Netanel, *supra* note 5, at 83-84.

56. Lemley & Volokh, *supra* note 5.

57. *Id.* at 210.

plaintiffs traditionally needed to satisfy a four-factor test in order to obtain a preliminary injunction but that the “ostensibly four-factor test collapses, in virtually all circuits, to a simple inquiry into likelihood of success on the merits.”<sup>58</sup> Courts presume the existence of irreparable harm, the balance of equities “virtually always” weighs in favor of the copyright plaintiff, and it is “virtually axiomatic” that the public interest favors upholding copyright protections through granting preliminary injunctions.<sup>59</sup> Largely because the preliminary injunction inquiry presumes irreparable harm, effectively ends at the determination of likely success on the merits, and does not actually proceed to the two additional steps, it burdens a considerable amount of speech that is protected by the First Amendment and might not be infringing.

Even though a preliminary injunction inquiry seemingly addresses the question of infringement at the same time that it addresses whether to grant a provisional remedy, Lemley and Volokh’s article suggests that there nonetheless remains a distinction between the merits/likelihood of success determination and the analysis of whether additional considerations entitle plaintiff to the requested relief. The major vice of copyright preliminary injunctions observed by Lemley and Volokh—that they lack remedial safeguards following a finding of infringement<sup>60</sup>—closely mirrors the earlier concerns of Goldstein and Leval that courts mechanically issue injunctions without giving proper attention to the questions of remedy that are supposed to chronologically follow a finding of infringement.

Although the Supreme Court’s 2003 decision in *Eldred v. Ashcroft* significantly dampened hopes for robust First Amendment scrutiny of substantive copyright protection,<sup>61</sup> the Court’s decision three years later in *eBay v. MercExchange* recently has considerably fueled the prospect of integrating First Amendment-related safeguards into the determination of remedies.<sup>62</sup> Drawing from

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58. *Id.* at 158-59 (footnote omitted).

59. *Id.* at 161-62.

60. *Id.* at 197.

61. 537 U.S. 186, 187-88 (2003) (upholding constitutionality of Copyright Term Extension Act). Such hopes were likely further dampened by the Supreme Court’s recent refusal to provide First Amendment scrutiny to section 104A of the Copyright Act. *See Golan v. Holder*, 132 S. Ct. 873, 883, 889-92 (2012).

62. *See supra* notes 15-16 and accompanying text.

*eBay*'s prohibition of categorical rules favoring patent injunctions, Pamela Samuelson and Krzysztof Bebenek argue that a presumption of irreparable harm in copyright preliminary injunction cases "undermines the constitutional values of U.S. copyright law when applied to transformative works, such as clips of songs or movies in documentary films or in user-generated content."<sup>63</sup> They argue that the presumption "may cause courts to enjoin a use without careful reflection" and that "[r]equiring plaintiffs to prove that they will be irreparably harmed offers an important procedural safeguard against unreasonable restraints on free expression interests of follow-on creators."<sup>64</sup> Several scholars have cited *eBay* for the proposition that, in close fair use cases in which the court ultimately determines that the use is infringing, issuing an injunction may be "an improper abridgement of speech."<sup>65</sup>

In another recent article, Orit Fischman Afori expressly proposes a flexible, nuanced approach to remedies as a way of reshaping the contours of copyright law.<sup>66</sup> Afori advocates a "cure" theory of remedies under which "remedies are not simply an automatic response to the analysis of the right, but rather a second stage of legal theory to be discussed in order to best achieve the legal effect, after the first stage of the right's relevant discussion has been exhausted."<sup>67</sup> At this later remedy stage, courts can develop a "comprehensive 'cure' doctrine that would ease some of the basic problems of copyright law.... Courts could first conclude that an infringement occurred, and at the remedies stage conclude that no damages (or only reduced damages) are warranted."<sup>68</sup> Accordingly,

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63. Pamela Samuelson & Krzysztof Bebenek, *Why Plaintiffs Should Have to Prove Irreparable Harm in Copyright Preliminary Injunction Cases*, 6 I/S: J.L. & POLY FOR INFO. SOC'Y 67, 80 (2010).

64. *Id.* at 89.

65. Robert Kasunic, *Preserving the Traditional Contours of Copyright*, 30 COLUM. J.L. & ARTS 397, 421 (2007); see also Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969, 1030 (2007) ("[E]ven when the harm caused by the defendant's use requires compensation, the social value of the defendant's use should weigh heavily in a court's decision on whether to grant an injunction."); John M. Newman, Note, *Raising the Bar and the Public Interest: On Prior Restraints, "Traditional Contours," and Constitutionalizing Preliminary Injunctions in Copyright Law*, 10 VA. SPORTS & ENT. L.J. 323, 344-45 (2011).

66. Orit Fischman Afori, *Flexible Remedies as a Means to Counteract Failures in Copyright Law*, 29 CARDOZO ARTS & ENT. L.J. 1, 2 (2011).

67. *Id.* at 23.

68. *Id.* at 24.

subjecting a request for injunctive relief to *eBay*'s four-factor test would help better advance free speech interests, promote competition, and ensure greater public access to creative works.<sup>69</sup>

Again, what emerges from both older and recent proposals is a descriptive and normative distinction between the adjudication of the merits and the determination of the remedy. Copyright scholars may see a role for the First Amendment at every point along the adjudicative timeline, but under all of these proposals, the First Amendment would be incorporated uniquely and independently into each stage of litigation. First Amendment scrutiny of the copyright term or the fair use doctrine is not expressly contingent upon increased sensitivity to free speech interests in the determination of injunctive relief; the remedy reforms can be adopted piecemeal, regardless of the court's view on the question of infringement. For example, *Eldred*'s rejection of the First Amendment challenge to the CTEA may seem to point in a different direction than the heightened standard for injunctive relief in *eBay*, but this distinction between rights and remedies has pervaded over forty years of copyright scholarship. As the following Parts will illustrate, the scholarship surveyed above has proven influential on the development of copyright injunction standards, persuading courts to devote, or in my view shift, a significant amount of intellectual energy to the remedy determination. In the process, a largely unquestioned rights/remedy distinction has become embedded into copyright law in a manner that risks undermining the free speech commitments motivating much of the scholarship above.

### *B. Law and Economics Approaches: From Property Rule → Liability Rule*

Some law and economics-minded copyright scholars have also argued for a shift away from injunctive relief,<sup>70</sup> but through a very

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69. *Id.* at 29-33.

70. See, e.g., James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 943-45 (2007) ("If the rights-holder could demand only a compensatory licensing fee, its ability to hijack the defendant's entire production process would disappear ... go[ing] a long way toward curtailing the unnecessary licensing that fuels doctrinal feedback."); Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783 (2007) (arguing that a liability rule helps prevent strategic holdup behavior by entitlement holders); Stewart E. Sterk, *Property Rules, Liability*

different methodological and conceptual framework from the scholars in the previous Section. Unlike much of the scholarship above, law and economics literature tracing back to Calabresi—the author of *Salinger v. Colting*—and Melamed has recognized the functional interrelationship between a substantive entitlement and the remedy available for enforcing that entitlement.<sup>71</sup> Rather than focus on how a particular entitlement does or does not further some normative policy goal, the main question is more often which type of remedy—for example, an injunction or damages—would best facilitate transactions in a particular sector.<sup>72</sup> Generally, in the presence of low transaction costs, parties are able to bargain efficiently towards a mutually beneficial outcome, and a property rule’s promise of injunctive relief helps crystallize each side’s initial bargaining position.<sup>73</sup> On the other hand, if transaction costs are

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*Rules, and Uncertainty About Property Rights*, 106 MICH. L. REV. 1285 (2008) (arguing that liability rules reduce incentives to engage in inefficient informational searches). Law and economics literature does not universally accept the shift away from strong property-like protections, however. See, e.g., David McGowan, *The Tory Anarchism of F/OSS Licensing*, 78 U. CHI. L. REV. 207 (2011); Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655 (1994); cf. William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 361-63 (1989) (discussing the ideal term of a copyright).

71. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); see Gibson, *supra* note 70, at 944-45.

72. See ROGER D. BLAIR & THOMAS F. COTTER, INTELLECTUAL PROPERTY: ECONOMIC AND LEGAL DIMENSIONS OF RIGHTS AND REMEDIES 3 (2005) (assuming that “the policymaker has chosen a particular scope and duration” and “some insights as to the advantages and disadvantages of different possible rules for the private enforcement of these rights in court”); Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL’Y 593, 608 (2008) (“Almost all the literature on the Calabresi-Melamed model has come to view it as focusing almost entirely on the issue of remedies.”); cf. Thomas F. Cotter, *Fair Use and Copyright Overenforcement*, 93 IOWA L. REV. 1271, 1295-97 (2008) (arguing that a liability rule might resolve much of the tension between the First Amendment and copyright depending on “how much weight to accord” defendants’ First Amendment interests).

A notable exception is Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1573-75 (1993), who argues that a shift toward a liability rule would better protect free speech interests. Additionally, although Calabresi and Melamed’s model is best known for its taxonomy of remedial options, they do mention considerations for initial entitlement allocations, such as efficiency, distributional preferences, and “[o]ther [j]ustice [r]easons.” Calabresi & Melamed, *supra* note 71, at 1093-1105.

73. See, e.g., David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 U. PITT. L. REV. 281, 330-31 (2004); Henry E. Smith, *Property and Property Rules*, 79

high, parties may be unable to reach an optimal outcome through private negotiations, and a liability rule ensures that socially beneficial transactions occur by limiting relief to monetary damages. Because copyright transactions often involve a substantial degree of legal uncertainty, strategic holdup behavior, and informational deficiencies, a liability rule limiting plaintiffs to monetary relief would seem appropriate in many cases.<sup>74</sup>

Unlike scholars working more expressly in a First Amendment vein, law and economics-minded scholars have more expressly acknowledged that a shift from a property rule to a liability rule might alter a court's approach to determining the copyright holder's substantive entitlement. As James Gibson has observed, "[O]nce courts no longer confront the all-or-nothing choice that a property rule imposes, they will be more inclined to 'split the baby' and order moderate licensing fees in cases that the defendant would once have won outright."<sup>75</sup> In response to the Ninth Circuit's controversial ruling upholding a preliminary injunction in *Dr. Seuss Enterprises v. Penguin Books USA, Inc.*,<sup>76</sup> Judge Alex Kozinski and Christopher Newman expressly proposed a split-the-baby, liability rule compromise that would deny both fair use and injunctive relief to derivative works and only grant actual damages.<sup>77</sup> Under this approach,

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N.Y.U. L. REV. 1719, 1729 (2004).

74. See, e.g., Sterk, *supra* note 70, at 1297-98.

75. Gibson, *supra* note 70, at 945. Wendy Gordon has similarly intuited that "the switch to monetary remedies [might] encourage a growth in pro-plaintiff doctrine (a growth that hardly needs any more fertilizer)." Wendy J. Gordon, *Render Copyright unto Caesar: On Taking Incentives Seriously*, 71 U. CHI. L. REV. 75, 91 (2004).

76. 109 F.3d 1394 (9th Cir. 1997) (rejecting the argument that an account of the O.J. Simpson trial entitled *The Cat NOT in the Hat! A Parody by Dr. Juice* was fair use of Dr. Seuss's well-known *The Cat in the Hat* and upholding the preliminary injunction). Several scholars have criticized the merits of the Ninth Circuit's analysis. See, e.g., Bruce P. Keller & Rebecca Tushnet, *Even More Parodic than the Real Thing: Parody Lawsuits Revisited*, 94 TRADEMARK REP. 979, 987-88 (2004) ("[D]istinguishing parody from satire requires aesthetic and literary judgment that the copied work is not in any way a target of criticism, and, in particular, it is far from clear that the *Dr. Seuss* court's view was correct."); Tyler T. Ochoa, *Dr. Seuss, The Juice and Fair Use: How the Grinch Silenced a Parody*, 45 J. COPYRIGHT SOC'Y U.S.A. 546, 548 (1998).

77. Kozinski & Newman, *supra* note 54, at 526; see also Richard Dannay, *Copyright Injunctions and Fair Use: Enter eBay—Four-Factor Fatigue or Four-Factor Freedom*, 55 J. COPYRIGHT SOC'Y U.S.A. 449, 459 (2008) ("For copyright owners, where fair use is a close question—close enough that a court might reject a finding of infringement liability for fear that an injunction might be too harsh but unavoidable—*eBay* may avoid the up-or-down risk of the binary fair-use finding." (footnote omitted)).

“the question as to whether *Dr. Juice* was legitimately a parody of Dr. Seuss would still arise, but it would arise as part of a determination of damages, rather than as the gatekeeper of liability.”<sup>78</sup>

By recognizing the importance of remedies in effectuating substantive entitlements, whatever they may be, the Calabresi-Melamed framework “effectively moves the emphasis in rights-analysis towards remedies.”<sup>79</sup> Although to a large extent this framework eschews a sharp conceptual distinction between rights and remedies, it does not eschew the chronological sequencing of their respective determinations. As Shyamkrishna Balganesh has observed, “The entitlement model involves two steps: in the first, the legal system vests the entitlement in someone; in the second, it adopts one of three rules to protect the entitlement so vested. Calabresi and Melamed focus almost entirely on the second of these steps—‘second order decisions.’”<sup>80</sup> By focusing almost exclusively on the second step of adjudication, the Calabresi-Melamed tradition leaves largely unquestioned the norms and values embedded in the initial entitlement determination, assigning to law a “principally corrective” function.<sup>81</sup> Even though this model acknowledges the interrelationship of rights and remedies, it nonetheless shifts focus away from the rights determination and embraces an adjudicative sequence that leaves first-order decisions intact and unquestioned.<sup>82</sup> As the following Parts will show, it is precisely this dynamic of shifting intellectual engagement toward the determination of remedies, while apparently leaving “earlier” determinations of rights unchecked, that can facilitate the covert expansion of substantive copyright protections under the guise of liberalizing its remedial structure.

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78. Kozinski & Newman, *supra* note 54, at 528.

79. Balganesh, *supra* note 72, at 609.

80. *Id.* at 607.

81. *Id.* at 609; see also Dale A. Nance, *Guidance Rules and Enforcement Rules: A Better View of the Cathedral*, 83 VA. L. REV. 837, 840-41 (1997) (questioning whether the Calabresi-Melamed taxonomy involved “guidance” or “enforcement” rules).

82. See, e.g., BLAIR & COTTER, *supra* note 72, at 1-6.

## II. THE RIGHTS/REMEDY RELATIONSHIP

Although the scholarship surveyed in the previous Section largely frames remedies as the second step in a two-part sequence of rights → remedies, there is a rich body of scholarship exploring a much more dynamic interplay between the scope of substantive rights and the scope of available remedies.<sup>83</sup> Pushing back against the idea that courts first determine the existence and violation of a particular right and then use remedies to determine whether and how much to vindicate that right, several scholars have demonstrated a much more dynamic interplay between these seemingly distinct inquiries that helps explain how the contraction of remedies can lead to the expansion of substantive copyright entitlements.<sup>84</sup>

The conventional wisdom dating back to *Marbury v. Madison* has been that there needs to be an available remedy in order to sufficiently vindicate a legal right: “[E]very right, when withheld, must have a remedy, and every injury its proper redress.”<sup>85</sup> In this view,

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83. This discussion will focus primarily on constitutional law scholarship due to the particular attention that has been given to the definition of the substantive constitutional right articulated in a particular case. Although a substantial body of scholarship in the legal realist tradition has focused on the rights/remedy relationship in tort, property, and contract law, see, e.g., Calabresi & Melamed, *supra* note 71; Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460-63 (1897), the “vaporized” boundaries between rights and remedies in this body of scholarship have shifted attention away from the definition of the substantive private law right or entitlement and toward a unified entitlement theory centered upon the available remedy, see, e.g., Saul Levmore, *Unifying Remedies: Property Rules, Liability Rules and Startling Rules*, 106 YALE L.J. 2149, 2149 (1997). Given the consequences of the way courts define infringement and fair use, see *infra* Part IV, it is important in the copyright context not to gloss over the substantive entitlement in a way that private law remedies scholarship can encourage and that the *eBay/Salinger* standard facilitates.

84. Important empirical research into judicial psychology and decision making has similarly shown an interplay between threshold justiciability questions and later decisions on the merits. See, e.g., Eileen Braman, *Reasoning on the Threshold: Testing the Separability of Preferences in Legal Decision Making*, 68 J. POL. 308, 308 (2006) (demonstrating the influence of judicial attitudes on abortion and free speech rights on standing decisions).

85. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); see also, e.g., *Bell v. Hood*, 327 U.S. 678, 684 (1946) (“[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.”); *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 624 (1838) (“[T]he power to enforce the performance of the act must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist.”).

a right is a “declaration” of a public value, and the remedy is its “actualization.”<sup>86</sup> The determination of the right occurs first in time, in the abstract realm of the Platonic constitutional ideal, and afterwards the court must face reality and craft a remedy that will actually be implemented.<sup>87</sup> This process will inevitably entail a degree of “loss” or “deficiency” in the process of translating an abstract injury into a “living truth.”<sup>88</sup> Nonetheless, it remains important in this rights/remedy framework to segregate these determinations because judges have unique competency to operate in the “realm of abstraction” as opposed to the “world of practical reality,”<sup>89</sup> and because there is a risk that instrumental concerns of remedy crafting will infect the purity of the predicate right.<sup>90</sup>

Daryl Levinson has termed this view of the rights/remedy relationship as “rights essentialism.”<sup>91</sup> This “two-step process of constitutional rights-construction” allows courts and commentators to speak of a right in complete isolation from real-world concerns and then “decide to scale it back or enhance it with remedial add-ons.”<sup>92</sup> In line with a long history of legal theory criticizing this formal distinction between rights and remedies,<sup>93</sup> Levinson pushes back

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86. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 52 (1979).

87. *Id.* (“Rights and remedies are but two phases of a single social process—of trying to give meaning to our public values. Rights operate in the realm of abstraction, remedies in the world of practical reality.”).

88. Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 587 (1983) (quoting *Cooper v. Aaron*, 358 U.S. 1, 20 (1958)); see Rudovsky, *supra* note 2, at 1199 (“[A]lthough constitutional and statutory rights have generally been expanding since the historic *Brown v. Board of Education*, federal remedies have not kept pace.”).

89. Fiss, *supra* note 86, at 52.

90. See PETER H. SCHUCK, *SUING GOVERNMENT* 26-28 (1983) (“[R]ights and remedies are utterly different legal phenomena—products of distinct reasoning processes employing distinct sources, methodologies, and decision criteria. Conceptions of justice that deny this disjunction are likely to be deeply flawed.”).

91. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999).

92. *Id.* at 924.

93. See, e.g., 2 JOHN AUSTIN, *LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW* 765-68 (Robert Campbell ed., 5th ed. 1885) (“[I]t is impossible to extricate the right of action itself from those subsidiary rights by which it is enforced.”); Frank H. Easterbrook, *Civil Rights and Remedies*, 14 HARV. J.L. & PUB. POL’Y 103, 103 (1991) (“Most disputes over remedies in civil rights cases have nothing to do with remedies and everything to do with substantive entitlements.”); Lon L. Fuller, *Williston on Contracts*, 18 N.C. L. REV. 1, 4 n.5 (1939) (reviewing SAMUEL WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* (rev. ed. 1938)) (“Certainly the issue cannot be foreclosed by assuming a moral duty which sets its own legal sanction, or by assuming a legal duty so tenacious of life that it continues to exist even

strongly against this essentialist view and argues instead that “rights and remedies are inextricably intertwined.”<sup>94</sup> Structural reform projects, such as school desegregation, prison condition reform, and voter reapportionment, have all involved the articulation of constitutional rights with a close eye to the remedial concerns of how those rights might actually be implemented.<sup>95</sup> In contrast to the essentialist view of causation as running only from rights to remedies, these structural reform cases “illustrate the importance of causation running in the opposite direction, from remedies to rights.”<sup>96</sup> Under Levinson’s theory of “remedial equilibration,” rights do not prefigure the remedial determination but instead are “dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence.”<sup>97</sup> Because the rigid two-part sequencing of rights essentialism maintains the “illusion” that rights are identified through some abstract reasoning process, the “functional, fact-specific policy concerns” embedded in the articulation of constitutional rights remain obscured.<sup>98</sup>

Copyright law and scholarship seem to understand the statutory rights/remedy relationship in copyright law largely in essentialist terms. Most explicitly, Justice Thomas’s insistence in *eBay* that “the creation of a right is distinct from the provision of remedies for violations of that right” isolates rights from remedies in a manner that denies the potential interdependency and symbiosis between the two.<sup>99</sup> Additionally, Judge Leval’s argument that “[w]hen a court rejects a fair use defense, it should deal with the issue of the appropriate remedy on its merits”<sup>100</sup> mirrors Levinson’s observation that the two-step approach to constitutional adjudication first determines the existence of a right and then scales it back via a limited remedy. Afori’s proposal to use flexible remedies as a

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after courts have ceased to enforce it.”); Holmes, *supra* note 83, at 458.

94. Levinson, *supra* note 91, at 858.

95. *Id.* at 873-84.

96. *Id.* at 884.

97. *Id.* at 858.

98. *Id.* at 857.

99. *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392 (2006). *Compare id.*, with Fiss, *supra* note 86, at 52 (“[A right] can exist without a remedy—the right to racial equality, to be free of Jim Crowism, can exist even if the court gave no relief (other than the mere declaration).”).

100. Leval, *supra* note 40, at 1133.

“comprehensive ‘cure’ doctrine that would ease some of the basic problems of copyright law”<sup>101</sup> and Samuelson and Bebenek’s view of the irreparable harm requirement as “an important procedural safeguard against unreasonable restraints on free expression interests”<sup>102</sup> similarly echo this view of remedies as calibrating the consequences of a rights declaration. Lastly, Kozinski and Newman’s proposal to shift the question of whether a work is a legitimate parody out of the liability determination and into the determination of damages<sup>103</sup> parallels the rights-essentialist move to address messy policy questions at the remedies phase. Because copyright law and much of its influential scholarship embody at least a quasi-essentialist view of the relationship between statutory rights and remedies, they are unable either to fully recognize the rights/remedy interactions Levinson and others explore or, accordingly, to anticipate how limitations on injunctive relief could lead to the expansion of substantive rights.

Levinson sets forth a useful taxonomy of ways in which remedial concerns shape and define the articulation of a particular right, illuminating the complexity and slipperiness of the rights/remedy relationship. The first relationship is “remedial deterrence,” wherein a “right may be shaped by the nature of the remedy that will follow if the right is violated.... The defining feature is the threat of undesirable remedial consequences motivating courts to construct the right in such a way as to avoid those consequences.”<sup>104</sup> For example, it is unlikely that the Court would have recognized the sweeping rights of *Miranda v. Arizona* if they applied retroactively to every criminal defendant seeking postconviction review.<sup>105</sup> The second relationship is “remedial incorporation,” wherein some prophylactic remedy is built into the definition of a right “[b]ecause it would be too difficult or costly” to determine on a case-by-case basis whether a particular circumstance triggered constitutional concern.<sup>106</sup> Rather than review every Fifth Amendment claim of self-incrimination for voluntariness, *Miranda* replaced such analysis

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101. Afori, *supra* note 66, at 24.

102. Samuelson & Bebenek, *supra* note 63, at 89.

103. See *supra* notes 77-78 and accompanying text.

104. Levinson, *supra* note 91, at 884-85.

105. *Id.* at 889-90; see 384 U.S. 436 (1966).

106. Levinson, *supra* note 91, at 887.

with a warning requirement.<sup>107</sup> The third relationship is “remedial substantiation,” whereby “the practical value of a right is determined by its associated remedies.”<sup>108</sup> Although *Miranda* set in place a constitutional warning requirement, the Court later limited the availability of the exclusion remedy—and accordingly the practical value of the right to be given *Miranda* warnings—by “labeling *Miranda* a subconstitutional prophylactic rule.”<sup>109</sup>

Intellectual property courts and scholars arguably have been sensitive to the second and third relationships in Levinson’s taxonomy. Prior to *eBay*, patent holders were entitled almost as a matter of right to an injunction upon demonstrating infringement, and the Court’s distinction between the right to exclude and the remedy available for a violation of that right disincorporated the injunctive remedy in Levinson’s terminology.<sup>110</sup> *eBay* also demonstrates sensitivity to the way automatic injunctions have enhanced the “practical value” of the patent entitlement, and both the Court and scholars have looked to scale back the arguably excessive value of an intellectual property right.<sup>111</sup> *eBay* and *Salinger* would therefore seem to “drive a wedge” between infringement and injunction in a way that seemingly “desubstantiates” the right to exclude.

What these approaches seem to overlook, however, is “remedial deterrence.”<sup>112</sup> In this rights/remedy relationship, a court refrains

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107. *Id.* at 901, 903.

108. *Id.* at 888.

109. *Id.* at 909.

110. Intellectual property holders regularly argue that injunctive relief is proper because it would be too difficult or costly to calculate monetary damages, *see eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 395 (2006) (Roberts, C.J., concurring) (noting “the difficulty of protecting a right to exclude through monetary remedies” (emphasis omitted)), but *eBay* and its progeny require courts to determine on a case-by-case basis whether a particular circumstance warrants the issuance of an injunction, *id.* at 393-94 (majority opinion).

111. *See, e.g.*, James M. Fischer, *What Hath eBay v. MercExchange Wrought?*, 14 LEWIS & CLARK L. REV. 555, 557 (2010) (“If no remedy for a violation is provided, the right is illusory for practical purposes. The stronger the remedy, the more valuable the right is to the right holder.”). For example, Justice Kennedy’s concurrence in *eBay* singles out nonpracticing entities/patent trolls as an industry reliant upon the threat of an injunction to extract supracompetitive licensing fees. *eBay*, 547 U.S. at 396 (Kennedy, J., concurring). Several scholars also have pointed to near-automatic copyright injunctions as giving rights holders undue leverage over downstream uses of their works. *See, e.g.*, Lemley & Weiser, *supra* note 70, at 784, 795.

112. Although copyright scholars for the most part have not grappled at length with remedial deterrence, some work has been done on the manipulation of copyright law to avoid

from finding the existence of a right in order to avoid imposing some unjust or unworkable remedy.<sup>113</sup> A good example might be Judge Leval's admission that he may have found fair use in the earlier *Salinger* litigation out of discomfort with issuing an injunction.<sup>114</sup> Inversely, a court denying a remedy is more likely to rule expansively on the question of whether a right exists. A good example might be the Second Circuit's later *Salinger* decision, which vacated a preliminary injunction but upheld the district court's charitable finding of likely infringement.<sup>115</sup> In short, "remedial deterrence" accounts for the incentive to split the baby: if a court can rule for defendants at the remedial stage and provide what appears to be only limited relief, it can more comfortably rule expansively for plaintiffs at the merits stage.

A number of constitutional scholars have embraced this potentially inverse, split-the-baby relationship between the scope of available remedy and the breadth of constitutional rights as helping to *advance* the development of constitutional rights. For example, *Miranda* might not have happened without the doctrine of nonretroactivity,<sup>116</sup> and *Brown v. Board of Education* might not have happened if it had been accompanied by crippling financial penalties to southern municipalities.<sup>117</sup> John Jeffries accordingly has argued that limitations on monetary damages for constitutional injuries, such as through the doctrine of qualified immunity, "facilitate[]

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what would be seen as harsh consequences of rigid application of copyright doctrine, for example in the development of a taxonomy of general, limited, investive, and divestive publication under the 1909 Copyright Act. See Jake Linford, *A Second Look at the Right of First Publication*, 58 J. COPYRIGHT SOC'Y U.S.A. 585, 605-10 (2011).

113. This reluctance to find infringement when the result is a broad set of remedies perhaps suggests one reason that content industries have increasingly focused their efforts on extrajudicial remedies, such as those made available under the proposed Stop Online Privacy Act. See H.R. 3261, 112th Cong. § 103(b) (2011) (requiring ad networks and payment processors to stop serving infringing websites upon notice from the copyright holder).

114. See *supra* note 48 and accompanying text.

115. *Salinger v. Colting*, 607 F.3d 68, 70, 83 (2d Cir. 2010).

116. See Levinson, *supra* note 91, at 889-90; see also Jeffries, *supra* note 2, at 99 ("The decision in *Miranda* depended, I think crucially, on the (now abandoned) doctrine of nonretroactivity, which allowed the Court to give effect to new requirements only in future applications."); Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 29 (2002) ("Would *Miranda* have been decided as it was if the cost of the decision was the granting of new trials to virtually every defendant in state and federal prison?").

117. Jeffries, *supra* note 2, at 101 ("Might *Brown* have come out differently if the decision had come with a huge pricetag?"); see 347 U.S. 483 (1954).

constitutional change by reducing the costs of innovation.”<sup>118</sup> Judges are far more likely to recognize expansive new constitutional rights for the benefit of future generations if the immediate impact on existing actors is minimized.<sup>119</sup> Sam Kamin agrees that in certain circumstances the gap between rights and remedies can “de-ossify constitutional law,”<sup>120</sup> but argues that for this dynamic to work, the “order matters.”<sup>121</sup> Remedial limitations cannot lead to an expansion of substantive rights if the court treats the limiting doctrine, such as qualified immunity, harmless error, or nonretroactivity, as a threshold question; instead, it must “consider the substance of a litigant’s claim *first*.”<sup>122</sup>

Although embracing remedial limitations in the constitutional context may be laudable to the extent they lead to the recognition of a wider range of individual rights, the same dynamic of remedial deterrence in the copyright context is potentially troubling. Scholars

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118. Jeffries, *supra* note 2, at 90.

119. *See id.* at 105 (describing a “rolling reallocation of constitutional resources from older to younger citizens”). Prominent criticisms of this view include Thomas Healey, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 928-35 (2005) (arguing that unnecessary rulings on the merits are likely to retard the development of constitutional rights because courts do not always rule for plaintiffs on the merits and plaintiffs have little incentive to litigate nondispositive issues), and Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 702-08 (2009) (arguing that judges are unlikely to issue split rulings due to attendant “cognitive dissonance”).

120. Kamin, *supra* note 116, at 39. Similarly, Ashutosh Bhagwat has advocated for “remedial discretion” as a way of dealing with difficult constitutional disputes. Rather than balancing the interests in recognizing a constitutional right against some particular overriding social interest—resulting in jurisprudence full of ad hoc exceptions—Bhagwat has proposed taking the resulting compromise out of the substance and into the procedure. Ashutosh Bhagwat, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30 CONN. L. REV. 961, 1005-10 (1998). By keeping questions of compromise out of the question of rights and using a flexible focus on remedies to balance competing social values, courts can firm up core constitutional commitments. “The primary consequence of a greater focus on remedial alternatives in hard cases is that hard cases will no longer generate quite as strong an impetus for courts to define rights narrowly to avoid social costs.” *Id.* at 1009.

121. Kamin, *supra* note 116, at 39.

122. *See id.* at 38-39 (emphasis added); *see also* John M.M. Greabe, *Mirabile Dictum!: The Case for “Unnecessary” Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403, 405-08 (1999) (arguing that courts should not always engage in “merits bypasses” due to the important notice-giving potential of their technically unnecessary rulings on the merits). Kamin accordingly embraced the Supreme Court’s decision in *Saucier v. Katz*, 533 U.S. 194 (2001), which mandated this sequential approach to qualified immunity. Unsurprisingly, the Court’s overruling of the case in *Pearson v. Callahan*, 555 U.S. 223 (2009), has been questioned as stifling constitutional development. *See* John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 116-17, 132-36.

and advocates have pushed for limitations on injunctive relief primarily to vindicate the First Amendment interests of users and consumers of copyrighted works; in the process, however, they may have effectively lowered the costs of ruling broadly in favor of rights holders at the merits determination. If a finding of infringement no longer requires courts to block the release of a book, movie, or web service, and the plaintiff is limited to court-determined monetary relief, there are fewer disincentives to rule in the plaintiff's favor on the merits. The current trend toward limiting injunctive relief may lower the practical value of any one exercise of the copyright holder's substantive entitlement, but it has the potential to expand the reach of this entitlement to cover a broader range of potentially infringing activities.<sup>123</sup> The costs of a finding of infringement do not, of course, drop to zero, as infringers still face the prospect of actual or statutory damages.<sup>124</sup> However, when the infringement question is novel or difficult, when defendants have deep pockets, or when the question of damages is not presently before the court—for example, requests for preliminary injunctions—the lower costs may tip the scales in favor of infringement.<sup>125</sup>

Notwithstanding its decision in *eBay*, the Supreme Court has recognized in the qualified immunity context that resolving a case on the basis of remedial issues—particularly in combination with a mandatory decisional sequence—can lead to problematic analysis of the merits. In *Pearson v. Callahan*, the Court unanimously held that lower courts addressing § 1983 claims no longer needed to decide whether a violation of a constitutional right occurred before

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123. Levinson briefly alludes to the “competing considerations of remedial deterrence and remedial substantiation” and notes that “more than one form of remedial equilibration may be in play at the same time.” Levinson, *supra* note 91, at 913. He further suggests that the “odd political alignments” on the question of retroactivity reflect this interplay. *Id.*

124. Even when entitled to statutory damages, rights holders may nonetheless sacrifice an extremely large damages award if it would deter a court from finding a substantive right. For example, in *Capitol Records v. Thomas-Rassett*, 692 F.3d 899 (8th Cir. 2012), plaintiffs had received a jury award of \$222,000, \$1,920,000, and \$1,500,000, respectively, over the course of three infringement trials. On appeal, plaintiffs sought, “for tactical reasons,” reinstatement of the \$222,000 award instead of the higher amounts. *Id.* at 902. In exchange, they sought a ruling by the Eighth Circuit about the heavily-disputed issue of whether “making available” a copyrighted work was a violation of the distribution right. *Id.* at 903 (noting district court split).

125. See Bhagwat, *supra* note 120, at 1008-12 (arguing that flexibility in remedial considerations allows courts to find the existence of a constitutional right in “hard cases”).

deciding whether a defendant is entitled to qualified immunity.<sup>126</sup> Instead, the decisional sequence now lies entirely within the discretion of the court.<sup>127</sup> One of the Court's proffered reasons for throwing out the mandatory sequencing it had put in place only eight years earlier<sup>128</sup> is particularly relevant:

Although the *Saucier* rule prescribes the sequence in which the issues must be discussed by a court in its opinion, the rule does not—and obviously cannot—specify the sequence in which judges reach their conclusions in their own internal thought processes. Thus, there will be cases in which a court will rather quickly and easily decide that there was no violation of clearly established law before turning to the more difficult question whether the relevant facts make out a constitutional question at all. In such situations, there is a risk that a court may not devote as much care as it would in other circumstances to the decision of the constitutional issue.<sup>129</sup>

Because the outcome of constitutional litigation often hinges upon whether the law was clearly established at the pertinent time, courts in such circumstances need not grapple extensively with the merits of the plaintiff's constitutional claim, leading to “insufficiently thoughtful and cautious” rulings on constitutional rights.<sup>130</sup> In the constitutional context, therefore, scholars and the Court have acknowledged that the dynamics of remedial deterrence can lead to poor decision making on the merits of a plaintiff's constitutional claims,<sup>131</sup> but in the intellectual property context, scholars and the

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126. 555 U.S. 223.

127. *Id.* at 236. In *Camreta v. Greene*, 131 S. Ct. 2020 (2011), the Court held that a defendant who prevails on qualified immunity grounds may seek review of a finding of a constitutional violation. *Id.* at 2028-33. Justices Kennedy and Thomas, dissenting, and Justice Scalia, concurring, suggested that eventually “the Court might find it necessary to reconsider its special permission that the Courts of Appeals may issue unnecessary merits determinations in qualified immunity cases with binding precedential effect.” *Id.* at 2043 (Kennedy, J., dissenting); *see also id.* at 2036 (Scalia, J., concurring) (“The alternative solution ... is to end the extraordinary practice of ruling upon constitutional questions unnecessarily when the defendant possesses qualified immunity.”).

128. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

129. *Pearson*, 555 U.S. at 239.

130. *Id.* at 239-40 (quoting *Horne v. Coughlin*, 191 F.3d 244, 247 (2d Cir. 1999)).

131. This is not to say that in the constitutional law context courts have gotten it right and settled upon the “correct” approach to adjudicating constitutional rights and remedies; it is

Court nonetheless insist on the conceptual segregation of rights and remedies.<sup>132</sup>

### III. THE PERFORMATIVITY OF REMEDIES

Although constitutional remedies scholarship provides useful tools—largely absent from copyright scholarship—for discussing the rights/remedies interrelationship, it provides little guidance as to *why* a particular combination is deployed in a particular case.<sup>133</sup> Poststructural theories of performativity and temporality, however, have the potential to link the chronological and conceptual interplay between rights and remedies to deeper normative commitments of copyright adjudication.

As explained above, the copyright field has largely overlooked the last of Levinson's rights/remedy relationships: "remedial deter-

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instead to point out that the rights/remedies interplay has risen up much closer to the surface in the constitutional context than it has in the intellectual property context. *See also* Warth v. Seldin, 422 U.S. 490, 520 (1975) (Brennan, J., dissenting) ("While the Court gives lip service to the principle, oft repeated in recent years, that 'standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal,' in fact the opinion ... can be explained only by an indefensible hostility to the claim on the merits." (footnote and citation omitted)).

132. For example, as support for its concern that mandatory sequencing would lead to careless decision making, the Court cited to a 2006 article by Judge Leval that criticized the "mischievous" sequencing rule set forth in *Saucier*. *Pearson*, 555 U.S. at 234 (citing Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1275, 1277 (2006)). In Leval's formulation, *Saucier* required that "before dismissing the case on the ground of good faith immunity, the court must first either gratuitously declare a new constitutional right in dictum or decide that the claimed right does not exist." Leval, *supra*, at 1275-76. This decisional sequencing is bound to produce "bad constitutional law" because "in many cases neither the judge nor the defendant has any practical interest in the theoretical question of constitutionality. Both know it can have no effect on the inevitable dismissal of the case. The court's conclusion on this question will come at no price." *Id.* at 1277-78 (footnote omitted). This concern stands in sharp relief to Leval's proposal in the copyright context to decouple a finding of infringement from the issuance of an injunction. *See supra* notes 40-49 and accompanying text.

133. Levinson notes but does not delve into "the competing considerations of remedial deterrence and remedial substantiation." *See* Levinson, *supra* note 91, at 913. Such indeterminacy, however, is often at the heart of postmodern critique and opens up space for political engagement at junctures seemingly foreclosed by essentialist accounts of a particular phenomenon. *See, e.g.*, Judith Butler, *Contingent Foundations: Feminism and the Question of "Postmodernism,"* in *FEMINISTS THEORIZE THE POLITICAL* 3 (Judith Butler & Joan W. Scott eds., 1992); Robert W. Gordon, *Some Critical Theories of Law and Their Critics*, in *THE POLITICS OF LAW* 641, 655 (David Kairys ed., 3d ed. 1998).

rence,” which both accounts for the “split-the-baby” dynamic discussed below under the *eBay/Salinger* standard and, not coincidentally, happens to be the most overtly countersequential in Levinson’s taxonomy. A court’s awareness of the real-world future consequences of its ruling on the merits—that is, its remedial decision—influences that “earlier” merits ruling in a manner rendered invisible by the rights essentialists’ two-step process of adjudication.<sup>134</sup> An essentialist view of rights, whether in copyright or constitutional law, has the potential to shield the pragmatism and policy considerations at play in the articulation of rights, and the unidirectional rights → remedies sequence “legitimate[s] and protect[s]” not just the idealized status of rights but also the normative commitments behind them.<sup>135</sup>

There is something extremely provocative lurking within Levinson’s critique of the rights/remedy split, his concern for the opacity and disingenuity of substantive adjudication, and his turn toward countersequentialism as a way of exposing the normative underpinnings of a court’s decisions. Although largely couched in the legal realist tradition, in arguing that remedies are not a mere outgrowth of some preceding decision on the merits but instead that the “after” shapes and defines that which happens “before,” Levinson’s theory rejects the essentialism of rights and suggests the “performativity” of remedies. A particular view of the eventual outcome of a dispute—and a normative belief in how similar parties should engage with one another in the future—sets in motion a series of steps that lead to and justify the ultimate combination of rights/remedies determinations.

A remedy is performative to the extent it brings into existence the substantive right that appears to prefigure and legitimize it.<sup>136</sup> Rather than a remedy being a court’s attempt at filtering an idealized right through the pragmatics of real-world implementation, the court’s understanding of the law’s consequence produces a

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134. See Levinson, *supra* note 91, at 924.

135. *Id.* at 857.

136. Cf. JUDITH BUTLER, *GENDER TROUBLE* 33 (1990) (“There is no gender identity behind expressions of gender; that identity is performatively constituted by the very ‘expressions’ that are said to be its results.”). In speech-act theory, language is performative more generally when it enacts or produces that which it names. See, e.g., AUSTIN, *supra* note 28, at 4-11; JACQUES DERRIDA, *Signature Event Context*, in *LIMITED INC* 1, 13-14 (1988); SEARLE, *supra* note 28, at 136-41.

right that can be implemented in accord with the court's normative sense of justice and fairness. In this sense, Levinson's legal-realist approach to remedies dovetails with queer and poststructural work on performativity. Just as scholars such as Judith Butler push against the distinction between a fixed material body and its gendered social construction,<sup>137</sup> Levinson questions the distinction between a pure constitutional value and its translation into the remedial apparatus.<sup>138</sup> According to Butler, it is a "juridical conception" to culturally inscribe meaning on that which appears to precede the social, political, and discursive, and the exercise of "juridical power" requires the existence of some temporally preexisting phenomenon to will upon and bring into social being.<sup>139</sup> The later-occurring social apparatus produces, and does not merely represent, that which appears to precede it temporally.<sup>140</sup>

Butler's work on offensive speech is particularly instructive. In determining that particular speech is unlawful, a court does not simply identify that speech as being in some fundamental sense offensive or obscene and then decide to deploy its remedial powers in order to censor it.<sup>141</sup> The adjudicative process may create the appearance of some preexisting categories of low-value or unlawful speech that are then censored, but the court is instead *producing* offensiveness and obscenity—and, as a corollary, nonoffensiveness and nonobscenity—through its power to censor.<sup>142</sup> In a manner closely aligned with Levinson's theories of remedial equilibration, the court shapes and defines freedom of speech through the imposition of a particular remedy. The idea that censorship defines speech, and that remedies define rights, inverts the "temporal relation" commonly associated with the "conventional view" of adjudication.<sup>143</sup> Through this temporal inversion, a court's knowledge

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137. JUDITH BUTLER, *BODIES THAT MATTER* 1-5, 12 (1993).

138. Levinson, *supra* note 91, at 870-72 (describing Ronald Dworkin's distinction between rights and remedies in social constructivist terms).

139. BUTLER, *supra* note 136, at 5, 11.

140. *Id.* at 5; BUTLER, *supra* note 137, at 5 ("But this sex posited as prior to construction will, by virtue of being posited, become the effect of that very positing.").

141. JUDITH BUTLER, *EXCITABLE SPEECH* 128 (1997) ("In the conventional view, censorship appears to follow the utterance of offensive speech: speech has already become offensive, and then some recourse to a regulatory agency is made.").

142. *See* BUTLER, *supra* note 137, at 10 ("[T]here is no reference to a pure body which is not at the same time a further formation of that body.").

143. BUTLER, *supra* note 141, at 128 ("Censorship precedes the text (by which I include

of what it is going to do in the future—imprison a deliverer of hate speech, desegregate schools, enjoin a book’s publication—reaches “back” and teleologically lays the foundation for its future pronouncements.<sup>144</sup> Viewed through the lens of performativity, the role of remedies is not merely to modulate some preceding identification of rights so as to enhance or diminish that right’s real-world impact, but instead to shape rights in order to align with particular social needs and normative beliefs of how disputes like the one at hand should be resolved.

Performativity theory also brings to light the potential for temporal sequencing to effectively reinforce normative preferences. What comes first must be able to stand on its own and be described in a manner that is independent of the description of some later concept, and through this seeming independence, the first-in-time becomes naturalized and normalized. Rights in an essentialist framework can and must be articulated first-in-time as a matter of principle, independent of remedial policy considerations. Accordingly, questions of whether an individual has a right to compensation or assistance of counsel or humane prison conditions stand on their own, pure and untainted.<sup>145</sup> What comes second to this primary concept in turn becomes an extension, “exaggeration,” or “diminution” of the normal course.<sup>146</sup> The question of whether

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‘speech’ and other cultural expressions), and is in some sense responsible for its production.”); see also Ritu Birla, *Performativity Between Logos and Nomos: Law, Temporality and the “Non-Economic Analysis of Power,”* 21 COLUM. J. GENDER & L. 90, 95 (2011) (“Performativity plays with temporality, and so with the very notion of context itself.”). Important studies of temporality in this vein include LEE EDELMAN, *NO FUTURE* (2004); ELIZABETH FREEMAN, *TIME BINDS* (2010); and ANNAMARIE JUGOSE, *INCONSEQUENCE* (2002).

144. See Madhavi Menon, *Spurning Teleology in Venus and Adonis*, 11 GLQ J. LESBIAN & GAY STUD. 491, 492 (2005) (“[T]eleology depends on a sequence leading to an end that can retrospectively be seen as having had a beginning.”). Carla Freccero has discussed the sense of being a “future dead person writing [her]self out of time while time is running out.” Carolyn Dinshaw et al., *Theorizing Queer Temporalities: A Roundtable Discussion*, 13 GLQ J. LESBIAN & GAY STUD. 177, 184 (2007). This concept is particularly provocative in the judicial context, not just for its temporal inversion but also for the permanency and memorialization that accompanies the issuance of a judicial opinion in our common law system. To the extent that concerns with issuing a particular remedy influence the articulation of a right, an interesting question is how a sense of legacy, with its associated fears and responsibilities, further contributes to the future’s shaping of the past.

145. Levinson, *supra* note 91, at 871-72 (analyzing RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 82-84, 90 (1977)).

146. Annamarie Jugose has shown how sequencing has been used in psychoanalytical literature to shore up sexuality and gender hierarchies by positing “normal” adult

someone is entitled to an injunction, to challenge the conditions of her arrest postconviction, or to have a prison cell to herself are merely second-order questions designed to effectuate the first-order right at a certain level of robustness; they are inherently dependent on, but by no means constitutive of, the earlier-identified right. This account, however, denies the interrelatedness of the seemingly earlier-identified right and its real-world implementation in the form of a remedy award. By focusing intellectual energy primarily on this apparently later-in-time real-world implementation, and conceding at least to some degree the existence of a foundational right to compensation, counsel, or humane prison conditions, we shield the assumptions and beliefs that feed into those rights from critique or meaningful engagement.<sup>147</sup> If a denial of an injunction is motivated by the belief that a liability rule adequately balances the interests of the parties and the general public, this policy preference, as well as its potential drawbacks, feeds “backwards” into a finding of infringement while remaining hidden by a forward-moving linear sequence.<sup>148</sup>

Viewing rights as performatively constituted by their remedies accordingly exposes the potential for a reshaping of remedies to further ideologies at odds with the *stated* motivations for remedy reform. As Butler notes, “[A] performative ‘works’ to the extent that

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heterosexuality as first or primary and its aberrations—in the form of male and female homosexuality, in that order—as developmental derivations from this norm. JUGOSE, *supra* note 143, at 25-27. One particularly illuminating example concerns the publication of Havelock Ellis’s monumental *Studies in the Psychology of Sex*. HAVELOCK ELLIS, *STUDIES IN THE PSYCHOLOGY OF SEX* (1905). Upon the publication of the first volume ready for print, *Sexual Inversion*, Ellis noted that “[i]t was not my intention to publish a study of an abnormal manifestation of the sexual instinct before discussing its normal manifestations.” JUGOSE, *supra* note 143, at 25. In subsequent editions of *Studies*, however, the volumes were reordered so that *Sexual Inversion* became Volume II, and Ellis “was pleased to be able to effect this change of order.” *Id.* at 26.

147. See, e.g., JUDITH HALBERSTAM, *IN A QUEER TIME AND PLACE* 6-7 (2005) (“[B]ecause we experience time as some form of natural progression, we fail to realize or notice its construction.” (analyzing DAVID HARVEY, *THE CONDITION OF POSTMODERNITY* (1990))); Carol J. Greenhouse, *Just in Time: Temporality and the Cultural Legitimation of Law*, 98 *YALE L.J.* 1631, 1636 (1989) (describing linear time as “time with a purpose” designed to resolve tensions among potentially conflicting priorities); cf. BUTLER, *supra* note 137, at 11 (suggesting that the concession of materiality performatively materializes it).

148. See WILLIAM E. SCHEUERMAN, *LIBERAL DEMOCRACY AND THE SOCIAL ACCELERATION OF TIME* 2-3 (2004) (arguing that temporal assumptions reflect particular social organizations and that linearity is linked to industrial wage economies).

it *draws on and covers over* the constitutive conventions by which it is mobilized.”<sup>149</sup> These “constitutive conventions” of the performative—in other words, the normative commitments of the regulatory scheme—are obfuscated primarily by the positing of some element—bodily “sex” for Butler, “rights” here—as preceding both language and social construction. If a particular concept is regularly and repeatedly treated as existing independent of ideological, pragmatic, and political consideration, it becomes entrenched as a foundational concept unmarked by the messiness of interpretation and social construction.<sup>150</sup> The problem, though, is that the apparently foundational is actually constructed by that which appears to spring forth from it and accordingly is inseparable from normative considerations. As Levinson has shown in the constitutional context,<sup>151</sup> and as the cases surveyed in the next Section suggest in the intellectual property context, rights determinations cannot be separated from remedial considerations, and the expressly pragmatic considerations of the remedies determination give rise, at least to some degree, to a declaration of a substantive right.

In some ways, the performativity of remedies is nothing new. John Austin, for example, observed the following:

[I]t is perfectly clear that the law which gives the remedy, or which determines the punishment, is the only one that is absolutely necessary. For the remedy or punishment implies a foregone injury, and a foregone injury implies that a primary right or duty has been violated. And, further, the primary right or duty owes its existence as such to the injunction or prohibition of certain acts, and to the remedy or punishment to be applied in the event of disobedience.<sup>152</sup>

In other words, Austin in the nineteenth century, like Levinson in the twentieth, recognized that rights and duties come into being through the imposition of a particular remedy. The concept of

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149. BUTLER, *supra* note 141, at 51.

150. BUTLER, *supra* note 136, at 189 (“If taken as the grounds of feminist theory or politics, these ‘effects’ of gender hierarchy and compulsory heterosexuality are not only misdescribed as foundations, but the signifying practices that enable this metaleptic misdescription remain outside the purview of a feminist critique of gender relations.”).

151. See *supra* notes 94-98 and accompanying text.

152. 2 AUSTIN, *supra* note 93, at 767.

performativity in the poststructural tradition, however, digs a layer deeper into the remedial considerations stated by a court and provides theoretical tools for unearthing ideological assumptions potentially at odds with those presented on the surface. What may appear to be—and what may be fully intended as—a vindication of speech and expression rights may instead reflect a commitment to market-oriented individualism at odds with the more communitarian ideals for which speech and expression often serve as proxies.<sup>153</sup> By refusing to take for granted even the most basic of Western cultural assumptions—for example, linear time, male and female sexes, individual autonomy—performativity and deconstructive theory expose key limitations on conventional legal reform and demonstrate how such pursuits can reify some of the very obstacles they confront.<sup>154</sup> As a narrow slice of these broader legal dynamics, the performativity of copyright remedies both problematizes the temporal and conceptual distinction between rights and remedies in service of First Amendment values and provides a normative, ideological dimension to the inherited observation that remedies bring life to rights.

The following two Parts will (1) demonstrate the essentialist moves made by courts in adopting the *eBay* standard and (2) apply the theoretical insight of remedial and performative theories to expose some of the potentially troubling aspects of this recent shift in copyright law.

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153. See, e.g., JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF* 7 (2012) (“My goal in this book is to focus critical attention on what the freedom/control binary leaves out. Upon closer inspection, each vision of the information society has a hollow core. The self that is to exercise expressive freedom, or to benefit from market abundance, remains a mere abstraction.”); *id.* at 51 (“Dichotomies between commerce and speech, or between utopian bliss and revolutionary struggle, are useful for expository purposes, but they can become crutches. The two-dimensional models that they offer are too stark to capture the full range of human motivations, choices, behaviors, and experiences, or the protean way in which one set of motivations and behaviors can flow into another.”).

154. See generally WENDY BROWN, *STATES OF INJURY* (1995) (discussing ways in which social justice projects premised upon the vulnerability and victimhood of certain groups codify such attributes in the legal treatment of members of those groups). I have observed other iterations of this dynamic elsewhere. See Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 *BERKELEY J. GENDER L. & JUST.* 83 (2008) (arguing, inter alia, that sex-stereotyping theories of transgender discrimination essentialize gender binaries and perpetuate status quo understandings of norms and deviancies).

#### IV. RIGHTS ESSENTIALISM IN MOTION: THE REEMERGENCE OF THE FOUR-FACTOR TEST

This Part will track the emergence of the *eBay* standard, its extension to copyright law in *Salinger*, and the split-the-baby dynamic that appears to have accompanied it. It will illustrate the consistently essentialist approach to remedies these decisions take and will demonstrate that the championing of the First Amendment and related public interests has managed to accompany material expansions of rights-holder entitlements.

##### A. *eBay v. MercExchange*

In *eBay*, the Court seized upon the distinctions between the “creation of a right” and “the provision of remedies for violations of that right” in order to allow equity to cabin some of the troubling consequences of a finding of patent infringement.<sup>155</sup> Drawing heavily from its copyright jurisprudence,<sup>156</sup> the Court replaced the Federal Circuit’s “general rule ... that a permanent injunction will issue once [patent] infringement and validity have been adjudged” with the traditional four-part equitable test for a permanent injunction.<sup>157</sup> Although the majority opinion remained silent as to the Court’s underlying motivations, Justice Kennedy’s concurring opinion explicitly mentioned two problems with the current patent system

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155. *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392 (2006).

156. *Id.* at 392-93 (“And as in our decision today, this Court has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed.”). In *Campbell v. Acuff-Rose Music, Inc.*, even though the Court accepted 2 Live Crew’s fair use defense, it went out of its way to embrace Judge Leval’s argument that “the goals of the copyright law, ‘to stimulate the creation and publication of edifying matter,’ are not always best served by automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use.” 510 U.S. 569, 578 n.10 (1994) (quoting Leval, *supra* note 40, at 1134). The Court reiterated this concern in *New York Times Co. v. Tasini*. In finding the inclusion of freelance articles in electronic databases infringing, the Court rejected arguments that its conclusion would “punch gaping holes in the electronic record of history.” 533 U.S. 483, 504-05 (2001). It emphasized that “it hardly follows from today’s decision that an injunction against the inclusion of these Articles in the Databases (much less all freelance articles in any databases) must issue.” *Id.* at 505.

157. *eBay*, 547 U.S. at 393-94.

that a more robust standard for injunctive relief might counter. He pointed to (1) the emergence of an industry in “which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees”—in other words, patent trolls—and (2) the “potential vagueness and suspect validity” of a “burgeoning number” of business method patents.<sup>158</sup> In Justice Kennedy’s view, along with Justices Stevens, Souter, and Breyer, “The equitable discretion over injunctions, granted by the Patent Act, is well suited to allow courts to adapt to the rapid technological and legal developments in the patent system.”<sup>159</sup> The four-part equitable test for injunctive relief would accordingly allow a court to deny an injunction to a trolling nonpracticing entity or the holder of a questionable business method patent, notwithstanding that same court’s earlier ruling that the challenged conduct was infringing.

Numerous commentators have embraced *eBay*’s shift away from a traditional property rule within the Calabresi-Melamed framework toward a liability rule.<sup>160</sup> Less able to wield the threat of an injunction, patent holders would have fewer incentives to engage in strategic holdout behavior,<sup>161</sup> leading to more efficient licensing negotiations and likely lower licensing fees. *eBay* accordingly brings considerably greater comfort that the breakdown or infeasibility of advance negotiations will not endanger the ultimate rollout of a financially lucrative and potentially socially valuable project.

Although *eBay* only specifically formalized a four-part test for permanent injunctive relief in the context of patent law, it has gradually expanded outside of patent law as well as into the preliminary injunction context.<sup>162</sup> The similarities between copy-

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158. *Id.* at 396-97 (Kennedy, J., concurring).

159. *Id.* at 397.

160. See, e.g., Daniel A. Crane, *Intellectual Liability*, 88 TEX. L. REV. 253, 263-65 (2009); Fischer, *supra* note 111, at 559-61; Jake Phillips, Note, *eBay’s Effect on Copyright Injunctions: When Property Rules Give Way to Liability Rules*, 24 BERKELEY TECH. L.J. 405, 411-12, 416-19 (2009).

161. See Lemley & Weiser, *supra* note 70, at 795-96; see also Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1045 (1995) (“The defendant’s ownership of the liability rule call option thus acts as an upper bound on the ability of a low-valuing plaintiff to overstate her valuation.”).

162. For example, in *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2756 (2010), the Court applied the *eBay* four-factor test to a claim under the National Environmental Policy Act.

right and patent—for example, both are rooted in Article I, Section 8 of the Constitution and balance public access versus private incentives—make this extension *conceptually* unproblematic;<sup>163</sup> but for the reasons set forth below, the normative implications are troubling. Because patent law is a purer strict liability regime than copyright,<sup>164</sup> there are fewer opportunities within the patent infringement analysis to incorporate public interest considerations like those set forth in Justice Kennedy’s *eBay* concurrence; accordingly, the structure of patent law to a significant degree forces courts to treat the question of infringement as foundational.<sup>165</sup> In copyright law, by contrast, the fair use inquiry incorporates public interest considerations, and prima facie infringements that trigger serious First Amendment concerns historically were not infringements at all.<sup>166</sup> The *eBay* standard, when extended to copyright disputes, allows courts to shift important public interest considerations out of the merits determination, easily find infringement, and deal with the broader policy considerations while crafting the appropriate remedy. Although copyright law, particularly through the development of the fair use doctrine, does not mandate an

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163. As David Bernstein and I have argued elsewhere, this extension to other areas of intellectual property law—in particular trademark law—is problematic. See David H. Bernstein & Andrew Gilden, *No Trolls Barred: Trademark Injunctions After eBay*, 99 TRADEMARK REP. 1037, 1038-39 (2009) (arguing that *eBay* should not eliminate the presumption of irreparable harm in trademark law due to conceptual differences between trademark law and patent and copyright law).

164. For example, patent law does not require actual copying like copyright law does. See Stephen M. Maurer & Suzanne Scotchmer, *The Independent Invention Defence in Intellectual Property*, 69 ECONOMICA 535, 535 (2002) (“Perhaps the most basic difference between patents and other intellectual property such as trade secrets and copyrights is that independent invention is not a defence to infringement.”).

165. See, e.g., Jiarui Liu, *Copyright Injunctions After eBay: An Empirical Study*, 16 LEWIS & CLARK L. REV. 215, 256 (2012); Maureen A. O’Rourke, *Toward a Doctrine of Fair Use in Patent Law*, 100 COLUM. L. REV. 1177, 1196-98 (2000). There are some exceptions written into the Patent Act, however, including the doctrine of patent misuse, limits on patentable subject matter, and government use compulsory license. See 28 U.S.C. § 1498 (2006); 35 U.S.C. §§ 101, 271(d) (2006). To the extent that the *eBay* standard shifts attention away from these doctrines, many of the concerns expressed in this Article likely would apply.

166. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 571-72 (1994) (finding parodic reinterpretation of Roy Orbison’s *Oh, Pretty Woman* to be fair use); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 447-56 (1984) (finding time shifting of television broadcasts to be fair use); see also Ned Snow, *The Forgotten Right of Fair Use*, 62 CASE W. RES. L. REV. 135 (2011) (arguing that fair use concerns were historically considered part of the threshold question of whether a use was infringing, instead of incorporated into an affirmative defense to infringement under current law).

essentialist approach to rights, the *eBay* standard nonetheless encourages courts to adopt an essentialist posture.

Moreover, at least as conceived by four Justices, the *eBay* standard was developed with a particular eye to the inefficiencies of the patent system and to curtail some of the well-publicized holdup behavior by industrial patent owners.<sup>167</sup> Although the copyright system certainly presents opportunities for trolling and strategic bargaining,<sup>168</sup> a repeated concern with abuses in the copyright system is the failure to adequately take into account the interests in free speech and a robust public discourse.<sup>169</sup> These are *not* necessarily concerns with efficiency but instead are ideological commitments to the importance of semiotic engagements not entirely beholden to market dynamics.<sup>170</sup> To the extent that this tension between democracy and efficiency commitments is more pronounced in copyright than in patent, efforts to harmonize the two areas of law have the potential to inadequately protect the nonmarket-based commitments so often prominent in copyright law and scholarship.

### *B. Salinger v. Colting*

In *Salinger v. Colting*, the Second Circuit shifted from a preliminary injunction standard with a relatively fluid treatment of rights and remedies toward a structured, sequential approach seemingly mandated by *eBay*.<sup>171</sup> Prior to its decision in *Salinger*, the Second Circuit employed a “sliding-scale” approach to all preliminary injunctions under which courts in the circuit would consider and balance several equitable considerations.<sup>172</sup> The test in the Second

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167. See, e.g., Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403, 1414 (2009).

168. See, e.g., Lemley & Weiser, *supra* note 70, at 800-03.

169. See *supra* Part I.A.

170. See, e.g., C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 990-1009 (1978); see also *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795 (“[T]he First Amendment does not permit the State to sacrifice speech for efficiency.”).

171. 607 F.3d 68 (2d Cir. 2010).

172. Circuits have split over whether a sliding-scale approach to preliminary injunctions remains valid after *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008). The Second, Seventh, and Ninth Circuits have held that *Winter* requires a consideration of the four-part test and requires at least a likelihood of irreparable harm, but that it does not forbid lower courts from balancing likelihood of success against the relative balance of harms. See *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011); *Citigroup*

Circuit required plaintiffs to show “(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.”<sup>173</sup> Although copyright plaintiffs ostensibly needed to satisfy this same test, a presumption of irreparable harm upon a showing of likely success meant that the Second Circuit “nearly always issued injunctions in copyright cases as a matter of course upon a finding of likelihood of success on the merits.”<sup>174</sup> Injunctions may have been relatively common before *Salinger*, but the presumption of irreparable harm nonetheless kept the court’s inquiry focused on the substance of the plaintiff’s claims.

In *Salinger*, the Second Circuit determined that its previous approach to copyright preliminary injunctions was inconsistent with *eBay* and *Winter*.<sup>175</sup> Because the district court had simply presumed irreparable harm upon finding a likelihood of infringement, the *Salinger* panel vacated the injunction and issued step-by-step guidance on how district courts in the circuit should approach the preliminary injunction inquiry. Under the first step, the plaintiff must demonstrate “either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the [plaintiff]’s favor.”<sup>176</sup> Under the second step, the plaintiff must show “that he is likely to suffer irreparable injury in

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Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 38 (2d Cir. 2010). The Fourth Circuit, by contrast, has interpreted *Winter* as setting forth a stricter four-part test that requires plaintiffs to show entitlement under each criterion. See *Real Truth About Obama, Inc. v. Fed. Election Comm’n*, 575 F.3d 342, 347 (4th Cir. 2009), *vacated*, 130 S. Ct. 2371 (2010). In her dissent in *Winter*, Justice Ginsburg stated that she did not believe that the majority opinion rejected the sliding-scale standard used in several circuits. *Winter*, 555 U.S. at 51 (Ginsburg, J., dissenting).

173. *Citigroup*, 598 F.3d at 35 (citations omitted).

174. *Salinger*, 607 F.3d at 76.

175. *Id.* at 76-79. In *Winter*, the Court rejected the Ninth Circuit’s standard for preliminary injunctions, particularly to the extent that it allowed preliminary injunctions to issue on a mere showing of a possibility of irreparable harm. It held instead that “[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter*, 555 U.S. at 20.

176. *Salinger*, 607 F.3d at 79 (quoting *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 476 (2004)) (alteration in original).

the absence of an injunction.”<sup>177</sup> Under the third step, “a court must consider the balance of hardships between the plaintiff and defendant.”<sup>178</sup> Lastly, “the court must ensure that the ‘public interest would not be disserved’ by the issuance of a preliminary injunction.”<sup>179</sup> This reformulated approach notably reorders the sequence of the court’s previous standard, placing a determination of the merits—whether there is a likelihood of success or existence of serious questions—at step one and moving a determination of irreparable harm “down” to step two. The legal rights of the parties and the additional prerequisites to injunctive relief are considered separately, and the determination of rights occurs first.<sup>180</sup>

Even though courts consider the merits of a copyright claim at step one, the *Salinger* court mentioned the serious First Amendment issues at stake in a copyright preliminary injunction *only* at steps two, three, and four. At steps two and three, courts must take into account both the defendant’s “core First Amendment interest in the freedom to express him or herself” as well as the plaintiff’s First Amendment interest in *not* speaking.<sup>181</sup> Courts may not presume the existence of irreparable harm after *eBay*, and, citing Justice Kennedy’s concurrence, the *Salinger* court noted that traditional equitable standards help courts “keep pace with innovation in this rapidly changing technological area.”<sup>182</sup> At step four, the court stated that (1) “[t]he object of copyright law is to promote the store of knowledge available to the public,” (2) “[t]he public’s interest in free expression ... is significant and is distinct from the parties’ speech interests,” and (3) “[e]very injunction issued before a final adjudication on the merits risks enjoining speech protected by the First Amendment.”<sup>183</sup> The court noted that in the past it had

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177. *Id.* at 80.

178. *Id.*

179. *Id.* (quoting *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2005)).

180. Indeed, Judge Calabresi repeated *eBay*’s insistence that “the creation of a [statutory] right [to exclude] is distinct from the provision of remedies for violations of that right.” *Id.* at 78 (quoting *eBay*, 547 U.S. at 392) (internal quotation marks omitted).

181. *Id.* at 81. See O’Neill, *supra* note 17, for an extended critique of this declared right not to speak.

182. *Salinger*, 607 F.3d at 82.

183. *Id.*

“rarely considered the public’s interest before deciding whether an injunction should issue.”<sup>184</sup>

Given the *Salinger* court’s heightened standard for preliminary injunctions and its repeated invocation of the First Amendment, the decision would seem to represent a significant victory for those seeking to better incorporate free speech considerations into copyright law. *Salinger* materially narrows the availability of injunctive relief in copyright cases, thereby effectuating the goal of several decades of scholarship and advocacy. District courts in the Second Circuit must now expressly take into consideration the free speech interests of both the parties and the public at large before enjoining an allegedly infringing work. A finding of likely infringement no longer necessitates the burning of books, the cancellation of a television show, or the delay of a movie release. Speech may disseminate or remain disseminated, the plaintiff may simply be compensated through monetary relief, and the First Amendment may proceed unoffended by this resolution.

*Salinger* may be, however, a pyrrhic victory for free speech interests in copyright. Although extolling the importance of considering a variety of First Amendment interests at stake in a copyright preliminary injunction, for the sake of “judicial economy”<sup>185</sup> the Second Circuit affirmed the district court’s heavily criticized<sup>186</sup> fair use analysis in a single paragraph.<sup>187</sup> Despite Frederick Colting’s “critical intervention” into the legacy of *The Catcher in the Rye*,<sup>188</sup> and despite fair use’s role as a “First Amendment safeguard[ ],”<sup>189</sup> the Second Circuit sanctioned the district court’s analysis largely by deferring to its “credibility finding” that criticism was

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184. *Id.* at 79 n.8.

185. *Id.* at 83.

186. See, e.g., Joseph P. Bauer, *Copyright and the First Amendment: Comrades, Combatants, or Uneasy Allies?*, 67 WASH. & LEE L. REV. 831, 898 (2010) (“The use of the format of a sequel based on this iconic literary character allowed unique insights, which might not have been achieved as effectively through more traditional forms of commentary or criticism.”); Thomas F. Cotter, *Transformative Use and Cognizable Harm*, 12 VAND. J. ENT. & TECH. L. 701, 749-51 (2010); Langvardt & Langvardt, *supra* note 16, at 123-34; Rebecca Tushnet, *Scary Monsters: Hybrids, Mashups, and Other Illegitimate Children*, 86 NOTRE DAME L. REV. 2133, 2143-44 (2011).

187. *Salinger*, 607 F.3d at 83.

188. Tushnet, *supra* note 186, at 2144.

189. *Eldred v. Ashcroft*, 537 U.S. 186, 219-20 (2003).

not actually Colting's primary motive.<sup>190</sup> The *Salinger* decision may have expressly infused the remedial question with considerations of the First Amendment and the public interest, but at the same time the court seemed largely agnostic to how these same concerns factor into the substantive copyright entitlement. Much as the Calabresi-Melamed framework has largely assumed the existence of some predicate entitlement and focused its energies on the question of remedies,<sup>191</sup> Judge Calabresi's *Salinger* opinion made short shrift of a difficult and important question of copyright infringement in the process of championing steps two through four of the *eBay/Winter* standard. Denying an injunction in *Salinger* allowed the court to trumpet the First Amendment in its question of remedies, but its sharp distinction between rights and remedies in effect collapsed the speech/expression concerns at the heart of the case into the question of whether a property rule or liability rule should govern *given* a finding of infringement.

By laying out a step-by-step inquiry beginning with a determination of the merits and then proceeding to additional remedial concerns, the *eBay/Salinger* standard places courts in a position in which they opine on the merits of the plaintiff's claim first,<sup>192</sup> likely fully aware that they are about to deny the plaintiff's requested relief. The *Salinger* approach may allow courts to champion the First Amendment in the process of denying a particular remedy, but the decisional sequence also allows them to expand the substantive reach of copyright to demand compensation from a broader range of

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190. *Salinger*, 607 F.3d at 83.

191. *See supra* notes 81-82 and accompanying text.

192. The Ninth Circuit's adoption of the *eBay* approach in *Perfect 10, Inc. v. Google, Inc.* perhaps suggests that this sequencing is not set in stone and that courts might bypass the merits altogether. *See* 653 F.3d 976, 982 n.3 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1713 (2012). The court in that case affirmed the denial of a preliminary injunction on the grounds that the plaintiff had not established irreparable harm, *id.* at 981-82, and the panel did not discuss the merits of Google's fair use defense. Given the apparent strength of Google's fair use argument, the decision is a bit of a lost opportunity to confirm Google's reliance on fair use in administering its ubiquitous Image Search service. Nonetheless, a discretionary approach to rights/remedy sequencing likely does help cabin split-the-baby incentives.

The panel's approach did not lead to any substantive expansions, given that the district court rejected the plaintiff's argument on the merits. It is important to note, however, that to the extent that future appeals present a split-the-baby decision in the lower court, an affirmance solely on the lack of irreparable harm could leave questionable district court rulings on the merits intact.

actors. *Salinger* appears to adapt *eBay*'s efficiency concerns in the patent system to the First Amendment concerns in the copyright system, but the ultimate result is that the *Salinger* test couches a shift to a liability rule in a commitment to robust freedoms for speech and expression.

### C. Splitting the Baby

Although the *eBay* standard is still slowly weaving its way into copyright law,<sup>193</sup> *Salinger* is neither the only, nor the first,<sup>194</sup> decision to take the opportunity to split the baby by ruling favorably for the copyright holder at step one but ruling in defendant's favor at steps two through four and denying the injunction. The sample size remains admittedly small—suggesting that *eBay* and *Salinger* may not have *revolutionized* the adjudication of copyright injunctions<sup>195</sup>—but when faced with difficult questions of fair use or novel questions posed by digital media, the decisions herein lean heavily on the *eBay/Salinger* standard in order to split the baby and, at least provisionally, resolve these questions in favor of the rights

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193. For example, the Ninth Circuit has only just recently held that *eBay* alters its traditional approach to copyright preliminary injunctions. See *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 995 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1713 (2012); *Perfect 10*, 653 F.3d at 981. The *Perfect 10* litigation is a good example of the interplay between fair use determinations and the availability of injunctive relief. In the initial preliminary injunction ruling, the district court rejected Google's argument that its Image Search thumbnails were a fair use of Perfect 10's images, concluding they could interfere with the market for small, low-resolution adult images on mobile devices. *Perfect 10, Inc. v. Google, Inc.*, 416 F. Supp. 2d 828, 851 (C.D. Cal. 2006), *aff'd in part, rev'd in part sub nom. Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007). Relying on the Ninth Circuit's presumption of irreparable harm, a preliminary injunction followed. *Id.* at 859. The district court did not preliminarily enjoin Image Search, however, but instead proposed a much more limited injunction requiring Google to implement a notice-and-takedown process for excluding Perfect 10 images. See Lemley & Weiser, *supra* note 70, at 801-02. "In adopting such a limited remedy, the court effectively removed much of the sting from its liability ruling." *Id.* at 802.

194. In *Tasini*, the Court concluded that the inclusion of freelance newspaper articles in online databases was infringing, but it at least arguably split the baby by declaring that an injunction need not follow. *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 506 (2001) ("Agreeing with the Court of Appeals that the Publishers are liable for infringement, we leave remedial issues open for initial airing and decision in the District Court.").

195. For instance, Jiarui Liu in his empirical study of copyright injunctions after *eBay* found little change in the rate of denying injunctions in copyright cases. See Liu, *supra* note 165, at 227-29. Liu's study, however, was admittedly limited to the time period ending June 2010, only a few months after *Salinger* was released. *Id.* at 228.

holder.<sup>196</sup> The cases in this Section demonstrate how remedial talk can be deployed in a manner at odds with the motivations of remedy reformers, and they also serve as a cautionary tale for attempting to do transformational copyright advocacy through remedies reform, at least as typically framed.

In *Whitmill v. Warner Bros. Entertainment, Inc.*, the tattoo artist behind Mike Tyson's distinctive facial tattoo sought to preliminarily enjoin the release of *The Hangover Part II* because it featured a nearly identical facial tattoo on the actor Ed Helms following his character's drunken evening in Bangkok, Thailand.<sup>197</sup> Mike Tyson—and the tattoo on his face—appeared in the first *The Hangover* film, and there appeared to be a fairly strong argument that the use of the tattoo in the sequel was a comedic reference to the first film, poking fun at Tyson and the arguably ridiculous design permanently emblazoned across his face. Nonetheless, the district court determined that Warner Brothers was unlikely to succeed on its fair use defense. According to the court, “This use of the tattoo did not comment on the artist’s work or have any critical bearing on the original composition.... Any other facial tattoo would have worked as well to serve the plot device.”<sup>198</sup> It then proceeded, however, to adopt the *eBay* standard and deny the requested injunction: “[A]fter *eBay* and *Winter*, there is no presumption that simply because there is a finding of likelihood of success on copyright infringement, or even a finding of actual copyright infringement[,] that there must be an injunction.”<sup>199</sup> Although the plaintiff established irreparable harm through a loss of control over his work, the court found that Warner Brothers and third-party distributors stood to lose tremen-

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196. Another example of this split-the-baby dynamic occurred shortly before this Article went to press. In *Fox Broad. Co. v. Dish Network, L.L.C.*, No. CV 12-04529 DMG, 2012 WL 5938563, at \*17-19 (C.D. Cal. Nov. 7, 2012), the district court denied Fox's motion for a preliminary injunction due to a lack of irreparable harm. Nonetheless, in its discussion of the merits, the court concluded that the creation of a Quality Assurance copy of the plaintiff's programs was not fair use, even though the QA copy was never directly presented to the end-users and the commercial-skipping end product it facilitated was itself deemed a fair use. *Id.* at \*14 (“The fact that consumers ultimately use AutoHop in conjunction with PTAT for private home use, a fair use under *Sony*, does not render the intermediate copies themselves a fair use as well.”).

197. See Transcript of Hearing on Motion for Preliminary Injunction at 2, *Whitmill v. Warner Bros. Entm't, Inc.*, No. 4:11-CV-752 (E.D. Mo. May 24, 2011), Doc. No. 56.

198. *Id.* at 4.

199. *Id.* at 5.

dous amounts of money if the film's release were blocked, making an injunction inappropriate under the third and fourth steps.<sup>200</sup> As in *Salinger*, the disaggregation of infringement from injunction allowed the court to reject a fairly strong assertion of fair use without seemingly offending free speech interests, and tensions between the two halves of the ruling are rendered unproblematic by the rights essentialism employed by the court.

In *Capitol Records, LLC v. ReDigi Inc.*, the district court similarly used the *eBay/Salinger* standard to deny an injunction to the rights holder while signaling the rights holder's likelihood of success on a problematic infringement claim.<sup>201</sup> Defendant's cloud-based service allowed users to "resell" a music file in a manner approximating the resale of physical media, wherein the seller could no longer access the file upon completion of the transaction.<sup>202</sup> Commentators and amici accordingly noted that the case raised fundamental questions about the applicability of the first-sale doctrine in the digital context, with broad implications for the cloud computing industry.<sup>203</sup> Citing the *eBay* standard, the court denied plaintiff's requested preliminary injunction due to lack of irreparable harm, reasoning that plaintiff's careful recordkeeping would reasonably permit a calculation of damages.<sup>204</sup> The court announced, however, that "likelihood of success on the merits is something that plaintiffs have

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200. *Id.* at 6-7.

201. Transcript of Bench Ruling at 3-5, *Capitol Records, LLC v. ReDigi Inc.*, No. 12 CV 95 (S.D.N.Y. Feb. 6, 2012) [hereinafter Bench Ruling], available at <http://www.scribd.com/doc/85183018/Redigi-Bench-Ruling-on-Preliminary-Injunction>.

202. Michael B. Farrell, *The Used Record Store Goes Digital*, BOS. GLOBE, July 2, 2012, available at 2012 WLNR 16218658.

203. See, e.g., Letter from Fenwick & West LLP, on Behalf of Google, to Judge Sullivan (Feb. 1, 2012), available at [http://beckermanlegal.com/Lawyer\\_Copyright\\_Internet\\_Law/capitol\\_redigi\\_120201GoogleLetterReAmicusBrief.pdf](http://beckermanlegal.com/Lawyer_Copyright_Internet_Law/capitol_redigi_120201GoogleLetterReAmicusBrief.pdf) ("The Court can and should deny the motion for preliminary injunction without reaching the complex and profound legal issues outlined above because any decision should be informed by the fullest presentation of the relevant facts and law rather than at a preliminary injunction stage. A premature decision on incomplete facts could create unintended uncertainties for the cloud computing industry."); James Grimmelman, *ReDigi and the Purpose of First Sale*, PRAWFSBLAWG (Feb. 8, 2012, 3:21 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2012/02/redigi-and-the-purpose-of-first-sale.html> ("What I love about this case is that it pushes and pulls our intuitions about copyright in so many different directions. It brings up fundamental questions not just about unsettled corners of doctrine, but also about what copyright is for.").

204. Bench Ruling, *supra* note 201, at 3.

demonstrated.”<sup>205</sup> Although Judge Sullivan cautioned that he was not finding that plaintiffs “would win,” he noted that “there are arguments that on their face look to be compelling or potentially persuasive arguments. They have certainly done a good job of articulating those based on the statute, which I think covers that element.”<sup>206</sup> He provided no analysis, however, of *why* defendant’s countervailing first-sale and fair use arguments were unlikely to prevail. The case may ultimately produce a final decision on the merits, but, until then or if the parties settle, Judge Sullivan’s provisional rejection is the sole guidance on the important questions raised.

Although the case primarily involved a claim of trademark infringement, the Eleventh Circuit’s decision in *North American Medical Corp. v. Axiom Worldwide, Inc.* presents another example of the *eBay* standard underwriting essentialist, split-the-baby adjudication.<sup>207</sup> The court in *North American Medical* vacated a preliminary injunction against defendant’s use of plaintiff’s mark because the district court relied on the court’s pre-*eBay* presumption of irreparable harm.<sup>208</sup> It upheld, however, the lower court’s very questionable likelihood-of-confusion analysis. The court found “actual source confusion” because defendant used plaintiff’s mark as a descriptive metatag for its website, and defendant’s website appeared second in the Google search results for that mark.<sup>209</sup> This finding was based on a considerable misunderstanding of contemporary search engines, which make little if any use of metatags in determining search relevancy.<sup>210</sup> The Eleventh Circuit was able to cabin the consequences of the district court’s highly questionable ruling by invoking the *eBay* standard, but it did so in a manner signaling liability for a fairly trivial—if not irrelevant—use of a plaintiff’s mark.

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205. *Id.* at 4.

206. *Id.*

207. 522 F.3d 1211, 1227-28 (11th Cir. 2008).

208. *Id.* at 1228.

209. *Id.* at 1223.

210. See *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1146 n.3 (9th Cir. 2011) (“Modern search engines such as Google no longer use metatags. Instead they rely on their own algorithms to find websites.”); Eric Goldman, *11th Circuit Freaks Out About Metatags*, TECH. & MARKETING L. BLOG (Apr. 8, 2008, 12:00 PM), [http://blog.ericgoldman.org/archives/2008/04/11th\\_circuit\\_fr.htm](http://blog.ericgoldman.org/archives/2008/04/11th_circuit_fr.htm).

Limitations on injunctive relief were ostensibly intended to provide better procedural safeguards for socially valuable expression. In the above cases, however, such limitations appear to have shifted the balancing of free speech and public interests away from the merits determination and into the remedy stages, both lowering the costs of finding infringement and seemingly isolating the merits question at the initial, threshold step. The merits and remedies determinations in *Salinger*, *Whitmill*, *ReDigi*, and *North American Medical* are closely intertwined, but their conceptual disaggregation and a shift in focus to the remedies determination leaves largely unquestioned the questionable predicate determinations of infringement produced by the rights/remedy interplay.

## V. WHAT IS THE HARM?

Looking at the rights/remedies relationship through the critical lens of remedial and performative theories reveals two types of troubling drawbacks to the essentialist approach to remedies employed by *eBay*, *Salinger*, and their progeny. The cases surveyed in the previous Section—and to a significant extent the scholarship surveyed in Part I—have overlooked the ways in which the framing of copyright remedy reform has the potential to (1) exacerbate distributional consequences of splitting the baby and (2) mask the realignment and reinforcement of industrial copyright norms.

### A. *Distributional Consequences and Chilling Effects*

Although the narrowing of injunctive relief may lead to an expansion of substantive copyright protection, as documented above there are some merits to the *eBay* and *Salinger* standards' shift toward a liability rule. Even though the split-the-baby dynamic described above suggests that the shift might be more appropriately characterized as a shift from a relatively weak property rule to a strong liability rule, many of the well-documented advantages of a liability rule would still likely attach under this regime. Large-scale digitization projects could proceed without the need to obtain ex ante permission from every rights holder,<sup>211</sup> multi-million-dollar

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211. See, e.g., Phillips, *supra* note 160, at 430-31 (noting that a liability rule might help

movie productions could proceed on schedule, and publications like those in the two *Salinger* cases would not be subject to the veto of unhappy rights holders. For the parties likely involved in these productions and the related licensing transactions, *eBay* and *Salinger* are certainly appealing.

There are nonetheless a number of reasons to be troubled by the shift to a liability rule accompanied by an expansion of substantive entitlements. This shift might be welcomed by Hollywood, the publishing industries, and certain large technology companies, but it threatens to burden individuals, nonprofits, documentary and independent filmmakers, and other authors who lack the financial resources to clear the rights for their creative endeavors.<sup>212</sup> Levinson has suggested that “remedies sometimes create a case-selection effect that in turn may influence the development and content of rights,”<sup>213</sup> and to the extent that copyright’s remedial structure furthers primarily the interests of those with the financial means to litigate, the doctrine that emerges will similarly reflect those interests. The results in each of the cases may ultimately be satisfactory for the respective parties—Whitmill could easily be compensated by a deep-pockets movie studio and Colting could perhaps share some of his proceeds with the *Salinger* estate<sup>214</sup>—but copyright law nonetheless casts a long shadow over nonindustrial endeavors.<sup>215</sup> Particularly given how prominently First Amendment and democratic concerns have factored into remedy reform proposals, the distributional consequences, rights-holder overreach, and moral implications of split-the-baby adjudications caution against a reflexive embrace of *eBay* and *Salinger*.

First, by expanding the range of infringing activity and, correspondingly, the circumstances requiring a copyright license, the

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solve orphan works problems).

212. See MARJORIE HEINS & TRICIA BECKLES, WILL FAIR USE SURVIVE?: FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL 5-6 (2005), available at <http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf>.

213. Levinson, *supra* note 91, at 912.

214. Indeed, both cases settled fairly soon after the courts’ decisions. See Matthew Belloni, Warner Bros. Settles ‘Hangover II’ Tattoo Lawsuit (Exclusive), HOLLYWOOD ESQ. (June 20, 2011, 1:39 PM), <http://www.hollywoodreporter.com/thr-esq/warner-bros-settles-hangover-ii-203377>; *supra* note 22 and accompanying text.

215. See, e.g., Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1918-21 (2007) (describing the widespread university classroom clearance customs that emerged from one settlement and one district court opinion).

dynamic described above may further exacerbate wealth-based speech disparities. In many cases, such a quasi-compulsory license regime approximated by a strong liability rule could put an end to nonprofit or noncommercial expression just as effectively as a court-ordered injunction.<sup>216</sup> For example, requiring documentary filmmakers,<sup>217</sup> vidders,<sup>218</sup> or fan fiction writers<sup>219</sup> to pay a “compulsory fee” to reimagine copyrighted works creates a risk of chilling a significant amount of this work.<sup>220</sup> Moreover, to the extent that a liability rule renders private licensing more efficient, and thus more customary, “clearance culture” norms can feed back into the determination of fair use and ultimately restrict the scope of the doctrine.<sup>221</sup> To

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216. For example, the imposition of a compulsory license on webcasters under the Digital Performance Right in Sound Recording Act put at least two hundred webcasters out of business within two weeks of the Librarian of Congress’s final order. Matthew J. Astle, *Will Congress Kill the Podcasting Star?*, 19 HARV. J.L. & TECH. 161, 177-78 (2005); see also PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE (2011) (providing many examples of license fees chilling creative endeavors).

217. PATRICIA AUFDERHEIDE & PETER JASZI, UNTOLD STORIES: CREATIVE CONSEQUENCES OF RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS 17-22 (2004), available at [http://www.centerforsocialmedia.org/sites/default/files/UNTOLDSTORIES\\_Report.pdf](http://www.centerforsocialmedia.org/sites/default/files/UNTOLDSTORIES_Report.pdf).

218. See Tushnet, *supra* note 186, at 2135, 2154-55 (explaining how vidders benefit from fair use).

219. See, e.g., Stacey M. Lantagne, *The Better Angels of Our Fanfiction: The Need for True and Logical Precedent*, 33 HASTINGS COMM. & ENT. L.J. 159, 171 (2011) (“Salinger is not an ideal fanfiction precedent.”).

220. Diane Leenheer Zimmerman, *Is There a Right to Have Something to Say? One View of the Public Domain*, 73 FORDHAM L. REV. 297, 368 (2004) (arguing that conditioning low-profit but socially valuable and self-enriching endeavors on the ability to pay “can lead to distortions that offend our norms of individual equality”); see also Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375, 384 (2005) (“While firms that produce content could easily carry the transaction costs involved in securing a license, high legal costs create a barrier on innovation by individuals.”); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 589 (2004) (“Yet poor people also have interests in self-expression and persuasion.... [I]f wealth controlled access to foundational elements of speech, that protection would no longer exist.”); Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1566 (2005) (“[I]terative creativity could be stifled by the mere expense of seeking and paying for permission to incorporate copyrighted expression into a new work.”).

221. See Gibson, *supra* note 70, at 884-85; Rothman, *supra* note 215, at 1958 (“The clearance culture is ... driven by big players—both owners and users—for whom licensing fees are much cheaper than the potential litigation down the road. Less well-financed users of IP cannot always afford licensing fees and therefore must rely on fair use and other defenses to infringement.”); cf. Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 288 (2007) (“Fair use deems lawful some uses that yield benefits to third parties, not because the transaction costs between the copyright owner and user are necessarily high, but

the extent that *eBay* and *Salinger* serve to facilitate industrial copyright licensing at the expense of fair use, they also serve to shift creative resources away from smaller-scale users of intellectual property.<sup>222</sup>

Second, this expansion of substantive copyright entitlement and contraction of fair use facilitates continued overreach by industrial content owners. A tremendous number of copyright disputes are resolved not through litigation or negotiation, but instead through sending takedown notices to internet service providers and websites that rights holders believe in “good faith” to be hosting infringing content.<sup>223</sup> Copyright owners have stretched this “good faith” requirement quite far,<sup>224</sup> and some estimate that roughly one-third of DMCA takedown notices stand on shaky legal ground.<sup>225</sup> Although § 512(f) provides a cause of action for rights-holder “misrepresentations” within a takedown notice, copyright holders generally are able to represent “gray” cases of fair use as clear infringement.<sup>226</sup> To the extent that *eBay* and *Salinger* lead to a contraction in fair use, they expand this gray area of infringement so as to subject a wider range of uses to “good faith” takedown requests.<sup>227</sup> If one of the

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rather to sustain the flow of spillovers to third parties.”).

222. See, e.g., Lloyd L. Weinreb, *Custom, Law, and Public Policy: The INS Case as an Example for Intellectual Property*, 78 VA. L. REV. 141, 146-47 (1992) (expressing concern that “the better financed private interest” will be served through reliance on custom). *But see* Shyamkrishna Balganesh, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1543, 1579-87 (2010) (supporting the use of custom to determine reasonableness in common law intellectual property adjudication).

223. 17 U.S.C. § 512(c)(3)(A)(v) (2006); see, e.g., JASON MAZZONE, *COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY* 69-71 (2011) (describing “[o]verreaching by copyright owners” in utilizing DMCA takedown notices).

224. See, e.g., Wendy Seltzer, *Free Speech Unmoored in Copyright’s Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 HARV. J.L. & TECH. 171, 178 (2010) (“[T]he DMCA makes it too easy for inappropriate claims of copyright to produce takedown of speech. It encourages service providers to take down speech on notice even if the notice is factually questionable or flawed.”).

225. See Jennifer M. Urban & Laura Quilter, *Efficient Process or “Chilling Effects”? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621, 666 (2006) (finding that at least a third of DMCA notices contained “substantial legal questions related to the underlying copyright claim” or “significant technical noncompliance” with the statute).

226. Ira S. Nathenson, *Civil Procedures for a World of Shared and User-Generated Content*, 48 U. LOUISVILLE L. REV. 911, 921 (2010); see *Rossi v. Motion Picture Ass’n of Am.*, 391 F.3d 1000, 1004-05 (9th Cir. 2004) (stating that only “knowing” misrepresentations are actionable).

227. See Nathenson, *supra* note 226, at 918-19 (arguing that through a “substance-procedure-substance feedback loop ... [t]he de facto scope of copyright can become extended

major impetuses for narrowing the availability of preliminary injunctions is a concern with prior restraint of lawful speech,<sup>228</sup> a doctrinal shift that will further underwrite extrajudicial censorship of a wide range of noninfringing content should be particularly troubling.<sup>229</sup>

Third, requiring compensation for an ever-expanding range of uses subverts many of the ideological and moral commitments underlying much of the scholarship in this area. As Diane Zimmerman has observed, “The idea of a metered public domain ... is intuitively uncomfortable, and I suspect quite alien to the understanding that animates the work of most scholars in the field.”<sup>230</sup> For example, Edwin Baker has argued that “speech freedom is a liberty—not a market—right. Freedom of speech gives a person a right to say what she wants. It does not give the person a right to charge a price for the opportunity to hear or receive her speech.”<sup>231</sup> In a slightly different vein, Jennifer Rothman argues that requiring payment for expressive uses of copyrighted works is in tension with the significant personal meaning that engagement with copyrighted works can carry, and that it can interfere with the liberty-enhancing benefits of such engagement.<sup>232</sup> Julie Cohen further suggests that “a compensation requirement might have the perverse effect of suppressing those retellings that map most closely to the dissent trope.”<sup>233</sup> If an author’s reinterpretation of a popular work were driven by some critical perspective on that work, guaranteeing financial enrichment to the object of that critique might seriously degrade and/or dissuade the author’s critical/creative endeavor.<sup>234</sup> Lastly, even if the earlier author would be entitled to financially benefit from a wider swath of subsequent uses, the shift from a property rule to a liability rule could excessively commodify and

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far beyond the scope of what de jure copyright law permits”).

228. See Lemley & Volokh, *supra* note 5, at 197-98.

229. See Seltzer, *supra* note 224, at 190 (“The takedowns resulting from DMCA notifications bear many of the hallmarks of prior restraints on speech.”).

230. Zimmerman, *supra* note 220, at 367.

231. Baker, *supra* note 5, at 903.

232. Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 CORNELL L. REV. 463, 528-29 (2010).

233. Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1202 (2007).

234. See, e.g., McGowan, *supra* note 73, at 331 (arguing that a shift from fair use to allocation of profits could “squelch” a book “as effectively as any district court order”).

devalue the emotional investment of the author in the *initial* work.<sup>235</sup>

### *B. Lack of Transparency*

Regardless of whether one views the harms outlined above as outweighing the potential benefits of the *eBay/Salinger* standard, it is nonetheless troubling that the shift toward a strong liability rule does not seem to be the product of careful, transparent deliberation about the advantages and disadvantages of such a regime. The *Salinger* court discussed at length how concerns with the First Amendment should be incorporated into steps two through four of the preliminary injunction inquiry, but it affirmed the district court's fair use analysis in a single paragraph without any mention of the serious First Amendment issues implicated by *that* decision.<sup>236</sup> It reduced the district court's fair use analysis to essentially a credibility determination, subject to "clear error" review.<sup>237</sup>

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235. For example, Wendy Gordon has expressed concern that a greater shift toward monetary remedies could "constrict" the ways that authors see their works:

The more the law pushes authors toward seeing their work in a cash-only nexus, the more danger it poses of devaluing the work in the artists' own minds. Common observation suggests that intrinsic motivations tend to produce better work, at least in the highly skilled vocations, than extrinsic motivations. But extrinsic motives could increasingly displace intrinsic ones if an author is entitled only to a sum of money.

Gordon, *supra* note 75, at 88 (footnote omitted); see also Robert P. Merges, *The Concept of Property in the Digital Era*, 45 HOUS. L. REV. 1239, 1271 (2008) ("Here is a thought: for some creators, it is more important to maintain the integrity of their work than to command a high price.").

236. A useful comparison is the Eleventh Circuit's approach to a very similar set of procedural and substantive issues in *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001). In that case, the district court had preliminarily enjoined the release of Alice Walker's novel *The Wind Done Gone*, a retelling of Margaret Mitchell's classic novel *Gone with the Wind*, largely from the perspective of the novel's black characters. *Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 1385-86 (N.D. Ga. 2001), *vacated*, 268 F.3d 1257. The district court had found defendants unlikely to succeed on their fair use defense, presumed the existence of irreparable harm, and found that the balance of harms and public interest weighed in favor of an injunction. See *id.* at 1370-85. Although the Eleventh Circuit did reject the district court's irreparable harm analysis, it carefully and extensively addressed the viability of the fair use defense and repeatedly emphasized that the fair use doctrine mediated First Amendment conflicts raised by copyright claims. See *Suntrust*, 268 F.3d at 1260-77. In ultimately concluding that Walker's novel was fair use, the court recognized the important speech and expression issues at stake in its fair use analysis. *Id.* at 1276-77.

237. *Salinger v. Colting*, 607 F.3d 68, 83 (2d Cir. 2010).

It then summarily concluded that this determination combined with “all the other facts in this case”—whatever they may be—supported a denial of fair use.<sup>238</sup> Instead of grappling with the issues of public access, creative incentives, competition, and free speech embedded within the fair use doctrine, *eBay* and *Salinger* allow courts to give each side a little bit of what they want, facilitate settlement,<sup>239</sup> and tip their hats to the First Amendment. Because the question of infringement—with subsidiary determinations of copyrightability, substantial similarity, and fair use—is no longer the end-all and be-all of a request for an injunction and is instead just the first of several steps, courts no longer need to vindicate speech/expression interests through the resolution of difficult questions of fair use; instead, they can just skim over the merits and seemingly achieve the same ends by denying injunctive relief. The *Salinger* panel did not need to give more than cursory attention to the fair use issue in order to vacate the district court’s order, but in so doing it effected a significant limitation on the rights of authors to critically engage with and reinterpret important cultural texts.

It would be one thing if the courts *actually* believed that the conduct in question, divorced from remedial considerations, represented clear instances of infringement. The rights/remedy distinction, however, makes it extremely difficult to know what concerns in fact motivated the result in the cases surveyed above. Douglas Laycock has observed that heavy reliance on equitable considerations, in particular the requirement of irreparable harm, can mask a court’s actual motivations and shield the underlying normative position behind a legal decision.<sup>240</sup> “[W]henever a court cites the irreparable injury rule and denies the remedy that plaintiff seeks, there is some other reason for the decision—the operative rule or the real reason.”<sup>241</sup> *Salinger* expressed concerns for the free speech interests of the parties and the public in a manner entirely divorced from its discussion of the merits of the plaintiff’s claims, but, looking

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238. *Id.*

239. A rich body of scholarship has discussed the merits and drawbacks of courts encouraging settlement. See, most prominently, Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (discussing the potential imbalances of power in the settlement process and the injustices that may arise by sidestepping trial and judgment).

240. See Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990).

241. *Id.* at 726-27.

at the case itself, it is impossible to know what concerns, if any, influenced the court's views on the merits. Even though rights and remedies are "inextricably intertwined,"<sup>242</sup> *Salinger* "retroactively installed" a plaintiff's rights as prior to remedial considerations and cleaved policy issues out of the discussion of rights, cutting off any "direct access" to the normative thrust of the opinion.<sup>243</sup> Because this sharp conceptual distinction between rights and remedies forecloses direct access to the normative underpinnings of the rights determination, it is incredibly difficult to assess the ideological and jurisprudential significance of *Salinger*. It is far from clear (1) whether *Salinger* is a First Amendment victory whose specific facts happened to militate against fair use or (2) whether the panel's preference for a strong liability rule and its attendant transactional efficiencies embraced a split-the-baby compromise as a means toward this end.

Looking at the *Salinger* standard, however, through the lens of performativity rather than through an essentialist rights/remedy distinction can potentially expose the cooperation of copyright law and market ideologies.<sup>244</sup> In deciding whether to enjoin some particular conduct, a court may not be merely responding to some potential failure in the market for copyrighted works; it may instead be producing the market-based structures that appear to have prefigured the dispute. In vacating the preliminary injunction in *Salinger*, the Second Circuit repeatedly invoked the First Amendment and the importance of considering the expressive interests of the parties as well as the public at large; despite this invocation, however, the decision as a whole shifts copyright law in a manner that further entrenches a belief that copyright holders are entitled to compensation for a vast range of downstream uses.<sup>245</sup> To those who have advocated limitations on injunctive relief based on a commitment to nonindustrial and/or noneconomic creative values, the potential adaptation of such proposals to reify transactional copyright norms should be troubling. A performative approach to remedies at the very least unearths the dynamism and slipperiness

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242. Levinson, *supra* note 91, at 858.

243. BUTLER, *supra* note 137, at 5.

244. See Birla, *supra* note 143, at 93 (highlighting the importance of considering "the performatives of law in its production of the market as sovereign").

245. See *supra* Part IV.B.

of the rights/remedy relationship as an object of inquiry and potential concern.

Performative theory further demonstrates the role of temporal sequencing in this reinforcement of status quo norms. As explained above, the “success” of a performative is in large part attributable to a temporal inversion, whereby it installs a phenomenon as existing prior to social interpretation. This temporal inversion is characteristic of the “two-step process” of rights essentialism which, according to Levinson, “legitimate[s] and protects” the privileged status of rights and obscures the way in which the iteration of remedies shapes substantive constitutional values.<sup>246</sup> This same two-part sequence—addressing the merits of an infringement claim and then deciding what remedy should or should not follow—has pervaded copyright scholarship and recent case law. By according first-order consideration to merits determinations and relegating the question of remedies to secondary status—whereby it attempts to enhance, diminish, or cure the consequences of the first-order decision—this sequential approach masks the normative significance of the remedial determination. By positing a robust entitlement determination as occurring first-in-time and in isolation from pragmatic considerations, the *Salinger* sequence naturalizes and normalizes a baseline right to control and/or receive compensation for the use of a copyrighted work.

Lastly, the idea that *eBay* and *Salinger* provide courts with greater flexibility or wider discretion insufficiently accounts for the role of such flexible remedies in shaping rights and fails to dislodge status quo economic norms from the construction of both rights and remedies.<sup>247</sup> Flexibility and fluidity may ease some of the constraints of the current system or “cure” some of the harshest consequences of a court finding infringement,<sup>248</sup> but greater freedom *given a particular determination of infringement* nonetheless “upholds and sustains” the assumptions and values that give rise to that baseline finding.<sup>249</sup> The entire discussions of injunctive relief in *eBay* and

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246. See Levinson, *supra* note 91, at 857, 924.

247. See Afori, *supra* note 66, at 2-3; Kamin, *supra* note 116, at 5-8; see also *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 51 (2008) (Ginsburg, J., dissenting) (“Flexibility is a hallmark of equity jurisdiction.”).

248. Afori, *supra* note 66, at 23-24.

249. See HALBERSTAM, *supra* note 147, at 18-19 (discussing how flexibility in terms of

*Salinger* are predicated upon an infringing act, and it is important to remember that both decisions' discussions of speech, competition, and the public interest operate off this baseline assumption. Flexibility at the remedies stage provides defendants greater freedom to continue their creative efforts notwithstanding the label of infringer, but *grounding* flexibility in that label conditions remedial freedom on at least temporary concession of that label's validity. Because freedom from the consequences of being named an infringer requires acceding to the existence of infringement, the linear rights → remedies sequence forecloses contesting infringement while simultaneously harnessing the liberatory promise of remedy reform. Broader equitable discretion can make the copyright system seem fairer and less explicitly speech inhibitory, but it does so without fundamentally reshaping the status quo values of that system.<sup>250</sup> Remedies—viewed as outgrowths of baseline rights—may be reformed by *eBay* and *Salinger*, but these decisions disaggregate rights and remedies in a manner that both obscures the performative role of remedies<sup>251</sup> and maintains a robust system of copyright entitlements.

## CONCLUSION

Halberstam has warned that “we have become adept within postmodernism at talking about ‘normativity,’ but far less adept at describing in rich detail the practices and structures that both oppose and sustain conventional forms of association, belonging, and identification.”<sup>252</sup> Copyright scholarship is filled with beautifully diverse articulations of alternative models of creativity, collaboration, and public discourse, but it is important to be sensitive to the

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sexual politics “upholds and sustains” heteronormative assumptions); Dinshaw et al., *supra* note 144, at 190-91 (describing flexibility as a “temporal” construct).

250. Accordingly, Reva Siegel's idea of “preservation through transformation”—whereby a particular status regime evolves different means of enforcement over time—may be a useful framework through which to understand the consequences of *eBay* and *Salinger*. See Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2119 (1996).

251. For a similar argument in the sex discrimination context, see Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 *U. PA. L. REV.* 1, 1-4 (1995).

252. HALBERSTAM, *supra* note 147, at 4.

conventional practices, procedures, and conceptual framings that serve to subtly, but effectively, entrench copyright's current ideological commitments.

The primary purpose of this Article has been to demonstrate the limits of using remedies to protect interests in speech and expression against the expansions of copyright law. I am not arguing that *eBay* or *Salinger* were wrong to prohibit categorical rules favoring injunctive relief; there are good reasons to require courts to keep in mind the traditional equitable factors before taking the drastic step of issuing an injunction. It is important, however, that courts and scholars recognize the potential consequences of advocating and embracing the standard embodied by *eBay* and *Salinger*. These cases deal with a particular set of litigants whose interests may be adequately served by the split-the-baby outcomes facilitated by the *eBay/Salinger* standard; but for the broader public operating in the shadow of copyright law, a court's finding of infringement may be deeply problematic.

Given the relative novelty of *Salinger* and the application of the *eBay* standard to copyright law, the ideas explored in this Article can only be provisional. Nonetheless, viewing the deployment of the four-part test through the lens of remedial and performative theories suggests a far more dynamic relationship between rights and remedies than copyright law and scholarship have generally acknowledged. Not only do these theories suggest an interrelationship between rights and remedies, but they also reveal a deep intertwining between the underlying normative aims of our copyright system and the adjudicative sequences that further them.