IRREPARABLE HARM

by
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This Article examines the irreparable harm doctrine and argues that sociological factors such as user perceptions of works be taken into account in evaluating whether such harm exists for purposes of granting injunctive relief. It surveys recent injunctive relief cases and argues that a presumption of irreparable harm should still apply where a plaintiff shows he or she is likely to prevail on infringement. This presumption is justified both by formal considerations concerning the nature of property rights and by the social expectations and understandings that often rest on those rights.

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I. INTRODUCTION

Susanne Pitt is an artist who perceived in Barbie dolls a latent and subversive sexuality. Paint, rubber, and, evidently, knife in hand, Ms. Pitt created "Lily the Diva Dominatrix." Fitted out with rubber lederhosen and improvised sexual organs, Lily sexually dominated and tortured a less fortunate modified Barbie whom Lily had made her slave.[1] Ms. Pitt sold her dolls on the Internet. The doll she sold to Mattel cost $186.

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[1] And whose name, alas, is not preserved in the court's opinion.

When Mattel sued Ms. Pitt, the district court had no problem holding that her adaptation of Barbie was fair use.[2]

The court said things might have been different if Mattel itself had marketed its own line of S&M Barbies or if Ms. Pitt had simply dressed her Barbie up in a cheerleader outfit. In either case, Ms. Pitt's dolls would have seemed much less transformative and might have cut into Barbie's market.[3] If the court did not enjoin Ms. Pitt's "Dungeon Dolls" in such a case, it would have required Ms. Pitt to pay damages. The court's ruling and its comment are entirely conventional copyright law.

But what is it about the absence of a line of S&M Mattel dolls that gives Ms. Pitt a royalty-free right to market her own for $186 a pop? What is it about Mattel's cheerleader doll that compels the opposite result?

The conventional answer is incentive effects: If Mattel could not exclude Ms. Pitt from selling the cheerleader Barbie, then Ms. Pitt could undercut Mattel's price and unravel the investment decisions that made the market in the first place. Because Mattel is not mining the S&M Barbie market we have no such worries. Q.E.D. What's for lunch?

This conventional answer is easy to say—so easy and said so often that repetition places us at grave risk of believing it says all there is to say. It fails to answer some interesting questions, though. This Article examines these questions to see what light they shed on the concept of irreparable harm: (1) Why isn't Mattel selling S&M Barbies? (2) Does it matter why they are not?

Part II of this Article surveys the basic doctrine of irreparable harm. Part III elaborates on this survey by arguing that presumptions of such harm are an inevitable aspect of equity doctrine and that nothing in the Supreme Court's *eBay* opinion is to the contrary. Part IV builds on this argument to relate the concept of irreparable harm to the debate over property and liability rules, and to note an irreducible tension in that debate.

II. A SURVEY OF THE DOCTRINE

Irreparable harm is that which cannot be compensated adequately with money damages.[4] Paradigm cases include harm caused by an impecunious defendant and harm to reputation.[5] Competitive harms,

[2] Mattel, Inc. v. Pitt, 229 F. Supp. 2d 315, 324–25 (S.D.N.Y. 2002).

[3] *Id.* at 322.

[4] *E.g.*, Hess Newmark Owens Wolf, Inc. v. Owens, 415 F.3d 630, 632–34 (7th Cir. 2005) (reversing district court order denying injunction to enforce restrictive covenant); Wildmon v. Berwick Universal Pictures, 983 F.2d 21, 24 (5th Cir. 1992).

[5] Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 404 (2d Cir. 2004) (enjoining violation of website terms of use where violation threatened loss to "reputation, good will, and business opportunities"); Med. Shoppe Int'l, Inc. v. S.B.S. Pill Dr., Inc., 336 F.3d 801, 805 (8th Cir. 2003) ("Harm to reputation and goodwill is difficult, if not impossible, to quantify in terms of dollars."); Concrete Mach. Co. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 611 (1st Cir. 1988).

such as disruption of business relationships or misappropriation, are close to paradigm cases as well.[6]

Courts traditionally enjoined infringement permanently following proof of liability and enjoined it preliminarily on a showing that the plaintiff was likely to succeed on the merits. In each case courts presumed that harm from infringement would be irreparable.[7] Though not absolute, this presumption was strong enough to justify rights holders in expecting injunctive relief if they prevailed on liability or showed they were likely to do so.

Recent opinions have muddled this state of affairs.[8] In *eBay, Inc. v. MercExchange, L.L.C.,* the Supreme Court issued one of its typical intellectual property opinions: It enjoined lower courts to read the relevant statute and not depart from its terms. In doing so, the Court reversed the longstanding presumption in favor of permanent injunctive relief for proven patent infringement.[9]

Justice Thomas's majority opinion pointed out that the Patent Act specifies that courts have the power to issue injunctions according to traditional equitable principles.[10] Although the Patent Act also specifies the patentee has the exclusive right to make, use, or sell the patented invention,[11] and that patents have the attributes of property,[12] the Court found these principles inadequate to support a presumption of irreparable harm. In Justice Thomas's view, "the creation of a right is distinct from the provision of remedies for violations of that right."[13] The majority opinion reflects a strict formalism in the textualist mode.

The majority's distinction of rights from remedies reflects a quintessentially anti-realist sentiment. For realists, one has no right in the

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[6] *See* Foodcomm Int'l v. Barry, 328 F.3d 300, 304–05 (7th Cir. 2003) (interference with customer relationship constituted irreparable harm justifying injunctive relief); Cadence Design Sys., Inc. v. Avant! Corp., 125 F.3d 824, 828 & n.6 (9th Cir. 1997) (presuming irreparable harm and noting as well that it would be hard to show what a market would have been absent infringement); C.B. Fleet Co. v. Unico Holdings, Inc., 510 F. Supp. 2d 1078, 1083 (S.D. Fla. 2007) (even without presumption of irreparable harm, copying by competitor impairs competition and plaintiff's reputation, and thus caused irreparable harm; collecting cases to the same effect).

[7] *E.g.*, *Cadence Design Sys., Inc.*, 125 F.3d at 828 & n.6 (presuming irreparable harm and noting as well that it would be hard to show what a market would have been absent infringement).

[8] *See* Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 374 (2008) (requiring plaintiff objecting to sonar testing to demonstrate likely irreparable harm); eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 394 (2006) (overruling presumption of injunctive relief and requiring direct application of statutory four-factor test).

[9] *EBay Inc.*, 547 U.S. at 394.

[10] *EBay Inc.*, 547 U.S. at 392 (citing 35 U.S.C. § 283 (2006)).

[11] 35 U.S.C. § 154(a)(1).

[12] 35 U.S.C. § 261.

[13] *EBay Inc.*, 547 U.S. at 392.

abstract, but instead a right *to* something. Remedies rather than text, therefore, define the right.[14]

Realism was not absent from the case, however, just from the majority opinion. The realist reading of *eBay* comes from the robust debates over patent "trolls" and the risk of disproportionate license fees due to the risk of hold-up. This concern was expressed most clearly in Justice Kennedy's concurrence. In his view, the traditional equitable factors evolved into a presumption because historically infringement occurred in contexts that satisfied those factors: "To the extent earlier cases establish a pattern of granting an injunction against patent infringers almost as a matter of course," he wrote, "this pattern simply illustrates the result of the four-factor test in the contexts then prevalent."[15]

For Justice Kennedy, this history remained "helpful and instructive" in cases that resembled traditional infringement cases.[16] But the history (and thus the presumption) was not helpful with regard to suits brought by non-practicing entities that bought patents as a means of investing in litigation rather than invention. Such suits might seek "exorbitant fees" in which the prospect of injunctive relief would give the plaintiff "undue leverage."[17] Injunctive relief might also empower vague patents of suspect validity. On this view, far from being the stand-alone checklist of the majority opinion, the traditional equitable factors could help district courts "determine whether past practice fits the circumstances of the cases before them."[18]

Nothing in this account eschews the use of presumptions. As Justice Kennedy describes it, the problem with presumptive injunctive relief is that it does not take enough contextual factors into account. It is one thing if *X* competes against *Y* by stealing *Y*'s technology and free-riding into the market to try to grab market share from *Y*; it is quite another if *X* simply hides under a bridge until *Y* has sunk costs into a technology and then jumps up and demands a toll for *Y* to cross over the bridge and into the market. Justice Kennedy's opinion expressed no skepticism over the use of injunctions to stop free-riding by competitors; to the contrary, his reasoning points toward the use of a presumption in such cases.

The Supreme Court returned to injunctive relief in *Winter v. Natural Resources Defense Council, Inc.* a case challenging the Navy's practice of testing sonar equipment in the oceans off California.[19] The Navy had performed such tests for forty years and the record contained no evidence of harm to marine life.[20] The Ninth Circuit nevertheless

[14] O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) (treating contracts as promises to perform or pay damages).

[15] *EBay Inc.*, 547 U.S. at 396.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 397.

[19] 129 S. Ct. 365, 374 (2008).

[20] *Id.* at 375.

affirmed a district court order enjoining certain testing on the ground that the plaintiff had shown a strong probability of succeeding on the merits of its claim and a "possibility" of irreparable harm.[21] This ruling followed circuit precedent, which relaxed the irreparable harm requirement in such cases.

The Supreme Court reversed, holding that injunctive relief is appropriate only where a plaintiff shows that irreparable harm is likely absent injunctive relief.[22] The military aspect of the case dominated the *Winter* Court's analysis—the majority opinion begins with a reference to George Washington and ends with a reference to Theodore Roosevelt—but history was also plainly important to the Court, as it had been to Justice Kennedy in *eBay*.

Even before *Winter* issued, circuit and district courts began to wonder whether *eBay*'s holding regarding permanent injunctions in patent cases changed the rules for preliminary injunctions in other types of cases. In *North American Medical Corp. v. Axiom Worldwide, Inc.*, for example, the 11th Circuit vacated a preliminary injunction issued by the district court in a trademark infringement and false advertising case.[23] The court stated "a strong case can be made that *eBay*'s holding necessarily extends to the grant of preliminary injunctions under the Lanham Act."[24] The court declined to decide the issue, however, preferring to vacate the injunction and remand the case for further proceedings consistent with its opinion and with *eBay*. The Fifth Circuit also avoided a decision on this question, though through the more defensible ground of finding that irreparable harm had been shown with or without the presumption.[25]

In contrast, in *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, the Ninth Circuit both cited *Winter* and held that because the district court "found a likelihood of success on the merits, it reasonably presumed irreparable injury."[26] The court made no effort to reconcile the two cases and seemed to perceive no tension between them. In the next Part, I argue that *Marlyn Nutraceuticals* was correct to perceive no tension and to apply the presumption.[27]

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[21] *Id.* at 374–75.

[22] *Id.* at 375.

[23] 522 F.3d 1211 (11th Cir. 2008). The court found the district court had misapplied circuit law regarding presumptions of irreparable harm in false advertising cases. The law presumed harm where the false statements occurred in comparative advertising but not where they concerned only the defendant's product. *Id.* at 1228.

[24] *Id.*

[25] Paulsson Geophysical Servs., Inc. v. Sigmar, 529 F.3d 303, 313 (5th Cir. 2008).

[26] 571 F.3d 873, 877 (9th Cir. 2009).

[27] District courts have continued to apply the presumption after *eBay*. *See* Warner Bros. Entm't, Inc. v. RDR Books, 575 F. Supp. 2d 513, 552 (S.D.N.Y. 2008) (making this point and applying presumption).

III. ASPECTS OF EQUITY

The formalist and realist readings of *eBay* reveal two different ways to think about irreparable harm in intellectual property cases. One approach is to work from the top down and deduce irreparable harm from the fact of exclusive rights. There is a hint of this approach in Chief Justice Roberts's *eBay* concurrence, which points out that it is hard to preserve exclusive rights through the imposition of damage awards.[28] The other is to work from the bottom up and try to identify valuation problems that are too hard for courts to solve and for that reason (or some other) warrant injunctive relief.

A top-down approach could yield presumptions, but they would be so strong they would look a lot like rules and thus would present the apparent conflict with statutory text that produced the majority opinion in *eBay*. A true bottom-up approach could not produce a presumption or even a rule. It would be subject to standard epistemological problems with induction that have been familiar since David Hume showed us that we have no logical grounds for believing the things we must believe to get along in life. When we tease from our observations things we call principles, we exceed those observations and embark on conjecture. Weak as the observations are (given that they can be no better than our flawed perceptions), the conjectures will be weaker.

Nevertheless, a middling ground between abstract deduction and the accumulation of a mass of unorganized observations is the only plausible ground for the law, so it is the best place to assess the problem of irreparable harm. In this Part, I start with the comparatively easy question of the present state of the law; in the next, I move to the harder question of what that analysis implies about irreparable harm. The gist of both arguments is to keep the question of irreparable harm as close to a bottom-up analysis as is possible.

Whether a presumption of irreparable harm survives *eBay* depends on what presumptions are supposed to do and what *eBay* actually should be taken to hold. Rebuttable presumptions economize on litigation costs by economizing on information costs. If in most cases *Y* follows from *X*, then presuming *Y* once *X* is shown saves everyone time and expense. Allowing the presumption to be rebutted increases accuracy in the presumably small set of cases where *X* does not imply *Y* (an irrebuttable presumption is best thought of as a rule whose application depends on the showing of some fact).

Does *eBay* allow for such cost-minimizing strategies? Justice Thomas's opinion notwithstanding, a strict textualism does not foreclose the use of presumptions. The Patent Act says only that courts may enjoin infringement "in accordance with the principles of equity" without saying what those principles are.[29] The Copyright Act is essentially the same.[30]

[28] EBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 395 (2006).
[29] 35 U.S.C. § 283 (2006).

Cases recite a conventional listing of equitable factors, but cases are not statutory text and the cases the Court cited emphasized the flexibility of equity practice, not the code-like appearance the factors took on in Justice Thomas's opinion.[31]

Indeed, one of the cases the *eBay* Court cited actually endorsed one type of presumption of irreparable harm while rejecting another. *Amoco Production Co. v. Village of Gambell* dealt with leases for offshore drilling which the Secretary of the Interior had granted without following certain procedures.[32] There was no evidence of environmental harm from the test drilling, but the Ninth Circuit reversed the district court's denial of injunction on the ground that irreparable harm is presumed when such a statutory process is violated.[33]

The Supreme Court reversed. It held the Ninth Circuit erred by focusing on statutory processes rather than on what was actually happening in the waters. It was this presumption regarding process the Court found "contrary to traditional equitable principles."[34] Immediately after making that comment, the Court held:

> Moreover, the environment can be fully protected without this presumption. Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment. Here, however, injury to subsistence resources from exploration was not at all probable.[35]

In the next Part, I will ask what it is about environmental injury that makes money an inadequate remedy. Here, I simply note that the cases on which *eBay* relied do not reject the use of presumptions in equity and one of them endorses it at least at the level of stating what will usually be the case. *EBay*'s use of authority is simply imprecise on this point. Nothing prevents equity courts from adopting presumptions, and nothing in the text of the Patent Act forecloses the use of presumptions if equitable principles make room for them. Even as a textualist matter, therefore, *eBay* should not be read literally. Justice Kennedy's concurring opinion adds force to this claim because he does not foreclose the use of presumptions grounded in history and, as noted above, comes close to

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[30] *See* 17 U.S.C. § 502 (2006).

[31] The cases cited in *eBay* also show how abstract those principles are. One involved Navy pilots dropping bombs into the waters off Puerto Rico during training exercises. *EBay Inc.*, 547 U.S. at 391 (citing Weinberger v. Romero-Barcelo, 456 U.S. 305, 311–13 (1982)). The other, *Amoco Production Co. v. Village of Gambell*, is discussed in the text accompanying notes 33–35.

[32] 480 U.S. 531 (1987).

[33] People of Gambell v. Clark, 774 F.2d 1414, 1428 (1984), *rev'd sub nom. Amoco Prod. Co.*, 480 U.S. 531.

[34] *Amoco Prod. Co.*, 480 U.S. at 545.

[35] *Id.*

endorsing them.[36] The question for Justice Kennedy, therefore, is not whether equity tolerates presumptions—which it plainly does—but how one defines the set of cases in which the presumption yields efficiencies without sacrificing accuracy.

Justice Kennedy's emphasis on history is echoed in the majority opinion in *Winter*, which stressed that forty years of sonar testing yielded no reliable evidence of harm to marine life.[37] As a logical matter this finding does not preclude a showing that such testing would likely cause irreparable harm, but it does raise a factual barrier that would be extremely hard to overcome: If such harm is likely, why hasn't it yet occurred? Reasons might be offered—harm might always have been there but old technology could not detect or measure it, for example—but the force of experience weighs heavily against such a finding.

This historical approach implies that when courts gain enough experience with a particular type of activity they are not obliged to reinvent the wheel in each case; they may use presumptions to move things along. Just as sufficient experience with price fixing arrangements justifies a per se prohibition of them—an irrebuttable presumption that they cause harm—sufficient experience with certain forms of actual harm justifies a presumption of irreparable harm. On this reading it is possible to reconcile Justice White's statement in *Amoco Production Co.*, that "[*i*]*n each case*, a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief,"[38] with his comment that in most cases environmental harm will justify injunctive relief.[39]

A final difference between Justice Thomas's majority opinion and Justice Kennedy's concurrence is worth noting. Formalist textualism does not mix well with equity. It is unrealistic to expect courts to treat each case as if it were truly new and to ignore the patterns of thought, heuristics, and rules of thumb that allow people to navigate their daily lives. No matter what the majority opinion says, therefore, the presumptions will reemerge, first as tendencies and then as themselves, though perhaps more modestly described. It is the way law works because it is the way practical thinking works. It is pointless to pretend otherwise.

IV. AN IRREDUCIBLE TENSION

The preceding sections tell us a bit about irreparable harm, but they do not get to the thing itself. This Part examines why any harm should seem irreparable through damages and then asks what purposes different conceptions of irreparable harm serve. This question produces the usual

[36] *See supra* note 15 and accompanying text.
[37] Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 381 (2008).
[38] *Amoco Prod. Co.*, 480 U.S. at 542 (emphasis added).
[39] *Id.* at 545.

answer that there is no thing itself, but I believe this approach yields useful insights on the way to that conclusion.

A. Irreparable Harm and Damages

Why should any sort of harm be treated as beyond the power of money to cure? After all, law and economics has succeeded to the point where much law *is* a sort of economics, and it is a tenet of at least one influential strand of the neoclassical economic approach that all human behavior can be generalized into preferences which, employing the assumption of rationality, can be counted as costs and benefits and thus analyzed using price theory. We have economic theories of marriage, sex, childbirth, adoption, and so on, for goodness' sake. Why not simply recognize that everything has a price and then set it?

There are a couple of answers to this question, which help frame our discussion of irreparable harm. For one thing, this technique works best where prices exist and can be discovered rather than made up. Prices have to be set somehow, and the best applications of this approach therefore presume a process or mechanism the approach cannot itself justify.

Things are more dicey where notional prices have to be made up. R. H. Coase's essay *Economics and Contiguous Disciplines* makes just this point.[40] Coase argues that economics is a subject, not a technique. The subject is "the workings of the social institutions which bind together the economic system," to which "the measuring rod of money" may be applied.[41] To treat economics as the technique of cost-benefit analysis based on rational choice assumptions is to practice price theory without the prices. But the institutional structure of markets is not the same as the institutional structure of other areas of human behavior, and even people who participate in markets may have a taste (pardon the pun) only for a touch of market activity rather than for the whole hog. As Coase puts it, "[t]o say that people maximize utility tells us nothing about the purposes for which they engage in economic activity and leaves us without any insight into why people do what they do."[42]

A related problem is that even assuming the great measuring rod of money could be applied to a situation, that application might introduce problems of its own. Price theory without prices works best if money is presumed to be a neutral instrument for establishing precise ratios for exchange (voluntary or otherwise). But money is more complex than that. We know intuitively that to offer money for some things is a grave insult. There is a difference between "may I take you to dinner" and "what will it cost me to have dinner with you," but it is not a difference that can be captured by treating money as a neutral measuring device.

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[40] R. H. COASE, *Economics and Contiguous Disciplines*, *in* ESSAYS ON ECONOMICS AND ECONOMISTS 34, 42 (1994).

[41] *Id.* at 41, 45 (internal quotation marks omitted).

[42] *Id.* at 43.

One can view money as transforming the world into an arithmetic problem, as Georg Simmel wrote,[43] but it does not. Economists such as Richard Thaler have shown that people do not treat money as fungible but adopt seemingly irrational mental accounting practices,[44] and sociologists such as Vivian Zelizer confirm the point from a different perspective. She cites studies finding people distinguish "honest" money from "dirty" money based on how it is earned: Money earned from occasional prostitution is spent on partying and drugs while money from lawful sources goes toward everyday expenses.[45] Regardless of whether interjecting money into certain activities reduces the willingness to engage in those activities, as Titmuss famously argued,[46] it would be a mistake to conceive of money as a universal neutral agent even apart from problems of measurement.

Irreparability, therefore, is a cogent concept and one that invites inquiry into very thick social relations. The risk is they are so thick that the inquiry bogs down and produces nothing useful. Ultimately, I think that does happen, but it happens to essentially all arguments that break their tethers from fact. It is still worth stretching the tether to see how far we can go before breaking it.

B. Immeasurability and Incommensurability

Part II defines irreparable harm as injury that cannot adequately be compensated for by money. Conventional analysis would distinguish two reasons this might be the case: the harm could not be measured well enough to pick a price, or the harm might be of a kind for which money was not a socially acceptable payment. I will call the first class of cases the immeasurability cases and the second the incommensurability cases.

Immeasurability seems to present purely technical problems of two types: sometimes adequately precise measurements are not available and sometimes they are available, but at a cost greater than the cost of market transactions that might be forced by enjoining a defendant's conduct. I will argue that this is true to some extent, but the appearance is misleading because it begs the question of baseline entitlements. That question is best viewed from the perspective of incommensurability—a

[43] GEORG SIMMEL, *The Metropolis and Mental Life*, *in* THE SOCIOLOGY OF GEORG SIMMEL 412 (1950).

[44] Richard H. Thaler, *Mental Accounting Matters*, 12 J. BEHAV. DECISION MAKING 183 (1999).

[45] VIVIANA A. ZELIZER, THE SOCIAL MEANING OF MONEY 3 (1994).

[46] RICHARD M. TITMUSS, THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY 94–95 (1971) (observing that monetary payment has negative impacts on blood donations as compared to all voluntary blood donations); *see* YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 93–94 (2006) (an update on the argument that 'crowd[ing] out' of intrinsic motivators, such as altruism, by extrinsic motivators, such as money, occurs in some cases).

perspective that poses an essentially endless number of questions while offering no means to answer them.

1. Immeasurability

Immeasurability is a problem only in relation to some reason for measuring. What does the law hope to accomplish by measurement? It might be no more than preferences, in which case injunctive relief would seem to dominate because any other result would frustrate at least one preference. Typically, in economics the goal is to achieve an efficient allocation of resources or an efficient rate of innovation.

This way of framing the issue seems congenial to damage awards and thus hostile to injunctions. Calculation of damages has the feeling of mathematics and thus of science, which is what economics aspires to be. Nevertheless, most exchanges in most countries of the world are priced by the parties to themselves rather than by third parties.[47] Why?

Cost is probably the biggest part of the answer. The stakes are not very high in most human interactions, so the costs of bargaining are lower than the costs of administrative price-setting proceedings. Take litigation as the example of a price-setting process. It requires lawyers, economists, and a tribunal whose time must be paid by someone. The lawyers and economists must acquire and comprehend information the parties already have and understand. Some learning may occur in the process, but much of it will involve relearning of things known. It would seem to be cheaper just to let the parties do it themselves.

This practical answer is a bit unsatisfying. It is hardly a great recommendation for bargaining to say that most interactions are not worth the effort it takes to calculate damages. There are some other answers, though. One is bias. The lawyers and economists who fight over damage figures are not paid simply to say what the parties think is true but to make the best case they can, even—and perhaps especially—if that entails asserting prices a party knows are excessive or inadequate. If the pricing party is disinterested, he or she may not know the difference between plausible and implausible numbers.

Tailoring provides a third reason why third-party pricing is not the norm. Some transactions are simple: *n* dollars per pound of apples of a recognized quality. Others involve many different terms that affect each other. Employment agreements may be like this—hours, wages, office quality, scope of work, travel, and so on all go into the mix. It is difficult to price one term without pricing the others, and pricing the bundle as a whole multiplies the first two problems.

Incentive effects provide a final reason why property rules dominate liability rules in most real-world transactions. The use of liability rules might encourage property owners to invest too much in trying to create their own property rules by denying access. They might spend too much

[47] *E.g.*, Richard A. Epstein, *A Clear View of* The Cathedral*: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2092–93 (1997).

on locks, alarms, private detectives, and so on.[48] Imagine a world in which I could take your car off your lot, but you could force me to pay you a damage award set by a third party. The damage setting process might be slow, expensive, and unpredictable—as litigation is—and would reverse the normal sequence of payment: I would get the car before you would get your money. In this scenario, you might want to spend money to keep me off your lot—money that you would not spend if the law set the police on me for taking the car. And I might not have enough money to be worth dealing with in the first place, in which case your judgment against me does you little good.

Persuasive as these concerns are, they do not mark a sharp distinction between injunctions and damages. Parties never have perfect information and are subject to all sorts of biases (relative to Bayesian baselines, admittedly, but biases nonetheless), and many transactions are just bets. Additionally, parties may bargain in the shadow of liability rules as well as in the shadow of injunctions. It is a leap from either damages or injunctions to efficiency, and the argument for injunctions is that they make for a shorter leap; a leap which requires less faith than is needed to trust judges or other third parties to set prices.

These instrumental concerns point the way to a pragmatic conception of irreparable harm as harm better dealt with by negotiation than by third party pricing. Immeasurability thus is a strictly comparative concept: Harm should be deemed irreparable when parties' bargaining could more closely approximate an efficient price (net of transaction costs) than could courts, or when parties able to bargain at reasonable cost could not reach one.[49] Most small value transactions will fall in the former category. Competitors exemplify the latter. Competitors typically do not agree to let each other make off with valuable property at any price.[50] Robust use of covenants not to compete and trade secret litigation reflect this fact. Misappropriation combines a reasonably high probability of some adverse effect on the plaintiff's business with a low probability of specifying that effect with any precision, given that competition is dynamic and probabilistic in the first place.[51]

[48] "Too much" in relation to the amount justified under a property rule, of course.

[49] This definition does not cover some situations, such as bilateral monopoly, in which bargaining is possible but bargaining positions create strategic incentives that may preclude agreement through gamesmanship or simply excessive variance in the parties' respective valuations. Though my definition does not work well for this case, these same factors call into question whether a liability rule could work any better.

[50] However, they may cross-license technology as part of an agreement to compete on some basis other than the subject of the license.

[51] Hess Newmark Owens Wolf, Inc. v. Owens, 415 F.3d 630, 632 (7th Cir. 2005) (reversing district court order denying injunction to enforce restrictive covenant between competitors).

2. Incommensurability

Immeasurability cases presume the parties are willing to monetize their transaction, but in some cases, they are not. Recall that reputation is among the factors that appear on our list of types of irreparable harm.[52] Reputation can be priced—entertainers are paid in part based on their fame—so harm to reputation would not seem to qualify as an incommensurability problem but as a measurement problem, which it is.

Measurement is only part of the story, however, which gets more interesting once we get past it. The plentiful examples of people eager to degrade themselves for fame—the tendency of once-famous stars to endlessly chase the spotlight to the point of making documentaries of their final illness and death—suggest that recognition has a subjective psychological component that cannot simply be cashed out. The point works in the other direction too. Sometimes, not chasing fame is the mark of virtue or at least of commitment to some vision: "Selling out" to chase recognition is a perfectly cogent concept. Some artists would view it as shameful to abandon their vision or voice for popular acclaim and money.

Analytically, we may divide reputation by distinguishing fame from honor. Though the law would treat harm to either as irreparable, the distinction poses a question that helps shed light on incommensurability as an element of irreparable harm.[53]

Fame is a market-based concept that is basically rivalrous—the more famous I am the less famous you are, or at least the lower you are in the pecking order of fame. Fame and notoriety are complementary and may be the same thing in many cases. Fame often may be gained, and much energy is spent pursuing it, through ridiculous behavior. For example, it is possible to buy a degree of fame through press agents and the like. If fame wanes, it may wax again—as John Travolta's experience shows.

Honor is not a market-based concept. It is non-rivalrous; that I am honorable does not make you less so. Honor cannot be acquired in the sense that fame may be chased or bought. Honor may be displayed, though not through absurd conduct or indeed any conduct that self-consciously seeks to display it. The trick with honor is not to gain it but rather not to lose it. Once lost, honor is extraordinarily hard, if not impossible, to regain.[54]

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[52] Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 404 (2d Cir. 2004) (enjoining violation of website terms of use where violation caused irreparable harm to "reputation, good will, and business opportunities").

[53] The discussion in the next three paragraphs draw heavily on the superb book by Alexander Welsh, particularly chapter one. ALEXANDER WELSH, WHAT IS HONOR: A QUESTION OF MORAL IMPERATIVES (2008).

[54] In general, I think the stakes for honor are higher than the stakes for fame. The loss of fame implies obscurity; the loss of honor is shame. Conversely—and this is more conjecture than established fact—honor may be less salient when stakes are low than when they are high. For example, to break one's promise in legal practice may prevent one from striking advantageous bargains in the future at material cost to

Fame and honor also differ with respect to attribution.[55] Fame cannot exist without it. An anonymous author is not famous until revealed. In contrast, one might act honorably precisely by not claiming credit for an honorable act, as Darcy did not claim credit for rescuing Lydia Bennett.[56] Still, acknowledgment of obligations is honorable while denying them is dishonorable, and the concept of honor as the product of a community implies that reciprocal evaluation and acknowledgment of acts, and thus some degree of communication and attribution, is crucial to maintaining a culture of honor.

It is easy to see why harm to honor would be irreparable. Honor is grounded in communities and relatively thick cultures. It is relatively particular: honorable conduct in one group may be senseless in another. Harm to honor, therefore, would be hard to price—the very idea of doing so seems inconsistent with the concept of honor—because the subjective element in any calculation of harm would be relatively high and the relevant honor community might be very small. For these reasons it is very easy to see why, for example, a court would enjoin publication of defamatory statements rather than simply requiring the publisher to pay a certain amount of money for each publication.

A more topical example is the supposed lack of moral rights in U.S. copyright law. Although it is often said that U.S. copyright law does not recognize moral rights as such, the law does recognize reputation as relevant to infringement remedies and treats reputational harm as irreparable.[57] That is true even when the relevant aspect of reputation is honor rather than fame, so that something other than money is at stake.

Thus, when ABC chopped Monty Python's work to fit the network's time slots and taste, the Pythons were successful in characterizing their interest as one of not gaining a reputation for doing the type of work ABC presented.[58] Presumably, that interest in the integrity of the work,

oneself and one's clients. To break one's promise in academe rarely matters very much. Thus, deadlines in practice are lines past which serious harm occurs while deadlines in academe are suggestions. This may be part of the reason for Henry Kissinger's famous observation that academic politics are fierce because the stakes are low. In a genuine honor culture, insults provoke duels.

[55] To say honor is the product of a community, and of relatively thick community bonds at that, is therefore to say dissolution of those bonds also dissolves the concept of honor the community sustained. Suppose that musicians with a certain background and training, say gospel music in churches, were taught a high standard of performance. To members of that community it might be shameful to appear onstage so drunk or stoned that they could not perform even if the community had lax or even no standards with respect to private drinking and drug use. Musicians without such bonds might see nothing wrong with appearing on stage so addled that they passed out during the show. For them it would be a humorous anecdote rather than shameful.

[56] JANE AUSTEN, PRIDE AND PREJUDICE (1813).

[57] Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 404 (2d Cir. 2004) (enjoining violation of website terms of use where violation caused irreparable harm to "reputation, good will, and business opportunities").

[58] Gilliam v. Am. Broad. Cos., 538 F.2d 14, 24 (2d Cir. 1976).

and in their own sense of honor in their craft, would not have changed had the bowdlerized versions been runaway hits that enhanced the group's fame. Perhaps they would have set a price for mutilating their work, but the case offers no reason to think so.

It is harder to see why lost fame should count as irreparable harm. Fame tends to bridge communities, particularly when the fame arises from markets, which provide the means for members of vastly different worlds to interact. Markets cultivate indifference to factors other than those present in a transaction. Because fame is relatively detached from the thicker social commitments that comprise an honor community, losses in fame are easier to price (though still not easy), and it feels less strange to do so.

Yet even in a case in which damages might be relatively easy to calculate—either because they were undoubtedly very small or because good comparison cases were available—it is hard to imagine a court holding that a defendant could persist in plagiarizing a work. The First Circuit's opinion in *Concrete Machinery Company, Inc. v. Classic Lawn Ornaments, Inc.*, tends to confirm this intuition.[59] The works at issue in that case were concrete lawn ornaments, some of natural figures such as deer. The court found only that these were "to some extent original works," and the parties argued over things like which way the deer tails pointed.[60]

One would think this is not the strongest case for a reputational harm argument or, if one were made, for showing that reputation in the production of quasi-commodity works has a distinctive value. The court took a different view:

> The ultimate commercial success of an "artist" often depends on name recognition and reputation with the value and popularity of each succeeding work depending upon the "name" established through commercial exploitation of preceding works. This can be true whether the "artist" creates musical compositions, video games, or concrete statues. Any ultimate success in a lawsuit could have little effect on public perception of who the true creator was.[61]

This is the language of immeasurability, but it is hard to shake the feeling that the court simply felt it wrong for Concrete Machinery to have to compete against its own products and not get the credit—for good or ill—for its concrete deer molds.

C. Beyond Monetary Damages

That people do not treat even fame as fungible with money, and indeed do not treat money as fungible itself, points to an incompleteness in neoclassical economics that casts an interesting light on the notion of

[59] 843 F.2d 600 (1st Cir. 1988).
[60] *Id.* at 603–04.
[61] *Id.* at 611.

irreparable harm. Immeasurability shows that, even viewing money as a universal solvent, some cases are better dealt with by forcing consensual interactions than by awarding damages. Incommensurability shows that it can be a serious mistake to interject money into social relations in which money is not treated as a neutral token.

This point supports the more general idea that the concept of irreparable harm must take into account the individual and social psychologies of situations. Even setting aside any problems of measurement, it is not enough to presume that money is a socially neutral instrument that may reconcile any conceivable harm. To illustrate this point, I offer three examples, which I then contrast with the Dungeon Dolls vignette with which we began.

The first example is an observation Richard Epstein made years ago. Liability rules can be conceived of as options, but they are always call options, in which I may take and use your resource on payment of damages. They are never defended as put options, in which I force my resource on you and extract payment in return.[62] Professor Epstein explains this observation on the ground that, to the extent they can be justified, liability rules are justified as solving expropriation problems that arise from monopoly situations. No one has a monopoly in cash so there is no reason to expect a forced transfer to leave anyone better off.[63]

This absence of liability can also be defended on more sociological grounds. Suppose I want to force my wastrel cousin into working in your office because I think it will be good for him. A true liability rule implies I should be able to do so (at least if you have space enough for a cubicle and at least a bit of work to do) and charge you the marginal product of his labor, meager as that might be.

That is of course not the law and it would be crazy if it were. My wastrel cousin might well disrupt the social structure of your office in any number of ways no outsider could perceive as well as you. Even if he did not cause disruptions, the prospect of forced "hirings" might well be disruptive in and of itself: Under such a rule you could never have any assurance of control over the composition of your work force and uncertainty itself is not productive. I, and countless others like me, would be your prospective involuntary partners. Nor is this an immeasurability problem. For example, it would not be solved if I paid you to employ my cousin rather than demanding payment. Rather, the unsettling effects of forcing would fundamentally change the dynamics of your workplace.

My second example flips this point around.[64] One can conceive of certain forms of production as seeking non-monetary returns either in the form of a reputation with potential market value or even in the more

[62] Epstein, *supra* note 47, at 2093.

[63] *Id.*

[64] Disclosure is important here: I presently am co-counsel in a case involving an open-source project similar to the one described in the next two paragraphs and have made this argument on behalf of my client. Discount accordingly.

honor-related sense of simply being a member of a community that does useful things. Some open-source software projects have these characteristics,[65] and the presence of attribution requirements in even undemanding software licenses such as the BSD, MIT, and Artistic licenses is evidence that attribution plays an important role in the sociology of production for projects that employ such licenses (the same is true of licenses, such as the GPL, that add an ideological component to attribution).[66]

Unacknowledged reproduction of the work of such projects could disrupt their work seriously. To copy the work of such programmers while denying them credit for their efforts is to turn them into unpaid, unacknowledged laborers competing with their own venture. They are forced partners by reason of a call rather than a put, but the fact of forcing is disruptive either way. To make use of someone's work in that way is to treat them as a means rather than with respect and to insult them as unworthy of even common acknowledgment. It is an insult. And given that most open-source projects do not seek payment but do seek acknowledgment, to suggest that their effort can be cashed out is to compound that insult by refusing to recognize their own view that their work is about something more than (or at least other than) money.

My third example is J.K. Rowling. She sued the author of the "Harry Potter Lexicon" for copyright infringement.[67] She won and, in arguing to enjoin distribution of the lexicon, she testified that publication of the lexicon would destroy her "will or heart to continue with writing" a Harry Potter encyclopedia of her own.[68] William Patry, the leading copyright scholar and lawyer in the nation at present, referred to this testimony as "[t]he most absurd type of alleged irreparable harm I have seen."[69]

With due respect for the great expertise of the author of this view, however, I think it is mistaken. No one would quibble if Ms. Rowling testified that absent an injunction she would not write her own encyclopedia because the defendant would have undercut her market and she would earn nothing from her work, even though she has plenty of money already. Her actual testimony, though more personal and not

[65] Josh Lerner & Jean Tirole, *Economic Perspectives on Open Source*, *in* PERSPECTIVES ON FREE AND OPEN SOURCE SOFTWARE 47–48 (Joseph Feller et al. eds., 2005) (the classic source on conventional market valuation); *see also* BENKLER, *supra* note 46, at 374–75 (on the thicker social structures of production); David McGowan, *Legal Implications of Open-Source Software*, 2001 U. ILL. L. REV. 241, 275 (2001). Some open-source work is subsidized by firms wishing to commoditize some element of software in order to earn margins on complements such as consulting. This discussion does not pertain to that model.

[66] *See* Open Source Initiative, License by Name, http://www.opensource.org/licenses/alphabetical.

[67] Warner Bros. Entm't, Inc. v. RDR Books, 575 F. Supp. 2d 513, 523 (S.D.N.Y. 2008).

[68] Transcript of Oral Argument at 54, *Warner Bros. Entm't, Inc.*, 575 F. Supp. 2d 513 (No. 07 CV 9667).

[69] 6 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 22.37 (2009).

cast in monetary terms, is entitled to no less respect. Samuel Johnson notwithstanding,[70] some people write books for money and others write for love of their own characters or to return appreciation shown by their fans, or even to have "a place into which [they] like[] to vanish" and "a discipline that [is] very important in keeping [them] sane."[71]

The law might choose for one reason or another to disregard such non-monetary psychological factors, but in doing so it either conceives of non-monetary factors as monetary ones or simply chooses to ignore them. It seems to me that the sort of bottom-up analysis reflected in Justice Kennedy's vision of the presumption of irreparable harm,[72] and in equity practice generally, counsels against ignoring such facts.

Except, of course, that we do tend to ignore them. The interesting thing about Rowling's testimony is that if it were not framed in terms of incentives—if she simply testified that she viewed the defendant's work as "sloppy, lazy" and "not worthwhile," and therefore was disgusted by it—her claims would be weaker. She would no longer be seen as an entrant seeking to keep a market clear of sales-siphoning rubbish and rather as an author trying to maintain a particular vision of integrity against those who would transform her work in ways at least some people would see as desirable. This weaker claim might or might not still prevail, depending on the amount copied and the degree of transformity, but there is no question it would be weaker because the prospect of a superseding use would be gone.

This is of course a position similar to the one in which Mattel found itself with respect to Barbie and the Dungeon Dolls. Mattel had no individual creator who could testify to a personal attachment to Barbie, as did Ms. Rowling, and Ms. Pitt did have a plausible claim to be redressing Barbie as a form of social comment, albeit one distributed only in one-to-one transactions with people rich enough to spend almost two-hundred dollars on a doll. As an impersonal corporation flogging a long-iconic toy, Mattel seems to be in it for the money more than does Ms. Rowling, even taking into account all the money she has made from her work.

But why then does Mattel leave money on the table? Why is Mattel not trying to exploit niche markets for S&M Barbies? After all, based on the Dungeon Dolls episode the margins in that market seem quite good. Perhaps the answer is that the market is too small to bother with. That seems wrong, though, because it was important enough to hire lawyers who tried to squelch it.

Perhaps the answer is that Mattel worried the S&M Barbies would gain too much attention and cannibalize sales of anodyne Barbies. But why would that be? Presumably through a form of tarnishment—once

[70] JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON, LL.D. 292 (William Wallace ed., Edinburgh, William P. Nimmo 1873).

[71] Transcript of Oral Argument, *supra* note 68, at 49.

[72] EBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 396 (2006).

one sees anatomically altered Barbies whipping each other and being sexually assaulted by prison guards, one thinks differently of Barbies, including the ones in the closet or on the store shelf. To the extent this is correct, it implies a non-monetary relationship between Barbie and consumers—a relation in which consumers embrace a vision of what Barbie represents to them.[73] They pay money for Barbie, so there is plainly an economic angle to this relationship, but it seems wrong to say that it is only about money. Mattel's efforts to defend their view of Barbie lend support to this point.

V. CONCLUSION

In the terms discussed above, fair use allocates a property rule to the fair user: They may use the underlying work royalty free, and the original author has no ability to interfere with reproduction or distribution of the altered work. This allocation of rights goes beyond simply monetizing harm to deny compensation altogether. In one sense, this seems appropriate—to the extent works implicate non-monetary considerations then it is right not to pretend that payment satisfies those concerns. The refusal to award damages may avoid insult and even lessen harm by marking the downstream work as, legally, something different and distinct from the original work, and therefore subject to different rules.

But even in such cases, the fact remains that the law chooses not to recognize the types of interests Ms. Rowling expressed in her characters and the creative space they provided for her. To the extent it recognizes something similar, or at least points to results consistent with recognizing such interests, it does so through the right to make derivative works, which it justifies on the ground that granting the right minimizes transaction costs. Pragmatically speaking, I cannot object to using market rhetoric to tell a story that justifies using indirect means to achieve this end. But an interest in candor and in tethering doctrine to all the facts of a case, rather than just some of them, suggests to me that we should be more inclusive in our conception of irreparable harm.

Authors—even soulless corporate authors such as Mattel—often create works that represent particular visions. Consumers may share in those visions and wish to hold on to them in an uncorrupted form. The symbolism of works implies complex relations between works and consumers, relations that fall comfortably into the category of non-monetary harm and thus are candidates for treatment as irreparable harm. It may be that such relations have no doctrinal valence—perhaps the thickness of these relations implies that consumers need great freedom to modify works that are important to them. Even that point is useful to make, however. The large literature espousing the virtues of user-created content takes half this point into account and is right to do

[73] *See* Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775, 795–96 (2003).

so.[74] But the other half matters too and gets nowhere near the academic press it deserves.

[74] *E.g.*, Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It,* 114 YALE L.J. 535, 545–46 (2004).