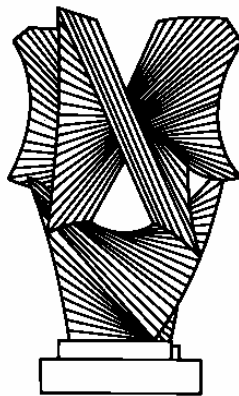


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## IRREPARABLE BENEFITS

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## **Irreparable Benefits**

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## Irreparable Benefits

*The conventional approach to preliminary relief focuses on irreparable harm but neglects entirely irreparable benefits. That is hard to understand. Errant irreversible harms are important because they distort incentives and have lasting distributional consequences. But the same is true of errant irreversible gains. When a preliminary injunction wrongly issues, then, there are actually two distinct errors to count: the irreparable harm wrongly imposed on the nonmoving party, and the irreparable benefit wrongly enjoyed by the moving party. Similarly, when a preliminary injunction is wrongly denied, there are again two errors, not one: the irreparable harm wrongly imposed on the moving party, and the irreparable benefit errantly accorded the nonmoving party. The conventional approach to preliminary relief mistakenly accounts for only half the problem.*

### I. Introduction

In every jurisdiction, a motion for preliminary relief is evaluated in light of three main factors: (1) the likelihood that the requesting party will ultimately prevail on the merits; (2) the irreparable harm the requesting party will suffer if the injunction is wrongly denied; and (3) the irreparable harm the opposing party will suffer if the injunction wrongly issues.<sup>1</sup> The idea is to account for and minimize irreversible court error. In a case where denial of the injunction would be irreversibly harmful and there is a real chance of wrongful denial, courts are more reluctant to deny. Conversely, if issuance poses the greater irreversible threat, courts are more reluctant to issue. The analysis is often cast in terms of a

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<sup>1</sup> See, e.g., *Micro Signal Research, Inc. v. Otus*, 417 F.3d 28, 31 (1st Cir 2005) (motion for preliminary relief evaluated based on “likelihood of success on the merits, irreparable injury absent relief, harm to the defendant if relief is granted, and any public interest considerations”); *Federal Express Corp. v. Federal Espresso, Inc.*, 201 F.3d 168, 173 (2d Cir 2000) (“a party seeking a preliminary injunction must demonstrate (1) the likelihood of irreparable injury in the absence of such an injunction, and (2) either (a) likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation plus a balance of hardships tipping decidedly toward the party requesting the preliminary relief”). In some jurisdictions, additional factors are considered, but the focus remains on these three considerations. See, e.g., *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 382-83 (7th Cir. 1984) (considering whether the proposed injunction will protect or harm the public interest); *Chathas v. Local 134 IBEW*, 233 F.3d 508, 513 (7th Cir. 2000) (discussing the importance of preserving the status quo).

sliding scale: “the more likely it is the plaintiff will succeed on the merits, the less the balance of irreparable harms need weigh towards its side.”<sup>2</sup>

This standard approach accounts for irreparable harms but neglects entirely irreparable benefits. That is hard to understand. If the goal is to minimize deviations from what will be the ultimate ruling on the merits,<sup>3</sup> errant irreversible gains can be just as troubling as errant irreversible losses. Both can have lasting distributional implications, and both can distort important incentives like the incentive to sue or settle. When an injunction wrongly issues, then, there are actually two errors to count: the irreparable harm wrongfully imposed on the nonmoving party and the irreparable benefit mistakenly conferred on the moving party. Similarly, when an injunction is wrongly denied, there are again two errors: the irreparable harm wrongfully suffered by the moving party and the irreparable benefit inadvertently accorded the nonmoving party.

Consider a simple example, one designed in particular to respond to the obvious criticisms that “irreparable benefits” is mere semantics and that this approach double-counts the same underlying wrong. Suppose that the plaintiff in a given case holds a patent on a chemical process shown to significantly reduce the rate of genetic mutation in a certain type of animal cell. The process at the moment has no specific medical application in humans, but the plaintiff believes that the process will ultimately mature into an important human therapy. The defendant, meanwhile, recently began work on a similar chemical process, also hoping in the end to find applications related to human ailments. The plaintiff’s legal allegation is that the defendant’s process infringes the patent and the defendant therefore should not be permitted to engage in further research without permission. The defendant’s response is that its research is permissible, either because its process does not fall within the scope of the patent’s claims or because the patent is invalid in light of the prior art.

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<sup>2</sup> *Abbott Labs v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992).

<sup>3</sup> Minimizing error costs is the goal according to virtually every scholarly and judicial account. See, e.g., John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 *Harv. L. Rev.* 525 (1978) (arguing that the standard for preliminary relief is best understood as an attempt to minimize expected error); *American Hospital Supply Corp. v. Hospital Products Ltd.*, 780 F.2d 589 (7th Cir. 1986) (Posner, J.) (formalizing and adopting Leubsdorf’s reasoning). It is worth pointing out that other goals are also plausible. For example, the standard might endeavor to encourage settlement, or to clearly signal to the parties the most likely outcome on the merits.

If the patentee moves for preliminary relief,<sup>4</sup> the first hurdle will be to show that something irreparable is at stake. Patent harms are not literally irreparable—most patent-related injuries can be fully compensated by some ex post cash payment—but they are typically deemed irreparable because patent harms are difficult for courts to value.<sup>5</sup> I will say more about this argument later,<sup>6</sup> but for now note that many “irreparable” harms are actually irreparable only in this limited sense. Bankruptcy is widely considered to be an irreparable harm,<sup>7</sup> even though in most instances there is some amount of cash that would fully soothe the wound. Similarly, restraints on employment are regularly categorized as irreparable,<sup>8</sup> although here again there surely is some amount of cash that would make whole a wrongfully restrained worker.

With irreparable harm shown, the next step in the analysis is to apply the three classic factors and therefore to consider: (1) the likelihood that the plaintiff’s patent is valid and infringed; (2) the irreparable harm that would be imposed on the defendant by a wrongful court order to halt its research; and (3) the irreparable harm that would be imposed on the plaintiff were the court to wrongfully deny relief. The first factor requires little explanation. If the plaintiff’s

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<sup>4</sup> It might not be in the patent holder’s interest to request preliminary relief. One reason is that, if the defendant’s infringement is later shown to be willful, the patent holder might be able to collect treble damages for these bad acts. A second reason is that a patentee who requests preliminary relief might have to agree to allow the accused infringer accelerated discovery.

<sup>5</sup> For many years, patent harms were presumed to be irreparable without the need for any additional specific showing with respect to the inadequacy of ex post cash damages. See, e.g., *H.H. Robertson Co. v. United Steel Deck*, 820 F.2d 384, 390 (Fed Cir. 1987). Today, courts seem more willing to inquire as to whether cash damages might suffice, for example refusing to recognize patent harms as irreparable in cases where the patentee has licensed the relevant patent to other parties and thereby implicitly established an approximate royalty rate. See, e.g., *Finisar Corp. v. DirecTV Group, Inc.*, Civil Action No. 1:05-CV-264 (E.D. Tx 2006) (denying request for injunctive relief on these facts).

<sup>6</sup> And have before. See Doug Lichtman, *Uncertainty and the Standard for Preliminary Relief*, 70 U. Chi. L. Rev. 197, 200-202 (2003) (arguing that valuation difficulties are the main reason why courts authorize preliminary relief).

<sup>7</sup> See, e.g., *Young v. Ballis*, 762 F. Supp. 823, 827 (S.D. Ind. 1990) (injunction may issue if “necessary to save a plaintiff’s business from insolvency”); *Roland Mach. v. Dresser Ind.*, 749 F.2d 380, 386 (7th Cir. 1984) (Posner, J.) (same if plaintiff “may go broke while waiting, or may have to shut down his business but without declaring bankruptcy”).

<sup>8</sup> See, e.g., *MacGinnitie v. Hobbs Group*, 420 F.3d 1234, 1242 (11th Cir. 2005) (“MacGinnitie has shown irreparable harm which cannot be undone through monetary remedies, in the form of unenforceable restrictions on his access to customers, employees, and information. These injuries are in the form of lost opportunities, which are difficult, if not impossible, to quantify.”).

case is a slam-dunk, the injunction should issue immediately, regardless of the relative irreparable implications. Conversely, if the plaintiff's allegations are preposterous, no injunction should issue, again regardless of the irreparable consequences. Both of these conclusions follow from the simple fact that preliminary relief is not meant to contradict the outcome on the merits. If the merits are clear, the court's decision with respect to preliminary relief is also clear, and irreparable consequences are utterly irrelevant.

Things are more interesting in cases where the merits are murky, because in those cases a court must confront the possibility that its ruling with respect to preliminary relief might ultimately turn out to favor the wrong party. This is where the standard for preliminary relief does its heavy lifting. Start with the possibility that the court will refuse to issue the injunction at the preliminary stage but then, after a full hearing on the merits, conclude that the defendant's research did in fact infringe. As the traditional analysis suggests, one cost associated with this errant denial is any irreparable harm that might be suffered by the patentee. This is a private cost suffered by the complaining patent holder, but it is also a social cost in that mistakes like this will over the long run dampen the ex ante incentive to pursue patent-eligible research, discourage patent holders from litigating even valid claims, and likely drive inventors to invest more heavily in costly self-help protections.<sup>9</sup>

There is another cost associated with this errant refusal to enjoin, however, and that is the irreparable benefit that accrues to the infringer. This cost is one that the traditional analysis overlooks, yet—like the irreparable harm normally considered—it, too, has unintended private and social consequences. Undeserved irreversible gains skew the defendant's incentives with respect to the question of whether to litigate or settle. They also encourage the defendant to invest further in his research, a wasteful outcome in cases where that research will ultimately turn out to be impermissible. Most importantly, undeserved irreversible gains undermine the defendant's incentive to "invent around" the patent rather than infringing it. This latter implication is of particular consequence given that the patent system is designed to encourage innovation not merely by rewarding patent holders for their accomplishments but also by

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<sup>9</sup> Dick Posner and Bill Landes have argued that discouraging self-help of this sort is patent law's most important purpose. See William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* 354 (2003).

forcing rivals to discover comparable, non-infringing substitutes for patented inventions.<sup>10</sup>

Turn now to the opposite category of court error, namely an instance where the court issues an injunction at the preliminary stage but then, after a full hearing on the merits, concludes that the accused research was in fact permissible. The traditional analysis focuses exclusively on the irreparable harm suffered by the defendant because of the wrongful injunction. My point, predictable at this stage, is that similar private and social concerns arise with respect to the plaintiff's wrongful and irreversible gains. Thus, the traditional approach recognizes that it is important to avoid a wrongful injunction in this setting because a wrongful injunction might irreversibly harm the defendant in a distributional sense and might skew long-run incentives like the incentive to pursue borderline but ultimately permissible research. The traditional approach overlooks, however, that wrongful injunctions are in addition troubling because they might irreversibly benefit the plaintiff in a distributional sense and might skew long-run incentives relevant to patentees, such as the incentive for a patent holder to litigate a case that is questionable on the merits.

Naturally, there is much more to say on all of these topics. For instance, there are interactions among the various long-run incentives I consider above, and those interactions amplify some concerns but mitigate others. Moreover, the concept of irreparability is actually significantly more complicated than I have thus far let on; some errors, for example, turn out to be irreversible when they manifest themselves as undeserved losses but fully reversible when they manifest themselves as unearned gains. For now, however, I want to stake out only a very basic claim: When evaluating a motion for preliminary relief, any deviation from what will be the ultimate resolution on the merits is relevant, no matter whether that deviation is perceived to be a benefit or a harm. All that matters is that the deviation is unintended and that its consequences are difficult for a court to later reverse.

I proceed as follows. In Part II, I explain what it means to say that a given harm or benefit is irreparable, and I explain why irreparability is thought to justify preliminary relief. My purpose here is to show that irreparable benefits are not so different from irreparable harms. Both matter because they threaten to lock in outcomes that are inconsistent with the outcomes that will be deemed

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<sup>10</sup> See *Hilton Davis Chem. Co. v. Warner-Jenkinson Co.*, 62 F.3d 1512, 1520 (Fed. Cir. 1995) (inventing around is "one of the important public benefits that justify awarding the patent owner exclusive rights to his invention"); *State Indus., Inc. v. A.O. Smith Corp.*, 751 F.2d 1226, 1235-36 (Fed. Cir. 1985) (inventing around "brings a steady flow of innovations to the marketplace").

appropriate after a full hearing on the merits. In Part III, I consider the logic of the current standard for preliminary relief and explain how it could be adjusted to account for irreparable benefits. I emphasize here that the right answer depends significantly on a tradeoff between two conflicting goals: minimizing the likelihood of judicial error on the one hand, and minimizing the severity of judicial error on the other. In Part III, I consider some likely objections to my account, including the argument that unintended benefits are better thought of as windfalls to be celebrated rather than errors to be avoided. Finally, in Part IV, I briefly conclude.

## II. Justifying Preliminary Relief

Under the conventional analysis, preliminary relief is appropriate in cases where there is an on-going risk of irreparable harm. That is, where a party to litigation can show (1) that some harm will continue to accrue during the course of litigation and (2) that the harm will be difficult to undo *ex post*, it is generally considered appropriate for the relevant court to issue a remedy early in the litigation rather than waiting to craft a remedy only after the merits have been definitively adjudicated. The reason is that under these conditions there is a tradeoff between accuracy and efficacy. Accuracy is maximized by waiting until all the evidence has been presented and all the arguments have been heard. But efficacy is maximized by moving quickly, before some part of the outcome has been irreversibly predetermined.

Examples of irreparable harm range across a wide spectrum.<sup>11</sup> Some harms are literally irreparable in that there is no plausible compensation for the loss. The loss of freedom associated with unjust imprisonment might be an example here, as might be the loss of companionship with a child or loved one. Other harms can be made whole in theory but are irreparable in a particular case. For example, the relevant bad actor might lack the necessary funds, or he might have the necessary funds but keep them beyond the reach of judicial process. Most irreparable harms, however, are irreparable only in the sense that the harm at issue is difficult for a court to value. In these instances, there is some amount of cash that would make the relevant victim whole, but the harm is in a practical sense irreparable because the court has no way of determining the appropriate amount.<sup>12</sup>

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<sup>11</sup> Doug Laycock offers a comprehensive taxonomy in Laycock, *The Death of the Irreparable Injury Rule*, 103 Harv. L. Rev. 687 (1990).

<sup>12</sup> See *Foundry Services, Inc. v. Beneflux Corp.*, 206 F2d 214, 216 (2d Cir. 1953) (Hand, J., concurring) (“The plaintiff indeed has failed to show any ‘irreparable injury,’ if by that is meant

Consider in this light speech harms. Limitations on speech are routinely characterized as irreparable, with courts and commentators readily accepting the notion that cash cannot adequately make up for speech that is wrongly restrained.<sup>13</sup> That, however, is ridiculous. A civil rights activist hoping to stage a peaceful demonstration on a particular Sunday would often willingly forsake that opportunity if compensated by (say) the funding necessary to sponsor ten demonstrations the following week, or, better yet, some mixture of demonstrations, public hearings, and other means through which his message might be heard. The real problem with most speech harms is therefore not that after-the-fact cash remedies cannot make the relevant victim whole, but instead that courts cannot reliably estimate the size of the necessary cash transfer.

All this, of course, raises the question of why a harm should be deemed irreparable simply because it is difficult for courts to measure reliably. After all, in cases like these courts could simply guess at the correct amount of compensation. Sometimes the award would be too high. Sometimes the award would be too low. But if courts are just as likely to overestimate as they are to underestimate, on average the guesses would end up just right. That said, preliminary relief is probably better than unadorned guessing for two reasons.<sup>14</sup> First, when faced with uncertainty, courts tend to underestimate harm. This is because evidentiary rules are slanted against speculative injuries—plaintiffs typically bear the burden of proving any harm with specificity<sup>15</sup>—and they need

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that money will not satisfy any loss that the defendant's competition will cause; nevertheless it has shown such an injury, if that includes the impossibility of ascertaining with any accuracy the extent of the loss. That has always been included in its meaning; and I cannot see how the plaintiff will ever be able to prove what sales the defendant's competition will make it lose . . . ."); *MacGinnitie*, 420 F.3d at 1242 (injury is irreparable because its value is "difficult, if not impossible, to quantify.").

<sup>13</sup> See, e.g., *Bronx Household of Faith v. Board of Ed.*, 2002 U.S. Dist. LEXIS 11318 (2002), and cases cited therein. See also *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("Loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.")

<sup>14</sup> In earlier work, I offer some other explanations, but none are as compelling as these two. See Lichtman, cited *supra* note 6, at 201. I should point out that my remarks there are incomplete with respect to risk. The real reason that risk is a bad explanation for preliminary relief is that risk is itself an injury that can be made whole through some appropriate *ex post* cash payment.

<sup>15</sup> Among countless examples, see *Kids' Universe v. In2Labs*, 95 Cal.App. 4th 870, 883 (Cal.App. 2002) ("where the operation of an unestablished business is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative"); *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 513 ("in a copyright action, a trial court is entitled to reject a proffered measure of damages if it is too speculative").

to be, or else the courts would be flooded by disingenuous claims. Second, even if court estimates were right on average, they would be wrong in particular cases, and that might matter tremendously. A plaintiff who can predict that his harm will be greater than the average harm, for example, would have an incentive to engage in costly self-help precautions. A plaintiff who can predict that his harm will be lesser than average, on the other hand, might exercise inefficiently little care. And, strategic behavior aside, many plaintiffs would end up with the wrong distributional outcomes. That might not be a tragedy, but preliminary relief offers another option, and even a quick glance at the caselaw confirms that courts routinely take it.<sup>16</sup>

My comments thus far focus on irreparable harm, but the basic arguments and examples transfer easily to irreparable benefits as well. For instance, if a person suffers irreparable harm when imprisoned unjustly, that person experiences an irreparable benefit when wrongly allowed to walk free. If a court's inability to enforce its judgments transforms a normal harm into an irreparable one, an inability to collect similarly renders irreparable an ill-gotten gain. If the harms associated with patent infringement are irreparable because it is hard to cash out those harms with precision, so, too, the benefits associated with patent infringement can be irreparable in instances where they are hard to accurately monetize. Indeed, nothing in my previous discussion turned on the fact that those "irreparable harms" were harms. My discussion instead focused on the fact that, in each example, the relevant change in status was "irreparable." That is in many ways my central point: it is irreparability that justifies preliminary relief, and benefits can be just as irreparable as can harms.

Does this mean that irreparable harms and irreparable benefits necessarily should be given equivalent policy or moral weight? Of course not. The reasons to care about the irreparable harm suffered by my hypothetical patent holder, for instance, are very different from the reasons to care about the associated irreparable benefit enjoyed by the relevant infringer. From an incentive

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<sup>16</sup> There is a third reason why preliminary injunctions might be an appropriate response in cases where an injury is difficult to value: the use of injunctive relief spares the court the expense of actually estimating value. Judge Posner rejects this explanation on the ground that any such expense would likely be worthwhile. It would only be incurred in litigated cases, but it would yield benefits more broadly given how many disputes settle in the shadow of the courts. See Richard Posner, *Economic Analysis of the Law* 35 (7th ed. 2005). I reject this explanation for a different reason, namely that it speaks to the wrong issue. Concerns about expense would explain why courts might choose to estimate damages rather than trying to calculate them precisely, but those concerns do not at all explain why courts should use injunctive relief rather than cheap but imperfect estimates.

perspective, the harm threatens to in the long run reduce the incentive to develop patentable research, whereas the benefit might undermine what would otherwise be a strong incentive to invent around the patented invention. Similarly, with respect to distributional concerns, irreparable harms might be of greater moral concern than are irreparable benefits—which is to say that, under certain plausible philosophical views, a government decision that wrongly deprives a private party of some right or freedom could reasonably be thought of as being of greater consequence than is a similarly errant decision that wrongly recognizes that right or freedom. Again, my point is only that irreparable harms and irreparable benefits share two core characteristics: they threaten to accrue during the pendency of litigation, and they can be relatively difficult to undo *ex post*. These characteristics are what justifies preliminary relief in the first place, and thus both irreparable harms and irreparable benefits have relevance when it comes to deciding when and whether preliminary relief is appropriate.

### **III. The Standard for Preliminary Relief**

The conventional standard for preliminary relief accounts for three primary factors: (1) the likelihood that the requesting party will ultimately prevail on the merits; (2) the irreparable harm the requesting party will suffer if the injunction is wrongly denied; and (3) the irreparable harm the opposing party will suffer if the injunction wrongly issues. The obvious implication of my work is to suggest that two more are relevant to the analysis: (4) the irreparable benefit the nonmoving party will enjoy if the injunction is wrongly denied; and (5) the irreparable benefit the moving party will enjoy in the event of wrongful issuance. Taken together, these five considerations would empower a court to estimate not only the likelihood of court error but also its severity.

The question would then become how to weight the factors. Two considerations seem dominant. First, particular attention should be paid to the court's prediction on the merits, bluntly because that is the most reliable factor of the five in play. Irreparable harms and benefits are by definition difficult to quantify.<sup>17</sup> Worse, irreparable benefits often interact with irreparable harms in

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<sup>17</sup> Put differently, when considering a preliminary injunction, the court is uncertain about all of the relevant inputs. The court is uncertain about the merits because, by definition, motions for preliminary relief are brought early in the litigation process. But the court is also uncertain about the relative irreparable implications at stake, primarily because irreparable consequences are typically difficult to precisely quantify. I have argued elsewhere that the modern standard for preliminary relief focuses so much on the first of these uncertainties that it fails to adequately account for the second. See Lichtman, *supra* note 6. I also suggest some ways by which a court

ways that a court cannot easily track. In the patent hypothetical, for instance, the main reason to worry about the irreparable harm that threatens the patent holder is that this harm would in the long run undermine the incentives created by patent protection. The irreparable benefit in play for that same patent holder is mainly troubling for the opposite reason: unearned protection would in the long run encourage inventors to work on inventions that the patent system itself would not protect. For some inventors—say, inventors who are unsure into which category their inventions will fall—these long-run consequences cancel out. But a court would be hard pressed to armchair this sort of integrated policy-driven analysis, matching the implications of each irreparable harm to those of each irreparable benefit and through that process identifying the net troubling effects. This argues against heavy reliance on the four irreparability factors.

The court's prediction on the merits, by contrast, seems very reliable. After all, courts are well equipped to evaluate legal arguments and parse evidentiary records. They also should be relatively good at evaluating more subtle clues like the relative quality of the lawyering. Moreover, the result of the preliminary hearing often taints the process in ways that make the court's predicted outcome more likely. This is sometimes a psychological effect, as where the judge is subconsciously influenced by his earlier decision when he later makes rulings or announces jury instructions.<sup>18</sup> And it is sometimes just an unavoidable ramification of preliminary relief, as where an injunction temporarily entrusts a minor to the custody of one of two feuding foster families, the unintended consequence being that the minor then strengthens his or her attachment with the chosen family, which in turn changes the case on the merits.<sup>19</sup> For these

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could improve the quality of its estimations, for example by using bonds and after-the-fact liability to tease out the parties' private valuations. *Id.* at 234.

<sup>18</sup> Similarly, a plaintiff who wins at the preliminary injunction stage might more aggressively pursue the litigation, and a defendant who defeats a motion for preliminary relief might more aggressively defend. Cf. Jolls, Sunstein & Thaler, *A Behavioral Approach to Law and Economics*, 50 *Stan. L. Rev.* 1471, 1516-18 (1998) (same point applied to prosecutors). Note that there are strategies for minimizing these sorts of psychological biases. For instance, the judge's psychological bias could be rendered irrelevant by scheduling litigation such that one judge decides preliminary matters but then a second judge, unaware of the result in the earlier hearing, actually hears the case. The cost of this approach would be the obvious lost economy of scale.

<sup>19</sup> See, e.g., *McLaughlin v. Pernesley*, 693 F. Supp. 318 (E.D. Pa. 1988) (interim placement of foster child relevant to final placement decision). Empirical research suggests that many cases settle after the issuance of a preliminary injunction but before a full hearing on the merits. Jean Lanjouw & Josh Lerner, *Tilting the Table? The Use of Preliminary Injunctions*, 44 *J. Law & Econ.* 573, 576-78 (2001). That finding can be interpreted many ways, but the authors of the study

reasons, then, a court should likely put more weight on its prediction with respect to the merits than it does on its estimates of the various irreparable consequences.

The second consideration that should influence the relative weight of these five preliminary injunction factors is the extent to which it is important to minimize the number of court errors as opposed to minimizing their average severity. The best way to minimize the number of errors is to focus exclusively on the court's prediction as to the likely outcome on the merits. Indeed, by granting relief in any case where the moving party is more likely than not to win on the merits, a court can maximize the likelihood that its preliminary decision will be consistent with its final ruling. After all, if the moving party is more likely to win than to lose, in most cases he will win, and thus granting the injunction is the safest bet. Some errors, however, are more troubling than others; and the only way to incorporate that idea is to consider in addition the irreparable harms and benefits associated with each type of error. That will increase the likelihood of error because the results will sometimes conflict with the simple more-likely-than-not rule. Ideally, however, those more numerous errors will on average be less severe, because the court will be able to identify and avoid the most serious threats.

This tradeoff between accuracy and severity knows no general solution. Even in the simplest case where only distributional issues are at stake, reasonable minds might disagree over whether it is better to have (a) four cases decided correctly but one horribly off or (b) two cases decided correctly but the remaining three only modestly in error. Cases where incentives are a concern complicate the problem, with the analysis now depending on what behaviors are at stake and how sensitive private parties are to the various errant payoffs. The fact that a court has only a limited ability to measure irreparable repercussions is also relevant here. In the extreme, a court's estimates might be so poor that incorporating them will increase the error rate but not offer much of a corresponding decrease in error severity. Lastly, if I am right in my claim above that decisions with respect to preliminary relief sometimes taint the outcome after a full hearing on the merits, that itself is a reason to encourage courts to emphasize accuracy and downplay severity. That way, if a little bias is inevitable, at least it will push in the right direction.

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interpret it as evidence for the proposition that preliminary injunctions significantly alter the parties' relative positions in the litigation. *Id.*

## IV. Objections

My account of preliminary relief in general and irreparable benefits in particular can be subject to a host of intuitive criticisms. Some of those are entirely on point. Others misconstrue the idea or its implications. All help, however, to further delineate the precise contours of my argument and to unpack its relationship to other literatures and debates.

Start with the most obvious criticism, namely that I am wrong here to characterize unintentional benefits as errors. According to this argument, to the extent that a preliminary injunction confers a benefit on one party without imposing an equivalent harm on the other, the result is a windfall that courts should ignore and perhaps even celebrate. I hear the intuition here, but I think the objection is misplaced, in that it incorrectly assumes that private benefits are also social benefits. Return to my patent hypothetical. If the patentee is mistakenly awarded preliminary relief, the patentee is admittedly privately better off. But it would be surprising were society to applaud that error. Patent law meant to award this patentee a certain payoff, a payoff designed to create particular incentives with respect to the patentee's behavior and to achieve a given distributional outcome as a reflection of the patentee's contributions to social welfare. Any deviation from that baseline distorts those incentives and undermines the desired distributional outcome. The labels "harm" and "benefit" thus mislead, emphasizing the private party perspective but neglecting broader social goals and consequences.<sup>20</sup>

A second intuitive criticism is that the irreparable harm at stake for a party in the litigation will typically be comparable in magnitude to the irreparable benefit at stake for that same party, and thus there is no reason to account for both. In my patent hypothetical, for instance, the irreparable harm at risk for the patentee is the irreparable harm associated with any unlawful infringement that might occur between the rejection of the motion for preliminary relief and the final resolution of the case on the merits. The irreparable benefit at stake, meanwhile, is the irreparable benefit associated with wrongful enforcement of the patent for that same time period. These magnitudes are indeed comparable in a superficial

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<sup>20</sup> I am obviously not the first to argue that unintended private benefits can be socially harmful. The literature on restitution develops this point, and courts widely accept it under theories like the theory of unjust enrichment. For discussion of when and why substantive legal rules disgorge unearned benefits even in the absence of a parallel undeserved harm, see E. Allan Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 *Yale L. J.* 1339 (1984); Douglas Laycock, *The Scope and Significance of Restitution*, 67 *Tex. L. Rev.* 1277 (1988); Saul Levmore & William J. Stuntz, *Remedies and Incentives in Private and Public Law: A Comparative Essay*, 1990 *Wis. L. Rev.* 483 (1990).

sense, but for three reasons equivalence here is an illusion. First, as I have stressed already, even if the magnitudes of two considerations are similar, their distributional and incentive implications will often differ substantially. Second, these two irreparable consequences might be irreparable to different degrees. Sales forsaken, for instance, are hard to measure because it is difficult to run the necessary counterfactual. Sales unlawfully made, by contrast, can often be easily disgorged, namely by taking away the tainted cash.<sup>21</sup> Third and finally, note that these superficially equivalent factors argue in entirely opposite directions. The possibility of that irreparable harm is a reason to issue the injunction, whereas the possibility of that irreparable benefit is a reason to deny it. Accounting for the irreparable harm therefore does not implicitly account for the irreparable benefit.

A third and related criticism emphasizes another form of possible equivalence: equivalence between the irreparable harm at stake for one party and the irreparable benefit in play for the other. Equivalence of this sort is common in disputes involving fungible goods. In a dispute over twenty dollars, that which one party gains from a wrongful win exactly corresponds to that which the other party loses. For harms and benefits that are irreparable, by contrast, equivalence seems unlikely to hold. In the patent hypothetical, for instance, the irreparable benefit associated with an errant injunction is the benefit that the patent holder derives from several months of undeserved protection. The irreparable harm, meanwhile, is the loss that the accused infringer suffers during that same time period. Are these two effects equivalent? Maybe, but maybe not. Much depends on how central the relevant research is to each firm's plans, what each firm's next-best research options look like, and dozens of other party-specific factors.

A fourth intuitive criticism is the argument that in one way or another my concerns here are already being addressed. This criticism can take many forms. For instance, courts do from time to time recognize that a given party might wrongfully benefit if the injunction at issue is either denied or granted.<sup>22</sup> And

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<sup>21</sup> Then again, if the product is an automobile and the infringement involves only a feature on the rearview mirror, valuation problems return because the court likely has no reliable way of disentangling the value of the infringement from the value of the rest of the car. Cf. *Sheldon v. Metro-Goldwyn Pictures*, 106 F.2d 45 (2d Cir. 1939) (dispute over whether the extent to which the value of a movie derived from the movie script, which infringed copyright, as opposed to other factors like the identity of the leading actress or the advertising budget of the film).

<sup>22</sup> I have hunted for opinions where the court in some way refers to irreparable benefits, but I have found only a tiny handful, and in even those cases the relevant court's reference to irreparable benefits is ambiguous to say the least. An example is *Perfect 10 v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1191 (C.D. Cal 2002), where the court notes in passing that the accused infringer "profits from the infringing and unlawful activities" but does not seem to have any

there are many jurisdictions where, in addition to the standard factors, courts evaluating a motion for preliminary relief explicitly consider whether “the public interest” would be served by granting the injunction<sup>23</sup>—an amorphous inquiry surely capable of including in its purview the many considerations I raise here. To this, my response is that even if courts do on occasion stumble into these intuitions, and even if certain articulations of the modern standard could be read to incorporate the concerns I raise here, it still is both troubling and puzzling that irreparable benefits are left to so haphazard and imperfect a safety net, whereas irreparable harms are uniformly and explicitly considered in every jurisdiction. As I have argued here, irreparable harms and benefits are factors of comparable importance. If courts are to be verbally reminded to consider irreparable harm as they weigh the pros and cons of injunctive relief, they should with similar force be reminded to weigh irreparable benefits.

A fifth and final intuitive criticism is that my thesis is too timid; if irreparable benefits have relevance for preliminary injunctions, they should be relevant when courts consider permanent injunctive relief as well. On this, I disagree. The reason is that decisions with respect to permanent relief are made entirely with an eye to the merits. That is, when evaluating a motion for injunctive relief, a court does not factor in the possibility that its final decision on the merits might be wrong. Instead, the court takes its final decision as a given and merely decides whether injunctive relief is among the types of remedies available under the relevant substantive law.<sup>24</sup> This is in sharp contrast to the analysis relevant to preliminary relief, where, as I have emphasized, the decision turns not only on the merits but also on the likelihood and magnitude of court error. Because of this difference, the concept of “irreparable benefits” is in my view of little import as applied to permanent relief. There is no reason to measure the consequences of error precisely; error costs are not a factor when it comes to permanent relief.

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sense of how that point relates to the other considerations at issue. That said, for the purposes of argument, I assume in the text that opinions like this exist, and I am meanwhile continuing to search for them.

<sup>23</sup> For citations and discussion, see Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 Wash. & Lee L. Rev. 109, 111 (2001) (citing cases).

<sup>24</sup> For explanations and criticisms of the practice, see David Kaye, *The Limits of the Preponderance of Evidence Standard: Justifiably Naked Statistical Evidence and Multiple Causation*, 1982 Am. B. Found. Res. J. 487; Steven Shavell, *Uncertainty over Causation and the Determination of Civil Liability*, 28 J. L. & Econ. 587 (1985); Joshua P. Davis, *Taking Uncertainty Seriously: Revising Injunction Doctrine*, 34 Rutgers L.J. 363 (2003).

## **V. Conclusion**

When considering a motion for preliminary relief, courts in every circuit take careful account of any harm that might accrue during the course of litigation but be difficult to undo *ex post*. In this Essay, I have urged that attention likewise be paid to benefits that might similarly accrue during the course of litigation and similarly be difficult to counteract. I would do so by introducing two additional considerations to the conventional analysis. Courts would be asked to consider the irreparable benefit enjoyed by the moving party in the event of errant issuance and the irreparable benefit enjoyed by the non-moving party in the event of an errant denial. That would admittedly complicate the analysis. However, the current approach simplifies things in an indefensible way. The very incentive and distributional concerns that justify the modern focus on irreparable harm similarly require judicial consideration of irreparable benefits.