

## “Make it Work”: *Project Runway* and Injunctive Relief in the Television Industry

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*Sure next season, whenever the hell it happens, will have Tim and Heidi and Michael and Nina and all that, but after all this bickering and tinkering and product placement and drama, I just doubt that anyone involved is going to feel that, in the end, the juice was worth the squeeze.*<sup>1</sup>

—Gawker.com

*In order to be irreplaceable one must always be different.*<sup>2</sup>

—Coco Chanel

### INTRODUCTION

In September 2008, fans and television industry members alike were shocked when the New York Supreme Court issued a preliminary injunction to prevent the airing of one of cable television’s biggest hits, *Project Runway*.<sup>3</sup> The case before the court involved a contractual dispute between NBC Universal (the parent company of Bravo, *Project Runway*’s old network) and the Weinstein Company, the producers of the show.<sup>4</sup> The preliminary injunction prevented the Weinstein Company from moving the successful show to its new home on Lifetime Television because it was alleged that the Weinstein Company failed to honor the contractual right of first refusal held by NBC Universal.<sup>5</sup> Most stunning to both the parties to the lawsuit and

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<sup>1</sup> Richard Lawson, *The Project Runway Lawsuit: Nobody’s Going to Win*, GAWKER.COM (Sept. 29, 2008, 10:58 AM), <http://gawker.com/5056266/the-project-runway-lawsuit-nobodys-going-to-win>.

<sup>2</sup> MARCEL HAEDRICH, *COCO CHANEL: HER LIFE, HER SECRETS* 255 (Charles L. Markmann trans., Little, Brown & Co. 1972).

<sup>3</sup> See Bill Carter & Brian Stelter, *‘Project Runway’ Move to Lifetime is Blocked*, N.Y. TIMES, Sept. 27, 2008, at B9.

<sup>4</sup> *Id.*

<sup>5</sup> Bill Carter, *Bravo’s Parent Sues for ‘Runway’ Rights*, N.Y. TIMES, Apr. 8, 2008, at C3; Carter & Stelter, *supra* note 3, at B9.

the entertainment industry as a whole, however, was the fact that a court would issue a preliminary injunction in an entertainment industry disagreement over an established television property—a fairly unusual occurrence.<sup>6</sup> Courts commonly grant preliminary injunctions as a form of equitable relief in breach of contract cases if the plaintiff can show (1) that irreparable harm will occur if the injunction is not granted, (2) that the plaintiff would prevail on the merits of the case at trial, and (3) that the balance of potential harm to either side weighs in favor of relief.<sup>7</sup> Courts, however, have rarely issued them in connection with media industry disputes due to the fact that money damages are almost always an adequate replacement for the loss of an entertainment property and a financial investment; accordingly, the moving party cannot establish irreparable harm.<sup>8</sup>

One could argue that a preliminary injunction is still available as a remedy in an entertainment case for a rare situation in which a dispute would center on unique and irreplaceable property for which no amount of money could substitute, such as television shows like *The Cosby Show*,<sup>9</sup> or, more recently, *Friends*.<sup>10</sup> However, such water-cooler shows that dominated the market share are no longer as frequent, and with all the changes in production, distribution, and advertising in television in the last decade,<sup>11</sup> it is harder to argue that a show is

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<sup>6</sup> Carter & Stelter, *supra* note 3, at B9 (“The decision stunned parties on all sides of the deal because such injunctions are so rarely granted in entertainment industry disputes.”). See also Bill Carter, *Weinstein Strikes a Deal in ‘Project Runway’ Lawsuit*, N.Y. TIMES, Apr. 2, 2009, at C3 (“NBC Universal won an injunction—highly unusual in the entertainment business—in September in State Supreme Court in New York. That decision prevented Lifetime from putting the show on.”).

<sup>7</sup> Nobu Next Door, LLC v. Fine Arts Housing, Inc., 833 N.E.2d 191, 192 (N.Y. 2005) (“The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor.”); Robert A. Barker, *Requirements for a Preliminary Injunction*, N.Y. L.J., Dec. 16, 1996, at 3.

<sup>8</sup> SportsChannel Am. Assocs. v. Nat’l Hockey League, 589 N.Y.S.2d 2, 3 (App. Div. 1992).

<sup>9</sup> See Bill Carter, *In the Huxtable World, Parents Knew Best*, N.Y. TIMES, Apr. 26, 1992 (Arts & Leisure), at 1 (“The series was the most-watched show of the last decade, the comedy seen by more people than any other in television history, the show that resurrected the sitcom as television’s most popular genre and the first to portray mainstream black middle-class life.”).

<sup>10</sup> See Bill Carter, *Friends’ Deal Will Pay Each of Its 6 Stars \$22 Million*, N.Y. TIMES, Feb. 12, 2002, at C1 (discussing that *Friends’* ratings in its second-to-last season were “the biggest in all of television”).

<sup>11</sup> AMANDA D. LOTZ, *THE TELEVISION WILL BE REVOLUTIONIZED 1* (New York University Press 2007) (“[L]ong before viewers or television executives truly imagined the reality of downloading television shows to pocket-sized devices or streaming video online, it was apparent that the box that had sat in our homes for half a century was on the verge of significant change.”).

unique.<sup>12</sup> Audiences have become fickle as to both scripted and reality television, causing networks to leave shows on for only a couple seasons or even to pull the plug after only a few episodes.<sup>13</sup> While turnover has always been a part of television, it is no longer likely that an average show will generate the large ratings and network market shares of previous decades.<sup>14</sup> Because of this and improved technology for network revenue-tracking, it should be easier for courts to assign monetary compensation as a remedy, even if such calculations are complicated by increased advertising revenue streams.<sup>15</sup> This Comment argues that preliminary injunctions are not an appropriate remedy for future television program lawsuits because of the time-sensitive nature of modern television shows, pop culture relevance, new media distribution, and product integration. Therefore, damages should be the compulsory remedy even if new technology makes damages potentially difficult to calculate.

Beginning with a background in legal remedies, Part I outlines the requirements of preliminary injunctions and how the courts view them. It also touches on how preliminary injunctions can be a drastic remedy and therefore should not be liberally applied.

Part II of this Comment delves into preliminary injunctions in the television industry. It examines prior cases that have dealt with motions for preliminary injunctions against television shows and television networks and the reasons they were denied. Part II also discusses the *Project Runway* legal battle, the issuance of the preliminary injunction, and the ramifications for all of the parties involved.

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<sup>12</sup> *Id.* at 36 (“Television’s new abundant offerings make it difficult to determine a proper frame through which to examine programming and assess its significance.”).

<sup>13</sup> Bernard Weinraub, *Wake Up and Knock the Lineup*, N.Y. TIMES, May 21, 2000, at A2 (“In their hunger to lure increasingly fickle audiences away from cable and the Internet, network executives said selecting and scheduling programs was a roll of the dice as well as a blend of considerations.”).

<sup>14</sup> LOTZ, *supra* note 11, at 43 (“[I]n comparison with the network-era reach of television—when top shows were watched by 40 to 50 percent of television households—popular contemporary shows such as *American Idol* have a narrower scope—only 15.7 out of a universe of 109 million homes watch it. But even with only an average of 14 percent of U.S. television households watching the show, it is among the most widely viewed regular programs in a given year.”).

<sup>15</sup> HOWARD J. BLUMENTHAL & OLIVER R. GOODENOUGH, *THE BUSINESS OF TELEVISION* 85 (3d ed. 2006) (“This type of advertising has a lot of buzz behind it, and it is growing rapidly. In the statistics-bound advertising industry, it seems likely that a meaningful measurement system will evolve as product placement becomes a more commonplace media buy.”).

Finally, Part III offers a proposal for making damages the standard remedy for entertainment industry disputes, focusing on television in particular. Part III focuses on the changing nature of television and posits that although these changes are altering the economic model of television, they should not alter how the courts determine remedies.

#### I. BACKGROUND: THE PROVISIONAL REMEDY OF PRELIMINARY INJUNCTIONS

Preliminary injunctions, as a form of equitable relief in breach of contract cases, are drastic remedies that are only available in certain situations.<sup>16</sup> A preliminary injunction is a provisional remedy that the courts use mainly before a trial to maintain the status quo of a situation when there is a legitimate issue in dispute. It is an ideal remedy in situations involving real and intellectual property disputes where monetary damages cannot begin to replace the item or expression of an idea that was lost.<sup>17</sup> In most cases, unless the situation includes unique goods or property, damages are a more appropriate remedy as long as they are somehow calculable.<sup>18</sup> The types of cases where courts are willing to issue a preliminary injunction usually involve a specific type of irreplaceable property like land or unique possessions, or are license or patent cases where damages are not calculable.<sup>19</sup> However, in 2006 the U.S. Supreme Court, in *eBay Inc. v. MercExchange, LLC*, radically changed the requirements for a preliminary injunction in intellectual property suits by finding against the automatic presumption of irreparable harm formerly used in patent cases.<sup>20</sup> In other types of cases where a

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<sup>16</sup> *Marietta Corp. v. Fairhurst*, 754 N.Y.S.2d 62, 64 (App. Div. 2003); Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 272 (1979) (“Under current law, courts grant specific performance when they perceive that damages will be inadequate compensation. Specific performance is deemed an extraordinary remedy, awarded at the court’s discretion . . .”).

<sup>17</sup> See Trial Order at 35, *NBC Universal, Inc. v. Weinstein Co. LLC*, 2008 WL 4619203 (N.Y. Sup. Ct. Sept. 26, 2008) (No. 601011/08) [hereinafter Trial Order] (“[I]t should be noted that it is settled law that the grant or denial of a request for a preliminary injunction, a provisional remedy designed for the narrow purpose of maintaining the *status quo*, is not an adjudication on the merits . . .”) (internal quotation marks omitted); Barker, *supra* note 7, at 3.

<sup>18</sup> See *SportsChannel Am. Assocs. v. Nat’l Hockey League*, 589 N.Y.S.2d 2, 3 (App. Div. 1992); Schwartz, *supra* note 16, at 271 (“Although the damages remedy is always available to a disappointed promisee under current law, the remedy of specific performance is available only at the discretion of the court. Moreover, courts seldom enforce contract clauses that explicitly provide for specific performance in the event of breach.”).

<sup>19</sup> Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 355–56 (1978).

<sup>20</sup> *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 393–94 (2006) (reversing the Court of Appeals’ automatic presumption of irreparable harm, and holding that, in intellectual property cases, “the decision whether to grant or deny injunctive relief rests

substantial equivalent for the property could be easily obtained elsewhere, money damages are an adequate substitute for relief.<sup>21</sup> There are set requirements that a court must find in order to grant a preliminary injunction.<sup>22</sup> The three-prong test requires the court to engage in a difficult analysis of the facts for each motion.<sup>23</sup> These requirements guide a court in weighing both parties' interests to determine the best possible outcome.

#### A. Preliminary Injunction Requirements

When a party seeks a preliminary injunction, the court must consider the evidence before trial to see if immediate action must be taken in the form of a preliminary injunction, or if damages would be easily calculable and therefore constitute a more appropriate remedy.<sup>24</sup> For a preliminary injunction to be granted, “[a] party seeking [this] drastic remedy . . . has the burden of demonstrating, by clear and convincing evidence, (1) a likelihood of ultimate success on the merits, (2) the prospect of irreparable injury if the provisional relief is withheld, and (3) a balancing of the equities in the movant’s favor.”<sup>25</sup>

Different jurisdictions also require that the party seeking relief demonstrates either a combination of likely success on the merits and irreparable harm, or a showing that there are “serious questions going to the merits” for the court to consider and that the “balance of hardships tips sharply in his or her favor.”<sup>26</sup> Courts do not view this “alternative standard” as a separate standard, but rather as a means of broadening the court’s decision-making power.<sup>27</sup>

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within the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards”).

<sup>21</sup> Kronman, *supra* note 19, at 358 (stating that “if the subject matter of a contract is such that its substantial equivalent for all practical purposes is readily obtainable from others than the defendant in exchange for a money payment, this fact will usually in the absence of other factors be sufficient to show that money damages are an adequate remedy for breach”) (internal quotation marks omitted).

<sup>22</sup> See *Berkoski v. Bd. of Trs. of Inc. Vill. of Southampton*, 889 N.Y.S.2d 623, 627 (App. Div. 2009).

<sup>23</sup> See *Barker*, *supra* note 7, at 3.

<sup>24</sup> See *Kronman*, *supra* note 19, at 362.

<sup>25</sup> *Berkoski*, 889 N.Y.S.2d at 627. See also *Int’l Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 822 (9th Cir. 1993) (explaining that the preliminary injunction test is generally a three-prong test and a potential fourth prong: “depending on the nature of the case, (4) the public interest favors granting relief”).

<sup>26</sup> *Int’l Jensen*, 4 F.3d at 822.

<sup>27</sup> *Id.*

### 1. Irreparable Harm

Courts have found that, of all of the preliminary injunction requirements, irreparable harm is the “single most important prerequisite for the issuance of a preliminary injunction.”<sup>28</sup> Regardless of the dispute at issue, the plaintiff seeking preliminary relief “must demonstrate that irreparable injury is *likely* in the absence of an injunction.”<sup>29</sup> Courts consider whether there are any other options, mainly monetary damages, which would maintain the status quo and sufficiently compensate the moving party.<sup>30</sup> There must be “an injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages.”<sup>31</sup>

In general, courts have found that if a party provides only evidence of loss of business resulting in provable monetary damages, a preliminary injunction is not appropriate.<sup>32</sup> Similarly, in breach of contract cases where disputes arise over lost profits, the court can easily quantify the breach in monetary terms.<sup>33</sup> Even when courts find it difficult to calculate damages, or parties offer little evidence to illustrate the amount of future lost profits, they still may not necessarily find irreparable harm.<sup>34</sup> Without evidence of such injury, a court will deny a

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<sup>28</sup> *Rodriguez v. DeBuono*, 175 F.3d 227, 233–34 (2d Cir. 1999) (holding that the moving party must first demonstrate likely irreparable injury before the court will consider the other requirements for a preliminary injunction); *accord Natsource LLC v. Paribello*, 151 F. Supp. 2d 465, 469 (S.D.N.Y. 2001).

<sup>29</sup> *Winter v. Nat. Res. Def. Council, Inc.*, 129 S. Ct. 365, 375 (2008) (emphasis in original). See also *Tom Doherty Assocs., Inc. v. Saban Entm't., Inc.*, 60 F.3d 27, 37 (2d Cir. 1995) (“Irreparable harm is an injury that is not remote or speculative but actual and imminent, and ‘for which a monetary award cannot be adequate compensation.’”); *Natsource*, 151 F. Supp. 2d at 469.

<sup>30</sup> *SportsChannel Am. Assocs. v. Nat'l Hockey League*, 589 N.Y.S.2d 2, 3 (App. Div. 1992) (stating that “[d]amages compensable in money and capable of calculation, *albeit* with some difficulty, are not irreparable”); Christopher T. Wonnell, *The Contractual Disempowerment of Employees*, 46 STAN. L. REV. 87, 142 (1993) (arguing that, in the context of employee breach of contract cases, “[c]ourts must . . . examine such agreements carefully, and grant relief from [an] injunction only if satisfied that it can calculate the defendant's profit with reasonable certainty”).

<sup>31</sup> *Rodriguez*, 175 F.3d at 234. Even in intellectual property cases, where the property at issue is often considered irreplaceable, courts no longer automatically presume irreparable injury; instead, the determination lies solely within the discretion of the trial court. *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 393–94 (2006).

<sup>32</sup> See *Tom Doherty Assocs.*, 60 F.3d at 37.

<sup>33</sup> See Wonnell, *supra* note 30, at 141 (arguing that “[c]ourts should not impose injunctive relief when they can assess damages with reasonable certainty (where damages are liquidated in the contract, for example) and the defendant can post a bond sufficient to cover potential damage awards to employers”).

<sup>34</sup> See *Barker*, *supra* note 7, at 3 (“[M]oney damages could serve to remedy any loss [the plaintiff] may have suffered. This is true . . . even though the calculation of such damages might be fraught with some difficulty.”).

motion for a preliminary injunction.<sup>35</sup> The next prong for the court to consider—whether or not the party seeking the injunction will prevail on the merits—can be straightforward or complicated depending on the circumstances, because it requires an in depth look at the evidence presented.

## 2. Prevailing on the Merits

Prevailing on the merits is the determination by the court of whether or not the party seeking a preliminary injunction would likely be successful at a future trial.<sup>36</sup> This requirement varies in difficulty and requires case-by-case determinations, because the court is forced to make a preliminary determination of the merits without having a full record established, often before discovery even begins.<sup>37</sup> If the case is simple, then it is a relatively undemanding inquiry in which the court examines the evidence to determine whether or not a party can clearly prevail, or whether a showing of irreparable harm is present.<sup>38</sup> Additionally, “the degree of likelihood of prevailing on the merits that the plaintiff must demonstrate decreases the more heavily the balance of harms weighs in its favor.”<sup>39</sup> In contrast, if the facts heavily favor the opposing party, the court can readily determine that the moving party will not prevail at trial, and therefore an injunction would not be justified.<sup>40</sup> However, in

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<sup>35</sup> *Rodriguez*, 175 F.3d at 233–34; 23A FEDERAL PROCEDURE: LAWYER’S EDITION § 54:422 (2001) (“A preliminary injunction will not be granted if the plaintiff is unable to establish a danger of irreparable harm, as where a plaintiff can be compensated by damages; however, it has been said that a reasonable apprehension of threatened injury will satisfy the ‘irreparable harm’ requirement.”).

<sup>36</sup> *E.g.*, 23A FEDERAL PROCEDURE: LAWYER’S EDITION § 54:422 (2001) (“[P]reliminary injunctions may be issued where the plaintiff demonstrates a likelihood of success on the merits . . .”); 87 C.J.S. *Trade-Marks, Trade-Names, and Unfair Competition* § 302 (2000) (stating that, in the context of trade-mark infringement, “[t]he likelihood of success sufficient to support a preliminary injunction exists if the party seeking the preliminary injunctive relief demonstrates that he or she has a better than negligible chance of succeeding on the merits of the underlying infringement claim”).

<sup>37</sup> *See Barker*, *supra* note 7, at 3.

<sup>38</sup> If a plaintiff has no chance of prevailing on the merits, he is highly unlikely to prevail on the other two factors, and thus will likely not be entitled to a preliminary injunction. *See id.*

<sup>39</sup> *Brunswick Corp. v. Jones*, 784 F.2d 271, 275 (7th Cir. 1986) (“Although the plaintiff must demonstrate some probability of success on the merits, the threshold is low. It is enough that the plaintiff’s chances are better than negligible . . .”) (internal quotation marks omitted).

<sup>40</sup> *See, e.g.*, *Fashion Television Assocs. v. Spiegel, Inc.* 849 F. Supp. 19, 21–22 (S.D.N.Y. 1994) (finding that the plaintiff did not create “a sufficient association in the public mind between the [service] mark and its source,” which indicated to the court that the plaintiff would not be able to prove these issues enough to prevail at a future trial); *Windows User, Inc. v. Reed Bus. Pub. Ltd.*, 795 F. Supp. 103, 108 (S.D.N.Y. 1992) (holding that the plaintiff had not demonstrated a likelihood that it would prevail on its claim because it could not establish the requisite first use of the service mark in question). *See also Barker*, *supra* note 7, at 3.

situations where facts are at issue, testimony is in dispute, or the court is asked to determine complex questions of law, the case will usually continue to trial without the protection of a preliminary injunction so that those core disagreements can be resolved.<sup>41</sup> No matter the circumstances, a judge must determine whether or not the plaintiff has a strong enough case to prevail on the merits at trial.<sup>42</sup> The remaining requirement can also be quite difficult to determine, depending on the circumstances.

### 3. Balancing of Potential Harm

The requirement that the court “balance the potential harm” is determined on a case-by-case basis and is often difficult to apply. The court must examine all possible consequences of a preliminary injunction, rather than just considering the evidence relevant to the dispute at issue.<sup>43</sup> This test, often called balancing of the equities, requires the court to “balance the competing claims of injury and [to] . . . consider the effect on each party of the granting or withholding . . . the requested relief.”<sup>44</sup> Most courts require the balance of hardships to “tip sharply” in the moving party’s favor, making this requirement exceedingly difficult to meet.<sup>45</sup> A plaintiff would at least have to establish that there are serious, unresolved, substantive issues in the case in order to prevail.<sup>46</sup>

Courts also consider equity and common sense in a decision to grant or deny an injunction.<sup>47</sup> Public policy concerns factor into the court’s decision as well, because the public can be adversely affected by a preliminary injunction.<sup>48</sup> For example, courts consider the effect that such an injunction would have on the public if granted and whether such an effect would be unfair, especially in instances where a decision would negatively impact

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<sup>41</sup> *Brunswick Corp.*, 784 F.2d at 274 n.2 (“Whether the plaintiff can demonstrate a reasonable likelihood of prevailing on the merits, however, often requires determination of a question of law.”); accord 87 C.J.S. *Trade-Marks, Trade-Names, and Unfair Competition* § 302 (2000).

<sup>42</sup> See *Brunswick*, 784 F.2d at 274.

<sup>43</sup> See *Barker*, *supra* note 7, at 3.

<sup>44</sup> *Chase-Riboud v. Dreamworks, Inc.*, 987 F. Supp. 1222, 1224 (C.D. Cal. 1997). See also *Barker*, *supra* note 7, at 3.

<sup>45</sup> *Int’l Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 822 (9th Cir. 1993).

<sup>46</sup> *Windows User, Inc.*, 795 F. Supp. at 109.

<sup>47</sup> See, e.g., *Bertolli, U.S.A., Inc. v. Filippo Bertolli Fine Foods*, 662 F. Supp. 203, 205–06 (S.D.N.Y. 1987) (stating that sometimes, the granting of an injunction also benefits the enjoined party, because if that party eventually loses at trial, the injunction protects that party from “needlessly devot[ing] time, energy and financial resources to a futile endeavor”).

<sup>48</sup> See *Brunswick Corp. v. Jones*, 784 F.2d 271, 274 & n.1 (7th Cir. 1986) (requiring the moving party to establish that, if issued, the injunction would not harm the public interest).



numerous third parties, such as employees or television audiences.<sup>49</sup> Overall, it takes a great deal of evidence to prove the necessity of a preliminary injunction, which is understandable considering the extraordinary nature of the relief.<sup>50</sup>

#### B. Preliminary Injunctions Are Drastic Remedies

Preliminary injunctions are provisional remedies that courts only issue as a last resort since most consider them a drastic remedy—because of this, it is a remedy that is not routinely granted.<sup>51</sup> Money damages are the normal remedy for breach of contract, and courts only use preliminary injunctions in very special circumstances when there is no other option for the property or issue in question.<sup>52</sup> For example, courts are more likely to use preliminary injunctions for claims concerning real estate, where the property in question is both unique and easily transferable.<sup>53</sup> The injury claimed cannot be merely theoretical, because preliminary injunctions freeze assets and render businesses temporarily useless, causing extreme problems and

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<sup>49</sup> As the court in *Hastings-Murtaugh v. Texas Air Corporation* explained:

Considering the contingent nature of the employees' proposal, the history of the unions' refusal to grant further concessions, and the financial crisis that precipitated the Texas Air merger agreement, loss of the Texas Air proposal could result in the ruin of Eastern Air Lines. Such a result would be disastrous not only to the corporate entity, but also to the shareholders represented by five of the plaintiffs here and to Eastern's employees and unions.

*Hastings-Murtagh v. Tex. Air Corp.*, 649 F. Supp. 479, 487 (S.D. Fla. 1986). See also *SportsChannel Am. Assocs. v. Nat'l Hockey League*, 589 N.Y.S.2d 2, 3 (App. Div. 1992) (finding that the lower court, in denying a preliminary injunction, properly balanced the interests of "NHL fans who would have been deprived of their right to watch the nationally televised hockey games if the NHL were forced to blackout its games for all or part of the 1992–1993 season . . . against SportsChannel," a television broadcast company); 23A FEDERAL PROCEDURE: LAWYER'S EDITION § 54:422 (2001) ("The court must also consider the interest of the public in maintaining the status quo pending the outcome of the litigation.").

<sup>50</sup> See *Metromedia Broad. Corp. v. MGM/UA Entm't Co.*, 611 F. Supp. 415, 427 (C.D. Cal. 1985).

<sup>51</sup> See *Marietta Corp. v. Fairhurst*, 754 N.Y.S. 2d 62, 65–66 (App. Div. 2003) (noting that there are powerful public policy considerations against issuing preliminary injunctions in cases involving personal service contracts, even if a case involves confidentiality issues and trade secrets).

<sup>52</sup> See *Hansen v. Ludera*, 325 N.Y.S.2d 78, 89 (Sup. Ct. 1971) (characterizing specific performance as "the most drastic and therefore most zealously guarded form of equitable relief"); *Kronman*, *supra* note 19, at 354 ("The normal remedy for breach of contract is, of course, money damages. Specific performance is exceptional. The Anglo-American law of contracts protects contract rights with a liability rule, only a few with a property rule.").

<sup>53</sup> Like preliminary injunctions, "[s]pecific performance is an appropriate remedy for a breach of contract concerning goods that are unique in kind, quality, or personal association where suitable substitutes are unobtainable or unreasonably difficult or inconvenient to procure." *Sokoloff v. Harriman Est. Dev. Corp.*, 96 N.Y.S.2d 425, 429 (2001) (internal quotation marks omitted).

financial losses for the parties involved.<sup>54</sup> If the dispute relates to a business, or the release of a movie or book where a significant investment has already been made, an injunction can damage the lives of more people than those involved in the original dispute, such as employees of a corporation or those involved in the production of a movie or television show, the public who uses a company's services, or the audience anticipating the item's release.<sup>55</sup>

In some circumstances, the most damaging effect that preliminary injunctions can have is "to tie [the defendant's] hands with an injunction . . . , in effect, grant[ing] the ultimate relief plaintiff seeks without his having even to begin to make out a meritorious case."<sup>56</sup> Such a remedy could even bankrupt a defendant's company before the conclusion of trial.<sup>57</sup> Courts must guard against abuse of the remedy. Large, wealthy companies with endless resources could attempt to take advantage of the equitable remedy process by including preliminary injunction provisions or covenants not to compete in their contracts with smaller companies (or with individual employees), and then expect courts to enforce such injunctions.<sup>58</sup> Courts frequently hesitate to issue preliminary injunctions with employment contracts—especially at-will employment contracts—because such an injunction against an employee could prevent him or her from working elsewhere and could temporarily take away his or her livelihood.<sup>59</sup> Nevertheless, such

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<sup>54</sup> *Metromedia*, 611 F. Supp. at 426–27 (determining that "claims [of] irreparable injury from loss of image, momentum, and goodwill as well as revenue from spot sales and barter" are merely theoretical and could not stand alone as the basis for a preliminary injunction); Barker, *supra* note 7, at 3 (recognizing the effect of a preliminary injunction on a defendant, stating: "were defendants' hands tied with the injunction they 'could not engage in any realistic agreement for the use of the premises'" (internal citations omitted)).

<sup>55</sup> See, e.g., *Chase-Riboud v. Dreamworks, Inc.*, 987 F. Supp. 1222, 1233 (C.D. Cal. 1997); *Hastings-Murtagh v. Tex. Air Corp.*, 649 F. Supp. 479, 487 (S.D. Fla. 1986); *Estate of Hemingway v. Random House, Inc.*, 268 N.Y.S.2d 531 (Sup. Ct. 1966).

<sup>56</sup> Barker, *supra* note 7, at 3.

<sup>57</sup> See, e.g., *Borey v. Nat'l Union Fire Ins. Co.*, 934 F.2d 30, 34 (2d Cir. 1991) (stating that evidence of irreparable harm to a party "might include, for example, proof that the monetary loss will probably force the party into bankruptcy"); *Hastings-Murtagh*, 649 F. Supp. at 487 (denying a preliminary injunction, and explaining that such relief would have been "disastrous not only to the corporate entity, but also to the shareholders . . . employees and unions").

<sup>58</sup> See Kronman, *supra* note 19, at 371. The court has broad discretion to consider contractual agreements in preliminary injunction hearings, but "[n]either party to a contract can insist, as a matter of right, upon a decree for its specific performance." *Id.* (quoting *Snell v. Mitchell*, 65 Me. 48, 50 (1876)).

<sup>59</sup> See Wonnell, *supra* note 30, at 141 ("If the contract involves an extended period of continuous labor, a court should not compel the employee to work. Rather, any injunction should be prohibitory in character and narrowly tailored to the situation. Courts should not enjoin the defendant from working for any employer other than the plaintiff during

negative injunctions occur with employee covenants not to compete and with entertainment industry talent, but agreement terms may keep the worker from pursuing gainful employment elsewhere only for a limited period of time.<sup>60</sup> Covenants not to compete are presumptively void in California, but since a 2008 decision by the California Supreme Court, the court has acknowledged certain statutory exceptions that allow such covenants to be enforced.<sup>61</sup>

Unlike real estate cases, in which each piece of disputed property is unique, in the television industry it can be difficult to determine if a property is unique enough to warrant the application of a preliminary injunction.<sup>62</sup> A television program, similar to music, films, and books, is unique in the non-legal definition because it is a creative property that conceivably comes from an original idea and ostensibly is the only one of its kind;<sup>63</sup> but these characteristics do not mean that the issuance of a preliminary injunction is always an appropriate remedy when a television program is involved.

## II. PRELIMINARY INJUNCTIONS IN THE TELEVISION INDUSTRY

The entertainment industry depends on a great number of contractual agreements, and breaches in those contracts are quite prevalent.<sup>64</sup> When a dispute arises concerning the ownership of the rights to a television show, book, or film, or to a copyright infringement claim, preliminary injunctions are often sought to keep one party from unfairly profiting off of the other

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the contract term. Such an injunction would differ little in practical effect from a mandatory injunction and would raise the same normative and constitutional problems.”)

<sup>60</sup> See *id.* at 142 (“[T]he prohibitory injunction should seek to prevent the employee from pursuing the same occupation for as long as she had promised to work for the plaintiff.”). Similarly, in the case of entertainment talent, where the moving party can show that an actor’s services are “unusual, unique, or extraordinary, and that the damage to the plaintiff will be irreparable and unascertainable, the latter may enjoin the performer from appearing elsewhere during the period of his contract.” *Harry Rogers Theatrical Enters., Inc. v. Comstock*, 232 N.Y.S. 1, 4 (App. Div. 1928).

<sup>61</sup> See *Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 297 (Cal. 2008) (“Noncompetition agreements are invalid under section 16600 [of the Business and Professions Code] in California even if narrowly drawn, unless they fall within the applicable statutory exceptions.”).

<sup>62</sup> Compare *LOTZ*, *supra* note 11, at 37 (stating that, considering the “ample variation in the availability and ubiquity of television programming,” it is becoming more difficult to assess each television show’s significance in today’s culture), with *Metromedia Broad. Corp. v. MGM/UA Entm’t Co., Inc.*, 611 F. Supp. 415, 427 (C.D. Cal. 1985) (finding that a television show, “like all works of art[,]” is unique).

<sup>63</sup> “Unique” is defined as “being the only one of its kind; unlike anything else.” *THE NEW OXFORD AMERICAN DICTIONARY* 1837 (Erin McKean ed., 2d ed. 2005).

<sup>64</sup> See, e.g., *Metromedia*, 611 F. Supp. at 427.

party's rightful property and future earnings.<sup>65</sup> Generally, courts deny preliminary injunctions in these cases, because the substantial investments that films and television programs require—even during the pre-production stage—usually make the balance of hardship tip toward the defendant.<sup>66</sup> In addition, preliminary injunctions are not routinely granted for television shows, because there is most likely a calculable financial burden involved in the balance of hardship.<sup>67</sup> Courts also give greater weight to the public interest because broadcasting is an inherently public act; the impact on the public is directly relevant to the determination.<sup>68</sup>

Reviewing a motion for a preliminary injunction for a television show in 2009, a federal district court in Los Angeles found that:

Given that the evidence before the Court shows that if an injunction were to issue, Defendants would lose a “significant financial investment” in the Program and advertising revenue . . . as well as suffer reputational damage with viewers and advertisers, the Court finds that the likely harm to Defendants if the preliminary injunction is granted exceeds the potential harm to Plaintiff if the preliminary injunction is denied.<sup>69</sup>

Television shows are creative property that can be considered unique. However, since television networks are in the business of determining the financial value of their properties in terms of constant ratings percentages and advertising sales figures, the damages can be easily determined in this industry without the need for more drastic remedies.<sup>70</sup> Thus, the

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<sup>65</sup> For example, Barbara Chase-Riboud sought a preliminary injunction against Dreamworks, the producer of the movie *Amistad*, to protect the copyright and licensing income from her book, *Echo of Lions*, as well as to protect her future potential film market for the book's film rights. See *Chase-Riboud v. Dreamworks, Inc.*, 987 F. Supp. 1222, 1232–33 (C.D. Cal. 1997).

<sup>66</sup> *Id.* at 1233 (noting that Dreamworks had invested \$70–75 million in *Amistad*, and, “with the film's nation-wide release imminent, Plaintiff seeks to enjoin its release . . . [T]he Court cannot find on the record before it that Plaintiff has met her burden of demonstrating that the ‘balance of hardships tips *sharply* in [her] favor”) (emphasis in original). See also *Twentieth Century Fox Film Corp. v. Marvel Enters., Inc.*, 155 F. Supp. 2d 1, 44 (S.D.N.Y. 2001) (determining that a preliminary injunction should not be issued because the balance of the equities weighed against halting production of a television series for a film sequel that was barely in the planning stages).

<sup>67</sup> *Metromedia*, 611 F. Supp. at 427 (determining that Metromedia had already placed a value on all of the show *FAME* because of the offer it made to MGM/UA).

<sup>68</sup> See *SportsChannel Am. Assocs. v. Nat'l Hockey League*, 589 N.Y.S.2d 2, 3 (App. Div. 1992).

<sup>69</sup> Milord A. Keshishian, *Court Imparts Tough Love and Denies Preliminary Injunction*, L.A. INTELLECTUAL PROP. TRADEMARK ATTORNEY BLOG (Apr. 27, 2009), <http://www.iptrademarkattorney.com/2009/04/trademark-tough-love-preliminary-injunction-denied-vh1-mtv-toughlove.html>.

<sup>70</sup> See, e.g., Memorandum of Law in Support of Weinstein Co., LLC's Motions to (I) Dissolve and Vacate the September 26, 2008 Preliminary Injunction; and (II) Alter or

television industry is easily governed by the common practice of determining legal relief because, “when a party can be fully compensated for financial loss by a money judgment, there is simply no compelling reason why the extraordinary equitable remedy of a preliminary injunction should be granted.”<sup>71</sup>

As of October 2010, a high court has yet to examine a preliminary injunction dispute in television. However, lower courts in New York and Los Angeles have addressed this issue on numerous occasions.<sup>72</sup> In the following two cases, the courts found that money damages were a more appropriate remedy for a television program than a preliminary injunction, and denied the motions in question.<sup>73</sup>

A. *SportsChannel America Associates v. National Hockey League*

In *SportsChannel America Associates v. National Hockey League*,<sup>74</sup> the New York Appellate Division found that injunctive relief was not an option because money damages were an adequate remedy for sports television.<sup>75</sup> The National Hockey League (NHL) sold its broadcast rights to the television network ESPN for the 1992–1993 season, instead of remaining with SportsChannel, which had broadcasted the league’s games the previous season.<sup>76</sup> When SportsChannel sought a preliminary injunction barring the move because of a contractual right of first refusal, the lower court denied the injunction.<sup>77</sup> The appellate court affirmed the denial, holding that “[d]amages compensable in money and capable of calculation, *albeit* with some difficulty, are not irreparable.”<sup>78</sup> The court also found that even SportsChannel knew that an injunction would effectively give it the relief it sought and that by granting it, the network would be

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Amend the Preliminary Injunction Pursuant to Rule 59(e) at 45, NBC Universal, Inc. v. Weinstein Co., LLC, 2008 WL 5262240 (S.D.N.Y. Nov. 3, 2008) (No. 08-CV-8911) [hereinafter Weinstein Co., LLC’s Motions] (“[T]he common practice in the television industry [is] to calculate the full value of a television show. Sophisticated analyses are commonplace in the industry and are used to calculate the value of adding or losing a show. Such analyses are also relied on by senior management in making decisions that lead to the financial success or failure of the network.”) (internal citations omitted).

<sup>71</sup> Borey v. Nat’l Union Fire Ins. Co., 934 F.2d 30, 34 (2d Cir. 1991) (stating simply that “monetary loss alone will generally not amount to irreparable harm”).

<sup>72</sup> See *Metromedia*, 611 F. Supp. at 427; *SportsChannel*, 589 N.Y.S.2d at 3.

<sup>73</sup> *Metromedia*, 611 F. Supp. at 427; *SportsChannel*, 589 N.Y.S.2d at 3.

<sup>74</sup> *SportsChannel*, 589 N.Y.S.2d at 2.

<sup>75</sup> *Id.* at 3.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

receiving a victory without the requirement of going to trial.<sup>79</sup> Therefore, the court found that it was not proper to issue a preliminary injunction for television programming where money damages were calculable, irreparable harm was not shown, there was no likelihood of prevailing on the merits, and fans would be adversely affected for an entire blacked-out NHL season.<sup>80</sup>

B. *Metromedia Broadcasting Corporation v. MGM/UA Entertainment Company*

In *Metromedia Broadcasting Corp. v. MGM/UA Entertainment Co.*,<sup>81</sup> Metromedia sought to enjoin the producer of *FAME*<sup>82</sup> from taking newly produced episodes of the show to its competitors.<sup>83</sup> The district court denied the preliminary injunction, finding that the alleged breach would not threaten Metromedia as a company and that “the difference between advertising revenue generated on *FAME* and a replacement is measurable.”<sup>84</sup> The court went on to find that, since the show had been a part of the plaintiff’s network for some time, it had a track record for the ratings of the show and the time periods surrounding it, as well as other data that would help the court calculate the loss; a preliminary injunction was therefore not necessary.<sup>85</sup>

The court also expanded on the idea of a show being a “unique” product that may be considered irreplaceable to its network’s success, but ultimately decided that an audience’s taste in television “is fleeting and there is nothing to show that a substitute may not catch on even more.”<sup>86</sup> Although a television show, like a work of art, can be considered a unique piece of property, the court found that this unique status was lost because another hit show could easily replace it.<sup>87</sup> The court

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<sup>79</sup> *Id.* (“Injunctive relief is also inappropriate inasmuch as SportsChannel concedes that the injunction would have the effect of granting it the ultimate relief it seeks. In effect, SportsChannel is improperly seeking a decree of specific performance in the guise of an injunction pendente lite . . .”).

<sup>80</sup> *Id.* at 3–4.

<sup>81</sup> *Metromedia Broad. Corp. v. MGM/UA Entm’t Co., Inc.*, 611 F. Supp. 415, 427 (C.D. Cal. 1985).

<sup>82</sup> *FAME* was a U.S. television series originally produced between 1982 and 1987. The show was based on the 1980 movie *FAME* and was popular during its first few seasons. See generally INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0083412/> (last visited Sept. 11, 2010).

<sup>83</sup> *Metromedia*, 611 F. Supp. at 418.

<sup>84</sup> *Id.* at 426–27 (emphasis added).

<sup>85</sup> *Id.* at 427.

<sup>86</sup> *Id.* Therefore, the court found that the injury claimed was “theoretical and not properly the basis for preliminary relief.” *Id.*

<sup>87</sup> See *id.* (explaining that, “while *FAME* (like all works of art) is unique and its loss may affect Metromedia’s momentum, it also may not”).

reasoned that, because a television show was replaceable, the relief sought by the parties could be determined using network data, formulas and the show's previous financial track record that would accurately give a price tag for the loss created, and thus a preliminary injunction would not be appropriate.<sup>88</sup>

### C. Effect on the Television Industry

Both *SportsChannel* and *Metromedia* set a standard in the television industry for the denial of preliminary injunctions as a remedy when television shows are involved.<sup>89</sup> Both courts supported the idea that ratings and advertising were calculable damages, and that anything beyond that was merely speculative and therefore not a basis for a preliminary injunction.<sup>90</sup> However, the television industry is one of constant change and technological improvements. Therefore, hit shows are harder to come by and ratings are becoming less important, so it is more difficult to establish that a show is unique enough to deserve such equitable relief.<sup>91</sup> While "unique" usually means "irreplaceable" or "without substitute," in the business world it is harder to define the concept because different companies measure what is "irreplaceable" by different standards.<sup>92</sup> Like technology, which changes so rapidly that what is current today may be outdated tomorrow,<sup>93</sup> television programming is also a rapidly evolving arena. With over two hundred cable channels currently broadcasting twenty-four hours a day,<sup>94</sup> any show with a modicum of success can be deemed a hit—i.e., a potentially

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<sup>88</sup> *Id.*

<sup>89</sup> See Weinstein Co., LLC's Motions, *supra* note 70, at 41.

<sup>90</sup> See *id.* (arguing that these two cases made it "clear that the loss of a television show does not constitute irreparable harm because damages arising from the loss of a television show are calculable and any alleged injury that does not accrue to those things that are calculable (ratings and advertising rates) are speculative and therefore not irreparable"); *Metromedia*, 611 F. Supp. at 418; *SportsChannel Am. Assocs. v. Nat'l Hockey League*, 589 N.Y.S.2d 2, 3 (App. Div. 1992).

<sup>91</sup> LOTZ, *supra* note 11, at 37.

<sup>92</sup> Kronman, *supra* note 19, at 358–59.

<sup>93</sup> *Windows User Inc. v. Reed Bus. Pub. Ltd.*, 795 F. Supp. 103, 109 (S.D.N.Y. 1992).

<sup>94</sup> See, e.g., DIRECT TV, <http://www.directtv.com> (last visited Sept. 11, 2010) (advertising that Direct TV has over 285 cable channels including pay cable channels and sports channels); LOTZ, *supra* note 11, at 52–53 (observing that, "[a]s a technology, cable substantially altered the viewers' experience with its introduction of a vast array of channels. In 1988, 50 percent of U.S. households subscribed to cable, which was the subscription base analysts believed necessary for cable operators to provide a large enough audience to achieve profitability. This subscription level marked an increase from just 19.9 percent in 1980, grew to 56.4 percent by 1990, and reached 68 percent in 2000. By 2000, nearly ten million additional households received programming via Direct Broadcast Satellite").

unique property—that is vital to the network.<sup>95</sup> One might think that the definition of “unique” would change in this current climate because a show can no longer acquire the large market shares that it did in the early days of television.<sup>96</sup> But nonetheless, the classification remains the same. There was a time when *The Cosby Show* was number one in the ratings with more than fifty percent of the viewing audience, a feat that is unlikely in today’s market.<sup>97</sup> Since the market has become saturated with hits of various levels, classifications, and target demographics, the viewpoint of a television show as a “unique” property might not be as helpful in determining the irreparable harm suffered by a network that has lost its television show.

The changing television industry has created problems in the definition of “unique,” which has led to lawsuits with inappropriate legal remedies being issued, even though damages might seem more appropriate. In 2008, the popular television show *Project Runway* was the subject of such a dispute and was kept from the airwaves due to the inappropriate granting of a preliminary injunction.

#### D. *Project Runway’s* Move to Lifetime and the Ensuing Legal Battle

In April 2008, television fans were abuzz with the news that cable network Bravo’s number one show, the critically acclaimed *Project Runway*,<sup>98</sup> would be airing on Lifetime, the network known for “victim-of-the-week movies and ‘Golden Girls’ reruns.”<sup>99</sup> Shortly after the producer of *Project Runway* (the Weinstein Company) announced the program’s shift to a competitor network, NBC Universal<sup>100</sup> (Bravo’s parent company)

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<sup>95</sup> With the increasing number of cable channels and the escalating amount of programming on those networks, content must do more than air on television to distinguish itself in terms of cultural relevance. LOTZ, *supra* note 11, at 36.

<sup>96</sup> Brian Stelter, *Cable Networks Trying to Build on Their Gains in Ratings*, N.Y. TIMES, May 26, 2008, at C5 (finding that cable networks have been steadily growing since the 1980s and taking ratings away from broadcast networks, thereby spreading ratings out over a larger field of eligible television shows); Brian Stelter, *In the Age of TiVo and Web Video, What is Prime Time?*, N.Y. TIMES, May 12, 2008, at C1 (noting that time shifting devices, on demand offerings, and cable television have drawn viewers away from traditional networks and first run television viewing).

<sup>97</sup> See Carter, *supra* note 9, at 1.

<sup>98</sup> Brian Stelter, *‘Project Runway’ Battle Dampens Fashion Week*, N.Y. TIMES, Feb. 21, 2009, at C3 (noting that *Project Runway* was the first reality show to win the Peabody Award in 2007).

<sup>99</sup> Allen Salkin, *In Bed with ‘Runway’: A Lifetime Story*, N.Y. TIMES, Apr. 13, 2008 (Style), at 2 (quoting blogger Tom Fitzgerald).

<sup>100</sup> BLUMENTHAL & GOODENOUGH, *supra* note 15, at 129 (“NBC operates not only the U.S. broadcast network, but also several cable networks, including Telemundo, which serves the increasingly profitable Hispanic audience. NBC also operates several cable networks, and maintains investment positions in others.”).



filed suit to halt the departure.<sup>101</sup> *Project Runway* had already aired on Bravo for three successful seasons, with the fourth and fifth seasons airing on the network in 2008; in those “first five seasons on the Bravo cable channel, *Project Runway* increased its average audience to 4 million viewers an episode from 1 million an episode, making the most recent season its biggest ever.”<sup>102</sup> NBC Universal moved for a preliminary injunction, alleging that by taking *Project Runway* to Lifetime for its sixth season, the Weinstein Company had breached its contractual right of first refusal for future seasons.<sup>103</sup> This right of first refusal, if valid, would allow NBC Universal to match another network’s bid for the show before the show could change networks.<sup>104</sup>

The trial court held a hearing on the motions.<sup>105</sup> There was significant debate about the details of the parties’ yearlong contractual negotiations and whether or not there had been a true meeting of the minds. This led the court to conclude that there were serious enough questions to proceed to trial, but that NBC Universal had a likelihood of prevailing on the merits.<sup>106</sup> NBC Universal argued in its motion that *Project Runway* is a unique show, a fact that the Weinstein Company was willing to concede.<sup>107</sup> NBC Universal argued that that *Project Runway* was a “game-changer” and a “flagship show” for the Bravo Network and that it raised the ratings of the entire NBC Universal conglomerate, thus warranting a finding of irreparable harm.<sup>108</sup>

The parties did not dispute that NBC Universal and the Weinstein Company had previously decided that *Project Runway* would no longer air on Bravo,<sup>109</sup> but NBC Universal had hoped that the show could continue on NBC or one of its other networks.<sup>110</sup> NBC Universal argued it would be impossible to

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<sup>101</sup> Carter, *supra* note 5, at C3 (“NBC Universal has gone to court to try to prevent the owners of ‘Project Runway,’ one of the biggest hits in cable television, from relocating the show next fall from NBC Universal’s Bravo network to a competitor, Lifetime.”).

<sup>102</sup> Edward Wyatt, *Legal Tangles of ‘Project Runway’ Keep it Frozen on the Catwalk*, N.Y. TIMES, Nov. 19, 2008, at C1.

<sup>103</sup> Carter, *supra* note 5, at C3.

<sup>104</sup> *Id.*

<sup>105</sup> While NBC moved for injunctive relief, The Weinstein Company moved to dismiss the case for failure to state a claim. The hearing on these motions was held on June 17, 2008. Trial Order, *supra* note 17, at 1–2.

<sup>106</sup> *Id.* at 1, 2, 15.

<sup>107</sup> Reply Memorandum of Law in Support of Plaintiff’s Motion for Preliminary Injunction at 2, NBC Universal, Inc. v. Weinstein Co. LLC, 2008 WL 5044008 2 (N.Y. Sup. Ct., Sept. 26, 2008) (No. 601011/08) [hereinafter Reply Memorandum].

<sup>108</sup> *Id.* at 11.

<sup>109</sup> NBC Universal and the Weinstein Company had previously decided to move *Project Runway* off of Bravo and to a network where it could expand to larger audiences. See Carter, *supra* note 5, at C3.

<sup>110</sup> Reply Memorandum, *supra* note 107, at 11.

predict what the hit show's future ratings might be in terms of calculating damages<sup>111</sup> and argued that the show created a "halo effect" for the entire network on which it aired.<sup>112</sup> This "halo effect" raised the ratings and value of other shows through promotional impact and allowed the network to increase the price of advertising on less desirable shows by packaging the advertisements together.<sup>113</sup> Although the Weinstein Company conceded that *Project Runway* was a unique and valuable show,<sup>114</sup> it countered that NBC Universal had already calculated its potential earnings based on over four seasons of ratings history and internal analyses to determine the existence of such a "halo effect."<sup>115</sup> The Weinstein Company also asserted that the show would not retain that same flagship status on NBC as it did on Bravo because NBC, as a broadcast network, typically had significantly higher ratings for its programming than *Project Runway* had on Bravo, a cable network.<sup>116</sup>

In September 2008, the trial court granted NBC Universal's motion for a preliminary injunction, enjoining the Weinstein Company and Lifetime from the promotion, marketing, and exhibition of *Project Runway*.<sup>117</sup> The court acknowledged that *Project Runway* was a significant "critical and commercial hit" when it aired on Bravo,<sup>118</sup> and that it had considerable valuable

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<sup>111</sup> *Id.* at 12.

<sup>112</sup> The "halo effect" is the impact that a successful show has on the others shows on the network. This includes both a literal ratings effect on the adjacent show, and a more speculative promotional impact on other shows, where the successful show "increases the ratings of 'shows on the weekly schedule' and the impact on 'average spot prices' as a result of the 'opportunity to package less desirable shows' with hit shows." *Id.*

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

<sup>114</sup> See *supra* note 107 and accompanying text.

<sup>115</sup> Weinstein Co., LLC's Motions, *supra* note 70, at 45; Reply Memorandum, *supra* note 107, at 12.

<sup>116</sup> Broadcast networks—networks that are available without the need for cable television—such as NBC, ABC, CBS, FOX, and the CW, command a larger share of the television audience and usually bring in ratings significantly larger than cable networks, which are generally only available via cable or satellite television. For a comparison of television show ratings that appear on broadcast networks versus cable networks, see THE FUTON CRITIC, <http://thefutoncritic.com/> (last visited Oct. 15, 2010). *Project Runway*'s ratings on Bravo were such that they would not compare to the ratings of NBC's other shows, which capture a much larger audience. See Weinstein Co., LLC's Motions, *supra* note 70, at 47–48.

<sup>117</sup> The court ordered that the plaintiff's motion for a preliminary injunction be granted to the extent that the Weinstein Company cannot promote, market, or exhibit *Project Runway* or any spin off of *Project Runway* on Lifetime. Additionally, although the Weinstein Company had requested a \$200 million bond, the court set the bond at only \$20 million. Trial Order, *supra* note 17, at 1–2, 34.

<sup>118</sup> *Id.* at 4 (explaining that the show became the first reality show to win a Peabody Award, was nominated for an Emmy Award in 2005, 2006, and 2007, and "ha[d] developed a 'fervent fan base' and ha[d] become 'appointment television,' meaning television that people will go out of their way to watch") (internal citation omitted).

marketing opportunities and product integration possibilities.<sup>119</sup> The court ultimately concluded that this was unlike other television program situations: “To be clear, the loss of any successful television program will not constitute irreparable harm. In this instant matter, the evidence submitted by both parties has shown that *Project Runway* is not an average successful television program.”<sup>120</sup> Distinguishing this case from *SportsChannel*, the court found that because of the program’s game-changing status and ability to anchor a network, damages were not calculable and thus irreparable harm was found.<sup>121</sup> The court also determined that, unlike in *SportsChannel*, where the NHL fans would be deprived of an entire hockey season,<sup>122</sup> *Project Runway* remaining off the air during a preliminary injunction would not cause substantial harm to the show because it had previously been off the air for as long as thirteen months, and this “rest period” was common for the show.<sup>123</sup> However, the court did state that, “[w]hile it appears that resting *Project Runway* for a period of time will not cause harm to the show, the court must ensure that it is not off the air for an excessive period of time,” and the court attempted to expedite the matter.<sup>124</sup>

The Weinstein Company challenged the court’s conclusion that *Project Runway* was not an average television show and was therefore unique enough to necessitate a preliminary injunction.<sup>125</sup> After the trial court granted the preliminary injunction, and Lifetime filed to remove the case to federal court in October 2008 after arguing that it involved a federal question regarding copyright issues,<sup>126</sup> the Weinstein Company filed a

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<sup>119</sup> *Id.* (“Product integration is an entertainment industry term to describe a form of advertising in which products and services are featured within a television program.”).

<sup>120</sup> *Id.* at 29.

<sup>121</sup> *Id.* at 30–31 (“This is not a situation like that in *Sportschannel America* where the court denied the preliminary injunction based upon plaintiff’s laches by waiting until broadcast plans for the hockey season were required to be finalized . . .”).

<sup>122</sup> The court explained that, in *Sportschannel*, NHL fans would have been deprived of their ability to watch hockey games, “which would be played whether they were aired on plaintiff’s television service or not. Here, fans will not be deprived of viewing the show although it may be on a different airing schedule than that contemplated by TWC and Lifetime.” Trial Order, *supra* note 17, at 32 (internal citation omitted).

<sup>123</sup> The court determined that two cycles of *Project Runway* had already aired in the current calendar year and that Bravo had never aired three cycles in one year, thus diminishing the argument of irreparable harm by The Weinstein Company. Additionally, “[t]here was a ten month rest between cycles one and two; a four month rest between cycles two and three; and a twelve month rest between cycles three and four.” *Id.* at 33 & n.18.

<sup>124</sup> *Id.* at 33–34.

<sup>125</sup> Weinstein Co., LLC’s Motions, *supra* note 70, at 1.

<sup>126</sup> Memorandum of Lifetime Entertainment Services in Support of Its Motion to Intervene at 1, *NBC Universal, Inc. v. Weinstein Co., LLC*, 2008 WL 5044007 (S.D.N.Y. July 21, 2008) (No.08-CV-8911) [hereinafter Lifetime Memorandum].

motion in the United States District Court for the Southern District of New York to dissolve and vacate, or alter, the preliminary injunction.<sup>127</sup> The Weinstein Company argued that *Project Runway* was no longer irreplaceable to the NBC Universal family because, during the preliminary injunction proceedings, NBC Universal continued its past trend of airing shows that capitalized on *Project Runway*'s successful formula,<sup>128</sup> even creating a new fashion design competition show, *The Fashion Show*.<sup>129</sup> The Weinstein Company asserted that:

By developing another such *Runway*-knockoff, using the same fashion-design theme as *Project Runway*, Bravo further undermines the argument that *Project Runway* is unique, and that its loss causes the Plaintiffs, and more specifically NBCU, irreparable harm. To the contrary, Plaintiffs development of *Fashion [Show]* admits that *Project Runway* is replaceable. Plaintiffs cannot continually replicate *Project Runway* while at the same time claim that the show is unique and their damages are irreparable.<sup>130</sup>

However, the court did not find the Weinstein Company's argument persuasive, and the controversial preliminary injunction remained in place into 2009.<sup>131</sup> The court did not publish a court order about its ruling, but one can imagine that the court believed that Bravo merely replaced what it expected to lose by creating *The Fashion Show* and did not expect the same

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<sup>127</sup> See Weinstein Co., LLC's Motions, *supra* note 70, at 1.

<sup>128</sup> The *Project Runway* formula inspired the creation of other hit shows on Bravo such as *Top Chef* (created by the producers of *Project Runway*) and *Top Design*. See Ginia Bellafante, *Trying to Stand the Heat in a Pressure Cooker*, N.Y. TIMES, Nov. 12, 2008, at C1; Ginia Bellafante, *Duck and Decorate: Putting Flair in the Fallout Shelter*, N.Y. TIMES, Sept. 10, 2008, at E3; Frank Bruni, *Cooking Under Pressure, That's Reality*, N.Y. TIMES, Jan. 31, 2007; Virginia Heffernan, *Walking the Runway Walk, Mile After Mile*, N.Y. TIMES, Mar. 8, 2006, at E8 ("Like Bravo's fashion winner 'Project Runway,' the channel's promising 'Top Chef' flaunts terms of art and insiderism to give it authority. Who knew cooking and sewing could be made so telegenic?").

<sup>129</sup> While *Fashion House* was the title referred to in the court documents, *The Fashion Show* is what eventually aired on Bravo in the spring/summer of 2009. See Stuart Elliott, *Hair Spray's Sponsorship Stays in Place (on Bravo)*, N.Y. TIMES, May 1, 2009, at B3 ("While the court battle continued, Bravo announced that it would buy 'The Fashion Show'—like 'Project Runway,' a competition among 15 fashion designers—from 3 Ball Productions and start showing it on May 7."); Alessandra Stanley, *Contestants are Sewing, but the Hosts Are Cutting*, N.Y. TIMES, May 7, 2009, at C1 (discussing how *The Fashion Show* is Bravo's response to losing *Project Runway* and how "a design competition by any other name is not nearly as sweet").

<sup>130</sup> Weinstein Co., LLC's Motions, *supra* note 70, at 42. Critics found the show to be a second-rate *Project Runway*: "I realize that this show was thrown together quick and sloppy once Bravo lost Project Runway to Lifetime, but that could have been an opportunity to have some fun with the format, jazz it up a bit—improvise." James Wolcott, *Project Rundown*, JAMES WALCOTT'S BLOG ON VANITY FAIR (May 15, 2009, 1:53 PM), <http://www.vanityfair.com/online/wolcott/2009/05/early-word-on-bravos-facsimile.html>.

<sup>131</sup> Stelter, *supra* note 98, at C3.

kind of success from it that *Project Runway* had been for the network.

Outside of the direct parties to the lawsuit, the Lifetime Network also had a great deal at stake. Lifetime filed a motion in July 2008, asking to be made a party to the lawsuit, and filed another motion in October 2008 to remove the case to federal court by alleging federal copyright issues, a motion which Lifetime eventually lost in December 2008 when a federal court judge ruled that the dispute should stay in state court.<sup>132</sup> Lifetime had made its deal with the Weinstein Company for the future seasons of *Project Runway* and *Project Runway* spin-offs without knowledge of any contractual dispute with NBC Universal, and a preliminary injunction halting the airing of the show could have cost the network significantly. Lifetime worried that the dispute could continue the show's hiatus indefinitely, causing audiences to not return once the show was allowed to resume.<sup>133</sup> The bad press associated with a lawsuit and the public knowledge that the show had been legally suspended could significantly damage Lifetime's future earning potential. The preliminary injunction prevented the Weinstein Company and Lifetime from promoting, marketing, and airing the future cycles of *Project Runway*, but it did not prevent them from producing the show.<sup>134</sup> At the time the lawsuit was filed by NBC Universal, the Weinstein Company had already started filming the sixth season of *Project Runway* for Lifetime, the cost of which included compensation for talent and crew.<sup>135</sup> While the preliminary injunction remained in force throughout the course of the lawsuit, both the Weinstein Company and the Lifetime Network

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<sup>132</sup> Lifetime Memorandum, *supra* note 126, at 1; John Bracchitta, *Lifetime Attempts to Move 'Project Runway' Lawsuit to Federal Court*, REALITYTVWORLD.COM (Oct. 21, 2008), <http://www.realitytvworld.com/news/lifetime-attempts-move-project-runway-lawsuit-federal-court-7891.php>; Matea Gold, *Maybe New Robes for the Judges?*, L.A. TIMES, Feb. 1, 2009 (Image), at 4; Jon Lafayette, *NBCU Wins Round in 'Project Runway' Case*, TVWEEK.COM (Dec. 23, 2008), [http://www.tvweek.com/news/2008/12/nbcu\\_wins\\_round\\_in\\_project\\_run\\_1.php](http://www.tvweek.com/news/2008/12/nbcu_wins_round_in_project_run_1.php).

<sup>133</sup> Lifetime Memorandum, *supra* note 132, at 8. Commentators explained:

In the short term the decision means that 'Project Runway' cannot be presented on Lifetime, nor marketed and promoted by that network. Nor can Lifetime offer any spinoffs of the show, as it had planned. 'Runway' had been tentatively scheduled to begin on Lifetime on Jan[uary] 7. Lifetime has built much of its winter schedule around the arrival of 'Runway,' one of the most successful recent shows in cable television.

Carter & Stelter, *supra* note 3, at B9.

<sup>134</sup> The court ordered the plaintiff's motion for a preliminary injunction be granted to the extent that the Weinstein Company could not perform its agreement with Lifetime through the promotion, marketing, or exhibition of *Project Runway* or any spin-off of *Project Runway* on Lifetime. Trial Order, *supra* note 17, at 41.

<sup>135</sup> Filming for the sixth season in Los Angeles did not finish until October 2008, with the finale later recorded in February 2009. Stelter, *supra* note 98, at C3.

sank significant production costs into a season of the show that might never air. Furthermore, even if it did air, if it had been delayed too long the season could have been outdated and potentially shunned by audiences.<sup>136</sup> Bravo, NBC Universal, and Lifetime could have possibly suffered damages to their reputations by engaging in a lawsuit that kept a fan favorite television show off the air over a contractual dispute.<sup>137</sup> Even after the lawsuit ended, the possible financial repercussions for everyone involved would mean that there was no true winner in the situation.<sup>138</sup> While the original production team of *Project Runway*, Magical Elves, Inc.,<sup>139</sup> decided not to produce the show for Lifetime and instead continued business with Bravo,<sup>140</sup> other parties involved with the show, including host Heidi Klum, judges Michael Kors and Nina Garcia, mentor Tim Gunn, and various other production staff, were affected by the preliminary injunction.<sup>141</sup>

While the celebrity judges and host are a large part of the show, the true talents marketed by *Project Runway* are the contestants competing for the show's prizes. Future designers vie to be a part of *Project Runway*, and when the designers of season six entered to be contestants, they did not know that their season would be fraught with such legal implications.<sup>142</sup> The main goal of a *Project Runway* contestant is to remain on the show long enough to be part of the final three, or sometimes four, designers who are given a chance to put on a fashion show at Bryant Park's Fashion Week in New York City.<sup>143</sup> Contestants who reach the finale get to show their own personal collections at

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<sup>136</sup> Those involved with the show were worried about the popularity of the show if and when it was allowed to return and air the sixth season. Former winner Christian Siriano was even quoted as saying: "It might be a little bit over by then." *Id.*

<sup>137</sup> Lawson, *supra* note 1 (speculating that since "*Project Runway* may not be airing on its new network, Lifetime . . . some may be wondering what the hell does this *mean* for the show. . . . NBC and Weinstein Company may be brattily fighting over a toy that's already been broken") (emphasis in original).

<sup>138</sup> *Id.* ("Bravo may have given up on this one because, heck, they were losing the show anyway, but it makes you wonder then why NBC is fighting so bitterly for it to return. The show isn't exactly fresh or new, it's six seasons old after all, with the sullied brand to show for it.")

<sup>139</sup> See generally MAGICAL ELVES, <http://www.magicalelves.com/home.html> (last visited Oct. 11, 2010).

<sup>140</sup> Brian Stelter, *'Runway' Producers Run Away*, N.Y. TIMES, May 6, 2008; Heather Havrilesky, *"Project Runway" Trips and Falls*, SALON.COM (Nov. 20, 2009, 5:20 ET), [http://www.salon.com/entertainment/project\\_runway/index.html?story=/ent/tv/review/2009/11/20/project\\_runway\\_finale](http://www.salon.com/entertainment/project_runway/index.html?story=/ent/tv/review/2009/11/20/project_runway_finale).

<sup>141</sup> See Stelter, *supra* note 98, at C3; Lawson, *supra* note 1.

<sup>142</sup> See Stelter, *supra* note 98, at C3.

<sup>143</sup> *Id.* ("In previous seasons the first episodes of 'Runway' had been broadcast by the time the three finalists presented at Fashion Week, enabling the audience at Bryant Park to root for their favorite contestants and handicap the results of the final competition.")

Fashion Week, and even if they do not win the contest, having a collection under their name at Fashion Week is often enough to launch a young designer's career.<sup>144</sup> The three finalists of season six reached Bryant Park's Fashion Week while the show was still under the state court's preliminary injunction. In order to protect the show from being spoiled for audiences if it eventually aired, the contestants had to show their collections anonymously.<sup>145</sup> Without the name recognition of showing a collection under the designer's future brand name, the young contestant's future earning potential as a designer in the fashion world is significantly diminished. This essentially defeats the main purpose of being a contestant on *Project Runway* in the first place.<sup>146</sup>

The list of those affected by the preliminary injunction is quite lengthy, from the sponsors involved in the various episode challenges, to the residual effects on the professional sponsorships of the show including Parsons School of Design,<sup>147</sup> L'Oréal Paris, and TRESemmé, which provided makeup and hairstyling for the designers' models during each episode.<sup>148</sup> In fact, many view *Project Runway* as important to the fashion industry as a whole and believe its disappearance from television would be nothing but detrimental to the health of the industry.<sup>149</sup> In April 2009, the lawsuit was settled when The Weinstein Company agreed to pay a settlement fee to NBC Universal and admitted that it improperly sold *Project Runway* to Lifetime without first giving NBC an opportunity to match the deal.<sup>150</sup> The settlement allowed the show to move to Lifetime without the

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<sup>144</sup> See *id.*

<sup>145</sup> Gold, *supra* note 132, at 4. See also Stelter, *supra* note 98, at C3 (“[T]he ‘Runway’ producers went to great lengths to conceal the identities of the finalists, lest future viewers feel that the show is spoiled by leaks. The finalists weren’t allowed to walk onstage and present their fashion collections publicly; instead the collections were shown anonymously.”).

<sup>146</sup> Stelter, *supra* note 98, at C3.

<sup>147</sup> See Eric Wilson, *Project Parsons: Fashion School as Star*, N.Y. TIMES, Apr. 20, 2006.

<sup>148</sup> Stephanie Clifford, *Bravo Shows Move Further into Licensing Products*, N.Y. TIMES, Apr. 13, 2009 (“Bravo has never been shy about product placement. ‘Project Runway’ has had design challenges sponsored by Hershey’s, Levi’s and Saturn. Models’ hair is styled in the Tresemmé hair salon, and their makeup is applied in the L’Oréal Paris makeup room. The show’s host, Heidi Klum, cradles a bottle of Moët & Chandon Champagne several times a season . . .”). Tresemmé, for one, chose to stay with Bravo when *Project Runway* left, instead opting to be the sponsor of *The Fashion Show*. Elliott, *supra* note 129, at B3.

<sup>149</sup> Nina Garcia, one of the judges, said that “[t]he show is about supporting young designers . . . [i]t’s about supporting the business of fashion.” In this current economic climate, Garcia said, *Project Runway* is “very needed right now in the industry.” Stelter, *supra* note 98, at C3.

<sup>150</sup> Bill Carter, *Weinstein Strikes a Deal in ‘Project Runway’ Lawsuit*, N.Y. TIMES, Apr. 2, 2009, at C3.

threat of future litigation, as long as the parties agreed to let Bravo air *The Fashion Show* first, without any competition from *Project Runway*.<sup>151</sup> However, although the show was free from litigation, the realistic effects in the ratings for a show that had moved to a new network after a year-long hiatus, had yet to be seen. *Project Runway* debuted on Lifetime with record high ratings for the network.<sup>152</sup> However, since the show's ratings steadily declined throughout the season and the season finale drew fewer viewers than it had on Bravo, the season premiere ratings may have merely indicated the audience's curiosity as to how the show would be different on a new network.<sup>153</sup> The media did not offer much support to *Project Runway*'s sixth season and blamed it on Lifetime.<sup>154</sup> But, while it is possible to blame the switch of a network for a show's lower ratings, it is more likely the show had fallen from favor due to the bitter legal battle that had placed the show in limbo.

### III. WHERE DO WE GO FROM HERE?

As Howard Blumenthal wrote in his book, *This Business of Television*: “[T]elevision is rarely about fine art. Television has always been a commercial endeavor. With few exceptions, television is about the money.”<sup>155</sup> Courts should apply this same principle to the legal remedies regarding the television industry. The television industry has a long track record of calculable profits and losses based on ratings and advertising, making damages consistently the most applicable remedy in a legal

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<sup>151</sup> *Id.*

<sup>152</sup> TV by the numbers reported that the season premiere of *Project Runway* on Lifetime

averaged 4.2 million viewers and a 3.3 household rating and was the highest-rated premiere ever for Lifetime. On a household ratings basis, that's up 32 percent from the show's season five premiere on Bravo, according to Lifetime. Among women 18–49, *Project Runway* averaged a 3.2 rating, that's 28 percent higher than its last season premiere on Bravo.

Robert Seidman, *Project Runway Ratings Take Off for Lifetime*, TVBYTHENUMBERS.COM (Aug. 21, 2009), <http://tvbythenumbers.com/2009/08/21/project-runway-ratings-take-off-for-lifetime/25174>.

<sup>153</sup> Amy Odell, *Project Runway's Ratings Dipped on Lifetime*, N.Y. MAGAZINE (Nov. 23, 2009, 1:50 PM), [http://nymag.com/daily/fashion/2009/11/project\\_runways\\_ratings\\_dipped.html](http://nymag.com/daily/fashion/2009/11/project_runways_ratings_dipped.html) (“Last week, *Project Runway*'s season finale aired on Lifetime instead of Bravo for the first time in the show's six-season history. And the ratings were *down*. Thursday's episode drew 4.2 million viewers, down from the 4.8 million who watched the season-five finale on Bravo. Despite a strong season premiere, ratings for the show dwindled to an average of 3.2 million each week, while an average of 3.6 million watched the show on Bravo.”).

<sup>154</sup> Havrilesky, *supra* note 140 (“The winner of Season 6 is announced, and no one cares. Did Lifetime murder Bravo's favorite pet? . . . Their collections were well-constructed, sure, but like the sixth season itself, not all that exciting.”); Odell, *supra* note 153.

<sup>155</sup> BLUMENTHAL & GOODENOUGH, *supra* note 15, at xxiv.



dispute.<sup>156</sup> However, over the last decade, television has changed dramatically, making it harder for shows to get the ratings and advertising rates they once did, which has made hit television shows harder and harder to come by.<sup>157</sup> Television now is no longer just regular network schedules, but also encompasses the use of DVRs, downloadable television content, and full streaming on the Internet.<sup>158</sup> This explosion has caused confusion for networks, production companies, and advertising companies in terms of how to measure the value of a show and what revenue streams can be used with the new technology.

Increasing technology and additional revenue streams for networks and producers has also made it more difficult to calculate the monetary harm involved in a case.<sup>159</sup> Traditional advertising revenue has also given way to more modern forms of advertising, such as product placement<sup>160</sup> and product integration,<sup>161</sup> which provide many new avenues for networks to expand television revenue and therefore more streams of potential monetary damages to recover during a legal battle.<sup>162</sup> Reality television, a form of unscripted programming,<sup>163</sup> has used

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<sup>156</sup> See *Metromedia Broad. Corp. v. MGM/UA Entm't Co.*, 611 F. Supp. 415, 427 (C.D. Cal. 1985); *SportsChannel Am. Assocs. v. Nat'l Hockey League*, 589 N.Y.S.2d 2, 3 (App. Div. 1992).

<sup>157</sup> LOTZ, *supra* note 11, at 43 (stating that even the most successful shows today can no longer get the same share of the market as successful shows previously could).

<sup>158</sup> Television is no longer as simple as turning on a television. With the advent of DVRs, TIVO, and Internet streaming, television is more accessible than ever before. Additionally, between iTunes and television on DVD, consumers can purchase and watch television both inside and outside of the home. "As a result of these changing technologies and modes of viewing, the nature of television use has become increasingly complicated, deliberate, and individualized." *Id.* at 2.

<sup>159</sup> LOTZ, *supra* note 11, at 34 (explaining that, with the new technologies of DVR, iTunes downloading and Netflix, "[e]ach of these possible transactions of capital for content created new and distinct relationships between the economic model, programming, and how these forms of television might function as a cultural institution").

<sup>160</sup> *Id.* at 166 (explaining that "[p]roduct' or 'brand placement' refers to situations in which television shows use name brand products or present them on the screen within the context of the show").

<sup>161</sup> While product placement is a type of advertising that allows characters or actors to use products on screen in order to promote a brand, product and brand integration provide networks with additional opportunities for advertising revenue, allowing such branding to become a part of the show. Simply stated, product placement is a character drinking a can of Coca-Cola as part of a scene, while product integration is the show itself using Coca-Cola for a marketing challenge, or a sponsorship that allows the show to become an overt promotion of the brand. *See id.* at 166, 169–70.

<sup>162</sup> BLUMENTHAL & GOODENOUGH, *supra* note 15, at 85 ("This type of advertising has a lot of buzz behind it, and it is growing rapidly. In the statistics-bound advertising industry, it seems likely that a meaningful measurement system will evolve as product placement becomes a more commonplace buy.").

<sup>163</sup> Reality television shows can be very lucrative in the short term for networks and producers because they do not use actors, conventional scripts, and are often set on location and therefore are cheaper to produce. Due to the lower production costs, reality shows appeal to networks looking to fill large periods of scheduling with very little

these revenue streams more extensively than its scripted television counterparts, expanding how the industry sees advertising revenue.<sup>164</sup> By 2009, these revenue streams had become relatively commonplace, and because of that there is an established track record of calculable profits that include product integration and production sponsorship that can allow courts a great deal of evidence in order to determine damages for a network that loses unscripted programming.<sup>165</sup>

Just because technology is new and presents new challenges does not mean it requires a different way of thinking.<sup>166</sup> The same general legal principles can apply to modern-day and future televisions shows, just as they did in *Metromedia* and *SportsChannel*. While any television program, like a work of art, could be considered financially unique and valuable to a network, this does not necessarily mean the program is irreplaceable. Especially given the time-sensitive nature and fleeting taste of audiences, there is no reason to believe such success could be found again with another show.<sup>167</sup> It is harder than ever to view

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upfront cost. By the year 2000, reality television had caught on with most of the major networks. *Id.* at 215.

<sup>164</sup> Reality television is more generic than scripted shows, and because of that, producers can more successfully integrate products into scenes and challenges. Producers use this organic marketing potential to sell advertisers the opportunity to be in more of the show than just the commercials. LOTZ, *supra* note 11, at 170.

<sup>165</sup> *Id.* (“According to conventional industry wisdom, most unscripted shows have little potential to recoup production deficits through syndication and consequently require producers to fully fund production through license fees or placement. Integration and placement revenues enable shows to afford impressive concepts or hire the limited skilled editing and production talent in this area of the industry, despite lower license fees and lack of deficit financing. Notably, each of the main unscripted shows for the Big Four networks in the mid-2000s (NBC, *The Apprentice*; CBS, *Survivor*; ABC, *Extreme Home Makeover*; FOX, *American Idol*) features a format that allows for organic placement or integration.”).

<sup>166</sup> The idea of something legal being new but not necessarily different is also seen with the “Law of the Internet.” Much like when the Internet was becoming more popular, Judge Frank Easterbrook of the Seventh Circuit argued at a 1996 Cyber-law seminar at the University of Chicago that having a “Law of the Internet” was like having a law of the horse. “That is, we should not focus on Internet issues that could make cyber-law unique, simply to engender publicity. Rather, Judge Easterbrook believes that we should focus on the fundamental history of the common law and the appropriate legal rules to apply in situations that *happen* to involve the Internet.” John C. Scheffel, *Blinded by the Light: Common Law and the Dangers of Cyberlawyering*, 19 PACE L. REV. 37, 40 (1998) (citing Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL. F. 207 (1996)); accord David G. Post, *Cyberspace and the Law of the (Electronic) Horse, or Has Cyberspace Law Come of Age?*, PLUGGING IN, Apr. 1998, available at <http://www.temple.edu/lawschool/dpost/horse.html> (explaining that Judge Easterbrook’s point was that the laws of cyberspace or the Internet are “much like the ‘law of the horse’: a specialized endeavor best understood with reference to familiar general principles of contract, intellectual property, privacy, free speech and the like, but which does not need, and does not deserve, its own separate category”).

<sup>167</sup> *Metromedia Broad. Corp. v. MGM/UA Entm’t Corp.*, 611 F. Supp. 415, 427 (C.D. Cal. 1985).

television, especially unscripted programming, as unique physical property that needs to be protected with a drastic measure like a preliminary injunction. While there are shows that rise to the level of phenomenal television hits like *Seinfeld*, *Friends*, *Sex and the City*, or *The Sopranos*,<sup>168</sup> and therefore become truly unique, the success of such shows can be fleeting, time-sensitive, and temporary, and something like a preliminary injunction could ruin a show's future prospects and success. Damages that are difficult to calculate do not give rise to irreparable harm requiring injunctive relief.<sup>169</sup> A preliminary injunction is *never* an appropriate remedy in television, because there is no reason television property disputes should require a remedy beyond monetary damages as compensation, no matter how unique a show is considered by its producers or network.

At the time NBC Universal filed for the preliminary injunction, *Project Runway* was a long-running show that had helped Bravo's reputation. But that did not make it irreplaceable. The trial court incorrectly enjoined the Weinstein Company from broadcasting the sixth season of the show on Lifetime. Even if the Weinstein Company violated its contract with NBC Universal, there was enough monetary evidence for the court to deny the motion for preliminary injunction and allow for damages instead. NBC Universal had five seasons of Bravo ratings, and even some ratings data from the show occasionally having aired on NBC. While the "halo effect" and product integration profits would be harder to calculate, the court still had a track record of success from which to draw.

Bravo and NBC Universal would not suffer irreparable harm from losing even a hit show like *Project Runway*, because Bravo had already reached high-profile awareness as a culturally significant network. Furthermore, losing a breakout hit show in its sixth season would only have given Bravo more opportunity to build upon its reputation with new and potentially better shows.<sup>170</sup> Reality television is also especially time-sensitive and

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<sup>168</sup> These shows were listed in the top 10 shows since 1983 by Entertainment Weekly as numbers 3, 9, 5, and 2 respectively. *The New Classics: TV: The 100 Best Shows from 1983 to 2008*, EW.COM (Jun. 17, 2008), [http://www.ew.com/ew/article/0,,20207076\\_20207387\\_20207339,00.html](http://www.ew.com/ew/article/0,,20207076_20207387_20207339,00.html).

<sup>169</sup> *SportsChannel Am. Assocs. v. Nat'l Hockey League*, 589 N.Y.S.2d 2, 3 (App. Div. 1992).

<sup>170</sup> Bravo already had a track record of successful hit shows, and NBC Universal was not in danger of losing its advertising stability and reputation. LOTZ, *supra* note 11, at 183 ("[B]y 2005, one break-out-hit series could move a cable network from the tier of relative obscurity to high-profile awareness, as *Trading Spaces* did for TLC, *Queer Eye for the Straight Guy* did for Bravo, and *The Shield* did for FX. And once a cable network achieves substantial cultural awareness, it is much easier to secure the advertising dollars necessary to maximize its niche status through additional programming.").

subject to the whim of a potentially fickle audience, such that what is hot for one season may not succeed during the next. However, while there is no way to know if the success of *Project Runway* had already started to fade before it left Bravo, that does not mean a court could not calculate the damages.

The trial court's ruling in *NBC Universal, Inc. v. The Weinstein Company, LLC* set a dangerous precedent for future courts facing motions to enjoin a television show from changing networks. Advertising strategies are only going to get more complicated as the television industry adjusts to new technology,<sup>171</sup> and because of that, every network could argue that any television property, no matter how valuable, is irreplaceable and its movement should therefore be restricted by the courts. Because of this, when courts are faced with a motion for a preliminary injunction involving a television show, the best response is to deny the motion. Even if the damages are difficult to calculate because of new media and advertising complications through product integration, it does not elevate the dispute from the realm of damages into the realm of irreparable harm. Difficulty in damage calculation does not make it impossible to do so, and the harm a court could potentially cause by halting the airing of a television show in the constantly changing realm of television would be much greater in the long term.

#### CONCLUSION

There are circumstances and legal disputes where a preliminary injunction is not only the most appropriate remedy, but also the only remedy available to adequately give relief to the party seeking it. However, in the television industry, as well as in other areas of media such as literary publishing, music publishing, and motion picture development, that has never really been the case. Damages are easily calculable due to the financially-oriented nature of the media industry. With the television industry changing at a rapid pace, there is a temptation to protect networks from losing potentially valuable show properties by issuing preliminary injunctions, but to do so uses an outdated definition of "unique." Preventing television shows from airing by tying them up with preliminary injunctions can have far-reaching repercussions beyond the lawsuit itself, and because of the temporal nature of modern television programming, a show can be irreparably damaged by any period

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<sup>171</sup> Indeed, "the proliferation of strategies at the end of the multi-channel transition suggests that a mix of placement, integration, branded entertainment, sponsorship, and the thirty-second spot will continue to exist in a post-network era in which television encompasses a range of conventional, on-demand, and subscription services." *Id.* at 179.

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of time that it is kept from being broadcast. A preliminary injunction is not an appropriate remedy in television because there is no reason that television property disputes should require a remedy beyond monetary damages as compensation, no matter how unique a show is considered to be, or how hard it is to accurately calculate advertising revenue.