Impoundment Procedures Under the Copyright Act: The Constitutional Infirmities

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ARTICLE

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INTRODUCTION

An effective system of copyright protection depends on the power copyright owners can exercise to control the use of their copyrighted works. The bundle of exclusive rights granted to authors by the Copyright Act of 19761 would be rendered economically worthless if the copyright owners' remedies were insufficient to prevent others from infringing those rights by unauthorized use.

Infringements and piracies have long plagued copyright owners in this country.2 In recent years, however, the proliferation of new technologies which facilitate the unauthorized copying and use of protected works (particularly in the areas of satellite-delivered programming, computer software, and video), and the growing volume of international trade in pirated copyrighted works, have posed serious threats to the rights of copyright owners. Every kind of copyrightable work is fair game for copyright piracy,3 both domestic and foreign.4 The piracy “epidemic” has become so widespread that Con-

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2. For the purposes of this Article, a “pirate” is a criminal infringer, as defined by 17 U.S.C. § 506(a) - one who intentionally copies another's copyrighted work for commercial advantage or private gain. 17 U.S.C. § 506(a) (1982). Such a copy is usually an identical copy of all or substantially all of the plaintiff's work. Proof of intent, commercial advantage, or private gain is not required for a finding of civil copyright infringement. The defendant need only copy a validly copyrighted work. 17 U.S.C. § 501(a) (1982).
3. Sounds Illegal, ECONOMIST, Apr. 14, 1984, at 86 (“[C]ounterfeiting costs America $8 billion in lost sales each year . . . Taiwan, South Korea and Hong Kong are said to be the three biggest sources of pirated goods in America.”).

Notwithstanding proposed or existing legislation, pirated works will continue to be introduced into commerce in the United States.\footnote{\textit{Some of these works may gain re-entry by use of "laundered" documents. Attenborough, supra note 4, at 60.}} The protection of the American market from such works depends largely upon the efforts of the United States Customs Service in stopping such works entering from other countries at the border,\footnote{\textit{See} 17 U.S.C. §§ 502, 503(b), 504-505 (1982).} and the efforts of the Federal Bureau of Investigation in pursuing domestic criminal infringers.\footnote{\textit{See} 17 U.S.C. §§ 506-509 (1982).} The priorities and limited resources of both these agencies, however, make it imperative that copyright owners have a civil remedy at their disposal which effectively protects their copyright interests.

The need for such a remedy was recognized by Congress in the Copyright Act of 1976. In addition to the remedies available after a decision on the merits,\footnote{\textit{See} 17 U.S.C. §§ 502, 503(b), 504-505 (1982).} the Copyright Act of 1976 (the 1976 Act)
arms a plaintiff in an infringement action with two powerful pretrial remedies: the preliminary injunction, and the impoundment of the alleged infringing articles by the United States marshal pending decision on the merits.

Impoundment under the 1976 Act, which may be ordered ex parte and prior to judgment, raises constitutional questions. Such seizures of property often violate the due process clause of the fifth amendment by failing to provide notice and an opportunity to be heard. They may also involve the seizure of works that communicate ideas, and thus may be suppression or restraint of "speech" in violation of the first amendment. Furthermore, the impoundment provisions of the 1976 Act may violate the fourth amendment's prohibition against unreasonable searches and seizures.

This Article will analyze the constitutional grounds upon which the remedy of impoundment may be invalidated, and will propose ways to rehabilitate impoundment as a means by which copyright owners may control the use of their copyrighted works. This Article will first examine the law presently governing impoundment, then discuss the constitutional issues and, finally, propose procedures that would cure the constitutional infirmities.

I. THE REMEDY OF IMPOUNDMENT

Section 503 of the Copyright Act of 1976 empowers courts to order the impoundment and destruction of articles infringing another's copyrighted work. To get a true picture of impoundment under the 1976 Act, section 503 must be read in conjunction with its predecessors, sections 101(c) and (d) of the Copyright Act of 1909 (the 1909 Act), and with the Supreme Court Rules for Practice and Procedure Under the Copyright Act (the Rules).

Although the Supreme Court Rules were specifically promulgated to effectuate impoundment under section 101(c) of the 1909 Act, these two provisions contain many inherent contradictions. The uncertain case law that grew out of these provisions is examined below, particularly with regard to its development under the 1976 Act.

Section 101(c) of the 1909 Act stated:

If any person shall infringe the copyright in any work protected under the copyright laws of the United States, such person shall be liable . . . [t]o deliver up on oath, to be impounded during the pendency of the action, upon such terms and conditions as the court may prescribe, all articles alleged to infringe a copyright.  

Shortly after this provision went into effect, the Supreme Court, pursuant to a limited rule-making power conferred by the 1909 Act, promulgated rules to govern procedure in copyright actions. Rules 3 through 13 govern impoundment.  

To obtain a writ of seizure under the Rules, a plaintiff need do only two things. First, the Rules require:

Upon the institution of any action, suit or proceeding, or at any time thereafter . . . the plaintiff or complainant, or his authorized agent or attorney, may file with the clerk of any court given jurisdiction . . . an affidavit stating upon the best of his knowledge, information and belief, the number and location, as near as may be, of the alleged infringing copies, records, plates, molds, matrices, etc., or other means for making the copies alleged to infringe the copyright, and the value of the same . . . .

Second, the Rules require that the plaintiff "shall file with the clerk a bond executed by at least two sureties and approved by the court or a commissioner thereof." The bond requirement is designed to ensure "prompt prosecution of the action," and to provide, at the court's discretion, payment of damages to the defendant if the impounded articles are found not to be infringements.

Once the affidavit has been filed and the bond approved, the Rules state:

[T]he clerk shall issue a writ directed to the marshal of the district where the said infringing copies, plates, records, molds, matrices, etc., or other means of making such infringing copies shall be

19. Id. The "commissioner" referred to in the text means United States commissioners, which were replaced by United States "magistrates" pursuant to Pub. L. 90-578, Oct. 17, 1968, 82 Stat. 1107, 1118.
stated in said affidavit to be located . . . directing the said marshal to forthwith seize and hold the same subject to the order of the court issuing said writ . . . .

The marshal is empowered to seize the articles, "using such force as may be reasonably necessary in the premises, and serve on the defendant a copy of the affidavit, writ, and bond." At no time under the Supreme Court Rules or either copyright act is the plaintiff required to give notice to defendant of the application for a writ of seizure.

Impoundment under the 1976 Act is governed by section 503(a), which provides:

At any time while an action under this title is pending, the court may order the impounding, on such terms as it may deem reasonable, of all copies or phonorecords claimed to have been made or used in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.

A. The Manner of Impoundment

Section 101(c) of the 1909 Act refers to a defendant delivering up to a court on oath the alleged infringing articles. The Supreme Court Rules, however, contemplate seizure by a marshal at any premises where the plaintiff's affidavit alleges the infringing works are located. Despite the discrepancy, early court decisions under section 101(c) and the Rules allowed seizures of infringing articles, wherever found by the marshal, as provided for in the Rules. Such seizures continued under the 1909 Act up to the effective date of the

21. Id. (emphasis added).
It is clear from the legislative history and the House Report on section 503(a) that a "seizure" of the infringing works, pursuant to a court's "order of impoundment," is intended by the 1976 Act.

**B. The Scope of Impoundment**

Section 101(c) authorized impoundment, during the pendency of an action, of "all articles alleged to infringe," a phrase which apparently limited impoundment to infringing *copies* only. In contrast, the destruction provision of section 101(d) authorized destruction after judgment not only of "all the infringing copies or devices," but also of "all plates, molds, matrices, or other means for making such infringing copies." The Rules empower the clerk to issue a writ directing seizure of "the said infringing copies" and of "plates, records, molds, matrices, etc., or other means of making the copies alleged to infringe the copyright" at any time after "the institution of any action, suit, or proceeding." Thus, the Rules permit seizure of instrumentalities used to make the alleged infringing copies, along with the copies themselves, as soon as the plaintiff has filed a complaint and before any finding of infringement has been made.

By obscuring the distinction in section 101 between impoundment and destruction, the Rules greatly broadened the scope of articles that may be seized prior to judgment. Courts are split between observing the narrow scope of seizure allowed by section 101(c) and the broader seizures allowed under the Rules. The weight of

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30. Id.


32. See Universal Pictures Co. v. Schaeffer, 140 U.S.P.Q. 17 (E.D. Pa. 1963) (court ordered seizure only of infringing motion picture film prints; apparently no seizure was made of negatives or other means of producing infringing copies); Universal Film Mfg. Co. v. Copperman, 206 F. 69 (S.D.N.Y. 1913), aff'd, 218 F. 577 (2d Cir.), cert. denied, 235 U.S. 704 (1914) (only positive print of motion picture seizure, although defendant may not have possessed the negative); Jewelers' Circular Publishing Co. v. Keystone Publishing Co., 274 F. 932 (S.D.N.Y. 1921), aff'd, 281 F. 83 (2d Cir. 1922), cert. denied, 259 U.S. 581 (1923) (only infringing copies of directory seized).

33. See Duchess Music Corp. v. Stern, 458 F.2d 1305 (9th Cir.), cert. denied, 409 U.S.
IMPOUNDMENT PROCEDURES

The authority of the later cases decided under the 1909 Act, however, has inclined towards the wider reach of the Rules.

The broadest and most controversial seizure permitted was in Duchess Music Corp. v. Stern, a 1972 Ninth Circuit Court of Appeals decision. A temporary restraining order and a writ of seizure were issued ex parte, by a district court, against alleged "music pirates." The writ authorized seizure of all infringing copies, instruments serving to mechanically reproduce the plaintiff's copyrighted works, "and all means for making the same, comprehending labels, cartridges, tape recordings and machinery utilized in the manufacturing process." After execution of the writ, the district court upheld the seizure of all property that embodied "a mechanical and/or electronic impression" of the plaintiff's copyrighted works "or any packaging or promotional devices identifying or referring to the same." The court ordered the return, however, of items used to make the infringing copies that did not embody, or were not identified to, the plaintiff's copyrighted works, including tape recording equipment and machinery, blank tapes, cartridges, cassettes and labels, and unmarked or unprinted packaging materials.

The Ninth Circuit reversed the lower court's decision and held that "[m]achines, blank cassettes and cartridges, blank and printed labels, and other devices are 'other means' for making [such] infringing copies" that may properly be impounded under section 101 (c) and the Supreme Court Rules. In reaching this decision, the Court of Appeals relied heavily upon the legislative hearings held with regard to the impoundment and destruction provisions of the 1909 Act. The court noted:

Congressmen, supporters, and opponents of the copyright bill agreed that the impoundment and destruction provisions were sweeping in their scope, and encompassed machines and items which could be used for other, allegedly innocent purposes. . . . Congress intended to impound and destroy "the whole of the paraphernalia," including those items which may be used for other

847 (1972) (tape recording equipment as well as blank tapes, cartridges, cassettes, labels, and packaging materials seized).

34. Id.
35. Id. at 1307.
36. Id.
37. Id.
38. Id.
39. Id. at 1308.
purposes.\textsuperscript{40}

Under the Rules and the 1909 Act other courts have also permitted impoundment of machinery capable of noninfringing uses,\textsuperscript{41} as well as seizure of materials not embodying "impressions" of, or otherwise identified to, the plaintiff's copyrighted work.\textsuperscript{42}

Unlike section 101(c) of the 1909 Act, section 503(a) of the 1976 Act explicitly authorizes impoundment of infringing copies and "of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced."\textsuperscript{43} The 1976 Act appears to have ratified the greatly broadened scope of impoundment permitted by the Rules\textsuperscript{44} and to have granted to courts wide discretion in tailoring orders of impoundment under section 503(a).

The phrase "or other articles" may be limited by the enumeration of instrumentalities immediately preceding it to only those articles embodying an identifiable impression of the copyrighted work. No court under the 1976 Act, however, has authoritatively decided whether neutral machinery capable of noninfringing uses and other materials not embodying "impressions" of the plaintiff's copyrighted work may properly be seized as "other articles by means of which

\textsuperscript{40} Id. at 1309.


Once infringement had been found, § 101(d) of the 1909 Act authorized destruction of "all infringing copies or devices," and also of "all plates, molds, matrices, or other means for making such infringing copies." 17 U.S.C. § 101(d) (1976) (repealed 1978). The scope of the destruction order may be very broad and occasionally one will extend to items that are not instrumentalities or other means for producing infringing copies. See Mode Art Jewelers Co. v. Expansion Jewelry, Ltd., 199 U.S.P.Q. 329, 340-41 (S.D.N.Y. 1977) (court ordered destruction of "all molds for making such copies and raw castings [of jewelry] and all related advertising and promotional materials, including all copies of the brochure for [promotion of jewelry]"). But see Dollcraft Indus., Ltd. v. Well-Made Toy Mfg. Co., 479 F. Supp. 1105, 1118 (E.D.N.Y. 1978) (court ordered U.S. marshall to hold all molds and patterns used to produce infringing dolls; order did not include raw materials not yet utilized).


\textsuperscript{44} 17 U.S.C.A. foll. § 501, Rule 3 (West 1977). The scope of impoundment under the Rules extends to the infringing articles and to "other means for making the copies alleged to infringe the copyright." Id.
C. Persons Subject to Impoundment Orders

The prefatory language of section 101 states that “if any person shall infringe . . . such person shall be liable” for the impoundment and destruction of infringing copies. It was uncertain whether such language limited impoundment and destruction only to items in the possession and control of active infringers, or whether infringing items possessed and controlled by innocent third parties could also be impounded. Under the 1909 Act, courts generally limited impoundment to infringing articles within the defendant’s possession and control. In one influential case decided in 1921, Jewelers’ Circular Publishing Co. v. Keystone Publishing Co., the court held that the plaintiff could not seize the defendant’s infringing trade directories from innocent bailees of the defendant. Rather, the plaintiff was required to work out its right to impoundment and destruction through

45. 17 U.S.C. § 503(a) (1982). In Wallace Berrie & Co. v. Custom Styled Toys, Inc., COPYRIGHT L. DECS. (CCH) ¶ 25,492 (E.D.N.Y. Aug. 16, 1982), the court ordered impoundment of “all copies alleged to infringe the plaintiffs’ copyrights and all means for making the same.” Similarly, in Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Prods., Inc., 508 F. Supp. 854, 861 (N.D. Ga. 1981), modified and rev’d on other grounds, 694 F.2d 674 (11th Cir. 1983), the court ordered impoundment of “all copies of the infringing Pamphlets and Booklets in defendants’ possession or control, as well as any plates or other means for printing the infringing materials that may also be in defendants’ possession.” Neither court indicated what those “other means” might be, nor did they report what articles were seized pursuant to that phrase in the writ of seizure. But see RCA Records v. All-Fast Systems, Inc., COPYRIGHT L. DECS. (CCH) ¶ 25,704 (S.D.N.Y. Sept. 7, 1984) (court refused to order impoundment of a “Rezound” cassette-copying machine used to infringe plaintiffs’ copyrighted works because it was capable of noninfringing uses).


47. See, e.g., Andre Matenciot, Inc. v. David & Dash, Inc., 422 F. Supp. 1199 (S.D.N.Y. 1976). The defendant allegedly infringed the plaintiff’s design copyrights on two fabric and wallpaper designs. Id. at 1201. The court ordered impoundment of all the infringing copies of the plaintiff’s works, and all catalogs displaying such copies, within the defendant’s “possession and control.” Id. at 1203. In one of the few reported opinions discussing the scope of such an impoundment order, the court held the defendant in contempt for failing to comply with the order. Id. at 1201. Prior to the lawsuit, the defendant had sold the infringing catalogs and materials to a number of independently owned distributors and showrooms, which in turn sold them to the public. Id. at 1202-03. The court found that the defendant had failed to specify request that the distributors and the distributors’ customers return the infringing designs and catalogs to the defendant, even though the defendant had no right to possession or recall of those articles. Id. at 1206-07. Thus, the court held the defendant in contempt for failing to take “all possible steps” to regain possession and control of the infringing articles. Id. at 1207.

48. 274 F. 932, 936-37 (S.D.N.Y. 1921), aff’d, 281 F. 83 (2d Cir. 1922), cert. denied, 259 U.S. 581 (1922).
the defendant's right to recall the books from its customers and distributors.49

Under section 503(a) of the 1976 Act, however, courts have been given the authority to order the impoundment of infringing articles "made or used in violation of the copyright owner's exclusive rights."50 The House Report indicates that the alternative phrase ("made or used") is meant to enable a court to exercise its discretion with regard to articles which are lawfully reproduced or acquired but which are used for infringing purposes.51

Despite the greatly increased discretion under the 1976 Act, courts have generally followed the case law under the 1909 Act and have only ordered impoundment of infringing articles actually under defendant's possession and control.52

49. Id. In an opinion by Judge Learned Hand, the district court stated:

[T]he possession of innocent bailees should be respected, because it is legal, and should be disturbed only under the terms of the agreement that created it. They are free to enjoy the piratical copies subject to the reserved rights of the defendant. If so, the plaintiff must work out its right to forfeit through the defendant's right to recall the books, and will be enjoined from its proposed course of seizing these books in the hands of the defendant's customers. There is an especial ground in equity for this, because, while such violence would be extremely disastrous to the defendant's business, it could not possibly benefit the plaintiff if the defendant recalls the books within a short time.


52. Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Prods., Inc., 308 F. Supp. 854 (N.D. Ga. 1981), modified and rev'd on other grounds, 694 F.2d 674 (11th Cir. 1983); Cassidy v. Bowlin, COPYRIGHT L. DECS. (CCH) ¶ 25,437 (W.D. Mo. Apr. 9, 1982). In National Research Bureau, Inc. v. Kucker, 481 F. Supp. 612, 615 (S.D.N.Y. 1979), the court declined as "impractical" the plaintiff's request that the defendants be required to recall all the copies of their infringing shopping mall directories already distributed. Instead, the defendants were directed to account only for profits from the directory attributable to the copied matter.

Destruction of infringing articles under the 1909 Act similarly extended to only those articles in the defendant's possession and control. See, e.g., Fisher-Price Toys v. My-Toy Co., 385 F. Supp. 218, 223 (S.D.N.Y. 1974). In Mode Art Jewelers Co. v. Expansion Jewelry, Ltd., 199 U.S.P.Q. 329, 340-41 (S.D.N.Y. 1977), the court permanently enjoined the defendants and its "officers, agents, servants and employees and those in privity with them" from further infringing the plaintiff's copyrighted jewelry. Id. Although the injunction extended to those in privity with the defendants, the order of destruction extended only to articles in the defendants' possession. Id.

When the defendant's distribution and sales network is considerable, courts have tailored orders of destruction to reach infringing articles out of the defendant's possession and control. In Foreign & Domestic Music Corp. v. Michael M. Wyngate, Inc., 66 F. Supp. 82, 87 (S.D.N.Y. 1946), defendants' movie soundtrack infringed five of plaintiff's copyrighted songs.
D. The Court's Discretion to Order Impoundment

Section 101(c) authorizes impoundment of alleged infringing articles "upon such terms and conditions as the court may prescribe." There is some ambiguity in the language of this provision. Does the court's discretion extend to the threshold question of whether or not to order impoundment at all, or to only the "terms and conditions" of the order once it is issued? This ambiguity was compounded by the Supreme Court Rules, which state that once the plaintiff's affidavit has been filed and the bond approved, "the clerk shall issue a writ" for seizure of the alleged infringing articles. In *Duchess Music Corp. v. Stern*, the Ninth Circuit, while speaking in the context of the scope of articles to be seized under section 101(c) and the Rules, seemed to indicate that the court must issue a writ of seizure once the plaintiff has formally complied with the Rules.

Any ambiguity that existed was resolved by section 503(a) of the 1976 Act, which states that "the court may order the impounding, on such terms as it may deem reasonable," of all infringing articles. Even though some discretion was exercised by courts under the 1909 Act, more discretion has been shown in ordering impoundment and in shaping individual orders under the 1976 Act, particularly when the plaintiff requests a temporary restraining order or preliminary injunction at the same time as an order of

After awarding summary judgment to plaintiff, the court ordered the defendants and "their agents, employees, successors, and assigns, and such persons, firms and corporations to whom delivery has been made of, or in whose possession or under whose control there is, the whole or any part or parts of the said musical compositions" to deliver such articles up for impoundment. *Id.* See also *Baez v. Fantasy Records, Inc.*, 144 U.S.P.Q. 537 (Cal. Super. Ct. 1964) (very broad scope of destruction order after a finding of common law copyright infringement).

55. 458 F.2d 1305 (9th Cir.), *cert. denied*, 409 U.S. 847 (1972). "Neither the statute nor the Supreme Court Rules give the District Court any discretion to determine what to impound or what to destroy. The process Congress granted the aggrieved copyright proprietor is a summary one. . . . It is to impound everything the plaintiff alleges infringes his copyright." *Id.* at 1308 (emphasis in original).
impoundment.\textsuperscript{58}

Given the near total discretion of courts to order impoundment, it is not surprising that a wide variety of rationales are used to justify seizures. In \textit{Jewelers' Circular Publishing Co. v. Keystone Publishing Co.},\textsuperscript{59} for example, Judge Learned Hand wrote “I take it as patent that the ‘impounding’ is only to assure the eventual destruction of the infringing articles.” In other instances, however, impoundment may be considered the only effective way to halt the infringer’s activities. In \textit{Wallace Berrie & Co. v. Custom Styled Toys, Inc.},\textsuperscript{60} the plaintiff filed a complaint claiming that its copyrighted “Smurf” toys were being infringed by the defendant.\textsuperscript{61} Subsequently, the plaintiff made ex parte requests for a temporary restraining order and a writ of seizure.\textsuperscript{62} The court granted both requests based on affidavits showing that the defendant had continued making and selling the alleged infringing toys after the complaint had been filed, rather than storing them pending the outcome of the trial.\textsuperscript{63} The seizure of the alleged infringing copies and other instrumentalities for making such copies may be ordered, therefore, to preserve the status quo between the parties pending trial on the merits, and to remove the infringing articles from the market, particularly in cases involving large-scale piracy of the plaintiff’s copyrighted work.\textsuperscript{64}

\textsuperscript{58} \textit{See} Power Lawn Mower Parts, Inc. v. Lawn Mower Parts, Inc., \textit{COPYRIGHT L. DECS.} (CCH) ¶ 25,317 (W.D.N.Y. Aug. 24, 1981), where the court issued a preliminary injunction against defendant’s catalog, but refused to order impoundment, stating that the plaintiff “has made no showing that an order prohibiting defendants from utilizing the infringing catalogs will not be sufficient to protect it.” \textit{Id.} at ¶ 16,799. The court added that “to the extent that plaintiff seeks to force defendants to deliver plates and materials used to prepare the catalog, impoundment is not an available remedy.” \textit{Id. See also} \textit{RCA Records v. All-Fast Systems, Inc.}, \textit{COPYRIGHT L. DECS.} (CCH) ¶ 25,704 (S.D.N.Y. Sept. 7, 1984) (a preliminary injunction was granted, but impoundment of the defendant’s “Rezound” cassette-copying machine was not ordered where the court found the machine had significant noninfringing uses, even though the defendant continued using the machine for infringing purposes after the action was commenced); WPOW, Inc. v. MRLJ Enter., 584 F. Supp. 132 (D.D.C. 1984) (court held that discretion given courts to order impoundment under § 503(a) of the 1976 Act impliedly required a fuller evidentiary hearing than summary proceedings under the old act approved by the Ninth Circuit in \textit{Duchess}); Clark Equip. Co. v. Harlan Corp., 539 F. Supp. 561 (D. Kan. 1982) (court dissolved a writ of seizure already executed upon after plaintiff’s subsequent motion for a preliminary injunction was denied).

\textsuperscript{59} \textit{274 F. 932, 936 (S.D.N.Y. 1921), aff’d, 281 F. 83 (2d Cir. 1922), cert. denied, 259 U.S. 581 (1923).}

\textsuperscript{60} \textit{COPYRIGHT L. DECS.} (CCH) ¶ 25,492 (E.D.N.Y. Aug. 16, 1982).

\textsuperscript{61} \textit{Id.} at ¶ 17,929.

\textsuperscript{62} \textit{Id.}

\textsuperscript{63} \textit{Id.} The opinion does not state who the affiants were, what facts they alleged, or what formed the basis of their beliefs.

\textsuperscript{64} \textit{See Duchess Music Corp. v. Stern, 458 F.2d 1305 (9th Cir.), cert. denied, 409 U.S.}. 2022

http://scholarlycommons.law.hofstra.edu/hlr/vol14/iss1/10
The defendant's liability and culpability, depending on the number of copies seized, or may even substantiate the plaintiff's infringement claim by providing the plaintiff with proof of the instrumentalities and other means for making the infringing copies. Evidence of the materials seized, as well as statements made by the defendant during the seizure, have been used to support a finding of infringement. Writs of seizure have also been used to seize materials that do not themselves infringe, but which give evidence of the defendant's infringing activities, such as advertising and promotional materials, business records, or materials not yet made into the infringing article.

E. The Showing Required for an Order of Impoundment

Some commentators have argued that the prefatory language of section 101 — "if any person shall infringe" requires the plaintiff to demonstrate a likelihood of success on the merits in the underlying infringement action. Although no case decided under the 1909 Act relied on this language, some courts ordered impoundment only after a preliminary injunction hearing. Several other

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71. See, e.g., Dealer Advertising Dev., Inc. v. Barbara Allan Fin. Advertising, Inc., 209 U.S.P.Q. 1003 (W.D. Mich. 1979) (unproduced radio scripts allegedly infringing radio commercials, and rate sheets seized); Mode Art Jewelry Co. v. Expansion Jewelry, Ltd., 199 U.S.P.Q. 329 (S.D.N.Y. 1977) (advertising and promotional materials related to sales of infringing jewelry seized). In Universal Pictures Co. v. Schaeffer, 140 U.S.P.Q. 17 (E.D. Pa. 1963), marshals seized several copies of motion pictures named in the writ of seizure, but did not seize records regarding sales or rentals of the infringing materials. Id. at 19-20. In Midway Mfg. Co. v. Omni Video Games, Inc., 668 F.2d 70 (1st Cir. 1981), however, one copy of the defendant's allegedly infringing video game was impounded pursuant to a writ of seizure. Id. at 71. The district court subsequently vacated the writ, stating that it had been "based on inaccurate information," and suppressed the game, holding that its seizure had been "unnecessary." Id. The First Circuit affirmed the lower court's exercise of discretion in suppressing all evidence obtained as a result of the execution of the writ of seizure, holding that, since the primary purpose of impoundment was to secure the infringing works for destruction, the plaintiff would not be hurt if the writ was vacated and only one copy of the defendant's allegedly infringing work was lost for destruction. Id. The First Circuit also indicated that if the district court's order of suppression was reversed on final appeal and the infringing copy had disappeared, the plaintiff would still have "the account by the individuals involved in the seizure of what they saw and heard." Id. at 72.
Courts are more likely to order impoundment for this reason in cases where the threat of irreparable injury is particularly great.\(^5\)

Another rationale for impoundment and destruction is the desire to punish the alleged copyright infringer and deter others, particularly in cases of piracy.\(^6\) The impoundment and destruction provisions are "highly penal"\(^7\) in nature and courts often order impoundment where it appears that the defendant's infringement is willful. In Wallace Berrie, a temporary restraining order was issued where the defendant continued to make and sell allegedly infringing copies after the action commenced and had been a defendant in a previous copyright infringement action involving the same goods.\(^8\) In another case, a court found the defendant in contempt and ordered impoundment where the defendant willfully violated an injunction issued in a prior infringement action between the same parties.\(^9\)

The final, and perhaps most significant, purpose of impoundment is to seize evidence of the defendant's infringing activities. Evidence obtained by a writ of seizure may determine the extent of a

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65. Nintendo of Am., Inc. v. Elcon Indus., Inc., 564 F. Supp. 937, 942 (E.D. Mich. 1982). The court initially issued a temporary restraining order and an order of impoundment. \textit{Id.} at 938. In subsequently issuing a preliminary injunction, the court emphasized the plaintiff's enormous expense in developing its video game and the ease with which such a game may be copied by others. \textit{Id.} at 942. The court went on to state:

The commercial life of audio-visual games is notoriously short. Despite the tremendous popularity of the [plaintiff's] game, most of its sales are likely to occur during the first six to twelve months of its commercial life, and thereafter the game's popularity is expected to drop sharply. The sale of [infringing] copies of [the plaintiff's game] poses an immediate and serious threat to the plaintiff's business. \textit{Id.}


69. National Research Bureau, Inc. v. Kucker, 481 F. Supp. 612, 615 (S.D.N.Y. 1979) (shopping mall directories impounded). \textit{See also} Amplex Mfg. Co. v. A.B.C. Plastic Fabricators, Inc., 184 F. Supp. 285, 288 (E.D. Pa. 1960), where impoundment of all the defendant's infringing catalogs was ordered even though the infringement was minimal and the plaintiff had not suffered any financial harm from the infringement. The court ordered impoundment and destruction because "the integrity of our Copyright Laws must be protected." \textit{Id.}
courts ordered impoundment under the 1909 Act only after a trial or full evidentiary hearing.\textsuperscript{75}

The Supreme Court Rules, however, do not require the plaintiff to make any factual showing on the merits of the underlying claim, either before or after the writ of seizure is executed. The Rules require only that the plaintiff file an affidavit locating the allegedly infringing articles and post a bond.\textsuperscript{76} For pretrial seizures ordered ex parte under the 1909 Act, the weight of authority supports the showing required by the Supreme Court Rules — none at all.\textsuperscript{77} In these cases, an order of impoundment was generally prayed for and granted on the same day the complaint was filed,\textsuperscript{78} and the writ of seizure that was issued pursuant to the order was generally executed very shortly thereafter.\textsuperscript{79}

There is nothing in the 1976 Act or its legislative history to indicate that Congress intended a plaintiff to make any showing of a likelihood of success on the merits before impoundment is ordered. As one court stated of section 503(a), "[t]he decision to impound is discretionary with the court; no standards are set out in the statute."\textsuperscript{80}

The House Report states that impoundment may be ordered for allegedly infringing articles "as soon as suit has been filed and with-

\begin{itemize}
\item \textsuperscript{76} 17 U.S.C.A. foll. § 501, Rule 3 (West 1977). The Rules, however, state that the order of impoundment may only be obtained "[u]pon the institution of any action." \textit{Id}. Thus, the writ of seizure may issue only after the plaintiff has, at least, filed a complaint which contains some factual allegations.
\item \textsuperscript{77} See Duchess Music Corp. v. Stern, 458 F.2d 1305 (9th Cir.), \textit{cert. denied}, 409 U.S. 847 (1972); Crown Feature Film Co. v. Bettis Amusement Co., 206 F. 362 (N.D. Ohio 1913).
\end{itemize}
Consequently, almost all courts continue to follow the impoundment procedures of the Supreme Court Rules when pretrial, ex parte impoundment is sought under the 1976 Act. At the same time, the clear trend under the new act is to order impoundment and issue a writ of seizure contemporaneously with the issuance of a temporary restraining order or a preliminary injunction. This effectively makes an order of impoundment dependent on the showing required by Rule 65 of the Federal Rules of Civil Procedure — irreparable injury and a likelihood of success on the merits.

This trend reflects growing judicial unease with the summary proceedings prescribed by the Supreme Court Rules and represents an attempt to balance more equitably the interest of both parties in an impoundment action under the 1976 Act. Although this attempted balancing of the parties' interests is in keeping with recent Supreme Court opinions regarding due process considerations in pretrial seizures, it has no basis in either section 503(a) or the Supreme Court Rules.

85. Fed. R. Civ. P. 65. The standard for issuing preliminary injunctions was stated in Wainwright Sec., Inc. v. Wall St. Transcript Corp., 558 F.2d 91, 94 (2d Cir. 1977): "[A] preliminary injunction can be granted if plaintiff shows irreparable injury, combined with either a probability of success on the merits, or a fair ground for litigation and a balance of the hardships in his favor." Id. There are still courts, however, that order impoundment on nothing more than compliance with the Supreme Court Rules under the new act. See Midway Mfg. Co. v. Omni Video Games, Inc., 668 F.2d 70 (1st Cir. 1981); Midway Mfg. Co. v. Dirkschneider, 215 U.S.P.Q. 336 (D. Neb. 1981).
86. In passing § 503(a) in its present form, Congress declined the opportunity to make notice and a showing of irreparable injury a prerequisite of impoundment. Congress, however,
F. The Release of Impounded Articles

Neither section 101 nor section 503 makes any provision for release of the impounded articles.87 The procedures a defendant must follow are governed by the Supreme Court Rules.88 Under the Rules, the defendant may serve an exception to the plaintiff's bond or sureties within three days after the articles are seized.89 If the defendant does not except, he or she may apply to the court "for the return . . . of the articles seized, upon filing an affidavit stating all material facts and circumstances tending to show that the articles seized are not infringing copies, records, plates, molds, matrices, or means for making the copies alleged to infringe the copyright."90

If such an application is made, the court has the discretion to order the return of the property upon the defendant's filing of a bond at a price fixed by the court.91 The burden of proof is on the defend-
tant at such a hearing and there is no time limit within which the hearing must be held, or within which a final judicial determination must be made on the validity of the seizure or on the underlying question of infringement. Further, as minimal as the procedures are for obtaining a writ of seizure under the Supreme Court Rules,\textsuperscript{92} irregularities in following them are not necessarily fatal to the seizure.\textsuperscript{93}

In addition to showing that the impounded articles do not infringe, release of the articles may be obtained by a showing that the factual allegations supporting the writ of seizure were false or misleading. In \textit{Jondora Music Publishing Co. v. Melody Recordings, Inc.},\textsuperscript{94} the plaintiffs applied for an ex parte writ of seizure on the same day they filed their verified complaint.\textsuperscript{95} The application was supported by the averments of the verified complaint, affidavits of the plaintiffs, and bonds.\textsuperscript{96} Both the complaint and the affidavits made lengthy factual allegations that the defendant was a "bootlegger" and a music tape "pirate," whose operation would go underground and be secretly moved to another location unless the writ of seizure was ordered ex parte.\textsuperscript{97} The court issued the writ ex parte one week after the application was made.\textsuperscript{98}

At the hearing held on the defendant's motions to quash the writ of seizure and vacate the injunction, the court found that the defendant had been making substantial royalty payments to the plaintiffs and had otherwise complied with the compulsory license provisions of the copyright act.\textsuperscript{99} The court granted the defendant's motions because the plaintiffs had failed to convey these material facts to the court, and had made "shocking misstatements" in their verified complaint and affidavits that "practiced a fraud" on the

\textsuperscript{92} See \textit{supra} notes 17-20 and accompanying text.
\textsuperscript{93} See \textit{Midway Mfg. Co. v. Dirkschneider}, 215 U.S.P.Q. 336, 337 (D. Neb. 1981). The court held that: (1) the plaintiff only needed one surety to secure the order of impoundment rather than the two required by Rule 3; (2) the plaintiff's bond was inadequate in light of the value of the goods actually seized, but the plaintiff had ten days to increase the bond to the appropriate amount pursuant to Rule 7; and (3) the marshal was not required by Rule 5 to serve the affidavit locating and valuing the goods on the defendant at the time of seizure because Rule 3 only required "that service of the affidavit shall be made by the marshal." \textit{Id.}
\textsuperscript{94} 351 F. Supp. 572 (D.N.J. 1972).
\textsuperscript{95} \textit{Id.} at 572-73.
\textsuperscript{96} \textit{Id.} at 573.
\textsuperscript{97} \textit{Id.}
\textsuperscript{98} \textit{Id.}
\textsuperscript{99} \textit{Id.} at 573-76.
The Supreme Court Rules require that the plaintiff post a bond to be used for payment to the defendant of any damages which the court might subsequently award. This provision appears to grant courts complete discretion, particularly since neither the copyright act nor the Rules contain any standards for deciding when damages are to be awarded. Nevertheless, damages in connection with impoundment are rarely discussed or awarded by courts. Despite strong language condemning the plaintiffs' actions in obtaining the writ of seizure, the Jondora court found that the plaintiffs were in technical compliance with the Supreme Court Rules and did not award damages for the wrongful seizure. The court merely vacated the writ upon equitable principles and ordered return of the articles seized.

One early court, in *Universal Film Manufacturing Co. v. Copperman*, affirmed an award of damages after finding that the defendant's one positive print of a 1912 motion picture did not infringe the plaintiff's copyright. The amount of the award for wrongful seizure was determined by analogizing to damages awarded for...

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100. *Id.* See also *Midway Mfg. Co. v. Omni Video Games, Inc.*, 668 F.2d 70, 71 (1st Cir. 1981) (court affirmed decision to vacate order of impoundment that had been "unnecessary" and "based on inaccurate information"). In these cases, the plaintiffs, proceeding under the Supreme Court Rules, were not required to make any showing as to their alleged need for swift, ex parte relief. See *supra* note 76 and accompanying text.


102. 351 F. Supp. at 576. Even more recently than Jondora, a case named Dealer Advertising Dev., Inc. v. Barbara Allan Fin. Advertising, Inc., 197 U.S.P.Q. 611 (W.D. Mich. 1977), 209 U.S.P.Q. 1003 (W.D. Mich. 1979), was decided that illustrated perfectly the kinds of abuses made possible by the procedures for impoundment under the copyright act. The procedural failures here, which arose from a very complex factual situation, were many. First, seizure of the defendant's alleged infringing radio advertisement spots, including seizure of sales brochures for the spots, cassette masters of demos, sets of scripts, rate sheets, and sales form letters, was ordered under the Supreme Court Rules even before the plaintiff had initiated an action for copyright infringement. 197 U.S.P.Q. at 614. Second, impoundment was ordered on the basis of a factual record showing that both parties had acted many times in disregard of the other's rights in the radio spots and in breach of their prior written agreement. 209 U.S.P.Q. at 1007-11. Third, the court had specifically declined to order a preliminary injunction regarding the defendant's advertising campaign a few months before impoundment was ordered, holding that the factual basis for it was insufficient. *Id.* at 1011. Nevertheless, the plaintiff was able to obtain an order of impoundment on the same claim with no factual showing at all and with another preliminary injunction motion on that claim pending. *Id.* at 1011-12. In view of the parties' poisoned feelings toward each other and the mass of litigation already pending, it appears that the plaintiff's impoundment application was an attempt to place the defendant at a disadvantage in its litigation before an adversary hearing could be had.

103. 218 F. 577 (2d Cir.), *cert. denied*, 235 U.S. 704 (1914).

104. *Id.* at 580.
breach of contract. The defendant also recovered attorney's fees. In a recent case, the District Court for the District of Rhode Island vacated a writ of seizure that had been "unnecessary" and based on inaccurate information. The district court did not award damages but instead ordered suppression of the evidence seized and awarded attorney's fees to the defendant.

The cases indicate that there is no consensus as to what interests should be compensated after a wrongful seizure. The Rhode Island district court used a fourth amendment remedy — suppression of evidence — to compensate for the violation of the defendant's privacy. The interests protected by the *Universal Film* court were solely pecuniary. The *Jondora* court did not compensate any interest of the defendant's at all, despite the plaintiffs' flagrant misconduct.

Thus, the remedy of impoundment under the 1976 Act contains many ambiguities. Under the minimal requirements of the Supreme Court Rules, courts have nearly total discretion in deciding to order impoundment. No showing at all of success on the merits or of the need for swift, ex parte relief is required, and an order of impoundment may extend the scope of seizure to persons in lawful possession of the infringing articles and to instrumentalities capable of non-infringing uses. The various policies underlying the impoundment remedy have led courts to require widely differing factual showings from the parties, both in ordering and vacating orders of impoundment.

II. PROCEDURAL DUE PROCESS AND THE FIFTH AMENDMENT

A. Fundamental Principles

1. *Sniadach v. Family Finance Corp.* and *Fuentes v. Shevin.* — In the past two decades, provisional remedies permitting private parties to obtain ex parte seizure of another's property prior to judgment have undergone profound change. Beginning in 1969,

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105. *Id.* The district judge had considered the following factors in making the award: "[t]he condition of the film or reel at the time of seizure and at the present time; the nature of the employment of the reel at the time of seizure; the rate of such employment and its probable future employment." *Id.*

106. *Id.* at 581-82.


108. *Id.* The district court had held that it was permissible to make an interlocutory appeal from its order vacating the writ, because it was a final order. The First Circuit held that an appeal from the order granting the writ was not permissible, because the issuance of such an order was within the court's discretion and was not subject to review. *Id.* at 72.
with *Sniadach v. Family Finance Corp.*,109 the Supreme Court significantly increased the procedural safeguards required by the fifth amendment before such seizures may lawfully be made.

The Court's decision in *Sniadach* was motivated by principles traditionally associated with due process. The Court struck down Wisconsin's prejudgment garnishment statute because of its fundamental unfairness to debtors.110 Upon a creditor's request, the statute authorized a court clerk to issue a writ of garnishment for up to fifty percent of a debtor's wages, and provided that the writ could be served on the garnishee before any notice had been given to the debtor.111 The Court found that these procedures enabled creditors to exert tremendous leverage on debtors for long periods of time without providing any opportunities for the debtors to be heard or to tender any defenses.112 Further, since the writ could be issued ex parte, plaintiffs could make fraudulent claims that would not be tested by an adversarial proceeding until trial, if ever.113

The due process principles underlying *Sniadach* were reiterated and expanded by the Supreme Court three years later in *Fuentes v. Shevin*.114 In *Fuentes*, a creditor claiming that a debtor had defaulted on an installment sales contract, brought a replevin action for household goods.115 To obtain a writ of replevin, the Florida statute in question required only that the creditor allege in conclusory form that he or she was lawfully entitled to possession of the property, and that a bond be posted for double the value of the property to be replevied.116 The writ was issued ex parte by a court clerk without judicial supervision, and no prompt, postseizure hearing was required.117

The Supreme Court stated that the debtor has a possessory interest in the property and that seizure of property without notice and an opportunity to be heard is a substantial invasion of this interest.118 A seizure ordered ex parte denied the debtor the opportunity to take part in proceedings that would determine his or her right to

110. *Id.* at 341-42.
111. *Id.* at 338.
112. *Id.* at 338-39.
113. *See id.* at 339.
115. *Id.* at 70.
116. *Id.* at 73-74.
117. *Id.* at 73-75.
118. *Id.* at 80-85.
possession, an opportunity necessary to protect the individual's dignity and self-respect. The Court stated that prejudgment seizures must be accompanied by procedural safeguards adequate to protect the debtor's use and possession of property from "arbitrary" encroachment. Such procedures were necessary to minimize the risk of "substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party." The Court further noted that "notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner." In light of the interests being protected, the Court held that notice and a hearing must be granted prior to seizure, except under extraordinary circumstances.

2. Abuses of Copyright Impoundment Procedures. — The risk of unfair or mistaken deprivations of property is greater under the Supreme Court Rules than under the statutory schemes in Sniadach and Fuentes because the Rules do not require a plaintiff to allege, even conclusorily, that the defendant has no right to possession of the goods to be seized. In fact, by allowing impoundment at the request of a self-interested private party without requiring more than the minimal factual showing in a plaintiff's complaint, the Supreme Court Rules increase the risk of fraudulent claims. As the court in Jondora Music Publishing Co. v. Melody Recordings, Inc. found, granting an order of impoundment without an adversarial hearing opens the door to the kind of "shocking misstatements" made by the plaintiffs in that case. It is conceivable that a plaintiff may use impoundment to pressure recalcitrant or potential licensees. The likelihood of such claims is also heightened by the fact that, unlike the parties in Sniadach and Fuentes, the parties in copyright actions are often business competitors. Sometimes they have had business relations with each other that soured before the infringement action.

120. 407 U.S. at 81.
121. Id.
122. Id. at 80.
123. See id. at 90-92. Notice and an opportunity to be heard are not required prior to seizure in "extraordinary situations." Id. at 90 (quoting Boddie v. Conn., 401 U.S. 371, 379 (1971)). These situations occur where the seizure is necessary to secure a crucial governmental or public interest, there is a need for prompt action, and where the government closely oversees the seizure procedure. Id. at 91.
124. See supra text accompanying notes 18, 76-77.
125. See supra notes 94-100 and accompanying text.
was brought. The Rules erect no procedural safeguards against the kind of sharp dealing and unfair deprivation that may be attempted in such circumstances.

Impoundment of alleged infringing articles will disrupt any defendant's business, and such an order may have an effect on the defendant that is considerably out of proportion to the harm caused to the plaintiff's copyright by the defendant's alleged infringement. For instance, impoundment, by preventing the defendant's use of the copyrighted work, may also hamper the defendant's sale of goods for which the copyrighted work is only a sales or operating tool. If the impoundment order extends to alleged infringing works in the possession of third parties who are part of the defendant's chain of distribution, the impoundment may severely damage the defendant's business relationships and sales of noninfringing works.

The risk of unfair and arbitrary deprivations is not limited to claims brought in bad faith. Impoundment is ordered to secure alleged infringing works for trial and potential destruction. Whether the defendant's work "infringes" the plaintiff's is a notoriously difficult question, however — far more difficult than the simple claims for default facing the courts in Sniadach and Fuentes. Ordering impoundment at the request of a self-interested private party, based upon an underlying infringement claim supported only by the plaintiff's zealous belief that his or her copyrighted work has been infringed, fails to protect against unfair seizures.


127. For example, in Clark Equip. Co. v. Harlan Corp., 539 F. Supp. 561, 563-66 (D. Kan. 1982), the plaintiff manufactured industrial lift trucks and supplied its authorized dealers with a copyrighted computer program and database on the parts sold by plaintiff for its lifts. The defendant, an unauthorized dealer, apparently copied the plaintiff's database, and used it to service plaintiff's lifts. Id. The court vacated an order of impoundment of the defendant's articles because the interference with his business due to the seizure of such articles outweighed any possible harm infringement would have on the plaintiff. Id. at 570-71.

Furthermore, as commercial exploitation of copyrights leads to increasingly complex business relationships, the need for an adversarial hearing increases to assure the accuracy of a court’s finding that a defendant may rightfully be deprived of possession of the alleged infringing works. The potential for error in this regard was illustrated in *Warner Bros., Inc. v. Kalish.* The plaintiffs, several major motion picture producers and distributors, claimed that the defendants, a film processing lab and its owner, were making infringing copies of the plaintiffs' copyrighted movies. Despite the significant possibility that a licensing or distributing agreement existed between the plaintiffs and defendants, either directly or through intermediate parties, an order of impoundment was granted contemporaneously with the filing of the plaintiffs' complaint and without any notice to the defendant or an opportunity to be heard.

Perhaps the most serious problem with the Rules' inadequate procedures is that they require courts to surrender virtually all control over a private party's use of the state's legitimate force. Not only is that control surrendered as to seizures of alleged infringing copies, but also as to other means by which such articles may be reproduced.

**B. Balancing the Parties' Interests**

1. *Mitchell v. W.T. Grant Co.* — Two years after *Fuentes* was decided, the Supreme Court upheld, in *Mitchell v. W.T. Grant Co.*, the constitutionality of an ex parte, prejudgment seizure under Louisiana's sequestration statute. The Court held that, although the seizure had been obtained ex parte, the statute contained procedural safeguards constitutionally sufficient to protect against unfair or mistaken deprivations. First, the availability of sequestration was limited to situations where the debtor had the power to conceal, dispose of, waste, or remove the property to be sequestered. Second, under the Louisiana statute the creditor was required to allege specific facts based on actual knowledge supporting

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130. Id. at 768-69.
131. Id. at 769.
132. Id. at 768.
133. See supra note 31 and accompanying text.
135. Id. at 604-05.
136. Id. at 605.
the claim for possession. In addition, the application for a writ of sequestration was made to a judge rather than to a clerk, and the debtor had a right to a prompt, postseizure hearing at which the creditor was required to prove the grounds upon which the writ was issued. Finally, the statute provided for damages if there was a wrongful taking, and the debtor could regain possession by filing a counterbond.

Although Mitchell implicitly modified Fuentes by allowing ex parte seizures prior to judgment, the central inquiry remained the same: Do the procedures for seizures of property prior to judgment contain adequate safeguards to minimize the risk of unfair or mistaken deprivations? Mitchell differed from Fuentes by requiring that such procedures strike a balance sufficient to protect the conflicting interests of both parties in the property to be seized. The Court reasoned that notice to the defendant prior to seizure could defeat the creditor's interest by giving the defendant an opportunity to conceal, destroy, remove, or otherwise dispose of the goods to be seized. Ex parte seizures, the Court noted, may be the only way to adequately protect a plaintiff's interest against such dangers. Since the Louisiana statute permitted ex parte sequestration only under circumstances where the debtor could defeat legitimate creditor interests, the Court found that the statute was not violative of due process requirements.

Regarding protection of the debtor's interests, the Court found that the Louisiana statute's requirements that the affidavit in support of an application for seizure contain specific facts made by one with actual knowledge, and that the application be made to a judge, were sufficient to minimize the defendant's risk of being subjected to an erroneous deprivation. The Court also noted that the defendant's
right to a prompt, postseizure hearing, at which the plaintiff would bear the burden of proving the grounds upon which the writ was issued, would swiftly serve to correct and redress any wrongful deprivations.\footnote{145}{See id. at 610.}

In permitting ex parte seizures in some situations, the \textit{Mitchell} Court seemed to emphasize the importance of the pecuniary interests at stake in a seizure, rather than the liberty or privacy interests that were emphasized in \textit{Fuentes}. Minimizing the risk of mistaken or unfair deprivations, however, still lies at the heart of fifth amendment procedural due process, and both \textit{Fuentes} and \textit{Mitchell} have continuing vitality in this area of the law.\footnote{146}{Often, courts rely on both \textit{Fuentes} and \textit{Mitchell} when performing the due process analysis. See, e.g., Guzman v. Western State Bank, 516 F.2d 125 (8th Cir. 1975); Keelon v. Davis, 475 F. Supp. 204 (N.D. Miss. 1979); Michigan State Treasurer v. Turner, 110 Mich. App. 228, 312 N.W.2d 418 (1981); Peebles v. Clement, 63 Ohio St. 2d 314, 408 N.E.2d 689 (1980); General Elec. Credit Corp. v. Hatch, 3 Ohio App. 3d 80, 443 N.E.2d 1054 (Ohio Ct. App. 1982). See also Terranova v. Avco Fin. Servs. of Barre, Inc., 396 F. Supp. 1402 (D. Vt. 1975) (\textit{Fuentes} decision required notice and a hearing be provided prior to nonpossessory seizure).}

2. Lack of Procedural Safeguards in the Supreme Court Rules. — The procedures for obtaining an order of impoundment under the 1976 Act\footnote{147}{See supra text accompanying notes 9-11.} and the Supreme Court Rules\footnote{148}{See supra text accompanying note 14.} do little, if anything, to safeguard defendants against mistaken deprivations. Under these procedures, a plaintiff need not allege specific facts supporting the underlying copyright infringement claim. Indeed, the application may be made by one without actual knowledge, such as the plaintiff’s authorized agent or attorney.\footnote{149}{See supra text accompanying note 17.} Further, neither the statute nor the Rules limits the remedy of impoundment to situations where the plaintiff may suffer irreparable injury or the defendant may conceal, dispose of, or waste the infringing articles.\footnote{150}{See supra notes 29-45 and accompanying text.} Although the application and issuance of an ex parte order of impoundment is made under judicial supervision, this procedural safeguard is rendered meaningless by the absence of a requirement for a factual showing in the application.\footnote{151}{See supra notes 76-80 and accompanying text.} Without such a showing the court’s discretion is reduced to little more than passing on the formal sufficiency of the plaintiff’s affidavit and bond.\footnote{152}{See supra text accompanying notes 17-20.}
Impoundment procedures do provide for a postseizure hearing, after which the court may order return of the impounded articles. The burden is on the defendant, however, to move for such a hearing by stating in an affidavit all material facts and circumstances tending to prove that the seized articles do not violate the plaintiff’s copyright. The plaintiff is not required to prove the grounds upon which the writ was issued. If the defendant prevails at the hearing, the court may order return of the impounded articles, but only after the defendant has posted a counterbond. Unlike the defendant in Mitchell, a defendant in an impoundment proceeding may not obtain return of the articles seized simply by posting a bond. The Rules state that the court may order an award of damages if the articles seized are later released. No such award is mandatory, however, and damages for wrongful impoundment are rarely awarded by courts in copyright actions. Thus, the deterrent effect of possible damage awards on plaintiffs with baseless claims is negligible. In short, the Rules fail to satisfy the procedural criteria of Mitchell. The Rules provisions that do address Mitchell requirements — a writ issued under judicial supervision, a postseizure hearing, and damages for wrongful seizure — are each insufficient to safeguard against mistaken or unfair deprivations.

The Rules completely lack any requirement that the plaintiff allege specific facts in support of the application for an order of impoundment or that the debtor receive notice prior to seizure. In

154. 17 U.S.C.A. foll. § 501, Rule 9 (West 1977). See Crown Feature Film Co. v. Bettis Amusement Co., 206 Fed. 362 (N.D. Ohio 1913), where the court stated that the only authority for a motion to release impounded articles is found in the Supreme Court Rules 9, 10, and 11. See Midway Mfg. Co. v. Omni Video Games, Inc., 668 F.2d 70, 71 (1st Cir. 1981); and Jondora Music Publishing Co. v. Melody Recordings, Inc., 351 F. Supp. 572, 576 (D.N.J. 1972), where the courts returned articles seized after the defendants demonstrated that the plaintiff’s statements in obtaining the writs were false.
156. In Guzman v. Western State Bank, 516 F.2d 125, 131 (8th Cir. 1975), the court struck down a state prejudgment attachment statute that, inter alia, required that the defendant post a bond equal to the value of the property seized, before he could challenge the statute.
157. 17 U.S.C.A. foll. § 501, Rule 4 (West 1977). Given the different interests protected by Fuentes and Mitchell, the basis of such an award is uncertain. See supra text accompanying notes 101-07 (damages awarded for impoundment of alleged infringing works).
158. See supra notes 101-108 and accompanying text. Although the statute approved in Mitchell did not require an award of damages for wrongful seizure, one court has since held that a similar statute does. See Springdale Farms, Inc. v. McLinn Bank & Trust, 281 Ark. 371, 663 S.W.2d 936 (1984).
159. See supra notes 151-58 and accompanying text.
*Mitchell* the Louisiana statute limited ex parte sequestration to situations where the defendant could conceal, dispose of, or waste the property to be sequestered. The summary procedures and wide-reaching scope of the impoundment remedy are arguably necessary to prevent copyright pirates from escaping from the jurisdiction pending a hearing or trial on the merits. A survey of the case law, however, shows that many defendants against whom impoundment is ordered are established businesses engaged for the most part in lawful business activities. It is unlikely that such defendants or the infringing articles and instrumentalities would escape the judgment of the court.

The impoundment procedures set forth in the Rules fail to adequately balance the parties' interests in the alleged infringing articles. The scales are weighted entirely in the plaintiff's favor; the defendant's pecuniary interest in the alleged infringing works receives little or no protection. It would be more appropriate, however, for the procedural safeguards surrounding impoundment to exceed the standards set forth in *Mitchell*. In upholding the Louisiana sequestration statute's constitutionality, the *Mitchell* Court noted that the issues involved in debtor/creditor relations are "ordinarily uncomplicated matters that lend themselves to documentary proof." In contrast, the factual circumstances and legal issues surrounding copyright infringement are often complex and difficult. Furthermore, although impoundment may have as drastic an effect on the defendant as the seizures of the debtors' wages and household goods did in *Sniadach*, *Fuentes*, and *Mitchell*, the impact will be even greater if instrumentalities and other means for making the infringing works are also seized along with the infringing copies, or if the order of

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162. In reported opinions, courts ordering impoundment often do not provide much information about the defendant's business or personal ties to the community. In the following cases, however, impoundment was ordered against substantial businesses without a showing that the plaintiff had reason to believe that the infringing articles or businesses themselves would escape the court's jurisdiction before a hearing could be had: Warner Bros., Inc. v. Kalish, 201 U.S.P.Q. 768 (W.D.N.Y. 1978) (infringing copies and instrumentalities seized from defendant's film-processing lab); Dealer Advertising Dev., Inc. v. Barbara Allan Fin. Advertising, Inc., 197 U.S.P.Q. 611 (W.D. Mich. 1977) (defendant's radio advertisements and other related materials seized); Elektra Records Co. v. Gem Elec. Distrib., Inc., 360 F. Supp. 821 (E.D.N.Y. 1973) (Make-a-Tape machine seized from defendant's music store).
impoundment extends to the defendant's bailees or distributors.\footnote{165} Despite the unfair and arbitrary deprivations copyright defendants may be exposed to by the present impoundment procedures, those procedures have been upheld against fifth amendment challenges.\footnote{166} Subsequent to \textit{Sniadach} and \textit{Fuentes}, only one court has extensively addressed the constitutionality of the impoundment procedures under the fifth amendment.\footnote{167} That court held that the impoundment procedures comply with the constitutional mandate of the fifth amendment, stating that \textit{Sniadach} and \textit{Fuentes} were not on point.\footnote{168} The court stated that because provisions exist in the Supreme Court Rules for relief from a seizure, the constitutional requirements were satisfied.\footnote{169} Clearly, the court was erroneous. \textit{Sniadach}, \textit{Fuentes}, and \textit{Mitchell}, and other cases passing on the constitutionality of statutes permitting ex parte seizures prior to judgment at the request of private parties, are relevant to the issue of impoundment under the copyright act. Before turning to a discussion of constitutionally adequate impoundment procedures, the first and fourth amendment implications for seizures under the copyright act must be examined.

\section*{III. Searches, Seizures, and the Fourth Amendment}

\subsection*{A. The Constitutional Requirements}

The fourth amendment to the United States Constitution preserves the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” and requires that “no Warrants shall issue, but upon probable cause . . . 

\footnote{165. The nature of the plaintiff's property interest in the alleged infringing works may be somewhat less than the creditors' interests in \textit{Sniadach}, \textit{Fuentes}, and \textit{Mitchell}. The copyright plaintiff's interest arises by statute and not by contract, and the copyright act does not give a plaintiff a possessory interest in a defendant's works, even after they have been found to infringe. Section 503(b) of the 1976 Act provides for destruction of articles found to infringe, and \S 202 expressly distinguishes ownership of a copyright from ownership of the material object in which the work is embodied. 17 U.S.C. \S 202 (1982).}


\footnote{168. \textit{Id.} at 499.}

\footnote{169. \textit{Id.} The court apparently overlooked the \textit{Fuentes} Court's holding that due process requires a hearing \textit{prior} to seizure. \textit{Fuentes}, 407 U.S. 67, 81 (1972).}
and particularly describing the place to be searched, and the person
or things to be seized."\textsuperscript{170} The basic purpose of the fourth amend-
ment is to safeguard the privacy and security of individuals against
arbitrary and oppressive invasions by governmental officials.\textsuperscript{171} Ex-
cept in certain carefully defined circumstances, a search or seizure of
private property without proper consent is unreasonable, unless it has
been authorized by a valid search warrant.\textsuperscript{172} The Supreme Court
has held that the fourth amendment prohibition against warrantless
intrusions protects commercial buildings as well as private homes,\textsuperscript{173}
and applies to civil, as well as to criminal, searches and seizures.\textsuperscript{174}

An evidentiary showing sufficient to justify issuance of a search
warrant must demonstrate that there is probable cause to believe
that the items sought are connected to a criminal or civil violation,
and that these items will be found in the place to be searched.\textsuperscript{175}
Both the probable cause and particularity requirements of the fourth
amendment are designed to take evidential evaluation and discretion
out of the hands of officers in the field and to place it in the hands of
neutral and detached judges and magistrates.\textsuperscript{176} The factual showing
presently required by the impoundment procedures, even if the applica-
tion is considered in conjunction with a verified complaint that
makes out a prima facie case of copyright infringement, does not
necessarily give rise to probable cause for the writ of seizure.\textsuperscript{177} The
applicant is not required by these procedures to state how the arti-

\textsuperscript{170} U.S. Const., amend. IV.
\textsuperscript{171} Camara v. Municipal Court, 387 U.S. 523, 528 (1967) ("The Fourth Amendment
    thus gives concrete expression to a right of the people which is basic to a free society.").
\textsuperscript{172} Id. at 528-29.
    inspection of business premises under the Occupational Safety and Health Act); Camara v.
    Municipal Court, 387 U.S. 523 (1967) (warrant required for health inspection of private resi-
    dence); See v. City of Seattle, 387 U.S. 541 (1967) (warrant required for fire inspectors to
    search commercial warehouse).
    F. Supp. 193 (S.D. Ill. 1978) (warrant required where tax collection officials search for and
    seize property as payment for delinquent taxes).
\textsuperscript{175} Zurcher v. Stanford Daily, 436 U.S. 547, 556 (1978). The Court stated that "a less
    stringent standard of probable cause is acceptable where the entry is not to secure evidence of
    crime against the possessor." Id.
    U.S. 307 (1978), where the Court stated that the safeguard of a neutral judicial officer evaluat-
    ing evidence and determining whether probable cause for a search exists is also required for
    civil searches. Id. at 323. Without such a safeguard, the Court found, the authority to conduct
civil searches would vest executive and administrative officers with almost unbridled discretion
to decide when to search, whom to search, and what to search for. Id.
\textsuperscript{177} See supra text accompanying notes 73-85.
IMPOUNDMENT PROCEDURES

cles to be seized are connected to the alleged copyright infringement.

An even more serious problem is created by the failure of the
impoundment procedures to require that a writ of seizure describe
the places to be searched and the things to be seized with particular-
ity. In the leading case of Marron v. United States,\textsuperscript{178} the Supreme
Court stated: "The requirement that warrants shall particularly de-
scribe the things to be seized makes general searches under them
impossible and prevents the seizure of one thing under a warrant
describing another. As to what is to be taken, nothing is left to the
discretion of the officer executing the warrant."\textsuperscript{179} The particularity
requirement ensures the guarantees of the fourth amendment by for-
bidding the indiscriminate mass seizures possible under general war-
rants and by giving notice to the party being searched of the limits
of the search.\textsuperscript{180} The underlying measure of the adequacy of the
description in the search warrant is whether, given the specificity of
the description, a violation of personal rights by seizure of non-off-
fending items and invasion of privacy is likely.\textsuperscript{181}

Not surprisingly, search warrants for criminal copyright in-
fringements are required to adhere scrupulously to the particularity
requirement. Warrants describing the items sought in generic terms
will be invalidated, and evidence seized pursuant to such warrants
will be suppressed.\textsuperscript{182} References in warrants to "illegally reproduced
and stolen copies,"\textsuperscript{183} or to "certain 8-track electronic tapes and tape
cartridges which are unauthorized 'pirate' reproductions,"\textsuperscript{184} have
been held to be too general to assure that executing officers will be
able to distinguish authorized copies from those illegally reproduced,
thus increasing the likelihood of a violation of personal rights.\textsuperscript{185} The
required degree of specificity increases where the unauthorized cop-
ies are intermingled with lawful ones, particularly where execution
of the warrant will have a substantial impact on the defendant's le-

\textsuperscript{178} 275 U.S. 192 (1927).
\textsuperscript{179} Id. at 196. But see Andresen v. Maryland, 427 U.S. 463, 479-82 (1976) (Court
construed phrase in search warrant—"together with other fruits, instrumentalities and evi-
dence of crime at this [time] unknown"—to be limited by the list of specific items to be seized
immediately preceding it).
\textsuperscript{180} United States v. Marti, 421 F.2d 1263, 1268 (2d Cir. 1970), cert. denied, 404 U.S.
947 (1971).
\textsuperscript{181} United States v. Klein, 565 F.2d 183, 189 (1st Cir. 1977).
\textsuperscript{182} See United States v. Drebin, 557 F.2d 1316, 1322-23 (9th Cir. 1977), cert. denied,
\textsuperscript{183} Id.
\textsuperscript{184} United States v. Klein, 565 F.2d 183, 184 (1st Cir. 1977).
\textsuperscript{185} See supra notes 182-84.
gal business activities. The fact that the executing agents are accompanied by industry piracy "experts" or representatives of the copyright owner will not cure a general warrant.

B. Seizures Under the Copyright Act

A United States marshal, armed with a writ of seizure to impound works alleged to infringe a plaintiff's copyright, may intrude on a defendant's privacy and security as much as any administrative officer searching for regulatory violations or law-enforcement officer searching for evidence of a crime. The impoundment procedures under the 1976 Act authorize the marshal to use force in seizing the alleged infringing copies from both a defendant's business and residence. Writs of seizure have been used to invade places and impound things with regard to which the defendant had a substantial and reasonable expectation of privacy. The items seized under a writ have been used as evidence against the defendant in copyright infringement actions.

The scope of the seizures that may be made by marshals executing writs under the impoundment procedures are often as broad as those by government agents executing search warrants in criminal copyright infringement actions. A writ issued under the Supreme

186. United States v. Klein, 565 F.2d 183, 185 (1st Cir. 1977) (FBI agents seized almost two thousand tapes from defendant's retail music store, approximately 80% of defendant's tape inventory; warrant impermissibly vague); United States v. Drebin, 557 F.2d 1316, 1331-32 (9th Cir. 1977), cert. denied, 436 U.S. 904 (1978) (FBI agents searched for 18 hours through inventory of 30,000 reels of film that defendant was lawfully licensed to distribute, rent, and lease, and seized 551 film prints; description in warrant insufficient).

187. United States v. Klein, 565 F.2d 183 (1st Cir. 1977). Contra United States v. La Monte, 455 F. Supp. 952 (E.D. Pa. 1978). In La Monte, expert testimony was used to aid in discriminating lawful from unlawful copies. The seizure of pirated record albums was not limited to the five titles named in the affidavit and search warrant. Id. at 959-61. The seizure was, nevertheless, upheld because samples of counterfeit and legitimate records had been shown to the magistrate prior to issuance of the warrant and characteristics by which they could be distinguished were pointed out and described in the warrant. Id. These identifying characteristics included the color of the dust jackets, the printed symbols on the record jacket, and symbols and etchings on the disc label. Id. at 960, n.10.

188. See supra text accompanying notes 22, 25-28.


Court Rules authorizes a marshal to seize not only alleged infringing copies, but also instrumentalities (such as plates, molds, matrices, and so on) and other means for making such infringing copies.\(^\text{191}\) The items to be seized pursuant to a writ of seizure, however, are frequently described in terms more general than would be allowed in criminal infringement actions,\(^\text{192}\) particularly where piracy is suspected.\(^\text{193}\)

Furthermore, since there is no preseizure procedure designed to test the plaintiff’s allegations, a writ of seizure may be executed on any premises where the plaintiff claims the infringing articles are located.\(^\text{194}\) In *Universal Pictures Co. v. Schaeffer*,\(^\text{195}\) for example, the writ of seizure directed the marshal to seize film prints of certain named motion pictures found "on the person, or in the possession, or under the control, of the above named defendant, at his place of business . . . and/or at his residence, and/or elsewhere where said defendant, or any agent of said defendant, may be found in the State of Pennsylvania."\(^\text{196}\) The lack of particularity in describing the place to be searched in this case created a roving commission with broad powers to use force to search an indeterminate number of premises. Given the potential for arbitrary and oppressive invasions of an individual's privacy and security, the fourth amendment safeguards should be applied to ex parte prejudgment impoundments made under the copyright act.

IV. SUPPRESSION OF SPEECH AND THE FIRST AMENDMENT

A. The Constitutional Requirements

First amendment values pervade copyright law. A copyrightable
“work of authorship” may be a form and medium of communication or expression. In Joseph Burstyn, Inc. v. Wilson,197 the Supreme Court discussed the protected speech values present in motion pictures as a class:

It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.198

One important commentator on first amendment law has stated that the first amendment applies to “expressive activity or any conduct that communicates ideas, information, or emotions, whether verbally, physically, or otherwise,” or that expresses “some proposition or attitude.”199 Although not all copyrighted works warrant first amendment protection,200 all seven of the categories of works protected by the copyright act should be presumed, in light of the broad definitions of speech above, to encompass a substantial number of works warranting first amendment protection.201

B. Regulation of Speech

The first amendment prohibits government action that restrains speech before it is uttered, published, or otherwise communicated.202 The rules against such prior restraints apply not only to statutory or

197. 343 U.S. 495 (1952).
198. Id. at 501 (emphasis added).
201. 17 U.S.C. § 102 (1982). The seven categories of copyrightable works are: literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; and, sound recordings. Id. First amendment values may be found in the following literary or pictorial works: advertisements, cartoons, circulars, comic books, financial reports, greeting cards, illustrations, lectures, magazine articles, news stories, nonfiction books, novels, paintings, pamphlets, photographs, plays, posters, sermons, speeches. See generally L. Tribe, AMERICAN CONSTITUTIONAL LAW 576-736 (1978) (discussing free speech values and specific rights of communication and expression). See also Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) (live nude dancing entitled to first amendment protection).
regulatory schemes that completely prevent speech activities, but also to regulations and statutes that impose burdens and conditions that could stifle or chill the exercise of free speech. Suppression of obscenity involves regulation at the borderline between unconditionally protected speech and speech which may legitimately be regulated. If a work is found to be obscene, it is often subject to total prohibition and suppression; if not obscene, a work is entitled to full first amendment protection. The Supreme Court has noted that separating protected from unprotected speech requires the use of "sensitive tools." Because obscenity is often separated from constitutionally protected speech by a dim and uncertain line, "regulations of obscenity [must] scrupulously embody the most rigorous procedural safeguards" in order to prevent the suppression of protected speech.

Since the character of the speech restrained is central to the question of its first amendment protection, the Supreme Court has struck down regulatory or statutory schemes that permitted seizure of alleged obscene works without any procedure "designed to focus searchingly on the question of obscenity." This requirement springs from the Court's fundamental belief, expressed in virtually all the obscenity-regulation cases, that "only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression."

In Marcus v. Search Warrant, the Court struck down a state statute that permitted search for and seizure of allegedly obscene

210. Id.
publications in a noncriminal proceeding. Under the applicable statute, a warrant authorizing the seizure could be issued upon either the complainant’s “positive” statement that the materials were obscene or upon the complainant’s allegation of evidential facts from which a judicial officer could find probable cause that the works were obscene. The alleged obscene works were not submitted to a judicial officer for evaluation before the search warrant was issued. In A Quantity of Books v. Kansas, the Court struck down a state statute that permitted issuance of a warrant for seizure of obscene works upon the filing by the state attorney general of a verified information containing only a conclusory assertion that obscene works were located within the court’s jurisdiction. The Court held that the procedures in both these cases were constitutionally insufficient because they failed to provide for a preseizure adversary hearing that would prevent the suppression of nonobscene books. In a 1973 decision, Heller v. New York, the Court stated that “[a]ny large-scale seizure of . . . materials presumptively protected under the first amendment [will be scrutinized] to be certain that the requirements of Quantity of Books and Marcus are fully met.”

C. Prior Restraints Under the Impoundment Procedures

It is unquestionable that the impoundment procedures under the

214. Id. at 718-19 & n.2.
215. Id. Compare this fact with Rule 2 of the Supreme Court Rules, which required a plaintiff to submit, with the complaint, copies of the allegedly infringing and infringed works. This rule was rescinded on February 28, 1966 (effective July 1, 1966). 17 U.S.C.A. foll. § 501 (West 1977).
217. Id. at 206-08.
218. Id. at 208, 210-11. In Marcus and Quantity of Books, the Court expanded the meaning of “prior restraint” to encompass restraints on speech imposed prior to a determination of the speech’s character as well as restraints on speech imposed prior to utterance or publication.
220. Id. at 491. Although the Heller Court held that seizure of a single copy of an alleged obscene work for the purpose of preserving it as evidence may be constitutionally permissible, providing certain safeguards are present, it specifically reaffirmed Marcus and Quantity of Books where mass seizures are made. Id. at 491-93. See also Roaden v. Kentucky, 413 U.S. 496 (1973). In Heller and Roaden, which were handed down on the same day, the Court stated that a seizure of even one copy of an alleged obscene work may effectively act as a restraint or suppression of speech. In Roaden one copy of an alleged obscene movie was seized incident to an arrest by a sheriff acting without a warrant. After invalidating the seizure, the Court stated that “[s]eizing a film then being exhibited to the general public presents essentially the same restraint on expression as the seizure of all the books in a bookstore.” 413 U.S. at 504.
copyright act, like the statutory schemes regulating obscenity described above, constitute a suppression of speech when works with first amendment values are seized. The impoundment procedures allow mass seizures of such works prior to any judicial determination reached after an adversary hearing on the question of infringement. Indeed, the plaintiff is not required by the impoundment procedures to make any specific factual showing of infringement other than that in the complaint, or even to submit copies of both parties' works for comparison by the judicial officer issuing the order of impoundment. Nothing in the impoundment procedures limits their effect to nonspeech works and, potentially, impoundment may be ordered of works with the highest levels of speech value.

As the Supreme Court recognized in Quantity of Books, a mass seizure of offending works is "the most effective restraint [of speech] possible" and is "more repressive than an injunction." Impoundments under the copyright act that have been ordered ex parte and prior to a judicial determination of infringement have involved such first amendment protected works as motion pictures, sound recordings, radio advertising materials, and brochures and booklets.

The copyright impoundment procedures are similar to those for regulating obscenity in another important respect. In both situations, the procedures must distinguish between a prohibited activity and an activity that is not only innocent but which is encouraged by the first amendment as a public good, i.e., the exercise of free speech and expression. In order to prevent the suppression of protected speech, the impoundment provisions should at least embody the same rigorous procedural safeguards required by the Court in the obscenity cases. To provide full first amendment protection, however, the im-

222. 378 U.S. 205, 210-11.
poundment procedures should erect safeguards greater than those re-
quired in the obscenity-regulation cases because the substantive law
governing impoundment permits seizures that are often broader and,
consequently, more repressive and chilling of free speech. A writ of
seizure in a copyright action may be used to seize not only the of-
fending copies, but also the instrumentalities and other means for
making such copies, even if the instrumentalities and other means
are capable of noninfringing uses.227 In addition, the 1976 Act ex-
tends impoundment to alleged infringing copies in the possession of
third parties, even if the copies were reproduced or acquired law-
fully.228 It is the intent of such comprehensive seizures to completely
halt the defendant's allegedly infringing speech activities229 and, in
the case of alleged piracy, to halt all speech or business activity by
the defendant.230

Given the lack of procedural safeguards accompanying issuance
of a writ of seizure, the threat of impoundment has an extreme chil-
ing effect in actuality. Copyright owners, particularly those repre-
sented by associations maintaining large antipiracy departments with
investigators in the field, may pressure alleged infringers and their
distributors by threatening court-ordered impoundment of the al-
leged infringing works. Short of arresting the alleged infringer, it is

227. See supra text accompanying notes 29-45. Cf. Porno, Inc. v. Municipal Court, 33
Cal. App. 3d 122, 108 Cal. Rptr. 797 (1973). The court held that seizure of movie projectors
used to exhibit obscene movies pursuant to a search warrant violated the first and fourth
amendments. Id. at 126, 108 Cal. Rptr. at 800. The court stated that since movie projectors
were designed for and capable of lawful use, they could not be seized as contraband. Id. Fur-
ther, since the projectors could be lawfully used as a "means of expression protected by the
First Amendment," the court found that Marcus v. Search Warrant imposed an obligation on
the magistrate to limit search warrants in such a way as not to restrain legitimate expression.
Id.

228. See supra text accompanying notes 46-52.

229. Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage
Prods., Inc. 508 F. Supp. 854 (N.D. Ga. 1981), modified and rev'd on other grounds, 694
F.2d 674 (11th Cir. 1983); Warner Bros., Inc. v. Kalish, 201 U.S.P.Q. 768 (W.D.N.Y. 1978);
1973).

230. See, e.g., Duchess Music Corp. v. Stern, 458 F.2d 1305, 1309 (9th Cir.), cert.
denied, 409 U.S. 847 (1972) ("Congress intended to impound and destroy the whole of the
paraphernalia, including those items which may be used for other purposes."); Elektra Records
difference, for the purpose of applying the first amendment, whether the suppression is made
by the government to protect public morals or by a private party, with the aid of a United
States marshal, to protect his or her copyright.
difficult to imagine a statutory scheme with a more chilling effect on the exercise of free speech than that permitted by impoundment under the copyright act.

First amendment challenges to impoundment of alleged infringing works have been dismissed on the grounds that no right of expression is restrained or suppressed by the seizure because an infringer is not expressing himself, but is copying another's expression. A work need not be an identical copy of another's copyrighted work, however, to be an infringement, and it may be that the infringer has incorporated significant and original expression of his own into the infringing work. The plaintiff's claim of infringement may be based on the defendant's copying of material in the plaintiff's work that is uncopyrightable or in the public domain. Furthermore, the "infringer" may be privileged to appropriate another's expression within the meaning of the copyright act, in order to exercise his or her right to expression within the meaning of the first amendment. Finally, even if the alleged infringer is making identical copies of the plaintiff's copyrighted work, it is no answer to say that the first amendment does not protect infringers if, at the time of impoundment, the defendant's work has not yet been judicially determined to be an infringement.

V. PROPOSED PROCEDURES

The procedures governing impoundment under the copyright act


232. In Rosemont Enter., Inc. v. Random House, Inc., 366 F.2d 303, 311-13 (2d Cir. 1966) (Lumbard, C.J., concurring), cert. denied, 385 U.S. 1009 (1967), the Second Circuit denied the plaintiff's motion for a preliminary injunction, noting that the copyright was being used to suppress the free circulation of ideas and information. See also Time, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130 (S.D.N.Y. 1968) (defendant privileged to make a fair use of virtually all of copyrighted film of the John F. Kennedy assassination). There is no reason why these first amendment considerations should be limited under the copyright act only to injunction.

Besides the first amendment/fair use defense to copying, a defendant may have many other defenses that would negate an apparent infringing use of the plaintiff's copyrighted work. For example, the defendant's copying may be of elements of the plaintiff's work that are not protected by copyright (such as ideas, facts, or other material in the public domain), or the defendant may be licensed to make such a use.
will require substantial changes before the constitutional infirmities are cured. In addition to these infirmities, re-evaluation of the impoundment procedures is required by the underlying policies of the copyright act itself. The act represents a compromise between competing social policies.\(^{233}\) One favors the widest possible dissemination of new ideas and new forms of expression. This policy is derived from both the first amendment and from the copyright act's own constitutional directive "[t]o promote the [p]rogress of [s]cience and useful [a]rts."\(^{234}\) The other policy of copyright law is to give authors and artists enough of a monopoly over their works to ensure their receipt of fair material rewards for their efforts and to thereby encourage creation of such works.\(^{235}\) The first policy predominates, therefore the system of rewards should be no more extensive than is necessary to elicit, in the long run, an optimal amount of creative activity.\(^{236}\) As the Supreme Court has stated, the "private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."\(^{237}\) It follows that the remedies available to copyright owners to enforce their limited copyright monopolies should be no more drastic than is necessary to obtain their fair material rewards. Clearly, the present impoundment procedures often work to prohibit the broad public availability of creative works and overprotect the author's copyright monopoly at the expense of the public interest.

The fundamental question regarding a proposed procedure is whether it minimizes the risk of wrongful seizures that would violate the defendant's constitutional rights. The stringency of the procedural safeguards should increase with the gravity of the rights that may be violated. Rule 65 of the Federal Rules of Civil Procedure, with the adaptations discussed below, should be used to cure the constitutional infirmities of the present impoundment procedures, and would better effectuate the policies underlying the copyright act.


\(^{235}\) Id.


A. Application of the Fifth and Fourth Amendments to the Impoundment Procedures

In *Mitchell v. W. T. Grant Co.*, the Supreme Court held that the fifth amendment required certain procedural safeguards before a prejudgment seizure of property could be ordered ex parte. The procedures in Rule 65 of the Federal Rules of Civil Procedure governing the issuance of temporary restraining orders, if applied to impoundment, satisfy the procedural due process requirements of *Mitchell*. Under Rule 65, temporary restraining orders prior to judgment are issued under judicial supervision and provide for damages for wrongful restraint.

Unlike the impoundment procedures, Rule 65 also requires that the factual showing in support of the application be made by one with personal knowledge, alleging specific facts demonstrating a reasonable probability of success on the merits in the underlying action. In addition, Rule 65(b) provides for a prompt, postseizure hearing:

On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

Impoundment procedures currently place the burden on the defendant to prove at the postseizure hearing that the works seized were not infringements. Rule 65(b) provides that where the temporary restraining order is granted without notice,

the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction, and, if he does not do so the court shall dissolve

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238. See supra text accompanying notes 134-43.
240. 11 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2949 (1973). See supra text accompanying note 149 for the factual showing required by the impoundment procedures.
242. See supra notes 113-15 and accompanying text.
the temporary restraining order.243

The evidentiary showing and the form of the hearing required for a preliminary injunction are sufficient to satisfy the Mitchell Court's requirement that the plaintiff prove, at the postseizure hearing, the grounds upon which the writ of seizure was issued.

Finally, and most importantly, the procedures governing temporary restraining orders limit their issuance to extraordinary situations. Rule 65(b) states:

A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required.244

Ex parte orders of impoundment should also be limited only to extraordinary situations requiring such a drastic remedy. At present, impoundment may be ordered for any reason simply upon a plaintiff's request.245 Such a procedure does not balance the parties' interests in the works; it provides far too much protection of the plaintiff's interest and maximizes, rather than minimizes, the risk of unfair or mistaken deprivations.246 The creditor's interest in Mitchell was a solely pecuniary interest, and seizure of the goods was made to secure payment of any judgment the creditor might have obtained against the debtor.247 A plaintiff's interest in a copyrighted work is more complex. The plaintiff will, of course, have a pecuniary interest in the alleged infringing copies already sold, the profits from which may be awarded to the plaintiff after trial on the merits, but the plaintiff does not have a pecuniary interest in the alleged infringing copies, instrumentalities, and other means seized from a defendant under a writ of seizure. They will be destroyed if infringement is found, or returned to the defendant if it is not.248 The plaintiff's real interest in applying for a writ of seizure is to halt the sales of the

243. FED. R. CIV. P. 65(b).
244. Id.
245. See supra notes 76-77 and accompanying text.
246. See supra text accompanying notes 124-32.
alleged infringing works, pending trial on the merits, in order to minimize any further damage to the copyright.\textsuperscript{249} Since the parties in a copyright action are often competitors, a defendant's infringement could irreparably damage the plaintiff's competitive position in the marketplace.

The defendant's interest, on the other hand, is to freely engage in commerce with as little burdening or disruption of its activities as possible. Enjoining the defendant from engaging in certain activities is far less burdensome than seizure of all the copies and instrumentalities by which the defendant has engaged in those activities. Thus, impoundment should be ordered ex parte only when it appears that a temporary restraining order or preliminary injunction are not sufficient to protect the plaintiff's interest.\textsuperscript{250} Such a situation arises, for example, when the defendant violates a temporary restraining order or preliminary injunction that has already been issued and continues to sell or tries to conceal or otherwise escape with the alleged infringing works. Another situation where injunction may not be sufficient to protect the plaintiff's interest is where the defendant's work is a close or identical copy of all or substantially all of the plaintiff's work, or where it otherwise appears from specific facts that the defendant is primarily engaged in illegitimate and infringing activities. The plaintiff's interest is far more likely to be defeated in such circumstances than if the alleged infringing works are made or distributed by a defendant otherwise engaged in lawful business activities.

The procedures of Rule 65(b), if applied to impoundment, would require that the plaintiff allege specific facts from which it appears that "irreparable injury" will occur if impoundment is not ordered.\textsuperscript{251} The term "irreparable injury," when applied to impoundment, must be construed by the courts to extend only to the extraordinary situation discussed above; this would require a far narrower construction of the term than is applied to an injunction.\textsuperscript{252}

\textsuperscript{249} For example, the plaintiff's reputation could be endangered by continued sales if the alleged infringing works are inferior copies.

\textsuperscript{250} \textit{See}, e.g., \textit{Wallace Berrie & Co. v. Custom Styled Toys, Inc.}, \textit{COPYRIGHT L. DECS. (CCH)} ¶ 25,492 (E.D.N.Y. Aug. 16, 1982).

\textsuperscript{251} \textit{Fed. R. Civ. P. 65(b)}.

\textsuperscript{252} A showing of "irreparable injury" for the purposes of obtaining a temporary restraining order or preliminary injunction in a copyright action is much less burdensome than such a showing should be for impoundment. In the former instances, irreparable injury may be presumed without a detailed showing if the plaintiff demonstrates probable success on the merits or makes out a prima facie case of infringement. \textit{Atari v. North Am. Philips Consumer Elec. Corp.}, 672 F.2d 607, 620 (7th Cir.), \textit{cert. denied}, 459 U.S. 880 (1982); \textit{Wainwright Sec., Inc. v. Wall St. Transcript Corp.}, 558 F.2d 91, 94 (2d Cir. 1977).
The further requirements of Rule 65(b), that every temporary restraining order granted without notice "shall define the injury and state why it is irreparable and why the order was granted without notice," will help to protect against unwarranted seizures when these procedures are applied to impoundment. An order of impoundment issued with notice to the adverse party and with an opportunity for that party to be heard should be issued according to the preliminary injunction procedures of Rule 65, if the works seized are without first amendment value. Such orders of impoundment should not be held to the stricter requirements of Rule 65(b) that are appropriate when impoundment is ordered ex parte.

The showing of a probability of success on the merits, as required by Rule 65, will also provide probable cause to believe that infringement of a copyright has occurred, as required by the fourth amendment. The fourth amendment further requires that the copyright plaintiff demonstrate probable cause that the items to be seized are related to the infringement and that they will be found in the places to be searched. If the plaintiff makes the requisite showing of probable cause, as well as the showing required by the fifth amendment, then seizure may be made of all alleged infringing copies, instrumentalities, and other means for making them, subject to the limitations imposed by the first amendment.

The procedures of Rule 65 should also be adapted to cure the lack of particularity presently permitted in writs of seizure as to the things seized, the places searched, and the persons subject to the impoundment order. Rule 65(d) provides:

[E]very order granting an injunction and every restraining order . . . shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or

255. See supra notes 240-43 and accompanying text.
256. See supra notes 178-81 and accompanying text. If the fourth amendment is complied with, a writ of seizure may be used to seize commercial documentation, advertising materials and other evidence of infringing activities.
257. Id.
258. See supra notes 48-52 and accompanying text.
In the context of impoundment, the phrase "act or acts sought to be restrained" would mean "the places to be searched and the things to be seized."

By applying Rule 65 of the Federal Rules of Civil Procedure to impoundment procedures, the constitutional infirmities presently existing can be corrected and the policies of the copyright act more completely fulfilled.

B. First Amendment Due Process and the Impoundment Procedures

The Supreme Court has held that procedures designed to focus searchingly on the question of infringement must be followed before a large-scale seizure is made of works with first amendment value. A preseizure adversary hearing is the only constitutionally sufficient procedure. Therefore, when an application for an ex parte order of impoundment is made, the court must assess, either by viewing a copy of the defendant's alleged infringing work or on the basis of other evidence, whether the work has significant speech value, and grant or deny the ex parte application accordingly.

One course of action that would satisfy all the constitutional objections to impoundment is suggested by the Supreme Court's decision in Kingsley Books, Inc. v. Brown. Decided in 1957, this case and the obscenity regulation procedures it approved were specifically affirmed by the Court in both Marcus and Quantity of Books. In Kingsley, a New York civil statute empowered the chief executive or legal officer of a municipality to seek an injunction against any person or business selling or distributing matter deemed to be "obscene." The injunctive proceeding was initiated by a complaint specifically naming and annexing a copy of the work to be seized. The statute provided that the person or business enjoined was entitled to a trial on the merits within one day after joinder of issue and

259. FED. R. CIV. P. 65(d).
265. Id. at 438-39.
that the court was required to render a decision within two days of the conclusion of the trial.\textsuperscript{266} If final judgment was entered that the work was obscene, the statute provided that the sheriff could then seize and destroy the obscene works.\textsuperscript{267} The \textit{Kingsley} procedures did not permit any seizure before the character of the speech had been judicially determined.\textsuperscript{268}

The Supreme Court held that the statutory scheme in \textit{Kingsley} contained safeguards that made it valid, even though it imposed a prior restraint by injunction.\textsuperscript{269} First, the restraint imposed prior to judicial characterization of the speech was imposed for a brief period of time, the length of which varied according to the time it took the defendant to answer.\textsuperscript{270} The purpose of the injunction, which was less intrusive and repressive than a mass seizure, was not to suppress speech or put the defendant out of business, but simply to freeze the parties' positions until a prompt trial on the merits could be had.\textsuperscript{271} Second, a prompt final judicial determination of the protected or unprotected character of the speech was assured by the statute.\textsuperscript{272} Third, the burden of proving that the restrained work was unprotected by the first amendment rested on the party requesting the restraint of speech.\textsuperscript{273}

There are three extraordinary situations where ex parte impoundment of works with first amendment values should be permitted. Although a preseizure adversary hearing may be dispensed with in these cases, there must still be a proceeding prior to seizure that focuses searchingly on the question of infringement. The same rigorous showing of probable success on the merits required by the fifth amendment should also be made at this time.

The first instance where ex parte impoundment should be permitted is when the plaintiff shows that the defendant's work is an identical copy of all or substantially all of the plaintiff's copyrighted work and that the defendant has no right to copy the plaintiff's work. In such cases of piracy it is reasonable to presume, at least initially, that the defendant's work has little or no speech value since it copies

\textsuperscript{266} Id. at 439.
\textsuperscript{267} Id. at 438, n.1.
\textsuperscript{268} Id. at 437.
\textsuperscript{269} Id. at 437 & n.1.
\textsuperscript{270} Id. at 437, n.1, 438-39.
\textsuperscript{271} Id. at 442-44.
\textsuperscript{272} Id. at 439.
\textsuperscript{273} Id. at 437 n.1. \textit{See also} Freedman v. Maryland, 380 U.S. 51, 58 (1965) (extending rule to licensing scheme regulating obscenity).
the plaintiff's work. Second, an ex parte order of impoundment should be issued if it appears that the defendant is not obeying a temporary restraining order or preliminary injunction that has already been issued. The government, in a copyright infringement action, has a valid interest in enabling its courts to provide effective final relief. This interest should be allowed to override the potential threat to first amendment rights in these circumstances. Third, an order of impoundment should be issued prior to notice to the adverse party if it is designed to seize only one alleged infringing work, in order to preserve it as evidence, but only in circumstances where such a seizure will not have the effect of a prior restraint. In each of these three instances a scrupulous adherence to the probable cause and particularity requirements of the fourth amendment must also be assured.

The procedures of Rule 65 may be adapted for use in any of the situations outlined above involving impoundment of works with first amendment value. Other than the length of the time limits on the procedural safeguards, the major difference between the safeguards required by the fifth and fourth amendments and those required by the first amendment is in the finality of the court's determination on the question of infringement. In the former, a proceeding similar to one for issuance of a preliminary injunction will suffice, while in the latter, a final decision on the merits is required.

If an ex parte order of impoundment is sought in an extraordinary situation, Rule 65(b) prescribes procedural safeguards that adequately protect against violations of first amendment interests. Under Rule 65(b), a restraint is imposed for a specified brief period of time; the defendant may move for dissolution or modification of the temporary restraining order within two days' time or less, or the temporary restraining order expires, by its own terms, within ten

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275. A prior restraint is not permissible if it alters the status quo. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 562 (1975) (delay in licensing plaintiff's play for production altered the status quo by forcing plaintiff to forgo engagement dates and chilling later use of the forum).

276. See supra note 220.

277. See supra notes 170-81 and accompanying text.


279. Id.
days.280 Further, if an ex parte temporary order is granted, the motion for a preliminary injunction is set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character.281

The procedures following ex parte orders of impoundment, however, must be more stringent than those required by the fourth and fifth amendments. Following such an impoundment, there must be a prompt, final judicial determination after a proceeding that focuses searchingly on the question of infringement. The Supreme Court has held that a preliminary injunction hearing by itself is not a final judicial determination sufficient to impose a restraint on protected speech.282 Rule 65(a)(2), however, permits a preliminary injunction

280. The length of a restraint prior to judicial determination of the character of the speech may vary according to the context of the seizure. See, e.g., United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971) (periods of no more than fourteen days from a customs seizure of alleged obscene works to the institution of judicial proceedings for their forfeiture, and no longer than sixty days from the filing of the action to a final judicial determination, were held to be constitutionally permissible).

281. Fed. R. Civ. P. 65(b). The Supreme Court has held that any procedures that restrain or suppress speech protected by the first amendment must "assure a prompt final judicial decision" on the character of the speech and the merits of the underlying action. Freedman v. Maryland, 380 U.S. 51, 59 (1965); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 561-62 (1975); Teitel Film Corp. v. Cusack, 390 U.S. 139, 142 (1968). Indeed, the Court has stated that a temporary restraining order or preliminary injunction, no matter how quickly it is heard by the issuing court, cannot be considered a final determination on the merits because its validity is based only on a showing of probable success on the merits. Vance v. Universal Amusement Co., 445 U.S. 308, 312, 312 n.5 (1980). The Court has required that any regulatory or statutory scheme allowing mass seizure of works protected by the first amendment prescribe "explicit time limits" within which such a final judicial determination must be made. United States v. Thirty-Seven Photographs, 402 U.S. 363, 368 (1971).

The post-seizure hearing required by the fifth amendment, on the other hand, does not need to be a final judicial determination on the merits. The Court stated in Mitchell:

[T]here is scant support in our cases for the proposition that there must be final judicial determination of the seller's entitlement before the buyer may be even temporarily deprived of possession of the purchased goods. On the contrary, it seems apparent that the seller . . . would need to establish . . . only the probability that his case will succeed to warrant the bonded sequestration of the property pending outcome of the suit.

416 U.S. at 609.

Nor is a postseizure hearing on a search warrant required to be a final judicial determination under the fourth amendment on the merits of the government's case. The Supreme Court has stated that such a hearing on a warrant should only extend to the truthfulness of the factual statements made in affidavits supporting the warrant. Franks v. Delaware, 438 U.S. 154, 170 (1978).

hearing to be consolidated with a trial on the merits,\textsuperscript{283} a proceeding that is sufficient to make a final judicial determination on the character of the speech. Rule 65(b) provides that the court shall determine such preliminary injunction motions as "expeditiously" as possible where a temporary restraining order has been granted ex parte.\textsuperscript{284} Rule 65(a)(2) and (b) should be construed, however, to require judicial determination within a specified number of days when impoundment is ordered ex parte, and should place the burden of proving that the defendant's work is unprotected by the first amendment on the plaintiff.

Finally, if a preseizure, adversary hearing is required (i.e., there is no extraordinary situation), the plaintiff must bring on the action in the manner approved by the Supreme Court in \textit{Kingsley} by moving for a preliminary injunction hearing consolidated with a trial on the merits. Only at the conclusion of such a trial may a valid seizure be made.

\textbf{CONCLUSION}

The bases for constitutional attacks on the impoundment procedures are evident. The procedures are untouched by modern notions of procedural due process, and the only basis for retaining them in their present form is their antiquity. Because they permit seizures of property without providing notice and an opportunity to be heard at a meaningful time, their constitutionality under the fifth amendment is in serious doubt. Further, the many ways the procedures can allow unreasonable searches and seizures may invade the privacy and security interests protected by the fourth amendment. Most seriously, the impoundment procedures present grave danger to the fundamental right of free speech by allowing virtually unregulated restraints and suppressions of first amendment protected speech.

In addition to exposing the procedures' constitutional infirmities, it has been the purpose of this Article to suggest ways of curing these infirmities. Because the likelihood of Congressional action on these procedures seems slight at this time, some judicial modification of the procedures is called for. Although the procedures of Rule 65 of the Federal Rules of Civil Procedure may provide a guide for modification of the impoundment procedures, courts must carefully distinguish between the natures of the impoundment and injunction

\textsuperscript{283} \textit{Fed. R. Civ. P.} 65(a)(2).
\textsuperscript{284} \textit{Fed. R. Civ. P.} 65(b).
remedies and tailor the modified impoundment procedures to preserve the potency of this much-needed remedy, while avoiding its unique constitutional dangers.