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A New Hope for Copyright: The U.K. Supreme Court Ruling in Lucasfilm Ltd. v. Ainsworth and Why Congress Should Follow Suit

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NOTES

A NEW HOPE FOR COPYRIGHT: THE U.K. SUPREME COURT RULING IN *LUCASFILM LTD. V. AINSWORTH* AND WHY CONGRESS SHOULD FOLLOW SUIT

*Kristen Elisabeth Bollinger**

TABLE OF CONTENTS

I.	INTRODUCTION	89
II.	BACKGROUND	91
A.	ATTACK OF THE CLONES: COPYRIGHT UNDER ENGLISH LAW.....	91
1.	<i>Fundamentals</i>	91
2.	<i>Jurisdiction for Infringement Claims Under the European Conventions</i>	92
3.	<i>Jurisdiction for Infringement Claims Under Traditional English Law</i>	94
4.	<i>Copyright Infringement Under English Statutes</i>	94
5.	<i>Jurisdiction Over Claims of International Copyright Infringement in English Case Law, Prior to the 2011 Lucasfilm Opinion</i>	95
B.	REVENGE OF THE SITH: THE 2011 <i>LUCASFILM</i> OPINION	98
C.	THE PHANTOM MENACE: CURRENT U.S. LAW ON ADJUDICATING CLAIMS OF INTERNATIONAL COPYRIGHT INFRINGEMENT	103
1.	<i>Statutory Copyright Law</i>	103
2.	<i>Case Law: A U.S. Copyright, a Foreign Infringer, and Infringement in the United States</i>	105
3.	<i>Case Law: A Foreign Copyright, a U.S. Infringer, and Infringement in the United States and Abroad</i>	106
4.	<i>Case Law: A U.S. Copyright, a Foreign Infringer, and Infringement Abroad</i>	107
5.	<i>Case Law: A U.S. Copyright, a Foreign Infringer, and Infringement Both in the United States and Abroad</i>	108

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III.	ANALYSIS.....	109
A.	THE EMPIRE STRIKES BACK: RECENT MOVEMENT IN THE UNITED STATES TOWARD ENGLAND'S NEW RULE.....	110
1.	<i>Ending the Privileged Sanctuary</i>	110
2.	<i>The Supreme Court Subtly Broadened Copyright Protection in 2010</i>	111
3.	<i>U.S. Copyright Law Took Its Present Shape by Responding to U.K. Copyright Law</i>	112
B.	THE CLONE WARS: ADOPTING THE LUCASFILM RULE WOULD BENEFIT THE U.S. ECONOMY.....	114
1.	<i>The Proposed Changes Would Reduce Piracy of U.S.-Copyrighted Products</i>	114
2.	<i>Extending U.S. Copyright Protection Abroad Would Encourage Transacting Copyright-Related Commerce Abroad</i>	116
3.	<i>The Proposed Changes Would Lend the United States Greater Clout in Negotiating Trade Agreements</i>	116
C.	RETURN OF THE JEDI: MATCHING ENGLAND'S NEW RULE WOULD FURTHER THE PURPOSE OF COPYRIGHT PROTECTION	117
IV.	CONCLUSION	118

I. INTRODUCTION

A long time ago in a jurisdiction far, far away, a helmet infringed a copyright. The ramifications of this small act have ushered in a time of change for copyright litigation. In July of 2011, the Supreme Court of the United Kingdom held in *Lucasfilm Ltd. v. Ainsworth* that under English law, a claim for infringement of a foreign copyright is justiciable in English courts.¹ Though a narrow decision, it reversed 118 years of English case law to set a new precedent for adjudicating specific scenarios of copyright infringements involving international players.²

This Note explores the case law giving rise to the court's decision, the prior standard for litigating claims of multinational copyright infringement under English law, and the subsequent change embodied by the court's opinion. Because *Lucasfilm* presents a redirection of Anglo-American law, this Note also explores the current state of United States law on litigating claims of multinational copyright infringements.³ This Note ultimately argues that Congress should amend Title 17 of the United States Code to provide that infringements committed wholly abroad by U.S. nationals against foreign copyrights are legally cognizable harms; that, under the principle of national treatment, infringements committed wholly abroad upon U.S. copyrights are legally cognizable harms; and that U.S. courts may thus adjudicate such claims.

In 1977, the first *Star Wars* film opened in the United States.⁴ The *Lucasfilm Ltd. v. Ainsworth* saga, however, commenced three years prior. In 1974, a group of artists began crafting the costumes for George Lucas's Imperial Stormtroopers—soldiers clothed in white and topped with menacingly anonymous helmets.⁵ Andrew Ainsworth received a commission to create the helmets based on drawings by the other artists.⁶ The helmets were meant as costume pieces, “to identify a character . . . [and] to portray something about that character. . . . [i]t was a mixture of costume and prop.”⁷ Thirty years later,

¹ *Lucasfilm Ltd. v. Ainsworth*, [2011] UKSC 39, [2011] Bus. L.R. 1211 [1244] (appeal taken from Eng.).

² *Id.*

³ Reference to “multinational,” “international,” and “foreign” copyright infringement will encompass both infringement of U.S. copyrights abroad, as well as infringement of foreign copyrights.

⁴ *Lucasfilm*, [2011] Bus. L.R. at 1215.

⁵ *Id.* at 1215–16.

⁶ *Id.* at 1216; *Lucasfilm Ltd. v. Ainsworth*, [2008] EWHC (Ch) 1878 [35]–[37], [2008] E.C.D.R. 17 (Eng.), *overruled by* *Lucasfilm Ltd. v. Ainsworth*, [2009] EWCA (Civ) 1328, [2010] 3 W.L.R. 333 (appeal taken from Eng.).

⁷ *Lucasfilm*, [2011] Bus. L.R. at 1215.

in 2004, Ainsworth took up his original tools to make additional pieces.⁸ He subsequently sold Stormtrooper helmets as well as full armor sets to the public.⁹ Domiciled in the United Kingdom, Ainsworth sold some of these in the United States for a total estimated to be between \$8,000 and \$30,000.¹⁰

Yet the copyrights to these items were registered in the United States as belonging to an English Corporation and a Californian corporation, both owned by Lucas, as well as a Californian subsidiary corporation that manages their licensing. The U.K. courts referred to these corporations collectively as “Lucasfilm.”¹¹ In 2005, Lucasfilm sued Ainsworth in U.S. District Court in California for copyright infringement, which rendered an unsatisfied default judgment of twenty million dollars as of January 2012.¹²

Lucasfilm also filed suit in the Chancery Division of the English High Court, bringing claims of copyright infringement under English law and under U.S. law, as well as a claim for enforcement of the U.S. judgment.¹³ The court held that the helmet was not a sculpture, and that Lucasfilm’s copyright claims under English law failed.¹⁴ The court also held that the U.S. judgment was unenforceable because the U.S. court had lacked personal jurisdiction over Ainsworth.¹⁵ The court did, however, determine that the U.S. copyright claims were justiciable in English courts and that Ainsworth had thereby infringed Lucasfilm’s copyright.¹⁶

Subsequently, the Court of Appeal affirmed that “[t]here was no copyright in any sculpture,” but found Lucasfilm’s U.S. judgment unenforceable.¹⁷ The court held “that for sound policy reasons the supposed international jurisdiction over copyright infringement claims does not exist.”¹⁸

⁸ *Id.* at 1215–16.

⁹ *Id.* at 1216; *Lucasfilm*, [2008] EWHC (Ch) 1878[2], *overruled by* *Lucasfilm Ltd. v. Ainsworth*, [2010] EWCA (Civ) 1328, [2010] 3 W.L.R. 333 [360] (Eng.).

¹⁰ *Lucasfilm*, [2011] Bus. L.R. at 1216; *Lucasfilm*, [2008] EWHC (Ch) 1878[2], *overruled by* *Lucasfilm Ltd. v. Ainsworth*, [2010] EWCA (Civ) 1328, [2010] 3 W.L.R. 333 (Eng.).

¹¹ *Lucasfilm*, [2011] Bus. L.R. at 1216, 1242.

¹² *Id.* at 1216. *See also* *Lucasfilm Ltd. v. Shepperton Design Studios Ltd.*, No. CV05-3434 RGK MANX, 2006 WL 6672241 (C.D. Cal. Sept. 26, 2006) (issuing the original default judgment).

¹³ *Lucasfilm*, [2008] EWHC (Ch) 1878[2], *overruled by* *Lucasfilm Ltd. v. Ainsworth*, [2010] EWCA (Civ) 1328, [2010] W.L.R. 333 (Eng.).

¹⁴ *Id.* (explaining that a sculpture equates to a “work of artistic craftsmanship,” which would be afforded copyright protection).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Lucasfilm Ltd. v. Ainsworth*, [2009] EWCA (Civ) 1328, [209], [2010] 3 W.L.R. 333 [385] (Eng.), *overruled by* *Lucasfilm Ltd. v. Ainsworth* [2011] UKSC 39, [2011] Bus. L.R. 1211 (appeal taken from Eng.).

¹⁸ *Id.* at [183].

The U.K. Supreme Court thus addressed only two issues: whether the helmet qualified as a sculpture under §§ 51–52 of the Copyright, Designs and Patents Act of 1988 (the 1988 Act), and whether U.S. copyright claims were justiciable in England.¹⁹ The U.K. Supreme Court accorded with the lower courts' opinions by holding that the Stormtrooper helmet was not a sculpture, and by dismissing *Lucasfilm*'s English copyright law claims.²⁰ It is the Supreme Court's decision on the second issue, however, on which this Note focuses.

Part II of this Note explores English copyright law and its standard on litigating foreign copyright infringements immediately before the 2011 *Lucasfilm* judgment. It then explains and critiques the 2011 *Lucasfilm* opinion. Part II ends by addressing current U.S. copyright law on litigating foreign copyright claims, with attention to how the domestic or foreign nature of the players affects the justiciability of the claim. Part III argues that for policy, economic, and foreign trade reasons, Congress should alter Title 17 of the United States Code to align the U.S. standard with England's now-disparate standard.

II. BACKGROUND

A. ATTACK OF THE CLONES: COPYRIGHT UNDER ENGLISH LAW

1. *Fundamentals.* As the historical origin of American copyright law, English copyright law retains a close resemblance to our own.²¹ Under the Copyright, Designs and Patents Act 1988, a copyright under English law is a property right allowing its owner “to exclude others from making certain unauthorized uses” of specific types of works.²² English copyright law “protects the expression of ideas, [rather than] the ideas themselves.”²³ It offers copyright protection for literary, dramatic and musical works, artistic works, sound recordings, films, broadcasts, and databases.²⁴ To merit protection, the work must be original²⁵ and contained in a fixed form.²⁶ Once the expression becomes fixed or

¹⁹ *Lucasfilm*, [2011] Bus. L.R. at 1211, 1216.

²⁰ *Id.* at 1211, 1228.

²¹ *Leo Feist, Inc. v. Debmar Pub. Co.*, 232 F. Supp. 623, 624 (E.D. Pa. 1964).

²² Justine Pila, *An Intentional View of the Copyright Work*, 71 M.L.R. 535, 537 (2008), <http://ssrn.com/abstract=982419> (citing the Copyright, Designs and Patents Act 1988, c. 48, §§ 3(1), 4, 5A, 5B, 6 (U.K.)).

²³ *Id.* at 538 (citing *Baigent v. Random House Grp. Ltd.*, [2007] EWCA (Civ) 247, [5] (Eng.)).

²⁴ Copyright, Designs and Patents Act 1988, c. 48, §§ 1–8 (U.K.).

²⁵ *Id.* § 1(1)(a), (b).

²⁶ *Id.* §§ 3(2), 178. *See also* *Univ. of London Press Ltd. v. Univ. Tutorial Press, Ltd.*, [1916] 2 Ch. 601 at 609 (Eng.) (stating that originality does not refer to novelty, but instead requires that the work “originate from the author”).

recorded in a permanent fashion, copyright protection attaches without regard to registration.²⁷

2. *Jurisdiction for Infringement Claims Under the European Conventions.* In 1886, the United Kingdom signed the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention), one of the two foremost international copyright conventions,²⁸ which took effect there in 1887.²⁹ The Berne Convention requires a minimum level of copyright protection.³⁰ It also requires Convention states to exercise “national treatment,” which means granting the same copyright protection to nationals and foreigners alike.³¹

Beyond these guarantees, determining which laws applied to questions of English copyright was a (perhaps unduly) complex task. If an action for copyright infringement involved parties and actions exclusively within the European Community (EC) or the European Free Trade Area (EFTA), then EC/EFTA rules applied.³² However, if the parties or activities were not limited to this geographical area, traditional English rules on jurisdiction applied instead.³³

The EC/EFTA rules derived from the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (the Brussels Convention), and from the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (the Lugano Convention).³⁴ The former applied when the defendant was domiciled in an EC Contracting State.³⁵ The latter applied if the defendant was domiciled in an EFTA Contracting State.³⁶ These conventions, whose provisions are

²⁷ JAMES J. FAWCETT & PAUL TORREMANS, *INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW* 7 (1998).

²⁸ Alan Story, *Burn Berne: Why the Leading International Copyright Convention Must Be Repealed*, 40 HOUS. L. REV. 763, 765 (2003).

²⁹ *Treaties and Contracting Parties*, WIPO.INT, http://www.wipo.int/treaties/en/Remarks.jsp?cn ty_id=1043C (last visited Aug. 17, 2012).

³⁰ William Patry, *Choice of Law and International Copyright*, 48 AM. J. COMP. L. 383, 405 (2000).

³¹ *Subafilms, Ltd. v. MGM-Pathe Commc'ns Co.*, 24 F.3d 1088, 1097 (9th Cir. 1994). See also Patry, *supra* note 30, at 402–03 (noting that national treatment “is not a jurisdictional provision requiring countries to accept foreign infringement claims and to apply foreign law to them”).

³² FAWCETT & TORREMANS, *supra* note 27, at 141–42.

³³ *Id.* at 142.

³⁴ *Id.* at 141–42.

³⁵ Adam Wolanski, *Leppard Changes Its Spot: Recent Changes to the Approach of Courts in England and Wales to Issues of Jurisdiction in Copyright Claims*, 8(4) ENT. L.R. 143, 143–45 (1997); see also Members of EU, U.S. DEP'T OF STATE, <http://www.state.gov/p/eur/rt/eu/c12191.htm> (last visited Aug. 22, 2012) (listing member states in what is now termed the European Union).

³⁶ FAWCETT & TORREMANS, *supra* note 27, at 142. See also *The EFTA States*, <http://www.efta.int/about-efta/the-efta-states.aspx> (listing the members of EFTA: Iceland, Liechtenstein, Norway

substantially the same, provide jurisdiction in questions of creation and validity: either the specific rule of Article 16(4) or the jurisdictional rules of general application would have applied.³⁷ Under neither convention did subject-matter jurisdiction limit the adjudication of foreign infringements of an intellectual property right.³⁸

The conventions contained no provisions tailored exclusively to infringements of intellectual property rights but instead provided general jurisdiction in Article 2 and specific jurisdiction in Articles 5 and 6.³⁹ In tort cases, under Article 2 of the Brussels Convention, a defendant could be sued only in the country in which she was domiciled.⁴⁰ However, three exceptions for copyright infringement claims allowed adjudication elsewhere.⁴¹

First, under Article 5(3), an accused infringer domiciled in an EC/EFTA State could be sued in tort in the jurisdiction where the act occurred—that is, the location of the actual damage or the location of the infringing event.⁴² According to the underlying rationale, damage occurs to the actual intellectual property right where that right is located.⁴³ Second, under Article 5(5), if the dispute arose from the operations of “a branch, agency, or other establishment,”⁴⁴ then the claim could be adjudicated in the courts of the state where that branch, agency, or establishment was located.⁴⁵ Third, under Article 6(1), if the accused infringer was one of a number of defendants, she could be sued in the jurisdiction of any one defendant’s domicile.⁴⁶

If the intellectual property right was not created in an EC/EFTA Contracting State, the Brussels or Lugano Convention could still apply at the court’s discretion if the accused infringer was domiciled in the United Kingdom.⁴⁷ An English court would thus have jurisdiction over the infringement action under Article 2.⁴⁸

and Switzerland).

³⁷ FAWCETT & TORREMANS, *supra* note 27, at 11.

³⁸ *Id.* at 190.

³⁹ *Id.* at 142, 144.

⁴⁰ Wolanski, *supra* note 35, at 144.

⁴¹ See FAWCETT & TORREMANS, *supra* note 27, at 150 (discussing the two exceptions relevant to infringement cases found in Articles 5(3) and (5)).

⁴² *Id.* at 152.

⁴³ *Id.* at 164.

⁴⁴ *Id.* at 169 (citing Brussels and Lugano Conventions on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, art. 5(5), May 10 1952, [1997] O.J. (C 15) 1).

⁴⁵ *Id.*

⁴⁶ *Id.* at 144.

⁴⁷ *Id.* at 194.

⁴⁸ *Id.*

Yet an English court was more likely to decline to exercise this jurisdiction under the doctrine of *forum non conveniens*.⁴⁹

3. *Jurisdiction for Infringement Claims Under Traditional English Law.* In the most basic cases, an English court had in personam personal jurisdiction over a copyright infringement action when the defendant was served a writ within the court's jurisdiction.⁵⁰ For cases involving defendants domiciled outside the United Kingdom, a plaintiff needed the court's leave to serve proceedings there.⁵¹ Meriting the court's leave required showing, among other criteria, "that there [was] a serious issue to be tried on the merits."⁵² For instance, to serve a writ outside the United Kingdom and establish jurisdiction in an English court for a claim under Article 5 of the Brussels Convention required an initial showing that the cause of action satisfied Article 5.⁵³

The English Parliament created Order 11, rule 1(1)(f) of the Rules of the Supreme Court precisely to incorporate Article 5(3) of the Brussels Convention into English law.⁵⁴ The rule allowed English courts jurisdiction over claims of foreign infringement that resulted in damage sustained in England.⁵⁵ Once an English court properly established jurisdiction over a claim of copyright infringement, it looked to English law to define the elements of the infringement.⁵⁶

4. *Copyright Infringement Under English Statutes.* Under the 1988 Act, one can violate a copyright by either primary or secondary infringement.⁵⁷ Section 16(1) enumerates six modes of primary infringement, including copying a work without the copyright owner's authorization.⁵⁸ In contrast, secondary infringement occurs almost exclusively at the commercial level and includes selling or renting copies of a work without the copyright owner's permission.⁵⁹

Traditionally, both versions were interpreted as territorially defined. This meant that a plaintiff could only bring claims of primary or secondary infringement in English courts if the infringing acts had taken place in the United Kingdom.⁶⁰ To file in an English court a claim of copyright

⁴⁹ *Id.*

⁵⁰ *Id.* at 241.

⁵¹ *Id.* at 243.

⁵² *Id.*

⁵³ *Id.* at 149.

⁵⁴ *Id.* at 248.

⁵⁵ *Id.* at 249.

⁵⁶ *Id.* at 133.

⁵⁷ *Id.* at 127.

⁵⁸ Copyright, Designs and Patents Act, 1988, c. 48, § 16(1) (Eng.).

⁵⁹ *Id.* §§ 22–26.

⁶⁰ FAWCETT & TORREMANS, *supra* note 27, at 125.

infringement committed abroad, a plaintiff needed to bring the action under the law of the country where the infringement occurred.⁶¹ The case law leading to the U.K. Supreme Court's *Lucasfilm* opinion largely reflected these rules.

5. *Jurisdiction Over Claims of International Copyright Infringement in English Case Law, Prior to the 2011 Lucasfilm Opinion.* The U.K. Supreme Court began its 2011 *Lucasfilm* opinion by considering *British South Africa Co. v. Companhia de Moçambique*, decided in 1893.⁶² This saga of international property rights concerned whether the English Supreme Court had jurisdiction over actions for damages resulting from trespass to foreign land.⁶³ The plaintiff company alleged that the defendant company had wrongfully broken into the plaintiff's South Africa property and had taken possession of land, mines, mining rights, and personal property, in addition to assaulting and imprisoning employees.⁶⁴ Lord Herschell L.C. opined that English courts had "always refused to entertain cases of trespass to lands abroad,"⁶⁵ and the court held that English courts lacked jurisdiction to adjudicate matters of ownership of, or tort to, foreign land.⁶⁶

Nearly a century later, in *Def Lepp Music v. Stuart-Brown*, the High Court of Justice adjudicated a claim of copyright infringement filed by an English musical group against a Luxembourgish company.⁶⁷ The plaintiffs alleged, first, that they owned a tape recording under English copyright law and, second, that the company had manufactured copies of the tape outside the United Kingdom without authorization and then sold them in the United Kingdom and abroad.⁶⁸ The plaintiffs also brought claims against defendants domiciled in the United Kingdom who had imported copies into England.⁶⁹ The court held the English Copyright Act of 1956 to be strictly territorial, conferring a narrow right "to do certain acts exclusively in the United Kingdom," so that only acts conducted in the United Kingdom were actionable as infringements.⁷⁰

Alternatively, in *Tyburn Productions Ltd. v. Doyle*, the Chancery Division considered the issue of English courts adjudicating questions of foreign

⁶¹ *Id.* at 133.

⁶² *Lucasfilm Ltd. v. Ainsworth*, [2011] UKSC 39, [2011] Bus. L.R. 1211 [1229–30] (appeal taken from Eng.); see also *British S. Africa Co. v. Companhia de Moçambique*, [1893] A.C. 602 (H.L.) (appeal taken from Eng.).

⁶³ *Moçambique*, [1893] A.C. 602 (H.L.) at 618.

⁶⁴ *Id.* at 602.

⁶⁵ *Id.* at 604.

⁶⁶ *FAWCETT & TORREMANS*, *supra* note 27, at 280.

⁶⁷ *Def Lepp Music v. Stuart-Brown*, [1986] R.P.C. 273 (Ch.) at 274–75 (Eng.).

⁶⁸ *Id.* at 273–74.

⁶⁹ *Id.*

⁷⁰ *Id.* at 275.

copyright law.⁷¹ The English plaintiff production company intended to distribute in the United States its television film featuring characters named Sherlock Holmes and Dr. Watson.⁷² It sought a declaration that Sir Arthur Conan Doyle's daughter had no rights under U.S. copyright law to prevent the distribution.⁷³ The court looked to the rule of double actionability, as propounded by the 1870 English case of *Phillips v. Eyre*, which stated that an act done abroad was only actionable in England if the act embodied a tort under the foreign state's law, and also would have constituted a tort under English law had it been committed in England.⁷⁴ The *Tyburn* court held that "the locality of the [copyright infringement] is inseparable from the wrong."⁷⁵ Hence, the rule of double actionability required more than a violation of English Law.⁷⁶ The court ultimately held that English courts may not adjudicate claims of infringement of U.S. copyrights.⁷⁷

Six years after *Tyburn*, the Private International Law (Miscellaneous Provisions) Act 1995 (the 1995 Act) came into force in the United Kingdom and abolished the rule of double actionability.⁷⁸ This enabled a plaintiff to bring a claim in English court concerning actions committed outside the U.K. if they violated the laws of the country where they were committed, regardless of the actions' legality under English law.⁷⁹ It also provided that to determine whether a tort is actionable in England, a court should use the law of the country where the tort was committed.⁸⁰

In 1997, the patent case of *Coin Controls Ltd. v. Suzo Int'l (U.K.) Ltd.* established that in addition to immovable property, the *Mozambique* rule applied by analogy to intellectual property rights.⁸¹ The Chancery Court reasoned that intellectual property rights confer economic rights where they are granted and

⁷¹ *Tyburn Prods. Ltd. v. Doyle*, [1991] R.P.C. 75 (Ch.) at 88 (Eng.).

⁷² *Id.* at 75–78.

⁷³ *Id.*

⁷⁴ *Lucasfilm Ltd. v. Ainsworth*, [2011] UKSC 39, [2011] Bus. L.R. 1211 [1231] (appeal taken from Eng.).

⁷⁵ *Tyburn*, [1991] R.P.C. 75 (Ch.) at 87 (Eng.).

⁷⁶ *Id.* at 77.

⁷⁷ *Id.* at 89; *Lucasfilm*, [2011] Bus. L.R. at 1234.

⁷⁸ Private International Law (Miscellaneous Provisions) Act 1995, c. 42, § 10 (U.K.).

⁷⁹ FAWCETT & TORREMANS, *supra* note 27, at 143–45.

⁸⁰ *Id.*

⁸¹ *Coin Controls Ltd. v. Suzo Int'l (U.K.) Ltd.*, [1999] Ch. 33 at 44 (Eng.) (citing *Potter v. Broken Hill Pty. Co.*, [1906] 3 C.L.R. 479).

are therefore “strictly territorial in nature,”⁸² or “local,” such that infringement actions “must be brought in the place where the rights [were] created.”⁸³

The Court of Appeal expanded this holding in *Pearce v. Ove Arup Partnership Ltd.*, in which an English architect brought suit against the city of Rotterdam, Dutch domiciliaries, and an engineering firm domiciled in the United Kingdom.⁸⁴ The plaintiff claimed that the defendants had infringed his English and Dutch copyrights in architectural plans.⁸⁵ The court held that acts committed in Holland “could not constitute infringements of the plaintiff’s United Kingdom copyright” and could not be adjudicated under English law.⁸⁶ Yet the court maintained jurisdiction over the claim in light of the Berne Convention and Article 2 of the Brussels Convention.⁸⁷

Because the infringing acts occurred before the 1995 Act came into force, the court had “no room for an objection of non-justiciability” and applied the general rules of jurisdiction and the common law doctrine of choice of law.⁸⁸ The court adjudicated the plaintiff’s claim that his Dutch copyright was violated,⁸⁹ reasoning that *Moçambique* directed English courts to apply the law of the country with the most significant relationship to the act and the parties at issue.⁹⁰

In *Skype Techs. SA v. Joltid Ltd.*, a Luxembourgish corporation plaintiff filed suit against Joltid, which was based in the British Virgin Islands, claiming infringement of Skype’s software copyright.⁹¹ After Skype began proceedings in England, Joltid filed suit in the Northern District of California against Skype.⁹² The High Court of Justice held that if a court has jurisdiction over a claim under Article 2 of the Brussels Convention, it cannot refuse to adjudicate it under the doctrine of *forum non conveniens*.⁹³ Yet, as the court observed, it does not follow that a court may prevent a court in a different jurisdiction from

⁸² *Id.*

⁸³ *Lucasfilm Ltd. v. Ainsworth*, [2011] UKSC 39, [2011] Bus. L.R. 1211 [1241] (appeal taken from Eng.).

⁸⁴ *Pearce v. Ove Arup P’ship Ltd.*, [2000] A.C. 403 at 406 (Eng.).

⁸⁵ *Id.*

⁸⁶ *Id.* at 423.

⁸⁷ *Id.*

⁸⁸ *Lucasfilm Ltd. v. Ainsworth* [2011] UKSC 39, [2011] Bus. L.R. 1211 [1240] (appeal taken from Eng.).

⁸⁹ *Pearce*, [2000] A.C. 403 at 445.

⁹⁰ *Id.* at 444.

⁹¹ *Skype Techs. SA v. Joltid Ltd.*, [2009] EWHC (Ch) 2783, [2009] Info. T.L.R. 104 [107] (Eng.).

⁹² *Id.* at 108–09.

⁹³ *Id.* at 112.

adjudicating a dispute between the same parties.⁹⁴ It ultimately held that an English court was the proper forum for Skype's action.⁹⁵

In the wake of its 2009 *Lucasfilm* decision, the Court of Appeal turned to *Crosstown Music Co. 1 LLC v. Rive Droite Music Ltd.* The Californian plaintiff company sought a declaration of title in 119 songs against defendant songwriters.⁹⁶ The assignment agreement expressly stated that it was subject to English law.⁹⁷ The court held that its *Lucasfilm* holding did not establish the non-justiciability of these copyrights.⁹⁸ Instead, the court distinguished *Crosstown's* action, for the ownership "turn[ed] on the legal effect of [the] contractual documents . . . subject to the exclusive jurisdiction of the English courts."⁹⁹

This sedimentation of case law held that copyright infringement was a strictly territorial tort and that a court must apply the laws of a foreign country to a claim of tort committed there.¹⁰⁰ The U.K. Supreme Court, however, held differently in July of 2011.¹⁰¹

B. REVENGE OF THE SITH: THE 2011 *LUCASFILM* OPINION

After declining to find the Stormtrooper helmet a sculpture, the U.K. Supreme Court addressed whether an English court has the jurisdiction to adjudicate a claim against a U.K. national for infringing a foreign copyright outside of the European Union in violation of another country's law.¹⁰² In order to answer the question, the court necessarily delved into "legal archaeology" through the cases on which the Court of Appeal had based its opinion.¹⁰³

The court opined that the *Moçambique* court had focused on the idea that jurisdiction over land is not a transitory but a local question because it is fundamentally dependent on the land's location.¹⁰⁴ In turn, for one state to

⁹⁴ *Id.* at 113.

⁹⁵ *Id.* at 115.

⁹⁶ *Crosstown Music Co. 1 LLC v. Rive Droite Music Ltd.*, [2010] EWCA (Civ) 1222, [2010] E.C.D.R. 5 [106] (Eng.).

⁹⁷ *Id.* at 106–08.

⁹⁸ *Id.* at 117.

⁹⁹ *Id.*

¹⁰⁰ *See Lucasfilm Ltd. v. Ainsworth*, [2011] UKSC 39, [2011] Bus. L.R. 1211 [1234–35] (appeal taken from Eng.).

¹⁰¹ *Id.* at 1244.

¹⁰² *Id.* at 1228.

¹⁰³ *Id.* at 1229.

¹⁰⁴ *Id.* at 1229–30.

exercise jurisdiction over land in another state would detriment comity among nations.¹⁰⁵

The U.K. Supreme Court also considered the Australian patent case of *Potter v. Broken Hill Proprietary Co.*, decided in Victoria.¹⁰⁶ The U.K. Supreme Court traced “four strands” behind the *Potter* court’s logic.¹⁰⁷ In the first and third, the *Potter* court held patents to be local in nature by virtue of being registered and thereby granted by “the sovereign power of the state.”¹⁰⁸ In doing so, the *Potter* court extended the *Moçambique* rule from land to patents, and interpreted intellectual property rights to be territorial.¹⁰⁹ Under this rationale, because a state sovereign enjoyed the exclusive power to grant these rights, resulting legal claims had to be adjudicated in the sovereign’s territory.¹¹⁰ For this reason, the court held that the plaintiff patent owner’s claim of infringement of a New South Wales patent committed in New South Wales was not justiciable in Victoria.¹¹¹

As its second strand of logic, the *Potter* court posited the rule of double actionability.¹¹² Fourth, and most essential to its holding, the court invoked the “act of state doctrine,” by which no state may “sit in judgment on the acts of the government of another done within its own territory.”¹¹³

However, the U.K. Supreme Court reasoned that the *Moçambique* and *Potter* rules have since been eviscerated by both statute and case law, rendering the Court of Appeal’s decision untenable. Section 30(1) of the Civil Jurisdiction and Judgments Act of 1982 (the 1982 Act) abolished the *Moçambique* rule by providing that English courts have jurisdiction to adjudicate a claim of trespass to property outside the United Kingdom, unless the claim is “principally concerned with a question of the title.”¹¹⁴ Not coincidentally, the 1982 Act enacted the Brussels Convention into U.K. law and evidenced a broader European movement¹¹⁵ away from imposing the strictures of the principle of territoriality on courts’ jurisdiction. Thus, the U.K. Supreme Court noted, in

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1231.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1231–32.

¹⁰⁹ *Id.* at 1232.

¹¹⁰ *Id.* at 1242.

¹¹¹ *Potter v. Broken Hill Proprietary Co.*, (1906) 3 CLR 479, 493 (Austl.).

¹¹² *Lucasfilm*, [2011] Bus. L.R. at 1231.

¹¹³ *Id.* at 1232 (quoting *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)).

¹¹⁴ *Id.* at 1233 (quoting Civil Jurisdiction and Judgments Act, 1982 c. 27, § 30(1)).

¹¹⁵ *Id.* at 1234.

claims regarding land in the E.U., “the *Moçambique* rule has been superseded . . . by what is now article 22(1) of the Brussels I Regulation.”¹¹⁶

All that remains of the *Moçambique* rule is the narrow principle that English courts lack jurisdiction to adjudicate claims regarding foreign land when the central issue is a party’s right of ownership or possession.¹¹⁷ The U.K. Supreme Court opined that “it is very difficult to see how [*Moçambique*] could apply to copyright,” since copyrights do not require registration, are not acts of state, and therefore are not territorial.¹¹⁸ In doing so, the court looked to the recent case of *Reed Elsevier, Inc. v. Muchnick*, in which the U.S. Supreme Court held that the registration requirement in 17 U.S.C.A. § 411(a) “does not restrict a federal court’s subject-matter jurisdiction.”¹¹⁹

This expunction of *Moçambique* eliminated the first and third strands of the *Potter* rule. The U.K. Supreme Court undercut the fourth strand, too, by holding that the act of state doctrine does not apply “to copyright in this case, even if . . . actions of officials involved with the registration and grant of intellectual property rights were acts of state.”¹²⁰ In looking to the United States, the U.K. Supreme Court agreed with the Southern District of New York’s decision in *London Film Productions Ltd. v. Intercontinental Communications, Inc.*¹²¹ that the act of state doctrine does not apply to claims of copyright infringement if validity is not in dispute.¹²² The court also observed that Article 22(4) of the Brussels I Regulation, as has been explained by the European Court, applies only to claims concerning the validity of an intellectual property right in establishing that the state where the protection was registered or applied for has exclusive jurisdiction.¹²³

The court posited that any transnational, political implications of a claim of copyright infringement may be resolved on a case-by-case basis.¹²⁴ It noted with approval that *Red Sea Insurance Co. v. Bouyges SA*,¹²⁵ followed by *Pearce*, held that a claim may be governed by the law of the state “with the most significant relationship” to the act and parties.¹²⁶ In the same year, the 1995 Act

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1241.

¹¹⁸ *Id.* at 1242.

¹¹⁹ *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1249 (2010).

¹²⁰ *Lucasfilm*, [2011] Bus. L.R. at 1242.

¹²¹ 580 F. Supp. 47 (S.D.N.Y. 1984).

¹²² *Lucasfilm*, [2011] Bus. L.R. at 1242.

¹²³ *Id.* at 1237 (this article was “formerly [A]rticle 16(4) of the Brussels Convention”).

¹²⁴ *Id.* at 1242.

¹²⁵ *Red Sea Ins. Co. v. Bouyges SA*, [1995] 1 A.C. 190.

¹²⁶ *Lucasfilm*, [2011] Bus. L.R. at 1235.

established the general rule that U.K. courts must apply the law of the state where the infringement occurred.¹²⁷

Because the *Tyburn* court had relied on *Moçambique* and the rule of double actionability in reaching its conclusion, the U.K. Supreme Court deemed it incorrectly decided.¹²⁸ Likewise, the Chancery Court's decisions in *Coin Controls* and *Def Lepp*, which derived from the now-defunct *Moçambique* and *Potter* rules, proved ineffectual.¹²⁹

The U.K. Supreme Court focused in particular on a general trend in the E.U. and the United States toward allowing the litigation of foreign intellectual property rights when validity is not at issue.¹³⁰ The court considered Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (O.J. 2007 (L 199), 40) (Rome II) (the Regulation),¹³¹ which evidences a lack of "European public policy against the litigation of foreign intellectual property rights."¹³² The Regulation applies only to members of the E.U. and establishes that for claims of intellectual property right infringement, a court must apply "the law of the country for which protection is claimed."¹³³ If the action concerns a "unitary Community intellectual property right," the court must apply the law of the state where the infringement occurred.¹³⁴

The court noted that although this legislation did not take effect until after *Lucasfilm* had filed its suits, the Regulation was "relevant."¹³⁵ The European Parliament had not drafted the Regulation to apply retroactively.¹³⁶ Yet in reaching its final judgment, the court fashioned the same result that retroactive application would have achieved. In *Lucasfilm*, the U.K. Supreme Court evaluated a cause of action six years old. Instead of clinging to the state of U.K. law prior to the Regulation, the U.K. Supreme Court sided with, and even promoted, progress in international copyright litigation, noting "that the modern trend is in favour of the enforcement of foreign intellectual property rights."¹³⁷

¹²⁷ *Id.*

¹²⁸ *Id.* at 1239, 1243.

¹²⁹ *Id.* at 1239.

¹³⁰ *Id.* at 1242.

¹³¹ *Id.* at 1237.

¹³² *Id.*

¹³³ *Id.* at 1238 (citing 2007 O.J. (L199) 864).

¹³⁴ *Id.*

¹³⁵ *Id.* at 1237.

¹³⁶ Private International Law (Miscellaneous Provisions) Act, 1995, c. 42, § 14(1) (U.K.).

¹³⁷ *Lucasfilm*, [2011] Bus. L.R. at 1242.

In doing so, the court found a homologue in the American Law Institute's 2008 proposals.¹³⁸ The court also looked to the draft *Principles for Conflict of Laws in Intellectual Property*, 2011, written by the European Max-Planck-Group for Conflict of Laws in Intellectual Property, and noted that the group intended for its provisions to encompass claims of "infringement of foreign rights abroad."¹³⁹ The draft provides that "habitual residence" is the main basis for jurisdiction, while the adjudicating court should apply the law of the state where the plaintiff seeks protection.¹⁴⁰

The U.K. Supreme Court also decided that former policy reasons for adjudicating claims of intellectual property right infringements only where the rights are granted have likewise disintegrated.¹⁴¹ The Court of Appeal had wrung its hands over the idea that enforcing foreign intellectual property law could lead to injunctions disallowing a defendant from committing otherwise legal acts in the United Kingdom.¹⁴² Yet the U.K. Supreme Court noted that English courts encounter no public policy barriers when granting injunctions to restrain acts committed abroad.¹⁴³

While the Court of Appeal fretted at the absence of an international regime for recognizing other countries' copyright jurisdictions and judgments, the U.K. Supreme Court noted that "this is no reason for the English court refusing to take jurisdiction over an English defendant in a claim for breach of foreign copyright."¹⁴⁴ Instead, policy now leans toward litigating foreign intellectual property rights. The court noted that the very existence of the Berne Convention evidences that "[s]tates have an interest in the international recognition and enforcement of their copyrights."¹⁴⁵

Because the cases on which the Court of Appeal based its opinion are now defunct, because the U.K. Supreme Court discerned a trend in Europe and the United States toward adjudicating intellectual property rights granted by other nations, and because formerly preclusive policy reasons have now fallen away, the U.K. Supreme Court held that copyright infringement claims are not local.¹⁴⁶ Instead, the U.K. Supreme Court "provided that there is a basis for in personam jurisdiction over the defendant" such that a claim for infringement

¹³⁸ *Id.* at 1238.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 1236–37.

¹⁴² *Id.* at 1243.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1242.

¹⁴⁶ *Id.* at 1241.

committed abroad against a foreign copyright is now justiciable in English courts.¹⁴⁷ The reasons behind this rule necessarily translate beyond the United Kingdom to the legal and commercial culture of the United States, the other half of the Anglo-American legal tradition.

C. THE PHANTOM MENACE: CURRENT U.S. LAW ON ADJUDICATING CLAIMS OF INTERNATIONAL COPYRIGHT INFRINGEMENT

1. *Statutory Copyright Law.* Copyright protection under U.S. law derives from the constitutional provision “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to . . . their . . . Writings.”¹⁴⁸ To effect this intent and bolster statutory protection, Congress enacted the Copyright Revision Act of 1976 (the Copyright Act)¹⁴⁹ and the Copyright Term Extension Act of 1998 (the CTEA).¹⁵⁰

Under U.S. law, a creator need not register her work to obtain copyright protection,¹⁵¹ which extends to literary, musical, and pictorial works, among others.¹⁵² Copyright protection grants the owner exclusive, enumerated rights, including reproducing the copyrighted work, creating derivative works, and authorizing the enumerated uses.¹⁵³ Thus, simply violating “the ‘authorization’ right constitutes infringement.”¹⁵⁴ To pursue a claim of infringement, a *prima facie* case requires showing “(1) ownership of the copyright; and (2) infringement—that the defendant copied protected elements of the plaintiff’s work.”¹⁵⁵

Because American copyright law is currently territorial, it does not apply outside U.S. borders.¹⁵⁶ Were Congress to grant the Copyright Act

¹⁴⁷ *Id.*

¹⁴⁸ *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1241 (2010) (citing U.S. CONST. art. I, § 8, cl. 8).

¹⁴⁹ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 542 (1985).

¹⁵⁰ *Eldred v. Ashcroft*, 537 U.S. 186 (2002).

¹⁵¹ 17 U.S.C. § 408(a) (2012). See also Nathan R. Wollman, *Maneuvering Through the Landmines of Multiterritorial Copyright Litigation: How to Avoid the Presumption Against Extraterritoriality When Attempting to Recover for the Foreign Exploitation of U.S. Copyrighted Works*, 104 W. VA. L. REV. 343, 384 (2002) (explaining that the Act of State Doctrine does not preclude filing copyright infringement claims in U.S. courts under foreign law because copyright protection is not an official act of state).

¹⁵² 17 U.S.C. § 102 (2012).

¹⁵³ *Id.* § 106.

¹⁵⁴ *Subafilms, Ltd. v. MGM-Pathe Commc’ns Co.*, 24 F.3d 1088, 1091 (9th Cir. 1994).

¹⁵⁵ *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000).

¹⁵⁶ Jane C. Ginsburg, *Extraterritoriality and Multiterritoriality in Copyright Infringement*, 37 VA. J. INT’L

“extraterritoriality,” U.S. copyright law would apply to actions outside U.S. territory.¹⁵⁷ Yet as it stands, the copying without authorization of a work that is protected by U.S. copyright law irksomely is not an infringement justiciable in U.S. courts if it occurs in a foreign country.¹⁵⁸

On the other hand, U.S. courts generally extend copyright protection to works unprotected in their countries of origin.¹⁵⁹ Under this principle, as well as the doctrine of national treatment, copying a foreign work in the U.S. without authorization violates the foreign author’s rights under U.S. copyright law.¹⁶⁰ Predictably, if the infringing act occurs in the United States, then U.S. copyright law applies.¹⁶¹ Copyright infringements involving acts or parties in multiple countries may also be adjudicated in the United States, though this may require applying foreign law.¹⁶²

In 1989, the United States acceded to the Berne Convention.¹⁶³ The Berne Convention, however, is not self-enacting, for the U.S. Code states that the convention does not expand or reduce the “rights in a work eligible for protection under this title.”¹⁶⁴ For this reason, a copyright owner may not bring a claim directly under the Berne Convention but may only obtain relief for violations of rights conferred by U.S. copyright statutes.¹⁶⁵

Yet the Copyright Act includes narrow exceptions whereby U.S. courts can adjudicate claims that resemble extraterritorial infringement.¹⁶⁶ First, the unauthorized importation of works protected by U.S. copyright constitutes infringement of an owner’s exclusive right to distribute copies.¹⁶⁷ The Copyright Act reaches further extraterritorial acts by prohibiting unauthorized importation of copies whose production has not actually violated U.S. copyright

L. 587, 587 (1997).

¹⁵⁷ *Id.* at 588.

¹⁵⁸ *Id.* at 596.

¹⁵⁹ *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 91 (2d Cir. 1998).

¹⁶⁰ Ginsburg, *supra* note 156, at 593.

¹⁶¹ Patry, *supra* note 30, at 448.

¹⁶² Ginsburg, *supra* note 156, at 588.

¹⁶³ Dale Nelson, *Golan Restoration: Small Burden, Big Gains*, 64 VAND. L. REV. EN BANC 165, 168 (2011).

¹⁶⁴ 17 U.S.C. § 104(c) (2012).

¹⁶⁵ *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 90 (2d Cir. 1998) (citing the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853).

¹⁶⁶ 17 U.S.C. § 602(a)(1) (2012). *See also* *Palmer v. Braun*, 376 F.3d 1254 (11th Cir. 2004) (holding that the defendant’s importation of over twenty-five copies of an infringing work published outside the United States merited the subject-matter jurisdiction necessary to adjudicate the claim in U.S. District Court).

¹⁶⁷ 17 U.S.C. § 602(a)(1) (2012).

laws but “would have . . . if this title had been applicable,” i.e., had the act occurred stateside.¹⁶⁸

Second, the doctrine of contributory infringement¹⁶⁹ allows U.S. courts in specific scenarios to adjudicate claims that one has infringed a U.S. copyright by inducing infringing conduct abroad.¹⁷⁰ However, contributory infringement presupposes that a related act of direct infringement has occurred in the United States.¹⁷¹ Furthermore, case law distinguishes claims of actual infringement in the United States that have led to later infringements in a foreign state from claims of authorization in the United States of infringements committed outside the United States.¹⁷²

2. *Case Law: A U.S. Copyright, a Foreign Infringer, and Infringement in the United States.* In *Litecubes, LLC v. Northern Light Products, Inc.*, the American plaintiff corporation filed suit in U.S. District Court against the Canadian defendant corporation for infringing its U.S. copyright in artificial, illuminable ice cubes powered by LEDs.¹⁷³ Operating from offices in Canada, the defendant shipped its products to consumers in the United States.¹⁷⁴ The court noted that the Copyright Act does not apply to infringing acts performed entirely outside the United States.¹⁷⁵ Yet it also reasoned that “[t]here is no absolute rule prohibiting the extraterritorial reach of federal statutes,”¹⁷⁶ nor is there evidence that “Congress intended the extraterritorial limitations on the . . . 1976 Act to limit the subject[-]matter jurisdiction of the federal courts.”¹⁷⁷ The court ultimately found the defendants liable for infringement under U.S. copyright law.¹⁷⁸ It thus held that whether the Copyright Act applies to overseas actions or foreign parties functions as an element of a plaintiff’s claim—she must establish it to succeed.¹⁷⁹ The court therefore found that the Copyright Act’s extraterritorial reach is not a question of subject-matter jurisdiction at all.¹⁸⁰

¹⁶⁸ *Id.* § 602(a)(2).

¹⁶⁹ See *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996) (quoting *Gershwin Publ’g Corp. v. Columbia Artists Mgmt.*, 443 F.2d 1159, 1162 (2d Cir. 1971)) (stating that contributory infringement arises when “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another”).

¹⁷⁰ Wollman, *supra* note 151, at 369.

¹⁷¹ *Id.* at 369–70.

¹⁷² Ginsburg, *supra* note 156, at 595–96.

¹⁷³ *Litecubes, LLC v. N. Light Prods., Inc.*, 523 F.3d 1353, 1357 (Fed. Cir. 2008).

¹⁷⁴ *Id.* at 1358.

¹⁷⁵ *Id.* at 1366.

¹⁷⁶ *Id.* at 1363.

¹⁷⁷ *Id.* at 1368.

¹⁷⁸ *Id.* at 1371.

¹⁷⁹ *Id.* at 1363.

¹⁸⁰ *Id.* at 1368.

3. *Case Law: A Foreign Copyright, a U.S. Infringer, and Infringement in the United States and Abroad.* Contrastingly, in *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, Russian plaintiffs, including a news-gathering company and a newspaper publisher, claimed that a New York-based Russian-language newspaper had copied and published without the plaintiffs' authorization nearly 500 articles that the plaintiffs had published in Russia.¹⁸¹ Because the infringement had occurred in the United States and because the defendant was a U.S. domiciliary, the court applied U.S. law to the claim of infringement.¹⁸²

Similarly, the Southern District of New York retained jurisdiction over U.S. defendants who had allegedly committed copyright infringements abroad.¹⁸³ In *London Film Productions Ltd. v. Intercontinental Communications, Inc.*, the British plaintiff corporation had produced motion pictures in the United Kingdom.¹⁸⁴ It filed a claim against a New York-domiciled defendant for infringing its U.K. copyright in the films by distributing them in South America without the plaintiff's authorization.¹⁸⁵ Although the defendant's actions violated no U.S. laws, the court exercised personal jurisdiction over the defendant.¹⁸⁶ The court reasoned that it had an interest in "the conduct of American citizens in foreign countries . . ."¹⁸⁷ The court thus adopted the theory that copyright infringement is a transitory, rather than local, cause of action and held that courts outside the state where the infringement occurred may adjudicate the resulting claim.¹⁸⁸

In the recent case of *Rundquist v. Vapiano SE*, the D.C. Circuit agreed that copyright infringement is transitory and that it could hear a claim of infringement under foreign law.¹⁸⁹ The Swedish plaintiff claimed that the German defendant corporation and its two U.S. subsidiaries had copied her photographs for commercial use in its restaurants in the United States and

¹⁸¹ *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 84–85 (2d Cir. 1998) (the defendants had cut articles, headlines, bylines, and graphics from the plaintiffs' publications, pasted them onto layout sheets, and sent these to an American printer "for photographic reproduction" in their American newspaper).

¹⁸² *Id.* at 84, 91.

¹⁸³ *London Film Prods. Ltd. v. Intercont'l Commc'ns, Inc.*, 580 F. Supp. 47, 50 (S.D.N.Y. 1984).

¹⁸⁴ *Id.* at 48.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 49–50 (at the time of this case, the U.S. had not acceded to the Berne Convention but was a party to the Universal Copyright Convention, which likewise guaranteed London Film national treatment).

¹⁸⁸ *Id.* at 49.

¹⁸⁹ *Rundquist v. Vapiano SE*, 798 F. Supp. 2d 102, 108 (D.D.C. 2011).

abroad without her authorization.¹⁹⁰ The court retained subject-matter jurisdiction over the claims of direct and contributory infringement under the Copyright Act, as well as those under foreign law.¹⁹¹ It did not, however, find subject-matter jurisdiction over two counts alleging conduct that occurred “wholly outside” the United States.¹⁹² The court reasoned that because the Copyright Act is territorial, U.S. courts may only exercise subject-matter jurisdiction over infringements committed by foreigners outside the United States resulting from “predicate acts of infringement” inside the United States.¹⁹³ In doing so, the D.C. Circuit took a stance directly opposed to that of the Second Circuit in *London Film*. The court ultimately found that the plaintiff’s theory of causation did not fit this exception because she argued that Vapiano SE had copied her photographs in Germany.¹⁹⁴

4. *Case Law: A U.S. Copyright, a Foreign Infringer, and Infringement Abroad.* In *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, the Ninth Circuit drew the narrow distinction that authorizing in the United States an infringement committed entirely outside the United States is not a cognizable harm under the Copyright Act.¹⁹⁵ The court reasoned that contributory infringement requires a preceding act of direct infringement, and because an act committed outside the United States cannot constitute copyright infringement, it cannot beget a claim of contributory infringement.¹⁹⁶

The case arose from a collaboration between the Beatles and the Hearst Corporation to produce the film entitled “Yellow Submarine.”¹⁹⁷ Hearst subsequently contracted with United Artists, predecessor of MGM-Pathe Communications Co., to distribute and fund the film.¹⁹⁸ The resulting contract lacked express authorization to distribute the film in videocassette form in the home video market.¹⁹⁹ The plaintiff corporations filed claims of copyright infringement and breach of contract against the defendant for internationally

¹⁹⁰ *Id.* at 107–08 (Vapiano had used “large mural-sized black and white reproductions” of her photographs of “Italian street scenes and Italians eating and cooking pizza” as a “central décor” element in its sixty restaurants, even after receiving multiple notifications that Rundquist objected).

¹⁹¹ *Id.* at 131 (applying supplemental subject-matter jurisdiction to Rundquist’s third count under 28 U.S.C. § 1367(a)).

¹⁹² *Id.* at 107.

¹⁹³ *Id.* at 123.

¹⁹⁴ *Id.* at 125.

¹⁹⁵ *Subafilms, Ltd. v. MGM-Pathe Commc’ns Co.*, 24 F.3d 1088, 1090–91 (9th Cir. 1994).

¹⁹⁶ *Id.* at 1093.

¹⁹⁷ *Id.* at 1089.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

distributing videocassette copies of its copyrighted film.²⁰⁰ The court opined that “[h]ad Congress been inclined to overturn the preexisting doctrine that infringing acts that take place wholly outside the United States are not actionable under the Copyright Act, it knew how to do so.”²⁰¹ The court thereby affirmed the territoriality of the Copyright Act and held that authorization in the United States of infringements committed wholly abroad do not constitute infringement under the Copyright Act.²⁰²

5. *Case Law: A U.S. Copyright, a Foreign Infringer, and Infringement Both in the United States and Abroad.* In 1988, the Second Circuit held in *Update Art, Inc. v. Modiin Publishing, Ltd.* that only if an infringement in the United States caused the overseas copying could the complaint of the plaintiff-appellee succeed.²⁰³ Based in New York, Update Art, Inc. (Update) created and distributed graphics printed on gift items.²⁰⁴ Update owned the copyright in a work entitled “Ronbo”²⁰⁵ and sued defendant-appellant Modiin Publishing (Modiin) for infringing on that protection.²⁰⁶ A newspaper publisher based in Israel, Modiin included a full-page reproduction of Ronbo without Update’s authorization in an international weekend edition.²⁰⁷ Despite initiating the appeal, Modiin failed to allege that the infringement occurred wholly overseas and provided insufficient evidence to support a finding against infringement cognizable under U.S. law.²⁰⁸

In *Los Angeles News Service v. Reuters Television International, Ltd.*, the Ninth Circuit allowed recovery for damages that occurred overseas due to infringements committed in the United States.²⁰⁹ Plaintiff-appellant Los Angeles News Service (LANS) owned the copyright in video and audio footage of the 1992 riots in Los Angeles.²¹⁰ It filed a claim of copyright infringement against the defendant corporation for copying the footage in the United States without authorization, then distributing it in Europe and Africa.²¹¹ The court

²⁰⁰ *Id.*

²⁰¹ *Id.* at 1096, 1098.

²⁰² *Id.* at 1099.

²⁰³ *Update Art, Inc. v. Modiin Publ’g*, 843 F.2d 67, 73 (2d Cir. 1988).

²⁰⁴ *Id.* at 68.

²⁰⁵ *Id.* (where the “Ronbo” image intentionally resembled Stallone’s “Rambo” character: “President Reagan’s head superimposed on a bare-chested muscular man’s body wearing dog tags and carrying a machine-gun in a jungle setting”).

²⁰⁶ *Id.* at 69.

²⁰⁷ *Id.* at 68–69.

²⁰⁸ *Id.* at 73.

²⁰⁹ *L.A. News Serv. v. Reuters Television Int’l*, 149 F.3d 987, 992 (9th Cir. 1998).

²¹⁰ *Id.* at 990.

²¹¹ *Id.*

found that “[e]ach act of copying constituted a completed act of infringement.”²¹² It adopted the Second Circuit’s rule that only if an overseas infringement is preceded by an infringement in the United States may it constitute infringement under U.S. law.²¹³ In doing so, it distinguished this case of direct infringement in the United States from that in *Subafilms*, where authorization alone occurred in the United States and permitted acts overseas.²¹⁴ The court affirmed that “[f]or the [Copyright] Act to apply, ‘at least one alleged infringement must be completed entirely within the United States.’”²¹⁵ The Copyright Act thus permitted LANS’s recovery for damage occurring outside the United States.²¹⁶

Under current U.S. statutory and case law, copyright infringements committed wholly abroad are not legally cognizable harms.²¹⁷ This standard leaves ajar a wide window through which infringers may escape liability. Part III explores the arguments for adopting in this country England’s new standard for litigating infringements of foreign copyrights.

III. ANALYSIS

Innovations in information technology “have changed the nature of intellectual property litigation.”²¹⁸ Digital media and their worldwide reach allow infringements of U.S. copyrights in far-flung locales. They incite redundant, and even simultaneous, causes of action in a multitude of states.²¹⁹ Vexingly, each state has a different intellectual property regime. More vexingly, this environment allows copyright piracy to flourish.²²⁰ At the same time, due to “the integration of intellectual property rights within the World Trade Organization” by the Agreement on Trade-Related Aspects of Intellectual Property Rights, U.S. copyright owners now face greater opportunities to market their intellectual properties abroad.²²¹ This melee of factors has paved the way for Congress to realign U.S. law on litigating foreign infringements of

²¹² *Id.* at 991.

²¹³ *Id.* at 992; *Update Art, Inc. v. Modiin Publ’g*, 843 F.2d 67, 73 (2d Cir. 1988).

²¹⁴ *L.A. News Serv.*, 149 F.3d at 991.

²¹⁵ *Id.* at 990.

²¹⁶ *Id.* at 992.

²¹⁷ Ginsburg, *supra* note 156, at 596.

²¹⁸ A.L.I. PRINCIPLES OF INTELLECTUAL PROP. INTRODUCTION (2008).

²¹⁹ *Id.*

²²⁰ See Institute for Policy Innovation, Policy Report #188 (2007), [http://www.copyrightalliance.org/files/soundrecordingpracy\(1\).pdf](http://www.copyrightalliance.org/files/soundrecordingpracy(1).pdf).

²²¹ Graeme W. Austin, *Domestic Laws and Foreign Rights: Choice of Law in Transnational Copyright Infringement Litigation*, 23 COLUM.-VLA J.L. & ARTS 1, 5 (1999).

U.S. copyrights with the standard espoused by the U.K. Supreme Court in *Lucasfilm*.

To adopt that standard would require amending Title 17 of the United States Code to codify the Second Circuit's holding in *London Film*—that an infringement committed wholly abroad by a U.S. national to a foreign copyright is a legally cognizable harm justiciable in U.S. courts, provided that the court has personal jurisdiction over the accused infringer. Because membership in the Berne Convention requires the United States to exercise national treatment in granting copyright protection, Congress should add another cognizable harm—infringements committed wholly abroad against U.S. copyrights. These changes would give shape to existing sentiment in U.S. legal culture and would strengthen the U.S. economy. Most importantly, such alterations would more fully achieve the original goal of the Copyright Act.

A. THE EMPIRE STRIKES BACK: RECENT MOVEMENT IN THE UNITED STATES TOWARD ENGLAND'S NEW RULE

According to the U.K. Supreme Court, “[t]here is no doubt that the modern trend is in favour of the enforcement of foreign intellectual property rights.”²²² Not limited to the United Kingdom, that trend exists in the United States as well.²²³ By realigning U.S. law on the adjudication of copyright infringements overseas, Congress would realize a larger, general movement toward compatible intellectual property laws among nations.

1. *Ending the Privileged Sanctuary.* Congress maintains the ability to extend the scope of U.S. laws to nationals beyond its borders.²²⁴ Furthermore, international law does not preclude Congress from doing so.²²⁵ In a separate intellectual property vein, the Lanham Act specifically provides for extending a trademark owner's protection internationally by allowing one to file an international application.²²⁶ It also allows a non-national to file for international registration and to receive protection in the United States.²²⁷ As the Supreme Court noted in the trademark infringement case of *Steele v. Bulova Watch Co.*, in such a scenario there would be “no question of international law, but solely of the purport of the municipal law.”²²⁸

²²² *Lucasfilm Ltd. v. Ainsworth*, [2011] UKSC 39, [2011] Bus. L.R. 1211 [1242] (appeal taken from Eng.).

²²³ See *infra* text accompanying notes 232–40, 245–59.

²²⁴ *Steele v. Bulova Watch Co.*, 344 U.S. 280, 282 (1952).

²²⁵ *Id.* at 285–86.

²²⁶ 15 U.S.C. § 1141A(a) (2009).

²²⁷ *Id.* § 1141E.

²²⁸ *Steele*, 344 U.S. at 285 (citing *Skiriotes v. Florida*, 313 U.S. 69, 73 (1941)).

In *Steele*, an American watch company sued an American citizen for trademark infringement after the defendant's business had constructed watches in Mexico from individual parts purchased in the United States and Switzerland, stamped them with the Bulova name, and then sold them in Mexico.²²⁹ The Court found the petitioner-defendant liable, even though he had committed the infringing acts outside the United States.²³⁰ The Court reasoned, "we do not think that petitioner by so simple a device can evade the thrust of the laws of the United States in a privileged sanctuary beyond our borders."²³¹

Because U.S. copyright law does not currently apply to infringements committed wholly outside the United States, it creates precisely the "privileged sanctuary" the Supreme Court found so violative of public policy in *Steele*. Extending protection under the Copyright Act to infringements of U.S. copyrights committed wholly abroad would fully implement the Supreme Court's rationale in *Steele*. Matching the reach of the new English standard would be a substantial step in that direction.

2. *The Supreme Court Subtly Broadened Copyright Protection in 2010.* In *Reed Elsevier, Inc. v. Muchnick*, the Supreme Court interpreted anew the Copyright Act's provisions for registration.²³² In this case, plaintiff writers, each owning one or more copyrights in periodical writings, filed a class action for copyright infringement.²³³ Although copyright protection attaches without the material's registration,²³⁴ 17 U.S.C. § 411(a) requires registration in order to file a claim of infringement based on this protection.²³⁵ Not every member of the class had done so.²³⁶ The Court held that § 411(a) is not a subject-matter jurisdiction requirement for adjudication and that the District Court properly exercised its jurisdiction in approving the parties' settlement.²³⁷ By this holding, the Court allowed owners who had not registered to pursue relief. The Court subtly broadened the scope of the Copyright Act's protection, making copyright protection and infringement litigation more accessible to copyright owners.²³⁸ To allow U.S. courts to adjudicate claims of infringement committed by U.S. nationals on foreign copyrights and to allow recourse for infringements of U.S. copyrights committed wholly abroad would continue this motion.

²²⁹ *Id.* at 281–85.

²³⁰ *Id.* at 287.

²³¹ *Id.*

²³² *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010).

²³³ *Id.* at 1242.

²³⁴ 17 U.S.C. § 408(a) (2012).

²³⁵ *Id.* § 411(a).

²³⁶ *Reed Elsevier*, 130 S. Ct. at 1241–42.

²³⁷ *Id.* at 1246–49.

²³⁸ *Id.* at 1249.

For U.S. courts to circumvent Congress by interpreting the Copyright Act as extraterritorial, however, would be improper.²³⁹ The Supreme Court has held that legislation applies “only within the territorial jurisdiction of the United States,” “unless a contrary intent appears”²⁴⁰ Thus, while the *Reed Elsevier* Court properly expanded the Copyright Act, U.S. courts lack the power to expand the Act’s scope internationally. Amending the Copyright Act to expressly provide for its extraterritorial application is the Legislature’s charge. These changes would broaden the Copyright Act’s scope but, more importantly, would increase protection for copyright owners.

3. *U.S. Copyright Law Took Its Present Shape by Responding to U.K. Copyright Law.* Through the CTEA, Congress added twenty years to the term of copyright protection.²⁴¹ Congress initiated this alteration in direct response to an EU directive that required its members to implement copyright protection for the duration of the owner’s life plus seventy years.²⁴² As the Supreme Court noted in *Eldred v. Ashcroft*, “Congress sought to ensure that American authors would receive the same copyright protection in Europe as their European counterparts.”²⁴³ Furthermore, when ratifying the Berne Convention, Congress articulated a desire for “‘effective and harmonious’ copyright laws among all nations.”²⁴⁴ This indicates a longstanding intent of the Legislature to maintain congruence between U.S. and European copyright law.

The American Law Institute (ALI), too, has expressed intent to increase the protective reach of the Copyright Act, via its 2008 *Principles of Intellectual Property*.²⁴⁵ In its introduction, the ALI notes that the “digital networked environment . . . increasingly mak[es] multiterritorial simultaneous communication of . . . intellectual property a common phenomenon, and large-scale piracy ever easier to accomplish.”²⁴⁶ As a result, according to the ALI, to adjudicate these matters efficiently and expeditiously, multiterritorial claims should be adjudicated in one court, rather than in each state where disputed acts occurred or accused parties reside.²⁴⁷ The ALI also partially attributes the

²³⁹ See Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT’L L. 505, 509–10 (1997) (discussing the presumption against extraterritorial application of U.S. laws).

²⁴⁰ *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949).

²⁴¹ *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

²⁴² *Id.* at 205.

²⁴³ *Id.* at 205–06.

²⁴⁴ *Subafilms, Ltd. v. MGM-Pathe Commc’ns Co.*, 24 F.3d 1088, 1097 (9th Cir. 1994) (citing H. R. REP. NO. 100-609, at 43 (1988)).

²⁴⁵ A.L.I., *PRINCIPLES OF INTELLECTUAL PROP.* § 207 (2008).

²⁴⁶ *Id.* at 3.

²⁴⁷ *Id.*

volatile intellectual property landscape to the United States' membership in the World Trade Organization (WTO), whose goal is "a globalized marketplace in which intellectual goods move freely."²⁴⁸ The resulting movement of goods across national borders spins off disputes, often multinational in nature, that fall under U.S. copyright law.

The ALI's model provisions list eight grounds that, individually, would be insufficient to confer jurisdiction over a transnational dispute.²⁴⁹ The ALI thus implies that a combination of the factors would suffice. Section 207 provides jurisdiction over defendants who, among other grounds, own intellectual property rights under the laws of the forum state, who conduct commercial activities in that state, who are served with judicial process in the forum state, or who are nationals of the state.²⁵⁰

The ALI principles also codify the doctrine of contributory infringement.²⁵¹ First, the principles allow jurisdiction over claims in which the defendant's actions in the United States caused injuries outside the United States.²⁵² Second, the principles provide that an accused infringer may be sued in the United States, where the infringement ultimately occurred, on the condition that she directed her inciting activities into the United States.²⁵³ Yet under the principles, a court would maintain jurisdiction only over injuries sustained in the United States.²⁵⁴ The principles also confer jurisdiction over claims in which preliminary acts took place outside the United States and caused infringement in the United States, regardless of where the injuries ultimately took effect.²⁵⁵ The ALI principles additionally provide jurisdiction over claims under foreign law that have subject-matter jurisdiction under the principles.²⁵⁶

The ALI thus forges no radically new provisions for U.S. copyright law. However, its rhetoric in propagating these staid suggestions leans in the direction of change. The ALI's underlying aim is "to adapt the traditional criteria to the digital environment."²⁵⁷ As a result, it "urge[s] courts to extend their authority beyond their traditional limits" in adjudicating transnational

²⁴⁸ *Id.* at 7.

²⁴⁹ *Id.* at 69–70.

²⁵⁰ *Id.*

²⁵¹ *Id.* § 204, at 47.

²⁵² *Id.* § 204 cmt. a, at 49–50.

²⁵³ *Id.* § 204(2), at 47.

²⁵⁴ *Id.*

²⁵⁵ *Id.* § 204, at 48.

²⁵⁶ *Id.* § 211, at 76.

²⁵⁷ *Id.* § 204, cmt. a, at 48–49.

claims.²⁵⁸ Amending Title 17 in the two aforementioned ways would implement precisely these objectives.

The Judiciary, the Legislature, legal academics, and legal practitioners have all espoused the goal of expanding protection for creators under the Copyright Act beyond U.S. borders. Furthermore, as stated by the Second Circuit in *London Film Productions Ltd.*, U.S. courts maintain an interest in “the conduct of American citizens in foreign countries”²⁵⁹ Thus, Congress should amend the Copyright Act by providing for two additional, cognizable harms. First, Congress should expressly allow U.S. courts to adjudicate claims that an infringement has been committed wholly abroad by a U.S. national against a foreign copyright, provided the court has personal jurisdiction over the accused infringer. Second, Congress should expressly enable U.S. courts to adjudicate claims that acts committed wholly abroad have infringed a U.S. copyright.

B. THE CLONE WARS: ADOPTING THE *LUCASFILM* RULE WOULD BENEFIT THE U.S. ECONOMY

In acceding to the Berne Convention, Congress intended to “secure the highest available level of multilateral copyright protection for U.S. . . . creators.”²⁶⁰ Expanding the recourse available under the Copyright Act to include infringements committed wholly abroad, either by a U.S. national to a foreign copyright or by a non-national to a U.S. copyright, would give further effect to this intent. These alterations would also confer much-needed benefits on the U.S. economy in three main ways: by reducing piracy of U.S.-copyrighted products, by encouraging copyright owners to transact business abroad, and by lending the United States greater clout in negotiating trade agreements with foreign countries and multinational organizations.

1. *The Proposed Changes Would Reduce Piracy of U.S.-Copyrighted Products.* Copyright piracy overseas adversely affects the U.S. economy on a billion-dollar scale each year. In its February 2011 Special 301 Submission Letter to the U.S. Trade Representative, the International Intellectual Property Alliance (IIPA) stated that 23.76% of global Internet traffic would constitute infringement under U.S. copyright law if committed in this country.²⁶¹ The IIPA calculated

²⁵⁸ *Id.* § 207, at 69–70.

²⁵⁹ *London Film Prods. Ltd. v. Intercont’l Commc’ns, Inc.*, 580 F. Supp. 47, 49 (S.D.N.Y. 1984) (at the time of this case, the United States had not acceded to the Berne Convention but was a party to the Universal Copyright Convention, which likewise guaranteed London national treatment).

²⁶⁰ S. REP. NO. 100-352, at 2 (1988).

²⁶¹ Special 301: Written Submission Regarding the Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment (Special 301), and Request to Testify

that the copyright industries contributed 11.1% of the U.S. gross domestic product and employed 10.6 million citizens in 2010.²⁶² Though these figures appear strong, they are detrimented each year by piracy and particularly by acts committed abroad. According to a 2011 report by the IIPA, “the commercial value of unlicensed U.S. software in 2010 exceeded \$32 billion. . . .”²⁶³ What is more, a January 2011 study determined that “23.76% of all worldwide Internet traffic is copyright infringing. . . .”²⁶⁴ Further, as of 2009, the U.S. Chamber of Commerce found that the United States loses 750,000 jobs per year due to commerce in counterfeit goods.²⁶⁵

In a 2009 hearing before the House of Representatives, the Committee on Foreign Affairs announced that “[t]o help boost our economy, it is imperative we take measures to ensure American innovations are protected abroad and artistic communities can earn a return on their investment in new creative expression.”²⁶⁶ In its February 2011 Special 301 Submission Letter to the U.S. Trade Representative, the IIPA included in its list of recommended acts to deter copyright piracy “updating laws and enforcement tools to meet the current piracy challenges, as the nature of these challenges changes”²⁶⁷ Congress ratified the Berne Convention, in part, to mitigate the effect of copyright piracy on the U.S. economy, since the Berne Convention offers greater protection than does the Uniform Commercial Code (U.C.C.).²⁶⁸ Augmenting the Copyright Act to allow adjudication of copyright infringements committed outside the United States and to provide recourse for infringements of U.S. copyrights committed wholly abroad would complete this motion and serve precisely these ends.

These alterations to the Copyright Act would also deter such activity. Additionally, allowing U.S. courts to adjudicate infringements committed

at the Public Hearing, 75 Fed. Reg. 82424 (Dec. 30, 2010), International Intellectual Property Alliance (Feb. 15, 2011) [hereinafter Special 301], <http://www.iipa.com/rbc/2011/2011SPEC301COVERLETTER.pdf>.

²⁶² International Intellectual Property Alliance, Copyright Industries in the U.S. Economy: The 2011 Report (2011) [hereinafter 2011 Report], <http://www.iipa.com/pdf/2011CopyrightIndustriesReport.PDF>.

²⁶³ Special 301, *supra* note 261.

²⁶⁴ *Id.*

²⁶⁵ *Sinking the Copyright Pirates: Global Protection of Intellectual Property: Hearing Before the Comm. on Foreign Affairs, House of Representatives*, 111th Cong. 2 (2009) [hereinafter Berman Statement] (statement of Howard L. Berman, Chairman, Comm. on Foreign Affairs), <http://foreignaffairs.house.gov/111/48986.pdf>.

²⁶⁶ *Id.*

²⁶⁷ Special 301, *supra* note 261.

²⁶⁸ S. REP. NO. 100-352, at 1–2 (1988).

abroad by U.S. nationals against foreign copyrights would deter this second strain of piracy. Doing so would save the copyright industries and, in turn, the U.S. economy earnings and jobs otherwise lost. This would coincide with the agenda of the Committee on Foreign Affairs.²⁶⁹ More tangibly, preserving U.S. copyright jobs in this manner would lessen the need for the federal government to invest money in job creation and would free some of these funds for allocation to other worthy agendas.

2. *Extending U.S. Copyright Protection Abroad Would Encourage Transacting Copyright-Related Commerce Abroad.* By developing new markets overseas, U.S. businesses in the copyright industries may cultivate additional sources of revenue.²⁷⁰ While such revenues may be taxed by the country where they are garnered or may be paid in part to the company's employees abroad, part of these funds would return directly to the company's U.S. branch and, in turn, to the U.S. economy. Conversely, providing equally strong copyright protection abroad and domestically encourages non-nationals to disseminate their works and transact business in the United States.²⁷¹ Congress tacitly espoused this objective in 1998 by passing the CTEA, which may encourage foreign creators to circulate their works in the United States.²⁷²

3. *The Proposed Changes Would Lend the United States Greater Clout in Negotiating Trade Agreements.* Strong copyright protection fortifies the United States' position in negotiating trade with foreign countries and in forming international regulations with multinational organizations like the WTO.²⁷³ Not only does the United States appear more credible in persuading other nations to adopt similar rights, but also its stronger laws provide leverage in bargaining.²⁷⁴ Thereby, the United States may achieve trade arrangements that foster domestic production and diminish the price of importation, both of which would bolster the U.S. economy. Strengthening copyright protection for U.S. products overseas would also prevent owners of foreign copyrights from enjoying a competitive advantage over U.S. creators in copyright-related commerce.²⁷⁵ Moreover, harmonized copyright laws between the United States and its trading partners would reduce the transaction costs of commerce with these nations

²⁶⁹ Berman Statement, *supra* note 265.

²⁷⁰ See 2011 Report, *supra* note 262 (noting that the copyright industry is a key contributor to the U.S. economy).

²⁷¹ Shira Perlmutter, *Participation in the International Copyright System as a Means to Promote the Progress of Science and Useful Arts*, 36 LOY. L.A. L. REV. 323, 329–30 (2002).

²⁷² *Eldred v. Ashcroft*, 537 U.S. 186, 205–06 (2002).

²⁷³ S. REP. NO. 100-352, at 4 (1988).

²⁷⁴ Perlmutter, *supra* note 271, at 330.

²⁷⁵ *Id.*

and would smooth their functioning.²⁷⁶ For example, distribution and licensing agreements would be more easily arranged and related disputes more easily resolved.²⁷⁷ Realigning U.S. copyright law with England's new standard would maintain the formerly low transaction costs of commerce with U.K. corporations. This is especially desirable in light of the countries' membership in the North Atlantic Treaty Organization and the WTO.

Amending the Copyright Act to expressly include infringements committed wholly abroad as cognizable harms would reduce piracy of products derived from U.S. copyrights, would encourage commerce, and would lend the United States greater clout in negotiating multinational trade agreements. Thus, amending the Copyright Act in this manner would entrance the U.S. economy.

C. RETURN OF THE JEDI: MATCHING ENGLAND'S NEW RULE WOULD FURTHER THE PURPOSE OF COPYRIGHT PROTECTION

In accordance with the Constitution, copyright law confers a narrow monopoly, which functions as an economic reward to stimulate artistic and scientific creation by ensuring a fair return on a creator's investment of time and labor.²⁷⁸ Copyright protection also encourages creators to disseminate these works without fear of misuse by others.²⁷⁹

To fully advance progress in these fields requires an international view, providing the same narrow monopoly to the use abroad by U.S. nationals of the products of these creative efforts. Indeed, due to the omnipresence of the Internet, communication of these works occurs without promotion by the federal government and often without the creators' knowledge. In one sense, this phenomenon renders the function of the Copyright Act redundant. But in another sense, the protection and remedies conferred by U.S. copyright law should meet the pace at which these works circulate.

If a creator seeks copyright protection in a country that belongs to the U.C.C. or to the Berne Convention, then under the principle of national treatment, she is entitled to the same protection that country affords its nationals.²⁸⁰ However, this protection may be less than the creator would

²⁷⁶ *Id.* at 328.

²⁷⁷ *Id.*

²⁷⁸ *Taylor Corp. v. Four Seasons Greetings, LLC*, 403 F.3d 958, 962 (8th Cir. 2005); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). See also U.S. CONST. art. I, § 8, cl. 8 (granting creators "exclusive Right[s] to their respective Writings and Discoveries").

²⁷⁹ See *Twentieth Century Music Corp.*, 422 U.S. at 156 (stating that "the ultimate aim is . . . to stimulate artistic creativity for the general public good").

²⁸⁰ *Subafilms, Ltd. v. MGM-Pathe Commc'ns Co.*, 24 F.3d 1088, 1097 (9th Cir. 1994).

receive under U.S. law.²⁸¹ If the creator seeks copyright protection in a country that is not a member of either convention, she receives protection only under that country's laws, which may prove scant or nonexistent.²⁸² A corporation in the copyright industry may have the luxury of choosing in which countries to transact its business, basing its decision on the copyright protection afforded by targeted foreign countries. However, not all copyright owners can control the dissemination of their works, especially in the age of digital media.

Copyright protection purposes to further the sciences and useful arts and to promote and disseminate creative works. Extending available recourse under U.S. copyright law to infringements committed wholly abroad would more fully ensure a remedy in the case of infringement, closing the door to the privileged sanctuary. In turn, this would further incentivize the aforementioned creation and promulgation, especially abroad, encouraging cross-border progress in the sciences and useful arts.²⁸³ This amendment would also enhance the ability of copyright owners to reap profits from this circulation, which may be reinvested in further original or derivative creation.²⁸⁴ This increased circulation of creative works and ideas would directly serve the fundamental purpose of the Copyright Act.

Thus, to fully effect the objective of the Constitution's Patent and Copyright Clauses, as well as the Copyright Act which translates it into force, Congress should amend Title 17. Specifically, Congress should expressly include copyright infringements committed wholly abroad by U.S. nationals against foreign copyrights and by non-nationals against U.S. copyrights as cognizable harms justiciable in U.S. courts.

IV. CONCLUSION

For over a century, U.K. law barred its courts from adjudicating claims of infringement of foreign intellectual property rights. Yet in *Lucasfilm Ltd. v. Ainsworth*, the U.K. Supreme Court found that the pillars on which the former standard stood had long since disintegrated under the combined effect of case law and statutes. The court found itself addressing a cause of action six years old. In the years after Lucasfilm filed its original claim in California, sentiment in the United Kingdom, the E.U., and the United States reached a near-boiling

²⁸¹ Berman Statement, *supra* note 265, at 1–3, 24–27, 44.

²⁸² U.S. Copyright Office Circular 38A: International Copyright Relations of the United States (2010), <http://www.copyright.gov/circs/circ38a.pdf> (while protection may be provided by a non-convention country, it may be limited or non-existent); Berman Statement, *supra* note 265.

²⁸³ Perlmutter, *supra* note 271, at 324.

²⁸⁴ *Id.* at 327.

point in favor of harmonized copyright laws among nations and adjudicating foreign intellectual property rights. Especially in light of Regulation (EC) No. 864/2007 of 2007, the court blessed this forward movement by definitively establishing that a claim of infringement of a foreign copyright may be adjudicated in English courts.

The other half of the Anglo-American legal tradition, U.S. law has retained a resemblance to that of the United Kingdom, both in its black-letter provisions and the underlying rationales and policies. U.S. copyright law actually conformed to U.K. copyright law in solidifying into its current shape, especially by adopting the U.K.'s copyright term of seventy years plus the creator's lifetime. Because current U.S. copyright law adheres to the idea of strict territoriality, England's new standard promulgated by the 2011 *Lucasfilm* decision has created a gap between the two regimes.

Thus, Congress should codify the Second Circuit's rule that infringements of foreign copyrights committed by U.S. nationals outside the United States may be adjudicated in U.S. courts. Under the principle of national treatment, Congress should also establish that infringements of U.S. copyrights committed wholly abroad are likewise legally cognizable harms under the Copyright Act.

These amendments would actualize the goals expressed by the Supreme Court, the Legislature, and U.S. legal culture of broadening copyright protection for U.S. creators beyond U.S. borders. These additions would also benefit the U.S. economy by deterring piracy of U.S.-copyrighted works, by encouraging the transaction of copyright-related commerce abroad, and by fortifying the position of the United States in foreign trade relations. Finally, such a change would more fully effect the purpose of the copyright doctrine by encouraging creation in the sciences and useful arts, as well as the public circulation of these creative works.

