

I. INTRODUCTION

This Comment argues that the Alien Tort Statute (“ATS”)¹ may serve as a jurisdictional basis for claims of international copyright infringement occurring outside of the United States.² While the Supreme Court’s recent decision in Sosa v. Alvarez-Machain³ restricts the class of claims that may invoke ATS jurisdiction, Sosa does not foreclose such jurisdiction for new claims based upon customary international law.⁴ Rather, Sosa requires that future ATS claims meet definitional “specificity” requirements, and enjoy international acceptance.⁵

¹ 28 U.S.C. § 1350 (2006).

² See Discussion infra Part III.

³ Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

⁴ See id., 542 U.S. at 729 (concluding that ATS jurisdiction remains available to only a “narrow class” of such claims); see also Anupam Chander, Symposium: On Democratic Ground: New Perspectives on John Hart Ely: Democracy and Distrust: Globalization and Distrust, 114 **Yale L.J.** 1193, 1209 (2005) (arguing that courts should embrace their post-Sosa function of promulgating federal common law under the ATS, given the institutional advantages of the judiciary vis-à-vis the more political branches of government).

⁵ See Sosa, 542 U.S. at 725 (requiring that claims under the ATS

Over the past century, the international community's concerted efforts to protect the copyrights of aliens have resulted in a fixture of normative international law. Specifically, through the pervasive and long-standing acceptance of multilateral intellectual property agreements, such as the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention")⁶ and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement"),⁷ principles of transnational copyright protection have risen to the level of customary international law.⁸ Because the global

exhibit a specificity-of-definition comparable to three paradigmatic principles of the law of nations as characterized by Blackstone, and be "accepted by the civilized world").

⁶ Berne Convention for The Protection of Literary and Artistic Works, July 24, 1971, 1161 U.N.T.S. 3 [hereinafter Berne].

⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, (1994), [hereinafter TRIPS Agreement].

⁸ Cf. Flores v. S. Peru Copper Corp., 343 F.3d 140, 162 (2d Cir. 2003) (stating that treaties and other international agreements may provide the basis for customary international law); Restatement (Third) of the Foreign Relations Law of the United

norm of protecting aliens' copyrights meets the specificity-of-definition and universality-of-acceptance requirements of Sosa,⁹ claims of international, extraterritorial copyright infringement may secure jurisdiction under the ATS.

Part II of this Comment provides an overview of the legal environment out of which the normative principle of international copyright protection grew.¹⁰ It describes the history and present-day application of the ATS,¹¹ the major international agreements that have laid the foundation for the international norm of international copyright protection,¹² the nature of the problem of international copyright infringement,¹³ and pertinent post-Sosa ATS litigation.¹⁴

Part III of this Comment assesses whether a claim of

States § 102(3) (1987) (stating that customary international law may be derived from multilateral agreements).

⁹ See supra note 5 (providing the two requirements that Sosa imposes for future ATS claims resting upon customary international law).

¹⁰ See Background infra Part II.C.

¹¹ See Background infra Part II.A.

¹² See Background infra Part II.B.

¹³ See Background infra Part II.C.

¹⁴ See Background infra Part II.D.

international, extraterritorial copyright infringement can establish ATS jurisdiction in light of Sosa. It concludes that such a claim passes each of Sosa's tests, and thus may secure subject matter jurisdiction under the ATS.¹⁵

Part IV outlines a study that the United States Copyright Office should undertake in collaboration with Congress.¹⁶ While performing the study, the Copyright Office should solicit and consider the views of a wide range of artists¹⁷ and organizations concerned with intellectual property.¹⁸ Upon completion of the study, Congress should determine whether to preserve the ATS as it currently stands, or amend it to eliminate jurisdiction for claims of international, extraterritorial copyright infringement.¹⁹

II. BACKGROUND

The conception of the Alien Tort Statute ("ATS")²⁰ is

¹⁵ See Discussion infra Part III.

¹⁶ See Recommendations infra Part IV.

¹⁷ See Recommendations infra Part IV.C.

¹⁸ See Recommendations infra Part IV.A.

¹⁹ See Recommendations infra Part IV.D.

²⁰ See Abdullahi v. Pfizer, Inc., 2005 U.S. Dist. LEXIS 16126, at *1, n.1 (D.N.Y. Aug. 9, 2005) (deciding to call the statute the

traceable to a scuffle between a French diplomat and an adventurer in Philadelphia in 1784.²¹ Following the brawl, the First Congress was concerned that the United States's inability to prosecute the aggressors in such incidents would embarrass the young nation on the world stage.²² Despite its sensational origins, the ATS was sparsely litigated and nearly forgotten since its passage as part of the 1789 Judiciary Act.²³ More than

Alien Tort Statute, although some courts call it instead the Alien Tort Claims Act ("ATCA").

²¹ See Sosa, 542 U.S. at 716-17 (describing Congress's passage of the ATS as a response to the so-called "Marbois incident of May 1794" and Congress's perceived self-incapacity to take effective countermeasures).

²² See id.; see also Genc Trnavci, The Meaning and Scope of the Law of Nations in the Context of the Alien Tort Claims Act and International Law, 26 **U. Pa. J. Int'l Econ. L.** 193, 225-26 (2005) (describing one version of the ATS's genesis as based on the Framers' and the First Congress's concerns that the states might inadequately enforce the law of nations with respect to affronts on foreign diplomats, and thus cause international embarrassment for the fledgling country).

²³ See Ryan Micallef, Note, Liability Laundering and Denial of Justice Conflicts Between the Alien Tort Statute and the

two centuries later, the ATS remains essentially unchanged,²⁴ and currently provides jurisdiction for tort claims brought by aliens that amount to violations of international law.²⁵

Given the adverse impact of international copyright infringement, in both its creative²⁶ and economic²⁷ dimensions,

Government Contractor Defense, 71 **Brooklyn L. Rev.** 1375, 1377 (2006) (referring to the ATS as little litigated and nearly “dormant” for almost 200 years); Carolyn A. D'Amore, Note, Sosa v. Alvarez-Machain and the Alien Tort Statute: How Wide Has the Door to Human Rights Litigation Been Left Open?, 39 **Akron L. Rev.** 593, 600 (2006) (noting that the ATS was “essentially unused” during almost two centuries of existence); Donald Francis Donovan and Anthea Roberts, Note, The Emerging Recognition Of Universal Civil Jurisdiction, 100 **A.J.I.L.** 142, 146 (2006) (describing the ATS as “largely dormant” until 1980, and only receiving a thorough treatment in the Supreme Court’s 2004 Sosa decision).

²⁴ See Jogi v. Voges, 425 F.3d 367, 372 (7th Cir. 2005) (observing that the ATS was “[o]n the books since the First Judiciary Act of 1789” and has remained “essentially unchanged since then”).

²⁵ 28 U.S.C. § 1350.

²⁶ Cf. U.S. Const. art. I, § 8, cl. 8 (justifying the protections

the ATS has the potential to promote artistic creation and strengthen the United States economy.²⁸ By providing subject matter jurisdiction for suits against foreign entities that infringe the copyrights of aliens as well as Americans, the ATS can indirectly protect the copyrights of Americans.²⁹

of patents and copyrights in terms of their ability " [t]o promote the progress of science and useful arts").

²⁷ See, Frank Ahrens, Hollywood Says Piracy Has Ripple Effect, **Washington Post**, Sept. 29, 2006, at D05 (commenting on Hollywood's assessment of the evils of movie "piracy," and noting that internet-based piracy can be particularly difficult to combat); Piracy 'threatens 600,000 jobs', **BBC News**, Jan. 20, 2003, <http://news.bbc.co.uk/2/hi/entertainment/2676117.stm> (warning that international copyright infringement may jeopardize the jobs of over 600,000 individuals in Europe).

²⁸ See **Office of United States Trade Representative, Strategy Targeting Organized Piracy (STOP!)** (2004), available at http://www.ustr.gov/Document_Library/Press_Releases/2005/June/US_Exps_Outreach_in_Campaign_to_STOP!_Trade_in_Fakes.html [hereinafter 2004 Strategy] (stating that global piracy of copyrighted American goods may weaken America's technology-driven economy and the competitiveness of American companies).

²⁹ Cf. **United States Trade Representative 2006 Special 301 Report**

Additionally, by permitting suits against foreign entities that infringe only aliens' copyrighted works, the ATS can help quash foreign piracy markets, and thereby secure the copyrights of Americans.

A. The Alien Tort Statute: Origins and Interpretation in Sosa v. Alvarez-Machain

The ATS was passed by the First Congress in 1789³⁰ and has evolved only slightly over the years.³¹ The statute reads: "The

(Apr. 2006), available at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/2006_Special_301_Review/asset_upload_file473_9336.pdf [hereinafter 2006 Report] (identifying markets for infringing goods as a cause of global piracy, and recognizing that quashing such markets may reduce global piracy).

³⁰ See generally Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789) (current version at 28 U.S.C. § 1350) (providing text of the original act, under which the district courts "... shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.").

³¹ See supra, note 24 (describing how only minimal changes have been made to the ATS since its passage).

district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”³² Only one case³³ has been able to successfully establish jurisdiction under the ATS in the statute’s first 170 years of existence.³⁴

The ATS was revived from dormancy by a wave of human rights litigation the 1980s, beginning with Filartiga v. Pena-Irala,³⁵ a

³² 28 U.S.C. § 1350.

³³ See Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (establishing ATS jurisdiction in a suit concerning the disposition of slaves aboard a Spanish ship that was captured by a privateer).

³⁴ See Sosa, 542 U.S. at 712, 720 (stating that, for more than 170 years after its passage, the ATS furnished jurisdiction only once).

³⁵ See Terry Collingsworth, Boundaries in the Field of Human Rights: The Key Human Rights Challenge: Developing Enforcement Mechanisms, 15 **Harv. Hum. Rts. J.** 183, 186 (2002) (describing the rebirth of the “long-dormant” ATS as commencing with Filartiga v. Pena-Irala, and recognizing the ATS’s subsequent use as a tool in international human rights litigation); Curtis A. Bradley, The Alien Tort Statute and Article III, 42 **Va. J. Int’l L.** 587, 588-89 (2002) (observing that ATS was inactive

case alleging wrongful death in violation of the United Nations Charter.³⁶ Subsequently, cases alleging false arrest,³⁷ rape,³⁸ murder,³⁹ slavery,⁴⁰ genocide,⁴¹ war crimes,⁴² crimes against

until Filartiga v. Pena-Irala, after which it served as a vehicle for international human rights advocacy).

³⁶ See Filartiga v. Pena-Irala, 630 F.2d 876, 879 (2d Cir. 1980) (listing the bases for the plaintiffs' claims, which included U.S. wrongful death statutes, the U.N. Charter, the Universal Declaration on Human Rights, the U.N. Declaration Against Torture, the American Declaration of the Rights and Duties of Man, and other human rights declarations and principles of normative international law).

³⁷ See Sosa, 542 U.S. at 692 (denying ATS jurisdiction for a claim of "'arbitrary' detention").

³⁸ John Doe I v. Unocal Corp., 395 F.3d 932, 954 (9th Cir. 2002) (permitting ATS jurisdiction for claims of, among other things, aiding and abetting rape).

³⁹ See id. (granting ATS jurisdiction for claims of aiding and abetting murder).

⁴⁰ See id. at 947 (permitting ATS jurisdiction for claims of forced labor, which is tantamount to slavery).

⁴¹ See Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1995) (deeming claims of genocide actionable under the ATS).

humanity,⁴³ tortious conversion of property,⁴⁴ price-fixing,⁴⁵ environmental contamination,⁴⁶ and even claims arising out of the September 11, 2001 terrorist attacks,⁴⁷ have sought to obtain jurisdiction, at least in part, under the ATS.

The elements of an ATS claim are clear from the statutory

⁴² See id. (considering claims of war crimes permissible under the ATS).

⁴³ See id. (allowing ATS jurisdiction for claims of crimes against humanity).

⁴⁴ See Cohen v. Hartman, 634 F.2d 318 (5th Cir. 1981) (denying ATS jurisdiction for a claim of tortious conversion, because it did not meet the “law of nations” requirement of the ATS).

⁴⁵ See Kruman v. Christie's Int'l PLC, 129 F. Supp. 2d 620, 627 (D.N.Y. 2001) (dismissing a claim of price-fixing under the ATS as borderline “frivolous” because of its lack of basis in customary international law).

⁴⁶ Flores, 343 F.3d at 161 (denying ATS jurisdiction for a claim of intrastate pollution as insufficiently grounded in customary international law).

⁴⁷ In re Terrorist Attacks on September 11, 2001, 392 F. Supp. 2d 539, 575-76 (D.N.Y. 2005) (dismissing most of the plaintiffs’ tort claims on grounds other than the ATS).

language:⁴⁸ the claim must (1) be brought by an alien and (2) allege a tort that (3) is a violation of the law of nations or a United States treaty.⁴⁹ Despite this apparent simplicity,

⁴⁸ But see Sosa, 542 U.S. at 733, n.21 (suggesting that “in an appropriate case” the Court would consider imposing an exhaustion of remedies requirement on ATS claims); Sarei v. Rio Tinto, PLC, 456 F.3d 1069, 1089-99 (9th Cir. 2006) (considering and ultimately refusing to graft an exhaustion of remedies requirement onto the ATS, given that Congress could have easily created such a requirement when it drafted the ATS’s sister statute, the Torture Victims Protection Act, in 1991); Keating-Traynor v. Westside Crisis Ctr., 2006 U.S. Dist. LEXIS 43858, at *20 (D. Cal. Jun. 16, 2006) (finding an alternative ground for dismissal of ATS claims on the basis of the tolling of the statute of limitations); Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 24 (D.D.C. 2005) (determining that when claims under the ATS concern “sensitive” matters, such as genocide or torture, with the potential complicity of a foreign government, a “more searching merits-based inquiry” may be required); Kadic, 70 F.3d at 239 (considering and rejecting a mandatory “state action” requirement for ATS jurisdiction).

⁴⁹ Bowoto v. Chevron Corp., 2006 U.S. Dist. LEXIS 63209, at *8 (D. Cal. Aug. 21, 2006); Keating-Traynor, 2006 U.S. Dist. LEXIS

however, ATS jurisdiction is often complex to assess.⁵⁰ Most often, the statute's third prong proves particularly difficult to apply.⁵¹ As discussed below,⁵² establishing jurisdiction under the ATS for claims of extraterritorial copyright infringement will likewise face the most challenging problems under this third statutory requirement.

Any case brought under the ATS must pass the two tests of Sosa v. Alvarez-Machain: specificity-of-definition and

43858, at *18; Kevin Scott Prussia, Note and Comment, NAFTA & the Alien Tort Claims Act: Making a Case for Actionable Offenses Based on Environmental Harms and Injuries to the Public Health, 32 **Am. J. L. and Med.** 381, 396 (2006).

⁵⁰ See Jogi, 425 F.3d at 370 (observing at the outset of an ATS case that there were "a bewildering array of complex issues" to consider).

⁵¹ See, e.g., Bowoto, 2006 U.S. Dist. LEXIS 63209, at *7-38 (outlining the three prongs of the ATS, and then proceeding to consider, and reject the plaintiffs' claims under, the third prong).

⁵² See infra Part III.C Analysis: International, Extraterritorial Copyright Infringement is a Violation of the Law of Nations and Satisfies the ATS's Third Prong.

universality-of-acceptance.⁵³ Sosa represents the Supreme Court's first-ever thorough examination of the ATS,⁵⁴ complete with an extensive historical analysis⁵⁵ and a forward-looking standard.⁵⁶ The plaintiff in Sosa, Alvarez, was abducted from his home in

⁵³ See supra note 5 (providing the two key tests of Sosa: definitional specificity and universal acceptance in the international community).

⁵⁴ See Hereros v. Deutsche Afrika-Linien GmbH & Co., 2006 U.S. Dist. LEXIS 2761, at *31 (D.N.J. Jan. 17, 2006) (justifying "keeping [the court's] hands off" the ATS claim raised in the case until Sosa was decided, and noting that Sosa "finally did provide assistance to the federal courts in figuring out what the ATCA means"); see also Donovan and Roberts, supra note 23 (recognizing Sosa as the first Supreme Court decision to thoroughly elucidate the ATS).

⁵⁵ See Sosa, 542 U.S. at 712-24 (discussing the First Congress's impetus in enacting the ATS, ATS's placement in the 1789 Judiciary Act, the question of whether the ATS was effective upon its enactment or whether it was "stillborn," and the state of the "law of nations" in 1789 as informed by Blackstone).

⁵⁶ See supra note 5 (providing the requirements of definitional specificity and universal acceptance that future ATS claims must satisfy).

Mexico, allegedly pursuant to U.S. Drug Enforcement Agency orchestration, and brought to the United States for criminal proceedings in which he was charged with torture and murder.⁵⁷ Alvarez responded by suing the United States and one of his Mexican captors (Sosa) under the ATS, alleging that he was falsely arrested in violation of international law.⁵⁸

In addressing Alvarez's ATS claim, the Court faced the question of whether the ATS was a purely jurisdictional statute, or whether it was capable of creating new causes of action to reflect the evolution of customary international law.⁵⁹ The Court

⁵⁷ See Sosa, 542 U.S. at 697-98 (recounting that Alvarez, a Mexican physician, was charged with prolonging the life of a Drug Enforcement Agency official who was tortured over a two-day period and then murdered).

⁵⁸ See id. 542 U.S. at 698, 734 (stating specifically that Alvarez argued that his false arrest constituted a violation of the Universal Declaration of Human Rights, and article nine of the International Covenant on Civil and Political Rights).

⁵⁹ See id. 542 U.S. at 712-13 (noting that the petitioner, Sosa, and the United States were aligned in arguing for a purely jurisdictional interpretation of the ATS, while the respondent, Alvarez, sought to characterize the ATS as an invitation to courts to recognize new causes of action based upon

professed to adopt neither extreme approach, and concluded that the ATS “was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject.”⁶⁰ As a matter of original intent, the Court determined that the ATS was meant to provide jurisdiction for three types of claims involving violations of the law of nations: “offenses against ambassadors, ... violations of safe conduct[,] ... and individual actions arising out of prize captures and piracy[.]”⁶¹ The common law at the time the ATS was enacted supplied the cause of action for such claims, and the

international law).

⁶⁰ Id. 542 U.S. at 714; see also Brinton M. Wilkins, Note, Splitting the Baby: An Analysis of the Supreme Court's Take on Customary International Law Under the Alien Tort Statute in Sosa v. Alvarez-Machain, 2005 **B.Y.U.L. Rev.** 1415, 1415-17 (2005) (expressing displeasure with the Sosa court's decision to “split the proverbial baby[,]” i.e., refrain from adopting a purely jurisdictional or a purely cause-of-action-producing interpretation of the ATS, and recommending the former).

⁶¹ Sosa, 542 U.S. at 720; see also **William Blackstone**, 4 Commentaries *68 (commenting that the three “principal” offences against the law of nations were violations of safe-conducts, infringements of the rights of ambassadors, and piracy).

ATS provided the district courts with jurisdiction to hear them.⁶² While the Court held that the drafters of the ATS only meant to provide jurisdiction for these three types of claims,⁶³ it did not prohibit the ATS from serving as a jurisdictional basis for new causes of action based upon customary international law.⁶⁴ Rather, the Court held that new claims may

⁶² See Sosa, 542 U.S. at 720; see also David D. Caron and Brad R. Roth, International Decision: Scope of Alien Tort Statute - arbitrary arrest and detention as violations of custom, 98 **A.J.I.L.** 798, 801 (2004) (mentioning that, when a court, post-Sosa, creates a new cause of action under the ATS, it does so by relying upon the federal common law).

⁶³ See Sosa, 542 U.S. at 724 (concluding that there is no reason to believe that the First Congress contemplated any claims invoking ATS jurisdiction other than Blackstone's three archetypical principles of normative international law).

⁶⁴ See id., 542 U.S. at 745 (Scalia, J., concurring) (arguing that the First Congress did indeed endorse Blackstone's three exemplars of customary international law, but that modern courts lack authority to fashion new causes of action under the ATS. Justice Scalia also pointed out that, by relying on the federal common law to provide the cause of action for new claims under customary international law, courts may render the ATS

secure ATS jurisdiction as long as they “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms” described above.⁶⁵ The Court’s standard is quite cautious, but leaves the door open to claims that have as much “definite content and acceptance among civilized nations” as the three types of claims originally cognizable under the ATS.⁶⁶

superfluous. That is, if federal courts are able to incorporate customary international law into the federal common law, which is “supreme federal law,” ordinary federal question jurisdiction could provide jurisdiction for such claims as well as the ATS).

⁶⁵ Id., 542 U.S. at 725; see also Igor Fuks, Note, Sosa v. Alvarez-Machain and the Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability, 106 **Colum. L. Rev.** 112, 122 (2006) (recognizing that Sosa’s specificity and acceptance requirements are “rather vague standards” and may pose difficulties to lower courts in their application).

⁶⁶ See Sosa, 542 U.S. at 729-732 (reiterating the specificity and acceptance requirements of the ATS, and offering the metaphorical summation that “the door [to the ATS] is still ajar subject to vigilant doorkeeping”).

B. Post-Sosa ATS Litigation with Relevance to a Claim of Extraterritorial, International Copyright Infringement

Determining whether a novel ATS claim passes the twin tests of Sosa requires an assessment of cases that have construed and applied Sosa. One particularly pertinent case is Sarei v. Rio Tinto, PLC.⁶⁷ In Sarei several plaintiffs from Papua New Guinea brought an ATS action against two corporations for claims of (among other things) violations of two provisions of the United Nations Convention on the Law of the Sea⁶⁸ (“UNCLOS”).⁶⁹ Under the UNCLOS, states must take measures necessary to “prevent, reduce and control pollution of the marine environment,”⁷⁰ including

⁶⁷ See Sarei, 221 F. Supp. 2d 1116 (D. Cal. 2002) (providing the factual background of the case, as written by the district court).

⁶⁸ See United Nations Convention on the Law of the Sea, 1833 U.N.T.S. 397 (Dec. 10, 1982) [hereinafter UNCLOS] (providing the complete text of the UNCLOS).

⁶⁹ Id. 221 F. Supp. 2d at 1161.

⁷⁰ See UNCLOS, infra note 186, art. 194(1) (incorporating the definition of “pollution of the marine environment” from Part I, art. 1(1)(4) of the UNCLOS, to include the introduction of “substances or energy” into the marine environment, causing “hazards to human health, hindrance to marine activities,

land-based pollution.”⁷¹ The trial court held, and the Ninth Circuit agreed,⁷² that, because the UNCLOS was ratified by 166 nations, it represented the law of nations.⁷³ Consequently, the plaintiffs’ environmental claims based on the UNCLOS were permissible under the ATS.⁷⁴

A second important case that construed Sosa is Jogi v. Voges.⁷⁵ In Jogi, much like Sarei, a treaty directed toward state action (rather than private action) was deemed to satisfy Sosa’s

including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities[.]”

⁷¹ See UNCLOS, supra note 68, art. 207(1).

⁷² Sarei, 456 F.3d at 1078.

⁷³ See Sarei, 221 F. Supp. 2d at 1161 (stating that, while the United States has not yet ratified the UNCLOS, it has signed it, and that the UNCLOS’s level of international acceptance qualifies it a principle of customary international law).

⁷⁴ See Sarei, 221 F. Supp. 2d at 1161-62 (providing the district court’s disposition of the case, under which the plaintiffs’ ATS claim was approved); Sarei, 456 F.3d at 1078 (providing the Ninth Circuit’s substantial affirmance of the trial court’s opinion).

⁷⁵ Jogi, 425 F.3d 367.

tests.⁷⁶ The plaintiff's claim in Jogi was that he was not told of his rights, as an arrestee, under the Vienna Convention on Consular Relations ("Vienna Convention")⁷⁷ to contact the Indian consulate.⁷⁸ The court held that, while the Vienna Convention generally deals with inter-state relations, Article 36 provides detained nationals with a private right to consular assistance.⁷⁹ The court's decision relied primarily on certain language of Article 36 that seemed to imply private rights, and thus a private cause of action.⁸⁰

C. Multilateral Copyright Instruments that Establish Copyright Infringement as a Violation of the Law of Nations

The community of nations has sought to reduce copyright

⁷⁶ See id. at 382 (holding that while "most parts of the Vienna Convention address only state-to-state matters, Article 36 confers individual rights on detained nationals").

⁷⁷ Vienna Convention on Consular Relations, 596 U.N.T.S. 261 (April 24, 1963) [hereinafter Vienna Convention].

⁷⁸ Id. 425 F.3d at 369-70.

⁷⁹ Id. 425 F.3d at 382.

⁸⁰ See id. at 374 (emphasizing that, under Article 36, consular authorities must receive notification of a detained national's detention "if he so requests[,]" and that the arresting state shall promptly "inform the person concerned" of his rights).

infringement through multilateral agreements for over 100 years.⁸¹ In addition to the Berne Convention and TRIPS Agreement, numerous other multilateral agreements currently address international copyright law, including the Universal Copyright Convention,⁸² the World Intellectual Property Organization ("WIPO") Copyright Treaty,⁸³ the WIPO Performances and Phonograms Treaty,⁸⁴ the Geneva Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms,⁸⁵ and the International Convention for the Protection

⁸¹ See Berne, supra note 6 (providing the text of the Berne Convention, which was adopted by eight nations on December 5, 1887, and completed in Paris on May 4, 1896).

⁸² Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, revised July 24, 1972, 25 U.S.T. 1341, [hereinafter UCC].

⁸³ World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 28542 (adopted by the WIPO Diplomatic Conference) [hereinafter WCT].

⁸⁴ World Intellectual Property Organization Performances and Phonograms Treaty, December 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 76 [hereinafter WPPT].

⁸⁵ The Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, Oct. 29, 1971, 25 U.S.T. 309 [hereinafter Geneva Convention].

of Performers, Producers of Phonograms and Broadcasting Organizations.⁸⁶ Additionally, various recommendations and declarations of the United Nations Educational, Scientific, and Cultural Organization ("UNESCO") manifest an international consensus on the necessity of protecting the rights of authors and artists.⁸⁷ While these multinational instruments signify the international community's significant and long-standing commitment to the principle of international copyright

⁸⁶ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter Rome Convention].

⁸⁷ See, e.g., Recommendation Concerning the Status of the Artist, UNESCO, 21st Sess., (Oct. 27, 1980) available at http://portal.unesco.org/en/ev.php-URL_ID=13138&URL_DO=DO_TOPIC&URL_SECTION=201.html (establishing that, because artists have a "right to enjoy the fruits of their work[,] members states have a duty to protect the works of artists); Charter on the Preservation of Digital Heritage, UNESCO, 32nd Sess., (Oct. 15, 2003) available at http://portal.unesco.org/en/ev.php-URL_ID=17721&URL_DO=DO_TOPIC&URL_SECTION=201.html (calling for a balance struck between the "legitimate rights of creators" of digital materials and the general public "in accordance with international norms and agreements").

protection, this Comment relies on the Berne Convention and the TRIPS Agreement to provide the substantive aspects of that principle.⁸⁸

1. The Berne Convention

The Berne Convention was adopted on September 9, 1886 in Berne, Switzerland.⁸⁹ By the turn of the century, only 12 countries had become signatories to Berne,⁹⁰ yet today Berne is in force in 162 nations.⁹¹ The Berne Convention, one century

⁸⁸ Cf. William Party, Choice of Law and International Copyright, 48 **Am. J. Comp. L.** 383, 419 (2000) (arguing that, if copyright protection was incorporated into customary international law, it would most likely occur via the Berne Convention; however, for purposes of Berne evading its non-self-executory status and having "direct" applicability in the United States, such an approach is "too clever").

⁸⁹ See Berne, supra note 6.

⁹⁰ See Contracting Parties, http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&start_year=1884&end_year=1900&search_what=C&treaty_id=15 (last visited Sept. 20, 2006) (providing a list of the signatory states of Berne in 1900).

⁹¹ See Contracting Parties, http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&start_year=ANY&end_year=ANY&search_what=C&treaty_id=15 (last visited Oct. 18, 2006) (providing a

after its origination, finally⁹² entered into force in the United States on March 1, 1989.⁹³ In the Berne Convention Implementation Act of 1988, Congress declared that the Berne Convention was non-self-executory, that the United States would perform its obligations thereunder “only pursuant to appropriate domestic law[,]” and that the United States’s existing copyright laws fully satisfied its obligations under the Berne Convention.⁹⁴

complete list of all current signatory states to Berne).

⁹² See Graeme B. Dinwoodie, A New Copyright Order: Why National Courts Should Create Global Norms, 149 **U. Pa. L. Rev.** 469, 477 (2000) (suggesting that the United States “belatedly” acceded to the Berne Convention, and that subsequently, international pressures have helped to shape American copyright law).

⁹³ See Berne, supra note 6 (referencing the Paris text of the Berne Convention, which is the most current text of the Convention).

⁹⁴ Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 2 102 Stat. 2853 (1988); see also 17 U.S.C. § 104(c) (2006) (denying claims based upon any “work eligible for protection under” the federal copyright statute arising “by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto”); Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 83 (2d Cir. 1995)

Two of the most salient characteristics of the Berne Convention are its establishment of a "Union" of signatories who pledge themselves to adhere to certain minimum standards of copyright protection, and its guarantee of equal national treatment - i.e., that signatory A will protect the works of nationals from signatory B to the extent A protects the works of its own nationals.⁹⁵ A third hallmark of the Berne Convention is perhaps its aversion toward "formalities" that may complicate obtaining a copyright.⁹⁶

(observing that, by passing the Berne Convention Implementation Act and declaring the complete supersession of U.S. copyright law over Berne's provisions, Congress "side-stepped" the tricky issue of protecting moral rights, as required by Berne).

⁹⁵ See Dinwoodie, supra note 92, at 491 (describing Berne's minimum substantive standards and endorsement of the national treatment principle as the Convention's overarching characteristics).

⁹⁶ See Berne, supra note 6, art. 5(2) (providing that the rights flowing from Berne "shall not be subject to any formality"); John R. Kettle III, Dancing to the Beat of a Different Drummer: Global Harmonization - And the Need for Congress to Get in Step with a Full Public Performance Right for Sound Recordings, 12 **Fordham Intell. Prop. Media & Ent. L.J.** 1041, 1076-77 (2002)

2. The TRIPS Agreement

The TRIPS Agreement is one of several multilateral agreements⁹⁷ that were created during the formation of the World Trade Organization ("WTO").⁹⁸ Consonant with the WTO's ambitious scope, the TRIPS Agreement protects not only copyrights, but also a broad range of other intellectual property rights.⁹⁹ The

(describing how the United States had to eliminate its copyright notice and registration formalities in order to join Berne).

⁹⁷ See WTO | legal texts - the WTO agreements, http://www.wto.org/english/docs_e/legal_e/legal_e.htm (last visited Oct. 30, 2006) (providing information about the other agreements in the WTO bundle, which concern the trade of goods, services, civil aircrafts, bovine meat, and dairy products, as well as dispute settlement within the WTO context, trade policy review, and governmental procurement).

⁹⁸ See generally The WTO in Brief, http://www.wto.org/english/the_wto_e/what_is_e/inbrief_e/inbr00_e.htm (last visited Oct. 18, 2006) (describing the Uruguay Round negotiations as multilateral talks aimed at reducing international trade barriers).

⁹⁹ See WTO | intellectual property - overview of TRIPS Agreement, http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm, (last visited Oct. 18, 2006) (outlining the various fields of intellectual property covered by the TRIPS Agreement, which

TRIPS Agreement initially had 111 signatories,¹⁰⁰ a number that has since risen to 149.¹⁰¹

Even before the TRIPS Agreement was set to take effect,¹⁰² Congress passed legislation implementing the WTO Agreements and limiting their domestic enforceability.¹⁰³ Specifically, Congress

include copyright and related rights, trademarks and service marks, geographical indications, industrial designs, patents, and trade secrets and test data).

¹⁰⁰ See Melville B. Nimmer & David Nimmer, 4-18 Nimmer on Copyright § 18.06 (2003) [hereinafter Nimmer] (noting that the Final Act of the Uruguay Round Negotiations was signed on April 15, 1994 in Marrakesh, Morocco by the United States and 110 other nations).

¹⁰¹ See WTO | Understanding the WTO - members, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Oct. 30, 2006) (providing a complete list of the WTO's 149 member nations and their respective dates of accession).

¹⁰² See generally Nimmer, supra note 100, 1.12[D] (observing that the Senate never actually ratified the Uruguay Round Agreements as a formal treaty).

¹⁰³ See 19 U.S.C. § 3512 (2006) (providing that "[n]o person other than the United States ... shall have any cause of action or

declared that federal law would trump any TRIPS provision in the event of conflict,¹⁰⁴ and that the United States - as opposed to any private plaintiff - would have the exclusive right to bring a suit under any of the Uruguay Round Agreements, including TRIPS.¹⁰⁵ Courts have construed these statutory principles as rendering the TRIPS Agreement non-self-executing, and barring private claims brought thereunder.¹⁰⁶

D. The Scope and Characteristics of International Copyright Infringement

Diversification of copyrightable material over the years¹⁰⁷

defense under" the Uruguay Round Agreements).

¹⁰⁴ See 19 U.S.C. § 3512(a)(1) (declaring the supersession of U.S. law over any provision of the Uruguay Round Agreements in the event of conflict).

¹⁰⁵ See supra note 103 (providing that private individuals shall have no cause of action under the provisions of the TRIPS Agreement).

¹⁰⁶ See, e.g., In re Rath, 402 F.3d 1207, 1210 (Fed. Cir. 2005) (regarding TRIPS as non-self-executory in light of Congress's requirements that U.S. law trump TRIPS provisions in the event of conflict, and that only the United States, rather than any private party, has a right of action under TRIPS).

¹⁰⁷ Compare 17 U.S.C. § 102(a) (2006) (providing that copyrights

has led to an increase in the means of copyright infringement.¹⁰⁸ In 1790, when the First Congress drafted the first copyright statute for the United States, the only works accorded protection were maps, charts, and books.¹⁰⁹ Modern copyright law also provides protection for musical works; dramatic works; pictorial, graphic, and sculptural works; pantomimes and choreographic works; motion pictures and other audiovisual works; sound recordings; and architectural works.¹¹⁰

may apply to "works of authorship fixed in any tangible medium of expression," including literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works) with infra note 109 (providing copyright protection for only maps, charts, and books).

¹⁰⁸ Cf. Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 430-31 (1984) (describing Congress' expansion of federal copyright law as a response to "new technology").

¹⁰⁹ See Act of May 31, 1790, 1 Cong. Ch. 15, 1 Stat. 124 (granting U.S. citizens and residents copyrights over maps, charts, and books).

¹¹⁰ See 17 U.S.C. § 102(a) (providing copyright protection for various types of original works of authorship that have been

The enforcement of intellectual property rights, including copyrights, is vital to creativity and economic growth in the United States.¹¹¹ According to the Motion Picture Association, movie companies lose an annual \$6.1 billion due to worldwide copyright infringement, with \$1.2 billion coming from the Asia-Pacific region.¹¹² The Recording Industry Association of America estimates that the American music industry loses \$4.2 billion annually to global copyright infringement.¹¹³ Similarly, American publishers of written materials lost approximately \$500 million

“fixed in any tangible medium of expression”).

¹¹¹ See generally 2006 Report, supra note 29 (describing the harmful effects of global piracy for “creative economies”); 2004 Strategy, supra note 28 (characterizing global piracy as a threat to “America’s innovation economy”).

¹¹² See Motion Picture Association, Anti-Piracy Fact Sheet: Asia-Pacific Region (2006) (providing an overview of motion picture piracy in the Asia-Pacific region, and summarizing the economic impact it has on member organizations).

¹¹³ See Recording Industry Association of America: Anti-Piracy, <http://www.riaa.com/issues/piracy/default.asp> (last visited Dec. 15, 2006) (comparing copyright infringement to traditional, ocean-based piracy, and summarizing its effects on the recording industry).

from world copyright infringement last year, according to the Association of American Publishers.¹¹⁴

In terms of the U.S. economy as a whole, "copyright industries" contributed between \$626.2 billion and \$1.254 trillion to the national economy in 2002, depending on how such industries are defined.¹¹⁵ As a percentage of gross domestic product, that translates into six to twelve percent of the total U.S. economy for the same year.¹¹⁶ The copyright industry employs between 5.48 and 11.5 million people in the United States, and has experienced employment growth rates above those pertaining to the total U.S. workforce.¹¹⁷ To the extent copyright

¹¹⁴ See Association of American Publishers: Anti-Piracy Program, <http://www.publishers.org/antipiracy/index.cfm> (last visited Dec. 15, 2006) (describing infringement of copyrights for books and journals as "rampant" and estimating the effect it has on American publishers).

¹¹⁵ See **Stephen E. Siwek, Copyright Industries in the U.S. Economy: The 2004 Report** (2004) (assessing the economic footprint of copyright related commerce in the United States in terms of "core" copyright industries and "total" copyright industries).

¹¹⁶ Id.

¹¹⁷ Id.

protection is designed to encourage the production of creative works by an economic incentive,¹¹⁸ therefore, reducing that incentive may limit the creative and economic potential of America.

III. ANALYSIS

The ATS may provide subject matter jurisdiction for claims of international, extraterritorial copyright infringement. In any ATS claim, the plaintiff must be an alien who alleges a tort that amounts to a violation of a United States treaty or the law of nations.¹¹⁹ According to the Supreme Court's decision in Sosa,

¹¹⁸ See Furine Blaise, Comment, Game Over: Issues Arising When Copyrighted Work is Licensed to Video Game Manufacturers, 15 **Alb. L.J. Sci. & Tech.** 517, 523-24 (2005) (noting that, "from the beginning," copyright law was meant to promote creative production through an economic incentive). But see Russell J. Anderson, Jr., Return of the Guilds: A Reflection on the Domestic and International Implications of Eldred v. Ashcroft, 12 **U. Balt. Intell. Prop. L.J.** 49, 49-50 (2003) (suggesting that the focus of copyright policy has changed from the encouragement of creative endeavors, to enriching the distributors of copyrighted goods).

¹¹⁹ 28 U.S.C. § 1350.

ATS claims must also be specifically defined and enjoy international acceptance.¹²⁰ A claim of international, extraterritorial copyright infringement may satisfy the standards of the ATS, as interpreted in Sosa, and therefore successfully secure ATS jurisdiction.

A. The ATS's Requirement that the Plaintiff be an Alien May be Met

The first element of the ATS requires that an "alien" be the individual or entity bringing the suit.¹²¹ In the context of copyright infringement, this means that the copyright-holder claiming infringement must be an alien.¹²² Not surprisingly, this rather straightforward element has been a minor obstacle in ATS litigation compared to the second, and especially the third, elements of the ATS.¹²³ Essentially, an "alien" is a non-

¹²⁰ Sosa, 542 U.S. at 725.

¹²¹ See 28 U.S.C. § 1350 (providing subject matter jurisdiction for "any civil action by an alien") (emphasis added).

¹²² See Keating-Traynor, 2006 U.S. Dist. LEXIS 43858, at *18 (dismissing plaintiffs' ATS claims because they were not aliens).

¹²³ See, e.g., id. at *18-19 (assessing plaintiffs' status as "aliens" in conclusory fashion); Exxon Mobil Corp., 393 F. Supp. 2d at 24 (noting that the plaintiffs were "plainly aliens," and

citizen.¹²⁴ A plaintiff with dual-citizenship (in the United States and another country) is a United States citizen, and thus not an alien.¹²⁵ The ATS does not require that defendants be aliens in order for jurisdiction to vest.¹²⁶

then progressing to consider “whether plaintiffs have adequately pled that defendants violated the law of nations”); Arndt v. UBS AG, 342 F. Supp. 2d 132, 138 (D.N.Y. 2004) (deciding that, because the plaintiffs were German citizens, they were aliens within the meaning of the ATS).

¹²⁴ Keating-Traynor, 2006 U.S. Dist. LEXIS 43858, at *18. See also **Blacks Law Dictionary** 79 (deluxe 8th ed. 2004) (defining an “alien” as a person born outside of U.S. jurisdiction, who is “subject to some foreign government, and who has not been naturalized under U.S. law”); **William Blackstone**, 1 **Commentaries** *354 (distinguishing between natural-born subjects and aliens on the ground that natural-born subjects are “born within the dominions of the crown of England,” while aliens “are born out of it”).

¹²⁵ See Keating-Traynor, 2006 U.S. Dist. LEXIS 43858, at *18 (barring the ATS claims of two plaintiffs on the ground that their dual citizenship - in the United States and another country - rendered them non-aliens).

¹²⁶ See Miner v. Begum, 8 F. Supp. 2d 643, 644 (D. Tex. 1998)

Various factual scenarios could give rise to an ATS claim of international, extraterritorial copyright infringement. Importantly, however, the ATS could not provide jurisdiction for claims of infringement occurring in the United States. Aliens are already entitled to copyright protection under federal law,¹²⁷ and therefore resort to the ATS as an enforcement vehicle would be unnecessary as well as improper.¹²⁸ Use of the ATS is

(stating that, for ATS purposes, the citizenship of defendants is "irrelevant"). Other issues may arise that could undermine the plaintiff's ability to advance a successful ATS claim against a defendant, however, such as sovereign immunity. See, e.g., Enahoro v. Abubakar, 408 F.3d 877, 881 (7th Cir. 2005) (holding that sovereign immunity did not attach to an individual member of a governing committee); Elmaghraby v. Ashcroft, 2005 U.S. Dist. LEXIS 21434, at *109-10 (D.N.Y. Sept. 27, 2005) (recognizing that the United States may claim sovereign immunity as a defense to an ATS claim if it has not already waived such privilege).

¹²⁷ See 17 U.S.C. § 104(a), (b) (providing protection for unpublished works "without regard to the nationality or domicile of the author[,]" and for published works of alien authorship in certain circumstances).

¹²⁸ Cf. Sosa, 542 U.S. at 731 (inviting Congress to "occupy the

desirable, however, where federal copyright law leaves off: extraterritorial infringement. United States copyright law does not have "extraterritorial operation."¹²⁹ In other words, acts of infringement that occur outside the jurisdiction of the United

field" of customary international law that otherwise might provide the basis for an ATS claim); The Paquete Habana, 175 U.S. 677, 700 (1900) (stating that customary international law is "part of our law" where there is "no controlling executive or legislative act or juricial [sic] decision"); Enahoro, 408 F.3d at 884-85 (barring a plaintiff from asserting a claim under customary international law where a federal statute occupies the field).

¹²⁹ Palmer v. Braun, 376 F.3d 1254, 1258 (11th Cir. 2004); Subafilms, Ltd. v. MGM-Pathe Communications Co., 24 F.3d 1088, 1095-06 (9th Cir. 1994); Update Art, Inc. v. Modiin Pub., Ltd., 843 F.2d 67, 73 (2d Cir. 1988); Nimmer, supra note 100, 17.02; see also Curtis A. Bradley, Extraterritorial Application of U.S. Intellectual Property Law: Principal Paper: Territorial Intellectual Property Rights in an Age of Globalism, 37 **Va. J. Int'l L.** 505, 507-08 (1997) (describing the uncertain rationale behind treating federal trademark law as having extraterritorial application, but denying such extraterritoriality to federal copyright and patent law).

States are not remediable in federal courts.

Thus the ATS, rather than federal copyright law, may provide a cause of action where an alien's copyrights are infringed overseas. For example, if a British record company held copyrights to music that was infringed via a Chinese website,¹³⁰ the record company may bring an ATS action against the website. Because the infringing conduct would have occurred outside the United States, the ATS may prove an attractive enforcement tool in light of the ineffectiveness of federal law.¹³¹ As another example, if a manufacturing plant in Russia pirated optical discs,¹³² an alien with copyrights to material on such discs may bring an ATS action against the plant. Again, federal law would not help such a plaintiff because of the

¹³⁰ Cf. China targets net pirates, **BBC News**, Apr. 2, 2000, <http://news.bbc.co.uk/2/hi/asia-pacific/698659.stm> (describing a Chinese court's decision to hold a website that offered pirated music for download liable for damages to Chinese and American record companies).

¹³¹ See supra note 129 (noting that federal copyright law is territorial in its application).

¹³² See 2006 Report, supra note 29 (reviewing Russia's progress in enforcing intellectual property rights, yet noting that plants are still used to pirate copyrighted works).

extraterritoriality of the infringement,¹³³ and the ATS would represent a promising alternative.

It may be argued, however, that any international norm of copyright protection must itself be strictly territorial in nature, and thus could not provide the basis for an ATS action in a U.S. court. That is, copyright protections under the Berne Convention¹³⁴ and TRIPS Agreement¹³⁵ apply only territorially, and

¹³³ See, e.g., Subafilms, Ltd. v. MGM-Pathe Communications Co., 24 F.3d 1088, 1095 (9th Cir. 1994) (determining that, whereas purely extraterritorial acts of copyright infringement are not actionable under U.S. copyright law, such acts are not made actionable in the event they receive domestic authorization).

¹³⁴ See Kathleen Patchel, Choice of Law and Software Licenses: A Framework for Discussion, 26 **Brooklyn J. Int'l L.** 117, 148 (2000) (noting that Berne's protection of intellectual property rights, as reflected in the principle of "national treatment," is territorially limited); Graeme W. Austin, Domestic Laws and Foreign Rights: Choice of Law in Transnational Copyright Infringement Litigation, 23 **Colum.-VLA J.L. & Arts** 1, 25 (describing the Berne Convention as resting on assumptions of territorial limitation).

¹³⁵ See Matthew Kramer, Comment, The Bolar Amendment Abroad: Preserving the Integrity of American Patents Overseas After the

therefore any principle of customary international law derived from those treaties must also be territorial in application. However, even if the normative principle of copyright protection to be drawn from Berne and TRIPS is strictly territorial, an alien may still use the ATS to enforce that norm in U.S. court. The reason why is the recognized extraterritorial operability of the ATS.¹³⁶ Because the ATS concerns only the tort claims of aliens, the alleged tortious conduct often occurs outside of the United States.¹³⁷ Indeed, (sea-based) piracy, a quintessential ATS claim according to the Sosa court, occurs on the open seas rather than on U.S. territory.¹³⁸ Thus, if the principle of

South African Medicines Act, 18 **Dick. J. Int'l L.** 553, 572

(2000) (describing the TRIPS framework as "hyper-territorial" in character).

¹³⁶ See Donovan and Roberts, supra note 23, 146 (recognizing that the ATS is an extraterritorial statute, and permits so-called "universal jurisdiction").

¹³⁷ See, e.g., Sarei v. Rio Tinto, PLC, 456 F.3d 1069 (9th Cir. 2003) (concerning an ATS action brought by citizens of Papua New Guinea who alleged various violations of international law occurring in Papua New Guinea).

¹³⁸ See United States v. Smith, 18 U.S. 153, 161 (1820) (defining piracy as robbery "upon the sea").

customary international law derived from Berne and TRIPS is territorial, countries with extraterritorial statutes similar to the ATS may be able to serve as a forum for litigation. As it turns out, the ATS is unique to the United States,¹³⁹ and therefore claims of international, extraterritorial copyright infringement may be brought in U.S. courts and perhaps no where else.

B. International, Extraterritorial Copyright Infringement is a Tort and Satisfies the ATS's Second Prong

To assess whether extraterritorial copyright infringement is a tort and thus satisfies the second element of the ATS, the applicable substantive law in ATS litigation must be determined.¹⁴⁰ That is, does the law of the jurisdiction in which the infringement took place govern,¹⁴¹ or does federal statutory

¹³⁹ See Donovan and Roberts, supra note 23, 149 (remarking that no nation has an extraterritorial statute similar to the ATS).

¹⁴⁰ See generally, Party, supra note 88, at 417 (observing that, because customary international law is universally adhered to, and exists apart from domestic law, there are no conflicts of law issues in terms of its substance).

¹⁴¹ Cf. Paul E. Geller, International Copyright: An Introduction, in 1 International Copyright Law and Practice, § 3[1][a][i] (Geller ed., 2006) [hereinafter International Copyright Law and

law, federal common law,¹⁴² state statutory law, or state common law apply?¹⁴³ Or, alternatively, does the law of nations itself provide the cause of action?

The Supreme Court addressed this question in Sosa. It held that the ATS was originally meant to provide the district courts with subject matter jurisdiction, while the common law would provide the cause of action for tort claims.¹⁴⁴ Specifically, the

Practice] (deducing that, pursuant to the principle of "national treatment" under Berne, courts will apply the copyright law of the nation in which the infringement occurred (implicitly assuming the suit was brought in that nation)).

¹⁴² See generally Wheaton v. Peters, 33 U.S. 591, 661-62 (1834) (determining that there is no common law copyright, and thus the federal copyright statute must determine issues of copyright infringement).

¹⁴³ See generally id. (favoring the federal copyright statute to a state or federal common law of copyright); Jogi, 425 F.3d at 373 (expressing relief that the plaintiff's claim arose under a treaty, rather than customary international law, because the latter is difficult to characterize as either federal common law or state common law).

¹⁴⁴ See Sosa, 542 U.S. at 724 (outlining the original understanding of the ATS, under which the common law was to

federal common law was to supply the substantive legal basis¹⁴⁵ for claims under the ATS.¹⁴⁶

Following Sosa, courts have often avoided discussing the application of federal common law, and have summarily treated causes of action as either torts or non-torts.¹⁴⁷ Although one could argue that, if the law of nations is an integral component

provide the cause of action for ATS claims).

¹⁴⁵ See generally International Copyright Law and Practice, supra note 141, at 3[1][a][i] (expressing the view that, if an alien brought a claim directly under a treaty, such as the Berne Convention or the TRIPS Agreement, rather than under customary international law, the law of the nation in which the infringement occurred would provide the substantive standard and not the federal common law).

¹⁴⁶ Sosa, 542 U.S. at 732. See also Sarei, 456 F.3d 1069 (applying the doctrine of vicarious liability in an ATS action as a matter of federal common law).

¹⁴⁷ See, e.g., Abdullahi, 2005 U.S. Dist. LEXIS 16126, at *19 (classifying without discussion plaintiffs' claims of injections of an experimental antibiotic as torts); Arndt, 342 F. Supp. 2d at 138 (deciding without analysis that "conversion" is a tort under the ATS).

of the federal common law,¹⁴⁸ the international community must, therefore, recognize particular conduct as tortious in order to satisfy the ATS's second element,¹⁴⁹ courts have simply not addressed this issue.¹⁵⁰ Nevertheless, it appears nearly certain that courts determine whether particular conduct is tortious by

¹⁴⁸ See Kane v. Winn, 319 F. Supp. 2d 162, 200 (D. Mass. 2004)

(stating that normative international law is binding in U.S. courts as a component of the federal common law); Leading Case: B. Alien Tort Statute, 118 **Harv. L. Rev.** 446, 453 (2004)

[hereinafter Harvard Leading Case] (regarding Sosa as consistent with the post-Erie Railroad Co. v. Tompkins view that customary international law is included in the federal common law).

¹⁴⁹ See generally International Copyright Law and Practice, supra note 141, at 1-FRA § 8[3][a] (describing the infringement of economic copyrights in France as a tort under the civil law); International Copyright Law and Practice, supra note 141, at 2-NETH § 8[1][c][iii][A] (noting that the plaintiffs advanced tort claims of contributory infringement under Dutch law against defendants who sold devices meant to circumvent the protections on copyrighted software).

¹⁵⁰ See infra note 145 (discussing cases in which conduct has been deemed tortious or non-tortious without to some form of international consensus on such a classification).

reference to traditional principles of American tort law, rather than to some form of international consensus on the issue. After all, if courts were applying foreign law to assess the tortious quality of infringing actions, they would likely acknowledge their doing so.¹⁵¹

In terms of copyright infringement, there is no precedent under the federal common law or any other body of law holding that international, extraterritorial copyright infringement is a tort. This is not surprising because courts have never addressed this issue. Unless and until an alien plaintiff advances such a claim, the federal common law will not have a chance to incorporate or reject it. Nevertheless, international, extraterritorial copyright infringement should constitute a tort

¹⁵¹ Cf. Exxon Mobil Corp., 393 F. Supp. 2d at 24 (determining without international reference that the plaintiffs' claims - of genocide, torture, crimes against humanity, arbitrary detention, extrajudicial killing - "plainly" satisfied the ATS's second element); Arndt, 342 F. Supp. 2d at 138 (regarding the plaintiff's claims, including "conversion," as torts, without any reference to non-American law); Trans-Continental Inv. Corp. S. A. v. Bank of Commonwealth, 500 F. Supp. 565, 570 (D. Cal. 1980) (conceding that "fraud is a universally recognized tort" without reference to international standards).

under the federal common law.

First, under state common law, copyright infringement has traditionally been deemed a tort.¹⁵² Although the law of state common law copyrights has been preempted in part by the Copyright Act of 1976,¹⁵³ it remains partially applicable today¹⁵⁴

¹⁵² De Gette v. Mine Co. Restaurant, Inc., 751 F.2d 1143, 1145 (10th Cir. 1985); MCA, Inc. v. Wilson, 677 F.2d 180, 186 (2d Cir. 1981); Bangor Punta Operations, Inc. v. Universal Marine Co., 543 F.2d 1107, 1109 (5th Cir. 1976); Fenton McHugh Productions, Inc. v. WGN Continental Productions Co., 105 Ill. App. 3d 481 (Ill. App. Ct. 1982); Frankel v. Irwin, 34 F.2d 142, 143 (D.N.Y. 1918).

¹⁵³ See 17 U.S.C. § 301(a) (providing that federal copyright preemption occurs with respect to state rights that are (1) equivalent to federal rights granted under 17 U.S.C. § 106, and (2) that overlap with copyrightable subject matter as provided by 17 U.S.C. §§ 102, 103, so long as the work at issue is "fixed in a tangible medium of expression"); see also Nimmer, supra note 100, 1.01[B] (restating the two requirements for federal preemption, and suggesting that Congress fell short of its goal of eliminating any "vague borderline areas between State and Federal" copyright provisions).

¹⁵⁴ Cf. Capitol Records, Inc. v. Naxos of Am., Inc., 4 N.Y.3d

and provides a doctrinal basis from which the federal common law may draw in characterizing extraterritorial infringement.

Moreover, copyright infringement is considered a tort under the modern federal copyright statute.¹⁵⁵ Thus, if particular infringing actions constitute a tort under state common law and federal statutory law, it would seem incongruous for the federal common law to treat them otherwise. That is, if the only difference between a claim of extraterritorial infringement and a claim of infringement occurring in the United States is territoriality, it would seem illogical to classify the same

540, 559-60 (2005) (holding that sound recordings fixed before February 15, 1972, are entitled to copyright protection under New York's common law until 15, 2067, the date of federal statutory preemption).

¹⁵⁵ Salton, Inc. v. Philips Domestic Appliances & Pers. Care B.V., 391 F.3d 871, 877 (7th Cir. 2004), citing Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343, 360 (2d Cir. 2000); Costello Pub. Co. v. Rotelle, 670 F.2d 1035, 1043 (D.C. Cir. 1981); see also Nimmer, supra note 100, 14.04[E][2][d] (characterizing the owner of two television stations that committed copyright infringement by airing a television program as a joint tortfeasor with respect to each station).

underlying infringing actions differently.¹⁵⁶

It may be argued, however, that the federal common law cannot be the doctrinal basis for a claim of international, extraterritorial copyright infringement, because copyright protection is grounded in statute rather than the common law.¹⁵⁷ If a common law of copyright were recognized, therefore, the 1976 Copyright Act would be effectively evaded.¹⁵⁸ The problem with this argument is that it fails to distinguish between

¹⁵⁶ Cf. Sosa, 542 U.S. at 732 (citing United States v. Smith, where the court approved of Congress borrowing the definition of piracy from the law of nations, as a case that contained a sufficiently well-defined claim of customary international law).

¹⁵⁷ See Wheaton v. Peters, 33 U.S. 591, 661-62 (1834) (finding that there was no basis in the federal, or Pennsylvania, common law, for copyright protection of published works); see also, **Intellectual Property Stories** 66 [hereinafter IP Stories] (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2006) (noting that, under Wheaton, copyright protection is purely statutory after an author has first published his works).

¹⁵⁸ Cf. Nimmer, supra note 100, 1.01[A] (noting that, between Wheaton in 1834 and passage of the Copyright Act in 1976, state common law governed copyrights of unpublished works, and federal statutory law governed copyright of published works).

causes of action that arise within the domestic common law, and causes of action that arise as customary international law and are imported into domestic common law.¹⁵⁹ Surely, the Copyright Act has displaced most of the state common law of copyright, however, the same cannot be said for the international norm of copyright protection. First, such a norm would be federal rather than state in nature, and thus would not face the same preemption problems faced by state common law under the 1976 Copyright Act.¹⁶⁰ Second, federal copyright law is strictly territorial, and thus does not apply to acts of infringement occurring outside of the United States.¹⁶¹ Therefore, because the rights protected by federal copyright law are not equivalent to

¹⁵⁹ Cf. Sosa, 542 U.S. at 732 (describing the standard by which novel claims of customary international law may be evaluated in order to become part of the federal common law).

¹⁶⁰ See Sosa, 542 U.S. at 745 (Scalia, J., concurring) (recognizing that “a judicially created federal rule based on international norms would be supreme federal law,” and could trump inconsistent state law); see also U.S. Const. Art. VI, Cl. 2 (providing that federal law “shall be the supreme Law of the Land”).

¹⁶¹ See supra note 129 (describing the strictly territorial nature of the Copyright Act).

those protected by normative international law, the latter may escape federal preemption.¹⁶² Third, to the extent the above argument focuses directly on the federal common law, and posits that Wheaton v. Peters expressly denied a federal common law of copyright, it rests on a weak foundation. The Wheaton court not only declined to apply a federal common law of copyright; it denied the existence of the federal common law.¹⁶³ Thus, given that ATS claims that invoke the law of nations necessarily rest upon the federal common law,¹⁶⁴ Wheaton cannot convincingly foreclose a federal common law of copyright.¹⁶⁵ Not surprisingly, Wheaton's wholesale denial of the federal common law did not go further to suggest that, if there were a federal common law,

¹⁶² Cf. Nimmer, supra note 100, 1.01[B][1] (noting that copyright laws are not preempted by the Copyright Act if they require "qualitatively" different elements to state a cause of action).

¹⁶³ See Wheaton, 33 U.S. at 658 (finding it "clear" that there is no federal common law, and that the only sources of federal law are the Constitution and federal statutes).

¹⁶⁴ See supra note 144 (providing that the federal common is to supply the substantive legal basis of ATS actions).

¹⁶⁵ See IP Stories, supra note 157, 67 (noting that Justice McLean, writing for the majority in Wheaton, provided an assessment of federal common law that "is, at best, suspect").

copyright protections would not be a part of it. Finally, as the law of (sea-based) piracy demonstrates, the federal common law and a federal statute may coexist even if they prohibit identical conduct.¹⁶⁶ In the case of international norms of copyright protection, therefore, the fact that U.S. law also protects copyrights should not bar the federal common law from incorporating similar protections.

C. International, Extraterritorial Copyright Infringement is a Violation of The Law of Nations and Satisfies the ATS's Third Prong

Customary international law protects the copyrights of aliens against extraterritorial infringement.¹⁶⁷ Specifically,

¹⁶⁶ Compare 18 U.S.C. § 1651 (2006) (outlawing "the crime of piracy as defined by the law of nations") with Sosa, 542 U.S. at 724 (recognizing piracy, under the law of nations, as a valid component of the federal common law for purposes of bringing an ATS action).

¹⁶⁷ See International Copyright Law and Practice, supra note 141, at § [2][a] (providing the basis for a different approach toward an infringement action under the ATS. In a country in which treaties are self-executing, such as Germany, copyright infringement occurring in Germany could be considered to violate the Berne Convention and TRIPS Agreement. If so, the plaintiff could possibly bring an ATS action in the United States and

through widespread adherence to multilateral treaties such as the Berne Convention and the TRIPS Agreement, the community of nations has recognized¹⁶⁸ and enforced¹⁶⁹ a custom¹⁷⁰ that protects the copyrights of aliens.

In order for a legal principle to become customary international law, three elements must generally be established: the principle must (1) be of mutual, rather than several, concern to the community of nations, and (2) be universally abided by (3) out of a sense of legal obligation.¹⁷¹

bypass the difficulties of articulating normative international law by asserting a treaty violation instead); see also Jogi, 425 F.3d at 373 (observing that, because the plaintiff's claim arose under the Vienna Convention rather than customary international law, a "knotty question" was be avoided).

¹⁶⁸ See infra section II(C) (2).

¹⁶⁹ See infra section II(C) (3).

¹⁷⁰ Cf. J.H. Reichman, Universal Minimum Standards of Intellectual Property Protection under the TRIPS Component of the WTO Agreement, 29 **Int'l Law.** 345, 347 (1995) (describing the TRIPS Agreement as reflecting "time-tested, basic norms of international intellectual property law" as found in the Berne Convention and other multilateral agreements) (emphasis added).

¹⁷¹ Flores, 414 F.3d at 248-49; Abdullahi, 2005 U.S. Dist. LEXIS

Additionally, as noted above, Sosa requires any claim of customary international law under the ATS to have sufficient international acceptance and specificity.¹⁷² Thus, if the general standard for customary international law is combined with Sosa's requirements, the result is four-part test. Ultimately, ATS claims relying on the law of nations must: (1) be of mutual international concern, (2) be universally abided by (3) out of a sense of legal obligation, and (4) contain the level of specificity required by Sosa. These four requirements are addressed below.

1. Multilateral Copyright Instruments Satisfy the Requirement of Mutual International Concern

International copyright infringement is undoubtedly an issue of mutual, rather than several, concern to the community of nations. The very existence of a "Union for the protection of the rights of authors in their literary and artistic works[,]"¹⁷³ as constituted by the Berne Convention's 162 member nations,

16126, at *27-28; see also infra note 8 (describing the way in which the practice of states may evolve into normative international law).

¹⁷² See supra note 5 (providing the definitional specificity and universal acceptance requirements of Sosa).

¹⁷³ See Berne, supra note 6, art. 1.

establishes that international copyright infringement is an issue of mutual international concern.¹⁷⁴ Similarly, the trade-related overtones of the 149-member TRIPS Agreement,¹⁷⁵ as well as the Agreement's protection of intellectual property, indicate the importance of international copyright protection as a matter of global policy.¹⁷⁶ Indeed, more theoretically, to the extent promoting "dialogue between civilizations, cultures and peoples" is an objective of the community of nations,¹⁷⁷ copyright

¹⁷⁴ Cf. Sarei, 456 F.3d at 1078 (holding that the UNCLOS codifies customary international law because has been ratified by at least 149 nations).

¹⁷⁵ See TRIPS, supra note 7, preamble (declaring that a purpose of the TRIPS Agreement is to "reduce distortions and impediments to international trade, ... promote effective and adequate protection of intellectual property rights, and ... ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade").

¹⁷⁶ See generally WTO | Understanding the WTO - Intellectual property: protection and enforcement, http://www.wto.int/english/thewto_e/whatis_e/tif_e/agrm7_e.htm (last visited Jan. 6, 2007) (linking the international protection of intellectual property to increased technology transfer and societal improvement).

¹⁷⁷ See UNESCO Culture Sector, <http://portal.unesco.org/culture/e>

protection on an international basis serves an important facilitating function toward that end.¹⁷⁸

2. The Universal Acceptance Requirement May be Satisfied Due to the Widespread Ratification of Berne and TRIPS

Any normative principle of international law premised on the international community's acceptance of the Berne Convention and the TRIPS Agreement should have no difficulty meeting the "universal acceptance" requirement.¹⁷⁹ Presently, 162 nations are signatories to the Berne Convention,¹⁸⁰ and 149 have accepted the TRIPS Agreement by virtue of their membership in the WTO.¹⁸¹ Commentators have observed that all of the world's "important"

n/ev.php-URL_ID=2309&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Oct. 18, 2006) (declaring quixotically that "[t]he pursuit of dialogue between civilizations, cultures and peoples is crucial for the future of humanity").

¹⁷⁸ Cf. Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (noting that the purpose of copyright law is to encourage the sharing and dissemination of ideas through a scheme of economic incentives).

¹⁷⁹ Cf. Nimmer, supra note 100, 17.01 (observing that multilateral copyright treaties, like the Berne Convention, have internationalized the practice of copyright law).

¹⁸⁰ See Berne, supra note 6.

¹⁸¹ See TRIPS, supra note 7.

countries adhere to the multilateral treaty framework for copyright protection.¹⁸² In fact, with the exception of Russia,¹⁸³ each member of the United Nations Security Council is a member of both Berne and TRIPS.¹⁸⁴ These two multilateral conventions provide a very strong basis upon which to assert components of normative international law.

Recently, in Sarei v. Rio Tinto, PLC, several plaintiffs sued a mining company under the ATS for various human rights violations, as well as environmental contamination.¹⁸⁵ The Ninth

¹⁸² See Nimmer, supra note 100, 17.01[B][1][a] (commenting that, since the United States in 1989, China in 1992, and Russia in 1995 became parties to the Berne Convention, "all the world's important countries now belong to Berne").

¹⁸³ See Gref reckons on completing Russian-American talks on Russia's WTO accession by end of October, 2006, http://www.wto.org/en/news.asp?msg_id=17999 (last visited Oct. 18, 2006) (providing information regarding Russia's attempts to join the WTO).

¹⁸⁴ See Membership of the Security Council, <http://www.un.org/sc/members.asp> (last visited Jan. 9. 2007) (providing a list of all ten members of the U.N. Security Council).

¹⁸⁵ See Sarei, 456 F.3d at 1073-75 (noting that the plaintiffs' claims covered charged of racial discrimination, environmental

Circuit approved the plaintiffs' environmental claim, which arose under customary international law as reflected by the UNCLOS.¹⁸⁶ The claim was adequate, according to the court, because the UNCLOS was ratified by at least 149 nations, which was "sufficient for it to codify customary international law that can provide the basis of an [ATS] claim."¹⁸⁷ Both Berne and TRIPS have comparable numbers of adhering states,¹⁸⁸ and thus should easily meet the requirement of universal acceptance.

3. Customary International Law is Binding on Signatories and thus Satisfies the Sense of Legal Obligation Requirement

The Berne Convention and TRIPS Agreement impose legal

damages, war crimes, and crimes against humanity).

¹⁸⁶ Id. at 1078. See also United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1245 (providing the full text of the UNCLOS).

¹⁸⁷ Sarei, 456 F.3d at 1078; see also supra note 8 (providing that multilateral agreements may constitute customary international law if they are intended for widespread acceptance and are in fact widely accepted).

¹⁸⁸ See Berne, supra note 6 (providing the official text of the 162-member Berne Convention); TRIPS, supra note 7 (providing the official text of the 149-member TRIPS Agreement).

obligations on their signatory nations.¹⁸⁹ However, because neither the Berne Convention¹⁹⁰ nor the TRIPS Agreement¹⁹¹ is self-executing in the United States, neither is directly binding in American courts.¹⁹² Thus, a plaintiff may not advance an ATS claim of copyright infringement by citing directly to the language of either agreement.¹⁹³ Instead, the plaintiff must

¹⁸⁹ See generally Restatement (Third) of the Foreign Relations Law of the United States § 321 (stating that all multilateral agreements are “binding upon the parties to” them).

¹⁹⁰ See supra note 94 (describing the implementing legislation that stripped the Berne Convention of self-executive operation in the United States).

¹⁹¹ See supra note 103 (outlining the implementing legislation that precluded self-execution for the TRIPS Agreement in the United States).

¹⁹² See Jogi, 425 F.3d at 373 (noting that, if Vienna Convention were non-self-executing, the plaintiff’s claim based directly on that treaty would fail); Restatement (Third) of the Foreign Relations Law of the United States § 111(3) (noting that U.S. courts are not bound by “non-self-executing” multilateral agreements unless such agreements have been legislatively implemented).

¹⁹³ See generally 28 U.S.C. § 1350 (providing subject matter

argue that Berne, TRIPS, and other international copyright agreements represent a codification of customary international law, under which international copyright infringement is prohibited.¹⁹⁴

Thus, to satisfy the legal obligation requirement of customary international law, the plaintiff must argue that the international norm prohibiting copyright infringement is internationally binding.¹⁹⁵ There is an obvious circularity problem, however, in demonstrating that a new principle of customary international law is binding.¹⁹⁶ That is, how could one

jurisdiction for aliens' tort claims that amount to violations of U.S. treaties).

¹⁹⁴ Cf. Sarei, 456 F.3d at 1078 (holding that the plaintiffs' UNCLOS claim may obtain ATS jurisdiction as a matter of customary international law, without discussing whether the UNCLOS is a self-executing treaty).

¹⁹⁵ See supra note 155 (providing the standard for claims of customary international law, which includes the legal obligation requirement).

¹⁹⁶ See Joshua Ratner, Back To The Future: Why a Return to the Approach of the Filartiga Court is Essential to Preserve the Legitimacy and Potential of the Alien Tort Claims Act, 35 Colum. J.L. & Soc. Probs. 83, 104 (2002) (noting that norms are only

say that a principle is binding if no one has ever tried to enforce it? Therefore, it is no wonder that the Sosa court, when providing the standards for new ATS claims, did not impose a requirement that such claims be demonstrably binding.¹⁹⁷

Essentially, determining whether a claim of international, extraterritorial copyright infringement qualifies as a principle of customary international law will first require the issue to be resolved in court. Thus, Sosa is best read as imposing only specificity-of-definition and universality-of-acceptance standards, rather than an additional "legally binding" requirement.

4. Sosa's Specificity Requirement May be Satisfied in Light of Post-Sosa Litigation

In contrast to the previous three requirements, the specificity requirement, as established by Sosa, requires a more thorough analysis of the proposed characterization of normative international law. Indeed, this requirement has caused courts to

"obligatory" for states once they have already been established as jus cogens or customary international law).

¹⁹⁷ See supra note 5 (outlining Sosa's definitional specificity and universal acceptance requirements for new ATS claims based upon the law of nations).

dismiss ATS claims in numerous cases.¹⁹⁸ Nevertheless, the global norm prohibiting the infringement of aliens' copyrights is defined with adequate specificity to overcome the definitional standards imposed by Sosa.¹⁹⁹

Sosa demands that any prospective claim of modern customary international law have as much specificity as the three 18th century examples to which Blackstone referred.²⁰⁰ The Sosa court did not, however, offer much guidance as to how a modern principle of normative international law could compare to

¹⁹⁸ See, e.g., Exxon Mobil Corp., 393 F. Supp. 2d at 24 (holding that "sexual violence" failed to measure up as sufficiently specific and accepted to form a principle of normative international law under the ATS); Abdullahi, 2005 U.S. Dist. LEXIS 16126, at *37-38 (rejecting the plaintiffs' ATS claims under the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights as insufficiently specific).

¹⁹⁹ See generally supra note 5 (describing Sosa's specificity and universal adherence requirements for new ATS claims based upon the law of nations).

²⁰⁰ See supra note 5 (providing the two standards imposed by the Sosa court for new ATS claims).

doctrinally dissimilar principles from the 18th century.²⁰¹

Nevertheless, ATS cases that have arisen after Sosa was decided provide illumination along the pathway of customary international law.

In Sarei v. Rio Tinto, PLC²⁰² several plaintiffs successfully brought ATS claims against two corporations alleging violations of the UNCLOS.²⁰³ According to the Ninth Circuit, the UNCLOS constituted customary international law because of its widespread international ratification.²⁰⁴ Just like the UNCLOS, the Berne Convention²⁰⁵ and TRIPS Agreement²⁰⁶

²⁰¹ See Harvard Leading Case, supra note 148, at 454 (noting that Sosa's specificity and acceptance requirements are both vague, and potentially difficult to apply).

²⁰² See supra note 67 (providing a factual outline of the case).

²⁰³ See Sarei, 221 F. Supp. 2d at 1161-62; see also supra note 68 (providing the official text of the UNCLOS).

²⁰⁴ See id. (stating that, while the United States has not yet ratified the UNCLOS, it has signed it, and that the UNCLOS's level of international acceptance qualifies it a principle of customary international law).

²⁰⁵ See Berne, supra note 6, art. 36 (providing that each signatory state "undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application

call for adhering states to conform their laws to certain standards, rather than regulate private conduct.²⁰⁷ Therefore, upon a quick reading, neither the UNCLOS, Berne, nor TRIPS seemingly provide any enforceable rights to private parties as a matter of normative international law.²⁰⁸ Nonetheless, the UNCLOS's requirements that adhering states adopt laws prohibiting environmental contamination²⁰⁹ did indeed form the

of this Convention." Upon each country's accession to the Convention, the country must "be in a position under its domestic law to give effect to the provisions of this Convention."

²⁰⁶ See TRIPS, supra note 7, art. 1 (providing that signatory states "shall give effect to the provisions" of the TRIPS Agreement in a manner consistent with their domestic law).

²⁰⁷ See supra note 94 (outlining the Berne Convention Implementation Act, under which no private party shall have a cause of action); supra note 103 (describing the implementing legislation of the WTO agreements, including TRIPS, under which private causes of action are denied).

²⁰⁸ Cf. Sosa, 542 U.S. at 727 (expressing concern about the "possible collateral consequences" of creating private rights of action, derived from customary international law).

²⁰⁹ See UNCLOS, supra note 68 (describing the requirements

basis of a claim of customary international law in Sarei by private plaintiffs against two private defendants.²¹⁰ Evidently, the UNCLOS's requirements for signatory states reflect an international condemnation of the underlying conduct that was prohibited on a domestic basis, and it was that condemnation that constituted a principle of customary international law.²¹¹

In precisely the same manner, Berne and TRIPS, by their terms, impose requirements on adhering states rather than govern private conduct.²¹² Just as the UNCLOS's implicit condemnation of environmental contamination was adequate to form a principle of customary international law upon which private litigants could rely, so should be the implicit condemnation of copyright infringement reflected in Berne and TRIPS.²¹³

imposed upon signatory states by the UNCLOS).

²¹⁰ Sarei, 221 F. Supp. 2d at 1161-62.

²¹¹ Cf. Sarei, 456 F.3d at 1078 (noting that the UNCLOS's baseline provisions reflect principles of customary international law).

²¹² See supra note 190 (referring to the state-oriented, rather than individual-oriented, character of Berne and TRIPS).

²¹³ Cf. infra note 203 (describing the private rights that are implicit in the Berne Convention's provisions); infra note 204 (referring to the "rights of authors" pursuant to the TRIPS

In another post-Sosa case, Jogi v. Voges,²¹⁴ a seemingly state-oriented (rather than individual-oriented) treaty was found to provide a private litigant with a cause of action.²¹⁵ While in prison, the plaintiff was removed from the United States and sent to India, his homeland.²¹⁶ The plaintiff asserted that, because he was not advised of his rights under the Vienna Convention²¹⁷ to contact the Indian consulate for assistance, the law enforcement officers who dealt with him tortiously violated his rights under international law.²¹⁸ The court held that, while the Vienna Convention is mainly an inter-state treaty, Article 36 provides detained nationals with private rights of consular notification.²¹⁹ The court's decision relied principally on

Agreement).

²¹⁴ Jogi, 425 F.3d 367.

²¹⁵ See id. 425 F.3d at 382 (holding that while "most parts of the Vienna Convention address only state-to-state matters, Article 36 confers individual rights on detained nationals").

²¹⁶ Jogi, 425 F.3d at 369-70.

²¹⁷ See Vienna Convention, supra note 77 (providing the official text of the treaty).

²¹⁸ Jogi, 425 F.3d at 369-70.

²¹⁹ Jogi, 425 F.3d at 382.

specific language of Article 36 that implied private rights.²²⁰

Analogously, Berne and TRIPS both single out private rights in exactly the same manner as the Vienna Convention. First, it is worth noting that Berne and TRIPS are treaties relating to “copyrights,” and as such, inherently deal with private rights in a way the Vienna Convention does not.²²¹ As for the substantive provisions of Berne and TRIPS, Article 1 of Berne states that the group of nations adhering to it form a “Union for the protection of the rights of authors in their literary and artistic works.”²²² Article 2 provides that copyright protections granted by signatory states, pursuant to Berne, “shall operate for the benefit of the author....”²²³ Under Article 5, “[a]uthors shall enjoy ... the rights which [other

²²⁰ See supra note 80 (describing how, under Article 36 of the Vienna Convention, consular authorities must receive notification of a detained national’s detention upon request, and that the arresting nation shall notify the detained individual of his rights).

²²¹ See id. (characterizing the Vienna Convention as concerned with consular relations and functions, the rights of consular personnel, and communications with host governments).

²²² See Berne, supra note 6, art. 1.

²²³ See Berne, supra note 6, art. 2(6).

signatory states'] laws do now or may hereafter grant ..., as well as the rights specially granted by this Convention."²²⁴ There are numerous similar provisions in Berne.²²⁵ Likewise, Article 3 of TRIPS provides that signatory states "shall accord to the nationals" of other signatory states copyright protection equal to that granted to its own nationals.²²⁶ Under Article 11, signatory states "shall provide authors ... the right to authorize or to prohibit the commercial rental ... of originals or copies of their copyright [sic] works."²²⁷ Article 14 grants "[p]roducers of phonograms ... the right to authorize or prohibit the direct or indirect reproduction of their phonograms."²²⁸ Additionally, decisions from WTO-administered dispute settlement Panels have referred to both Berne and TRIPS

²²⁴ See Berne, supra note 6, art. 5(1).

²²⁵ See, e.g., Berne, supra note 6, art. 6bis(1) (providing that, in addition to an "author's economic rights," he "shall have the right to claim authorship of the work" and protect against alterations made to it); see also Berne, supra note 6, art. 7(1) (determining the duration of an author's copyright protection as lasting 50 years after his death).

²²⁶ See TRIPS, supra note 7, art. 3(1) (emphasis added).

²²⁷ See TRIPS, supra note 7, art. 11 (emphasis added).

²²⁸ See TRIPS, supra note 7, art. 14(2) (emphasis added).

as treaties that confer private rights.²²⁹ Therefore, if a treaty concerned mostly with state-to-state conduct such as the Vienna Convention can be construed to generate private rights of action because of a few select references to the rights of individuals, the Berne Convention and TRIPS Agreement, which inherently concern private rights and refer to such rights repeatedly, should likewise be read to create private rights of action.

IV. Recommendations

If indeed a claim of international, extraterritorial copyright infringement may obtain ATS jurisdiction, determining the likely consequences becomes important.²³⁰ A wide range of

²²⁹ See Panel Report, United States - Section 110(5) of the US Copyright Act, WT/DS160/R (June 15, 2000) (noting that in dispute settlement proceedings before the WTO, the complaining party has the burden of supporting its claims of violations of "the basic rights that have been provided under the copyright provisions of the TRIPS Agreement," and under the Berne Convention as incorporated by TRIPS. The Panel further recognized that Berne created "exclusive rights" for "[a]uthors of dramatic, dramatico-musical and musical works[.]"

²³⁰ Cf. Sosa, 542 U.S. at 726 (noting that courts should be cautious in expanding the substantive content of the federal

opinion and experience is necessary to properly assess the impact of such jurisdiction. To perform the assessment, the U.S. Copyright Office should work closely with Congress to receive and consider the views of all interested parties.

A. The Intellectual Property Litigation Context

The effects of ATS jurisdiction within the context of intellectual property litigation should undergo careful assessment. The views of American artists, businesses, consumers, state and federal courts, state and federal legislatures, and executive agencies are all relevant and potentially meaningful.²³¹ The Copyright Office should have the

common law, particularly in the area of foreign affairs, without guidance from the legislature).

²³¹ Cf. Eight Charged with Copyright Infringement for Distributing the Latest Star Wars Movie that was..., <http://www.usdoj.gov/criminal/cybercrime/valenteCharge.htm> (last visited Jan 9, 2007) (detailing a criminal prosecution of eight individuals who illegally copied a movie, in which the parties of concern were the production company, websites, the Federal Bureau of Investigation, and the U.S. Department of Justice); Recording Industry Association of America, <http://www.riaa.com/issues/piracy/riaa.asp> (last visited Nov. 2, 2006) (describing the recording industry's interest in curbing music "piracy" and

responsibility of collecting the views of such parties, and orchestrating a study on the impact of ATS jurisdiction for international copyright infringement.²³² Only with the benefit of the opinions and recommendations of such parties may the Copyright Office make thoughtful recommendations about the future utility of the ATS as a jurisdictional basis for international copyright litigation.

B. The Economic Context

The Copyright Office should also explore the economic consequences of ATS jurisdiction for claims of international

outlining steps it has currently undertaken in pursuance thereof); Motion Picture Association of America, <http://www.mpa.org/piracy.asp> (last visited Nov. 2, 2006) (providing detailed information about global "piracy" of movies).

²³¹ See generally Background, infra Part II.D (describing the potential adverse economic effects of international copyright infringement).

²³² Cf. U.S. Copyright Office - Reports, <http://www.copyright.gov/reports/> (last visited Nov. 2, 2006) (providing a list of studies and reports that the Copyright Officer presently produces, including annual reports, strategic plans, and more particularized reports).

copyright infringement.²³³ In this connection, the views of the Department of Commerce, the Federal Trade Commission, the Treasury Department, and various business interest groups are important. Additionally, several business organizations that market copyrighted products have compiled substantial economic data related to the infringement of copyrights, which may prove probative.²³⁴ Among other issues, the Copyright Office should consider whether the economic benefits of permitting ATS jurisdiction outweigh the costs such jurisdiction would impose as a result of higher levels of litigation.

C. The Artistic Community

Thirdly, the Copyright Office should solicit the perspectives of those in the artistic communities whose work is

²³³ See Background, infra Part II.D (describing the potential adverse economic effects of international copyright infringement).

²³⁴ See, e.g., supra note 112 (providing economic data that was compiled by the Motion Picture Association relating to infringement of movies overseas); supra note 113 (summarizing the economic consequences of copyright infringement for the music recording industry, as supplied by the Recording Industry of America).

both protected and advanced by United States copyright law.²³⁵ These individuals, and the groups that represent them, could offer important recommendations about the benefits of permitting the ATS to serve as a jurisdictional basis for claims of international copyright infringement. Similarly, international organizations that perform work in cultural fields may provide interesting insights about such jurisdiction from their own unique perspectives.²³⁶

D. Collaboration with Congress

Once the Copyright Office completes its collection and assessment of the information submitted to it by interested individuals and entities, the Copyright Office should

²³⁵ Cf. NAEA | About Us, <http://www.naea-reston.org/aboutus.html> (last visited Nov. 2, 2006) (describing the history and purpose of the 59-year old artists' organization, the National Art Education Association); WAA home page, <http://www.artuk.co.uk/asoc/waa.htm> (last visited Nov. 2, 2006) (outlining the mission of the World Artists Association, a global artists' union).

²³⁶ See generally Fact Sheet No.16 (Rev.1), The Committee on Economic, Social and Cultural Rights, <http://www.unhchr.ch/html/menu6/2/fs16.htm> (last visited Jan. 9, 2007) (describing the efforts and objectives related to cultural progress from a subsidiary organization within the U.N.).

participate in a policy-making process led by Congress. The Copyright Office should submit its final assessment to Congress in an effort to provide needed insight in the event Congress decides that legislative action is needed.²³⁷

Congress may act upon the Copyright Office's final assessment in various ways. For instance Congress could amend the ATS to expressly prohibit its use in international copyright litigation.²³⁸ This would be a very narrowly conceived solution. By addressing only copyright litigation and nothing else, Congress may appear too selective in its legislation. Further, doing so would undermine the jurisprudential goal of ensuring predictability in the law.²³⁹

Another alternative is to amend the ATS to declare that its reference to the "law of nations" excludes customary

²³⁷ See generally Sosa, 542 U.S. at 731 (stating that Congress's views are welcome on the subject of the ATS, particularly because of the statute's foreign policy implications).

²³⁸ Cf. id. (noting that Congress may "occupy the field" of the ATS, and thereby remove the law of nations as a basis for claims made thereunder).

²³⁹ Cf. Garvey, Inc. v. United States, 726 F.2d 1569 (Fed. Cir. 1984) (stating that, at least as a matter of personal tax liability, Congress favors predictability in the law).

international law based upon widespread ratification of multilateral agreements.²⁴⁰ This would have the effect of denying ATS jurisdiction for international copyright infringement claims, but would have collateral effects as well. Denying ATS jurisdiction on the basis of customary international law premised on multilateral agreements would certainly implicate other agreements that may otherwise give rise to jurisdiction under the ATS.²⁴¹

Alternatively, Congress may decide to strike the ATS from the United States Code altogether.²⁴² Doing so may not be as drastic as it sounds, because the federal question jurisdiction statute already provides jurisdiction for violations of

²⁴⁰ See generally Sarei, 221 F. Supp. 2d at 1161 (holding that the UNCLOS, a multilateral agreement, represents customary international law).

²⁴¹ See, e.g., Sarei, 456 F.3d at 1078 (determining that the UNCLOS, a multilateral agreement, is a source of customary international law that may provide private litigants the basis for an ATS action).

²⁴² Cf. Sosa, 542 U.S. at 731 (observing that Congress may “explicitly” remove the law of nations as a basis for ATS claims).

customary international law.²⁴³ In fact, the only function of the ATS is perhaps to make clear federal court jurisdiction over claims of customary international law.²⁴⁴

Whatever course of action Congress ultimately takes, the critical prerequisite to any congressional action is a complete process of information gathering led by the Copyright Office. The nature of an ATS claim of international, extraterritorial copyright infringement is quite complex, and the consequences of permitting such claims is uncertain.²⁴⁵ Only after gathering and

²⁴³ See 28 U.S.C. § 1331 (providing federal district courts with jurisdiction over civil claims “under the Constitution, laws, or treaties of the United States; see also Sosa, 542 U.S. at 745 (Scalia, J., concurring) (warning that the ATS may become surplusage under the majority’s analysis, because customary international law may rely on ordinary federal question jurisdiction if it is integrated into the federal common law).

²⁴⁴ See Jogi, 425 F.3d at 373 (commenting that there is complete overlap between “treaty” both “law of nations” jurisdiction under the ATS and the federal question statute, and that the only point of “law of nations” jurisdiction under the ATS is possibly to make clear that such jurisdiction actually exists).

²⁴⁵ See supra note 237 (noting that, without guidance from Congress, expanding the federal common law to include new ATS

considering a wealth of information from those in the copyright field, may Congress properly decide among the alternatives described above.

V. Conclusion

This Comment assesses the potential for the Alien Tort Statute ("ATS") to serve as a jurisdictional basis for claims of international, extraterritorial copyright infringement. It finds that the ATS may successfully provide jurisdiction for such claims, because of the high degree of specificity with which copyright infringement is defined by multilateral agreements and the widespread acceptance of such agreements by the international community. Consequently, claims of international copyright infringement may pass the two tests established by the Supreme Court in Sosa, and invoke subject matter jurisdiction in federal district courts. Given that the ATS may provide jurisdiction for claims of international, extraterritorial copyright infringement, the next step is assessing the likely consequences. A public policy inquiry, spearheaded by the Copyright Office, must address whether the ATS should serve as a jurisdictional basis for claims of international, extraterritorial copyright infringement. The Copyright Office

claims should proceed cautiously).

should solicit the views of all interested parties, including those with particularly important perspectives from the legal, commercial, and artistic fields. Only with the benefit of the insights from these groups may the Copyright Office thoughtfully determine whether to maintain the ATS as a source of jurisdiction for international, extraterritorial copyright litigation.