

Notes

At Sea, Anything Goes? Don't Let Your Copyrights Sail Away, Sail Away, Sail Away*

I. Introduction

The cruise ship industry is big business for America. In 2013, the cruise ship industry contributed approximately \$44.1 billion in gross output to the U.S. economy.¹ More comprehensibly, that figure reflects \$20.1 billion of direct spending by cruise lines, their crew members, and their passengers.² Much has already been written about the safety concerns of cruise ship passengers³ and the largely unregulated toll these floating cities take on the environment.⁴ One important harm, however, seems to be missing from the list of evils: copyright piracy on the high seas.

With nearly ten million passengers embarking on cruise ships from U.S. ports each year,⁵ cruise ships work hard to keep passengers—and their wallets—engaged.⁶ Onboard entertainment options usually include a

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1. BUS. RESEARCH & ECON. ADVISORS, THE CONTRIBUTION OF THE NORTH AMERICAN CRUISE INDUSTRY TO THE U.S. ECONOMY IN 2013, at 10 (2014) [hereinafter 2013 CRUISE INDUSTRY CONTRIBUTIONS], available at http://www.cruising.org/sites/default/files/pressroom/US-Economic-Impact-Study-2013Final_20140909.pdf, archived at <http://perma.cc/FQB9-F573>.

2. *Id.* at 8. Direct spending by cruise lines includes “expenditures for headquarters operations, food and beverages provided onboard cruise ships and business services such as advertising and marketing.” *Id.* Direct spending by crew members and passengers includes “a variety of goods and services including clothing, shore excursions and lodging as part of their cruise vacation or as part of a pre- or post-cruise stay.” *Id.*

3. See, e.g., Sarah J. Tomlinson, Comment, *Smooth Sailing? Navigating the Sea of Law Applicable to the Cruise Line Industry*, 14 VILL. SPORTS & ENT. L.J. 127, 131–32 (2007) (describing the body of law governing cruise ships on the high seas and suggesting measures the U.S. government could take to improve passenger safety).

4. See, e.g., Asia N. Wright, Note, *Beyond the Sea and Spector: Reconciling Port and Flag State Control Over Cruise Ship Onboard Environmental Procedures and Policies*, 18 DUKE ENVTL. L. & POL'Y F. 215, 217 (2007) (reviewing the history of cruise ship pollution and sketching the environmental regulations that impact cruise ships).

5. 2013 CRUISE INDUSTRY CONTRIBUTIONS, *supra* note 1, at 7 tbl.ES-3.

6. One career cruise line executive estimated onboard revenue accounted for 30% of cruise line revenue. Fran Golden, *Why Do Cruise Lines Do the Things They Do?*, TRAVELMARKET REP.

casino, bars and lounges, restaurants, spa treatments, theme parties, and production shows.⁷ Two common species of production shows are the Broadway-style revue and the pop music show.⁸ In both formats, the ship's resident cast of hardworking dancers and singers⁹ perform music with popular appeal, likely copyrighted works previously published within the United States. Familiar, popular music is arguably a vital factor in crafting these entertainment options. After all, it stands to reason that if passengers skip the show and retire to their staterooms, the ship's revenue stream retires for the night as well.

If these performances were taking place on land within the United States, U.S. copyright law would clearly require a license for any public performance of a copyrighted work.¹⁰ Once the ship has sailed more than twelve nautical miles from the shore, however, the ship has crossed over into the high seas—the nautical equivalent of the proverbial no-man's land.¹¹ Presumably wishing to challenge such inequitable treatment of copyrighted works on land and at sea, the copyright holders of the musical *Grease* brought suit against several cruise lines for infringement of their work.¹² The cruise lines responded with a straightforward defense: the Copyright Act has no extraterritorial effect and thus could not reach alleged infringements on the high seas.¹³

Given the increasing globalization of world economies,¹⁴ should this still be the case? Should cruise ships continue to be allowed to willfully infringe upon the copyrights of protected works simply because they transport their largely American audiences far enough away from U.S. shores? The current situation is, at least, troubling. This Note offers a

(Feb. 2, 2012), <http://www.travelmarketreport.com/tmrarticledisplay?aid=6861>, archived at <http://perma.cc/739X-2EH8>.

7. E.g., *Onboard Activities*, CARNIVAL, <http://www.carnival.com/onboard.aspx>, archived at <http://perma.cc/MQS4-4WJD>; *Onboard Experience*, NORWEGIAN CRUISE LINE, <http://www.ncl.com/freestyle-cruise/whats-onboard>, archived at <http://perma.cc/7NY-H3SZ>.

8. See, e.g., *What's On Board?*, NORWEGIAN CRUISE LINE, <http://www.ncl.com/cruise-ship/spirit/onboard/entertainment>, archived at <http://perma.cc/5UC8-FJK9> (listing *On Broadway*, a Broadway revue, and *Soul Rockin' Nights*, a rock-and-roll show, among a ship's entertainment options).

9. These resident performers are often recruited through auditions in New York City. See, e.g., *Norwegian Cruise Line – 2015 Open Dance Call*, DARYL EISENBERG CASTING, <http://www.decasting.com/cruise>, archived at <http://perma.cc/SXN4-TKH2> (seeking dancers for an open audition call in New York City).

10. See *infra* subpart II(B).

11. See *infra* notes 61–63 and accompanying text.

12. See *infra* Part III.

13. See *infra* note 96 and accompanying text.

14. Cf. Gregory Swank, Comment, *Extending the Copyright Act Abroad: The Need for Courts to Reevaluate the Predicate-Act Doctrine*, 23 DEPAUL J. ART TECH. & INTELL. PROP. L. 237, 244 (2012) (“As the marketplace becomes more international, the ability to exploit copyrighted material abroad becomes much easier.”).

possible solution, one that stems from a little known exception to the extraterritorial limitations of U.S. copyright—the predicate-act doctrine.¹⁵ In Part II, I begin with a brief explanation of relevant U.S. copyright and licensing provisions, highlighting the unique treatment of musical theater works. In Part III, I recount the only attempt at litigating the issue of copyrights on the high seas in U.S. courts, *Jacobs v. Carnival Corp.*¹⁶ In Part IV, I apply the predicate-act doctrine to the facts of *Jacobs* in hopes of finding a remedy for the injured copyright holders. With this solution in mind, I urge similarly situated copyright holders to raise their objections and judges and legislators to respond with tighter regulation. The cruise ship industry seems to be a continuous series of inequitable loopholes where profits can be exploited with little to no oversight and without regard to injury. The time has come to draw the high-water mark for such unjust practices.

II. Copyright and Licensing of Musical Theater Works

A. *The Copyright Act*

U.S. copyright holders enjoy certain exclusive rights.¹⁷ Article I of the U.S. Constitution charges Congress to regulate and protect these rights.¹⁸ Two such rights relevant to this Note are the right of public performance¹⁹ and the right to prepare derivative works.²⁰ Both of these rights must be understood as terms of art that have been defined within the Copyright Act. First, a public performance, contrary to intuition, is determined according to the audience gathered to view the performance rather than in reference to any particular locale: “To perform or display a work ‘publicly’ means [] to perform or display it in a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.”²¹ Second, a derivative work not only expressly includes a “musical arrangement” but also contemplates “any other form in which a work may be recast, transformed, or adapted.”²² Copyright owners generally enjoy these exclusive rights for a term of the author’s life plus an additional seventy years.²³

15. See *infra* Part IV.

16. No. 06 Civ. 0606(DAB), 2009 WL 856637 (S.D.N.Y. Mar. 25, 2009).

17. 17 U.S.C. § 106 (2012).

18. U.S. CONST. art. 1, § 8.

19. 17 U.S.C. § 106(4).

20. *Id.* § 106(2).

21. *Id.* § 101. Certain transmissions may qualify as public performances as well. *Id.*

22. *Id.*

23. *Id.* § 302(a).

The Copyright Act affords copyright owners various means to enforce these rights. Infringement broadly encompasses “[a]nyone who violates any of the exclusive rights of the copyright owner.”²⁴ Infringers could face liability in both civil actions²⁵ and criminal prosecution.²⁶ Remedies include temporary and final injunctions,²⁷ seizure and destruction of infringing materials,²⁸ and monetary damages.²⁹ A copyright owner may elect to pursue either actual damages or statutory damages.³⁰

If an owner opts for statutory damages, damages are awarded upon the basis of each infringed work rather than for each infringing act.³¹ Under current law, however, if one infringing act draws from multiple independent copyrights, the statutory damage award can be multiplied to reflect the number of independent copyrights.³² For each work infringed, the court is given discretion to award between \$750 and \$30,000.³³ If the copyright owner proves the infringer acted willfully, that ceiling is lifted to \$150,000.³⁴ Although the Copyright Act does not define what constitutes willful infringement, it is generally understood to mean acting “with knowledge that the defendant’s conduct constitutes copyright infringement.”³⁵ Moreover, the Second Circuit—highly regarded for its copyright jurisprudence³⁶—broadens willful infringement to include a reckless disregard for the rights of copyright holders.³⁷ On the other hand, if the infringer is able to prove he was not aware and had no reason to believe such acts constituted infringement, the court has discretion to reduce the statutory award “to a sum of not less than \$200.”³⁸

24. *Id.* § 501(a).

25. *Id.* § 501(b).

26. *Id.* § 506.

27. *Id.* § 502(a).

28. *Id.* § 503.

29. *Id.* § 504.

30. *Id.* § 504(c)(1).

31. *Id.* § 504(c)(1); see 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.04[E][2][a][i] (Matthew Bender rev. ed. 2014) [hereinafter NIMMER ON COPYRIGHT] (quoting a House of Representatives Report as explaining that “a single infringer of a single work is liable for a single amount [in statutory damages] . . . no matter how many acts of infringement are involved”).

32. NIMMER ON COPYRIGHT, *supra* note 31, § 14.04[E][1][a].

33. 17 U.S.C. § 504(c)(1).

34. *Id.* § 504(c)(2).

35. NIMMER ON COPYRIGHT, *supra* note 31, § 14.04[B][3][a] (footnotes omitted); see also *Sony BMG Music Entm’t v. Tenenbaum*, 660 F.3d 487, 507–08 (1st Cir. 2011) (joining the Fourth and Sixth Circuits in concluding “an infringement is willful under § 504 if it is ‘knowing’”).

36. William K. Ford, *Judging Expertise in Copyright Law*, 14 J. INTELL. PROP. L. 1, 41 (2006).

37. *Island Software & Computer Serv., Inc. v. Microsoft Corp.*, 413 F.3d 257, 263 (2d Cir. 2005).

38. 17 U.S.C. § 504(c)(2).

Any copyright holder wishing to enforce his copyrights is encouraged to act quickly. Civil actions must be brought within three years of the infringing act,³⁹ and criminal acts must be prosecuted within five years.⁴⁰

B. *Licensing Dramatic Musical Works*

Musical theater works, such as those works that would appear in a Broadway-style revue onboard a cruise ship, are treated differently than their pop song counterparts. This is due to the enumeration of “dramatic works, including any accompanying music”⁴¹ as distinct and separate from “musical works, including any accompanying words”⁴² within the Copyright Act’s categories of works eligible for protection.⁴³ At the time the Copyright Act was revised in 1976, legislators did not define a dramatic work because they believed its meaning was “‘fairly settled.’”⁴⁴ In his usual pithy manner, Justice Holmes once interpreted a dramatic work (somewhat unhelpfully) to mean “that we see the event or story lived.”⁴⁵ Nimmer has distilled the various case law rulings concerning dramatic works and extracted “two essential elements . . . : (1) that it relate a story, and (2) that it provide directions whereby a substantial portion of the story may be visually or audibly represented to an audience as actually occurring, rather than merely being narrated or described.”⁴⁶ Thus, a court will generally respect operas, operettas, and musical comedies (including Broadway musicals) as dramatic works.⁴⁷

The distinction between dramatic and nondramatic works has far-reaching consequences. The Copyright Act provides that certain performances will be exempt from infringement actions,⁴⁸ but each of these is extended only to *nondramatic* musical works.⁴⁹ Similarly, the three large performing rights organizations—American Society of Composers, Authors, and Publishers (ASCAP); Broadcast Music Incorporated (BMI); and Society of European Stage Authors and Composers (SESAC)—that

39. *Id.* § 507(b).

40. *Id.* § 507(a).

41. *Id.* § 102(a)(3). Under the previous 1909 Copyright Act, this category was termed “dramatico-musical composition.” 1 NIMMER ON COPYRIGHT, *supra* note 31, § 2.06[C].

42. 17 U.S.C. § 102(a)(2).

43. *Id.* § 1.02(a).

44. 1 NIMMER ON COPYRIGHT, *supra* note 31, § 2.06[A].

45. *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 61 (1911).

46. 1 NIMMER ON COPYRIGHT, *supra* note 31, § 2.06[A] (footnote omitted).

47. *See* *April Prods. v. Strand Enters.*, 79 F. Supp. 515, 516 (S.D.N.Y. 1948) (“Operas, operettas and musical comedies are the most usual form of dramatico-musical compositions.” (quoting LEON H. AMDUR, *COPYRIGHT LAW AND PRACTICE* § 20, at 127 (1936) (internal quotation marks))).

48. 17 U.S.C. § 110(2)–(4), (6)–(7).

49. 1 NIMMER ON COPYRIGHT, *supra* note 31, § 2.06[D].

negotiate blanket performance licenses on behalf of copyright holders⁵⁰ do not include any dramatic rights (or “grand rights”) within such licensing schemes.⁵¹ Thus, a blanket license acquired from one of the performing rights organizations will not shield a defendant from liability for infringing upon a dramatic work.⁵²

In the realm of cruise ship entertainment—briefly ignoring any issues of extraterritoriality—the performance rights to a revue of popular music *would* be included under a blanket performance license. But the same rights to a Broadway-style show utilizing characters, costumes, and sets certainly would not.

C. *Extraterritorial Application of the Copyright Act*

The idea that copyright laws do not extend beyond U.S. borders predates even the 1909 Copyright Act.⁵³ Today, this idea is firmly entrenched in copyright jurisprudence: the Copyright Act has no extraterritorial application.⁵⁴

But like most rules, there is an exception: the predicate-act doctrine. If a single act of infringement occurs within the United States, the injured copyright holder may recover for all related damages, including foreign infringements, flowing from that initial infringing act.⁵⁵ In at least one circuit, a plaintiff may even assert an infringement claim based upon a

50. RON SOBEL & DICK WEISSMAN, *MUSIC PUBLISHING: THE ROADMAP TO ROYALTIES* 34 (2008).

51. *About Publishing*, SESAC, <http://www.sesac.com/EDU/Publishing.aspx>, archived at <http://perma.cc/S3QX-6S9F>; *BMI and Performing Rights*, BMI, http://www.bmi.com/licensing/entry/business_using_music_bmi_and_performing_rights, archived at <http://perma.cc/U2Z5-4DW5>; *Common Music Licensing Terms*, ASCAP, <http://www.ascap.com/licensing/termsdefined.aspx>, archived at <http://perma.cc/D9UA-UT45>; see also *United States v. Am. Soc’y of Composers, Authors & Publishers*, No. 41-1395, 2001 WL 1589999, at *2 (S.D.N.Y. June 11, 2001) (defining “right of public performance,” in a suit involving the scope of ASCAP’s licensing abilities, as limited to “the right to perform a work publicly in a nondramatic manner”).

52. See, e.g., *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 511 (9th Cir. 1985) (holding that defendant hotel’s musical tribute to *Kismet* was not covered under the hotel’s blanket ASCAP license).

53. See, e.g., *McLoughlin v. Raphael Tuck & Co.*, 191 U.S. 267, 268, 270 (1903) (affirming a trial court’s determination that a statutory penalty for displaying a false U.S. copyright notice had no extraterritorial application).

54. See, e.g., *Subafilms, Ltd. v. MGM-Pathe Commc’ns Co.*, 24 F.3d 1088, 1095 (9th Cir. 1994) (“[W]e are unwilling to overturn over eighty years of consistent jurisprudence on the extra-territorial reach of the copyright laws . . .”).

55. See *Tire Eng’g & Distrib., LLC v. Shandong Linglong Rubber Co.*, 682 F.3d 292, 307 (4th Cir. 2012) (per curiam) (“Once a plaintiff demonstrates a domestic violation of the Copyright Act, then, it may collect damages from foreign violations that are directly linked to the U.S. infringement.”).

predicate act that would otherwise be time barred under the Copyright Act's statute of limitations.⁵⁶

The predicate-act doctrine is attributed to Judge Learned Hand.⁵⁷ In deciding whether to allow foreign profits to be included in a damages award stemming from the unauthorized domestic copying of a motion picture, Hand wrote:

The Culver Company made the negatives in this country, or had them made here, and shipped them abroad, where the positives were produced and exhibited. The negatives were "records" from which the work could be "reproduced[.]" and it was a tort to make them in this country. The plaintiffs acquired an equitable interest in them as soon as they were made, which attached to any profits from their exploitation, whether in the form of money remitted to the United States, or of increase in the value of shares of foreign companies held by the defendants. . . . [A]s soon as any of the profits so realized took the form of property whose situs was in the United States, our law seized upon them and impressed them with a constructive trust, whatever their form.⁵⁸

Though Hand's rationale is not without its critics,⁵⁹ the predicate-act doctrine seems to be alive and well in American courts.⁶⁰

III. The Controversy: Copyright Protection on the High Seas

Before we dive into the deep waters, we should pause briefly to get our feet wet. The high seas could be regarded as a no-man's land, but it is in fact an everyman's land.⁶¹ The high seas are a residual category, which is

56. *See id.* at 306 ("No court applying the [predicate-act] doctrine has ascribed significance to the timeliness of domestic claims, and we decline to . . . limit its application to cases where a domestic violation is not time barred.").

57. *Id.*

58. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, 52 (2d Cir. 1939).

59. *See, e.g.*, 7 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 25:89 (2014) [hereinafter PATRY ON COPYRIGHT] (attacking Hand's constructive trust idea as "farfetched" and "sophistry"). Patry is highly critical of any intimation of a predicate-act doctrine. *See id.* § 25:90 ("Until an international consensus develops on global jurisdiction . . . U.S. courts should decline the role of world enforcer of Copyright Americana.").

60. *See Tire Eng'g & Distrib.*, 682 F.3d at 307–08 (recognizing the validity of the predicate-act doctrine); *Litecubes, LLC v. N. Light Prods., Inc.*, 523 F.3d 1353, 1371 (Fed. Cir. 2008) (same); *L.A. News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 990–92 (9th Cir. 1998) (same); *Liberty Toy Co. v. Fred Silber Co.*, 149 F.3d 1183 (6th Cir. 1998) (unpublished table decision) (same); *Update Art, Inc. v. Modlin Publ'g, Ltd.*, 843 F.2d 67, 73 (2d Cir. 1988) (same).

61. *See* United Nations Convention on the Law of the Sea art. 87, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS] (guaranteeing that "[t]he high seas are open to all States, whether coastal or land-locked" and granting certain freedoms to "be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas"). Although the United States has not ratified UNCLOS, the United States Supreme Court has acknowledged its authority as "customary international law." *United States v. Alaska*, 503 U.S. 569, 588 n.10 (1992). For a broader discussion of the reluctance on the part of the United States

to say it consists of whatever is left after individual countries have claimed territorial and economic zones.⁶² The United States claims the maximum area allowed by international law: twelve nautical miles from the shore.⁶³ Once a cruise ship passes outside this zone, onboard activities such as bingo, casino games, and gift shops may operate without regard to U.S. law.⁶⁴

While sailing upon the high seas, cruise ships are required to fly the flag of a country of registry,⁶⁵ if for no other reason than to ward off uninvited visitors.⁶⁶ The flag state is charged with oversight and care of a vessel.⁶⁷ Thus, under international law, flag states have exclusive jurisdiction over their flagged vessels while those vessels are sailing upon the high seas.⁶⁸

Because of this exclusive jurisdiction principle, registering a vessel becomes a calculated strategy, rife with abuse. When a ship is registered in a country other than the beneficial shipowner's country, the ship can be characterized as flying a "flag of convenience."⁶⁹ This is especially true of the cruise ship industry: all the major cruise lines, even those that sail year-round from American ports, register their vessels under non-U.S. flags.⁷⁰ Common registries include those of developing nations like Panama, Liberia, Malta, and the Bahamas.⁷¹ Developing nations attract cruise lines to their registries by offering lower tax rates and freedom from restrictive regulatory schemes.⁷² Furthermore, because the flag state economies

to ratify UNCLOS, notwithstanding the United States' leading role in negotiating and drafting its terms, see generally Elizabeth M. Hudzik, Note, *A Treaty on Thin Ice: Debunking the Arguments Against U.S. Ratification of the U.N. Convention on the Law of the Sea in a Time of Global Climate Crisis*, 9 WASH. U. GLOBAL STUD. L. REV. 353, 354–59 (2010).

62. See UNCLOS, *supra* note 61, at art. 86 (applying the high seas provisions only to those parts of the sea "not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State").

63. Proclamation No. 5928, 3 C.F.R. 547 (1988), *reprinted in* 43 U.S.C. § 1331 (2012).

64. See UNCLOS, *supra* note 61, at art. 89 ("No State may validly purport to subject any part of the high seas to its sovereignty.").

65. *Id.* at art. 92.

66. See *id.* at art. 110(d) ("Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship . . . is not justified in boarding it unless there is reasonable ground for suspecting that: . . . the ship is without nationality . . .").

67. *Id.* at art. 94(1).

68. *Id.* at art. 92.

69. Stephen Thomas, Jr., *State Regulation of Cruise Ship Pollution: Alaska's Commercial Passenger Vessel Compliance Program as a Model for Florida*, 13 J. TRANSNAT'L L. & POL'Y 533, 539 (2004).

70. ROSS A. KLEIN, CRUISE SHIP BLUES: THE UNDERSIDE OF THE CRUISE SHIP INDUSTRY 139 (2002).

71. Andrew Schulkin, Note, *Safe Harbors: Crafting an International Solution to Cruise Ship Pollution*, 15 GEO. INT'L ENVTL. L. REV. 105, 115 (2002).

72. See LOUIS B. SOHN & JOHN E. NOYES, CASES AND MATERIAL ON THE LAW OF THE SEA 107 (2004) (pointing out the benefits of "flag of convenience" countries of which shipowners may

depend on the revenue, it stands to reason that a flag state will be less likely to discipline a vessel for fear of losing its business.⁷³ This begs the question: if a port country cannot reach a foreign-flagged vessel, and if a flag state ignores its exclusive right to oversee the vessel's operations, who is left to answer for the vessel's injuries? This conundrum constantly plagues consumers in the cruise line industry.⁷⁴ The litigation story memorialized in *Jacobs v. Carnival Corp.* provides a clear illustration: plaintiffs' rights to recover for their injuries are currently lost at sea.

A. *The Original Complaint*

Early in 2006, a complaint was filed in the Southern District of New York on behalf of the author-composers of the musical *Grease* against several cruise line defendants.⁷⁵ Plaintiffs alleged two counts of copyright infringement: the cruise lines willfully infringed upon their copyrighted works through (1) unlicensed public performances⁷⁶ and (2) alterations and modifications of the protected works.⁷⁷ The suit also sought to incorporate similarly situated copyright holders as a class.⁷⁸ In the initial prayer for relief, plaintiffs sought a permanent injunction to prevent the cruise lines from infringing class members' copyrighted works and a judgment for no less than \$50 million—representing disgorgement of profits, compensatory damages, punitive damages, and attorneys' fees.⁷⁹

If you find the \$50 million shocking, you are probably in good company.⁸⁰ Recall that if the owner were to elect for statutory damages

take advantage, including “low taxes or fees” and no requirement for “national ownership or control of a registered vessel, or a national crew or officers, or national build”).

73. See Schulkin, *supra* note 71, at 115 (citing these registry nations' “dependence on registry fees” as a reason they have “little incentive to punish” polluting cruise ships).

74. See, e.g., Tomlinson, *supra* note 3, at 146–48 (summarizing a 2006 congressional hearing “focused on the lack of uniform standards regarding both incident reporting and security procedures to be followed after an incident occurs”). As one Congressman testified, the well-being of those travelling in international waters “too often depends upon an unpredictable combination of facts, circumstance, and happenstance that may or may not mean the protection of U.S. laws are available to those in peril at sea.” *International Maritime Security II: Law Enforcement, Passenger Security and Incident Investigation on Cruise Ships: Hearing Before the Subcomm. on Nat'l Sec., Emerging Threats, and Int'l Relations of the H. Comm. on Gov't Reform, 109th Cong. 1* (2006) (statement of Rep. Christopher Shays, Chairman, Subcomm. on Nat'l Sec., Emerging Threats, and Int'l Relations).

75. Complaint and Jury Demand at 1–2, *Jacobs v. Carnival Corp.*, No. 06 CV 0606 (S.D.N.Y. Mar. 25, 2009), 2006 WL 551156.

76. *Id.* at 10–11.

77. *Id.* at 11–12.

78. *Id.* at 6.

79. *Id.* at 13.

80. The only copyright decision to approximate a \$50 million award in damages is *UMG Recordings, Inc. v. MP3.com, Inc.*, No. 00 Civ. 472(JSR), 2000 WL 1262568 (S.D.N.Y. Sept. 6, 2000), but that award was based upon 4,700 counts of infringement. 4 NIMMER ON COPYRIGHT, *supra* note 31, § 14.04[E][1][a] (awarding \$53,400,000).

under U.S. copyright law, the maximum award for willful infringement is \$150,000 *per work*, not *per infringement*.⁸¹ Given the ambiguities of copyright protection on the high seas, it seems unlikely that a judge would find the cruise lines acted with the requisite knowledge⁸² to rise to a level of willful infringement. Further, under a more generous Second Circuit standard of willful infringement,⁸³ the statutory maximum would still need to be applied to 334 works in order to reach a \$50 million judgment.⁸⁴ Such a scenario is difficult to imagine, even within a class action against multiple cruise lines.

The *Jacobs* plaintiffs might fare better to prove actual damages. Consider the following scenario: the musical *The Phantom of the Opera* averaged gross box office sales of roughly \$688,000 per week in 1996.⁸⁵ Assuming the author-composers receive a royalty rate of 6% of gross box office sales,⁸⁶ the plaintiffs could claim they lost more than \$536,000 each year in lost profits.⁸⁷ Over the course of the three-year limitation for civil actions⁸⁸ and accounting for the thirteen cruise lines named in the complaint,⁸⁹ lost profits could approach \$21 million.⁹⁰ In addition to actual damages, § 504 of the Copyright Act allows a copyright holder to disgorge

81. See *supra* notes 31–34 and accompanying text.

82. See *supra* note 35 and accompanying text.

83. See *supra* note 37 and accompanying text.

84. \$150,000 per work × 334 works = \$50,100,000. See *supra* note 34 and accompanying text.

85. *Broadway Grosses – 1996*, BROADWAYWORLD.COM, <http://www.broadwayworld.com/grossesbyyear.cfm?year=1996>, archived at <http://perma.cc/4AJ-CDBC>.

86. See, e.g., Jeff Brabec & Todd Brabec, *The Investment Economics of Broadway Musicals*, CORP. COUNS. (Nov. 14, 2014), <http://www.corpcounsel.com/id=1202676298498/The-Investment-Economics-of-Broadway-Musicals?slreturn=20141030235422>, archived at <http://perma.cc/UP4L-VE6R> (noting that, under the Dramatists Guild of America Approved Production Contract, authors receive “4.5 percent of the gross weekly box-office receipts prior to recoupment and 6 percent once a show’s investment has been recouped”). Even so, the 6% figure is perhaps simplistic. The theater industry now prefers a royalty-pool scheme tied to revenues net weekly expenses. See JAY SHANKER ET AL., ENTERTAINMENT LAW & BUSINESS: A GUIDE TO THE LAW AND BUSINESS PRACTICES OF THE ENTERTAINMENT INDUSTRY § 9.2.3.3 (3rd ed. 2009) (explaining the concept of a royalty pool and characterizing royalty pools as “the most common form of royalty agreement for commercial productions on or Off-Broadway”).

87. *Phantom* typically sells tickets to eight shows per week. *Broadway Grosses – The Phantom of the Opera*, BROADWAYWORLD.COM, <http://www.broadwayworld.com/grossesshow.cfm?show=THE-PHANTOM-OF-THE-OPERA&year=1996>, archived at <http://perma.cc/Z2NV-XYLN>. I am assuming for my calculation that a cruise line will present one Broadway-style revue each week with two seatings. Thus, \$688,000 gross weekly receipts ÷ 8 *Phantom* shows × 2 ship seatings × 52 weeks × 6% royalty rate = \$536,640.

88. See *supra* note 39 and accompanying text.

89. See Complaint and Jury Demand, *supra* note 75, at 2–5 (naming Carnival Cruise Lines, Costa, Cunard, Holland America, Princess, Seabourn, Swan, Windstar, Royal Caribbean International, Celebrity, Crystal, Norwegian Cruise Line, and Radisson).

90. \$536,640 annual lost profits × 3 years × 13 cruise lines = \$20,928,960.

the infringer's unjust profits.⁹¹ Once the copyright holder proves the infringer's gross revenue, the burden shifts to the infringer to prove any deductible expenses and to allocate the remaining profit among other factors.⁹² Here, it is important to remember that the production show has a very specific purpose: to keep guests out of their rooms and contributing to onboard revenue.⁹³ On similar facts, copyright holders of the musical *Kismet* were able to recover 2% of a hotel's indirect profits for the hotel's unlicensed musical "tribute."⁹⁴

Defendants in *Jacobs* responded to plaintiffs' infringement claim with a motion to dismiss the complaint, asserting a predictable panoply of defenses. First, the defendants claimed the court lacked subject matter jurisdiction to hear the case.⁹⁵ To this end, defendants stated that U.S. copyright law lacks extraterritorial application and that the plaintiffs could not rely upon diversity jurisdiction.⁹⁶ Second, defendants asserted they possessed valid licenses to perform the copyrighted works as a result of reciprocal arrangements between ASCAP and ASCAP's foreign counterparts such as the Panamanian Society of Authors and Composers (SPAC).⁹⁷ Defendants argued the court should respect the forum selection and arbitration clauses contained in those agreements.⁹⁸ As discussed previously in subpart II(B), it was essential that defendants characterize the performances of *Grease* songs as "nondramatic" in order to implicate ASCAP license coverage, and so they did.⁹⁹ Finally, defendants asserted a forum non conveniens defense, noting a concern with a U.S. court attempting to apply foreign law.¹⁰⁰

Defendants conceded, however, to performing certain songs from *Grease* in "revue-type shows."¹⁰¹ It is worth calling attention to the prevalence of this industry practice of incorporating unlicensed copyrighted

91. 17 U.S.C. § 504(b) (2012).

92. *Id.*

93. *See* Golden, *supra* note 6 (noting that onboard revenue, as compared to ticket sales to board the ship, "is disproportionately higher in terms of the net profit").

94. *Frank Music Corp. v. Metro-Goldwyn-Mayer Inc.*, 886 F.2d 1545, 1550 & n.4 (9th Cir. 1989).

95. Memorandum of Law in Support of the Motion to Dismiss the Complaint by Carnival Corp., Carnival Cruise Lines, Carnival PLC, Holland America Line and Princess Cruises at 1, *Jacobs v. Carnival Corp.*, No. 06 CV 0606 (S.D.N.Y. Mar. 25, 2009), 2006 WL 1444193 [hereinafter Memorandum of Law].

96. *Id.* at 1–2.

97. *Id.* at 5–6.

98. *Id.* at 2.

99. *See id.* at 5 (recognizing that "[w]hat constitutes a 'nondramatic' as opposed to a 'dramatic' performance is a central issue" in the dispute because "[n]one of the licenses at issue extend to . . . 'dramatic' performances of musical works").

100. *Id.* at 16, 19.

101. *Id.* at 4.

works into production shows: four of Carnival's twenty-one ships, eight of Holland America's thirteen ships, and eight of Princess's fourteen ships used at least one *Grease* song.¹⁰² Using the same assumption of one protected work in one show per week with two seatings, this represents more than 2,000 unlicensed performances in a single year.¹⁰³ Also of note, defendants were deliberate in qualifying the location of such performances: "[Carnival's] ships sail *almost* entirely outside of United States territorial waters [Holland America's] ships also spend *a great deal* of time outside of United States territorial waters *Many* of [Princess's] performances also occur outside of U.S. waters"¹⁰⁴

Unfortunately, like so many first-year law students, plaintiffs fell victim to the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*,¹⁰⁵ a tidal wave that rocked the legal world in 2007 by heightening the pleading standard.¹⁰⁶ Perhaps it was just a matter of bad timing. Judge Batts issued her ruling less than two years after the *Twombly* fallout.¹⁰⁷ As a result of these heightened requirements, Judge Batts felt dissatisfied that the plaintiffs pleaded with the appropriate level of specificity and dismissed the complaint with leave to amend.¹⁰⁸ In particular, Judge Batts pointed out two deficiencies: (1) the plaintiffs failed to allege a time period in which the infringing acts took place and (2) the plaintiffs failed to allege where such acts took place.¹⁰⁹ Judge Batts clarified that she wanted to know "where, literally in the world, the ships were at sea when the performances occurred"¹¹⁰—a rather high bar when one considers this was a pre-discovery motion. Indeed, this location requirement was not an element of a copyright infringement claim under any prior precedent, but instead a requirement Judge Batts imposed *sua sponte* "because of the unusual circumstances of this case."¹¹¹ Judge Batts offered plaintiffs a glimmer of

102. *Id.* at 4–5.

103. 1 protected work × 1 show per week × 2 seatings × 52 weeks × 20 ships = 2,080 unlicensed performances.

104. Memorandum of Law, *supra* note 95, at 4–5 (emphasis added).

105. 550 U.S. 544 (2007).

106. *Twiqbal*, as is commonly used to refer to *Twombly* and its companion case *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), presented a true game changer in legal pleading. See David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1204 & n.3 (2013) (noting the "furor" that *Twombly* caused when it replaced notice pleading with "a more demanding pleading standard").

107. Compare *Twombly*, 550 U.S. at 544 (decided May 21, 2007), with *Jacobs v. Carnival Corp.*, No. 06 Civ. 0606(DAB), 2009 WL 856637, at *1 (S.D.N.Y. Mar. 25, 2009) (decided March 25, 2009).

108. See *Jacobs*, 2009 WL 856637, at *3, *6, *8 (identifying the *Twombly* standard, concluding "[p]laintiffs have failed to satisfy the pleading requirements," and granting plaintiffs thirty days to amend their complaint).

109. *Id.* at *5.

110. *Id.*

111. *Id.* at *4.

hope, however: “[I]f any of the allegedly infringing performances took place within the territorial waters of the United States, and/or the preparation of those performances took place in Defendants’ United States’ offices, this Court would have subject matter jurisdiction over those performances and any preparation that amounted to infringement.”¹¹² Before concluding, Judge Batts warned plaintiffs to abandon their attempts to establish any form of class action.¹¹³

B. The First Amended Complaint

Not to be dissuaded, plaintiffs filed an amended complaint. As to Judge Batts’s preliminary concern for the time period of the allegedly infringing acts, plaintiffs added general qualifications such as “since at least January 2003” or, in one case, “since at least February 26, 2004.”¹¹⁴ Presumably, plaintiffs were following the lead of the case Judge Batts cited with approval in her ruling, which did not require plaintiffs to assign a specific date but rather to specify a “limited period.”¹¹⁵ As to the location of the acts, plaintiffs amended the complaint to read that each ship was “in the territorial waters of the United States.”¹¹⁶ Perhaps this was also a direct response to the judge’s express language.¹¹⁷

Plaintiffs made other material improvements to their complaint that were not addressed by the first ruling. With regard to each named defendant, plaintiffs recorded the fleet’s registry, noting that each country of registry was a signatory to the Berne Convention.¹¹⁸ Plaintiffs indicated any additional performances occurring outside of U.S. territorial waters would still be subject to the court’s jurisdiction under the Berne Convention.¹¹⁹ Finally, plaintiffs reduced their damages demand to \$10 million.¹²⁰

Defendants responded to the amended complaint in much the same way as the original. They renewed their arguments that the court lacked

112. *Id.* at *7.

113. *See id.* at *6 n.2 (“[I]t is not advisable for Jonah to attempt to swallow the whale by taking on the onerous additional class action requirements.”).

114. First Amended Complaint and Jury Demand at 6–8, *Jacobs v. Carnival Corp.*, No. 06 Civ. 0606 (S.D.N.Y. Aug. 20, 2010), 2009 WL 244298.

115. *Jacobs*, 2009 WL 856637, at *5 (quoting *Tangorre v. Mako’s, Inc.*, No. 01CIV4430(BSJ)(DF), 2002 WL 313156, at *3 (S.D.N.Y. Jan. 30, 2002)).

116. First Amended Complaint and Jury Demand, *supra* note 114, at 6–8.

117. *See supra* note 112 and accompanying text.

118. First Amended Complaint and Jury Demand, *supra* note 114, at 6–9. The Berne Convention is a multilateral international treaty mandating certain minimum standards of protection for literary and artistic works. Jane C. Ginsburg & John M. Kernochan, *One Hundred and Two Years Later: The U.S. Joins the Berne Convention*, 13 COLUM.-VLA J.L. & ARTS 1, 2 (1989).

119. First Amended Complaint and Jury Demand, *supra* note 114, at 9.

120. *Id.* at 12.

subject matter jurisdiction, that the performances were licensed under controlling foreign forum-selection and arbitration clauses, and that the court should dispose of the case on forum non conveniens grounds.¹²¹ By this time, *Iqbal*¹²² had been handed down from the Supreme Court, and defendants were armed with additional language with which to color their attacks on the amended complaint's sufficiency.¹²³ While making no mention of the amended time provisions, defendants characterized the amended location—"in the territorial waters of the United States"—as being as "patently deficient" as the original.¹²⁴ Furthermore, in response to plaintiffs' new pleadings regarding the Berne Convention, defendants asserted that while the Berne Convention provides a certain level of protection throughout member states, it does not "create jurisdiction over extraterritorial acts."¹²⁵

A reply memo filed by plaintiffs in response to defendants' motion to dismiss the amended complaint raised two interesting points that provoked this author's interest in writing this Note. First, regarding the court's federal subject matter jurisdiction, plaintiffs drew the court's attention to the developing body of cases that carefully distinguish between subject matter jurisdiction and a substantive ingredient of a claim for relief, discussed below in subpart IV(A).¹²⁶ As a result, any question of extraterritoriality should not prevent the court from asserting subject matter jurisdiction to hear the controversy.¹²⁷ Second, the reply memo questioned the underlying assumption that "ships in international water are, by definition, 'extraterritorial' for the purpose of the Copyright Act."¹²⁸ Plaintiffs then went on to describe the unique factors in assessing choice of law in maritime matters.¹²⁹

121. Memorandum of Law in Support of the Motion to Dismiss the First Amended Complaint by Carnival Corp., Carnival Cruise Lines, Carnival PLC, Holland America Line Inc. and Princess Cruise Lines, Ltd. at 2–3, *Jacobs v. Carnival Corp.*, No. 06 CV 0606 (S.D.N.Y. Aug. 20, 2010), 2009 WL 2443000 [hereinafter Memorandum in Support of the Motion to Dismiss].

122. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

123. See Memorandum in Support of the Motion to Dismiss, *supra* note 121, at 10 ("Rule 8 requires 'more than an unadorned, the-defendant-unlawfully-harmed-me accusation.'" (quoting *Ashcroft*, 556 U.S. at 678)).

124. *Id.* at 2.

125. *Id.* at 14 n.10.

126. See Plaintiffs James H. Jacobs and the Estate of Warren Casey's Memorandum in Opposition to Defendants' Motions to Dismiss and/or Sever and Transfer at 3–5, *Jacobs v. Carnival Corp.*, No. 06 CV 0606 (S.D.N.Y. Aug. 20, 2010), 2009 WL 3191325 [hereinafter Plaintiffs James H. Jacobs Memorandum] (discussing the bright-line test created by the Supreme Court in *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), and how the Court of Appeals for the Federal Circuit applied *Arbaugh* to an extraterritorial copyright infringement claim).

127. See *id.* at 5–6 ("The issue of extraterritoriality is an element of proof of infringement, not one of subject matter jurisdiction.").

128. *Id.* at 6.

129. *Id.* at 6–7.

Defendant's reply brief in further support of their motion to dismiss was perhaps evidence of their growing desperation. Defendants staunchly clung to their attacks on the sufficiency of the amended complaint and summarily dismissed plaintiffs' dichotomy between subject matter jurisdiction and elements of a claim.¹³⁰ Defendants also dismissed plaintiffs' choice of law argument as a "complicated, multi-factor analysis" with "no relevance to this case, where the performances are governed by the Vessel Licenses."¹³¹ Perhaps in their weakest moment, defendants argued a supposedly resulting parade of horrors.¹³²

Briefly harboring plaintiffs' claims, Judge Batts ruled to deny defendants' motion to dismiss.¹³³ However, she agreed with defendants that "[p]laintiffs have not made a showing of any of the allegedly infringing performances taking place within the territorial waters of the United States."¹³⁴ Thus, Judge Batts ordered discovery limited to the jurisdictional issue.¹³⁵

Unfortunately, the copyright questions raised by plaintiffs' complaint have never been answered. Plaintiffs' porthole to recovery was unceremoniously closed by Judge Batts in August 2010 when she ordered the case to be dismissed with prejudice for plaintiffs' failure to file a second amended complaint at the end of limited discovery.¹³⁶ Thus, plaintiffs spent more than four years in an attempt to recover from the defendant cruise lines and were never able to move past the pleadings.

IV. Fishing for a Remedy

The plaintiffs in *Jacobs* came close to arguing their merits before the court but ultimately missed the boat. The non-extraterritorial nature of U.S. copyright law proved fatal to their claim. In this Part, I argue that the predicate-act doctrine would have provided the *Jacobs* plaintiffs with a

130. See Reply Memorandum of Law in Further Support of the Motion to Dismiss the First Amended Complaint by Carnival Corp., Carnival Cruise Lines, Carnival PLC, Holland America Line Inc., and Princess Cruise Lines, Ltd. at 1, *Jacobs v. Carnival Corp.*, No. 06 CV 0606 (S.D.N.Y. Aug. 20, 2010), 2009 WL 4888827 ("But whether 'territoriality' is a limitation on this Court's jurisdiction or an element of the claim makes no difference to the viability of the complaint.").

131. *Id.* at 2.

132. See *id.* at 2–3 (suggesting a choice of law analysis would threaten "a stable international regime of intellectual property rights" and to give effect to any other license beside the Vessel Licenses regarding the performances "would cause chaos in the international licensing regime for copyrighted music").

133. *Jacobs v. Carnival Corp.*, No. 06 Civ. 0606, slip op. at 2 (S.D.N.Y. Mar. 1, 2010).

134. *Id.* at 1–2.

135. *Id.* at 2.

136. *Jacobs v. Carnival Corp.*, No. 06 Civ. 0606, slip op. at 2 (S.D.N.Y. Aug. 20, 2010).

navigable path to relief.¹³⁷ In turn, I will (1) address the jurisdictional question at issue; (2) examine what acts might qualify in this context as a domestic infringing predicate act; and (3) dispose of the defenses previously asserted by the defendant cruise lines.

A. *Personal and Subject Matter Jurisdiction*

Before a U.S. court can hear a controversy, the court must be satisfied that it may assert both jurisdiction over the defendant—personal jurisdiction¹³⁸—and jurisdiction over the particular claim asserted—subject matter jurisdiction.¹³⁹ For the purposes of my analysis, I will assume the court properly asserted its personal jurisdiction over the defendant cruise lines in *Jacobs*. This issue was never challenged in the initial proceedings.

With regard to the question of subject matter jurisdiction, courts are in disagreement as to whether the extraterritorial nature of an allegedly infringing act should be analyzed (1) within the realm of subject matter jurisdiction, and thus subject to a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction; or rather (2) as an element of the plaintiffs' prima facie infringement claim, and thus subject to a Rule 12(b)(6) motion to dismiss for failure to state a claim.¹⁴⁰ In *Jacobs*, the various cruise lines filed both Rule 12(b)(1) and Rule 12(b)(6) motions.¹⁴¹ Judge Batts acknowledged that, even though the leading copyright infringement precedent did not have a place-of-infringement requirement, she was adding such a requirement to the plaintiffs' initial burden due to the fact that the

137. It seems the plaintiffs tried to assert the predicate-act doctrine, but it was too late. The magistrate judge assigned to manage discovery after Judge Batts ruled on the First Amended Complaint denied the plaintiffs' motion to compel discovery for "information concerning auditions, rehearsals, and other activities that took place in the United States" because plaintiffs failed to raise the predicate-act doctrine in their earlier complaint. *Jacobs v. Carnival Corp.*, No. 06 Civ. 0606(DAB)(JCF), 2010 WL 2593923, at *1 (S.D.N.Y. June 22, 2010). It seems odd that the magistrate did not give effect to the fact that Judge Batts clearly acknowledged the possibility of a predicate act in an earlier ruling:

In the present case, although not at all discernable from this Complaint, if any of the allegedly infringing performances took place within the territorial waters of the United States, and/or the preparation of those performances took place in Defendants' United States' offices, this Court would have subject matter jurisdiction over those performances and any preparation that amounted to infringement under the United States Copyright Act.

Jacobs v. Carnival Corp., No. 06 Civ. 0606(DAB), 2009 WL 856637, at *7 (S.D.N.Y. Mar. 25, 2009).

138. See FED. R. CIV. P. 12(b)(2) (granting lack of personal jurisdiction as a defense to a claim).

139. See *id.* R. 12(b)(1) (granting lack of subject matter jurisdiction as a defense to a claim).

140. See PATRY ON COPYRIGHT, *supra* note 59, § 25:86 (commenting on the difficulty of discerning the distinction between subject matter jurisdiction and an element of a claim and observing disagreement among courts as to whether extraterritoriality is a question of jurisdiction or substantive law).

141. *Jacobs*, 2009 WL 856637, at *1.

court was relying on the Copyright Act for subject matter jurisdiction.¹⁴² She granted the 12(b)(6) motions as to certain defendant cruise lines but declined to reach the subject matter jurisdiction question for the remaining defendants until plaintiffs could allege with some specificity where the infringing acts actually occurred.¹⁴³

The predicate-act doctrine would make short work of such an overly burdened jurisdictional analysis. The predicate-act doctrine requires at least one act of purely domestic infringement, thereby granting courts the jurisdictional authority to hear the case and award recovery for all damages, foreign and domestic, that flow from the initial domestic infringement.¹⁴⁴ A single predicate act occurring wholly within the United States, then, will satisfy the court's subject matter jurisdiction inquiry.

B. *Invoking the Predicate-Act Doctrine*

Invoking the predicate-act doctrine is fairly straightforward. Most recently, the Fourth Circuit held that the doctrine has but two requirements: “[A] plaintiff is required to show a domestic violation of the Copyright Act and damages flowing from foreign exploitation of that infringing act.”¹⁴⁵ The plaintiff's burden for proving the predicate act presumably mirrors a normal infringement analysis.¹⁴⁶ In the *Jacobs* court, Judge Batts stated the elements as follows: “(1) [W]hich specific original works are the subject of the copyright claim, (2) that plaintiff owns the copyrights in those works, (3) that the copyrights have been registered in accordance with the statute, and (4) by what acts and during what time the defendant infringed the copyright.”¹⁴⁷ What is essential to this context, though, is that the infringement be a domestic violation.

But what sorts of domestic violations might suffice in this context? In Judge Hand's seminal *Sheldon* opinion, discussed above, he pointed to the illegal copying of motion picture negatives, which he characterized as “‘records’ from which the work could be ‘reproduced’” abroad.¹⁴⁸ In a cruise ship Broadway-style revue, the printed musical score is a close analogy to the negatives of a motion picture. The musical score is the precise roadmap, note by note, of melodic and lyrical directives needed to

142. *Id.* at *4.

143. *Id.* at *5–7.

144. *See supra* subpart II(C).

145. *Tire Eng'g & Distrib., LLC v. Shandong Linglong Rubber Co.*, 682 F.3d 292, 308 (4th Cir. 2012) (per curiam).

146. *Cf. De Bardossy v. Puski*, 763 F. Supp. 1239, 1243 (S.D.N.Y. 1991) (“[J]urisdiction would be proper in the United States . . . if plaintiff can show that an infringing act occurred in the United States and that this act has led to further infringement abroad.”).

147. *Jacobs*, 2009 WL 856637, at *4.

148. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, 52 (2d Cir. 1939).

replicate the work that is being performed.¹⁴⁹ Even if the musical score was purchased outright from the music publisher, such a sale would not include any public performance rights or a right to prepare derivative works.¹⁵⁰ Typically, these musical scores must be rented through a licensing agency to ensure that only those who have purchased the grand performance rights have access to these precious materials.¹⁵¹

For those bad actors who wish to avoid the expense of such a licensing scheme, there are other ways of replicating a musical score. For instance, someone with a particular talent in this field may be able to listen to a musical recording of the score and notate her own musical arrangement that is substantially similar. Such a process is typically referred to as a “transcription.”¹⁵² A person can then take the transcription and create a new musical arrangement for a new ensemble of musicians to record. Thus, with access to a single bootleg¹⁵³ or commercial recording of the music from a Broadway show, a cruise line production company could easily create its own arrangements without ever contacting the composer, the licensing agency, or the music publisher. This process would also allow a production company to alter the original copyrighted music to fit its own needs, perhaps reducing the duration of a certain musical number, trimming down the size of the accompanying instrumentation, or excerpting one song from one musical to fit in a sequence with songs from other musicals. Without question, such reproductions and derivative works would qualify as acts of infringements if occurring within the United States.¹⁵⁴

149. Cf. THE HARVARD DICTIONARY OF MUSIC 765 (Don Michael Randel ed., 4th ed. 2003) (defining a musical score as the “notation of a work” where each part is “notated on its own staff”).

150. See JAMES H. LASTER, SO YOU’RE THE NEW MUSICAL DIRECTOR!: AN INTRODUCTION TO CONDUCTING A BROADWAY MUSICAL 13 (2001) (“No one can legally put on a production of a musical by simply purchasing the piano/vocal score of the show.”); *Licensing Help: General FAQ*, ASCAP, <http://www.ascap.com/licensing/licensingfaq.aspx>, archived at <http://perma.cc/N2BM-6TW4> (following the “I bought the record or sheet music. Why do I need permission to perform the music?” hyperlink, ASCAP clarifies that “[r]ental or purchase of sheet music . . . does not authorize its public performance.”).

151. See HALLER LAUGHLIN & RANDY WHEELER, PRODUCING THE MUSICAL: A GUIDE FOR SCHOOL, COLLEGE, AND COMMUNITY THEATRES 5 (1984) (“Unlike non-musical scripts, which may be purchased, libretti for most musicals and the music itself for all musicals may only be rented for a given period of time . . . and [must be] returned to the controlling organization as soon as the final performance has been given.”).

152. Cf. THE HARVARD DICTIONARY OF MUSIC, *supra* note 149, at 902 (defining transcription as “[t]he reduction of music from live or recorded sound to written notation”).

153. A bootleg recording made in the United States would also qualify as a predicate act if completed by an agent of the cruise ship production company. See 17 U.S.C. § 1101(a) (2012) (“Anyone who, without the consent of the performer or performers involved—(1) fixes the sounds or sounds and images of a live musical performance in a copy or phonorecord” will be liable “to the same extent as an infringer of copyright.”).

154. See *id.* § 106(1) (forbidding the unauthorized reproduction of a copyrighted work); *id.* § 106(2) (forbidding the unauthorized preparation of derivative works).

It is also very likely that after the arrangements have been made, the arrangements will then be recorded by musicians in a studio for use as an accompanying track onboard the ship. Due to the economic implications, it is much simpler to record a musical track for onboard playback rather than hire a full orchestra for each performance, give them room and board, purchase the necessary sound equipment to amplify the instruments, maintain the health of the instruments onboard, and so forth. Therefore, if the production company records a musical track in the United States for use onboard the ship, yet another predicate act exists to which liability can attach.

Furthermore, there may be predicate acts occurring within the companies' rehearsal facilities. Several of the cruise ships operate rehearsal facilities near their headquarters in Miami, Florida.¹⁵⁵ This is where the singers and dancers meet with the creative staff to learn the shows before they travel to the ship. These rehearsals could qualify as infringing public performances if it could be shown that the rehearsal facility is a "place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."¹⁵⁶

Thus, there are ample opportunities for a predicate act to occur on U.S. soil throughout the process of creating a Broadway-style revue before the show ever makes it to sea. An injured plaintiff need only prove one instance in order to recover for all of the subsequent damages.¹⁵⁷ As discussed earlier, the plaintiffs could reasonably claim nearly \$21 million dollars in actual damages from unlicensed performances at sea over the three-year statute of limitations, plus disgorgement of the cruise ship's profits that are attributable to those performances.¹⁵⁸

C. *Cruise Ship Defenses*

The defendant cruise lines in *Jacobs* offered three main defenses that need to be addressed: the extraterritoriality defense, the foreign licenses, and forum non conveniens.¹⁵⁹ The predicate-act doctrine, as discussed in subpart IV(B), already disposes of any extraterritoriality defense.¹⁶⁰ The two remaining defenses can be disposed of quickly.

155. Executives from both Celebrity and Royal Caribbean acknowledged that planning and preparation for these performances took place in the Miami area. Plaintiffs James H. Jacobs and the Estate of Warren Casey's Memorandum in Support of Their Motion to Compel Defendants Celebrity Cruise Inc. and Royal Car[ib]bean Cruise Ltd. to Produce Documents at 9–10, *Jacobs v. Carnival Corp.*, No. 06 CV 0606 (S.D.N.Y. June 22, 2010), 2010 WL 3054696.

156. 17 U.S.C. § 101.

157. See *supra* note 55 and accompanying text.

158. See *supra* notes 85–91 and accompanying text.

159. *Jacobs v. Carnival Corp.*, No. 06 Civ. 0606(DAB), 2009 WL 856637, at *1 (S.D.N.Y. Mar. 25, 2009).

160. See *supra* subpart IV(B).

1. *Blanket Licenses*.—First, and most frivolously, defendants asserted that the performances in question are authorized by certain foreign licenses through reciprocal agreements with ASCAP.¹⁶¹ As previously discussed, ASCAP does not have the authority to grant performance rights to dramatic works.¹⁶² The more pertinent issue is whether the infringing performance is dramatic or nondramatic, a point defendants buried in their first reply.¹⁶³ To this end, plaintiffs eventually hit the nail squarely on its head: a Broadway-style revue has already been adjudged to be outside the scope of an ASCAP license under Second Circuit precedent.¹⁶⁴ Moreover, it is fundamental to our property system that “no one gives what he does not have.”¹⁶⁵ In short, any defense based upon a blanket license theory is but a smokescreen.

2. *Forum Non Conveniens*.—Second, the forum non conveniens argument is often used as a trump card for cruise ship defendants.¹⁶⁶ Unlike passengers, though, copyright holders never subjected themselves to boilerplate forum selection clauses.¹⁶⁷ While a complete analysis is beyond the scope of this Note, a court could (and should) dispose of a forum non conveniens defense quickly by limiting its scope of analysis to the predicate act. In such a case, assuming the court can assert personal jurisdiction over the defendant, a court should have no trouble honoring the U.S. plaintiff’s choice of venue concerning an act of infringement of a U.S. copyright that took place on U.S. soil.

V. Conclusion

American courts are well equipped to decide the issues presented in *Jacobs v. Carnival Corp.* Producing a Broadway-style revue is no small task, and the path to the stage is littered with preparatory acts, any one of which could qualify as a predicate act. Once the infringement claim is

161. See *supra* note 97 and accompanying text.

162. See *supra* notes 51–52 and accompanying text.

163. See *supra* note 99 and accompanying text.

164. Plaintiffs James H. Jacobs Memorandum, *supra* note 126, at 15 (“That there is a distinction between a dramatic grand right and a nondramatic small right pursuant to the ASCAP license, and that the ASCAP licenses do not grant grand rights, is well settled in the Second Circuit as well.”).

165. See, e.g., *Mitchell v. Hawley*, 83 U.S. (16 Wall.) 544, 550 (1872) (“No one in general can sell personal property and convey a valid title to it unless he is the owner or lawfully represents the owner. *Nemo dat quod non habet.*”).

166. See, e.g., *Membreño v. Costa Crociere S.P.A.*, 425 F.3d 932, 937–38 (11th Cir. 2005) (briefly weighing forum non conveniens factors in favor of a cruise ship defendant).

167. See generally Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEX. INT’L L.J. 323 (1992) (disagreeing with the application of a forum-selection clause to dismiss a personal injury suit against a cruise line in *Carnival Cruise Lines v. Shute*).

cemented in a U.S. court under the predicate-act doctrine, a just verdict requires little more than peering past the fiction that cruise lines are licensing dramatic works through blanket nondramatic licenses. Thus, injured copyright holders can put an end to these copyright pirates who are enjoying the spoils of substantial contact with the American forum while hiding behind a flag of convenience.

—*Jeff Pettit*