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Brittany Binderoff

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Is The Martian Just The Latest Example Of A Way To Avoid Liability Copyright Infringement In International Waters?

BY [BRITTANY BINDEROFF](#) / ON APRIL 26, 2016

The 2015 Golden Globe winning Best Motion Picture Musical or Comedy, *The Martian*,^[1] is a movie about an astronaut, played by Matt Damon, who was left stranded on Mars after being presumed dead as the result of a storm.^[2] He ended up surviving and was left to find a way to signal Earth that he was alive.^[3] Many people may not connect this movie with copyright law, but about three-fourths of the way through the movie, Damon's character makes the following statement: "I've been thinking about law on Mars. There's an international treaty saying that no country can lay claim to anything that's not on Earth. By another treaty, if you're not in any country's territory, maritime law applies. So Mars is international waters...the second I walk outside I'm in international waters. So I'm going to be taking a craft over in international waters without permission, which by definition...makes me a pirate."^[4] Although not specifically referring to copyright law, it isn't hard to see the huge issue that this quote exemplifies: people in international waters, and other negative spaces, know that they are outside the jurisdiction of any country and can, therefore, break any laws, including copyright, that they want to without having to face consequences.

Given the evolving nature of international relations, heightened by the globalization of world economies^[5] and major technological advances,^[6] international law is becoming much more intertwined with domestic law. With copyright law, "as the marketplace becomes more international, the ability to exploit copyright material abroad becomes much easier."^[7] Protected works are reaching individuals throughout the world thanks to the Internet and advanced digital communications, international newspapers, multi-national corporations and global travel.^[8] Consequentially, United States courts have more and more often found themselves entangled in transnational copyright disputes.^[9] Copyright law, however, operates territorially, as mandated by the Berne Convention, and the U.S. Copyright Act has no extraterritorial effect.^[10] Regardless, circuit courts have begun to apply domestic law to infringements that have occurred entirely abroad.^[11]

However, there is an even larger problem involving copyright infringement outside of the jurisdiction of any country. *The Martian* is only the latest example in a trend of individuals and companies finding ways to exploit the lack of law, and therefore avoid liability, for copyright infringement in international waters. Individuals and corporations have been devising and experimenting with ways to avoid domestic copyright laws while on the high seas because international waters are one of the few areas in the world where no country can claim complete control over.^[12]

In the 2009 case of *Jacobs v. Carnival Corp.*,^[13] Carnival Cruises was held not to be liable for copyright infringement for putting on an unlicensed production of *Grease* because the ship was sailing outside of the U.S.'s jurisdiction (i.e. more than 12 miles out into international waters). If taking place on U.S. soil, these performances would clearly require a license.^[14] However, being that this performances took place on a cruise ship sailing in international waters,^[15] once the ship was outside the 12 nautical mile range of U.S. territory, the ship was in the proverbial no-man's land,^[16] and therefore U.S. copyright laws no longer applied because they have no extraterritorial effect.^[17]

The other case documenting this problem involves one of the top BitTorrent websites, The Pirate Bay (TPB), which is an online index of digital content where visitors can search, download and contribute magnet links and torrent files, which facilitate peer-to-peer ("P2P") file sharing among users of the BitTorrent protocol.^[18] In 2012, TPB, on its blog page, announced a proposed plan to fly file-sharing drones in international waters to avoid copyright liability of any nation.^[19] By launching their servers through GPS-controlled drones and moving them over international waters, TPB would be able to avoid criminal and civil liability for copyright infringement.^[20] Just as with cruise ships publicly performing musical theater works in international waters, TPB providing copyrighted infringement in international waters would allow them to have a good argument that they are free from the laws of any jurisdiction.^[21]

The nineteenth century saw a movement to institute a "universal law of copyright...[in] a single code, binding throughout the world."^[22] The Berne convention revisions in the twentieth century incrementally approached this ideal by compelling Berne countries to assure increasingly broader and stronger minimum rights.^[23] Advancements in technology and media stimulated these revisions and we now live in a digitally connected world whereby individuals in one country are connected with individuals everywhere else in the world.^[24] Cruise ships carry people from one state and/or country to another.^[25] Geography is largely irrelevant in P2P file sharing; "[a] computer logging on in Bombay or Brussels becomes part of the same network as a computer in Pittsburgh."^[26] And, with NASA planning a mission to Mars, like in *The Martian*, space shuttles will be carrying people into outer space,^[27] another area of international waters.

We need a broader understanding of international copyright lawmaking because right now, there is a gap in copyright protection. The currently proposed solutions, including the predicate-act doctrine, only go so far. They do not help when the infringement occurs in an area where there is no governing law. We need another solution.

Brittany Binderoff is a second-year law student at Benjamin N. Cardozo School of Law and a Staff Editor of the Cardozo Arts & Entertainment Law Journal. She is Theater Chair of the Cardozo Entertainment Law Society and hopes to pursue a career in entertainment law.

LinkedIn: www.linkedin.com/in/brittanybinderoff

[1] Ross A. Lincoln, *'The Martian' Wins Golden Globe For Best Motion Picture Musical Or Comedy*, Deadline (Jan. 10, 2016, 7:44pm), <http://deadline.com/2016/01/the-martian-wins-golden-globe-for-best-motion-picture-musical-or-comedy-1201679827/>

[2] *The Martian* (20th Century Fox 2015).

[3] *Id.*

[4] *The Martian* Quotes, IMDB, <http://www.imdb.com/title/tt3659388/quotes?item=qt2643181>.

[5] Jeff Pettit, Note, *At Sea, Anything Goes? Don't Let Your Copyright Sail Away, Sail Away, Sail Away*, 93 Tex. L. Rev. 743 (2005).

[6] 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 (2012).

[7] Swank, *supra* note 6 at 244.

[8] Patricia Scahill, Note, *U.S. Copyright Law and Its Extraterritorial Application: Subafilms, Ltd. v. MGM-Pathe Communications*, 19 Md. J. Int'l. L. 293 (1995).

[9] Graeme B. Dinwoodie, Article, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. Pa. L. Rev. 469, 529 (2000).

[10] William F. Patry, 7 Patry on Copyright § 25:86 (2015).

[11] *Update Art, Inc. v. Modiin Publ'g, Ltd.*, 843 F.2d 67, 73 (2d Cir. 1988); *L.A. News Serv. v. Reuters TV Int'l.*, 149 F.3d 987 (9th Cir. 1998); *Tire Eng'g & Distrib., LLC v. Shandong Linglong Rubber Co.*, 682 F.3d 292, 306-307 (4th Cir. 2012).

[12] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, arts. 87 and 89, http://www.un.org/Depts/los/convention_agreements/texts/unclos/part7.htm.

[13] 2009 WL 856637 (S.D.N.Y. 2009).

[14] *About Publishing*, SESAC, <http://www.sesac.com/EDU/Publishing.aspx> (“**The Grand Right** is the right of the copyright owner to perform or license others to perform their song in a dramatic matter, which advances the plot of the production in which it is included (such as a Broadway show). This requires a license from the copyright owner separate and distinct from, what is commonly known as, the “small” performing rights...”).

[15] *The United Nations Convention on the Law of the Sea (A historical perspective)*, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations (2012),

http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm

[16] *Id.*

[17] Swank, *supra* note 6, at 239 (“This is because it has long been understood that copyright laws operate territorially.”).

[18] Matt Peckman, *How The Pirate Bay’s Anti-Censorship ‘PirateBrowser’ Works*, Time (Aug. 12, 2013), <http://techland.time.com/2013/08/12/how-the-pirate-bays-anti-censorship-piratebrowser-works/>.

[19] Mr. Spock, *TPB Loss*, The Pirate Bay Blog (March 18, 2012), <https://thepiratebay.vg/blog/210>.

[20] Eriq Gardner, *How Hollywood Could Stop Pirate Bay’s Plan to Launch Servers into the Sky*, The Hollywood Reporter (March 22, 2012: 4:19pm PT), <http://www.hollywoodreporter.com/thr-esq/pirate-bay-mpaa-hollywood-servers-303369>.

[21] *Id.*; see also Jason Koebler, *The Pirate Bay to Fly ‘Server Drones’ to Avoid Law Enforcement*, U.S. News (March 19, 2012: 12:15pm EDT), <http://www.usnews.com/news/articles/2012/03/19/the-pirate-bay-to-fly-server-drones-to-avoid-law-enforcement>.

[22] William Briggs, *The Law of International Copyright* 162 (1906).

[23] Berne Convention for The Protection of Literary and Artistic Works, arts. 2(1) and 5(1), July 24, 1971, 1971 U.S.T. 263, 1161 U.N.T.S. 35.

[24] Paul Edward Geller, *The Universal Electronic Archive: Issues in International Copyright*, 25 INT’L REV. OF INDUS. PROP. & COPR. L. [I.I.C.] 54 (1994).

[25] Pettit, *supra* note 5, at 743-744.

[26] M. Eric Johnson, Dan McGuire, Nicholas D. Willey, *The Evolution of the Peer-to-Peer File Sharing Industry and the Security Risks for Users*, Hawaii International Conference on System

Sciences, Proceedings of the 41st Annual (2008),
http://digitalstrategies.tuck.dartmouth.edu/cds-uploads/publications/pdf/30750383_1.pdf.

[27] *NASA's Journey to Mars*, NASA (Dec. 1, 2014), <https://www.nasa.gov/content/nasas-journey-to-mars>.