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**ELSEVIER V. SCI-HUB: PIRACY OF KNOWLEDGE AND  
THE JURISDICTIONAL REACH OF U.S. COPYRIGHT LAW**

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<b>I. INTRODUCTION</b> .....	<b>199</b>
<b>II. FACTUAL AND PROCEDURAL BACKGROUND OF <i>ELSEVIER V. SCI-HUB</i></b> .....	<b>201</b>
<b>III. FINDING JURISDICTION THROUGH A VOLUNTARY APPEARANCE</b> .....	<b>204</b>
<b>IV. EXTRATERRITORIAL THEORIES OF JURISDICTION.</b>	<b>208</b>
A. EFFECTS PRINCIPLE: JURISDICTION OVER CONDUCT THAT PRODUCES EFFECT WITHIN A STATE'S TERRITORY .....	210
B. PASSIVE PERSONALITY PRINCIPLE: JURISDICTION OVER CRIMES AGAINST A STATE'S CITIZENS .....	219
C. UNIVERSALITY PRINCIPLE: JURISDICTION OVER UNIVERSAL CRIMES .....	221
D. PROTECTIVE PRINCIPLE: JURISDICTION OVER ACTS THAT THREATEN STATE SECURITY .....	222
<b>V. CONCLUSION</b> .....	<b>223</b>

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*In a world where information instantaneously cuts through borders, current scholarship has failed to create an adequate jurisdictional framework for purely digital crimes that take place abroad. This essay analyzes this unique jurisdictional problem through the context of global copyright infringement case, and explains how principles of extraterritoriality might settle this jurisdictional question. In a recent copyright infringement case, Elsevier v. Sci-Hub, a publisher brought suit against a foreign defendant for operating a website pirating academic articles. While that case resulted in a default judgment, Pennoyer reminds us that default judgments may be void given a defect in personal jurisdiction, leaving the unanswered question of how U.S. Copyright law might assert extraterritorial jurisdiction to a defendant abroad.*

*Thus, this essay presents the first legal analysis of the Elsevier case, and how the application of extraterritorial principles answers questions of U.S. jurisdiction over cases of international copyright infringement and remote access, questions that are essential in a global world of information access.*

## I. INTRODUCTION

Meet Alexandra Elbakyan. She is a twenty-seven-year-old neuroscience student from Kazakhstan.<sup>1</sup> And at the age of twenty-two, she created the website that is now responsible for stealing over fifty million scientific articles from academic publishers.<sup>2</sup> That, at least, is the complaint alleged by Elsevier—one of the “big four” of academic publishers<sup>3</sup>—who filed a civil suit in 2015, in the Southern District of New York, seeking an injunction to shut down the website known as Sci-Hub.<sup>4</sup> The problem: the Sci-Hub website and its creator are beyond

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<sup>1</sup> Michael S. Rosenwald, *This Student Put 50 Million Stolen Research Articles Online. And They're Free*, WASH. POST (Mar. 30, 2016), [https://www.washingtonpost.com/local/this-student-put-50-million-stolen-research-articles-online-and-theyre-free/2016/03/30/7714ffb4-eaf7-11e5-b0fd-073d5930a7b7\\_story.html](https://www.washingtonpost.com/local/this-student-put-50-million-stolen-research-articles-online-and-theyre-free/2016/03/30/7714ffb4-eaf7-11e5-b0fd-073d5930a7b7_story.html).

<sup>2</sup> Devin Coldewey, *Sci-Hub is Providing Science Publishers with Their Napster Moment*, TECHCRUNCH (Apr. 29, 2016), <http://techcrunch.com/2016/04/29/sci-hub-is-providing-science-publishers-with-their-napster-moment>.

<sup>3</sup> Tina Amirtha, *The Open Publishing Revolution, Now Behind a Billion-Dollar Paywall*, FAST COMPANY (Apr. 17, 2015, 2:30 PM), <http://www.fastcompany.com/3042443/mendeley-elsevier-and-the-future-of-scholarly-publishing>.

<sup>4</sup> Complaint at 1, 14-15, *Elsevier Inc. v. Sci-Hub*, No. 15-04282, 2015 WL 3505890 (S.D.N.Y. June 3, 2015).

the borders of the United States, raising an important question about the jurisdictional reach of United States copyright law. Specifically, *Elsevier Inc. v. Sci-Hub* raises the jurisdictional question of how the United States extraterritorially enforces rules that regulate intangible information goods that may often move and exist beyond our borders.<sup>5</sup>

Consequently, this case has significant and novel implications for U.S. jurisdiction over cases of international copyright infringement, digital piracy, and hacking and remote access. There is no doubt, on the substantive merits, that Elbakyan would be liable for secondary liability, if not outright liability, for copyright infringement.<sup>6</sup> But the intriguing question is not whether she committed copyright infringement, but whether or not the Southern District of New York had personal jurisdiction over her in the first place, since Alexandra Elbakyan was nowhere near New York when the ruling took place.<sup>7</sup> There is an additional wrinkle: before the Southern District made its ruling, Elbakyan communicated with the New York court via two conference calls to determine whether or not she would retain legal representation.<sup>8</sup> Although Elbakyan never retained legal representation or filed an appearance, her communications with the court raises the question of what actions might constitute a voluntary appearance.<sup>9</sup>

Given these facts, the *Elsevier* case reexamines jurisdictional doctrine from the context of remote communications and access, and this Note proceeds to review how these technological circumstances affect the various jurisdictional hooks available for cases involving global piracy and remote digital access. Part II begins with a factual and procedural background of *Elsevier*, describing the Sci-Hub website, its creation, and the subsequent case launched against it in New York. Part III of this Note examines whether or not Elbakyan's remote

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<sup>5</sup> See Memorandum of Law in Support of Plaintiff's Application for an Order Authorizing Alt. Serv. of Process on Defendants and Order to Show Cause for a Preliminary Injunction at 23-25, *Elsevier Inc. v. Sci-Hub*, No. 15-4282, 2015 WL 3505890 (S.D.N.Y. June 11, 2015) (addressing the issue of how the Court could enforce the requested preliminary injunction against alien defendants).

<sup>6</sup> See Copyright Act of 1976, 17 U.S.C. §106(1) (2013) (granting copyright owners the exclusive right to reproduction); §106(3) (granting copyright owners the exclusive right to distribution); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022-24 (9th Cir. 2001) (finding that Plaintiff demonstrated a likelihood of success on the merits of its vicarious infringement claim against Napster for the multitudes of music copyright infringement that transpired on Napster's peer-to-peer file sharing service).

<sup>7</sup> *Alexandra Elbakyan and Sci-Hub: The Full Story*, ULTIUS (Jan. 17, 2017), <https://www.ultius.com/ultius-blog/entry/alexandra-elbakyan-and-sci-hub-the-full-story.html>.

<sup>8</sup> *Elsevier Inc. v. www.Sci-Hub*, No. 15 CIV. 4282 RWS, 2015 WL 6657363, at \*1 (S.D.N.Y. Oct. 30, 2015).

<sup>9</sup> *Id.* at 2.

participation in teleconference calls with the federal district judge in New York constituted a voluntary appearance for the purposes of establishing personal jurisdiction. Though the phone calls between Elbakyan and the court create some confusion as to her legal participation in the case, her subsequent letter to the court is cognizable as an attempt to argue substantive merits before the court, counting as a voluntary submission to the court's jurisdiction. If, however, that does not suffice to establish jurisdiction, then Part IV of this Note proceeds to review the bases of international law that the United States may rely upon if it wishes to prescribe its federal law to extraterritorial acts. Part IV breaks down these principles into the four bases of extraterritorial reach that are enumerated through the Third Restatement of Foreign Relations Law. In doing so, this Note considers the effects principle, the passive personality principle, the universality principle, and the protective principle as potential bases to declare the extraterritorial application of U.S. Copyright law. Ultimately, the effects principle provides the strongest basis for the extraterritorial reach of copyright law, since the principle permits the United States to prescribe its federal law to extraterritorial behavior that produces a substantial effect within United States territory, including economic effects such as the ones that would be produced through mass copyright infringement.

## II. FACTUAL AND PROCEDURAL BACKGROUND OF *ELSEVIER V. SCI-HUB*

Sci-Hub is a website where any user can freely download scientific articles that otherwise only exist behind the locked paywalls of for-profit journals like Elsevier.<sup>10</sup> The price of a single article can range from \$32 to \$41.95 per download,<sup>11</sup> and yearly subscriptions to a scientific journal may cost as much as \$20,000 a year.<sup>12</sup> Understandably, these prices put these papers out of the reach of countless researchers around the world,<sup>13</sup> but even institutions like

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<sup>10</sup> Ernesto, *Sci-Hub Tears Down Academia's "Illegal" Copyright Paywalls*, TORRENTFREAK (June 27, 2015), <https://torrentfreak.com/sci-hub-tears-down-academias-illegal-copyright-paywalls-150627/>.

<sup>11</sup> John Willinsky, *Sci-Hub: Research Piracy and the Public Good*, TIMES HIGHER EDU. (Mar. 14, 2016), <https://www.timeshighereducation.com/blog/sci-hub-research-piracy-and-public-good>.

<sup>12</sup> Robbie Gonzalez, *Why Does it Cost \$20,000 a Year to Subscribe to a Science Journal?*, IO9 (Sept. 21, 2011, 9:20 AM), <http://io9.gizmodo.com/5842304/why-does-it-cost-20000-a-year-to-subscribe-to-a-science-journal>.

<sup>13</sup> For example, Meysam Rahimi, an Iranian Ph.D student, reported that the high price of accessing research would have prevented him from completing the research necessary for him to complete his Ph.D program. According to his calculations,

Harvard have reported their inability to afford the steep prices of these journals.<sup>14</sup>

Alexandra Elbakyan, herself a student barred from access to journals by high price walls, decided to obtain this knowledge through alternative means. She created her website, [www.Sci-Hub.ac](http://www.Sci-Hub.ac), an endlessly growing database of pirated academic papers.<sup>15</sup> When users make a request for a paper that is not contained in the database, the website uses various library passwords that it has accumulated to download that paper remotely and add it to the overall database.<sup>16</sup> The result: Sci-Hub has grown on a global scale, with more than four million paper downloads a month, occurring all across the world.<sup>17</sup> Out of the millions of download requests that are made, only 4.3% of those requests are unable to find their requested paper in the Sci-Hub database.<sup>18</sup> Elbakyan, described by some as a “Robin Hood neuroscientist,”<sup>19</sup> described by others as a “criminal hacker,”<sup>20</sup> strikes into the heart of conflict between academic publishers and advocates of open knowledge.<sup>21</sup> In her project to spread knowledge, Alexandra

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purchasing the academic papers he needed for just one week of research alone would have cost \$1000. For him, “[t]he choice seemed clear: Either quit the Ph.D. or illegally obtain copies of the papers.” See John Bohannon, *Who’s Downloading Pirated Papers? Everyone*, SCIENCE (Apr. 28, 2016 2:00PM), <http://www.sciencemag.org/news/2016/04/whos-downloading-pirated-papers-everyone>. For perspective, if I had to pay an average price of \$30 per secondary source cited in this paper, I would have had to pay \$1,290 for the research necessary to produce this Article.

<sup>14</sup> Ian Sample, *Harvard University Says It Can’t Afford Journal Publishers’ Prices*, GUARDIAN (Apr. 24, 2012, 12:45 PM), <https://www.theguardian.com/science/2012/apr/24/harvard-university-journal-publishers-prices>.

<sup>15</sup> Rosenwald, *supra* note 1.

<sup>16</sup> *Id.*

<sup>17</sup> Bohannon, *supra* note 13. Data shows that 2.6 million download requests came from Iran, 3.4 million from India, 4.4 million from China, with requests coming from over three million unique IP addresses and from every single continent, with the exception of Antarctica. Though IP addresses may sometimes be misleading due to the use of proxies, the sheer quantity of IP addresses making requests in each continent reflect the clearly global scale that Sci-Hub has reached. See also Coldewey, *supra* note 2 (estimating the quantity of downloads a month to be between four and six million).

<sup>18</sup> Bohannon, *supra* note 13.

<sup>19</sup> Rosenwald, *supra* note 1.

<sup>20</sup> David Kravets, *A Spiritual Successor to Aaron Swartz is Angering Publishers All Over Again*, ARSTECHNICA (Apr. 3, 2016, 10:00 AM), <http://arstechnica.com/tech-policy/2016/04/a-spiritual-successor-to-aaron-swartz-is-angering-publishers-all-over-again>; see also Rosenwald, *supra* note 1 (quoting Lui Simpson as calling it “outright piracy”).

<sup>21</sup> See generally, D.D. Guttenplan, *Internet Ruffles Pricey Scholarly Journals*,

Elbakyan's activities have been likened to the work of Aaron Swartz,<sup>22</sup> a tech prodigy who committed suicide after the federal government brought a slew of criminal charges against him for his own attempt at a large-scale download of academic articles.<sup>23</sup>

On June 3, 2015, in response to Elbakyan's website, Elsevier filed a complaint enumerating the claims it had against Alexandra Elbakyan and all others involved in the Sci-Hub operation.<sup>24</sup> Asserting violations of both the Copyright Act of 1976 and Computer Fraud and Abuse Act of 1986, the complaint also goes on to assert the Southern District's jurisdiction based upon the presence of Elsevier's computer servers in that district and the allegation that the defendants have "affirmatively directed actions at the Southern District of New York by utilizing computer servers located in the District without authorization."<sup>25</sup> Soon after, the court granted a request to serve notice of process via e-mail, and notice was sent out on July 1, 2015.<sup>26</sup>

While the plaintiff's complaint provides a section on jurisdiction that appears to be a quick routine and procedural point, the issue of personal jurisdiction carries tremendous importance for this case. If Alexandra Elbakyan was not present to contest the court's issuance of the injunction, the facts of *Elsevier Inc. v. www.Sci-Hub.org* bear close resemblance to the circumstances of *Pennoyer v. Neff*, where a default judgment rendered in the absence of the defendant is void if there is a defect in the original court's assertion of personal jurisdiction.<sup>27</sup>

While the jurisprudence on personal jurisdiction has evolved since *Pennoyer's* emphasis on *in personam* power,<sup>28</sup> the underlying principle

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N.Y. TIMES (Sept. 18, 2011),

<http://www.nytimes.com/2011/09/19/world/europe/19iht-educLede19.html>; Kate

Murphy, *Should All Research Papers be Free?*, N.Y. TIMES (Mar. 12, 2016),

<http://www.nytimes.com/2016/03/13/opinion/sunday/should-all-research-papers-be-free.html>; Richard Van Noorden, *Open Access: The True Cost of Science Publishing*,

NATURE (Mar. 27 2013), <http://www.nature.com/news/open-access-the-true-cost-of-science-publishing-1.12676>.

<sup>22</sup> Kravets, *supra* note 20.

<sup>23</sup> John Naughton, *Aaron Swartz Stood Up for Freedom and Fairness – and was Hounded to his Death*, GUARDIAN (Feb. 7, 2015, 6:00 PM),

<https://www.theguardian.com/commentisfree/2015/feb/07/aaron-swartz-suicide-internets-own-boy>; see also Aaron Swartz, *Guerilla Open Access Manifesto* (July 2008),

[https://archive.org/stream/GuerillaOpenAccessManifesto/Goamjuly2008\\_djvu.txt](https://archive.org/stream/GuerillaOpenAccessManifesto/Goamjuly2008_djvu.txt) (describing the goals and aims of the open access movement).

<sup>24</sup> Complaint, *supra* note 4, at 11-14.

<sup>25</sup> *Id.* at 3-4.

<sup>26</sup> Aff. of Service, *Elsevier Inc. v. www.Sci-Hub.org*, No. 15-CV-4282-RWS, 2015 WL 6657363 (S.D.N.Y. 2015).

<sup>27</sup> *Pennoyer v. Neff*, 95 U.S. 714 (1877).

<sup>28</sup> See, e.g., *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Int'l Shoe Co. v. Wash.*

in *Pennoyer* remains. A default judgment, rendered in absence of a defendant, is void on collateral attack when there is a defect in personal jurisdiction.<sup>29</sup> The key question explored here, then, is whether contemporary standards of personal jurisdiction allowed the Southern District of New York to properly assert jurisdictional authority over Elbakyan.<sup>30</sup>

### III. FINDING JURISDICTION THROUGH A VOLUNTARY APPEARANCE

The easiest way to find personal jurisdiction in *Elsevier* is if Elbakyan made an appearance before the Southern District of New York. Though she had not participated in the litigation in any traditional sense, she may have made an appearance through her other activities. These contacts, consisting of a series of teleconference calls, may have constituted a voluntary submission to the jurisdiction of the court.<sup>31</sup>

On June 30th, Judge Abrams issued an order for both parties to participate in a teleconference call with the court.<sup>32</sup> Elbakyan subsequently participated in two telephone conference calls with the judge and with Elsevier's legal counsel.<sup>33</sup> The first call took place on July 7th.<sup>34</sup>

In this call, the court received a mixed answer from Elbakyan on whether or not she would seek legal counsel, and the court decided to follow up with a second call the following week on July 14th.<sup>35</sup> During the follow-up call, Elbakyan asked for time to find an attorney, and the court gave her a month.<sup>36</sup> However, the August deadline came and

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Office of Unemployment Compensation & Placement, 326 U.S. 310 (1945).

Although these cases have expanded personal jurisdiction beyond *in personam* power, they have not abrogated the *in personam* jurisdictional hook; *in personam* power merely shifted from being a necessary condition for personal jurisdiction to becoming a sufficient condition for personal jurisdiction.

<sup>29</sup> *Pennoyer*, 95 U.S. at 721.

<sup>30</sup> Complaint, Elsevier Inc. v. Sci-Hub et. al., No. 15-CV-4282-RWS, 2015 WL 6657363 (S.D.N.Y. 2015).

<sup>31</sup> Dan B. Dobbs, *The Validation of Void Judgments: The Bootstrap Principle*, VA. L. REV. 1003 (1967).

<sup>32</sup> Order, Elsevier Inc. v. www.Sci-Hub.org, No. 15-CV-4282-RWS, 2015 WL 6657363 (S.D.N.Y. June 30, 2015).

<sup>33</sup> See Transcript of Telephone Conference, Elsevier Inc. v. www.Sci-Hub.org, No. 15-CV-4282-RWS, 2015 WL 6657363 (S.D.N.Y. June 30, 2015).

<sup>34</sup> *Id.*

<sup>35</sup> Transcript of Record at 12, Elsevier, Inc. v. Sci-Hub, et. al., 1:15-cv-04282-RWS (S.D.N.Y. July 14, 2015), Doc. 38 (“I don’t know if Ms. Elbakyan is going to try to get an attorney.”).

<sup>36</sup> Transcript of Record at 8, Elsevier, Inc. v. Sci-Hub, et. al., 1:15-cv-04282-RWS (S.D.N.Y. July 14, 2015), Doc. 42 (“Ms. Elbakyan: I think I need at least one month or more. The Court: Okay. I’m going to give you until that August 21 date to

passed, and Elbakyan never had an attorney file a notice of appearance.<sup>37</sup> Instead, she sent a letter in September to the presiding judge, to outline her open access principles and motives in maintaining her website and to “clarify some details” regarding the case.<sup>38</sup> Left with only this letter and without any filing of appearance, the court rendered its decision on October 15th, granting the preliminary injunction with the Defendant absent and in default.<sup>39</sup>

Thus, the question is: does participation in a teleconference call count as making an appearance before the court? The legal standard for an appearance is not an issue that appears frequently in federal jurisprudence. In fact, the question has not entered federal consideration in over eighty years; the last Supreme Court ruling dealing with appearance took place in 1932.<sup>40</sup> And generally, there’s a good explanation for that, the idea of an appearance itself appears uncomplicated. The defendant either argues the case in front of the judge, or they do not. Even with the introduction of remote communications, that fact remains unchanged. Regardless of telephones, Skype, or other new technology, a defendant will either argue before the court, or they will not, regardless of his or her means. So what’s so special about Elbakyan’s case?

Though technology does not change the role that parties take within the legal system, technology does complicate whether or not the parties properly filled those roles in the first place. In other words, the intermediary of the phone makes it less clear whether or not somebody on the line intends to participate in the formal process of litigation—whereas the physical location of the courtroom very clearly signals the acts that take place within, and a party’s intention in entering such a space.

In Elbakyan’s case, the call was initiated by the court, intended for the judge to clarify the baseline question of Elbakyan’s participation.<sup>41</sup> In the first call, Judge Abrams opens by saying, “I’m not going to talk about anything substantive on the merits on this call.”<sup>42</sup> He continues, addressing Elbakyan: “[s]o you have not yet appeared in this action.

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get an attorney to file a notice of appearance, okay.”).

<sup>37</sup> See *Elsevier Inc. v. www.Sci-Hub.org*, No. 15-CV-4282-RWS, 2015 WL 6657363, at \*2 (S.D.N.Y. 2015).

<sup>38</sup> Letter from Alexandra Elbakyan to Judge Robert W. Sweet 1 (Sept. 15, 2015).

<sup>39</sup> *Elsevier*, No. 15-CV-4282-RWS, 2015 WL 6657363 at \*2

<sup>40</sup> See *Daniel v. Guaranty Trust Co. of New York*, 285 U.S. 154, 52 S. Ct. 326 (1932).

<sup>41</sup> See generally Transcript of Record, *supra* note 35 (showing that the court initiated the call by the fact Judge Abrams addresses the other party first and showing the purpose of the call through the general dialogue).

<sup>42</sup> *Id.* at 7.

You have not had a lawyer file a notice of appearance on your behalf. Do you intend to obtain an attorney to represent you in this case?”<sup>43</sup> His statement, that Elbakyan had “not yet appeared,”<sup>44</sup> highlights the ambiguity in this case. He offers this description despite the fact that she is already on the call with him and plaintiff’s counsel, implying that her mere participation on the call is insufficient to establish an appearance. And the judge’s language frames appearance as established when Elbakyan would have either declared her representation of herself or had an attorney file an appearance on her behalf.

The court does not resolve this issue in the first call, and it decides to follow up with a second to confirm Elbakyan’s mode of representation.<sup>45</sup> But the second call provides no clarity—Elbakyan simply states that she needs more time to find an attorney.<sup>46</sup> Although the court grants this extension, Elbakyan never follows up with a confirmation of her legal representation.<sup>47</sup> If the last word we have on Elbakyan’s legal representation is the claim that she intends to represent herself only with an attorney, the absence of any attorney filing an appearance might suggest that Elbakyan never made an appearance, and thus never fell under the court’s jurisdiction.

Still, a court would likely construe Elbakyan’s actions as making an appearance because she had been properly served with process via e-mail. After all, the calls took place after process had been served,<sup>48</sup> and service would be sufficient to inform Elbakyan that her participation in the call would count as voluntarily participating in the legal suit filed against her.<sup>49</sup> To be clear, service of process alone does not establish personal jurisdiction; proper service is simply another necessary condition before a court can claim personal jurisdiction.<sup>50</sup> But service

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<sup>43</sup> *Id.* at 7–8.

<sup>44</sup> *Id.* at 7.

<sup>45</sup> *See generally* Transcript of Record, *supra* note 36.

<sup>46</sup> *Id.* at 3.

<sup>47</sup> *Id.* at 5.

<sup>48</sup> Affirmation of Service, Elsevier Inc. v. www.Sci-Hub.org, No. 15-CV-4282-RWS, 2015 WL 6657363 (S.D.N.Y. Oct. 28, 2015).

<sup>49</sup> Service by e-mail satisfies the *Mullane* standard for notice, since it is a reasonably calculated means of alerting Elbakyan about the suit, while being the only option for plaintiffs because they did not have her physical address. *See Mullane v. Central Hannover Bank & Trust Co.*, 339 U.S. 306 (1950); Memorandum in Support of Plaintiff’s Application for an Order Authorizing Alternative Service of Process on Defendants and Order to Show Cause for a Preliminary Injunction 31, Elsevier Inc. v. www.Sci-Hub.org, No. 15-CV-4282-RWS, 2015 WL 6657363 (S.D.N.Y. Oct. 28, 2015); *see also* *Stafford v. Briggs*, 444 U.S. 527, 553 n.5 (1970) (Stewart, J., dissenting on other grounds) (“[A]s a general rule, service of process is the means by which a court obtains personal jurisdiction over a defendant.”).

<sup>50</sup> *See, e.g.*, *Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104,

of process, in this context, may support the claim that Elbakyan had the requisite knowledge to understand that any communication she sent to the court would signal her voluntary participation in the litigation, and voluntary participation would be the court's jurisdictional hook. Although the court may have initiated the call, Elbakyan could have simply never picked up or responded at all.<sup>51</sup>

And this is without even addressing the letter that Elbakyan submitted to the court, which is perhaps the most damning evidence of an appearance.<sup>52</sup> If Elbakyan's argument for no appearance rests on the claim that she did not voluntarily participate, because the court was the one soliciting her through the teleconference calls—or if her argument rests on the claim that the calls were purely on the procedural point of how she would be represented, antecedent to any actual appearance—the letter that Elbakyan sent undermines both claims. The letter was a purely unsolicited and voluntary act on her part, sent to the court and filed amidst the rest of the case's documents.<sup>53</sup> The letter also contains ostensibly substantive arguments that make a moral claim in defense of Elbakyan's project, arguments that were even considered by the court in its ruling on the preliminary injunction.<sup>54</sup>

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108 (1987).

<sup>51</sup> Nor can Elbakyan argue that her actions were a special appearance, a form of limited participation in the litigation. Although special appearances are still permitted under certain state procedural rules, *see, e.g.*, *Williams v. Gould, Inc.*, 443 N.W.2d 577 (Neb. 1989), special appearances are no longer a rule of current Federal Rules of Civil Procedure, having been subsumed into Rule 12(b)(2) (motion to dismiss for lack of personal jurisdiction). To preserve a claim of lack of personal jurisdiction, Elbakyan would have had to submit a 12(b)(2) claim concurrent with whatever other responses, arguments, or communications with the Court. Her failure to submit a 12(b)(2) motion, however, likely counts as a waiver of any personal jurisdiction defect under Fed. R. Civ. P. 12(h)(1). James A. Pike, *Some Current Trends in the Construction of Federal Rules*, 9 GEO. WASH. L. REV. 26, 32–33 (1940–41).

<sup>52</sup> In the letter, Elbakyan admitted pirating research papers and sharing them for free through sci-hub.org. *See* Letter from Alexandra Elbakyan, *supra* note 38, at 1.

<sup>53</sup> Alexandra Elbakyan's letter was also filed amidst the docket of documents contained in this litigation. Document 50, PLAINSITE.ORG, <http://www.plainsite.org/dockets/21t9206gt/new-york-southern-district-court/elsevier-inc-et-al-v-scihub-et-al/>.

<sup>54</sup> Judge Sweet wrote, "To the extent that Elbakyan mounts a legal challenge to the motion . . . it is on the public interest prong of the test," where Judge Sweet then proceeded to cite and consider arguments that Elbakyan presented in her letter. *Elsevier Inc. v. www.Sci-Hub.org*, No. 15 Civ. 4282 RWS, 2015 WL 6657363, at \*4 (S.D.N.Y. Oct. 28, 2015).

#### IV. EXTRATERRITORIAL THEORIES OF JURISDICTION

While it's likely that *Elsevier* can establish jurisdiction through Elbakyan's appearance, suppose that Alexandra Elbakyan somehow did not make an appearance in the court, or suppose she is replaced by another internet infringer<sup>55</sup> who is savvy enough to avoid coming anywhere close to a court communication. What then? This is the trickier question raised by the *Elsevier* case, one with broader repercussions for claims of piracy and unauthorized information access on a global scale.

For starters, you might recall how the United States handled another high profile case of extraterritorial copyright infringement—the arrest of Kim Dotcom and the takedown of Megaupload, one of the first uses of extradition in a copyright infringement case.<sup>56</sup> Though the United States successfully arrested Kim Dotcom abroad, it did so through the aid of New Zealand's police forces, who agreed to extradite Kim Dotcom to the United States.<sup>57</sup> Extradition was specifically made possible through the existence of an extradition treaty between the United States and New Zealand, and it was only applicable to Dotcom through the Government allegations of racketeering and money

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<sup>55</sup> As they are known to do. *See*, for example, the “whac-a-mole” game in efforts to shut down the infamous torrenting site, Pirate Bay. Ernesto, *Pirate Bay Caught up in a Hosting Whac-a-Mole*, TORRENTFREAK (Feb. 17, 2015), <https://torrentfreak.com/pirate-bay-caught-up-in-a-hosting-whac-a-mole-150217/>. Elbakyan has also stated that, despite the court's injunction and the ensuing shut-down of www.Sci-Hub.org, several backup sites have taken its place and are available online. Ernesto, *Elsevier Complaint Shuts Down Sci-Hub Domain Name*, TORRENTFREAK (May 4, 2016), <https://torrentfreak.com/elsevier-complaint-shuts-down-sci-hub-domain-name-160504/>.

<sup>56</sup> Kim Dotcom was accused of facilitating and inducing the piracy of about \$500 million worth of material on his website. The extradition claims included criminal charges of laundering and racketeering. Charles Graeber, *Inside the Mansion—and Mind—of the Net's Most Wanted Man*, WIRED (Oct. 18, 2012, 6:30 AM), <http://www.wired.com/2012/10/ff-kim-dotcom/>. Before the attempted extradition of Kim Dotcom, there had been only one notable extradition attempt based on piracy, involving a twenty-three year old student from the UK, Richard O'Dwyer. Peter Walker, *'Piracy' Student Loses US Extradition Battle over Copyright Infringement*, THE GUARDIAN (Jan. 13, 2012, 3:16 PM), <https://www.theguardian.com/law/2012/jan/13/piracy-student-loses-us-extradition>. The lack of precedent for using extradition against copyright infringers may largely be because U.S. extradition treaties often allow extradition solely for criminal acts, and copyright infringement only becomes a criminal act in certain limited circumstances. *See generally* Mike Masnick, *Larry Lessig Tells New Zealand Court that DOJ's Case Against Kim Dotcom is a Sham*, TECHDIRT (Sept. 16, 2015, 11:00 AM), <https://www.techdirt.com/articles/20150916/09395232272/larry-lessig-tells-new-zealand-court-that-dojs-case-against-kim-dotcom-is-sham.shtml>.

<sup>57</sup> Graeber, *supra* note 56.

laundering.<sup>58</sup> Extradition, however, is a very unlikely scenario for Alexandra Elbakyan. For one, the *Elsevier* case so far is a purely civil case, with the Government currently refraining from bringing any criminal charges, while Dotcom faced racketeering and laundering charges. And that's probably not going to change—the pursuit of criminal charges against Elbakyan would be a political blunder, given the popularity of the open access movement (and the unpopularity of for-profit journals like Elsevier).<sup>59</sup>

Even Kim Dotcom, with his reputation for being a “rich, young troublemaker”<sup>60</sup> had the New Zealand public on his side against the New Zealand and U.S. governments for the way they handled the arrest.<sup>61</sup> Transplant those facts to a young student who merely wishes to share knowledge with the world, and you have a recipe for political disaster. Of course, all of this assumes that such an extradition is even possible in Elbakyan's case. But her precise location is unknown, and her most likely current residence—in Russia—probably rules out extradition as even a possibility.<sup>62</sup>

But before extradition, or any other means of enforcement, Elsevier must find a way to assert the extraterritorial jurisdiction to prescribe the application of United States law. A state does not have jurisdiction to enforce its rule of law unless it first establishes the authority to prescribe that rule of law to those beyond its borders.<sup>63</sup> Because *Elsevier*

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<sup>58</sup> Cyrus Farivar, *Kim Dotcom Finally to be Extradited to the US, New Zealand Judge Rules*, ARS TECHNICA (Dec. 22, 2015, 8:52 PM), <http://arstechnica.com/tech-policy/2015/12/kim-dotcom-to-be-finally-extradited-to-the-us-new-zealand-judge-rules/>.

<sup>59</sup> See Kate Murphy, *Should All Research Papers be Free?*, N.Y. TIMES, Mar. 12, 2016, at SR6.

<sup>60</sup> Charles Graeber, *10 Days Inside the Mansion—and Mind—of the Net's Most Wanted Man*, WIRED, Nov. 2012, at 156.

<sup>61</sup> Carole Cadwalladr, *Kim Dotcom: From Playboy Entrepreneur to Political Firebrand*, GUARDIAN (Aug. 17, 2014, 12:00 AM), <https://www.theguardian.com/technology/2014/aug/17/kim-dotcom-megaupload-new-zealand-interview> (noting that “it was the biggest, most dramatic raid to ever take place on New Zealand soil and was instigated on behalf of the FBI. This shocked the country. . . . The raid, and what it said about the government's relationship with the US, brought back unhappy memories.”); see also Graeber, *supra* note 60, at 200 (describing the events by saying that “[T]he raid was viewed as an unprecedented use of armed antiterror forces on a civilian home, based on a faulty search warrant and misleading intelligence. . . . In the coming weeks, Kim Dotcom will become the center of New Zealand's own Watergate.”).

<sup>62</sup> Murphy, *supra* note 59.

<sup>63</sup> Kathleen Hixon, Note, *Extra Territorial Jurisdiction Under the Third Restatement of Foreign Relations Law of the United States*, 12 FORDHAM INT'L L.J. 127, 130 (1988). In fact, proving extraterritorial reach is an uphill battle, since canons of statutory interpretation hold that there is a presumption *against* extraterritoriality.

addresses questions of federal substantive law, the relevant theories are principles derived from international law:<sup>64</sup> the effects principle, the passive personality principle, the universality principle, and the protective principle.<sup>65</sup> Each principle utilizes its own particular reasoning to justify the extraterritorial application of U.S. federal law. This paper will consider each in turn, and whether or not each principle might support a jurisdictional claim over Elbakyan's extraterritorial acts, and whether or not each principle might support a more general extraterritorial reach to U.S. Copyright law.

#### **A. Effects Principle: Jurisdiction over Conduct that Produces Effect within a State's Territory**

The effects principle, also known as objective territoriality, argues that a state may apply its law "to conduct outside its territory that has or is intended to have substantial effect within its territory."<sup>66</sup> One of the first cases invoking the effects principle was *S.S. Lotus*, a case before the Permanent Court of International Justice, the precursor to the International Court of Justice.<sup>67</sup>

The case involved a collision of a Turkish and a French ship, where the ships were recognized as floating wooden blocks of national territory; though the Turkish ship sank due to behavior beyond its borders (from the territory of the French ship), such actions had a clear effect on Turkish territory, allowing them to assert Turkish law over the French vessel.<sup>68</sup> U.S. courts later cited the effects principle in its own

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See William S. Dodge, *Understanding the Presumption Against Territoriality*, 16 BERKELEY J. OF INT'L L. 85 (1998).

<sup>64</sup> Lea Brilmayer & Charles Nochi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217 (1992). Professors Brilmayer and Nochi also point out an interesting inconsistency between the extraterritorial reach of substantive federal laws versus state laws, where the application of the former requires no satisfaction of due process, but the application of the latter does. Brilmayer & Nochi, at 1219. However, the *Elsevier* case does not appear to fall into the category of cases where this inconsistency is particularly salient (impact territoriality cases where the local effects are not foreseeable) due to the fact that Elbakyan acknowledges the fact that her website flies in the face of copyright laws, making its impact foreseeable.

<sup>65</sup> These principles are also subject to the limitations of "reasonableness." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987).

<sup>66</sup> *Id.* at § 402(1)(c) (1987).

<sup>67</sup> John Eisinger, *Script Kiddies Beware: The Long Arm of U.S. Jurisdiction to Prescribe*, 59 WASH. & LEE L. REV. 1507, 1516 (2002) (citing *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 30–32 (Sept. 7, 1927)).

<sup>68</sup> *Id.*

rulings, beginning with the Second Circuit in 1945,<sup>69</sup> and later, the Supreme Court in the antitrust case of *Hartford Fire Insurance Co. v. California*.<sup>70</sup> Since then, the U.S. courts have invoked the effects principle in a large number of cases, applying extraterritorial jurisdiction to crimes ranging from fraud to murder.<sup>71</sup>

There are two bases for an effects claim in *Elsevier*: the unauthorized computer access and downloading claim brought under the Computer Fraud and Abuse Act (“CFAA”), and the copyright infringement claim.<sup>72</sup> Regarding the CFAA claim, Elsevier argues that Elbakyan “unlawfully obtain[ed] access credentials belonging to individuals and entities located in the District.”<sup>73</sup> In short, Elsevier alleges that the usernames and passwords needed to access their articles were “stolen” by Sci-Hub and Elbakyan,<sup>74</sup> with some sources suggesting that these credentials are compromised through phishing attacks.<sup>75</sup>

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<sup>69</sup> See *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d. Cir. 1945) (holding that the Sherman Act could apply to anticompetitive behaviors of Canadian company even though all behavior occurred beyond the borders of the United States).

<sup>70</sup> *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 796 (1993).

<sup>71</sup> See, e.g., *United States v. Best*, No. 01-4321, 2002 WL 31080306, at \*1 (3d Cir. Sept. 18, 2002) (stating that United States had jurisdiction over offense of smuggling aliens into United States, even if those actions related to smuggling were done abroad); *United States v. Vasquez-Velasco*, 15 F.3d 833 (9th Cir. 1994) (applying the effects principle to establish jurisdiction over a defendant accused of murdering two Americans in Mexico); *United States v. Felix-Gutierrez*, 940 F.2d 1200 (9th Cir. 1991) (applying the effects principle in case of murder and kidnapping of a DEA agent in Mexico); *United States v. Ortega*, 2011 WL 3267896, at \*5 (D. Ariz. June 3, 2011), aff’d, 519 F. App’x 445 (9th Cir. 2013) (invoking objective territoriality for charges relating to false statements in a passport application process); *United States v. Daniels*, No. C 09-00862, 2010 WL 2557506, at \*6-7 (N.D. Cal. June 21, 2010) (applying extraterritorial jurisdiction to a case of wire fraud, mail fraud, and money laundering); *United States v. bin Laden*, 92 F. Supp. 2d 189 (S.D.N.Y. 2000) (ruling that defendant’s acts of bombing U.S. embassies fell under U.S. jurisdiction).

<sup>72</sup> See generally *Elsevier Inc. v. www.Sci-Hub.org*, No. 15-CV-4282-RWS, 2015 WL 6657363 (S.D.N.Y., Oct. 28, 2015).

<sup>73</sup> Complaint at 4, *Elsevier Inc. v. Sci-Hub*, No. 15-CV-04282, 2015 WL 3505890 (S.D.N.Y., June 3, 2015).

<sup>74</sup> Mem. in Supp. of Mot. for Prelim. Injunction & Alternate Service of Process at 8, *Elsevier Inc. v. www.Sci-Hub.org*, No. 15-CV-4282-RWS, 2015 WL 6657363 (S.D.N.Y., Oct. 28, 2015).

<sup>75</sup> A phishing attack being one where the attacker employs a fake e-mail or website that imitates a legitimate one, prompting a user to enter his or her username and password information, which instead goes to the person launching the phishing attack. For sources suggesting that phishing attacks have been used to supply Sci-Hub with access to academic works, see Rosenwald, *This Student Put 50 Million Stolen Research Articles Online. And They’re Free*, WASHINGTON POST, Mar. 30,

This phishing claim, if true, would present a strong argument for jurisdiction under the effects principle. People who employ effective phishing attacks target particular users and institutions, since the efficacy of such attacks depends upon how well the phishing messages imitate the legitimate ones that a user would expect to receive.<sup>76</sup> For phishing attacks targeting university staff or students, these messages might, for instance, imitate ones sent from library or university administrators in order to trick users into surrendering their login credentials.<sup>77</sup> Since universities are geographically rooted institutions, phishing attacks that target them therefore knowingly aim their effects at the particular territorial jurisdictions that these institutions occupy.<sup>78</sup>

It is true that phishing may not target the physical location of the university directly, instead targeting the university's digital network. But the digital location of the networks are still closely tied to their physical locations.<sup>79</sup> University networks link together a series of local area networks to provide overlapping wireless internet coverage in a particular geographic area.<sup>80</sup> While a user can still remotely access Elsevier databases by using a permitted proxy service,<sup>81</sup> the purpose of the proxy is to make the remote computer "appear to be located at the

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2016, [https://www.washingtonpost.com/local/this-student-put-50-million-stolen-research-articles-online-and-theyre-free/2016/03/30/7714ffb4-eaf7-11e5-b0fd-073d5930a7b7\\_story.html?utm\\_term=.260b07960a76](https://www.washingtonpost.com/local/this-student-put-50-million-stolen-research-articles-online-and-theyre-free/2016/03/30/7714ffb4-eaf7-11e5-b0fd-073d5930a7b7_story.html?utm_term=.260b07960a76); Carrie Russell & Ed Sanchez, *Sci-Hub Unmasked: Piracy, Information Policy, and Your Library*, 77 C. & RES. LIBR. NEWS 122 (2016).

<sup>76</sup> Carrie Russell & Ed Sanchez, *Sci-Hub Unmasked: Piracy, Information Policy, and Your Library*, 77 C. & RES. LIBR. NEWS 122 (2016).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 123.

<sup>79</sup> See Decl. by Anthony Woltermann at 4, *Elsevier Inc. v. www.Sci-Hub.org*, No. 15-CV-4282-RWS, 2015 WL 6657363 (S.D.N.Y., Oct. 28, 2015) (noting that access from a remote location to a university network goes through the university's IP address, physically located at the university and giving the appearance a remote accessor is physically on the campus using that IP address).

<sup>80</sup> See *Introduction to Cisco Network Design*, CISCO SYSTEMS INC., Feb. 8, 2002, <http://www.ciscopress.com/articles/article.asp?p=25259>. ("A campus is generally a portion of a company (or the whole company) that is constrained to a fixed geographic area . . . . The distinct characteristic of a campus environment is that the company that owns the campus network usually owns the physical wires deployed in the campus. The campus network topology is primarily LAN technology connecting all the end systems within the building. Campus networks generally use LAN technologies, such as Ethernet, Token Ring, Fiber Distributed Data Interface (FDDI), Fast Ethernet, Gigabit Ethernet, and Asynchronous Transfer Mode (ATM)."); see also, *Network Information for IT Providers*, STANFORD UNIVERSITY IT (Dec. 9, 2015), <https://uit.stanford.edu/service/network>.

<sup>81</sup> For example, Yale University users can use the Yale Virtual Private Network (VPN) to remotely access Yale University resources. The vast majority of this paper was written via such remote access.

IP address of the university operating the proxy service.”<sup>82</sup> In short, the proxy allows access by pretending that the remote user is on the university campus, within the secure university network. Even with remote use, then, a user is making use of the university’s geographic location. Thus, the effect of unauthorized access could be said to take place in the university’s territorial location, since the unauthorized user actively exploits the university’s internet address, an address that is tied to its physical address.

However, it is unclear whether or not Elsevier can prove that Elbakyan was responsible for any phishing attacks. In an interview, Elbakyan explicitly disavowed participating in any phishing attacks.<sup>83</sup> In fact, Elsevier has recognized phishing as a potential vulnerability for its intellectual property, and it cites active efforts to work with universities to clamp down on compromised accounts.<sup>84</sup> As a result, Elsevier acknowledges that Elbakyan and her associates may have relied upon alternate means of accessing the academic articles in the Elsevier databases. Anthony Woltermann, the Systems Operations Manager at Elsevier, wrote in his declaration:

Beginning in or about March 2014, rather than connect to ScienceDirect through a university proxy, Sci-Hub instead began using university proxies only to obtain an authorization token . . . This method . . . is much more difficult to investigate and, to date, Elsevier has been unable to effectively combat Sci-Hub’s new vector of attack.<sup>85</sup>

Unlike phishing attacks, which would essentially steal a user’s credentials to log onto the database, accessing the authorization token means that Elbakyan discovered a way to create her own key into

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<sup>82</sup> See Woltermann, *supra* note 79, at 4 (noting that any unauthorized access of universities in New York would result in accessing servers also located in New York).

<sup>83</sup> Michael S. Rosenwald, *This Student Put 50 Million Stolen Research Articles Online. And They’re Free.*, WASH. POST (Mar. 30, 2016), [https://www.washingtonpost.com/local/this-student-put-50-million-stolen-research-articles-online-and-theyre-free/2016/03/30/7714ffb4-eaf7-11e5-b0fd-073d5930a7b7\\_story.html](https://www.washingtonpost.com/local/this-student-put-50-million-stolen-research-articles-online-and-theyre-free/2016/03/30/7714ffb4-eaf7-11e5-b0fd-073d5930a7b7_story.html). Although Elbakyan acknowledges the possibility that contributors may have used phishing attacks when contributing various library access credentials, that possibility remains purely a speculative possibility, without any documentation from Elsevier linking any phishing attempts directly to the activities of Elbakyan or Sci-Hub.

<sup>84</sup> Woltermann, *supra* note 79, ¶¶ 50, 52.

<sup>85</sup> *Id.* at ¶ 53.

Elsevier's system.<sup>86</sup> And this method, unlike the phishing route, is entirely severed from the physical location of particular university networks, locations, or servers.<sup>87</sup> In this case, the use of an authorization token would occur on a purely digital plane, which complicates whether or not its effects thereby take place within the United States. In Woltermann's exhibit C, he demonstrates that the new method of access allows direct access to Elsevier's article database and its content.<sup>88</sup> From the exhibit, it is no longer clear on what path the information travels, or on what servers the Sci-Hub website would access.<sup>89</sup> Even Woltermann conceded Elsevier's inability to investigate this process further, and the subsequent inability to map the situs of this unauthorized access means that Elsevier would not be able to establish jurisdiction through the effects principle, since the effect must demonstrably take place within the jurisdiction.<sup>90</sup>

Of course, Sci-Hub's main effect is to facilitate a worldwide academic pirating network, and Elsevier's copyright infringement claims offer the second, and strongest, argument for Elsevier to establish jurisdiction through the Sci-Hub's substantial effect within the United States. The use of the effects principle in antitrust cases may be the closest analogue for applying this principle to cases of copyright infringement.<sup>91</sup> The effects principle in copyright follows the same logic of the effects principle in antitrust, simply inverted. Antitrust laws are meant to ensure properly competitive markets, and such markets can be undermined by anticompetitive behavior abroad.<sup>92</sup> Copyright laws are meant to ensure limited monopolies (in order to incentivize

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<sup>86</sup> *Id.* at ¶¶ 14, 53.

<sup>87</sup> *See id.* .

<sup>88</sup> *See* Ex. C, Elsevier Inc. v. www.Sci-Hub.org, No. 15-CV-4282-RWS, 2015 WL 6657363 (S.D.N.Y., Oct. 28, 2015).

<sup>89</sup> *Id.*

<sup>90</sup> *See* Woltermann, *supra* note 79, at 13–14.

<sup>91</sup> However, the use of the effects principle in antitrust has itself attracted some controversy. As the Third Restatement of Foreign Relations Law acknowledges in its reporter notes, “[t]he effects principle has been a major source of controversy when invoked to support regulation of activities abroad by foreign nationals because of the economic impact of those activities in the regulating state. This basis for jurisdiction is increasingly accepted for regulation of restrictive business practices, particularly in the European Community and some of its member states.” Restatement (Third) of Foreign Relations Law § 402. Reporters’ Notes 2 (1987). That said, such use may summon controversy mainly when the regulated activity is illegal in the prescribing territory, but legal in the territory where it takes place. That situation does not arise in the copyright context, where copyright protections have been universally institutionalized through international agreements. *See supra* notes 52-57.

<sup>92</sup> *See* Aaron Xavier Fellmeth, *Copyright Misuse and the Limits of the Intellectual Property Monopoly*, 6 J. INTELL. PROP. L. 1, 2 (1998).

production) that can be undermined by infringing piracy abroad.<sup>93</sup> Both are laws substantially motivated by economic effects, and both can be seriously undermined by behavior beyond one's own borders.

This comparison is strengthened by the fact that U.S. Copyright is intended to have global reach and applicability,<sup>94</sup> just as U.S. courts have found in the case of the Sherman Act.<sup>95</sup> In order to apply the effects principle, a court must first determine that Congress intended the relevant statute to contain extraterritorial application, either through the text of the statute, or through inference from the nature of the offense and Congressional efforts at eliminating said offense.<sup>96</sup> In the case of U.S. copyright law, the extraterritorial intent is quite clear—the United States is a signatory to the Berne Convention and the TRIPS Agreement, a series of international agreements meant to universalize U.S. copyright protections internationally.<sup>97</sup> The TRIPS Agreement incorporates the Berne Convention protections for copyright,<sup>98</sup> which states in Article 2 that “[t]he works mentioned in this Article shall enjoy

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<sup>93</sup> *See id.*

<sup>94</sup> Berne Convention for the Protection of Literary and Artistic Works, opened for signature Sept. 9, 1986, 828 U.N.T.S. 221, S. Treaty Doc. No. 99–27, 99th Cong. (1986) (revised at Paris, July 24, 1979) [hereinafter Berne]; TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement], available at [https://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](https://www.wto.org/english/docs_e/legal_e/27-trips.pdf).

<sup>95</sup> *See United States v. Aluminum Co.*, *supra* note 69.

<sup>96</sup> *United States v. Vasquez-Velasco*, 15 F.3d 833, 839 (9th Cir. 1994).

<sup>97</sup> *See supra* note 94. The TRIPS Agreement actually carries its own international mechanism for enforcing the terms of the TRIPS Agreement. Specifically, it subjects disputes under the agreement to the World Trade Organization's dispute settlement procedure. TRIPS Agreement Art. 64. However, the WTO's dispute settlement panel does not provide an alternative venue for U.S. parties to bring claims against extraterritorial infringement because the WTO dispute procedure governs disputes between states, not individual parties. Furthermore, enforcement of the TRIPS Agreement does not directly enforce intellectual property rights, but merely enforces the provisions requiring states to have intellectual property rights and appropriate punishment. This may result in cases where intellectual property infringement is clearly happening, but the WTO panel is unable to enforce those rights because the state respondent is not shown to substantially fail in enforcing its laws. *See China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights* (WTO Dispute Settlement Panel decision, Jan 26, 2009), [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds362\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm).

<sup>98</sup> TRIPS Agreement, *supra* note 94, § 1 art. 9 (“Members shall comply with Articles 1 through 21 of the Berne Convention”).

protection in *all countries* [emphasis added].”<sup>99</sup> Moreover, countries must sign onto the TRIPS Agreement to gain membership in the World Trade Organization (“WTO”).<sup>100</sup> The two jurisdictions that Elbakyan might come under, Russia and Kazakhstan, have joined WTO.<sup>101</sup> Thus, the TRIPS Agreement ensures that both ostensibly recognize U.S. Copyright law, providing a legal framework to conclude that U.S. Copyright protection is meant to apply extraterritorially in those two countries.<sup>102</sup>

With that in place, it is a fairly easy conclusion that Elbakyan’s activities either intended to have a substantial effect or did have a substantial effect within the United States.<sup>103</sup> Qualitatively, some

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<sup>99</sup> Berne, *supra* note 94, art. 2. ¶ 6.

<sup>100</sup> SUSAN SELLS, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 8 (2003).

<sup>101</sup> *Members and Observers*, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Jan. 15, 2017).

<sup>102</sup> *See supra* Part IV.A. That said, the canons of statutory interpretation are notorious for having two potential sides to every argument, *see* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons of About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 399 (1950). The presumption against extraterritoriality is no different. Elbakyan, for example, could argue that the TRIPS Agreement demonstrates that the U.S. Copyright Act was *not* intended to have extraterritorial application, since the TRIPS Agreement provides a separate legal framework to address intellectual property violations. In fact, the TRIPS Agreement expressly requires that signatories “shall ensure that enforcement procedures as specified in this Part are available under *their* law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement,” TRIPS Agreement Pt. 3, § 1, art. 41 (emphasis added). This suggests that the TRIPS Agreement expressly contemplates making states individually responsible for managing IP violations within their borders, which would counter the claim of any particular state’s copyright law extending extraterritorially. In fact, the Court refused to apply extraterritorial application to the Lanham Act in 1952. *See* Dodge, *supra* note 63, at 86. Still, the current state of the presumption against extraterritoriality is unclear. More recent developments of the law suggest that the presumption against extraterritoriality may have less force, and may still be overcome with a proper showing that the law at issue triggers the effect principle. William S. Dodge points out that “The Restatement (Third), which appeared in 1987, dispensed with the presumption altogether. It noted Justices Holmes’ remark in *American Banana* ‘that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done,’ but observed that ‘[t]his statement, though still often quoted, does not reflect the current law of the United States.’” *Id.* Although he acknowledges that “reports of the presumption’s demise were greatly exaggerated,” he concludes that “under the presumption, acts of Congress should presumptively apply only to conduct that causes effects within the United States regardless of where that conduct occurs.” *Id.* at 86, 90.

<sup>103</sup> There are some interesting wrinkles to be found in the interaction purely between copyright infringement and the effects principle. Unlike other crimes that

scholars have already suggested that instances of computer fraud may be enough to satisfy the effects principle, given the ease with which these acts can be done on a large scale.<sup>104</sup> Quantitatively, Sci-Hub has resulted in millions of illegally downloaded articles, with hundreds of thousands of those downloads taking place in the United States.<sup>105</sup> From the memoranda and affidavits filed by Elsevier, there is sufficient basis to determine that Sci-Hub performs its unauthorized article downloads via servers located in the United States.<sup>106</sup> Estimates show about seventy-four thousand download requests in New York City over a six month period; assuming an average article price of thirty dollars, infringement from New York City alone costs \$2.22 million over just a six month period.<sup>107</sup>

As Woltermann writes, Elsevier provides its academic articles through servers operated by Akamai Technologies, Inc., and that Akamai serves copies of content to users by routing them through “edge

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saw the use of the effects principle, the effect of copyright infringement is harder to pin down to a particular location. When a person plans to murder someone, or when a person commits monetary fraud to steal money from a bank, it’s fairly easy to determine the territory that those crimes target—the person inside the United States or the bank inside the United States. But a copyright violation raises a metaphysical (as well as plain old physical) complications to the question of effect, and a website’s role in producing such an effect. When a person possesses a copyright, in what territory is that copyright located? Is the location found in the server containing the copyrighted work, or the servers that a user accesses when illegally downloading the copyrighted work? Given the way that copyright is partly defined as the fixation of the expression in a tangible medium, the location of infringement is probably found in the physical location where the pirated reproductions are produced (e.g. in the location of a person’s computer, tablet, or other devices).

Another recourse is to find the location of effect not in infringement but in the loss of profit. But where does loss of profit take place? Elsevier, after all, is a company headquartered in Amsterdam. *Company Information*, ELSEVIER, <https://www.elsevier.com/about/company-information> (last visited Jan. 15, 2017). Although Elsevier’s company offices include locations within the United States, *Locations*, ELSEVIER, <https://www.elsevier.com/about/company-information/locations> (last visited Jan. 15, 2017), it is unclear how the loss in profit affects those particular locations or offices. The most convincing effects claim is the argument that the effect is found in the wide extent to which United States users employ Sci-Hub to commit their own acts of academic piracy. See Bohannon, *supra* note 13. Of course, the question of where copyright infringement has its effect is moot in the *Elsevier* case, given the facilitation of piracy just noted above, in addition to the CFAA claims alleged by Elsevier.

<sup>104</sup> See Sanjay S. Mody, Note, *National Cyberspace Regulation: Unbundling the Concept of Jurisdiction*, 37 STAN. J. INT’L L. 365, 379 (2001); Ellen S. Podgor, *International Computer Fraud: A Paradigm for Limiting National Jurisdiction*, 35 U.C. DAVIS L. REV. 267, 294 (2002).

<sup>105</sup> Bohannon, *supra* note 13.

<sup>106</sup> See Woltermann, *supra* note 79, at 13–14.

<sup>107</sup> Bohannon, *supra* note 13.

servers that are geographically close to the user.”<sup>108</sup> Given the data that a significant amount of downloads have taken place within the United States,<sup>109</sup> any phishing activities in *Elsevier* would produce clear effects within the United States that could suffice for jurisdiction.

More generally, this points to the effects principle as a broader basis for giving the Copyright Act extraterritorial reach. However, the effects principle notably requires that an act have a *substantial* effect within the United States.<sup>110</sup> While Elbakyan’s website is an extreme example that almost certainly counts as having a substantial effect, it is important to define when copyright infringement rises to the point of having a substantial effect. Notably, the Restatement (Third) of Foreign Relations Law does not define when an effect qualifies as a substantial effect.<sup>111</sup>

Fortunately, the Copyright Act contains its own criteria to assist in defining when an act of copyright infringement counts as substantial.<sup>112</sup> The Copyright Act differentiates between infringement that creates civil liability, and infringement that creates criminal liability.<sup>113</sup> Thus, acts

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<sup>108</sup> Woltermann, *supra* note 82, at 2–3.

<sup>109</sup> See Bohannon, *supra* note 13.

<sup>110</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 403 (AM. LAW INST. 1987).

<sup>111</sup> “Effects principle. Jurisdiction with respect to activity outside the state, but having or intended to have substantial effect within the state’s territory, is an aspect of jurisdiction based on territoriality, although it is sometimes viewed as a distinct category. The effects principle is not controversial with respect to acts such as shooting or even sending libelous publications across a boundary. It is generally accepted with respect to liability for injury in the state from products made outside the state and introduced into its stream of commerce. Controversy has arisen as a result of economic regulation by the United States and others, particularly through competition laws, on the basis of economic effect in their territory, when the conduct was lawful where carried out. This Restatement takes the position that a state may exercise jurisdiction based on effects in the state, when the effect or intended effect is substantial and the exercise of jurisdiction is reasonable under § 403.” RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE U.S. § 402 cmt. d (AM. LAW INST. 1987).

Other academic pieces that have also discussed the effects principle largely side-step the definition of a “substantial” effect. *See generally*, Eisinger, *supra* note 67; Mody, *supra* note 104; Podgor, *supra* note 104.

<sup>112</sup> 17 U.S.C. § 501 (2016).

<sup>113</sup> (1) In general.—Any person who willfully infringes a copyright shall be punished as provided under section 2319 of title 18, if the infringement was committed—

(A) for purposes of commercial advantage or private financial gain;

(B) by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or

of willful infringement that rise to the level of criminal liability implicitly seem to count as acts serious enough to count as having a substantial effect, and thus would create a basis for extraterritorial jurisdiction.

### **B. Passive Personality Principle: Jurisdiction over Crimes against a State's Citizens**

Another related theory of extraterritorial jurisdiction is the passive personality principle, which argues that states ought to have jurisdictional reach over those who commit crimes against their citizens on the basis of their nationality, even if such actions occur beyond a state's borders.<sup>114</sup> If Elsevier can establish some form of corporate 'citizenship' within the United States, it might attempt to argue jurisdiction through passive personality. However, the passive personality principle is perhaps the most controversial theory for extraterritorial jurisdiction. Professor Ian Brownlie describes passive personality as the "least justifiable" basis of jurisdiction,<sup>115</sup> and Professor Edwin D. Dickinson writes that "passive personality . . . has been more strongly contested than any other" justification for the extraterritorial reach of United States law.<sup>116</sup> As the Third Restatement on Foreign Law concurs, "[t]he [passive personality] principle has not been generally accepted for ordinary torts or crimes."<sup>117</sup>

Furthermore, legal scholars in the United States opposed passive personality jurisdiction for a lengthy period. Both the First and Second Restatements of Foreign Law declared that passive personality was not a legitimate basis for extraterritorial jurisdiction,<sup>118</sup> and the United

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phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000; or

(C) by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.  
17 U.S.C. § 506(1) (2016).

<sup>114</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 402 cmt. g (AM. LAW INST. 1987).

<sup>115</sup> IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 298, 303 (4th ed. 1990).

<sup>116</sup> EDWIN D. DICKINSON, JURISDICTION WITH RESPECT TO CRIME, (1932), *reprinted in* 29 AM. J. INT'L LAW 435, 579 (Supp. 1935).

<sup>117</sup> RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE U.S. § 402 cmt. g (AM. LAW INST. 1987).

<sup>118</sup> Geoffrey R. Watson, *The Passive Personality Principle*, 28 TEX. INT'L L.J. 1, 9 (1993).

States held this position well up until the late Twentieth century.<sup>119</sup> Though the United States has recently shifted its position towards passive personality, it has only embraced the use of this principle in a very limited set of circumstances.<sup>120</sup> The Third Restatement on Foreign Relations Law acknowledges this, stating that the principle “is increasingly accepted as applied to terrorist and other organized attacks on a state’s nationals by reason of their nationality, or to assassination of a state’s diplomatic representatives or other officials.”<sup>121</sup> Consequently, the great majority of scholarship discussing the passive personality principle is directed towards cases of international terrorism and overseas piracy (piracy as in Captain Hook).<sup>122</sup> But very little has addressed its prospective use against digital piracy (piracy as in Napster).<sup>123</sup>

As such, the passive personality principle is unlikely to provide a basis for jurisdiction in *Elsevier*. First, Elsevier would have to be able to claim status as a United States citizen. According to *Hertz Corp v. Friend*, a corporation has citizenship in the place that its “nerve center,” or headquarters, is located.<sup>124</sup> Although Elsevier has offices in the Netherlands, United Kingdom, and the United States,<sup>125</sup> Elsevier’s

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<sup>119</sup> *Id.* at 7 (explaining that after the *Cutting* case—where the United States had opposed to Mexico using the passive personality principle in asserting jurisdiction over a U.S. citizen for defamation—“the views expressed by the United States in [that] case remained the United States position for almost one hundred years”).

<sup>120</sup> *Id.* at 11.

<sup>121</sup> RESTATEMENT (THIRD) FOREIGN REL. LAW OF THE U.S. § 402 cmt. g (AM. LAW INST. 1987).

<sup>122</sup> See, generally, Elizabeth R.P. Bowen, Comment, *Jurisdiction Over Terrorists Who Take Hostages: Efforts to Stop Terror-Violence Against United States Citizens*, 2 AM. U. J. INT’L L. & POL’Y 153 (1987); Aaron D. Buzawa, Comment, *Cruising with Terrorism: Jurisdictional Challenges to the Control of Terrorism in the Cruising Industry*, 32 TUL. MAR. L.J. 181 (2007); Mason H. Drake, Note, *United States v. Yunis: The D.C. Circuit’s Dubious Approval of U.S. Long-Arm Jurisdiction Over Extraterritorial Crimes*, 87 NW. U. L. REV. 697 (1993); Laura Halonen, *Catch Them if You Can: Compatibility of United Kingdom and United States Legislation Against Financing Terrorism with Public International Law Rules on Jurisdiction*, 26 EMORY INT’L L. REV. 637 (2012); Eric Talbot Jensen, *Exercising Passive Personality Jurisdiction Over Combatants: A Theory in Need of a Political Solution*, 42 INT’L L. 1107 (2008); John G. McCarthy, Note, *The Passive Personality Principle and its Use Combatting International Terrorism*, 13 FORDHAM INT’L L.J. 298 (1989/1990).

<sup>123</sup> Stephen Witt, *Goodbye to Piracy: How the Internet and I Grew Out of Illegal Music Sharing*, SLATE (Jan. 18, 2017), [http://www.slate.com/articles/arts/music\\_box/2015/06/illegal\\_music\\_sharing\\_is\\_ending\\_how\\_the\\_internet\\_finally\\_grew\\_up\\_and\\_learned.html](http://www.slate.com/articles/arts/music_box/2015/06/illegal_music_sharing_is_ending_how_the_internet_finally_grew_up_and_learned.html).

<sup>124</sup> *Hertz Corp. v. Friend*, 559 U.S. 77, 92–95 (2010).

<sup>125</sup> Complaint at 2, *Elsevier Inc. v. Sci-Hub et. al.*, No. 15-CV-4282-RWS, 2015 WL 6657363 (S.D.N.Y. 2015).

headquarters are based in Amsterdam.<sup>126</sup> As a result, it is doubtful that Elsevier could claim United States “citizenship.” But say we assume that Elsevier had United States citizenship. Its passive personality claim would still probably fail, first, because of the previously mentioned limitations to the principle’s usage in the United States, and second, because it is dubious that Elbakyan’s activities are targeting Elsevier or any other organization because of their nationality. Though it is true that Elbakyan protests the activities of Elsevier, this protest is largely founded upon Elsevier’s profit model, and is not tied in any way to the nationality of the corporation.<sup>127</sup> While future piracy groups could ostensibly target their sources on the basis of nationality, it seems unlikely that such cases will arise, especially given the close connection between copyright infringement and the simple desire to acquire commercial goods.

### C. Universality Principle: Jurisdiction over Universal Crimes

Under the universality principle, states have extraterritorial jurisdiction over “certain offenses recognized by the community of nations as of universal concern, such as piracy,<sup>128</sup> slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism.”<sup>129</sup> The language in the Third Restatement is inclusive, listing crimes such as the ones enumerated, meaning that the list is not exhaustive and may encompass further crimes.<sup>130</sup> However, the crimes listed are an accurate reflection of the crimes that states, in practice, have recognized thus far under the universality principle.<sup>131</sup> To apply this form of jurisdiction to Elbakyan, Elsevier would have to establish copyright infringement as an offense recognized with universal concern.

While it is true that international institutions have recognized copyright infringement as an act worth policing under the TRIPS Agreement,<sup>132</sup> the crimes included in the universality principle appear to deal more with acts that the international community considers to be

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<sup>126</sup> See text accompanying note 103 ¶ 2.

<sup>127</sup> Letter from Alexandra Elbakyan, to Judge Robert W. Sweet (Sept. 15, 2015).

<sup>128</sup> Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 791 (1988) (explaining piracy as in Captain Morgan, as opposed to illegally downloading movies of Captain Jack Sparrow).

<sup>129</sup> RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE U.S. § 404 (AM. LAW INST. 1987).

<sup>130</sup> See *id.*

<sup>131</sup> Randall, *supra* note 128, at 839.

<sup>132</sup> See discussion *supra* pp. 18–19.

violations of fundamental rights.<sup>133</sup> And although intellectual property may be seen as a form of right, its primary justification seems to emerge more from its economic motivations, and not the supposed heinousness of the action that compels universal jurisdiction over crimes such as genocide, war crimes, or acts of terrorism.<sup>134</sup> In fact, the TRIPS Agreement can be further distinguished from treaties that universally condemn certain crimes, such as the war crimes, hijacking, or torture conventions, because the latter conventions explicitly confer domestic jurisdiction over those extraterritorial crimes.<sup>135</sup> The TRIPS Agreement, in contrast, makes no reference to extraterritorial jurisdiction, instead offering its own forum for dispute resolution.<sup>136</sup> As a result, the universality principle and its crimes of “universal concern” likely do not include claims of copyright infringement.

#### **D. Protective Principle: Jurisdiction over Acts that Threaten State Security**

Finally, the protective principle is the theory of extraterritorial jurisdiction that is least likely to apply to the Elbakyan case, since it applies to extraterritorial conduct that “is directed against the security of the state or a limited class of other state interests.”<sup>137</sup> Though the language of “state interests” may seem quite broad, in practice the protective principle refers largely to crimes that threaten state security.<sup>138</sup> The best argument for applying this principle to *Elsevier* would be some sort of argument that Sci-Hub’s copyright infringement harms the economic model of scientific research largely supported and funded by the government.<sup>139</sup> But that link is a bit too tenuous to produce a protective principle claim, and largely sounds more like the effects principle in its emphasis upon the negative outcome that such

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<sup>133</sup> See generally Randall, *supra* note 128, at 841 (“[T]he expansion of universal jurisdiction is much in keeping with various legal efforts to curtail and redress terrorist activities and violations of fundamental rights.”).

<sup>134</sup> See SELLS, *supra* note 100, at 8 (describing TRIPS as part of a set of multilateral trade agreements).

<sup>135</sup> See Randall, *supra* note 127, at 819.

<sup>136</sup> TRIPS Agreement disputes are resolved through the WTO’s Dispute Settlement Body and its rulings. See SELLS, *supra* note 100, at 9.

<sup>137</sup> RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE U.S. § 402(3) (1987).

<sup>138</sup> See generally, Monika B. Krizek, *The Protective Principle of Extraterritorial Jurisdiction: A Brief History and an Application of the Principle to Espionage as an Illustration of Current United States Practice*, 6 B.U. INT’L L.J. 337, 357 (1988).

<sup>139</sup> See Amy Kapczynski, *Outbreak: How Open Science Creates Order Without Intellectual Property Law*, YALE J. OF L. & TECH. (pending publication) (on file with author).

activity might produce. As the Restatement (Third) of Foreign Relations Law notes, the protective principle is confined to a “limited class” of state interests,<sup>140</sup> marking narrow grounds for when it may be applied. Previous U.S. cases invoking the protective principle dealt with either attacks against the United States government or attacks against government agents.<sup>141</sup> Since neither are implicated in the Elbakyan case, the protective principle has little bearing. And while other commentary has addressed this principle in relation to cybersecurity and cyberconflict,<sup>142</sup> this principle probably has little applicability to instances of copyright law.

## V. CONCLUSION

Some 5,000 miles from New York, Alexandra Elbakyan is continuing her studies in a history of science program in an undisclosed location in Russia.<sup>143</sup> And a ruling an ocean away will give a government the authority to lock her away. It’s unlikely that the United States will take drastic action to effect an arrest, as it did with Kim Dotcom, but the possibility may always loom in the background. By sealing and sending an envelope to the New York District Court, Elbakyan sealed her legal status by making an appearance in the U.S. legal system. But even if that were not the case, the effects principle of international law creates a clear basis in which the success of her website becomes its greatest legal liability, producing a substantial effect in the United States (and worldwide) that allows the United States to assert its jurisdictional authority over her. While all of the other principles of international law apply to narrow sets of crimes, usually ones such as terrorism, the effects principle has the broadest scope, and its previous use in relation to economic effects is most applicable to the ostensibly economic effect produced by mass copyright infringement. Though the presence of information technologies might appear to complicate the picture, the effects principle sidesteps the technicalities of physical servers, information routing, and physical access due to the principle’s broad net of an effect and where that effect might take place. Under this principle, then, the United States would have a strong claim

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<sup>140</sup> See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE U.S. § 402(3) (1987).

<sup>141</sup> *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1205–06 (9th Cir. 1991) (citing the protective principle in a case involving the kidnapping and murder of a DEA agent); *United States v. Bin Laden*, 92 F. Supp. 2d 189, 196 (S.D.N.Y. 2000) (citing the protective principle in relation to attacks on U.S. Embassies).

<sup>142</sup> See Eisinger, *supra* note 67, at 1528.

<sup>143</sup> John Bohannon, *The Frustrated Science Student Behind Sci-Hub*, 352 SCI. 511, 511 (2016), <http://www.sciencemag.org/news/2016/04/alexandra-elbakyan-founded-sci-hub-thwart-journal-paywalls>.

to prescribing copyright law to Elbakyan's activities abroad.

More broadly, this analysis of *Elsevier* provides an analytic framework for how we might examine jurisdictional questions relating to foreign digital acts that violate United States law. While the international law principles of extraterritorial jurisdiction provide a starting point, the application of those principles here may reveal how further inquiry may be taken in the context of digital acts. When examining digital acts that violate U.S. law, one point of distinction might be whether the act produces economic or physical harm. The passive personality principle, protective principle, and universality principle all seem concerned with the latter. A digital act whose criminality is mainly economic, then—such as copyright infringement—must justify extraterritorial reach under the effects principle. The effects principle, of course, does not broadly sweep up every act that has an economic effect (which would capture nearly every possible act). Prior application of the effects principle in the realm of antitrust law suggests that the effects principle is cabined to laws that purposely regulate market effects at their broadest level: the regulation of monopolies. This would then include copyright law, which governs the grant of monopolies to intellectual property.

Of course, the jurisdictional fact that courts can exercise power does not address the critical question of whether or not they should. If the United States has learned from its experience with Kim Dotcom, it should recognize the potential dangers in overusing the long reach of American law. The pursuit of extraterritorial prosecution is as much a political game as it is a legal one, and every use of extraterritorial jurisdiction is a use of political capital, given the United States' dependence upon other states for extradition and the actual means of arrest and enforcement. Furthermore, the use of extraterritorial jurisdiction may become a double-edged sword, where the United States' use of a principle legitimates its use by other countries, which could potentially give those countries jurisdiction against American citizens and to enforce laws that the United States may oppose. This, after all, was the longstanding basis for the United States' opposition to the passive personality principle, and is a likely reason why the United States has limited its reliance on these principles to such a narrow set of cases.

Most importantly, U.S. action in this case would have the effect of throwing the international copyright regime into the spotlight, showcasing the conflict between values of intellectual property and open access. Though copyright and intellectual property rules may have been institutionalized globally through the TRIPS Agreement, these rules are not free from contention or controversy. The international institutionalization of patent protections, for example, resulted in

limitations on access to generic drugs in developing countries in the midst of the HIV/AIDS epidemic in the late 1980s, raising outcry over how such agreements constrained efforts to address the dire needs of those in the developing world.<sup>144</sup> Such outcry drove movements that resulted in pushback, and ultimately shifts in these international institutions to address the concerns of unequal access.<sup>145</sup> Elbakyan's case strikes precisely the same chord concerning the intellectual property regime and its role in producing inequities in access. Equal access to knowledge is a pressing concern in a globalized world that purports to live in an age of information, and a single case may be all that it takes to catalyze a movement seeking change.

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<sup>144</sup> Toni Johnson, *The Debate Over Generic-Drug Trade*, COUNCIL ON FOREIGN REL. (Aug. 3, 2011), <http://www.cfr.org/drug-trafficking-and-control/debate-over-generic-drug-trade/p18055>.

<sup>145</sup> See, e.g., World Trade Organization, *Ministerial Declaration of 14 November 2001*, WT/MIN(01)/DEC/1, 41 I.L.M. 746, 748–49 (2002) (stating the Doha Declaration, which affirms flexibilities that allow developing countries the ability to produce and access generic drugs); IAN F. FERGUSSON, U.S. CONG. RESEARCH SERV., *THE WTO, INTELLECTUAL PROPERTY RIGHTS, AND THE ACCESS TO MEDICINES CONTROVERSY*, 2 (RL33750, 2006) <http://www.au.af.mil/au/awc/awcgate/crs/rl33750.pdf>.