

No. 20-__

IN THE
Supreme Court of the United States

SUPERAMA CORPORATION, INC.
D/B/A USA SUMO,

Petitioner,

v.

TOKYO BROADCASTING SYSTEM
TELEVISION, INC., DOES, 1-100,

Respondents.

*On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In Arbaugh v. Y & H Corp., 546 U.S. 500 (2006), this Court held that a statutory requirement was not jurisdictional because Congress had not clearly indicated that it was.

In Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010), this Court applied Arbaugh's clear-statement rule, holding that copyright's registration requirement was non-jurisdictional. In Morrison v. National Australia Bank Ltd., 561 U.S. 247 (2010), this Court observed that, in the context of a securities law, the presumption against extraterritorial application is also non-jurisdictional.

This case involves the presumption against extraterritorial application but now in the context of the U.S. Copyright Act. Here, the Ninth Circuit held that dismissal based on the presumption against extraterritorial application was a dismissal for lack of subject-matter jurisdiction.

Thus, the question presented is:

Whether the presumption against extraterritorial application, applied in the context of the U.S. Copyright Act, creates a jurisdictional bar.

CORPORATE DISCLOSURE STATEMENT & RELATED PROCEEDINGS

Corporate Disclosure Statement:

Petitioner Superama Corporation, Inc. (hereinafter “Superama”) hereby advises the Court that it is a privately held corporation with no parent corporations and that no publicly held company owns 10% or more of Superama’s stock.

Directly Related Proceedings

- In the District Court: Superama Corp., Inc. v. Tokyo Broad. Sys. Television, Inc., No. CV 19-3059-MWF (JCx) (C.D. Cal., decided Aug. 21, 2019).
- In the Court of Appeals: Superama Corp., Inc. v. Tokyo Broad. Sys. Television, Inc., No. 19-55981 (9th Cir., decided Oct. 21, 2020).

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Petitioner Superama respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a) is available at 830 F. App'x 821.

The district court's opinion (Pet. App. 7a) is unpublished but is available at 2019 U.S. Dist. LEXIS 219561.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was issued on October 21, 2020. The time to file a petition for certiorari was extended by general order of this Court to 150 days. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Relevant provisions of the Copyright Act are reproduced in the Appendix to this Petition at 17a-19a.

STATEMENT OF THE CASE

1. Clarifying that the presumption against extraterritorial application is *not* jurisdictional in the copyright context matters for many of the reasons discussed in Arbaugh—and then some.

In Arbaugh, this Court was expressly “mindful of the consequences” of mischaracterizing a statutory requirement as jurisdictional. 546 U.S. at 513. Those consequences stem from the very nature of limits on subject-matter jurisdiction, *i.e.*, that such requirements “can never be forfeited or waived.” See id. at 514.

Therefore, as this Court noted, jurisdictional requirements can burden the district courts by imposing an “independent obligation” to raise and address issues *sua sponte*. Id. Erroneously deeming a requirement jurisdictional can also end up requiring courts to make upfront factual findings, impinging upon the role of the jury as the “the proper trier of contested facts.” Id.

Perhaps worst of all, if the parties, lawyers, and court fail to catch a jurisdictional error early on, a later dismissal for lack of jurisdiction will render all their efforts in the case up to that point moot, even if the matter had been “fully tried by a jury and determined on the merits” of the claims. Id.

In sum, Arbaugh discussed the “unfairness” and “waste of judicial resources” that could result from imprecise characterizations of statutory requirements as jurisdictional ones. 546 U.S. at 515.

Arbaugh’s progeny have reiterated many of these points. E.g., Fort Bend Cty. v. Davis, 139 S. Ct. 1843, 1849 (2019) (“wasted court resources”); Sebelius v. Auburn Reg’l Med. Ctr., 568 U.S. 145, 153 (2013) (“Tardy jurisdictional objections can therefore result in a waste of adjudicatory resources and can disturbingly disarm litigants.”); Gonzalez v. Thaler, 565 U.S. 134, 141 (2012) (discussing need for “stricter distinction between truly jurisdictional rules” and “nonjurisdictional” ones for reasons identified in Arbaugh).

All of these rationales apply here in the copyright context. For all of these reasons, this Court should apply its Arbaugh framework to determine whether domestic infringement is merely necessary “to prove the defendant bound by” the Copyright Act or whether domestic infringement is, in addition, a jurisdictional imperative. See Arbaugh, 546 U.S. at 511.

Like in Arbaugh, holding that the territorial scope of the Copyright Act is a jurisdictional matter is likely to burden district courts, to frontload factual disputes, and, where not caught early, to waste adjudicatory resources and do so unfairly.

Yet, further reasons, beyond those identified in the Arbaugh line of precedents, weigh in favor of this Court giving guidance that the presumption against extraterritorial application, as applied to the Copyright Act or generally, is *not* a jurisdictional bar.

First, copyrights are a form of intellectual property. As a result, knowing precisely where an infringing act has occurred, *i.e.*, whether it happened domestically or extraterritorially, can be a very complicated, and even somewhat metaphysical, exercise.

Such determinations can turn on relative minutiae of complicated technology and those minutiae are rarely in the possession of copyright plaintiffs. Such knowledge and expertise may not even be held by the defendants either: where unsophisticated defendants used a third-party technology to infringe, the precise technological mechanisms of the infringement and how that mechanism affects *where* the infringement occurred might not be easily known by any of the parties. In some situations, neither the defendant nor the plaintiff would have a good grasp on the key facts necessary to determine what the Ninth Circuit in this case deemed a jurisdictional question.

Therefore, in the copyright context, treating territoriality as a jurisdictional question risks introducing major complexity at the outset of a case.

Determining whether “the numerical qualification contained in Title VII’s definition of ‘employer’”—the statutory issue construed in Arbaugh—can get complex. See 546 U.S. at 503; id. at 509 (late-stage discovery and rulings classifying workers as independent contractors).

Yet it would be an extraordinarily rare situation where neither the plaintiff nor the defendant (or their lawyers) have a good idea whether the pertinent employer-defendant had 15 or more employees. By contrast, the technological and technical issues that determine the place of the infringement in online copyright cases *will* often require technical discovery and the retention of technical experts to be resolved.

In online copyright cases, complex technological issues are likely to be determinative of where infringement occurred. Therefore, deeming territorial issues to be jurisdictional in copyright would force courts to address complex technological questions even if the parties don’t raise them and even in otherwise simple cases of online infringement.

Ultimately, deeming territoriality questions in copyright to be jurisdictional, as the Ninth Circuit did below, raises an even greater risk of wasting judicial resources than one might think at first glance. And, unfortunately, those burdens could and would arise in otherwise simple copyright disputes.

Second, deeming the place of infringement to be a jurisdictional issue—rather than a choice-of-law issue—could add tremendous complexity to calculating damages in copyright lawsuits.

A number of the Courts of Appeals have adopted a predicate-act doctrine for calculating copyright damages on a global basis. E.g., IMAPizza, LLC v. At Pizza, Ltd., 965 F.3d 871, 878-879 (D.C. 2020); Halo Creative & Design, Ltd. v. Comptoir Des Indes, Inc., 816 F.3d 1366, 1371 (Fed. Cir. 2008). The predicate-act doctrine entails that where there are infringing acts both within the United States and in any number of foreign jurisdictions, damages may be calculated globally using the remedial provisions of the U.S. Copyright Act. Cf. 17 U.S.C. § 504 (copyright-damages section).

The interests in judicial economy served by the predicate-act doctrine are enormous. The alternative would be to burden district courts with presiding over a separate claim of infringement under a separate nation’s copyright law for every jurisdiction where infringement occurred. For example, without the predicate-act doctrine, a district court would need to adjudicate 30 separate infringement claims arising under 30 separate nations’ copyright laws where one work was displayed in 30 counties via the Internet.

By contrast, with the predicate-act doctrine, if there is a finding of infringement in the U.S., then the court can proceed to determine remedies globally from adjudication of that one claim. Yet, if the Ninth Circuit’s view that territorial issues are jurisdictional were left intact, then the continued survival of the predicate-act doctrine would be in doubt. And, without it, the burden of calculating damages—and of determining precisely where each and every specific act of infringement occurred—would be enormous.

Under the Ninth Circuit’s ruling about jurisdiction, these burdens could not be waived even by the agreement of all parties. Thus, deeming the place of infringement in copyright to be a jurisdictional question would have downstream doctrinal consequences that could turn the simplest of online-infringement cases into complex litigation.

In the context of qualified immunity, this Court advised that “courts should think hard, and then think hard again, before turning small cases into large ones.” See Camreta v. Greene, 563 U.S. 692, 707 (2011). Perhaps that wise admonition applies here as well. And, holding that territorial issues in copyright are also jurisdictional issues would turn any copyright case with international dimensions—even if the substantive issues are relatively simple—into a large case.

With the advent of the Internet and “as copyright commerce becomes increasingly international,” copyright disputes with international dimension are increasingly common. See Jane C. Ginsburg, Extraterritorial Application of U.S. Intellectual Property Law, 37 Va. J. Int'l L. 587, 587-588 (1997). As such, the question presented is important.

2. In many ways, this case is a relatively simple copyright dispute, but with an added international dimension.

A major national broadcaster publicly showed segments of a copyright holder's videos and photographs on national, prime-time television without authorization. The wrinkle, however, is that the broadcaster defendant isn't CBS, ABC, or NBC. It's TBS, *i.e.*, Tokyo Broadcasting System Television, Inc. (“TBS”), a major Japanese broadcaster. TBS publicly showed Superama's American-made, sumo-wrestling videos and photographs on prime-time television *in Japan*, as TBS has admitted, without authorization.

Substantively, under either Japanese copyright laws or U.S. copyright laws, unauthorized nationwide performance of copyrighted works is plainly an infringement. Yet the complexity here is that Superama is based in the U.S. and the prime-time broadcast occurred in Japan.

Petitioner Superama is an organization dedicated to facilitating the growth and appreciation of the sport of sumo in the United States. Pet. App. 8a. It organizes an annual sumo-wrestling tournament here. Pet. App. 3a. From these tournaments, Superama creates a plethora of copyrighted material documenting its tournaments in various videos and photographs. Pet. App. 3a, 9a.

TBS had inquired about licensing a small amount of footage for rebroadcast on TV in Japan but never obtained a license. Pet. App. 3a, 9a. Nonetheless, TBS downloaded, altered, and displayed substantially more of Superama's copyrighted videos and photography than it had inquired about, all on national, prime-time television throughout Japan—all without Superama's authorization. Pet. App. 3a, 9a.

3. Upon discovering this infringement, Superama sued. Pet. App. 10a. The district court dismissed the case, holding that the pertinent infringements occurred exclusively outside the United States, even though Superama's copyrighted materials were downloaded by TBS from U.S.-based servers. See Pet. App. 11a-15a. The district court styled its dismissal as a dismissal for lack of subject-matter jurisdiction. Pet. App. 10a, 12a-13a.

4. The Ninth Circuit affirmed. Pet. App. 3a, 6a.

It too viewed the infringement as wholly extraterritorial. Pet. App. 4a-6a. Then, and critically for purposes of this Petition, it affirmed the dismissal as a dismissal for lack of subject-matter jurisdiction. Pet. App. 2a, 5a-6a.

There is a split among the Courts of Appeals on whether such a dismissal is jurisdictional or not. And, the characterization of the dismissal as jurisdictional has significant implications for litigants and courts in almost all Internet-related copyright cases. Therefore, Petitioner Superama respectfully requests that this Court grant the Petition.

REASONS FOR GRANTING THE WRIT

I. THERE IS A CIRCUIT SPLIT ON WHETHER, IN THE CONTEXT OF THE COPYRIGHT ACT, THE PRESUMPTION AGAINST EXTRATERRITORIAL APPLICATION IS JURISDICTIONAL.

1. No matter how you slice it, the Ninth Circuit's decision below is at odds with several other decisions by the Courts of Appeals.

If one characterizes the issue decided below narrowly as whether extraterritorial application of *the Copyright Act* is a jurisdictional matter, there's a Circuit split. The Eleventh Circuit (pre-Arbaugh) and the Ninth Circuit below (post-Arbaugh) hold that extraterritorial application in copyright goes to a court's subject-matter jurisdiction. By contrast, the Fifth Circuit, D.C. Circuit, and Federal Circuit (all post-Arbaugh) view territoriality under the Copyright Act as a non-jurisdictional matter.

If the issue is construed more broadly as being whether extraterritorial application of *intellectual-property statutes* is a jurisdictional matter, more Circuits join the split. The First Circuit (pre-Arbaugh) and the Eleventh Circuit (post-Arbaugh) construe certain extraterritorial applications of the Lanham Act's trademark provisions as jurisdictional issues.

By contrast, the Ninth and Tenth Circuit (both post-Arbaugh) go the other way.¹ The Federal Circuit does too with respect to patents.

The issue can be viewed even more broadly as whether the presumption against extraterritorial application—a *judicial* canon of statutory construction—can ever provide the kind of clear *legislative* indication necessary to meet Arbaugh’s bright-line test.

These multiple ways to frame the Circuit split give this Court options regarding how broadly it would like to rule. After all, this Court has already “characterized as nonjurisdictional an *array* of mandatory claim-processing rules and other preconditions to relief.” Fort Bend, 139 S. Ct. at 1849 (emphasis added).

This Court has already applied Arbaugh, repeatedly. So, it may wish to rule more broadly, rather than address continued Arbaugh questions piecemeal. Or, perhaps not.

¹ Notably, on this broader view of the issue, the Ninth Circuit appears to go both ways. In *copyright*, it goes one way. Pet. Appl. 1a-6a (extraterritoriality in copyright is jurisdictional). In *trademark*, it goes the other way. Trader Joe's Co. v. Hallatt, 835 F.3d 960, 968–69 (9th Cir. 2016) (extraterritoriality in trademark is not jurisdictional).

It is true that some tricky applications have arisen since Arbaugh's inception. For example, "in the *unique context* of the FTCA, all elements of a meritorious claim are also jurisdictional." Brownback v. King, 141 S. Ct. 740, 2021 U.S. LEXIS 1198, at *11 (2021) (emphasis added).

That admixture of merits considerations and jurisdictional considerations has made similar questions in the FTCA context contested even by eminent jurists. Compare United States v. Wong, 575 U.S. 402, 405-421 (2015) (Kagan, J.) (opinion of the Court concluding certain FTCA deadlines subject to judicial tolling; discussing Arbaugh) with id. at 421-432 (Alito, J., dissenting) (reaching opposite conclusion; also discussing Arbaugh).

Yet beyond such tough cases, this Court has coalesced around many applications of Arbaugh, confirming that most run-of-the-mill statutory requirements are "not of jurisdictional cast." See, e.g., Fort Bend, 139 S. Ct. at 1850 (unanimous).

This Court has repeatedly made clear that Arbaugh and its progeny are no "mere quirk of Title VII law." Guerrero v. BNSF Ry. Co., 929 F.3d 926, 929 (7th Cir. 2019). Nothing seems particularly difficult about applying Arbaugh in this copyright context, especially since the basis of the Copyright Act's purely domestic application is a *judicial* presumption.

Because there are various ways to more narrowly or more broadly describe the Circuit split at issue here, there are various options for this Court here. If the Petition is granted, this Court could address the non-jurisdictional nature of

- (1) the presumption against extraterritoriality as applied in the context of the Copyright Act specifically;
- (2) the presumption against extraterritoriality as applied in the broader context of federal intellectual-property statutes; or
- (3) the judicially-fashioned presumption against extraterritorial application writ large.

No matter which frame this Court adopts, the Circuits are split even though this Court has been clear:

Over and over, the [Supreme] Court has stressed the difference between the fundamental power to adjudicate a claim (i.e. something affecting subject-matter jurisdiction) and lesser restrictions, including claim-processing rules and ingredients of a claim.

Guerrero, 929 F.3d at 929 (7th Cir. 2019) (emphasis added).

* * * * *

2. Taking the narrowest frame of the issue, *i.e.*, whether extraterritorial application of the Copyright Act is jurisdictional, there is a Circuit split.

The Ninth Circuit in the decision below viewed the matter as a jurisdictional one. After determining that the pertinent copyright infringements at issue in this case all took place in Japan, the Ninth Circuit concluded that the “district court’s dismissal of Superama’s complaint *for lack of subject matter jurisdiction* was [...] proper.” Pet. App. 6a (emphasis added); Pet. App. 4a (“Dismissal for lack of subject matter jurisdiction was thus proper here, as all alleged infringing activity took place outside of the United States.”).

The Eleventh Circuit has adopted a similar view. In Palmer v. Braun, 376 F.3d 1254 (11th Cir. 2004), a defendant had copied a plaintiffs’ copyrighted course materials, partially in the U.S. and partially in Paris, France, before posting the materials online. Id. at 1256-1257. After losing at trial on copyright, the defendant challenged “whether the federal courts have subject matter jurisdiction over [p]laintiffs’ copyright claim.” Id. at 1257.

The Eleventh Circuit construed the territoriality issue as a jurisdictional one: “it is only where an infringing act occurs in the United States that the infringement is actionable under the federal

Copyright Act, giving the federal courts jurisdiction over the action.” Id. at 1258.; see id. (“[T]he district court had subject matter jurisdiction over this case.”).

By contrast, the Fifth Circuit has adopted the alternative view. The Fifth Circuit expressly took note of the Eleventh Circuit’s Palmer decision, discussed above. Geophysical Serv. v. TGS-NOPEC Geophysical Co., 850 F.3d 785, 791 n.8 (5th Cir. 2017) (collecting adverse cases). Nonetheless, the Fifth Circuit held that territoriality was *not* a jurisdictional issue: “We are persuaded that the Copyright Act’s insistence that infringing conduct be domestic offers an essential element of a copyright infringement plaintiff’s claim, *not of jurisdiction.*” Id. at 791 (emphasis added).

The Fifth Circuit reasoned that, because the Copyright Act’s limited territorial reach stems not from the text but from a “background presumption[,]” Congress had *not* clearly stated that extraterritorial applications of the Copyright Act implicated courts’ subject-matter jurisdiction. Id.

The Federal Circuit has reached the same conclusion as the Fifth Circuit on this issue, noting that the issue often confused. Litecubes, LLC v. N. Light Prods., 523 F.3d 1353, 1357 (Fed. Cir. 2008) (“often-confused boundary between elements of a federal claim [...] and the requirements for establishing subject matter jurisdiction”).

On a copyright claim, the Federal Circuit held that the “district court *erred* in treating the issue of whether the goods had been imported into the United States *as an issue impacting its subject matter jurisdiction.*” Id. (emphasis added).²

To the Federal Circuit, there is simply “no indication” Congress intended territoriality to be a jurisdictional issue. Id. at 1368. Thus, the Federal Circuit too has held that domestic infringement “is properly treated as an element of the claim which must be proven before relief can be granted, *not a question of subject matter jurisdiction[.]*” Id. (emphasis added).

Likewise, the D.C. Circuit has suggested that it holds a similar view to the Fifth and Federal Circuits by styling a dismissal of an extraterritorial claim as a failure to state a claim—and *not* as a dismissal for lack of subject-matter jurisdiction. See IMA Pizza, LLC v. At Pizza, Ltd., 965 F.3d 871, 879 (D.C. Cir. 2020) (“In sum, IMA Pizza failed to state a claim under the Copyright Act because it did not allege an act of copyright infringement in the United States.”).

² Notably, the Federal Circuit was applying its own law—not the law of a regional circuit. Litecubes, 523 F.3d at 1366.

Thus, there is a Circuit split between the Ninth and Eleventh Circuits, on the one hand, and the Fifth, Federal, and D.C. Circuits on the other.

On the specific issue of whether the presumption against extraterritoriality imposes a jurisdictional limitation on the Copyright Act, the Circuits are split.

3. If the question is viewed more broadly as whether extraterritorial application of intellectual-property statutes is a jurisdictional matter, the Courts of Appeals are further divided still. While the First and Eleventh Circuits conclude that acts beyond the territorial reach of trademark's Lanham Act are outside the subject-matter jurisdiction of federal courts, the Ninth and Tenth Circuits take the opposite view (as does the Federal Circuit with respect to patent infringement).

Trademark law permits some extraterritorial application under an effects test. Meeting that effects test, the First Circuit has held, is a jurisdictional prerequisite: "We *hold* that *subject matter jurisdiction* under the Lanham Act is proper only if the complained-of activities have a substantial effect on United States commerce, viewed in light of the purposes of the Lanham Act." McBee v. Delica Co., 417 F.3d 107, 111 (1st Cir. 2005) (emphasis added).

Very recently, the Eleventh Circuit reaffirmed this view, feeling itself bound by prior Circuit precedent. It acknowledged that “some courts have held that ‘the extraterritorial reach of the Lanham Act is a merits question that does not implicate federal courts’ subject-matter jurisdiction”—citing the *exact* Ninth Circuit and Federal Circuit cases discussed below. Parsons v. Regna, __ F. App’x ___, No. 20-11293, 2021 U.S. App. LEXIS 7758, at *9 n.9 (11th Cir. 2021).

The Eleventh Circuit also acknowledged that the “extraterritorial reach of a statute *ordinarily* presents a merits question, not a jurisdictional question.” Id. (emphasis added). Nonetheless, it felt “bound by language in [past decisions] that described the extraterritorial reach of the Lanham Act as a jurisdictional question.” Id.

As the Eleventh Circuit noted, the Ninth Circuit has taken the opposite position. The Ninth Circuit viewed the issue as whether Arbaugh had “abrogated circuit case law” describing territoriality as a jurisdictional issue in trademark. Trader Joe’s Co. v. Hallatt, 835 F.3d 960, 966 (9th Cir. 2016). The Ninth Circuit concluded that Arbaugh *had*, especially in light of Morrison, where this “Court applied Arbaugh and held that the extraterritorial reach of [a securities law] is a merits question”—not a jurisdictional question. Id. at 968.

Thus, the Ninth Circuit held “that the extraterritorial reach of the Lanham Act is a merits question that does not implicate federal courts’ subject-matter jurisdiction, and that the district court erred as a matter of law when it decided otherwise.” Id.

The Tenth Circuit has made largely the same point: “the proper extraterritorial reach of a Lanham Act injunction is a matter of statutory interpretation, *not jurisdiction.*” Derma Pen, Ltd. Liab. Co. v. 4EverYoung Ltd., 736 F. App’x 741, 748 n.4 (10th Cir. 2018) (emphasis added).

Finally, the Federal Circuit has come to the same conclusion with respect to extraterritorial application of the Patent Act, concluding that it’s not a jurisdictional issue. Litecubes, 523 F.3d at 1363. The Federal Circuit reasoned that Congress has “not clearly stated” that the Patent Act’s “requirement that the infringing act happen within the United States is a threshold jurisdictional requirement”—so it held that the requirement was *not* jurisdictional. Id.

Thus, there is also a split along the broader lines of whether the intellectual-property statutes have made territoriality issues into jurisdictional ones. The split goes beyond the Copyright Act.

In fact, the Federal Circuit in Litecubes went so far as to suggest that issues of extraterritoriality would rarely rise to the order of being a jurisdictional issue: “Whether Congress did extend any particular statute to reach extraterritorial activity is simply a question of statutory interpretation.” Id.

Viewed this way, the split among the Circuits could be seen as raising the still broader question of whether a *judicial* presumption against extraterritorial application can ever amount to the clear *legislative* statement required by Arbaugh for an issue to be jurisdictional. See Section II, *infra*.

4. Two other appellate decisions related to Arbaugh and extraterritoriality address some of the wrinkles that can arise when assessing whether territoriality is a jurisdictional issue.

For example, the Third Circuit has confronted the “rather convoluted language” of the Foreign Trade Antitrust Improvements Act of 1982 (the “FTAI”), a statute expressly addressing territoriality but without any clear statement on jurisdiction. Animal Sci. Prods. v. China Minmetals Corp., 654 F.3d 462, 465 (3d Cir. 2011). Applying Arbaugh, the Third Circuit held that even though the FTAIA expressly addressed extraterritoriality, it gave no clear indication about jurisdiction. Id. at 468.

Without any such clear indication, the FTAIA’s rules on territoriality were not jurisdictional. See id.; id. at 468 n.7 (“agree[ing] with Justice Scalia that ‘the extraterritorial reach of the Sherman Act has nothing to do with the jurisdiction of the courts’ but is a ‘question of substantive law’ (quoting Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting) (ellipsis omitted)).

Finally, the Sixth Circuit recently suggested that the Arbaugh approach applies to the interpretation of a state intellectual-property statute, the Ohio Uniform Trade Secrets Act (“OUTSA”). The Sixth Circuit concluded that “whether OUTSA reaches extraterritorially is a *merits question*”—and is, therefore, *not* a jurisdictional question. Atricure, Inc. v. Meng, ___ F. App’x ___, No. 20-3264, 2021 U.S. App. LEXIS 1611, at *19 n.4 (6th Cir. 2021) (emphasis added).

* * * * *

The cases mentioned in this Section show that there is a Circuit split here. The split can be framed narrowly or more broadly, as discussed above, but the split is clear and acknowledged.

II. *MORRISON, ARBAUGH, AND MUCHNIK MAKE CLEAR THAT THE NINTH CIRCUIT WAS WRONG TO TREAT THE PRESUMPTION AGAINST EXTRATERRITORIAL APPLICATION AS A JURISDICTIONAL MATTER.*

Below, the Ninth Circuit made a clear, but understandable, error. In light of Morrison, Arbaugh, and Muchnik, the Ninth Circuit's characterization of territoriality as a jurisdictional issue was a *mischaracterization*.

Arbaugh and its progeny require a clear Congressional statement for a rule to be jurisdictional. The Copyright Act has no such clear statement but is presumed to only apply domestically by operation of judicial presumption. Yet, the *judicial* presumption against extraterritorial application is not a clear statement by *Congress* about jurisdiction.

Rather, the presumption against extraterritorial application is just that—a *judicial* presumption as to how to interpret statutes. As such, limitations against extraterritorial application based on this judicial presumption would rarely, if ever, amount to Congress' clear statement that the rule against extraterritorial application is jurisdictional. Put simply, inferred or presumed readings of statutes don't meet Arbaugh's clear-statement test.

* * * * *

Below, the Ninth Circuit affirmed “the district court’s dismissal of Superama’s complaint for lack of subject matter jurisdiction[,]” finding a dismissal under Rule 12(b)(1) appropriate. Pet. App. 6a. The Ninth Circuit reasoned that because “United States copyrights *[sic]* laws do not have extraterritorial effect,” the “[d]ismissal for lack of subject matter jurisdiction was thus proper[.]” Pet. App. 4a.

The Ninth Circuit’s characterization is quite understandable. Courts have often “conflated” subject-matter jurisdiction with “merits-related determination[s].” Arbaugh, 546 U.S. at 511. Although the line between the two is “perhaps clear in theory[,]” in practice distinguishing between jurisdictional conditions and non-jurisdictional conditions can be “confusing[.]” Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 161 (2010).

Therefore, it’s understandable that a court might hold that the territorial reach of the Copyright Act implicated subject-matter jurisdiction. Yet, in so ruling, the Ninth Circuit made an understandable error.

It’s an error because the Ninth Circuit’s holding below, although understandable, conflicts with this Court’s decisions in Morrison, Arbaugh, and Muchnik.

Arbaugh's rule applies in the copyright context. Muchnick, 559 U.S. at 161 (applying Arbaugh to copyright's registration rule).

And, Arbaugh supplies a “readily administrable bright line” to determine whether a requirement or restriction is jurisdictional. Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 153 (2013). That bright line rule asks “whether Congress has ‘clearly state[d]’ that the rule is jurisdictional” and, if Congress has not, “courts should treat the restriction as nonjurisdictional in character.” Id. A matter is only jurisdictional “if the Legislature clearly states” as much. Muchnick, 559 U.S. at 161.

This approach, Arbaugh's approach, provides a “*general approach* to distinguish ‘jurisdictional’ conditions from claim-processing requirements or elements of a claim[.]” Id. (discussing Arbaugh) (emphasis added).

In turn, this general approach supplies the appropriate analytical framework for addressing whether the territorial reach of a statute is a jurisdictional question. In fact, in Morrison v. National Australia Bank Ltd., this Court said territorial reach is *not* jurisdictional, at least in the context of a securities law. 561 U.S. 247, 253 (2010).

There, this Court held that a dismissal under Rule 12(b)(1) due to extraterritoriality was “error” because the dismissal should have been under Rule 12(b)(6). Id. at 253-254. At least in context of a securities law, Morrison made clear that extraterritoriality is not a jurisdictional question but rather “a merits question[.]” Id. at 254. And, nothing in Morrison’s analysis of the issue would suggest that Morrison does not or cannot apply to other statutory contexts beyond securities law.

In fact, several Courts of Appeals have applied Morrison’s key insight that extraterritoriality is not a jurisdictional question to other statutes. For example, the Fifth Circuit held that, because the Copyright Act’s limit on territorial reach is not clearly stated to “count as jurisdictional[,]” courts must “treat the restriction as *nonjurisdictional* in character.” Geophysical, 850 F.3d at 791 (emphasis added) (relying on Arbaugh and Morrison).

That makes sense. If the Copyright Act never states any rule against extraterritorial application but instead relies upon the judiciary to properly infer such a rule, then Congress has by no means clearly stated any limit on subject-matter jurisdiction. In other words, any statute that relies upon a *presumption* against extraterritorial application surely does not meet Arbaugh’s requirement for a *clear statement* of that rule’s jurisdictional significance.

That's *why* the Fifth Circuit has concluded that the Copyright Act's presumption is not a clear statement of jurisdictional limitations in Geophysical. That's *why* the Federal Circuit and D.C. Circuit have said the same—because a judicial presumption is not a clear legislative statement. See Litecubes, 523 F.3d at 1357; IMAPizza, 965 F.3d at 879.

Importantly, the Copyright Act has no generalized express statement about the geographical scope of its application. Certain provisions, such as 17 U.S.C. § 602's importation restrictions hint that it's only a domestically applicable law but do not so state.

Similarly, this Court has stated that the Copyright Act "does not instantly *protect* an American copyright holder from unauthorized piracy taking place abroad." Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 531 (2013) (emphasis in original); see also Quality King Distrib. v. L'Anza Research Int'l, 523 U.S. 135, 154 (1998) (Ginsburg, J., concurring) (citing Patry treatise for the proposition "that provisions of Title 17 do not apply extraterritorially unless expressly so stated").

Infringements abroad simply aren't generally addressed by the U.S. Copyright Act. And, when a statute gives "no clear indication of an extraterritorial application, it has none." See RJR Nabisco, 136 S. Ct. 2090, 2100 (2016) (quoting Morrison, 561 U.S. at 255).

Here, in the context of the Copyright Act, the lack of any statement about extraterritorial application is *also* a lack of clear statement as to the jurisdictional significance of the law's territorial reach. Since the Copyright Act doesn't even clearly state its territorial reach, it cannot clearly state the jurisdictional significance of that territorial reach, per Arbaugh.

Yet, even if the Copyright Act expressly limited its reach to U.S. territory, such an express limitation would still not be jurisdictional without an express indication to that effect.

Even when the Courts of Appeals have confronted Congressional enactments that *expressly* limited antitrust laws to domestic applications, the expressly stated rule against extraterritorial application was *still* held to be non-jurisdictional under Arbaugh and Morrison. See Animal Sci. Prods. v. China Minmetals Corp., 654 F.3d 462, 466 (3d Cir. 2011); Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 852 (7th Cir. 2012) (concluding that Morrison "provides all the guidance we need").

* * * * *

Ultimately, the Copyright Act has no express statement about its territorial reach. Instead, it leaves the judiciary to presume that it applies domestically.

Thus, it's hard to see how a *judicially inferred* rule against extraterritorial application could meet Arbaugh's clear-legislative-statement test when even an expressly stated rule against extraterritorial application (that makes no mention of jurisdiction) doesn't. If courts must infer a rule, then, *a fortiori*, Congress has not clearly stated that the inferred rule is of jurisdictional significance.

Below, the Ninth Circuit understandably but erroneously contravened this Court's repeated holding that a rule is not jurisdictional unless Congress clearly indicates as much. See Pet. App. 6a.

III. BEING PRECISE AS TO WHETHER AN ISSUE IS JURISDICTIONAL OR MERELY MANDATORY IF RAISED HAS SIGNIFICANT CONSEQUENCES, AS THIS COURT HAS REPEATEDLY EMPHASIZED.

The characterization of a rule as jurisdictional or non-jurisdictional “is not merely semantic but one of considerable practical importance for judges and litigants.” Henderson v. Shinseki, 562 U.S. 428, 434 (2011). As such, this Court has not idly undertaken significant efforts to “ward off profligate use of the term” jurisdictional. See Fort Bend Cty. v. Davis, 139 S. Ct. 1843, 1848 (2019).

Rather, it’s done so because of the “unique” effects of such a characterization: the “harsh consequences,” the potential for “wasted court resources[,]” and the capacity to “disturbingly disarm” litigants through late-raised jurisdictional objections. See id. at 1849 (cleaned up); United States v. Wong, 575 U.S. 402, 409 (2015) (“harsh consequences”); Henderson, 562 U.S. at 435 (“drastic”).

In fact, insofar as many of the rules in litigation are intended to “promote the orderly progress of litigation[.]” characterizing such rules as jurisdictional in nature could result in the opposite effect of slowing litigation down or wasting significant resources. See Wong, 575 U.S. at 410.

That's why this Court has "tried in recent cases to bring some discipline to the use" of the term jurisdiction. Auburn, 568 U.S. at 153. This Court has given the lower courts a "readily administrable bright line" to use in deciding how to characterize a rule—and most statutory or legal rules turn out, under this Arbaugh test, to be non-jurisdictional in nature. Cf. id.

Above, this Petition described why these issues might be especially urgent in copyright. First, because knowing the place of infringement can be quite technologically complicated, especially when the copies can be "fixed by any method now known or later developed[.]" 17 U.S.C. § 101 (defining "Copies") (emphasis added). Second, because calculating damages on a global basis would be dizzyingly more complex if extraterritorial applications were jurisdictionally barred.

A third consideration is that, unlike most forms of property, intellectual property easily transcends national boundaries, especially on the Internet. In this sense, it would be easy for an American citizen to infringe another American's copyrights in foreign countries through online acts. If American courts were jurisdictionally barred from hearing a copyright dispute between American nationals as to an infringement that occurred abroad, the effect could be harmful for both parties.

The copyright plaintiff would be less likely to have access to law. Yet, if the plaintiff could retain foreign copyright counsel, American copyright defendants would find themselves called into foreign courts for acts of online infringement. Indeed, under the rule applied by the Ninth Circuit below, that would be the plaintiff's only option—even if both sides preferred a domestic forum.

Years ago, two Justices of this Court showed some solicitude for the alarming possibility that everyday persons could be forced into litigation far from their homes. See J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 891-92 (2011) (Breyer, J., joined by Alito, J.) (concerns about how a rule of personal jurisdiction might affect “an Appalachian potter” whose distributor resells products in “Hawaii”). Those kinds of concerns are highly apposite here as well, especially where the parties could *not* agree to a domestic forum—forcing certain disputes into foreign courts.

CONCLUSION

For the foregoing reasons, Petitioner Superama respectfully requests that this Petition be granted.

If this Court thinks it appropriate, this Petition may be appropriate for summary disposition in light of Arbaugh, Muchnik, Morrision, and other cases in their line of precedents.

Respectfully submitted,

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