

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| EXPLOROLOGIST LIMITED, |) | Civil Action No. 2:07-cv-01848-LP |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | The Honorable |
| |) | Louis H. Pollak |
| BRIAN SAPIENT aka BRIAN J. CUTLER, |) | |
| |) | |
| Defendant. |) | |
| |) | |

**BRIEF IN SUPPORT OF
DEFENDANT’S MOTION FOR
PARTIAL SUMMARY JUDGMENT
ON BRITISH COPYRIGHT LAW**

I. INTRODUCTION

This motion for summary judgment is filed in response to this Court’s invitation for further briefing regarding the United Kingdom copyright law issues raised by this case. As explained in the Rule 44.1 expert reports filed with this motion, Plaintiff Explorologist must fail in its effort to extend the reach of U.K. copyright law to activities that occurred entirely outside the of the U.K.

Explorologist has backed itself into a corner. At the heart of this case is a 14-minute video that criticizes Explorologist’s principal, self-styled “mentalist” Uri Geller. After Defendant Brian Sapient posted the video to the popular Internet video site, YouTube, Explorologist sent a trumped-up copyright infringement notice to YouTube, based on its alleged copyright ownership over eight seconds of material used to set up the video’s critique. As a

result of this pretextual copyright infringement notice, the entire video was “taken down” by YouTube. Now, in an effort to intimidate Mr. Sapiient and keep the video from the public, and well aware that it has no infringement claim under U.S. copyright law, Explorologist has asked this Court to apply U.K. law to the alleged “infringement.” As explained in detail below, however, and bolstered by the testimony of leading British copyright scholars, Explorologist’s copyright claim fails under U.K. law just as surely as it would fail under U.S. law.

British copyright law is guided by the same strong principles of territoriality that have shaped U.S. statutes and judicial decisions, and those principles doom Explorologist’s claims. The allegedly copyrighted material in question here (i.e., the eight-second clip) was uploaded by a U.S. resident to the website of a U.S.-based company that has no servers located in the U.K. In other words, the undisputed facts establish that Explorologist is targeting activities that took place entirely outside the territorial reach of U.K. copyright law. Furthermore, because Explorologist has failed to identify any acts that could infringe U.K. copyright law, its derivative “authorization” claim against Sapiient must also fail.

Mr. Sapiient respectfully requests that this Court put an end to Explorologist’s misguided effort to censor criticism that is plainly constitutionally protected free speech under U.S. law.

II. STANDARDS OF REVIEW

A court may grant summary judgment when the submissions in the record “show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c). “The inquiry performed is the threshold inquiry of determining whether there is the need of a trial—whether, in other words, there are

any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

Once an issue of foreign law has been properly raised, the court’s determination of its application is a matter of law. FED. R. CIV. P. 44.1. In making that determination it “may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.” *Id.* “The Court has great discretion in choosing source materials when the application of foreign law is necessary.” *Zurich Capital Mkts., Inc. v. Coglianesi*, 383 F.Supp.2d 1041, 1052-53 (N.D. Ill. 2005) (examining Bahamian law in context of motion to dismiss).

To assist the Court, Mr. Sapient submits herewith an expert report from one of the foremost authorities on British copyright law, Professor Lionel Alexander Fiennes Bently, of the Centre for Intellectual Property and Information Law, Faculty of Law, University of Cambridge. Professor Bently has published extensively on British intellectual property law, including co-authoring one of the principal textbooks on the subject, *Intellectual Property Law* (with Brad Sherman) (Oxford, Oxford University Press, 2001) (2d ed., 2004). (See Expert Report of Professor Lionel Bently Pursuant to Federal Rule of Civil Procedure 44.1 [“Bently Report”], attached hereto as Ex. 1, at ¶¶ 1-2 and Ex. A to Bently Report (CV).) He has taught intellectual property law for almost 20 years, in the United Kingdom and abroad, and is currently a visiting Professor of European Law at Columbia University. In addition, Professor Bently has reviewed and endorsed the expert report of Professor Sir Hugh Laddie, Q.C., submitted with Google, Inc. et al.’s amicus brief in support of this Motion. (See Bently Report ¶ 4 and Ex. B to Bently Report

(Expert Report of Professor Sir Hugh Laddie Pursuant to Federal Rule of Civil Procedure 44.1) [“Laddie Report”].) Professor Laddie is himself a renowned intellectual property scholar who presided over a number of U.K. intellectual property cases in his previous capacity as a judge in the British High Court. Finally, Mr. Sapiant submits relevant cases, statutory sections and commentary from a leading treatise on U.K. copyright, *Copinger and Skone James on Copyright*, I (Kevin Garnett et al. eds., 15th ed. 2005). (See Appendix of Foreign Authorities (“App.”) at Items 1-8.)

III. ISSUES TO BE DECIDED

1. Whether Mr. Sapiant’s alleged uploading of a nearly 14-minute video that contained the eight-second clip constitutes authorization of a restricted act under British copyright law, given that the servers for the website to which he is alleged to have uploaded the video are located outside the United Kingdom.

2. Whether Mr. Sapiant infringed Explorologist’s copyright in the Hughes Film, under British law, by making a copy in the United States of a nearly 14-minute video that contained an eight-second clip of the Hughes Film.

IV. RELEVANT UNDISPUTED FACTS

The facts of this case are straightforward and, in all respects relevant to this motion, undisputed.

This case is about an eight-second clip contained in a nearly 14-minute video (the “Video”) that Defendant Brian Sapiant uploaded to YouTube on November 15, 2006. (See Ex. 2 (Printout of webpage located at <http://www.youtube.com/watch?v=M9w7jHYriFo>) [last visited

on Jan. 14, 2008]; Am. Compl. ¶ 2.¹) Mr. Sapient resides in Pennsylvania and is a member of the Rational Response Squad, an activist group dedicated to challenging what they see as irrational claims. (Am. Compl. ¶ 2.) YouTube is a popular video-sharing website headquartered in California. (See Ex. 3.) By uploading to the YouTube website, Mr. Sapient transmitted the Video over the Internet to YouTube, which in turn stored it on its servers for the public to access. See generally *U.S. v. Riggs*, 739 F.Supp. 414, 417 n.3 (N.D. Ill. 1990) (“‘Downloading’ is the process of transferring files, programs, or other computer-stored information from a remote computer to ones own computer . . . ‘Uploading’ is the reverse process, i.e., transferring computer-stored data from ones own computer to a remote computer.”) (citations omitted); <http://www.youtube.com> (last visited January 9, 2008). None of YouTube’s servers are located in the U.K. (See Declaration of William Patry in Support of Def.’s Motion for Summary Judgment [“Patry Decl.”], attached hereto as Ex. 4, at ¶ 3.)

The Video is an excerpt taken from a 1993 documentary entitled “Secrets of the Psychics” produced by the U.S. Public Broadcasting Service (“PBS”) television series NOVA (the “NOVA Documentary”). (See NOVA, *Secrets of the Psychics: Program Overview*, attached hereto as Ex. 5²; see also Brief in Support of Sapient’s Request for Judicial Notice (“RJN”), Dkt. 20, Ex. B [PBS’s “Secrets of the Psychics”].) The hour-long NOVA Documentary included a

¹ In its Amended Complaint, Explorologist alleges the video was uploaded in January 2007. Am. Compl. ¶ 10. As the YouTube webpage dedicated to the video demonstrates, this date is incorrect. (See Ex. 2). In any event, the date of the uploading is not material to the issues in this Motion.

² http://www.pbs.org/wgbh/nova/teachers/programs/2012_psychics.html (last visited January 9, 2008).

14-minute segment in which magician and skeptic James Randi first explains how Uri Geller's allegedly supernatural feats might have been accomplished through trickery, then exposes faith healer Peter Popoff. (*Compare* RJN Ex. A (PBS's "Secrets of the Psychics") with <http://www.youtube.com/watch?v=M9w7jHYriFo> (last visited on January 14, 2008).) Mr. Sapient excerpted and uploaded that segment—the Video.

As it happens, the Video includes eight seconds of footage in which an individual (Dr. C.J. Hughes), standing alone on stage, introduces Uri Geller to an audience, stating that Mr. Geller's "remarkable affinity for metal and his psychic abilities are well documented all over the world." (*See* Video at 0:50 to 0:58.) This footage ("the Hughes Clip") was allegedly taken from a longer videotape (the "Hughes Film") filmed by Geller's brother-in-law, Shimshon ("Shipi") Shtrang, of a 1987 Geller performance at the Hexagon Theatre in England.³ (*See* Hughes Film, included as Ex. 6⁴ at 0:6 to 0:14; Am. Compl. ¶¶ 7-8.) Explorologist claims to own the copyright in the Hughes Film, and the inclusion of the Hughes Clip in the Video is the basis of Explorologist's infringement claim.⁵ (Am. Compl. ¶¶ 6-10; Plaintiff's Initial Disclosures,

³ The entire Hughes Film provided by Explorologist as part of its Initial Disclosures is about four minutes long, and consists of a single continuous shot of a man introducing Mr. Geller, ending as soon as Mr. Geller arrives on the stage. (*See* Ex. 6.) The Hughes Clip (i.e., the eight seconds of the Hughes Film that appear in the Video and which is the basis for Explorologist's copyright claim) occurs in the first few seconds of the Hughes Film. (*Id.* at 0:06 to 0:14.)

⁴ The Hughes Film was filed separately because it is in DVD format.

⁵ While this summary judgment motion turns on the legal issues arising from British copyright law and not the underlying videos themselves, Defendant believes viewing the actual videos (the NOVA Documentary, the Video and the Hughes Clip) may aid the Court in its understanding of the context of the case and, therefore, respectfully urges the Court to do so. To facilitate this, Defendant has submitted the Hughes Film with this Motion. As noted, a videotape of the

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attached hereto as Ex. 7; *see also* Pl.'s. Opp. to MTD pp. 4-5; Def.'s MTD, *Sapient v. Geller*, N.D. Cal. Case No. 3:07-cv-02478-VRW, Dkt. 25, p. 13 [stating lawsuit revolves around posting of "a short film clip featuring Dr. C.J. Hughes]," attached hereto as Ex. 8.)

On March 23, 2007, Mr. Shtrang, an agent of Plaintiff Explorologist and Mr. Geller, demanded that YouTube take down the Video pursuant to the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512. (*See* DMCA Notice, *John Doe a/k/a Brian Sapient v. Uri Geller a/k/a Uri Geller-Freud and Explorologist Ltd.*, N.D. Cal. Case No. 3:07-cv-02478-VRW, attached hereto as Ex. 9.) Four days later, Mr. Sapient submitted a counter-notification of noninfringement to YouTube under the DMCA. (*See* Shtrang Declaration, ¶ 18, *Sapient v. Geller*, N.D. Cal. 0-0248-VRW, attached hereto as Ex. 10.) However, as a result of Explorologist and Mr. Geller's conduct, Mr. Sapient's YouTube account and all of his video postings (including, but not limited to, the Video) remained unavailable for more than two weeks before it was reposted on April 6, 2007.

V. PROCEDURAL HISTORY

Explorologist filed the instant case on May 7, 2007 and filed its Amended Complaint on May 23, 2007. Relying on the British Copyright Designs and Patents Act of 1988 ("CDPA"), Explorologist alleged that Mr. Sapient infringed its United Kingdom copyright in the Hughes Film by posting the Video. (*See* Am. Compl. ¶ 10; Video at 0:50 to 0:58; Ex. 6 at 0:6 to 0:14.) Explorologist also alleged state law causes of action not at issue in this Motion. On May

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complete NOVA program (including the segment Mr. Sapient uploaded) is already in the record, and the Video is readily available at <http://www.youtube.com/watch?v=M9w7jHYriFo>.

8, 2007, Mr. Sapiant sued Explorologist and Mr. Geller in the Northern District of California, seeking damages for misrepresentation and a declaratory judgment of noninfringement. *See Sapiant v. Geller*, N.D. Cal. Case No. 3:07-cv-02478-VRW.

Mr. Sapiant filed a Motion to Dismiss the Amended Complaint on June 12, 2007, arguing, *inter alia*, that Explorologist could not state a cause of action under British law because (1) all of Mr. Sapiant's alleged copying took place in the United States; and (2) if anyone communicated the work to the public, that person was YouTube, the entity hosting the Video. Explorologist responded to the latter argument by claiming that Mr. Sapiant had infringed its copyright in the eight-second Clip by *authorizing* YouTube to make the Video Segment available.

On October 29, 2007, the Court ruled that infringement by authorization was properly alleged. (Order, Dkt. 35.) The Court further noted that on this theory Mr. Sapiant's alleged liability necessarily derived from YouTube's conduct—if YouTube's acts were not infringing, then Mr. Sapiant's authorization of those acts could not be infringing—and invited briefing on the issue of whether YouTube's conduct was actionable under British law. (Order at 2-3.⁶)

⁶ There are many dispositive problems with Explorologist's copyright claims. However, this Motion only addresses the issue this Court invited the Defendants to address in its October 29, 2007 order. If necessary, Mr. Sapiant will bring the other issues before this Court at a later date.

VI. ARGUMENT

U.K. copyright law grants copyright owners certain exclusive rights, and specifies that those rights are territorially limited: “The owner of the copyright in a work has, in accordance with the following provisions of this Chapter, the exclusive right to do the following acts in the United Kingdom.” (*See* CDPA 1988 § 16(1), attached at App. Item 7; Bently Report at ¶15; Laddie Report at ¶¶ 5, 9.) U.K. copyright law does contemplate liability for authorizing an infringing act from outside the U.K.—but only if the copyright owner pressing such a claim can also prove that the allegedly authorized infringement itself took place in the U.K. (Bently Report at ¶ 20; Laddie Report at ¶ 12-13.)

Thus, in order to prevail, Explorologist must either present evidence that Mr. Sapien himself engaged in a restricted act in the U.K., or show that he is responsible for “authorizing” a third party to engage in a restricted act in the U.K. The undisputed facts demonstrate that Explorologist has not, and cannot, meet this burden.

A. **Mr. Sapien Has Not Communicated the Hughes Clip to the Public Within the Meaning of British Copyright Law, Nor Authorized Such a Communication.**

1. *Mr. Sapien Did Not Make the Hughes Clip Available to the Public.*

In its Amended Complaint, Explorologist alleges that Mr. Sapien infringed its copyright by “causing” the Hughes Clip to be seen and heard in the United Kingdom. While “causing material to be seen” is not a cause of action under U.K. law, the claim can be construed to invoke the exclusive right to “communicate” the work to the public. (*See* CDPA 1988 § 16, App. at Item 7.) As amended in 2003, the right specifically encompasses “making a work available” to the public by electronic means “in such a way that members of the public may

access it from a place and time individually chosen by them.” (*Id.*; *see also* Laddie Report at ¶¶ 17-18.)

But Explorologist’s Amended Complaint does not (and cannot) allege that Mr. Sapien himself made the work available to the public. (*See* Am. Compl. at ¶¶ 10-11.) Rather, he is accused of uploading the video to the YouTube website; YouTube, in turn, makes the video publicly accessible. (*See* Order at 2; *see also* *Copinger and Skone James on Copyright*, App. at Item 8 at §§ 7-114, 7-115. “[W]here A makes the work available to B, an internet service provider, so that B can make it available to the public [by electronic transmission] *it is the act of B* in making it available by electronic transmission such that the public can access it which is the restricted act.” (*Id.* (emphasis added).) British copyright experts confirm this view. (*See* Laddie Report at ¶ 18; Bently Report at ¶¶ 15-17.) Thus, Mr. Sapien cannot be held directly liable for making the video available.

2. *Mr. Sapien Did Not Authorize Any Infringement Because YouTube Has Not Infringed U.K. Copyright Law.*

Recognizing that it has no direct “making available” claim against Mr. Sapien under U.K. law, Explorologist nonetheless insists that Mr. Sapien is indirectly liable because he allegedly *authorized* YouTube to make the video available. (Order at 2; Pl.’s Opp. to MTD at 15.) Yet assuming *arguendo* that authorization is properly alleged in the Amended Complaint, *see* Order at 2, Explorologist still cannot prove up its claim because Mr. Sapien did not authorize an infringing act.

A party cannot be held liable for authorizing an act unless that act is itself forbidden by U.K. law. “Authorising is a tort only if the act authorized is an act restricted by

copyright.” (Laddie Report at ¶ 12; *see also* Bently Report at ¶ 20; App. at Item 1 at 660.) Thus, as this Court correctly surmised, if YouTube has not violated U.K. law by rendering the video accessible to the public, then Mr. Sapien has not violated U.K. law by purportedly authorizing that activity. (Bently Report at ¶ 20; Laddie Report at ¶ 13.) As set forth below, because YouTube servers are not located in the United Kingdom, YouTube has not infringed U.K. copyright law—and neither has Mr. Sapien.

(a) “Making Available” Is Restricted Under British Law Only If Accomplished Within the United Kingdom.

While no British court has directly considered the meaning of “making available,” experts agree that the act of making a video available must be understood to occur where the video itself is hosted, *i.e.*, where the server is located. Professor Bently notes that in the analogous case of broadcasting (also a subset of “communication to the public”), the broadcast is understood to occur where the broadcast originates—not where the broadcast is received. (Bently Report at ¶¶ 15-16; *see also Copinger and Skone James on Copyright*, App. at Item 8 at § 7-111; CDPA § 6, App. at Item 7.) Similarly, the act of making available by electronic transmission must occur where the apparatus (*i.e.*, the server) that permits access to the work is situated. (*Id.*) Professor Laddie comes to the same conclusion, observing that the statute contemplates that the act of making available is complete when the material is in fact made available for access. “It is not necessary for the copyright owner to wait until a member of the public somewhere has taken advantage of the opportunity presented to him. All that is necessary is to show that the material is available.” (Laddie Report at ¶18.) Therefore, under U.K. law, the restricted act “is something which happens when the material is placed on the server, not when it is accessed.” (*Id.*)

And, if the server in question is located outside of the United Kingdom, making material available on that server is not a restricted act under U.K. law. CDPA section 16(1) applies only to acts that occur in the United Kingdom, whether the act in question is making a copy or making a copy available. (App. at Item 7, Bently Report at ¶ 15; Laddie Report at ¶¶ 5, 10.) As Lord Justice Neill put it in *ABCKO Music and Records v. Music Collection International Limited*, [1995] R.P.C. 657, 663, the plain language of the CDPA makes it “clear that the rights conferred by 16(1) are rights which protect the copyright only insofar as they are exercised in the United Kingdom . . . It is plain that the ‘doer’ of a restricted act will infringe the copyright if, but only if, he does that act within the United Kingdom.” Similarly, in *Polydor Ltd. v. Brown*, [2005] EWHC 3191 (Ch.), a British court found that the defendant, a U.K. resident, had made music files available where he installed the files on his home computer in the U.K. and installed software that enabled members of the public to access those files from that computer. (See App. at Item 6.) Thus “all the acts that cumulatively resulted in the sound recordings becoming accessible by the public from a place and at a time chosen by it were acts in the United Kingdom that were controlled by [Defendant U.K resident].” (Bently Report at ¶13; see also *Copinger and Skone James on Copyright*, App. at Item 8 at § 7-131 [“no infringement is committed by the doing of any of the restricted acts unless the act takes place in the United Kingdom,” citing CDPA s. 16(1)]).

Here, it is undisputed that the server to which Sapient uploaded the material at issue is owned and controlled by YouTube. (Am. Compl. at ¶ 10 (“Defendant digitally upload[ed] upon the website pages of the domain name www.youtube.com electronic images of the Film”).) YouTube has declared that it does not have any servers in the United Kingdom. (Patry Decl. at ¶ 3.) Accordingly, YouTube did not make and could not have made the video available

in the United Kingdom within the meaning of section 16(1). Thus, YouTube's alleged conduct is not actionable under British law.

Indeed, any other conclusion would fly in the face of the principles of territoriality that are deeply embedded in U.K., U.S. and international copyright law. Copyright laws "generally do not operate extraterritorially . . . the law that applies is generally the law of the country of infringement." (Order at 1; *see also* App. at Item 1 at 660 ("In principle the law of copyright is strictly territorial in application.") (*citing Def Lepp Music v. Stuart Brown* [1986] R.P.C. 273, 276).

There are strong policy reasons for this rule, as this case demonstrates. On Explorologist's theory, U.K. law could be used to sue any website or Internet service provider, anywhere in the world, even where all of the underlying activity took place outside of the U.K., as long as it was possible for a person living in the U.K. to access the defendant's servers. This would effectively project U.K. copyright law to the four corners of the globe; any Internet service provider or website accessible to a U.K. resident would suddenly be subject to U.K. copyright laws. As set forth above, and affirmed by a leading treatise on U.K. copyright law and two highly respected experts, nothing in British statutory or case law supports such a radical interpretation.

Explorologist's own statements illustrate the dangers of such a precedent. In a pleading filed in the California litigation, Explorologist has stressed the "great disparity" between U.S. and U.K. copyright law:

In the United States, there is an interplay between the fair use defense and first amendment free speech protections. *Eldred v. Ashcroft*, 537 U.S. 186 (1993). There is no corresponding First Amendment protection under the copyright laws of England and Wales.

(Ex. 8 at p. 5.) Explorologist asks this Court to set a precedent allowing for the application of the British copyright law to American companies, so that it and others can try to sidestep the First Amendment-based fair use doctrine in favor of the U.K. concept of “fair dealing.”⁷ This is anathema to U.S. First Amendment and copyright policies, and must be rejected.

(b) Mr. Sapien Did Not Authorize Any Restricted Act.

By extension, U.K. law does not forbid Mr. Sapien’s alleged “authorization” of YouTube’s conduct. Brian Sapien is accused of uploading the video to YouTube and thereby authorizing YouTube to make the video available. (Am. Compl. at 10; Pl.’s Opp. to MTD at 4-5.) The only question, then, is whether that authorization violates U.K. law if, as explained above, YouTube’s act of making the video available *does not* violate U.K. law.

British authorities agree that the answer must be a resounding *no*, for two overlapping reasons. First, it is not an infringement to authorize a noninfringing act. (Bently Report at ¶ 20; Laddie Report at ¶ 13; *see also Nelson v. Rye* [1996] Fleet Street Reports 313 (no infringing authorization if no act of infringement), attached at App. Item 5; *Composers, Authors and Publishers Assoc. of Canada Ltd. v. CTV Television Network Ltd.* [1968] S.C.R. 676, 680 (same), attached at App. Item 3.) Because YouTube’s conduct did not infringe Explorologist’s British copyright, neither does Mr. Sapien’s conduct.

⁷ The First Amendment, of course, cannot be ignored by U.S. courts, regardless of what law is applied. (See Def.’s Motion to Dismiss at pp. 17-21.)

Second, it is not an infringement to authorize activity that does not take place in the United Kingdom. (*See* Laddie Report at ¶ 18.) In *ABKCO*, discussed *supra*, a British appellate court held that a party located outside of the United Kingdom could be held liable for authorizing restricted acts *where those acts took place in the United Kingdom*. In reaching the holding, the Justices’ respective analyses carefully stressed the territoriality of British copyright law, noting that the somewhat exceptional extraterritorial application of U.K. law to authorization abroad was balanced by the requirement that the act authorized take place in the U.K. Lord Justice Hoffman observed that section 16(2) did not specify geographic limits because “the requirements of territoriality are satisfied by the need for the act authorized to have been done in the United Kingdom.” (App. at Item 1 at 660.) Lord Neill agreed, noting that: “The scope of the tort has sufficient territorial limitation *because the restricted act which is authorised has to be done in the United Kingdom*” (*Id.* at 663) (emphasis added.) Here, the opposite is true: as explained above, the alleged restricted act did not take place in the U.K.

Thus, both authorization limits apply: the allegedly authorized act was noninfringing (limit 1) because it did not occur in the United Kingdom (limit 2). Simply put, British copyright law does not bear on the acts alleged. Explorologist’s “authorization” claim fails as a matter of undisputed fact and U.K. law, and Mr. Sapient is entitled to summary judgment on Explorologist’s “authorization” claim.

B. Explorologist Cannot Use Foreign Copyright Law to Punish Mr. Sapient for Allegedly Reproducing the Work in the United States.

Explorologist’s claim alleging “reproduction” of the Hughes Clip, *see Am. Compl.* ¶ 11(a), fails for similar reasons. While Explorologist does not specify the nature of the “copying” at issue, based on the Amended Complaint and subsequent pleadings, it appears that

the alleged infringement consisted of making a copy in the course of preparing the Video for uploading, and/or in the process of uploading, both of which Explorologist concedes took place in the United States. (See Am. Compl. ¶ 2; Pl.’s Opp. to MTD at 9.)

Given that this allegedly infringing activity took place entirely in the United States, the United States is the protecting country and its law governs the actionability of the activity. See *Itar-Tass Russian News Ag. v. Russian Kurier*, 153 F.3d 82, 91 (2d Cir. 1998) (U.S. law applies to infringement issues where infringement allegedly occurred in U.S.); *Bridgeman Art Library, Ltd. v. Corel Corp.*, 25 F. Supp. 2d 421, 426, *reconsidered*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999) (“whether an infringement has occurred in the United States is a matter of United States law.”); Paul Goldstein, *Goldstein on Copyright*, 3d Ed. § 18.2.1.1 (2007) (“the law of the protecting country—the country where the work is being exploited without the copyright owner’s authority—will as a rule govern whether . . . the rights alleged to be infringed are protected by copyright . . . [for example] if X’s scholarly article, first published in the United States, is reproduced without X’s authority in France, X’s rights, and the exceptions to those rights will be determined under French law.”); see also Paul Goldstein, *International Copyright* § 3.3.2.1 (2001).⁸

⁸ Moreover, these basic territoriality principles are buttressed by Section 301 of the U.S. Copyright Act, which provides:

all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 . . . are governed exclusively by this title. 17 U.S.C. § 301(a).

Section 301 specifically anticipates and disposes of the application of foreign law to purely U.S. activities, noting that:

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Indeed, British authorities concur that the United Kingdom has no jurisdiction over reproductions made in other countries.⁹ (*See* App. at Item 8 at § 22-116 [U.K. copyright law generally does not apply to restricted acts committed outside of the United Kingdom]) and App. at Ex 7; Bently Report at ¶15; Laddie Report at ¶ 10.)

Thus, to the extent that Count I relies on an alleged violation of Explorologist's reproduction right, the claim fails under U.S., British and international law.

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The scope of Federal preemption under this section is not affected by the adherence of the United States to the Berne Convention or the satisfaction of obligations of the United States thereunder.

Id.; *see also Bridgeman*, 36 F. Supp. 2d at 193 (“it now is clear that the treaty power is subject to the constitutional limitations that apply to all exercises of federal power.”) (internal quotations omitted). In its Complaint and pleadings, Explorologist explicitly alleges and acknowledges that Sapient violated its British copyright by making a reproduction of its video footage in the United States. Am. Compl. ¶ 11(a). Pl.'s Opp. to MTD at 9. Section 106(1) of the U.S. Copyright Act specifically entitles owners of copyrighted works to the exclusive right of reproduction within the United States. 17 U.S.C. § 106(1). Thus, Explorologist's claim to the legal and equitable right to control reproduction in the United States under British law is equivalent to the exclusive right of Section 106(1) and must be preempted under Section 301.

⁹ As explained in Section VI(A)(2)(b), extraterritorial *authorization* of a restricted act may be actionable, but only if the authorized act takes place within the United Kingdom.

VII. CONCLUSION

For the foregoing reasons, this Court should grant Defendants' motion for summary judgment on Explorologist's British Copyright claim.

/s/ Corynne McSherry

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