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Killing One Bird With One Stone: How the United States Federal Courts Should Issue Foreign Antisuit Injunctions in the Information Age

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KILLING ONE BIRD WITH ONE STONE: HOW THE UNITED STATES FEDERAL COURTS SHOULD ISSUE FOREIGN ANTISUIT INJUNCTIONS IN THE INFORMATION AGE

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I. INTRODUCTION

In 1895, the United States Supreme Court in *Hilton v. Guyot*[1] refined the

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[1] 159 U.S. 113 (1895) (involving an action to recover business losses that failed in French court).

definition and application of international comity[2] regarding the recognition of foreign judgments by United States courts.[3] In a landmark ruling, the Court found that foreign judgments rendered by a competent foreign court are *prima facie* evidence of the truth of the matter adjudged, but are not conclusive and worthy of the full faith and credit of United States courts[4] absent a reciprocity agreement[5] between the nations.

Since *Hilton v. Guyot*, the United States Circuit Courts of Appeals have applied varying levels of adherence and interest to the doctrines of international comity and reciprocity.[6] In the area of foreign antisuit injunctions,[7] United States federal courts have balanced international comity

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[2] *See* Hilton v. Guyot, 159 U.S. 113, 163-64 (1895) (stating that comity is neither an absolute obligation, nor mere courtesy, but rather the recognition by one nation of the acts of another nation); *see also* Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971) (defining comity as the "recognition which one nation extends within its own territory to the legislative, executive, or judicial acts of another"). The court elaborated further that comity is an ideal with more force than mere courtesy and accommodation, but demonstrates a respect to foreign acts that should be withheld only when their acceptance would be contrary to domestic public policy or interests. *See id.* The doctrine began in the Seventeenth Century as theorists began to reconcile "emerging notions of absolute sovereignty within national boundaries" with the practice of applying foreign law to certain domestic cases. *See* Brian Pearce, *The Comity Doctrine as a Barrier to Judicial Jurisdiction: A U.S.-E.U. Comparison*, 30 STAN. J. INT'L L. 525, 526 (1994) (comparing notions of comity among Member States of the EU and the United States). The solution to the dilemma became the ideal that nations should mutually "recognize rights acquired under the laws of another state," unless such recognition was against the law or public policy. *Id. quoting from* Ernst G. Lorenzen, *Huber's De Conflict Legum*, 13 ILL.L.REV. 375, 378 (1919).

[3] *See Hilton*, 159 U.S. at 205-206 (discussing the effect of foreign judgments on United States courts).

[4] *See id.* at 227 (ruling that international comity, absent a treaty with France or statutory authority recognizing French decisions as conclusive, does not require that United States courts grant French decisions full faith and credit).

[5] *See id.* at 210-28 (discussing how Europe and the Americas have generally accepted the rule of reciprocity). The doctrine of reciprocity raises the standard of respect and enforceability of foreign judicial decisions through bilateral agreement from comity, which is the equivalent of a *prima facie* level of deference, to a level of conclusiveness and res judicata. *See id.* at 205-206. Irrespective of reciprocity, the Court emphasized that the chief concern with the enforcement of foreign judgments is the assurance that the parties have had a fair and impartial trial. *See id.* at 205-206 (stating that fraud and prejudice are two grounds for impeaching foreign judgment).

[6] *See* Steven R. Swanson, *The Vexatiousness of a Vexation Rule: International Comity and Antisuit Injunctions*, 30 GEO. WASH. J. INT'L L. & ECON. 1, 12-31 (1996) (illuminating a wide spectrum of rationale to supersede or respect international comity in both conservative and liberal circuits).

[7] *See* Richard W. Raushenbush, *Antisuit Injunctions and International Comity*, 71 VA. L. REV. 1039, 1040 (1985) (defining an antisuit injunction as a court order upon a party subject to the issuing court's jurisdiction that prohibits or conditions the maintenance of a suit in another court). The moving party requests an antisuit injunction from the court when the party feels that its interests are better served in a United States court or that the foreign litigation is simply too costly, unnecessary, and inconvenient. *See generally* Teresa D. Baer, *Injunctions Against the Prosecution of Litigation Abroad: Towards a Transnational Approach*, 37 STAN. L. REV. 155 (1984) (discussing the circumstances of the request for an

with the concerns of parties under its jurisdiction[8] in two distinct manners.[9] All federal courts must first determine whether they have jurisdiction over the parties.[10] Second, they must determine whether the parties and issues are the same in both the American and foreign actions so that resolving one action will dispose of the other.[11] The federal circuits, however, have developed "conservative" and "liberal" standards to use in the final determination of whether the facts of the case justify the issuance of an antisuit injunction.

The conservative group, composed of the United States Courts of Appeals for the Second, Third, Sixth, and District of Columbia Circuits, favors international comity over the courts' equitable power to issue antisuit injunctions.[12] These circuits require the movant to demonstrate that an injunction is necessary to protect the forum's[13] jurisdiction, or to prevent

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antisuit injunction). United States courts generally respect the issuance of antisuit injunctions by other United States courts, but will probably not enforce one that is against the forum's important public or regulatory policies. *See* Raushenbush, *supra* note 7, at 1054.

The federal courts may also accomplish the goal of the foreign antisuit injunction - prevention of the initiation or continuance of litigation abroad - under the doctrines of *forum non conveniens*, and *lis alibi pendens*. *See generally*, Yoshimasa Furuta, *International Parallel Litigation: Disposition of Duplicative Civil Proceedings in the United States and Japan*, 5 PAC. RIM L. & POL'Y J. 1, 9-18 (1995). Under *forum non conveniens*, a court may decline jurisdiction when it deems itself to be a seriously inconvenient forum and an adequate alternative forum exists. *See id.* at 9 (applying Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947)). The *Gulf Oil Corp.* court articulated a balance between the private and public interests involved. When the private interests of the parties outweighed the public interests of the United States, a dismissal under *forum non conveniens* was appropriate. *See Gulf Oil Corp.*, 330 U.S. at 508-509. In *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), the Court extended the use of *forum non conveniens* in the international context by lowering the threshold for dismissal to a showing by a party that an alternative forum is the "most suitable" and by attaching a presumption of convenience for the foreign party to the alternative forum. *See Piper Aircraft Co.*, 454 U.S. at 256. The Latin phrase *lis alibi pendens* means "a suit pending elsewhere." BLACK'S LAW DICTIONARY 931 (6th ed. 1991). Under the common law, this doctrine allows a federal court to stay its proceeding in favor of a foreign parallel litigation, thereby conserving judicial and litigant expense. *See* Furuta, *supra*, at 16. Ideally, the federal court stays the proceeding until the foreign action reaches final judgment, whereupon the federal court recognizes it as res judicata in full or in part. *See id.* If matters between the parties remain unadjudicated, the federal court revives its proceeding. *See id.*

[8] *See infra* notes 13, 17 and accompanying text (defining "forum" and "jurisdiction" over parties).

[9] *See* Baer, *supra* note 7, at 157-59 (illuminating the two tests that American courts use to issue foreign antisuit injunctions).

[10] *See id.* at 158.

[11] *See id.* (illuminating the preliminary determinations made by the court before considering whether to issue an antisuit injunction).

[12] *See id.* at 159 *quoting* Medtronic, Inc. v. Catalyst Research Corp., 664 F. 2d 660 (8th Cir. 1981) (stating that "the question is whether the balance of equities so favors the movant that justice requires the court to intervene").

[13] *See* BLACK'S LAW DICTIONARY 452 (6th ed. 1991) (defining "forum" as a court of justice, judicial tribunal, and place of litigation, administrative body, and jurisdiction).

evasion of the important public policies of the forum.[14] These circuits thereby elevate the doctrine of international comity to the virtual exclusion of all other considerations.[15]

The liberal group, containing the United States Courts of Appeals for the First, Fifth, Seventh, and Ninth Circuits, employs a more flexible test that justifies an injunction when duplication of the parties and issues raise equitable concerns.[16] These courts use a four-prong test and may enjoin a party from proceeding with a foreign action that is 1) against the public policy of the forum issuing the injunction; 2) vexatious or oppressive; 3) threatening to the issuing court's *in rem*[17] or *quasi in rem*[18] jurisdiction; or 4) prejudicial to other equitable considerations.[19] These circuits emphasize the traditional

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[14] *See* China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 36 (2d Cir. 1987) ("*China Trade*") (reversing the issuance of a foreign antisuit injunction lacking additional justification besides similarity in parties and issues); Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am., 651 F.2d 877, 887 (3d Cir. 1981) (reversing an injunction where duplication of issues and insurer's delay were sole bases for its issuance); Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1358 (6th Cir. 1992) (holding that international comity precludes issuance of antisuit injunction absent a threat to the court's jurisdiction or evasion of important public policies); Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 927 (D.C. Cir. 1984) ("*Laker Airways*") (issuing a foreign antisuit injunction only to "prevent an irreparable miscarriage of justice," such as protecting the court's jurisdiction or policies). The Eleventh Circuit has not ruled on this issue, but appears to lean toward the conservative standard. *See* Mutual Serv. Cas. Ins. Co. v. Frit Indus., Inc., 805 F. Supp. 919, 923-24 (M.D. Ala. 1992) (adopting view that only showing of threat to court's jurisdiction or important public policies is grounds for issuance of foreign antisuit injunction).

[15] *See* Raushenbush, *supra* note 7, at 1051 (explaining that the "conservative" approach to antisuit injunctions prohibits their issue without a showing of threat to jurisdiction or evasion of the public policies of the forum).

[16] *See* Baer, *supra* note 7, at 159 (stating that after the proponent meets the two-prong threshold test, any showing of vexation, duplication of litigation, delay, inconvenience, or possibility of inconsistent rulings is enough to issue an injunction).

[17] *See* BLACK'S LAW DICTIONARY 545 (6th ed. 1991) (pertaining to the court's jurisdiction over "a thing possessed"). Conversely, *in personam* jurisdiction involves the court asserting jurisdiction over the defendant personally and not the subject of the dispute between the parties. *See id.* at 544 (defining "*in personam*" as the jurisdiction or power that court may acquire over the party).

It is unclear whether *in personam* jurisdiction is sufficient or whether *in rem* jurisdiction is also needed, or separately sufficient, before a United States federal court will entertain the question of issuing an antisuit injunction. *Compare* Seattle Totems Hockey Club, Inc. v. National Hockey League, 652 F.2d 852, 855 (9th Cir. 1981) (finding *in personam* jurisdiction over the parties sufficient), *and Laker Airways*, 731 F.2d at 924 (issuing antisuit injunction to protect the court's valid jurisdiction over parties), *with* Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 626 (5th Cir. 1996) (finding that court has power to enjoin persons connected with its *in rem* jurisdiction), *and China Trade*, 837 F.2d at 36 (stating that antisuit injunction may be appropriate in both *in rem* and *in personam* proceedings).

[18] *See China Trade*, 837 F.2d at 36 (defining "*quasi in rem*" as "[a]n action in which the basis of jurisdiction is the defendant's interest in property, real or personal, which is within the court's power . . .").

[19] *See* Canadian Filters, Ltd. v. Lear-Siegler, Inc., 412 F.2d 577, 578-79 (1st Cir. 1969) (stating that comity must give way when the forum seeks to enforce its own substantial interests, or when

equitable power of the court to enjoin a person within its jurisdiction from litigating abroad.[20] Comity, arguably, is set aside in the interests of the parties.[21]

As our nation moves into the global economy, it must overcome the isolationist tendency and re-tool in order to compete.[22] Moreover, it must also confront the issues and problems with a developing global legal system.[23] The existence of two distinct standards used in determining when a foreign antisuit injunction should override comity provides a level of uncertainty to international business transactions.[24]

International commerce depends on the ability of merchants to predict the likely consequences of their conduct in overseas markets.[25] Predictability depends in part on the level of cooperation and reciprocity between nations,[26] but manifests itself primarily from reliance upon an established legal standard that is not a surprise to any party.[27] The divided standard for determining the

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relitigation would cover exactly the same points, both suits are *in rem*, and the burden of a second suit thus renders reliance on res judicata alone inappropriate); *Kaepa, Inc.*, 76 F.3d at 627 (declining to "require a district court to genuflect before a vague and omnipotent notion of comity every time that it must decide whether to enjoin a foreign action"); Allendale Mut. Ins. Co. v. Bull Data Sys., Inc., 10 F.3d 425, 431 (7th Cir. 1993) ("*Allendale*") (expressing the circuit's adherence to a "lax," or liberal standard, which allows injunction of second litigation that would be vexatious or oppressive); Seattle Totems Hockey Club, Inc. v. National Hockey League, 652 F.2d 852, 856 (9th Cir. 1981). The Fourth and Eighth Circuits have not ruled on this issue, but appear to align themselves with the liberal standard. *See* United Cigarette Mach. Co. v. Wright, 156 F. 244, 245 (E.D.N.C. 1907) (declaring that courts of equity can restrain litigants in a foreign state or country when the matter is already fully litigated in the court determining injunctive relief); Cargill, Inc. v. Hartford Accident & Indem. Co., 531 F. Supp. 710, 715 (D. Minn. 1982) (applying two-prong similarity threshold and criteria). The Tenth Circuit has also not ruled on the issue of foreign antisuit injunctions, nor provided any caselaw that indicates which standard it even implicitly favors. *See generally* Robin Cheryl Miller, Annotation, *Propriety of Federal Court Injunction Against Suit in Foreign Country*, 78 A.L.R. FED. 831 (Supp. 1998) (delineating caselaw of all federal circuits that have reviewed and/or ruled on the issue of foreign antisuit injunctions, with the notable absence of the Tenth Circuit).

[20] *See* Raushenbush, *supra* note 7, at 1049 (elaborating on the basis for the "liberal" approach to antisuit injunctions).

[21] *See* Markus Lenenbach, *Antisuit Injunctions in England, Germany, and the United States: Their Treatment Under European Civil Procedure and the Hague Convention*, 20 LOY. L.A. INT'L & COMP. L.J. 257, 261 (1998) (explaining how liberal jurisdictions view comity in light of interests of litigants).

[22] *See* Michael David Schimek, *Antisuit and Anti-antisuit Injunctions: A Proposed Texas Approach*, 45 BAYLOR L. REV 499 (1993) (discussing economic situation of the United States).

[23] *See* Swanson, *supra* note 6, at 1 (discussing the division in the circuits on when to issue a foreign antisuit injunctions).

[24] *See* Gau Shan Co., Ltd. v. Bankers Trust Co., 956 F. 2d 1349, 1355 (6th Cir. 1992) (discussing the effects of inappropriate use of antisuit injunctions).

[25] *See id.*; *see also* Raushenbush, *supra* note 7, at 1039 (stating that the interdependence of the international economic system ensures the extraterritorial application of each nation's laws).

[26] *See Gau Shan Co.*, 956 F.2d at 1355 (stating value of predictability in international commerce).

[27] *See* Julie E. Dowler, *Forging Finality: Searching for a Solution to the International Double-suit*

issuance of foreign antisuit injunctions exacerbates the problem by making cooperation and reciprocity between courts of different nations less likely.[28]

The United States Supreme Court has had the opportunity to address the division in the circuits and articulate a uniform standard several times in the past twenty years.[29] As recently illustrated in *Computer Assocs. Int'l, Inc. v. Altai, Inc.*,[30] however, the Court continues to decline this opportunity by denying certiorari to appropriate cases.

This Comment presents the *Altai* cases and, from the issues raised in Altai's petition for certiorari, determines why the Court should have taken the opportunity to eliminate the division in the circuits. Part II presents the *Altai* cases in the United States and France, thereby explaining Altai's arguments and the principles of res judicata[31] and international comity. In particular, Part II demonstrates how these principles are understood and applied in France, the European Community ("EC"), and other principal trade partners of the United States. Part III illuminates the standards used in the two groups of United States circuit courts and their repercussions on international business and litigants. Part IV recommends that the United States Supreme Court should adopt a uniform standard that flexibly employs the doctrine of international comity, while adequately responding to the needs of United States members of the global economy by limiting litigation in areas of "global" law.

Dilemma, 4 DUKE J. COMP. & INT'L L. 363, 365 (1994) (stating that litigants must know that they can rely on the judicial system of the country in which it does business to follow consistently the international policy and rationale set by the country's legislative and executive branches). Due to its unpredictable nature and negative effect on international business, protective judicial procedures, e.g., antisuit injunctions, should be eliminated in order to prevent international businesses' dissatisfaction with the legal relief available from the United States, which arguably forces them to turn away from its market. *See id.*

[28] *See Gau Shan Co.*, 956 F.2d at 1355 (noting negative effect of the unpredictable issuance of foreign antisuit injunctions).

[29] *See, e.g.*, Northwest Sports Enters., Ltd. v. Seattle Totems Hockey Club, Inc., 457 U.S. 1105 (1982) (denying cert.); Compagnie des Bauxites de Guinea v. Insurance Corp. of Ireland, Ltd., 457 U.S. 1105 (1982) (denying cert.); Achilles Corp. v. Kaepa, Inc., 117 S. Ct. 77 (1996) (denying cert.); Altai, Inc. v. Computer Assocs. Int'l, Inc., 523 U.S. 1106 (1998) (denying cert.).

[30] 126 F.3d 365 (2d Cir. 1997) ("*Altai VII*") (affirming denial of antisuit injunction), *cert. denied*, 523 U.S. 1106 (1998).

[31] *See* BLACK'S LAW DICTIONARY 1305 (6th Ed. 1990) (defining res judicata as a rule that "a final judgment rendered by a court of competent jurisdiction . . . is conclusive as to the rights of the parties," thereby constituting an absolute bar to its subsequent litigation).

II. *COMPUTER ASSOCIATES INTERNATIONAL, INC. V. ALTAI, INC.*

Computer Associates International, Inc. ("CA")[32] and Altai, Inc. ("Altai")[33] were involved in a total of seven different legal proceedings, spanning ten years and continuing. The first five proceedings, *Altai I* through *Altai V*, comprise the original copyright infringement action.[34] The final two, *Altai VI* and *Altai VII*, pertain to Altai's request for a foreign antisuit injunction.[35]

A. *The United States Copyright Infringement Action*

In 1988, CA brought a copyright infringement[36] suit against Altai alleging

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[32] *See Computer Associates: About CA*, (visited Sept. 29, 1998) <http://www.cai.com/about.htm> (providing general information about corporation). CA, with its headquarters in Islandia, NY, is a world leader in mission-critical business software – developing, licensing, and supporting over 500 products. *See id.* (employing over 11,000 people in over forty-three countries, with revenue of $4.7 billion its last fiscal year).

[33] *See* Tsu-Man Peter Tu, *Copyright — Computer Software Copyright Infringement--Three-step Test for Substantial Similarity, Involving Abstraction, Filtration, and Comparison, Should be Applied in Determining Whether Computer Software Copyright has been Infringed* – Computer Assocs. Int'l, Inc. v. Altai, Inc., *982 F.2d 693 (2d Cir. 1992)*, 25 SETON HALL L. REV. 412, n.24 (describing Altai as a Texas corporation doing business in Arlington, Texas, that designs, develops, and markets computer software packages that run on a variety of computer hardware platforms).

[34] *See* Computer Assocs. Int'l, Inc. v. Altai, Inc., 775 F. Supp. 544, 560-62 (E.D.N.Y. 1991) ("*Altai I*") (holding that Altai's OSCAR 3.4 infringed CA's copyright, but OSCAR 3.5 did not); Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 715-20 (2d Cir. 1992) ("*Altai II*") (affirmed *Altai I*'s ruling, but vacated preemption holding); Computer Assocs. Int'l, Inc. v. Altai, Inc., 832 F. Supp. 50, 54 (E.D.N.Y. 1993) ("*Altai III*") (holding on remand that trade secret claim was barred under Texas's two-year statute of limitations); Computer Assocs. Int'l, Inc. v. Altai, Inc., 22 F.3d 32, 37 (2d Cir. 1994) ("*Altai IV*") (certifying issue of statute of limitations to the Texas Supreme Court); Computer Assocs. Int'l, Inc. v. Altai, Inc., 61 F.3d 6, 8 (2d Cir. 1995) (per curiam) ("*Altai V*") (affirming District Court's decision to dismiss CA's trade secret claim).

[35] *See* Computer Assocs. Int'l, Inc. v. Altai, Inc., 950 F. Supp. 48, 54 (E.D.N.Y. 1996) ("*Altai VI*") (denying Altai's motion to enjoin CA from pursuing French action); *Altai VII*, 126 F.3d at 372 (affirming *Altai VI*'s denial of injunction).

[36] *See generally* Andrew G. Isztwan, Computer Associates International v. Altai, Inc.: *Protecting the Structure of Computer Software in the Second Circuit*, 59 BROOK. L. REV. 423, 423-24 (1993) (describing evolution of copyright protection for computers and computer software); Tu, *supra* note 33, at 414-418 (showing progression of case law regarding copyright protection of computer software); Dennis M. McCarthy, *Copyright Infringement — Redefining the Scope of Protection Copyright Affords the Non-Literal Elements of a Computer Program* – Computer Associates International, Inc. v. Altai, Inc., *982 F.2d 693 (2d Cir. 1992)*, 66 TEMPLE L. REV. 273, 273-74 (1993) (providing concise evolution of copyright protection for computer programs).

that Altai copied substantial portions of CA's SCHEDULER[37] computer program into Altai's OSCAR 3.4[38] program.[39] After CA brought suit, Altai rewrote parts of OSCAR 3.4 and marketed OSCAR 3.5.[40] In response, CA amended its complaint to include a claim that OSCAR 3.5 infringed CA's copyright to its ADAPTER[41] program.[42]

The court in *Altai II* rejected prior authority and adopted a three-prong test of "abstraction, filtration, and comparison" in order to determine whether a specific computer program is "substantially similar" and thereby infringes the copyright of another program. *Altai II*, 982 F.2d at 711-714. The application of the abstraction-filtration-comparison test and an analysis of specifically how the Second Circuit found that OSCAR 3.4 did infringe CA's copyright to SCHEDULER and how OSCAR 3.5 did not, is beyond the scope of this Comment. The test is important, however, to illustrate how the United States and the common law address copyright infringement.

Pursuant to the common-law tradition, copyright protection began under the common law, has since been codified, and subsequently has grown from the original codification. The Copyright Act of 1976 provides the base for all copyright enforcement of computer programs. *See* 17 U.S.C. §§ 101-1010 (1988 & Supp. V 1994). "A work may be copyrighted if it is an original 'work of authorship' fixed in a tangible medium of expression from which it can be perceived, reproduced, or otherwise communicated." Tu, *supra* note 33, at 421-422 (quoting 17 U.S.C. § 102(a) (1988 & Supp. V 1994)).

In *Baker v. Selden*, 101 U.S. 99, 103 (1879), the Court articulated an idea-expression distinction to copyright protection. The *Baker* rule provides that copyright protection is limited to the means of expressing an idea and is not applicable to the underlying ideas. *See id.* at 102-103. The Copyright Act of 1976 followed *Baker* by declaring that copyright protection covers expression, but does not extend to any "idea, procedure, process, system, method of operation, concept, principle[,] or discovery." 17 U.S.C. § 102(b).

Copyright law protects all works in tangible medium of expression by granting equitable relief to copyright holders against all works "substantially similar." MELVILLE B. NIMMER, 4 NIMMER ON COPYRIGHT § 13.01 (1980). To prevail on a claim of copyright infringement, a plaintiff must prove ownership of the copyright and copying by the alleged infringer. *See id.* Since there is often no direct evidence of copying, the plaintiff ordinarily establishes it by proving access to the copyrighted material and substantial similarity between the two works. *See id.* § 13.01(B); *see also* Lotus Dev. Corp. v. Borland Int'l, Inc., 49 F.3d 807, 813 (1st Cir. 1995) (applying two-prong test as articulated in NIMMER ON COPYRIGHT). Now, after *Altai II*, the Second Circuit employs the abstraction-filtration-comparison test to determine when a work is substantially similar to the copyrighted work and therefore demands equitable relief to the copyright holder. *See Altai II*, 982 F.2d at 714. Copyright protection under French and EC law is distinct in application, but similar to United States law in theory and purpose. *See* discussion *infra* note 48 (elaborating on French and EC copyright protection).

[37] *See* Sue Mota, Computer Associates v. Altai – *French Computer Software Copyright Action Not Barred By U.S. Decision*, 3 J. TECH. L. & POL'Y 1, n.8 (Fall 1997) <http://journal.law.ufl.edu/~techlaw/3-1/mota.html> (describing SCHEDULER as a job-scheduling program with three different operating systems for IBM mainframe computers).

[38] *See id.* (describing OSCAR as an operating system compatibility component, developed for use with Altai's ZEKE program).

[39] *See Altai I*, 775 F. Supp. at 549, 552-53.

[40] *See Altai VI*, 950 F. Supp. at 49.

[41] *See* Mota, *supra* note 37, at n.8 (describing ADAPTER as an operating system compatibility component that connects CA's SCHEDULER with three different operating systems).

[42] *See id.*

In 1991, the United States District Court for the Eastern District of New York found in *Altai I* that OSCAR 3.4 infringed CA's United States copyright to SCHEDULER, but held that OSCAR 3.5 was not substantially similar to CA's ADAPTER program.[43] The court awarded CA $364,444 in actual damages plus pre-judgment interest.[44] The Second Circuit affirmed in *Altai II*, but vacated the district court's holding that federal copyright law preempts Texas law regarding trade secret claims.[45] In 1995, after consultation with the Texas Supreme Court, the Second Circuit affirmed in *Altai V* the district court's dismissal of CA's trade secret claim, ruling that Texas's two-year statute of limitations applied and barred CA's claim.[46]

B. *The French Copyright Infringement Action*

On February 15, 1990, before *Altai I* went to trial in the United States, CA and L'Agence pour la Protection des Programmes ("L'Agence")[47] filed a copyright infringement action[48] in the Tribunal de Commerce of Bobigny, France ("Commercial Court"),[49] against Altai and its French distributor, La Societe FASTER, S.A.R.L. ("FASTER").[50] In the complaint, CA and L'Agence alleged that Altai's importation and FASTER's distribution of OSCAR 3.5 violated CA's French copyright.[51] CA obtained French copyright

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[43] *See Altai I*, 775 F. Supp. at 560-62.

[44] *See id.* at 560-61, 571-73.

[45] *See Altai II*, 982 F.2d at 715-20.

[46] *See Altai V*, 61 F.3d at 8.

[47] *See* Mota, *supra* note 37, para. 9 (stating that *L'Agence pour la Protection des Programmes* is a non-profit, private, professional society representing the interests of authors and copyright owners of computer programs).

[48] *See* T. Com. Bobigny, 7e civ., Jan. 20, 1995, 90/02131 at 7 (Fr.) ("*Bobigny*") (unpublished decision), *translated in* Brief in Petition for Writ of Certiorari app. at 189, Altai, Inc. v. Computer Assocs. Int'l, Inc., 118 S. Ct. 1676 (1998) (denying cert.) [hereinafter Altai Petition for Certiorari] (identifying the circumstances preceding CA's and L'Agence's filing against Altai and FASTER); *Altai VI*, 950 F. Supp. at 50 (noting the circumstances of litigation against Altai and FASTER). The EC Council Directive on the Legal Protection of Computer Programs ensures and harmonizes copyright protection of computer programs among the Member States of the EC. *See* Council Directive 91/250, art. 1, para. 1, 1991 O.J. (L 122) 42, 44 [hereinafter Computer Directive] (declaring that "Member States shall protect computer programs, by copyright, as literary works within the meaning of the Berne Convention").

[49] *See Altai VI*, 950 F. Supp. at 50, n.4 (describing the Commercial Court as a court of limited jurisdiction over civil disputes between parties with commercial status or for acts that are commercial in nature).

[50] *See Altai VI*, 950 F. Supp. at 50 (stating that FASTER was a French company, owned by a Dutch concern, which distributed software containing OSCAR 3.5).

[51] *See Bobigny*, 90/02131 at 7, *translated in* Altai Petition for Certiorari, *supra* note 48, app. at 189; *Altai VI*, 950 F. Supp at 50.

protection by and through the Universal Copyright Convention of Geneva[52] and the Berne Convention for the Protection of Literary and Artistic Works.[53] The United States and France, as signatories to both conventions, entitle foreign works of other Member States to national treatment.[54]

On October 1, 1991, Altai alerted the Commercial Court that the United States court in *Altai I* had found that Altai's OSCAR 3.5 did not violate CA's United States copyright to ADAPTER.[55] In light of CA's pending appeal to the Second Circuit, the Commercial Court postponed the trial until September 10, 1992.[56] On September 10, 1992, Altai requested a stay of the French trial until the Tribunal de Grande Instance in Paris[57] ruled on Altai's request for an *exequatur*,[58] which would allow Altai to introduce the affirmed judgment of

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[52] Universal Copyright Convention, Sept. 6, 1952, (as amended July 24, 1971), 25 U.S.T. 1341.

[53] Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971), S. TREATY DOC. No. 27 (1986), 828 U.N.T.S. 221 [hereinafter Berne Convention]. The Computer Directive follows the Berne Convention in that it leaves substantive decisions about how to judge copyright infringement claims to its Member States, subject only to the rule of national treatment. *Accord id.* at arts. 5-6; Computer Directive, *supra* note 48, at art. 1, para. 2 (stating that ideas and principles that underlie any element of a computer program, including those that underlie its interfaces, are not protected under the Computer Directive).

[54] *See Bobigny*, 90/02131 at 15, *translated in* Altai Petition for Certiorari, *supra* note 48, app. at 197 (explaining the sections of the Universal Copyright Convention and the Berne Convention that entitle national treatment to foreign works of all Member States); *Altai VI*, 950 F. Supp at 50 (noting that the Universal Copyright Convention and the Berne Convention require national treatment of foreign works of the signatories). As signatories to the conventions, France and the United States recognize each other's grant of copyright protection as conclusive. *See* Universal Copyright Convention, *supra* note 52, art. II, 25 U.S.T. at 1343; Berne Convention, *supra* note 53, art. V(1), 828 U.N.T.S. at 226; *see also* Berne Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

[55] *See Bobigny*, 90/02131 at 10, *translated in* Altai Petition for Certiorari, *supra* note 48, app. at 192 (noting Altai's pre-trial petitions); *accord Altai VII*, 126 F.3d at 368.

[56] *See Bobigny*, 90/02131 at 9, *translated in* Altai Petition for Certiorari, *supra* note 48, app. at 191 (stating that CA and Altai consented to the postponement of French proceeding); *Altai VII*, 126 F.3d at 368 (noting that CA and Altai consented to the postponement of the French action).

[57] Altai Petition for Certiorari, *supra* note 48, at n.5 (defining the Tribunal de Grand Instance as a regional French court of general civil jurisdiction, benched by professional jurists).

[58] *See* Altai Petition for Certiorari, *supra* note 48, at n.10, (defining the *oronnance d'exequatur* as the legal process by which foreign judgments are given res judicata effect and rendered enforceable in France). In order to grant the *exequatur*, the French court must determine that: 1) the rendering court had jurisdiction and the French courts did not have exclusive jurisdiction; 2) the foreign procedure was regular; 3) the foreign court applied law that was substantially equivalent to French law or would have been applicable under French conflict of laws rules; 4) the foreign judgment is not against French public policy; and 5) there was no evasion of mandatory rules of law. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 reporter's note 6(c) (1987); *see also* Thomas E. Carbonneau, *The French Exequatur Proceeding: The Exorbitant Jurisdictional Rules of Articles 14 and 15 (Code Civil) as Obstacles to the Enforcement of Foreign Judgments in France*, 2 HASTINGS INT'L & COMP. L. REV. 307 (1979) (analyzing the difficulty of obtaining res judicata for United States final judgments in French courts). *See generally* Russel J. Weintraub, *How Substantial is our Need for a Judgments-recognition Convention and What*

Altai I in the Commercial Court.[59] The Commercial Court issued the stay on October 22, 1992[60] and the Tribunal de Grande Instance issued the *exequatur* on June 21, 1993.[61]

The French trial resumed on November 25, 1994[62] and on January 20, 1995, the Commercial Court found that Altai's OSCAR 3.5 did not violate CA's rights under French copyright law.[63] As relief for L'Agence's seizure of FASTER's products using OSCAR 3.5, the Commercial Court awarded Altai 100,000 francs.[64]

Altai prevailed, despite unsuccessfully arguing that *Altai I* controlled the French trial under the doctrine of res judicata.[65] The Commercial Court

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Should we Bargain Away to Get it?, 24 BROOK. J. INT'L L. 167, n.101 (1998) (elaborating that the *exequatur* process "differ[s] from country to country and can be onerous"); Jorge A. Vargas, *Enforcement of Judgments and Arbitral Awards in Mexico*, 5 U.S.-MEX. L.J. 137, 147 (1997) (stating that even when a proponent complies with all conditions for issuance of an *exequatur*, there is no guarantee that the foreign judgment will be enforced).

[59] *See Bobigny*, 90/02131 at 11, *translated in* Altai Petition for Certiorari, *supra* note 48, app. at 193 (noting Altai's pre-trial motions to the Commercial Court); *Altai VII*, 126 F.3d at 368 (stating Altai's pre-trial petitions to the Commercial Court).

[60] *See Bobigny*, 90/02131 at 11, *translated in* Altai Petition for Certiorari, *supra* note 48, app. at 193 (elaborating on Altai's requests to the Commercial Court); *Altai VII*, 126 F.3d at 368 (noting that Altai requested a stay of the French proceeding).

[61] *See Bobigny*, 90/02131 at 12, *translated in* Altai Petition for Certiorari, *supra* note 48, app. at 194 (stating that the issuance of the *exequatur* by the Tribunal de Grand Instance made the decision in *Altai II* enforceable in France); *accord Altai VII*, 126 F.3d at 368.

[62] *See Bobigny*, 90/02131 at 13, *translated in* Altai Petition for Certiorari, *supra* note 48, app. at 195 (stating that the Commercial Court based its decision on the facts as reported in the United States rulings); *accord Altai VII*, 126 F.3d at 368.

[63] *See Bobigny*, 90/02131 at 30-31, *translated in* Altai Petition for Certiorari, *supra* note 48, app. at 212-13 (holding that OSCAR 3.5 did not infringe CA's copyright to ADAPTER because the source codes to both programs were different, the architecture and organization of the programs had similarities dictated by constraining logic, and the interfaces of computer programs were not subject to protection); *accord Altai VII*, 126 F.3d at 368.

[64] *See Bobigny*, 90/02131 at 31, *translated in* Altai Petition for Certiorari, *supra* note 48, app. at 213 (noting negative business impact that CA's suit had upon FASTER, who entered liquidation on September 25, 1990, and awarding damages to Altai as compensation for business losses); *see also* Mota, *supra* note 37, para. 14 (discussing the judgment rendered by the Commercial Court for Altai in 1995).

[65] *See Bobigny*, 90/02131 at 24, *translated in* Altai Petition for Certiorari, *supra* note 48, app. at 206 (rejecting Altai's res judicata argument because the French proceeding saw the addition of L'Agence and FASTER who were not involved in the United States proceeding); *Altai VII*, 126 F.3d at 368 (rejecting res judicata due to dissimilarity of issues and parties). Pursuant to Article 1351 of the French Civil Code, res judicata applies to a claim when a previous judgment involved the same claim, the same cause, and the same parties. *See Bobigny*, 90/02131 at 23-24, *translated in* Altai Petition for Certiorari, *supra* note 48, app. at 205-206 (citing C. CIV. art. 1351 (Fr.)).

The French and EC doctrines of res judicata are controlled by the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, July 28, 1990, 33 O. J. (C 189) 1, 1-34 [hereinafter EC Convention on Jurisdiction]. The EC encounters parallel litigation frequently and, in

justified its rejection of res judicata because neither the parties, nor the French and United States bodies of copyright law were identical.[66] The Commercial Court rejected Altai's argument that the *exequatur* effectively made *Altai II* control the French decision, stating that software protection jurisprudence in the United States and France is so unsettled that the courts must consider each case individually.[67]

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order to adequately support its ideal of free circulation of goods and persons, adheres to the "first-filed rule." *See* EC Convention on Jurisdiction, arts. 21-23, 33 O. J. at 10-11. Where proceedings involving the same cause of action and parties are brought in different Contracting States, the first court to obtain jurisdiction hears the case, and all other courts are bound to decline jurisdiction. *See id.*, art. 21. If the proceedings are "related [and] are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments from separate proceedings," all courts after the first-filed court may stay their proceedings or decline jurisdiction. *Id.*, art. 22.

The EC Convention on Jurisdiction negates the necessity of the EC and its Member States to promulgate their own antisuit injunction procedure or allow its development through decisions by the European Court of Justice. *See id.*, arts. 21-23. While some Member States developed the antisuit injunction procedure before the inception of the EC, the majority of the Member States that adhere to the civil law tradition do not employ it. *See* Markus Lenenbach, *Antisuit Injunctions in England, Germany, and the United States: Their Treatment Under European Civil Procedure and the Hague Convention*, 20 LOY. L.A. INT'L & COMP. L.J. 257, 259 (stating that in 1996, the German judicial system first deliberated the legal effect of an English antisuit injunction against a German party from continuing a pending German lawsuit). Unlike English and American courts, German courts have no equitable power and, therefore, may not decline jurisdiction under the doctrine of *forum non conveniens* or deny the action by an antisuit injunction. *See id.* at 272 (noting that jurisdictional rules in Germany are mandatory and that judges may not deviate from rules even if the procedural rules produce an unjust outcome). Germany, through the power of the forum selection clause and the statutory decree that the plaintiffs bear the defendants' economic burden when a court without proper jurisdiction hears the case, has no need for a foreign antisuit injunction. *See id.* at 282 (explaining that international comity is a common law tradition that has no equivalent in Germany or other civil law countries). English courts, however, liberally issue foreign antisuit injunctions under equity where the English court must intervene to protect injustice). *See id.* at 267 (noting that the 1981 Supreme Court Act empowers English courts to issue an injunction "in all cases in which it appears to the court to be just and convenient"); Sup. Ct. Act, 1981, 37 (Eng.).

[66] *See Bobigny*, 90/02131 at 24, *translated in* Altai Petition for Certiorari, *supra* note 48, app. at 206 (rejecting Altai's res judicata argument); *accord Altai VII*, 126 F.3d at 368.

[67] *See Bobigny*, 90/02131 at 24, *translated in* Altai Petition for Certiorari, *supra* note 48, app. at 206 (stating that even if United States copyright law is close to French law it "cannot be completely and immediately identified with French law without an analysis of the facts under French law"); *accord Altai VII*, 126 F.3d at 368. This dicta hails to the *Hilton* court's essential statement that international comity, absent an explicit treaty recognizing judgments of the foreign country in question, does not equate the level of res judicata. *See* Hilton v. Guyot, 159 U.S. 113, 227 (1895) (commenting on the doctrine of reciprocity). The Commercial Court's rejection of Altai's attempt to use the *exequatur* made the arduous pre-trial proceedings to obtain the *exequatur* from the Tribunal de Grand Instance and stay the proceeding in the Commercial Court completely a waste of time. *See* discussion *supra* note 58 (defining *exequatur* and explaining how a party obtains the order). The Commercial Court acted within its discretion, however, because the Tribunal de Grand Instance allowed the trial court to determine the *exequatur's* "incidence on the outcome of the proceedings before it." CA Paris, 4e ch., Oct. 23, 1998, 95/14189 at 4 (Fr.) ("*CA Paris*") (unpublished decision) (presenting progression of the CA's copyright infringement claim in France).

CA appealed the Commercial Court's decision to the Cour d'appel de Paris ("Paris Court of Appeals")[68] on April 25, 1995.[69] The Paris Court of Appeals received briefs on May 13, 1998, and heard oral argument from the parties on June 18, 1998.[70] The Paris Court of Appeals first affirmed the Commercial Court's finding that the addition of FASTER to the French proceeding and the difference between United States and French copyright law precluded Altai's *exequatur* from controlling the French proceeding as res judicata.[71] Second, the Paris Court of Appeals found that CA failed to show that there was another means of writing the source codes at Altai's disposal when it designed OSCAR 3.5.[72] Therefore, the Paris Court of Appeals affirmed that OSCAR 3.5 did not infringe CA's copyright to ADAPTER.[73]

C. *Altai's Motion for Antisuit Injunction*

On November 16, 1994, Altai requested that the United States District Court for the Eastern District of New York enjoin CA from litigating its French claim of copyright infringement, only to voluntarily withdraw the request because the Commercial Court ruled for Altai in 1995.[74] Upon CA's appeal of the Commercial Court's decision to the Paris Court of Appeals, however, Altai reactivated its motion to enjoin.[75]

Altai argued that *Altai II* barred CA from continuing the French action[76] under the doctrine of res judicata[77] or, alternatively, collateral

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[68] *See* Mota, *supra* note 37, at n.54 (describing CA Paris as an intermediate appellate court that has jurisdiction to hear all appeals from any court within its geographic territory).

[69] *See Altai VII*, 126 F.3d at 368.

[70] *See CA Paris*, 95/14189 at 2; *Altai VII*, 126 F.3d at 368.

[71] *See CA Paris*, 95/14189 at 2 (stating that Altai failed to establish the three-fold res judicata requirements of identical parties, objects, and issues).

[72] *See id.* at 9 (noting that CA, who "had the technical means to demonstrate the inaccuracy of the Commercial Court's assessment," did not even attempt to show that functional imperatives did not dictate the structure of ADAPTER). Presumably, had CA showed the existence of comparable, alternative means that Altai could have adopted instead of merely changing parts of OSCAR 3.4, the Paris Court of Appeals would have remanded. *See id.* (rejecting the Commercial Court's finding that copyright protection does not extend to interfaces).

[73] *See id.* The Paris Court of Appeals did reverse, however, the Commercial Court's award of 100,000 francs to Altai for business losses. *See id.* at 9-10 (stating that due to Altai's criticizable conduct in refusing to provide the source codes to the Commercial Court-appointed expert witness in discovery, fairness does not justify that the Paris Court of Appeals uphold the indemnity granted to Altai for its unrecoverable expenses).

[74] *See Altai VII*, 126 F.3d at 368.

[75] *See id.*

[76] *See Altai VI*, 950 F. Supp. 43, 51 (E.D.N.Y. 1996).

[77] *See supra* note 31; *see also* Burgos v. Hopkins, 14 F.3d 787, 789 (2d. Cir. 1994) (stating that res judicata provides preclusion from relitigation of claims that could have been raised in the action already

estoppel.[78] In *Altai VI*, the district court rejected Altai's res judicata argument for want of subject matter jurisdiction,[79] finding that it had jurisdiction solely over the United States copyright infringement claim.[80] The *Altai VI* court also held that it could not exercise personal jurisdiction over FASTER, which was necessary to make the United States decision dispositive over the French claim, despite evidence that FASTER previously had submitted voluntarily to the jurisdiction of United States courts.[81] Finally, the court rejected res judicata and collateral estoppel on grounds that the absence of FASTER to the United States action, and the difference between issues and law, prevented *Altai II* from being dispositive to the French action.[82]

Addressing the request for an antisuit injunction specifically, the court denied it on the same grounds used to deny res judicata and collateral estoppel: lack of similarity of parties and issues.[83] Although the court recognized its equitable power to enjoin foreign suits by persons subject to its jurisdiction, it declared that international comity demands that a court issue an injunction only after it has explored all other remedies.[84]

The court denied the antisuit injunction following application of the Second Circuit's two-prong threshold test, as delineated in *China Trade and Development Corp. v. M.V. Choong Yong* ("*China Trade*").[85] The parties of

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brought to final judgment). The *Altai VI* court relied upon *Burgos* in order to preclude the use of res judicata when "the initial forum did not have the power to award the full measure of relief sought in the later litigation." *See Altai VI*, 950 F. Supp. at 51 (quoting Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994)). The *Altai VI* court agreed with CA that the plaintiff could not have added its French claims to the United States complaint because they arose afterward and the United States court lacked subject matter jurisdiction. *See id.*

[78] *See* Metromedia Co. v. Fugazy, 983 F.2d 350, 365 (2d Cir. 1992) (defining collateral estoppel as "bar[ring] a party from relitigating in a second proceeding an issue of fact or law that was litigated and actually decided in a prior proceeding, if that party had a full and fair opportunity to litigate the issue . . . and the decision of the issue was necessary to support a valid and final judgment on the merits").

[79] *See Altai VI*, 950 F. Supp. at 51.

[80] *See id.* The decision followed precedent set in GB Mktg. USA, Inc. v. Gerolsteiner Brunnen, 782 F. Supp. 763, 772 (W.D.N.Y. 1991), which held that copyright infringement occurring inside and outside the United States grants the district court jurisdiction only over the United States infringement.

[81] *See Altai VI*, 950 F. Supp. at 52.

[82] *See id.* at 53. The court rejected without explanation Altai's argument that, despite FASTER's absence from the United States action, the issues and standards governing their adjudication in France and the United States were identical, thereby warranting collateral estoppel. *See id.* Although the court previously referenced the Berne Convention and the Uniform Copyright Convention as the source for CA's right to seek remedy for infringement in France, no discussion followed on how these same conventions might show some level of uniformity in the issues and legal standards employed in France and the United States. *See Altai VI*, 950 F. Supp. at 53.

[83] *See id.* at 53-54.

[84] *See id.* at 53 (citing language from United States v. Davis, 767 F.2d 1025, 1038 (2d Cir. 1985)).

[85] China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33 (2d Cir. 1987) ("*China Trade*").

both suits must be the same, and the issues in both suits must be the same so that their adjudication before the enjoining court is dispositive of the action to be enjoined.[86] The court found that Altai met neither of these two requirements and denied the injunction.[87] The *China Trade* test requires the consideration of five additional factors[88] upon fulfillment of the two-prong threshold test.[89] Since the court found the threshold test unfilled, the court refused to address these factors in *Altai VI*.[90]

Altai appealed to the Second Circuit in *Altai VII*, arguing that the *China Trade* factors were inapplicable where a United States forum has reached a final judgment.[91] The court declined to address this issue because, through application of another *China Trade* test, Altai's case failed to show that an injunction was necessary to protect the jurisdiction of the court or the integrity of the court's judgment.[92]

In *China Trade's* dissent, Senior Circuit Judge Bright emphasized that a second action brought abroad would be vexatious to the parties and would potentially frustrate the proceedings of the United States court.[93] Judge Bright acknowledged that comity demands that United States courts must ordinarily respect the concurrent jurisdiction of sovereign courts.[94] Judge Bright also stated, however, that *Laker Airways, Ltd. v. Sabena Belgian World Airlines* ("*Laker Airways*") "emphasizes that if a substantial amount of time has

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[86] *See Altai VI*, 950 F. Supp. at 54 (applying two-prong threshold test as articulated in China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 38 (2d Cir. 1987)).

[87] *See Altai VI*, 950 F. Supp. at 54.

[88] *See China Trade*, 837 F.2d at 35-36 (stating the five factors to consider as: 1) frustration of forum's policy; 2) vexation created by foreign action; 3) threat to issuing court's *in rem* or *quasi in rem* jurisdiction; 4) prejudice or inequity in foreign proceeding; or 5) adjudication of same issues in separate actions would result in delay, inconvenience, expense, inconsistency, or a race to judgment).

The *China Trade* court reversed an antisuit injunction granted via application of the two-prong threshold test and consideration of the additional five factors, stressing that the "equitable factors relied upon by the district court . . . are not sufficient to overcome the restraint and caution required by international comity." *Id.* at 36.

[89] *See Altai VI*, 950 F. Supp. at 54.

[90] *See id.*

[91] *See Altai VII*, 126 F.3d 365, 372 (2d Cir. 1997).

[92] *See id.* (applying two-prong test as articulated in *China Trade*, 837 F.2d at 36-37).

[93] *See China Trade*, 837 F.2d at 38 (Bright J., dissenting) (quoting China Trade and Dev. Corp. v. M.V. Chong Yong, No. 85-8794, slip op. at 7-8 (S.D.N.Y. July 2, 1987). Judge Bright commented that, due to the high cost of litigation today, the court has an affirmative duty to prevent a litigant from entering a forum court in order to confuse, obfuscate, or complicate litigation in this country. *See id.* at 40.

[94] *See id.* at 38 (commenting on effect of decision in Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984)).

elapsed between the commencement of the two actions, equitable principles make it more appropriate to enjoin the second action."[95]

Applying this reasoning to Altai's appeal in *Altai VII*, it appears that some discussion over the timing of CA's appeal of the French decision was proper. Judge Bright stated that even under *Laker Airways*'s strict standard, an injunction is proper when a party files a foreign action almost two and one-half years after the United States action.[96] At the time of the ruling in *Altai VII*, CA had appealed the French decision over three years after *Altai II* ruled that OSCAR 3.5 did not infringe CA's copyright to ADAPTER.[97]

Despite the length of time between the French appeal and *Altai II*, the *Altai VII* court emphatically denied the injunction because, even if all the equitable factors were present, the facts of the case still did not warrant an injunction.[98] The *Altai VII* court conceded that the French proceeding was vexatious, but found that res judicata and collateral estoppel were impossible because the parties and issues were not the same.[99] Essentially, the *Altai VII* court ruled that international comity barred an antisuit injunction in the absence of an established need to protect the court's jurisdiction or judgment.[100]

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[95] *Id.* at 38-39 (quoting Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 929 n.63 (D.C. Cir. 1984)).

[96] *See id.* at 39.

[97] *See Altai VII*, 126 F.3d at 367-68.

[98] *See id.* at 372.

[99] *See id.* CA initiated the United States litigation on the eve of Altai's planned merger with a competitor of CA. Due to the costs and publicity of the copyright infringement lawsuit, the competitor canceled the merger. *See* Mota, *supra* note 37, para. 29. That competitor likely was Goal Systems International, Inc. ("Goal Systems"). *Compare Altai, Goal Systems Sign Letter of Intent for Merger*, PR NEWSWIRE, July 25, 1988 (stating that Goal Systems is a privately-held corporation that "designs, develops, markets, and supports software products for the major IBM mainframe operating systems"), *with Computer Associates: About CA*, (visited Sept. 29, 1998) <http://www.cai.com/about.htm> (stating that CA is a world leader in mission-critical business software which develops, licenses, and supports over 500 products). While CA may have struck a blow to its competition and obtained a $344,000 relief in *Altai I*, the costs of litigation negated both gains considerably. *See* Mota, *supra* note 37, para. 30. The French litigation destroyed forty-seven percent of Altai's foreign revenue, forcing FASTER to liquidate its assets while owing Altai $258,000. *See id.*, para. 29. Due in part to Altai's business losses and litigation expenses, Platinum Technology, Inc. ("Platinum") easily purchased Altai on August 23, 1995. *See Platinum Technology and Altai Finalize Acquisition; Altai Becomes a Platinum Technology Subsidiary*, BUS. WIRE, Aug. 23, 1995 (reporting that Platinum exchanged 1,100,000 shares of Platinum common stock for all of the outstanding Altai shares); *see also Platinum's Corporate Background: About Platinum*, (visited Nov. 15, 1998) <http://www.platinum.com/corp/corphist.htm> (stating that Platinum is the world's seventh largest independent software vendor with 1997 revenues of $739 million).

[100] *See Altai VII*, 126 F.3d 365, 372 (2d Cir. 1997).

D. *Altai's Petition for Certiorari*

1. ALTAI'S BRIEF IN SUPPORT OF GRANT OF CERTIORARI

Altai filed a petition for certiorari on February 27, 1998,[101] arguing that *Altai VII* highlights the tension between the principles of international comity and the duty of United States courts to enforce principles of finality and repose[102] that are bedrocks of American law.[103] Altai asserted that with the advent of the Internet, similar international commerce cases with similar international law issues would soon inundate United States courts.[104] Altai urged the Court to hear the case because the distribution of copyright infringing works over the Internet will soon lead to simultaneous causes of action in numerous Member States of the Berne Convention.[105]

Altai emphasized that the global economy necessitates the issuance of foreign antisuit injunctions requested by United States parties in order to ensure that final United States judgments avoid collateral attack in *seriatim*[106] litigation around the world.[107] Moreover, when a United States party requests a foreign antisuit injunction, "there should be no lack of uniformity or ambiguity among the lower courts about the standard for granting it."[108]

Next, Altai illustrated the division in the United States Circuit Courts of Appeals regarding the standards used to issue a foreign antisuit injunction.[109] Altai noted that in the circuits employing the conservative or "strict" standard, no court has issued a foreign antisuit injunction.[110] Meanwhile, in the circuits following the liberal, or "lax" standard, a party could obtain a foreign antisuit injunction merely upon showing "that the parallel proceeding imposes an unreasonable burden on the defendant."[111] Altai asserted that its case demonstrates how the division in the circuits can deliver grave injustice upon

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101 *See Altai VII*, 126 F.3d 365 (2d Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 1197 (U.S. Feb. 27, 1998) (No. 97-1417).

102 *See* WEBSTER'S NEW INTERNATIONAL DICTIONARY 1926 (3d ed. 1961) (defining "repose" as a "cessation or absence of activity, movement, or animation").

103 *See* Altai Petition for Certiorari, *supra* note 48, at 15.

104 *See id.* at 15-16.

105 *See id.* at 16.

106 *See* WEBSTER'S NEW INTERNATIONAL DICTIONARY 2073 (3d ed. 1961) (defining "seriatim" as describing the action of setting forth things or statements "in a series").

107 Altai Petition for Certiorari, *supra* note 48, at 16.

108 *Id.*

109 *See id.* at 16-19; *see also* discussion *infra* Part III.

110 Altai Petition for Certiorari, *supra* note 48, at 20.

111 *Id.*

parties that deserve a foreign antisuit injunction but fall into a less-accommodating circuit.[112]

Altai also attempted to show the Court that, while the doctrine of international comity is ephemeral in nature,[113] the preclusion of claims and the principles of finality and repose[114] are well established in American jurisprudence.[115] Altai attempted to show the Court how international comity and claim preclusion may find reconciliation by illustrating Judge Posner's decision in *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.* ("*Allendale*").[116]

Finally, Altai argued that irrespective of whether the appropriate standard for issuing an antisuit injunction should be the conservative[117] or liberal[118] standard, either of Judge Posner's proposed rules of reconciliation,[119] or another rule,[120] the matter was ripe for the Court to decide.[121]

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[112] *Id.* (claiming that had Altai been able to request the foreign antisuit injunction in the Fifth Circuit, where it is incorporated, or in the Seventh Circuit, where its parent company is located, it would have obtained the injunction).

[113] *See id.* at 21 (noting confusion in courts in the use and understanding of "comity" and "international comity"). In support, Altai cites *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting), where Justice Scalia explained that when the lower courts use the terms they do not refer to "the comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere," but rather to the respect sovereign nations grant each other by limiting the extraterritorial reach of their laws.

[114] *See* Altai Petition for Certiorari, *supra* note 48, at 22 (citing support that claim preclusion and principles of finality and repose are more established than international comity). Altai cited *Federated Dep't Stores, Inc. v. Moitie*, where then Justice Rehnquist stated that public policy dictates that "those who have contested an issue shall be bound by the result of the contest and that matters once tried shall be considered forever settled as between the parties . . ." *Id.* (quoting Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 401 (1979) (elaborating that res judicata is not a procedural norm, but rather a rule of fundamental and substantial justice)).

[115] *See* Altai Petition for Certiorari, *supra* note 48, at 22.

[116] *See id.* at 23-24 (citing Allendale Mut. Ins. Co. v. Bull Data Sys., Inc., 10 F.3d 425, 431-33 (7th Cir. 1993)). In *Allendale*, Judge Posner suggested two ways in which lower courts could determine the propensity of a request for an antisuit injunction. First, the opponent to the antisuit injunction should demonstrate that the injunction would in fact disturb the foreign relations of the United States. *See Allendale*, 10 F.3d at 433. This evidentiary proffer would allow the lower courts to ignore international comity objections of the "purely theoretical" nature so that they may not "trump a concrete and persuasive demonstration of harm to the applicant for the injunction . . ." *Id.* Second, when a United States party is unable to plead res judicata to a foreign court, which would deprive that party of the benefit of the United States judgment, considerations of comity should not prevent a federal court, even under the strict or conservative standard, from enjoining a foreign defendant or a United States party from proceeding, in defiance of the judgment, in a foreign court. *See id.*

[117] *See* discussion *infra* Part III.A.

[118] *See* discussion *infra* Part III.B.

[119] *See supra* note 116 and accompanying text.

[120] *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421(1) (1987) (granting United States jurisdiction over the person or thing when the relationship of the state to the person or thing is such

2. CA'S BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

CA argued that the potential conflict between the domestic and foreign judgments that Altai discussed does not exist.[122] Assuming that such conflict did exist, CA argued that Altai's failure to satisfy the two-prong threshold test,[123] as applied in all circuits, precludes its request for an antisuit injunction.[124] The first prong, similarity of parties, fails because of the addition of FASTER and L'Agence to the French action.[125] As for the second prong, similarity of issues, the difference between CA's copyright in France and the United States, prevents the United States judgment from disposing of the French action.[126]

CA next attacked Altai's attempt to materialize a justiciable controversy out of dicta from the opinion in *Altai VII*.[127] CA implicitly argued that even if Altai had met the threshold test of similarity of parties and issues, under

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as to make the exercise of jurisdiction reasonable under its inclusive list); Laura M. Salava, *Balancing Comity With Antisuit Injunctions: Considerations Beyond Jurisdiction*, 20 J. LEGIS. 267, 270 (1994) (advocating that the Advisory Committee amend Rule 65 of the Federal Rules of Civil Procedure to include Subsection F that adopts the conservative standard). *See also* FED. R. CIV. P. 65.

121 *See* Altai Petition for Certiorari, *supra* note 48, at 24; *see also* Swanson, *supra* note 6, at 37 (concluding that the issue of what standards are appropriate for the issuance of foreign antisuit injunctions is "ripe for resolution by the Supreme Court"); Arif S. Haq, Kaepa, Inc. v. Achilles Corp.: *Comity in International Judicial Relations*, 22 N.C. J. INT'L L. & COM. REG. 365, 388 (1996) (stating the need for the Court to resolve the division in the circuits in order to make consistent judgments).

122 Brief in Opposition to Petition for Writ of Certiorari at 5, Altai, Inc. v. Computer Assocs. Int'l, Inc., 118 S. Ct. 1676 (1998) (denying cert.) [hereinafter CA Opposition to Certiorari] (articulating inadequacies of Altai's arguments).

123 *See supra* note 75 and accompanying text.

124 *See* CA Opposition to Certiorari, *supra* note 122, at 5.

125 *See id.* at 7. What might have been lost by the courts in *Altai VI* and *VII*, is that the two French parties that had disrupted Altai's claim of res judicata and collateral estoppel, L'Agence and FASTER, were not parties to CA's appeal of the Commercial Court's decision in 1998. *See CA Paris*, 95/14189 at 2 (stating that L'Agence is no longer a party to the appeal and that creditors had liquidated FASTER). Altai alerted the Court in its petition of this occurrence, attempting to show the vexatious and awkward character of an appeal that ultimately consisted of two United States parties litigating in France. *See* Altai Petition for Certiorari, *supra* note 48, at n.11 (stating that L'Agence is no longer part of litigation and that FASTER went out of business on September 25, 1990).

126 *See id.*

127 *See id.* at 8 (stating that Altai has no basis to assert a "circuit split" regarding the appropriate adherence to international comity because that issue was never raised in the case). Altai began its analysis of the division in the circuits regarding the standards federal courts use to issue foreign antisuit injunctions by citing *Altai VII's* denial of the injunction. *See* Altai Petition for Certiorari, *supra* note 57, at 13 (quoting *Altai VII*, 126 F.3d 365, 372 (2d Cir. 1997) ("We can discern no basis for enjoining [CA] from pursuing its French action; moreover[,] the interests of comity caution against such an injunction.")).

either the liberal or the conservative standard, no federal court would have issued the foreign antisuit injunction.[128]

In closing, CA stated that public policy considerations support the Second Circuit's denial of the antisuit injunction.[129] CA cautioned that Altai's position—that the United States should decide all copyright claims worldwide —would lead to a hyper-clogging of the federal court dockets and force the courts to deal "with legal experts on foreign law, problems of discovery in foreign countries, translations of foreign-language documents, and many other issues now left for the courts of those countries."[130]

Despite Altai's arguments and the pleas of many legal scholars,[131] the Court chose not to address the division in the circuits.[132] The press generally neglected to cover Altai's petition for certiorari.[133] Thus, without much fanfare, the Court denied Altai's petition for certiorari on May 4, 1998.[134]

III. THE DIVISION IN THE UNITED STATES CIRCUIT COURTS OF APPEALS

A. *The Conservative Standard*

The United States Circuit Courts of Appeals for the Second, Third, Sixth, and District of Columbia Circuits, restrain their equitable power to issue antisuit injunctions by requiring the proponent to demonstrate that an injunction is necessary to protect the forum's jurisdiction, or to prevent evasion of the forum's important public policies.[135] Although these circuits

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[128] *See* CA Opposition to Certiorari, *supra* note 122, at 9 (criticizing Altai's use of contract cases such as *Allendale* and *Kaepa, Inc.*). CA argued that these two cases were irrelevant to CA's copyright infringement action, which involved two independent intellectual property rights granted under the laws of the respective fora. *See id. Allendale* and *Kaepa, Inc.* are "inapposite because once a final judgment is reached in a contract case, the prevailing party has the ability to apply res judicata, collateral estoppel, or both in concurrent litigation regarding the same contract." *Id.*

[129] *See id.* at 11-12 (criticizing Altai's position that the United States could and should decide all copyright claims worldwide).

[130] *See id.* at 11.

[131] *See* cited articles *supra* note 121.

[132] *See* Altai, Inc. v. Computer Assocs. Int'l, Inc., 523 U.S. 1106 (1998).

[133] *See generally, High Court Won't Review Denial Of Injunction Against French Copyright Action*, 6 MEALEY'S LITIG. REP.: INTELL. PROP. 7 (reporting on Altai's failed petition for certiorari); *Sup. Ct. Turns Down Cert. Petitions On Jurisdiction, Antitrust*, 15 ANDREWS COMPUTER & ONLINE INDUS. LITIG. REP. 12 (May 19, 1998) (reporting Altai's failed petition for certiorari).

[134] *See Altai, Inc.*, 523 U.S. at 1106.

[135] *See* China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 36 (2d Cir. 1987); Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am., 651 F.2d 877, 887 (3d Cir. 1981); Gau

state adherence to the two-prong threshold[136] and five-factor test[137] as articulated in *China Trade*, their reverence of international comity precludes issuance of an antisuit injunction absent a threat to their jurisdiction or policy.[138]

The District of Columbia Circuit fully articulated the conservative standard in *Laker Airways*, issuing the decree that "duplication of parties and issues alone is not sufficient to justify the issuance of an antisuit injunction."[139] The *Laker Airways* court added that the liberal circuits' policies of "avoiding hardship to parties and promoting the economies of consolidated litigation" are not the basis for antisuit injunction but more properly considered in a motion for dismissal under *forum non conveniens*.[140] This analysis survives upon the premise that, in all situations where a party requests an antisuit injunction, the court has the luxury of also weighing the elements of a *forum non conveniens* motion.[141]

In the case of Altai, when the foreign action is the second proceeding, a *forum non conveniens* motion would fail its primary goal of allowing the parties to adjudicate their dispute in the most convenient forum.[142] Where the

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Shan Co., Ltd. v. Bankers Trust Co., 956 F. 2d 1349, 1358 (6th Cir. 1992); Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 927 (D.C. Cir. 1984).

136 *See China Trade*, 837 F.2d at 39 (requiring the similarity of parties and issues before determining the propriety of issuing a foreign antisuit injunction).

137 *See id.* at 35-36 (stating five factors to consider as 1) frustration of forum's policy; 2) vexation created by foreign action; 3) threat to issuing court's in rem or quasi in rem jurisdiction; 4) prejudice or inequity in foreign proceeding; or 5) adjudication of same issues in separate actions would result in delay, inconvenience, expense, inconsistency, or a race to judgment).

138 *See* Raushenbush, *supra* note 7, at 1051 (explaining that the "conservative" approach to antisuit injunctions prohibits their issue without a showing of threat to jurisdiction or evasion of the public policies of the forum).

139 *Laker Airways*, 731 F.2d at 928.

140 *Id.*

141 *See* Furuta, *supra* note 7, at 9 (stating elements of *forum non conveniens* as when the United States court deems itself a seriously inconvenient forum and an alternative forum exists). One scholar proposes that the courts may avoid the potential damage to international comity presented by foreign antisuit injunctions by more extensively employing a *forum non conveniens* determination first. *See* Baer, *supra* note 7, at 175 (arguing that, after a United States federal court finds that the parties and issues are similar in both the domestic and foreign action, it should make a *forum non conveniens* determination, *sua sponte* if necessary). If the United States federal court decides that it is the most appropriate forum to adjudicate the dispute, it should order the party requesting the antisuit injunction to ask the foreign court to dismiss or stay its proceeding under the doctrine of *forum non conveniens*. *See id.* If the foreign court refuses to relinquish its jurisdiction over the parties, the United States federal court then may decide whether to issue the antisuit injunction. *See id.*

142 *See id.*; *see also* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981) ("[W]here the remedy offered by the [foreign] forum is clearly unsatisfactory, the [foreign] forum may not be an adequate alternative.").

parties are international businesses based in the United States, it seems logical that the most convenient forum, considering the applicable law and the interests of the parties, would reside in the United States.[143] That the party would request an antisuit injunction suggests that the foreign forum is either inconvenient or inappropriate. Altai argued both points unsuccessfully in *Altai VI* and *VII*.

Scholars laud the conservative standard because it adequately reflects the goals of international comity: global cooperation and respect for sovereign judicial systems.[144] These goals, however, are as ephemeral and vague as the comity doctrine. Nevertheless, one supporter believes the conservative standard reflects the "consideration of the practical needs of the forum state and the international system," which in turn allows for the creation of a smoothly functioning mechanism for dispute resolution.[145]

Under the conservative standard, however, the smooth functioning of the global legal system entails the allowance of duplicative litigation to the vexation of both the foreign legal system and the parties involved.[146] While the amount of jurisprudence is small, *Laker Airways*[147] represents the only instance in which a circuit under the conservative standard issued a foreign antisuit injunction.[148] The results of this reticence are massive litigation costs,[149]

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[143] *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-509 (1947) (stating that the court must consider "the appropriateness of having the trial of a diversity case in the forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle the problems in conflict of law, and in foreign law itself").

[144] *See* Swanson, *supra* note 6, at 36 (stating that, while the conservative standard does not provide "the perfect solution in every case," it does create opportunity for global cooperation); *see also* Lenenbach, *supra* note 65, at 265 (supporting the stricter approach to antisuit injunctions that recognizes complexity of world economy and "that the United States cannot expect to impose its point of view on the rest of the world"); Haig Najaran, *Granting Comity Its Due: A Proposal to Revive the Comity-based Approach to Transnational Antisuit Injunctions*, 68 ST. JOHN'S L. REV. 961, 983 (1994) (litigation is public in nature and, as an exercise of sovereignty, should use comity).

[145] *See* Swanson, *supra* note 6, at 36 (arguing that the liberal standard encourages judicial conflict, hinders dispute resolution, and ignores the interest in developing an international system).

[146] *See* Altai Petition for Certiorari, *supra* note 48, at 19-20 (stating that in the conservative circuits one must assume "the significant financial burden and commercial uncertainty of litigating a parallel foreign proceeding").

[147] *See Laker Airways*, 731 F.2d 909, 927 (D.C. Cir. 1984) (issuing foreign antisuit injunction in order to protect its jurisdiction).

[148] Altai Petition for Certiorari, *supra* note 48, at 20 (stating that no circuit under the conservative standard has issued a foreign antisuit injunction when the issue is parallel litigation). The *Laker Airways* court issued an antisuit injunction not because the parallel litigation was vexatious, but rather because the English court attempted to obtain exclusive jurisdiction. *See Laker Airways*, 731 F.2d at 930.

[149] *See, e.g.*, Dowler, *supra* note 27, at 363-64 (noting that duplicative foreign litigation may eliminate plaintiff's United States relief, breach comity, unduly burden litigants, and threaten the public policies of the United States forum); Nancy Nelson, *Forum Non Conveniens, Comity, Antisuit Injunctions,*

waste of judicial resources,[150] and a near complete failure of the doctrine of res judicata.[151]

B. *The Liberal Standard*

The United States Courts of Appeals for the First, Fifth, Seventh, and Ninth Circuits, exercise their equitable power to issue antisuit injunctions where there is a duplication of parties, issues, and where the foreign action would be 1) against public policy of the forum issuing the injunction; 2) vexatious or oppressive; 3) threatening to the issuing court's *in rem* or *quasi in rem* jurisdiction; or 4) prejudicial to other equitable considerations.[152]

In *Allendale*, the Seventh Circuit articulated the liberal standard's extreme view that international comity is purely a theoretical doctrine.[153] Where the opponent can show that the antisuit injunction will in fact damage the foreign relations of the United States, the court must weigh that damage against the proponent's equitable considerations.[154] The Seventh Circuit reasoned that where a foreign court showed concern over the antisuit injunction, it would inform the United States court through the United States State Department or foreign offices of the concerned country.[155]

Altai attempted to convince the Supreme Court that the analysis of *Allendale* provides a practical adherence to international comity while still allowing the opportunity for the court to weigh the equitable concerns of

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and Parallel Proceedings, 90 AM. SOC'Y INT'L L. PROC. 62, 66 (1996) (describing Citibank Corp.'s involvement in expensive litigation in Australia).

[150] *See* Jane C. Ginsburg, *Extraterritoriality and Multiterritoriality in Copyright Infringement*, 37 VA. J. INT'L L. 587, 602 (1997) (arguing that judicial economy favors retaining the action with the United States court that has already gained some acquaintance to the facts and that offers a forum to ascertain many of the same facts that would be adduced abroad).

[151] *See, e.g.*, Carbonneau, *supra* note 58, at 307 (analyzing the difficulty of obtaining res judicata for United States final judgments in French courts); Weintraub, *supra* note 58, at 167, n.101 (elaborating that the *exequatur* process "differ[s] from country to country and can be onerous"); Vargas, *supra* note 58, at 147 (stating that even when a proponent complies with all conditions for issuance of an *exequatur*, there is no guarantee that the foreign judgment will be enforced).

[152] *See* Canadian Filters, Ltd. v. Lear-Siegler, Inc., 412 F.2d 577, 578-79 (1st Cir. 1969); Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 627 (5th Cir. 1996); Allendale Mut. Ins. Co. v. Bull Data Sys., Inc., 10 F.3d 425, 431 (7th Cir. 1993); Seattle Totems Hockey Club, Inc. v. National Hockey League, 652 F.2d 852, 856 (9th Cir. 1981).

[153] *See Allendale*, 10 F.3d at 432-33; *see also Kaepa, Inc.*, 76 F.3d at 627 (declining to force court to "genuflect before a vague and omnipotent notion of comity").

[154] *See Allendale*, 10 F.3d at 432-33.

[155] *See* Philips Med. Sys. Int'l v. Bruetman, 8 F.3d 600, 605 (7th Cir. 1993) (holding that injunctions are necessary to protect party from multiplicity of suits for purpose of harassment).

United States parties.[156] It is impossible to ascertain whether the Court seriously considered Altai's argument.

The main criticism against the liberal standard is that it completely ignores comity.[157] Through the liberal issuance of antisuit injunctions, judicial resources may be saved in the short-term, but ultimately the savings could be off-set by difficulties and costs incurred while enforcing the injunction against the foreign court or fighting the foreign court's issuance of a counter-injunction or anti-antisuit injunction.[158]

Scholars regard the decisions in *Allendale*[159] and *Kaepa, Inc. v. Achilles Corp.*,[160] as demonstrative of those circuits' "flawed understanding of comity."[161] One critic stated that the *Allendale* decision shows a "misunderstanding of the doctrine" of international comity because it creates an analysis that "turns on political questions presented by the case rather than legal questions that should be addressed by the court."[162]

C. *Effect on International Business*

1. REPERCUSSIONS OF AN ANTISUIT INJUNCTION

When a federal court denies a request for a foreign antisuit injunction, it forces the litigants to use more than one stone to kill one bird by splitting their

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156 *See* Altai Petition for Certiorari, *supra* note 48, at 24.

157 *See* Swanson, *supra* note 6, at 33 (arguing that liberal circuits' emphasis on vexatious or oppressive nature of the duplicative litigation disregards its international context).

158 *See id.* (stating that there is ultimately no way for the United States court to compel a foreign court to not exercise its jurisdiction). In *Laker Airways*, the court affirmed the lower court's issuance of the antisuit injunction because an English court had threatened the United States jurisdiction by asserting its exclusive jurisdiction. *See Laker Airways*, 731 F.2d 909, 930 (D.C. Cir. 1984).

159 *See supra* text accompanying note 116 (discussing decision in *Allendale*).

160 *See supra* text accompanying note 17 (discussing rationale behind decision in *Kaepa, Inc.*). In *Kaepa, Inc.*, the court upheld the federal district court decision to enjoin a party from asserting a duplicative claim in foreign court where such litigation would cause "inequitable hardship" and "tend to frustrate and delay the speedy and efficient determination of the cause." *Kaepa, Inc.*, 76 F.3d at 627 (quoting *In re* Unterweser Reederei, 428 F.2d 888, 896 (5th Cir. 1970)). The *Kaepa, Inc.* court was the first to articulate the "actual threat standard," whereby the opponent must show that issuance of the antisuit injunction would somehow damage the foreign relations of the United States. *See Kaepa, Inc.*, 76 F.3d at 627.

161 Swanson, *supra* note 6, at 35 (arguing that the Seventh and Fifth Circuits misapplied doctrine of international comity); *see also* Haq, *supra* note 121, at 386-88 (stating that courts should adjudicate disputes without considering political judgments regarding the effects of their actions); Najaran, *supra* note 144, at 984 (arguing that the court in *Allendale* failed to assess comity within its proper context by holding that the opponent must offer evidence of damage to United States foreign relations to stop the issuance of an antisuit injunction).

162 Swanson, *supra* note 6, at 36-37.

financial resources to adjudicate their dispute in two or more jurisdictions.[163] Opponents of the conservative standard fear that, in an era of high litigation costs at the domestic level, allowing additional litigation abroad would significantly exacerbate the problem.[164] If the Court allows multiple, duplicative litigation to continue unabated, these litigation costs will likely force fledgling companies out of international markets.[165] The result of the conservative circuits' reverence of international comity could be an international market dominated exclusively by gigantic transnational companies.[166]

In the alternative, when a federal court issues a foreign antisuit injunction, it allows the litigants to "kill one bird with one stone" by conserving resources and concentrating on one forum to resolve the dispute.[167] While the issuance of an antisuit injunction conserves global judicial resources, it also prevents the foreign jurisdiction from developing its jurisprudence in that particular area of law.[168] Critics summarily declare that the issuance of an antisuit injunction conveys the message to the foreign court that the United States disrespects its ability to handle the dispute.[169] In *Kaepa, Inc.*, the court

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[163] *See* Baer, *supra* note 7, at 155-56 (discussing the circumstances surrounding a request for an antisuit injunction).

[164] *See* Dowler, *supra* note 27, at 369 (finding that the United States courts' reverence of comity and refusal to issue antisuit injunctions ironically allows the foreign court to breach comity at the expense of the United States litigants); Mota, *supra* note 37, paras. 29-30 (indicating that Altai and CA incurred immense litigation and business costs from nearly a decade of copyright and antisuit litigation).

[165] *See supra* text accompanying note 99 (discussing financial and business impact upon Altai from copyright and antisuit injunction litigation). While big businesses such as CA have realized the power of forcing expensive multiple-fora litigation upon its up-start competitors, they have also recognized the need for an international framework to govern multiple claims against them. *See Global Business Dialogue on Electronic Commerce: Introduction*, ("GBDe") (visited Sept. 11, 1999) <http://www.gbde.org/intro.htm> (outlining purposes of organization); *see also GBDe Business Steering Committee*, (visited Sept. 11, 1999) <http://www.gbde.org/conference/participants-e.html> (providing list of corporate participants in global conference of September 13, 1999, and founding members of organization). The GBDe seeks to facilitate the formation of jurisdictional reforms regarding intellectual property litigation, in particular, stronger enforcement and international harmonization of intellectual property protections. *See GBDe: Issue Group Conference Brief*, (visited Sept. 11, 1999) <http://www.fujitsu.co.jp/hypertext/Events/gbde-ipr/>.

[166] *See* Dowler, *supra* note 27, at 365 (indicating that loss of predictability of foreign jurisdiction may force some businesses to trade elsewhere due to high risk and cost).

[167] *See* Ginsburg, *supra* note 150, at 602 (limiting the litigation the United States forum conserves global judicial resources and provides the litigants a better opportunity to adjudicate their dispute in a forum already acquainted with the facts).

[168] *See* Salava, *supra* note 120, at 269 (stating that recognizing comity allows for the development of a mutually beneficial legal regime in which international commerce can flourish).

[169] *See* Gau Shan Co., Ltd. v. Bankers Trust Co., 956 F. 2d 1349, 1355 (6th Cir. 1992) (stating that antisuit injunctions convey the message, intended or not, that the issuing court has little confidence in the foreign court's ability to adjudicate the dispute fairly and efficiently). *See also* Salava, *supra* note 120, at 269 (concluding that when the United States court issues an antisuit injunction and prevents a party from appearing before a foreign court that has proper jurisdiction, the United States judiciary conveys the

noted that this simplistic inference becomes less of an egregious international incident, however, when one considers the antisuit injunction for what it is: an order by a United States court upon a party over which the court has personal jurisdiction.[170]

2. RESPONSE TO INJUNCTION/MULTIPLE LITIGATION DILEMMA

The United States Supreme Court has indicated the rationale that only by reaching decisions reflecting the needs of the international system can our courts develop a regime within which United States international business can compete effectively.[171] Despite this decree, critics of the liberal standard insist that recent cases "show a lack of sensitivity and sophistication relating to the issues presented by antisuit injunctions and international comity."[172] Therefore, these scholars reason the Court must demonstrate the concern that some circuits lack, grant certiorari to the next available case, and establish a uniform standard.[173] If the Court fails to act decisively soon, some critics fear that United States leadership in the emerging international system will wane.[174]

The Full Faith and Credit Clause of the Fourth Amendment to the United States Constitution[175] does not apply to foreign judgments.[176] Thus, in

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message that it lacks confidence in the foreign court's ability); *International Legal Developments in Review: 1996 Business Transactions and Disputes*, 31 INT'L L. 317 (1997) (stating that an antisuit injunction, while technically against the parties, offends the foreign court's jurisdiction and sovereignty).

[170] *See* Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 626 (5th Cir. 1996) (emphasizing that the circuit courts have established that the federal courts have the power to enjoin persons subject to their jurisdiction from litigation abroad). Implicitly, the court argued that to assume that every antisuit injunction automatically disturbs international comity would "require a district court to genuflect before a vague and omnipotent notion of comity every time that it must decide whether to enjoin a foreign action." *Id.* at 627.

[171] *See* Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 281 (1982) (stating that the doctrine of comity, jurisprudence, and restatements all fail to allow courts to make decisions that serve not only the interest of the court's sovereign or the competing court's sovereign, but also the needs of the global community).

[172] Swanson, *supra* note 6, at 37 (concluding that the issue of what standards are appropriate for the issuance of foreign antisuit injunctions is "ripe for resolution by the Supreme Court").

[173] *See, e.g., id.*; Haq, *supra* note 121, at 388 (stating that the need for a consistent policy toward antisuit injunctions requires the Court to resolve the division in the circuits).

[174] *See* Swanson, *supra* note 6, at 37 (concluding that the Court's reticence may affect United States international leadership).

[175] *See* U.S. CONST. Art. IV, § 1 ("Full Faith and Credit shall be given in each State to public Acts, Records, and judicial Proceedings of every other State.").

[176] *See* Aetna Life Ins. Co. v. Tremblay, 223 U.S. 185, 190 (1912) (stating that the Constitution does not require full faith and credit "to the judgments of foreign states or nations"). While state and federal courts are not required by the Constitution to recognize foreign judgments, as a general matter the

response to the growing incidence of multiple, duplicative litigation, scholars and practitioners have called for the adoption of a global judgments recognition agreement.[177] Regional agreements, such as the European Community's Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ("EC Convention on Jurisdiction")[178] and the Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments,[179] have been successful.[180]

The EC encounters parallel litigation frequently and, in order to adequately support its ideal of free circulation of goods and persons, adheres to the "first-filed rule."[181] Where litigants initiate proceedings involving the same cause of action and parties in multiple courts of different Member States, the first court to obtain jurisdiction hears the case, and all other courts are bound

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courts will enforce a foreign judgment unless the opponent to recognition can establish that the foreign court violated American standards of procedural due process or lacked personal jurisdiction over the parties. *See* Hilton v. Guyot, 159 U.S. 113, 163-65 (1895). The party seeking foreign enforcement of a foreign judgment must demonstrate to the American court that the foreign court exercised jurisdiction over the parties and conducted a fair trial of the merits. The American court will not recognize the foreign judgment if it finds that the rationale of the foreign court and/or its decision violates the public policy of the American forum. *See* Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 929 (D.C. Cir. 1984) (explaining that the specific reason for refusing to recognize a foreign judgment on public policy grounds may vary and is highly discretionary, i.e., the foreign law that controlled the judgment may be repugnant to the American court's conception of decency and justice).

[177] *See, e.g.*, Dowler, *supra* note 27, at 363 (arguing that a multilateral full-faith and credit agreement is the only solution that could formalize the notion of comity among nations, assure reciprocity, consistency, predictability, judicial efficiency, and equity between and among judicial fora); Weintraub, *supra* note 58, at 167-68 (discussing benefits of a judgments-recognition convention); Matthew H. Adler, *If We Build It, Will They Come?—The Need for a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgments*, 26 LAW & POL'Y INT'L BUS. 79, 80 (1994) (arguing that a multilateral judgment convention would be beneficial, but would require the United States to concede that foreign delegations unequivocally will demand that the convention exclude United States judgments involving treble and punitive damages).

[178] Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, art. 28, Sept. 27, 1968, 1990 O.J. (C 189) 1 [hereinafter Brussels Convention] (binding all EC Member States to recognize the judgments of other Member States even if they have jurisdiction over dispute).

[179] Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments, art. 1, May 24, 1984, O.A.S. TREATY SER. NO. A/39 [hereinafter Inter-American Convention] (providing for the recognition by all Member States of Member State *in personam* money judgments and decisions relating to tangible, movable property). The United States has not ratified the Inter-American Convention. *See* Weintraub, *supra* note 58, at n.10.

[180] *See* Dowler, *supra* note 27, at 398 (indicating that the Brussels Convention and the Inter-American Convention are successful because they control closely-linked economic, geographic, and political areas). The Hague Conference on Private International Law ("Hague Conference"), established in 1893, has met and attempted to draft a multilateral judgments recognition convention. *See* Weintraub, *supra* note 58, at n.1 (defining the Hague Conference as an organization that focuses on the drafting of multilateral conventions covering choice of law and procedural problems of international litigation).

[181] See EC Convention on Jurisdiction, supra note 65, arts. 21-23.

to decline jurisdiction.[182] If the proceedings are "related [and] are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments from separate proceedings," all courts after the first-filed court may stay their proceedings or decline jurisdiction.[183]

Despite the obvious benefit of a multilateral agreement such as the EC Convention on Jurisdiction — judicial systems of all Member States would grant the judgments of other Member State courts full faith and credit[184] — its adoption in the near future is unlikely.[185] Therefore, until foreign courts provide United States litigants with reasonably predictable *exequatur* and res judicata procedures,[186] the antisuit injunction must remain a viable judicial convention to ensure the integrity of the United States judgment and the interests of the United States litigants.[187]

IV. RECOMMENDATIONS

A. *The Attitude Toward Multiple Litigation Must Change*

The common law Parallel Proceeding Rule[188] generally allows multiple-

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[182] *See id.*, art 21.

[183] *Id.*, art. 22.

[184] *See* Dowler, *supra* note 27, at 399 (elaborating that a multilateral judgment recognition agreement should require that all signatories "abandon the discretionary, *ad hoc* approach currently employed to dispose of international cases" of multiple, duplicative litigation).

[185] *See, e.g., id.* at 395 (stating that concluding an international convention on recognition and enforcement that will address multiple, duplicative litigation and provide for aggressive judicial action will be a difficult task due to reoccurring themes in the United States of unilateralism, preference for national over international uniformity, impatience, and penuriousness); Adler, *supra* note 177, at 80 (stating that the completion of a multilateral judgment convention would be difficult due to the likely demand by foreign delegations that the convention exclude United States judgments of treble and punitive damages); Weintraub, *supra* note 58, at 220 (concluding that, based on the failure of previous attempts, drafting of any multilateral convention will reach an impasse or that few countries will ratify any document that emerges). Recently in 1992, an attempt by the Hague Conference to draft a convention ended in failure because foreign industry feared United States jury awards. *See id.* at 169 (elaborating that a previous Hague Conference produced a convention, but only three countries ratified it).

[186] *See supra* note 58 (discussing difficult and unpredictable procedure of obtaining an *exequatur* and arguing res judicata).

[187] *See* Allendale Mut. Ins. Co. v. Bull Data Sys, Inc., 10 F.3d 425, 433 (7th Cir. 1993) (stating that when a United States party is unable to plead res judicata to a foreign court, which would deprive that party of the benefit of the United States judgment, considerations of comity should not prevent a federal court, even under the conservative standard, from enjoining a foreign defendant or a United States party from proceeding, in defiance of the judgment, in a foreign court).

[188] *See* Dowler, *supra* note 27, at 368 (defining the Parallel Proceeding Rule as a common law doctrine related to comity in that it provides "guidance where jurisdictional overlaps occur with foreign courts"). The Parallel Proceeding Rule allows two courts of concurrent *in personam* jurisdiction over the parties to proceed with litigation until one court reaches judgment, which the second court may consider

fora litigation to continue simultaneously until one forum reaches a judgment that the parties then may plead as res judicata in the other fora.[189] After the first forum reaches judgment, however, the *Altai* cases illustrate that there is no guarantee available to the victorious party that the foreign fora will give the United States judgment recognition,[190] even to a *prima facie* degree.[191] Therefore, before the United States Supreme Court attempts to define a uniform standard for the issuance of foreign antisuit injunctions, it needs to redefine how the United States judiciary views multiple-fora litigation henceforth.[192]

The common law adopted the Parallel Proceeding Rule over a span of decades when there was little concern of judicial waste.[193] If the parties could afford to litigate the same dispute in multiple fora, a court had little incentive to threaten comity by declaring exclusive jurisdiction.[194] Today, the reverse may be true in that the principle concern of the parties and the courts is judicial efficacy.[195] The Parallel Proceeding Rule[196] and the conservative

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as res judicata. *See id.* The Parallel Proceeding Rule, coupled with international comity, significantly restrains United States courts from preventing multiple, duplicative litigation abroad. *See id.* By offering the least resistance to multiple litigation, the Parallel Proceeding Rule appears to offer the greatest safeguard against collateral litigation relating to which court should adjudicate the dispute. *See* Louise Ellen Teitz, *Taking Multiple Bites Of The Apple: A Proposal To Resolve Conflicts Of Jurisdiction And Multiple Proceedings*, 26 INT'L LAW. 21, 28 (1992) (elaborating on the use of the Parallel Proceeding Rule and its effects). The practical result of the Parallel Proceeding Rule, however, is that it merely changes the litigants' battle from the issue of personal jurisdiction to the determination of the enforcement of the foreign judgment. *See id.* at 29 (noting that due to the absence of an international judgment recognition convention, the focus of any multiple litigation abroad undoubtedly turns to the enforcement of the first judgment via res judicata).

189 See Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 928 n.53 (D.C. Cir. 1984) (discussing the Parallel Proceeding Rule).

190 *See* sources cited *supra* note 58 (elaborating on the difficulty and uncertainty behind *exequatur* and res judicata proceedings in foreign courts).

191 *See* sources cited *supra* note 5 (elaborating that the doctrine of reciprocity raises the standard of respect and enforceability of foreign judicial decisions through bilateral agreement from comity, which is equivalent to a *prima facie* level of deference, to a level of conclusiveness and res judicata).

192 *See* Teitz, *supra* note 188, at 29 (urging the United States to discontinue the legal mentality and practice of approving the initiation of parallel proceedings in order to lessen the negative "implications of uninhibited dual litigation").

193 *See* Pearce, *supra* note 2, at 526 (tracing comity's origin to the needs of Seventeenth Century Dutch legal theorists to solve conflict-of-law problems amongst its neighboring countries).

194 *See* Teitz, *supra* note 188, at 24 (noting that as recently as 1990, the United States federal courts have referred approvingly to the tactic of multiple-fora litigation in different countries as a prudential means of ensuring enforceability of subsequent judgments); *see also* Herbstein v. Bruetman, 743 F. Supp. 184, 188 (S.D.N.Y. 1990) (characterizing favorably multiple-fora litigation as a means of enforcing subsequent judgments and not as vexatious duplicative litigation).

195 *See* Teitz, *supra* note 188, at 22 (elaborating that any "run-of-the-mill commercial dispute" may impose substantial burdens on the litigants and judicial resources to adjudication of not only the dispute, but also collateral battles over which forum should control the dispute); *see also* Ginsburg, *supra* note 150,

standard's view of international comity[197] disallow judicial efficacy to emerge as a primary goal.

In order for the United States to remain a leader in the Information Age,[198] the United States Supreme Court must redefine the ways that United States businesses may look to the courts in order to adjudicate their disputes. As international commerce expands toward a "cybereconomy,"[199] the law must expand with it in order to adequately protect United States parties. In August 1998, the Securities and Exchange Commission ("SEC") established the Office of Internet Enforcement.[200] This new unit of the SEC handles the 120 complaints it receives per day alleging Internet-related securities fraud.[201] This is an important step in enforcement, but it does not address the problems of multiple, duplicative litigation.

B. *Forum Non Conveniens Fails to Address the Big Picture*

Some scholars claim that the doctrine of *forum non conveniens* accomplishes the same result as an antisuit injunction without rebuking international comity.[202] They base this conclusion, however, by arguing form

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at 602 (arguing that United States courts should issue an antisuit injunction in order to further the interest of judicial economy).

[196] *See* Teitz, *supra* note 188, at 28 (arguing that the Parallel Proceeding Rule spawns an amount of "hostile injunctive litigation" that will only increase as prescriptive jurisdiction expands with commercial transactions).

[197] *See* Raushenbush, *supra* note 7, at 1051 (commenting that the conservative standard elevates the doctrine of international comity to the virtual exclusion of all other considerations).

[198] *See* Swanson, *supra* note 6, at 37 (concluding that the Court's reticence may affect United States international leadership).

[199] Michael P. Avramovich, *The Protection Of International Investment At The Start Of The Twenty-first Century: Will Anachronistic Notions Of Business Render Irrelevant The OECD's Multilateral Agreement On Investment?*, 31 J. MARSHALL L. REV. 1201, 1218-19 (commenting on the possible evolution of international commerce into a strict "cybereconomy where business transactions exist completely outside of the jurisdiction of nation-states").

[200] *See SEC Creates Office of Internet Enforcement to Battle Online Securities Fraud*, (visited Nov. 11, 1998) <http://www.sec.gov/news/press/98-69.txt>, at para. 1 (announcing establishment of the Office of Internet Enforcement).

[201] *See id.*, at para. 3. *See generally Internet-Related Litigation and Administrative Proceedings Announcements*, (visited Sept. 11, 1999) <http://www.sec.gov/enforce/arintrel.htm> (providing archived list of SEC internet-related enforcement actions).

[202] *See* Paul J. Carney, *International Forum Non Conveniens: "Section 1404.5" — A Proposal in the Interest of Sovereignty, Comity, and Individual Justice*, 45 AM. U. L. REV. 415, 462-63 (1995) (proposing a new statute, 28 U.S.C. § 1404.5, to reform and clarify the doctrine of *forum non conveniens* for use by the United States federal courts). Section 1404.5 would allow United States federal courts to stay an action so the parties may litigate in a more proper, alternative forum. *See id.* at 463. As long as a proper, alternative forum exists for the litigants, the doctrine of *forum non conveniens* adequately conserves

over substance, which fails to address what really happens in multiple-fora litigation. As the *Altai* cases and others demonstrate, a party may not file an additional suit abroad until much later in the United States litigation.[203] At that point, the United States court and litigants have already spent a considerable amount of time and money adjudicating the dispute domestically.[204]

In order for a *forum non conveniens* ruling to solve the problem of high litigation costs, vexation, and conflicting judgments, the United States court must ascertain a proper, alternative forum early in the development of the United States litigation. When litigation occurs in three or more countries, however, it is impossible for a United States court to determine whether it is the "most convenient forum" without hearing some collateral arguments from the parties,[205] thereby incurring additional expense for the litigants and the court.[206] If all of the countries involved in the litigation are equally appropriate fora to adjudicate the dispute, it forces the identification of one court as controlling and the injunction of the rest to prevent additional litigation of the dispute until the controlling court completes its proceeding.[207]

Moreover, it is unclear whether United States courts may raise a *forum non conveniens* ruling *sua sponte*.[208] The benefits to international comity are

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judicial resources and eliminates multiple-fora litigation for United States multinational corporations. *See id.*

[203] *See Altai VII*, 126 F.3d 365, 367 (2d Cir. 1997) (providing that CA filed suit in France two years after commencing litigation in the United States); *see also* China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 34-35 (2d Cir. 1987) (indicating that the parties commenced the United States litigation two years before the foreign action); Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am., 651 F.2d 877, 880 (3d Cir. 1981 (stating that the plaintiff did not file in foreign court until five years after the United States litigation began); Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 626 (indicating that the defendant filed suit in foreign court seven months after the United States action commenced); Seattle Totems Hockey Club, Inc. v. National Hockey League, 652 F.2d 852, 853 (9th Cir. 1981) (stating that the foreign suit arose twenty-seven months after the United States action).

[204] *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 261 (1981) (determining the appropriate forum decisively due to the "enormous commitment of judicial time and resources" of litigation).

[205] *See* Carney, *supra* note 202, at 462 (noting that critics of the doctrine of *forum non conveniens* argue the United States courts lack the ability to identify the political and practical inadequacies of foreign fora).

[206] *See* Baer, *supra* note 7, at 175 (outlining a four-step process that United States courts should administer before considering a foreign antisuit injunction). Baer comments that "[i]f the litigation in a foreign country is truly vexatious or wasteful," the foreign courts may dismiss such proceedings on their own volition. *Id.* at 179.

[207] *See id.* (conceding that if the United States court finds that a dismissal under *forum non conveniens* is inappropriate, and the foreign fora fail to dismiss their actions, it should then consider a foreign antisuit injunction).

[208] *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947) (noting simply that the doctrine of *forum non conveniens* allows a court to resist imposition upon its jurisdiction of a claim that statute authorizes it to hear). Overwhelmingly, however, it is the defendant of the action that moves the court to

obvious in that it removes from the court the burden of ordering a party not to pursue litigation in a foreign forum that has every right to hear the dispute.[209] However, its application only conserves judicial and litigant resources when a party pleads *forum non conveniens* early in the United States proceeding,[210] or initiates the action in United States court after a foreign proceeding.[211]

C. *The Role of Antisuit Injunction in the Information Age*

Until foreign courts provide United States litigants with reasonably predictable *exequatur* and res judicata procedures,[212] or the United States ratifies a foreign judgment recognition convention,[213] the foreign antisuit injunction must remain a viable judicial convention to ensure the integrity of United States judgments and the interests of the United States litigants.[214] Although scholars, practitioners, and institutions have suggested various manners to address the problem of multiple, duplicative litigation,[215] many

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dismiss under the doctrine. *See* Baer, *supra* note 7, at 177 (arguing that a court should be able to raise a motion to dismiss *sua sponte* under *forum non conveniens*).

[209] See Baer, *supra* note 7, at 172 (commenting that a court's dismissal of an action under *forum non conveniens* shows a deference to a foreign court, thereby fostering comity and promoting cooperation among the judicial systems of the world). Baer argues that both *forum non conveniens* actions and antisuit injunctions consolidate the litigation into one forum; the difference is that the former promotes comity, while the latter hinders it. *See id.* at 173.

[210] *See* sources cited *supra* notes 203-204.

[211] *See* Piper Aircraft Co. v. Reyno, 454 U.S 235, n.22 (1981) (requiring that at the outset of a *forum non conveniens* inquiry, the court must determine that an alternative forum exists). In order to make a determination that an alternative forum exists, the court must know either which foreign courts have already exercised jurisdiction over the parties or know enough about the law of possible foreign fora so that it may determine which courts may exercise jurisdiction in the future. *See Gulf Oil Corp.*, 330 U.S. at 507 (stating that, although the doctrine of *forum non conveniens* does not require that a foreign proceeding already be in progress, it "presupposes at least two for[a] in which the defendant is amenable to process).

[212] *See* sources cited *supra* note 58 (discussing how to obtain an *exequatur* and argue res judicata abroad).

[213] *See supra* notes 175-180 and accompanying text (discussing the need for a multilateral foreign judgment convention).

[214] *See* Allendale Mut. Ins. Co. v. Bull Data Sys., Inc., 10 F.3d 425, 433 (7th Cir. 1993) (stating that when a United States party is unable to plead res judicata to a foreign court, which would deprive that party of the benefit of the United States judgment, considerations of comity should not prevent a federal court, even under the conservative standard, from enjoining a foreign defendant or an United States party from proceeding, in defiance of the judgment, in a foreign court).

[215] *See* Salava, *supra* note 120, at 270 (advocating that the Advisory Committee amend Rule 65 of the Federal Rules of Civil Procedure to include Subsection F that adopts the conservative standard); *supra* notes 175-180 and accompanying text (arguing that the United States should adopt a multilateral foreign judgment convention); sources cited *supra* note 202 (arguing need for the United States to employ the doctrine of *forum non conveniens* in order to limit foreign litigation to one forum).

agree that the most effective response would be that the United States Supreme Court grant certiorari to the appropriate case and finally define how United States federal courts should apply the equitable remedy of the foreign antisuit injunction.[216]

This Comment demonstrates that international comity and business interests cannot receive equal emphasis under either the conservative or the liberal standard for issuing foreign antisuit injunctions.[217] If the Court adopts the proper standard and applies it in a practical manner for the Twenty-first Century, however, the doctrine of international comity can work for international business.

1. ADOPTION OF THE LIBERAL STANDARD

The United States federal circuits under the conservative standard refuse to issue an antisuit injunction unless the foreign action threatens their jurisdiction or policy in the name of international comity.[218] The caselaw and this Comment show that only once has a court under the conservative standard issued a foreign antisuit injunction,[219] indicating that multiple-fora litigation rarely reaches that level of conflict. Although *China Trade* provides five factors for the conservative circuits to consider when determining the propriety of issuing an injunction,[220] *Altai VII* illustrates how infrequently the conservative circuits even consider these factors.[221]

The liberal standard adequately responds to the reality of multiple, duplicative litigation,[222] by allowing United States courts to exercise their

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216 *See* discussion *supra* note 121 (discussing need for the United States Supreme Court to resolve the division in the circuits on the standards used to issue a foreign antisuit injunction).

217 *Compare* Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1355 (6th Cir. 1992) (stating that the liberal standard fails to provide predictability of judicial system that is crucial to international commerce), *with* China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 40 (2d Cir. 1987) (J. Bright, dissent) (arguing that when there is no actual threat to international comity from commercial litigation, the court has a duty to limit the expense of resources by the court and the litigants by limiting the dispute to one forum).

218 *See* Raushenbush, *supra* note 7, at 1051 (explaining that the "conservative" approach to antisuit injunctions prohibits their issue without a showing of threat to jurisdiction or evasion of the public policies of the forum); *see also* cited sources *supra* note 14 (delineating caselaw of conservative standard).

219 *See supra* note 148 and accompanying text.

220 *See China Trade*, 837 F.2d at 35-36 (citing American Home Assurance Corp. v. Insurance Corp. of Ireland, Ltd., 603 F. Supp. 636, 643 (S.D.N.Y. 1984) (articulating five factors to consider before issuing a foreign antisuit injunction)).

221 *See Altai VII*, 126 F.3d 365 (2d Cir. 1997)(finding no need to decide whether the *China Trade* factors apply).

222 *See* sources cited *supra* note 204 (discussing immense cost of multiple-fora litigation).

equitable power to limit the litigation to one forum.[223] In *Allendale*, Judge Posner reasoned that the practical application of international comity today requires that the opponent to an antisuit injunction offer some evidence as to how the injunction would negatively affect the foreign relations of the United States.[224] When the opponent is unable to show a potential detriment to international comity, the liberal standard allows the court to grant an antisuit injunction by consistent application of its four-factor test.[225]

The Supreme Court has had numerous opportunities to resolve the conflict in the circuits, but has denied certiorari in all cases.[226] As further indecision will only exacerbate the problem of multiple, duplicative litigation, the Court must grant certiorari to the next appropriate case.[227] Consistent application of the liberal standard would allow international businesses to predict the consequences of their actions in litigation,[228] a prerequisite for international commerce to thrive.[229] Moreover, it would eliminate the ability of larger businesses to extend the duration and expand the fora of litigation in order to drive a smaller, competitor-litigant into liquidation or allow a larger company to acquire it.[230] While these benefits are tangible and easily monitored, the benefits from rigid adherence to international comity are ephemeral and impossible to quantify.[231] Therefore, in the interests of the United States businesses and judicial efficacy, the Court should adopt the liberal standard.

2. ADOPTION OF A "MODERATE" STANDARD

If the United States Supreme Court refuses to adopt the liberal standard, a compromise between the conservative and liberal standards could also adequately address the problem of multiple, duplicative litigation. Texas has attempted to accommodate the concerns of litigants about vexatious litigation and maintain the doctrine of international comity by simply combining factors

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223 *See China Trade*, 837 F.3d at 35 (noting that United States federal courts have the equitable power to enjoin a foreign action by parties subject to their jurisdiction).

224 *See* Allendale Mut. Ins. Co. v. Bull Data Sys., Inc., 10 F.3d 425, 431 (7th Cir. 1993).

225 *See supra* note 19 and accompanying text (outlining four-prong test of the liberal standard).

226 *See* cases cited *supra* note 29.

227 *See* discussion *supra* note 121.

228 *See* Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1355 (6th Cir. 1992) (stating value of predictability in commerce).

229 *See* Dowler, *supra* note 27, at 364-365 (indicating that loss of predictability of foreign jurisdiction may force some businesses to trade elsewhere due to high risk and cost).

230 *See* sources cited *supra* note 99 (discussing financial and business impact of litigation upon Altai).

231 *See supra* note 113 and accompanying text.

of both the liberal and conservative standards into its test.[232] Essentially, the Texas standard provides the litigants with more reasons to argue for an antisuit injunction, while allowing a simple showing of vexation to justify its issuance.[233]

A better approach to the moderate standard could operate similar to the EC Convention on Jurisdiction's first-filed scheme.[234] Where the law regulating the activity or protecting the right is substantially similar,[235] e.g., copyright protection of computer software in the EC and the United States,[236] there are negligible concerns of creating an international incident through disrespect of the judicial system of another sovereign by limiting the litigation to the United States forum.[237] Considering that some scholars expect a deluge of litigation from the hyper-dissemination of goods via the Internet,[238] a court

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[232] *See* Schimek, *supra* note 22, at 515-16 (outlining Texas standard for issuing antisuit injunctions as articulated by the Texas Supreme Court in Gannon v. Payne, 706 S.W.2d 304, 307 (Tex. 1986)). The *Gannon* court held that a court may issue an antisuit injunction for one of the following reasons: 1) to prevent a multiplicity of suits; 2) to protect a party from vexatious litigation; 3) to protect the court's jurisdiction; or 4) to protect an important public policy of the forum. *See* Gannon v. Payne, 706 S.W.2d 304, 307 (Tex. 1986).

[233] *See id.*

[234] *See* EC Convention on Jurisdiction, *supra* note 65, arts. 21-23 (defining first-filed system to determine jurisdiction).

[235] *Cf. id.*, art. 22 (providing that if the proceedings are "related [and] are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments from separate proceedings," all courts after the first-filed court may stay their proceedings or decline jurisdiction).

[236] *See* Pamela Samuelson, *Symposium On U.S.-E.C. Legal Relations: Comparing U.S. and E.C. Copyright Protection for Computer Programs: Are they More Different than they Seem?*, 13 J.L. & COM. 279 (1984) (stating the EC promulgated the Computer Directive in order to harmonize the laws of the Member States, but also to bring EC law into conformity with United States copyright protection of computer programs). Both EC and United States law now view copyright as the appropriate legal protection of computer programs, considering the programs "literary works." *Id.* at 280-281. Samuelson discovered some differences, however, between the Computer Directive and United States copyright law. *See id.* Samuelson noted that there remain differences in the following areas: 1) some commercial details, e.g., regulation of license contracts; 2) the static nature of the Computer Directive, which requires amendment for change, whereas United States protection evolves continuously via caselaw; and 3) the absence of language in the Computer Directive addressing copyright protection of certain aspects of computer software, i.e., user interfaces and program behavior that already have protection in the United States. *See id.* at 280-81.

[237] *See* Allendale Mut. Ins. Co. v. Bull Data Sys., Inc., 10 F.3d 425, 433 (7th Cir. 1993) (suggesting that in the absence of a showing by the opponent that the antisuit injunction would in fact disturb the foreign relations of the United States, the court should not allow "purely theoretical" international comity objections to "trump a concrete and persuasive demonstration of harm to the applicant for the injunction").

[238] *See* Altai Petition for Certiorari, *supra* note 48, at 15-16. *See also* Avramovich, *supra* note 199 (commenting on the possible evolution of international commerce into a "cybereconomy"); Walter A. Effross, *Contact Through Internet Sufficient for Jurisdiction over Nonresident: 6th Circuit Hands a Victory to Compuserve*, 13 COMPUTER L. STRATEGIST 4, 5 (commenting on implications of the 6th Circuit's ruling in Compuserve, Inc. v. Patterson, 89 F.3d 1257, 1264 (6th Cir. 1996), which found that a

may welcome the opportunity to decline jurisdiction.[239]

The first-filed court would have the power to issue a foreign antisuit injunction upon any party subject to its jurisdiction that would attempt to file a duplicative claim in a foreign court controlled by substantially similar law.[240] In effect, international comity would demand the issuance of the injunction in order to avoid vexation upon the parties and the foreign court.[241]

Where the United States court finds the law is not substantially similar, the parties would be able to continue the litigation abroad at the court's discretion and attempt to apply the judgment of the court that reaches judgment first as res judicata in the other fora.[242] While the United States court would make the "substantially similar law" determination[243] within its equitable power to issue an antisuit injunction,[244] the existence of a multilateral judgment recognition convention on that particular area of law[245] would further support the court's determination and increase the court's adherence to international comity.

V. CONCLUSION

The doctrine of international comity ensures that foreign judicial and legislative acts receive a level of deserved respect in the United States. The exact level of respect that the United States federal courts should grant,

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court can exercise personal jurisdiction over a nonresident who makes primary contacts with a company through the Internet); *SEC Creates Office of Internet Enforcement to Battle Online Securities Fraud*, (visited Nov. 11, 1998) <http://www.sec.gov/news/press/98-69.txt>, at para. 3 (noting that the SEC receives 120 complaints per day concerning Internet-related securities fraud).

[239] Baer, *supra* note 7, at 179 (commenting that foreign court may dismiss vexatious proceedings on their own volition).

[240] *Cf.* EC Convention on Jurisdiction, *supra* note 65, art. 21 (providing that where proceedings involving the same cause of action and parties are brought in different Member States, the first court to obtain jurisdiction hears the case, and all other courts are bound to decline jurisdiction).

[241] *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 261 (1981) (emphasizing need for the courts to determine the appropriate forum due to the "enormous commitment of judicial time and resources"); *see also* Ginsburg, *supra* note 150, at 602 (arguing that United States courts should issue an antisuit injunction in order to further the interest of judicial economy).

[242] *Cf.* EC Convention on Jurisdiction, *supra* note 65, art. 22 (allowing courts to stay their proceedings or decline jurisdiction when the proceedings are related and so closely connected that it is expedient to limit the litigation to one forum in order to avoid the risk of irreconcilable judgments from separate proceedings).

[243] *See id.*, arts. 21-23.

[244] *See* China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 36 (2d Cir. 1987) (noting that United States federal courts have the equitable power to enjoin a foreign action by parties subject to their jurisdiction).

[245] *See supra* notes 175-180 and accompanying text (discussing the need for a multilateral foreign judgment convention, its benefits, and the difficulty of its ratification).

however, is unclear. Equally unclear amongst the federal courts are the standards by which a litigant may successfully move the court to trump comity in order to protect the interests of the parties or the court. The division in the United States Circuit Courts of Appeals on the standards used to issue foreign antisuit injunctions exemplifies this ambiguity. This division affects international commerce by hindering the predictability of United States courts for foreign parties and by failing to adequately protect the interests of United States parties engaged in commerce abroad. As our nation moves into a century of unprecedented international commerce and litigation, it is imperative that the United States Supreme Court resolve the division in favor of the liberal standard or, in the alternative, a flexible standard that equitably regulates the doctrine of international comity with the interests of United States business in order to ensure the competitiveness of United States business for the next century.