

RECORD NO. 20-1016

In The
United States Court of Appeals
for the Fourth Circuit

FRANCE.COM, INC., a California corporation,
Plaintiff-Appellee,

v.

**THE FRENCH REPUBLIC; ATOUT FRANCE;
THE MINISTRY FOR EUROPE AND FOREIGN AFFAIRS;
FRANCE.COM, a domain name,**
Defendants-Appellants,

and

**JEAN-YVES LE DRIAN, in his official capacity as the
French Republic's Minister for Europe and Foreign Affairs;
VERISIGN, INC.,**
Defendants.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA**

**PETITION FOR REHEARING *EN BANC*
OF APPELLEE FRANCE.COM, INC.**

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RULE 35(b) STATEMENT

Pursuant to Rule 35 of the Federal Rules of Appellate Procedure, Plaintiff-Appellant France.com respectfully files this Petition for Rehearing *en Banc* of the panel opinion in *France.com, Inc. v. French Republic*, No. 20-1016 (4th Cir. Mar. 25, 2021) (ECF No. 41). The Panel's opinion conflicts with controlling authority and authoritative decisions in other Circuits and raises questions of exceptional importance regarding (1) United States citizens' ability to enforce trademark rights against foreign sovereigns within the United States, (2) the supremacy of United States law, (3) the role of United States Courts in protecting United States-based property and property rights, and (4) the enforceability of United States intellectual property rights.¹

INTRODUCTION

France.com's suit below asserts separate claims for cybersquatting, reverse domain name hijacking, expropriation, trademark infringement, and unfair competition. France.com alleged each of those claims to protect its United States-based property, namely, property rights in the domain name <France.com> as well as its rights in U.S. Trademark Registration No. 4514330 for FRANCE.COM.²

¹ Defendants are collectively referred to herein as the French Republic.

² Registered in, among other classes, I.C. 35 for promoting tourism.

The lawsuit below involves different rights giving rise to different claims.

<France.com> was a domain/property owned by Plaintiff and located in Northern Virginia – Plaintiff’s claim of expropriation is the avenue to address the taking of that property. FRANCE.COM is a longstanding trademark owned by Plaintiff.³ Encroachment of trademark rights and resulting injury are addressed through claims of trademark infringement, cybersquatting, unfair competition, and reverse domain name hijacking. Plaintiff’s trademark rights do not arise from ownership of a domain but rather arise statutorily by virtue of registration.⁴

Defendants have not disputed that they have used both the Plaintiff’s <France.com> domain name and thus the FRANCE.COM mark in the United States since March 2018. Defendants use the <France.com> domain name and FRANCE.COM to redirect traffic to France’s own commercial tourism website at www.france.fr.

³ *United States Pat. & Trademark Off. v. Booking.com B. V.*, 140 S. Ct. 2298, 2302, 207 L. Ed. 2d 738 (2020) (“The Lanham Act ... arms trademark owners with federal claims for relief; importantly, it establishes ... trademark registration. The owner of a mark ... enjoys “valuable benefits,” including a presumption that the mark is valid [of validity].”)

⁴ Infringement upon intellectual property rights *within* the United States is not permissible simply because actions do not constitute infringement *outside* of the United States. Dismissing Plaintiff’s infringement-related claims with prejudice – claims that have had no factual discovery or testing by a lower Court – in effect, holds they can.

Below, Plaintiff argued the commercial activity exception to FSIA immunity applies because its trademark claims are based upon Defendants' activities within the United States (including their ongoing infringement and internet activity) and that the expropriation exception to the FSIA applied to the taking of Plaintiff's domain name. The court determined factual discovery was required in order to resolve those FSIA immunity questions. Defendants appealed, arguing postponement of that determination, in forcing them to continue litigation, denied immunity.

The Panel reviewed *de novo* questions of whether the FSIA confers immunity to Defendants for their unauthorized use of Plaintiff's <France.com> domain name and FRANCE.COM trademark, and whether Plaintiffs plead facts sufficient to assert Defendants actions in obtaining the domain name <France.com> constituted expropriation.

Defendants argued transferring the domain did not constitute expropriation and neither taking the domain nor using it or FRANCE.COM was commercial activity - thus shielding them from Plaintiff's expropriation and infringement-related claims. Defendants argued, and the panel agreed, that FSIA exceptions are inapplicable as the gravamen of the case is an undomesticated French Court order (currently on appeal) granting the French Republic a right of publicity to the generic word "France" and ordering Plaintiff to voluntarily transfer the domain to

Defendants or face a fine.⁵ Defendants avoided discussing claims related to infringement, arguing Plaintiff's lawsuit is merely sour grape re-litigation of the adverse judgment which actually injured the Plaintiff.

The Panel explained that “whether the commercial activity exception applies ... [requires] identifying the conduct on which the action is “based.”⁶ The Panel then determined that “[a]ll asserted injuries alleged in the complaint flow from that French judgment”⁷ and “[t]he claims arise from [that] judgment.”⁸ By treating the Plaintiff's claims as a whole and focusing its analysis on a single non-commercial factual predicate instead of the conduct that “actually injured” France.com, the Panel placed this Circuit into conflict with the United States Supreme Court and other Circuits.

The Panel's opinion conflicts with Supreme Court decisions in *Nelson* and *Sachs*,⁹ as well as the Eleventh Circuit's *Devengoechea* decision¹⁰ the Second

⁵ See ECF No. 24, at 8; JA 268-289, JA 293-304.

⁶ ECF No. 41, at * 3, citing *Saudi Arabia v. Nelson*, 507 U.S. 349, 356, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993).

⁷ *Id.*

⁸ *Id.* at *5.

⁹ *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 136 S. Ct. 390, 396, 193 L. Ed. 2d 269 (2015)

¹⁰ *Devengoechea v. Bolivarian Republic of Venezuela*, 889 F.3d 1213 (11th Cir.

Circuit's *Pablo Star* decision,¹¹ and this Circuit's own *Globe Nuclear* decision.¹² Each of those controlling or authoritative decisions unambiguously provides that a reviewing Court determines the gravamen – *i.e.*, the conduct that actually injured the plaintiff – in FSIA exception cases on a claim-by-claim basis.

The Panel's departure creates myriad problems of exceptional public importance. It creates conflict concerning the correct determination of "gravamen" in FSIA exception cases within this Circuit and elsewhere, expands FSIA immunity beyond its logical limits, encourages foreign sovereigns to avoid judicial review of foreign orders, and threatens the validity and enforceability of United States intellectual property rights. Accordingly, France.com respectfully seek rehearing *en banc*.

SPECIFIC QUESTIONS

- 1. *En banc* rehearing is necessary to resolve the conflict between the Panel's analysis and (a) the Supreme Court's decisions in *Nelson* and *Sachs*, (b) this Court and other Circuit Court opinions interpreting them, and (c) its expropriation analysis.**

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¹¹ *Pablo Star Ltd. v. Welsh Gov't*, 961 F.3d 555, 562 (2d Cir. 2020), cert. denied, 141 S. Ct. 1069 (2021)

¹² *Globe Nuclear Servs. & Supply (GNSS), Ltd. v. AO Techsnabexport*, 376 F.3d 282 (4th Cir. 2004)

Summarizing its “gravamen” analysis, the Panel held that “[t]he Corporation’s **claims arise from an adverse judgment of a foreign court** ... not ... commercial activity that may have followed that transfer” without individually examining the Plaintiff’s distinct claims.¹³ The Panel treated the Plaintiff’s claims as single unit and focused its analysis on a single preceding event, but not one causing Plaintiff’s various injuries.¹⁴

The Panel’s approach conflicts with Supreme Court precedent, and decisions of this Circuit, the Eleventh, and Second Circuits. The *Nelson* and *Sachs* decisions require courts to review a plaintiff’s claim on a claim-by-claim basis to determine what conduct each claim is “based-upon” and “actually injured” the plaintiff. Here, Plaintiff’s claims each seek redress for injuries occurring in the United States apart from any “adverse judgment.” Plaintiff’s Amended Complaint alleges Defendants’

¹³ ECF No. 41, at *3 (The panel opinion, save discussing the expropriation exception, does not even mention Plaintiff’s individual claims after describing the contents of the filed lawsuit in recounting the background below).

¹⁴ As stated in oral argument, *Garb v. Republic of Poland*, 440 F.3d 579, 586 (2d Cir. 2006) is inapplicable. *Garb* involved rights in property confiscated by the Nazi regime. The *Garb* Plaintiffs sued because of the confiscation – not expropriation because the property was within the borders of Poland. The *Garb* Plaintiffs then argued for jurisdiction because later commercial property sales met the commercial activities exception. The *Garb* Court said no, the later commercial activity does not render the taking commercial under of FSIA. **That is not this case.** Plaintiff’s trademark related claims arise independently of the transfer of the domain name. Indeed, if Defendant’s argument was correct, every claim of infringement would center not on acts of infringement but rather the manner of acquisition of property later used to infringe.

conduct in the United States (i.e., the taking and infringement), are what “actually injured” the Plaintiff. The Plaintiff’s cybersquatting, reverse domain name hijacking, trademark infringement, and unfair competition are claims are “based upon” admitted conduct by the Defendants in the United States.

2. *En banc* rehearing is necessary to address the ramifications of the Panel’s opinion in the areas of domestication of foreign judgments and intellectual property rights.

Defendants did not domesticate the adverse foreign judgment (which conflicted with United States intellectual property law by granting the French Republic a “right of publicity” to the generic word “France”).¹⁵ The adverse foreign judgment carried no authority in the United States and did not direct the domain registrar or Defendants to transfer the domain name. Plaintiff’s expropriation claim is “based upon” Defendants’ efforts in the United States to convince a United States domain name registrar, Web.com, to divest the Plaintiff of its United States property, the <France.com> domain name. Based on the Panel’s opinion, a foreign sovereign can argue in their own courts what they cannot in the United States, obtain a favorable ruling, and then privately enforce parts of that ruling without ever presenting it to a United States court for review – and in so doing make United States property subject to foreign law. Here, intangibility of the property allowed the

¹⁵ In the past, the French Republic expressly disclaimed such an argument in the United States. *See* ECF 24, at 7-8.

transfer to occur without United States court review,¹⁶ and the Panel's opinion stands for the proposition that the only path for redress or to enforce rights in that transferred property is in a foreign tribunal.

ARGUMENT

1. *Nelson, Sachs, and their progeny require the gravamen of a lawsuit to be addressed on a claim-by-claim basis.*

a. *Nelson and Sachs*

In *Saudi Arabia v. Nelson*, a plaintiff argued for jurisdiction over a sovereign for torts occurring overseas on the theory that the action was “based upon” the sovereign's preceding commercial activity (job recruitment) in the United States.¹⁷ The *OBB Personenverkehr AG v. Sachs* plaintiff argued for jurisdiction over a sovereign for injuries sustained in a fall overseas because of a preceding commercial activity (sale of a train ticket) in the United States.¹⁸ **In both instances, the Supreme Court explained that it is the activity giving rise to the specific claim that is key, not preceding conduct disconnectedit..** France.com concedes that

¹⁶ The foreign judgment did not direct anyone except the Plaintiff (working through the prescribed channels of appealing) to take action and Plaintiff had neither opportunity to prevent the domain transfer in U.S. Courts nor notice of the need to take such action.

¹⁷ *Saudia Arabia v. Nelson*, 507 U.S. at 356-358.

¹⁸ *Sachs*, 577 U.S. at 35-37.

questions involving the domain transfer are squarely at issue in its expropriation claim¹⁹ and that damages arise because of the transfer, but all other claims arise out of statutory trademark rights and injuries/damages related to the rights in the trademark – not rights in the domain.

The Panel misapplication of *Nelson* and *Sachs* (in dismissing all commercial activity related to the elements of France.com’s actual claims because of what they found to be non-commercial activity in a preceding event) is what *Sachs* expressly warned against. The *Sachs* Court wrote,

We cautioned in *Nelson* that the reach of our decision was limited, and similar caution is warranted here. . . **we consider here only a case in which the gravamen of each claim is found in the same place.**

Sachs, 577 U.S. at 36 n.2 (internal citation omitted) (emphasis added). The Supreme Court expressly noted the importance of a claim-by-claim analysis and the possibility that gravamina for different claims might lie in different places.

This Circuit, in *Globe Nuclear Servs. & Supply (GNSS), Ltd. v. AO Techsnabexport*, heeded the Supreme Court’s direction. In reversing the district court decision finding a lawsuits gravamen outside of the each claim’s elements, this Court explained that “[t]he district court’s capacious view of the conduct upon which

¹⁹ The expropriation claim cannot center on a non-executable judgment that did not give the defendants or anyone else rights to act. Damage and injury to Plaintiff was caused not by the French court’s direction to anyone but rather by what actors decided to do with that judgment (a judgment on appeal).

[the] lawsuit is “based” cannot be reconciled with the Supreme Court's decision in *Nelson*.” *Id.* at 286–87. This Court highlighted that under *Nelson* a court “must turn [its] attention . . . to the specific claim[s] . . . asserted . . . and the elements of claim[s] that, if proven, would entitle [a plaintiff] to relief.” *Id.* Just as the district court’s decision in *Globe* conflicted with *Nelson*, so too does the Panel’s.

b. Conflicting decisions in other Circuits

The Eleventh Circuit, in *Devengoechea v. Bolivarian Republic of Venezuela*, 889 F.3d 1213 (11th Cir. 2018), provided similar guidance. The Eleventh Circuit explained that “the [*Sachs*] Court found that the conduct making up the gravamen of *Sachs*’s suit happened in Austria because [a]ll . . . claims turn[ed] on the same tragic episode [occurring there].” *Devengoechea*, 889 F.3d at 1223. The Eleventh Circuit stressed that *Sachs* “expressly recognized that the gravamina of different claims may occur in different locations.” *Id.* The Eleventh Circuit specified that reviewing courts must “identify the conduct on which [plaintiff] bases his suit” and look to “the conduct that actually injured [him or her]” and “therefore that makes up the gravamen of [his] lawsuit.” The Eleventh Circuit then proceeded to examine the plaintiff’s two separate claims..

Most recently, the Second Circuit in *Pablo Star Ltd. v. Welsh Gov’t*, 961 F.3d 555, 562 (2d Cir. 2020)²⁰, applied the above guidance in the context of intellectual

²⁰ cert. denied, 141 S. Ct. 1069 (2021).

property infringement case against a sovereign. In *Pablo Star*, the Welsh government argued (as the Defendants have below) that the promotion of tourism is not commercial activity. In accord with *Sachs* and *Nelson*, the Second Circuit focused on the conduct of the defendant that actually injured the plaintiff. It specifically focused on the act of alleged infringement itself, and held that “[f]or purposes of the commercial-activity exception, the relevant “activity” on which the claims are based is the ... [allegedly infringing] use of the photographs in question [by the Welsh government.]” *Pablo Star Ltd.*, 961 F.3d at 560–61.

Hence, no matter the type of claim, reviewing courts have taken a consistent approach in understanding that it is the actual claims presented that are to be examined in a gravamen analysis. Though seemingly different on their faces, when examined the cases are similar. *Nelson*’s torture, *Sachs*’ fall, and *Garb*’s property confiscation couldn’t survive the analysis because none of the elements of the claims involved Plaintiffs’ alleged threshold commercial activity. *Devengoechea* was allowed to proceed because the commercial activity alleged was directly tied to the individual claims made. In *Pablo Star*, the suit could proceed because the commercial activity alleged was the infringement alleged. In all of the cases, with all of the claims, one thing remains constant: *Nelson* and *Sachs* require claim-by-claim analysis of the conduct of the Defendant that actually injured the plaintiff²¹

²¹ Unchallenged recent District of Columbia opinions reached similar results.

c. Application of the *Nelson/Sachs* claim by claim analysis to the current suit.

This Court has explained the elements of each of the claims made by France.com.²² As detailed below, only the claim of expropriation can be argued to have the manner of transfer of the domain or any other property as an element. The transfer of the domain name to France is only at issue in the claim of expropriation, where a party must show both that rights in property are at issue and that the property was taken. *See Zappia*, 215 F.3d at 251. Reverse domain name hijacking requires a Plaintiff to show that it was a registrant of a domain name that was transferred because of a registrar's policy – but such a claim is about infringement²³ *See Barcelona.com*, 330 F.3d at 626. Each of the remaining three claims deals only with statutory rights and remedies created by the Lanham Act in Plaintiff's registered

See Jam v. Int'l Fin. Corp., 481 F. Supp. 3d 1 (D.D.C. 2020); *Rodriguez v. Pan Am. Health Org.*, No. CV 20-928 (JEB), 2020 WL 6561448 (D.D.C. Nov. 9, 2020).

²² *See Lamparello v. Falwell*, 420 F.3d 309, 318 (4th Cir. 2005) (explaining elements of cybersquatting); *Barcelona.com, Inc. v. Excelentísimo Ayuntamiento De Barcelona*, 330 F.3d 617, 626 (4th Cir. 2003) (reverse domain name hijacking); Dkt. 41, citing *Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 251 (2d Cir. 2000) (expropriation); *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 152 (4th Cir. 2012) (TM infringement); *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc.*, 43 F.3d 922, 930 (4th Cir. 1995) citing 15 U.S.C. § 1114(1) (unfair competition).

²³ In reverse domain name hijacking, a Plaintiff's domain gets transferred because an owner of a trademark complains to a registrar that the domain infringes upon their trademark – the Plaintiff then files suit and shows that their use of the domain was actually not infringing).

trademark. Those claims do not revolve around, hinge upon, or even involve as a defense one's ownership of a domain. In response to a claim of trademark infringement or unfair competition, the issue is the protection of a Plaintiff's rights in a trademark and not whether or not a defendant has rights in an object they are using to infringe. Ownership or possession of a domain does not invalidate one's rights in a valid registered trademark, especially one such as FRANCE.COM that was registered decades prior to the Defendant's use of a domain (however obtained).

d. Expropriation

The Panel's analysis of the expropriation claim is perplexing. It states "[t]he complaint's factual allegations do not permit a reasonable inference that its claims satisfy the expropriation exception," but after reciting uncertainty about other elements it based its holding on Plaintiff's supposed "failure to identify any international law that [the] expropriation violated. Dkt. 41, at *5. Despite briefing and oral argument, the Panel apparently understood the alleged violation of international law to be allegations "the French court applied French law in a way that conflicts with or is hostile to the laws of the United States."

Though the decision and rationale is indeed hostile to United States law, the Amended Complaint is replete with allegations that the transfer of the domain occurred without compensation in violation of international law. As Plaintiff argued, "a state is responsible under international law for injury resulting from: (1)

a taking by the state of the property of a national of another state that ... is not accompanied by provision for just compensation” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712 (AM. LAW INST. 1987).

2. The Panel’s Opinion impact on United States intellectual property rights and questions of domestication of foreign judgments.

If the Panel opinion stands, federally registered intellectual property rights are at risk so long as there is a foreign government willing to use their own courts to stake a claim to those same rights. That is no overstatement. In determining that the gravamen of any infringement lawsuit is actually a factual predicate rather the infringement itself, and thus non-commercial, the Court has determined that, in the Fourth Circuit, the foreign actor is shielded by the FSIA as long as the factual predicate is non-commercial.

Further, the Court has invited foreign actors to simply avoid the domestication process and judicial review and enforce such orders privately – and yet claim the benefits of review and domestication should their private efforts be challenged.

The Court’s fundamental misapplication of the gravamen analysis and apparent grant of deference and comity to a foreign judicial decision never subjected to challenge or even the slightest of judicial reviews warrants *en banc* review.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, Appellee France.com respectfully requests that this Court grant this Petition for Rehearing En Banc, reverse the District Court's Order(s) dismissing the Complaint and Amended Complaint, and reinstate and remand the case for further proceedings on the merits.

April 8, 2021

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 20-1016 **Caption:** France.com, Inc. v. The French Republic, et al.

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(s) Ben Barlow

Party Name France.com, Inc.

Dated: April 8, 2021

CERTIFICATE OF SERVICE

In accordance with the Rules of the United States Court of Appeals for the Fourth Circuit, I hereby certify that I have this April 8, 2021 filed the required copies of the foregoing Petition for Rehearing En Banc of Appellee France.com, Inc. electronically using the Court's CM/ECF system which will send notification of such filing to the following counsel:

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Per the Court's May 11, 2020 advisory in the wake of the COVID-19 crisis, no hard copies of filings have been delivered to the Court.

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