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A "Fundamental" Problem: The Vulnerability of Intellectual Property Licenses in Chapter 15 and the Meaning of § 1506

Daniel A. Nolan IV

A "FUNDAMENTAL" PROBLEM: THE VULNERABILITY OF INTELLECTUAL PROPERTY LICENSES IN CHAPTER 15 AND THE MEANING OF § 1506

INTRODUCTION

Congress enacted chapter 15 of the Bankruptcy Code (Code)[1] in 2005 to provide clear procedures for American courts' cooperation in cross-border bankruptcy cases.[2] Chapter 15 provides a procedural framework for courts dealing with the bankruptcy of a multinational company, and it was intended to work within fundamental United States policies and existing case law.[3] Specifically, it provides for recognition of proceedings taking place in another country that have an impact on parties or property within the United States.[4] In cases where there is a conflict between foreign law and United States law,[5] the principle of international comity[6] typically guides the court, and the law of the debtor's country should control any ancillary proceedings in the United States.[7] Despite this presumption, courts should deny comity, and United States law should govern a chapter 15 proceeding, when granting comity would be manifestly contrary to public policy. Consider the following hypothetical:

Happy Technology, Inc. (Happy) is a United States corporation dedicated to the manufacture and sale of semiconductors throughout the world. Happy holds a nonexclusive license to a United States patent, held by Mytech, Inc. (Mytech), that permits Happy to manufacture a critical component covered by

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1 11 U.S.C. §§ 1501–1532 (2006).

2 *See id.* § 1501(a).

3 U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT, at pt. 2, para. 20, U.N. Sales No. E.99.V.3 (1997), *available at* http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf [hereinafter MODEL LAW ON CROSS-BORDER INSOLVENCY].

4 *See, e.g.*, 11 U.S.C. § 1501(a)(1), (3) (stating that the purpose of chapter 15 is to promote cooperation between courts of the United State and courts in foreign countries to foster the "fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor").

5 For the purposes of this Comment, the relevant U.S. law consists of title 11 of the United States Code. Unless otherwise noted, all statutory references are to title 11.

6 "Comity" is defined as "[a] practice among political entities (as nations, states, or courts of different jurisdictions), involving esp. mutual recognition of legislative, executive and judicial acts." BLACK'S LAW DICTIONARY 303 (9th ed. 2009).

7 *In re* Qimonda AG, No. 09-14766-RGM, 2009 WL 4060083, at *1 (Bankr. E.D. Va. Nov. 19, 2009), *aff'd in part, remanded in part*, 433 B.R. 547 (E.D. Va. 2010).

the patent. Mytech is a German technology company that holds thousands of patents, both in the United States and around the world. Unfortunately, Mytech's business has not been properly managed, and it has declared bankruptcy in the German insolvency court. Hermann Wissenschaft, Mytech's representative appointed by the German court, files a petition for recognition of the German insolvency proceeding as the foreign main proceeding under chapter 15, which the United States court grants. As part of its plan for reorganization, Mytech has chosen to reject the license with Happy pursuant to German insolvency law. Happy knew it would still be able to manufacture the component under American law but discovers, much to its dismay, that German law does not allow a licensee to continue using intellectual property once the license is rejected. The German court approves Mytech's rejection. With no other statutory option, the United States court applies principles of international comity and prohibits Happy from continuing to use the technology under the Mytech license. Without the right to manufacture the critical component, Happy is no longer able to manufacture semiconductors. As a result, Happy must also file for bankruptcy.[8]

As this hypothetical demonstrates, chapter 15 allows a foreign court to control the administration of a foreign debtor's bankruptcy in the United States and provides a procedure for the cooperation with that foreign court. While it may seem as though chapter 15 compels an American court to follow a foreign court's decisions, there is a narrow exception.[9] Chapter 15 grants courts a limited amount of policy-based discretion in § 1506 when considering whether to grant a petition for recognition under chapter 15. Section 1506 allows a

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[8] These facts are based on those in *Micron Technology, Inc. v. Qimonda AG (In re Qimonda AG Bankruptcy Litigation)*, 433 B.R. 547 (E.D. Va. 2010). The district court remanded the case for a consideration of whether applying German law to the patent licenses would be manifestly contrary to public policy. *Id.* at 571. On October 28, 2011, the bankruptcy court, after a rehearing on the issue of whether § 1506 precluded the application of German insolvency laws, held that § 365(n) should control the treatment of the patent licenses. *In re* Qimonda AG, No. 09-14766-SSM, 2011 BL 278371, at *33–34 (Bankr. E.D. Va. Oct. 28, 2011). However, the court focused on the question of whether applying German law would severely impinge on the value of a constitutional or statutory right. *Id.* at *29–30. The court found that the "failure to apply § 365(n) under the circumstances of this case and this industry would 'severely impinge' an important statutory protection accorded licensees of U.S. patents and thereby undermine a fundamental U.S. public policy promoting technological innovation." *Id.* at *34. Therefore, the court held "that deferring to German law, to the extent it allows cancellation of the U.S. patent licenses, would be manifestly contrary to U.S. public policy." *Id.* at *34. However, the court did not attempt to define what it means for a policy to be "fundamental," a necessary consideration for whether foreign law would be "manifestly contrary to public policy." H.R. REP. NO. 109-31(I), at 88 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 172. Therefore, while this court reached the correct result based on the facts, it does not change the need for a definition of "fundamental."

[9] *See* 11 U.S.C. § 1506.

court to deny a foreign representative's petition if granting recognition would be "manifestly contrary to . . . public policy."[10] Both chapter 15 and the United Nations Model Law on Cross-Border Insolvency (Model Law) on which chapter 15 is based warn that this provision should be interpreted narrowly, restricting the exception to only apply in circumstances where a "fundamental policy" of the United States is threatened.[11] This Comment will explain that advancing intellectual property growth is a fundamental policy of the United States, and licensing is a critical component of encouraging such innovation. Therefore, United States law should govern intellectual property[12] licenses in cross-border insolvencies where foreign law fails to protect the rights of the licensee. Such foreign law should not be recognized pursuant to § 1506 because doing so would introduce uncertainty into the licensing market and impede the development of science and technology in contravention of a fundamental policy of the United States.

The fundamental policies of the United States guide the creation of domestic laws, including the Code. Specifically, American bankruptcy law protects the fundamental policy of encouraging the growth of intellectual property by protecting intellectual property licenses from the trustee's power to reject executory contracts.[13] Encouraging the growth of science and technology is a fundamental policy based in part on language in Article I, Section 8, Clause 8 of the Constitution, which directs Congress to protect such growth by "securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[14] Congress created patent and copyright protections to encourage investment in developing science and technology; these protections provide an economic incentive for inventors to invest time and money into developing technological and artistic creations.[15] The patent and copyright systems provide a means for these creators to derive

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10 *Id.*

11 *See* H.R. REP. NO. 109-31(I), at 88; *see also* MODEL LAW ON CROSS-BORDER INSOLVENCY, *supra* note 3, at pt. 2, para. 89.

12 The Code defines "intellectual property" to include trade secrets, patents, patent applications, plant varieties, and copyrights, but not trademarks. 11 U.S.C. § 101(35A). As used in this Comment, the term "intellectual property" refers to those categories of intellectual property included in § 101(35A).

13 As discussed further *infra* in Part I.A, an executory contract is a contract where the obligation of both parties are incomplete such that the failure by one party to complete performance would excuse performance by the other. *See* Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 460 (1973).

14 U.S. CONST. art. I, § 8, cl. 8.

15 Peter S. Menell, *Bankruptcy Treatment of Intellectual Property Assets: An Economic Analysis*, 22 BERKELEY TECH. L.J. 733, 741 (2007).

profits from their beneficial activities by granting limited monopoly rights to inventors. The ability to license intellectual property is an essential component of patent and copyright holders' ability to make money from their creations because it allows third parties to use the inventors' works while providing inventors with compensation for use of their ideas.[16] The opportunity for these profits through licensing provides inventors with greater financial incentives to pursue innovation.[17]

Additionally, licensing puts those creative works in the hands of parties who are often able to further develop and improve the inventions in ways the inventors may not have anticipated.[18] Therefore, licensing is vital to advancing science and the arts because it provides critical opportunities for inventors to make money from their works and promotes an ideal environment for the refinement of intellectual property.[19] To secure and promote a robust licensing market, Congress chose to protect the basic elements of an intellectual property license, even in the licensor's bankruptcy.[20] However, with the increased prominence of international commerce, chapter 15 of the Code introduces potentially devastating uncertainty and instability into U.S. licensing markets when a foreign corporate licensor goes bankrupt.

This Comment argues that, despite the strong mandate for comity and cooperation provided by both the Model Law and chapter 15, United States courts should deny recognition of a foreign proceeding when foreign law allows the debtor to unilaterally cancel all license rights. Part I provides a background for both § 365(n) and for chapter 15. Part I.A demonstrates how bankruptcy policy has developed to protect intellectual property licenses. The Code is a powerful tool with the authority to supersede other laws.[21] The Code, however, operates within the fundamental policies of the United States, and Congress has shaped bankruptcy law to correspond with these policies.[22] In the context of this Comment, United States bankruptcy law protects the rights of

[16] *Id.*

[17] *See id.* at 737.

[18] *Id.* at 741.

[19] *See id.* at 737, 741.

[20] 11 U.S.C. § 365(n)(1)–(2) (2006) (providing that even if the trustee rejects the license, the licensee can still use the licensed property but must continue to make royalty payments).

[21] *See, e.g.*, *id.* § 547 (giving the trustee the power to avoid valid and legal transfers).

[22] Despite bankruptcy's broad power, certain laws remain untouched. *See, e.g.*, *id.* § 365(n) (protecting intellectual property licenses from the trustee's power to reject executory contracts); *see also id.* § 523(a) (exempting, among others, domestic support obligations, educational loans, and intentional tort awards from discharge).

intellectual property licensees when the licensor goes into bankruptcy. This demonstrates that, although much of bankruptcy law is aimed at undoing other laws, contracts, and transfers, United States policy is that intellectual property licenses are crucial enough to warrant protection, even in bankruptcy. Part I.B provides an introduction to cross-border bankruptcy laws, specifically the Model Law and how it has been incorporated into United States law as chapter 15. Part II then analyzes how courts have interpreted both the principle of international comity under § 304, the predecessor to chapter 15, and the more specific public policy exception in § 1506. Next, Part III analyzes what types of policies are sufficiently important that courts should invoke § 1506 when a foreign proceeding threatens them. Within the analysis of Part III, this Comment will demonstrate what it means for a policy to be "fundamental."

The final section of this Comment, Part IV, suggests several solutions to extend the protection of intellectual property licenses into international bankruptcy cases. First, courts should recognize that securing intellectual property licenses is a fundamental policy of the United States and should invoke § 1506 when a foreign proceeding threatens them. Secondly, Congress should amend § 1520, which governs the effects of recognizing a foreign proceeding as a main proceeding. By amending § 1520(a) to include § 365(n), licenses will automatically be protected if United States courts grant recognition to the foreign proceeding. Finally, as a private matter, licensees should include a choice of law clause in their license contracts. Even if neither the courts nor the legislature moves to protect this fundamental policy, licensees can still ensure their continued use of the intellectual property if their licensor files for bankruptcy by contractually agreeing that U.S. law will govern the license in bankruptcy.

While the United States has been able to protect the growth of intellectual property within its own borders, especially in the context of the Code, the increasingly global economy has left these protections ineffective in international insolvency cases. Current law leaves intellectual property licenses vulnerable to foreign laws that allow debtors to unilaterally and completely cancel the license, contrary to United States law. This severely threatens the continuing growth of intellectual property in the United States. This Comment suggests that § 1506 allows courts to deny comity where needed to protect intellectual property licenses. Doing so will ensure the security of such licenses in a chapter 15 case, thereby promoting a robust licensing market and ultimately encouraging continued investment in the development of intellectual property in the United States.

I. BACKGROUND TO § 365(N) AND CHAPTER 15

Before it is possible to analyze why § 1506 can and should be used to protect intellectual property licenses in a chapter 15 case, it is necessary to understand why both § 365(n) and chapter 15 were enacted. Part A demonstrates that § 365(n) is Congress's response to the vulnerability of intellectual property licenses under § 365. Section 365(n) reflects that the Code functions within the broader context of the fundamental policies of the United States; one result is the protection of the rights under an intellectual property license, regardless of the licensor's financial condition. Part B then shows that Congress enacted chapter 15 to provide a clear framework for cooperation with foreign insolvency proceedings. Because it operates as a part of U.S. bankruptcy policy, chapter 15 contains a limited grant of discretion, § 1506, that courts may invoke when a foreign bankruptcy law or proceeding functions in a way that is manifestly contrary to public policy. Section 1506 therefore acts as a release valve that facilitates cooperation with the foreign proceeding in a way that respects the fundamental policies of the United States.[23]

A. Lubrizol Enterprises, Inc. *and Congress' Response in § 365(n)*

Section 365(n) demonstrates the importance of maintaining the security of intellectual property licenses. Even though bankruptcy law has the ability to unwind other laws, Congress has explicitly provided that bankruptcy law cannot entirely unwind an intellectual property license. In choosing to protect such licenses regardless of the licensor's bankruptcy, Congress demonstrated that sustaining the stability of intellectual property licenses is more important than allowing the debtor to entirely reject a license. This section will explore the background of § 365(n) and the policies it reflects.

Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc. (In re Richmond Metal Finishers, Inc.)[24] threatened the stability of intellectual property licensing and the continued development of intellectual property in the United States.[25] In July 1982, Richmond Metal Finishers, Inc. (RMF) entered into a nonexclusive license with Lubrizol Enterprises, Inc. (Lubrizol) to allow Lubrizol to use metal processing technology owned by RMF.[26] RMF's

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[23] *See id.* § 1506.

[24] Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc. (*In re* Richmond Metal Finishers, Inc.), 756 F.2d 1043 (4th Cir. 1985), *superseded by statute*, 11 U.S.C. § 365(n).

[25] *See* S. REP. NO. 100-505, at 2–3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3200, 3201–03.

[26] *In re Richmond Metal Finishers, Inc.*, 756 F.2d at 1045. The license required RMF to notify Lubrizol of any patent infringement lawsuits against RMF or of any other licensing of the technology, to reduce the

business declined, and it filed for bankruptcy in August 1983.[27] As part of its reorganization plan, RMF rejected the license with Lubrizol under § 365(a), thus allowing RMF to sell or further license the technology, unburdened by the Lubrizol license.[28]

As an initial matter, the bankruptcy court concluded that the license was executory because nonperformance by either party would constitute a material breach.[29] The contract was executory with respect to RMF because, among other reasons, RMF continued to owe a duty to inform Lubrizol of any licensing and other uses of the technology and to reduce Lubrizol's royalties if another license is issued at a lower price.[30] Further, the contract was executory with respect to Lubrizol because Lubrizol owed RMF the continuing duty to account for and pay royalties, including delivering quarterly sales reports and having a certified public accountant inspect Lubrizol's financial documents.[31] The court then turned to the question of whether the rejection would be beneficial to RMF and held that RMF's decision to reject the license was not unreasonable under the business judgment rule.[32] The bankruptcy court thus approved the rejection of the Lubrizol license.[33]

On appeal, the District Court for the Eastern District of Virginia reversed the bankruptcy court, holding that the rejection was not a sound business decision.[34] The Fourth Circuit Court of Appeals reversed the district court, holding the district court failed to apply the business judgment rule and instead

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royalty payments if RMF contracts at a lower rate with another party, and to indemnify Lubrizol against any breach of warranty or misrepresentation by RMF. In return, Lubrizol paid royalties to RMF. *Id.*

27 *Id.*

28 *Id.* Section 365(a) allows a debtor to reject or assume contracts when: (1) the contract is executory and (2) the court approves the rejection or assumption as beneficial to the debtor. *See* 11 U.S.C. § 365(a); *see also In re Richmond Metal Finishers, Inc.*, 756 F.2d at 1045.

29 *In re Richmond Metal Finishers, Inc.*, 756 F.2d at 1045–46. The court used Professor Vern Countryman's widely accepted analysis defining executory contracts as those in which the "obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." Countryman, *supra* note 13, at 460, *quoted in In re Richmond Metal Finishers, Inc.*, 756 F.2d at 1045.

30 *In re Richmond Metal Finishers, Inc.*, 756 F.2d at 1045.

31 *Id.* at 1046. The mere obligation to pay another party does not make a contract executory. Because Lubrizol was required to account for the royalties by providing sales reports and keeping records subject to inspection, Lubrizol's continuing obligations made the contract executory. *Id.*

32 *Id.* at 1046–47. The business judgment rule prevents courts from attempting to retroactively determine the appropriateness of a business decision. The rule is that courts should defer to decisions of a business except upon a finding of bad faith or a gross abuse of "business discretion." *Id.*

33 *Id.* at 1047.

34 *Id.*

substituted its own business judgment.[35] Lubrizol argued that the district court's refusal both to follow the business judgment rule and to treat the contract as executory was the correct result on policy grounds.[36] The court of appeals recognized Lubrizol's concerns but nonetheless reversed the district court's ruling, stating: "It cannot be gainsaid that allowing rejection of such contracts as executory imposes serious burdens upon contracting parties . . . . Nor can it be doubted that allowing rejection in this and comparable cases could have a general chilling effect upon the willingness of such parties to contract at all . . . ."[37] Since Congress had clearly provided a mechanism for rejecting such contracts under § 365(a)[38] and had not provided a special provision for technology licenses, the Fourth Circuit concluded that Lubrizol's policy arguments were insufficient to prevail where RMF's actions were clearly authorized by the Code.[39]

Lubrizol demonstrated the judicial trend of allowing debtors to use § 365 to terminate a licensee's right to use the licensed property.[40] Congress took the result in *Lubrizol* very seriously and passed the Intellectual Property Bankruptcy Protection Act (IPBPA) in 1988.[41] IPBPA amended § 365 to include § 365(n), which specifically ensures that licensees' right to use the licensed property "cannot be unilaterally cut off as a result of the rejection of the license pursuant to [§] 365."[42] The Senate Report accompanying the IPBPA demonstrates that Congress understood this potential rejection of licenses to threaten the fundamental policy of advancing the growth of science and technology.[43] Congress enacted the IPBPA to defeat the "threat to the development of American Technology" created by cases such as *Lubrizol*.[44]

Congress recognized that instability in the licensing market would have a substantial negative impact on the advancement of technology and drafted § 365(n) to afford licensees both certainty and protection.[45] The overall effect of § 365(n) is that a trustee may still reject an executory license if doing so

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35 *Id.* at 1047–48.

36 *Id.* at 1048.

37 *Id.*

38 *Id.*

39 *Id.*

40 S. REP. NO. 100-505, at 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3200, 3201.

41 Intellectual Property Bankruptcy Protection Act, Pub. L. No. 100-506, 102 Stat. 2538 (1988) (codified as amended at 11 U.S.C. §§ 101, 365(n) (2006)).

42 S. REP. NO. 100-505, at 1.

43 *Id.* at 2–3.

44 *Id.* at 1.

45 *Id.* at 3.

would be beneficial to the estate, but § 365(n) allows "IP licensees to retain their rights under [the] rejected license agreements."[46] The Senate Report explicitly indicates that Congress recognized the gravity of the potential impact of *Lubrizol*-type cases: "It is not an overstatement to say that the change is a *fundamental threat to the creative process* that has nurtured innovation in the United States."[47] Without some statutory protection, the impact of these cases would continue to hinder the development of technology and the financial incentives for creators and inventors to continue to create and invent.[48] Congress thus enacted § 365(n) to protect the stability and flexibility of the American licensing market and to preserve the economic viability of licensing intellectual property.[49]

A trustee's rejection of an executory contract where the debtor is a licensor of intellectual property triggers the application of § 365(n).[50] Section 365(n)(1) allows the licensee to either treat the rejection as a breach, which would have been available without the IPBPA, or to retain its rights under the license.[51] If the licensee chooses to retain its rights, § 365(n)(2) requires the trustee to permit the licensee to use the intellectual property as provided in the license.[52] Section 365(n)(2) also requires the licensee to continue making all royalty payments as required by the license.[53] However, § 365(n) does not allow the licensee to seek specific performance or any other affirmative performance from the debtor or the trustee.[54] Essentially, § 365(n) allows the licensee to assert its right to use the intellectual property and make payments, while releasing the debtor or trustee from all active obligations.[55] Section 365(n) only applies once the trustee rejects the contract, but § 365(n)(4) allows the licensee to force the trustee's hand by requesting the trustee not interfere with the licensee's contract rights and to either perform the contract or provide the intellectual property to the licensee.[56] In sum, Congress drafted § 365(n) to

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46 Menell, *supra* note 15, at 772.

47 S. REP. NO. 100-505, at 2 (emphasis added).

48 *Id.* at 3. The impact of *Lubrizol*-type cases on the licensing market is further discussed *infra* in Part III.

49 S. REP. NO. 100-505, at 3.

50 11 U.S.C. § 365(n) (2006).

51 *Id.* § 365(n)(1); *see also* S. REP. NO. 100-505, at 5–6.

52 11 U.S.C. § 365(n)(2); *see also* S. REP. NO. 100-505, at 6.

53 11 U.S.C. § 365(n)(2); *see also* S. REP. NO. 100-505, at 7–8.

54 S. REP. NO. 100-505, at 6, 8. Section 365(n)(3) only requires the trustee to provide any intellectual property, as specified by the license, and not interfere with the rights of the licensee under the contract. 11 U.S.C. § 365(n)(3).

55 S. REP. NO. 100-505, at 6.

56 11 U.S.C. § 365(n)(4).

"satisfy the needs of intellectual property licensees to continue their exploitation of intellectual property while shielding debtor-licensors from any additional burdens associated with the license."[57] In doing so, Congress chose to pursue the goal of promoting the growth of science and technology by protecting an intellectual property license's essential elements, even in a bankruptcy proceeding.

B. The UNCITRAL Model Law on Cross-Border Insolvency and Chapter 15

In 1997, the United Nations Commission on International Trade Law (UNCITRAL) adopted the Model Law to provide examples of efficient methods for dealing with cross-border insolvency cases.[58] Prior to the Model Law, most national insolvency laws were unable to appropriately handle the increased number of international bankruptcies.[59] Further, the Model Law's Guide to Enactment (Guide) notes that this lack of "predictability in the handling of cross-border insolvency cases impedes capital flow and is a disincentive to cross-border investment."[60] The purpose of the Model Law was to "assist States to equip their insolvency laws with a modern, harmonized[,] and fair framework to address more effectively instances of cross-border insolvency."[61] More specifically, the Model Law was adopted to foster legal certainty within international trade, maximize the value of a debtor's assets, and to protect the interests of creditors and all other interested parties.[62]

The Model Law is intended to fit into an enacting State's existing insolvency law and provide a procedural guide for handling cross-border insolvency cases.[63] As with most model laws, the Guide allows states to make changes to the Model Law to better incorporate it into their existing laws.[64] While this flexibility in enactment is helpful when a State chooses to adopt the Model Law, the Guide recommends that modifications be kept to a minimum.[65] By creating a fairly uniform system, the Model Law seeks to

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57 Menell, *supra* note 15, at 772.

58 G.A. Res. 52/158, U.N. Doc. A/RES/52/158 (Jan. 30, 1998); *see also* MODEL LAW ON CROSS-BORDER INSOLVENCY, *supra* note 3, at pt. 1, pmbl.

59 MODEL LAW ON CROSS-BORDER INSOLVENCY, *supra* note 3, at pt. 2, para. 13.

60 *Id.*

61 *Id.* at pt. 2, para. 1.

62 *Id.* at pt. 1, pmbl.

63 *Id.* at pt. 2, para. 20.

64 *Id.* at pt. 2, para. 12.

65 *Id.* The Model Law loses its primary purpose—to provide a relatively uniform system of cross-border insolvency proceedings—if an enacting State makes too many changes to the model law. *Id.*

foster procedural clarity and cooperation between judges and courts from different countries.[66] This cooperation has its limits, though, and the Model Law includes Article 6, a public policy exception that grants a court some discretion in providing relief or recognizing a foreign proceeding.[67] Because the Model Law was intended to create consistency and predictability in international bankruptcies, legislatures and courts must interpret this exception narrowly to avoid drastically varying applications from country to country.[68]

Article 6 reads: "Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State."[69] The Guide explains that this article should be limited to only those policies that reflect "fundamental principles of law," and courts should only use this exception when the application of foreign law would contravene those principles.[70] The Guide also distinguishes between public policy in the domestic context and its application to international affairs.[71] To promote international cooperation, which is the central purpose of the Model Law, public policy should be construed more strictly in the context of international matters and in recognition of foreign law.[72] Accordingly, UNCITRAL used the word "manifestly" when drafting the Model Law to emphasize that the public policy exception should be construed narrowly and should only be invoked in cases involving "matters of fundamental importance for the enacting State."[73]

As of February 2011, nineteen countries had adopted the Model Law and incorporated it into their respective national insolvency codes, with the United States joining in 2005.[74] As part of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), the United States adopted chapter 15 of

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66 *Id.* at pt. 1, pmbl., pt. 2, para. 38.
67 *Id.* at pt. 1, ch. 1, art. 6.
68 *See, e.g.*, *id.* at pt. 2, paras. 1, 13.
69 *Id.* at pt. 1, ch. 1, art. 6.
70 *See id.* at pt. 2, paras. 87–88.
71 *Id.* at pt. 2, para. 88.
72 *Id.* at pt. 2, para. 88.
73 *Id.* at pt. 2, para. 89.
74 *Status: 1997—UNCITRAL Model Law on Cross-Border Insolvency*, U.N. COMM'N ON INT'L TRADE L., http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited Oct. 1, 2011). Prior to the adoption of the Model Law in the United States, § 304 governed how courts cooperated with foreign proceedings. 11 U.S.C. § 304 (2000), *repealed by* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 802(d)(3), 119 Stat. 23, 146 (2005). Specifically, § 304(c) provided six factors to weigh when deciding whether the United States courts should grant recognition to a foreign proceeding. *Id.* § 304(c). The most important factor for this Comment is comity. *See id.* § 304(c)(5).

the Code, which tracked the language of the Model Law with minimal changes.[75] Chapter 15 provides, among other things, guidance in dealing with foreign representatives or courts that seek assistance in the United States regarding a foreign proceeding; chapter 15 further provides a framework for courts to analyze whether they should recognize a foreign representative and a foreign proceeding.[76]

The purpose of chapter 15 is to "provide effective mechanisms for dealing with cases of cross-border insolvency,"[77] which it does by establishing clear procedures for starting a case ancillary to a "foreign proceeding."[78] Chapter 15 is appropriate where a "foreign representative"[79] seeks cooperation from the United States court in connection with a foreign proceeding or where cases in the United States and a foreign country concerning the same debtor are pending at the same time.[80] A foreign representative begins a chapter 15 ancillary case by filing a petition for recognition under § 1515.[81] The United States court can recognize the foreign proceeding as either a "foreign main proceeding"[82] or as a "foreign nonmain proceeding."[83] Chapter 15 grants the United States courts fairly wide discretion in cooperating with the foreign court to craft appropriate relief.[84] There is a strong emphasis on cooperation with the foreign court throughout chapter 15, most notably in § 1525, which explicitly directs the United States court to communicate directly with the foreign court.[85] However, neither chapter 15 nor the Model Law requires absolute

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[75] *See* 11 U.S.C. § 1501; *see also* 8 COLLIER ON BANKRUPTCY ¶ 1501.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2011).

[76] 11 U.S.C. §§ 1501(b)(1), 1515.

[77] *Id.* § 1501(a).

[78] A "foreign proceeding" is a "collective judicial or administrative proceeding in a foreign country . . . under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation." *Id.* § 101(23).

[79] A "foreign representative" is "a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding." *Id.* § 101(24).

[80] *Id.* § 1501(b).

[81] *Id.* § 1504.

[82] A "foreign main proceeding" is "a foreign proceeding pending in the country where the debtor has the center of its main interest." *Id.* § 1502(4).

[83] A "foreign nonmain proceeding" is "a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment." *Id.* § 1502(5).

[84] *See, e.g.*, *id.* §§ 1520–1522. For example, § 1521 allows the court to grant "any appropriate relief" to further "effectuate the purpose[s] of this chapter and to protect the assets of the debtor or the interests of the creditors." *Id.* § 1521(a).

[85] *Id.* § 1525; *see also id.* §§ 1526–1527.

cooperation, and both contain a limited grant of discretion to the court in determining whether to recognize a foreign proceeding.[86]

Chapter 15 includes § 1506, a public policy exception that copies the Model Law's Article 6 language almost word for word.[87] The House Report accompanying chapter 15 explicitly states that courts should use the Guide to interpret the provisions of chapter 15.[88] With respect to § 1506, the House Report notes that this provision has been interpreted narrowly around the world and that the word "manifestly" restricts this exception to the "most fundamental policies of the United States."[89] Again, it is important to note that one of the central purposes of the Model Law and chapter 15 is to foster greater legal certainty and cooperation in the context of cross-border insolvency cases.[90] The reason that the Model Law, and thereby § 1506, restrict this exception to fundamental public policy is that "international cooperation would be unduly hampered if public policy would be understood in an extensive manner."[91]

Section 1506 is unique because no other chapter in the Code requires a provision to protect the policies of the United States. The Code and bankruptcy policy generally are necessarily shaped by the fundamental policies of the United States. However, chapter 15 requires United States courts to cooperate with foreign courts, controlled by foreign laws[92] which may not respect the fundamental policies of the United States.[93] The goal of chapter 15, and the Code more broadly, is the efficient and cooperative administration of the bankruptcy case;[94] § 1506 favors this goal by allowing the United States court to cooperate with the foreign proceeding in a way that guarantees that the fundamental policies of the United States are respected.

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[86] *Id.* § 1506; MODEL LAW ON CROSS-BORDER INSOLVENCY, *supra* note 3, at pt. 1, ch. 1, art. 6.

[87] 11 U.S.C. § 1506 ("Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States.").

[88] H.R. REP. NO. 109-31(I), at 88 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 172–73.

[89] *Id.*

[90] MODEL LAW ON CROSS-BORDER INSOLVENCY, *supra* note 3, at pt. 1, pmbl.

[91] *Id.* at pt. 2, para. 88.

[92] *See* 8 COLLIER, *supra* note 75, ¶ 1501.01 ("Chapter 15 cases are generally intended to be supplementary to cases brought in the debtor's home country.").

[93] *See, e.g.*, *In re* Toft, 453 B.R. 186, 198 (Bankr. S.D.N.Y. 2011) (noting that the German law allowing surveillance of debtor's emails without the debtor's consent or without a court order would violate American criminal law and the debtor's constitutional and statutory privacy rights).

[94] *See* 11 U.S.C. § 1501(a) (2006).

II. INTERPRETATIONS OF THE PRINCIPLE OF COMITY AND THE § 1506 PUBLIC POLICY EXCEPTION

This Comment will now explore both § 304, the precursor to chapter 15, and the § 1506 exception. First, this section will analyze the cases that considered § 304(c), which codified the principle of comity, and discuss the circumstances under which comity should be denied. This section will then show that United States courts have interpreted § 1506 narrowly. These cases taken together demonstrate that, consistent with the purposes of the Model Law and chapter 15, United States courts should only refuse to cooperate with a foreign proceeding to protect a fundamental policy of the United States.

A. *Section 304(c) and the Principle of Comity*

Congress adopted § 304 as part of the Bankruptcy Reform Act of 1978.[95] Section 304(c) enumerated certain factors for courts to use when determining whether to grant relief to a foreign representative.[96] In pursuing "an economical and expeditious administration" of an international bankruptcy case, the court would consider the just treatment of all claim holders, the protection of United States creditors, and the principle of comity, to name a few factors.[97] Section 304(c)(5) codified the common law doctrine of comity, whose best known definition comes from the 1895 Supreme Court case, *Hilton v. Guyot*.[98]

According to *Hilton*, comity "is the recognition which one nation allows within its territory to the . . . acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens."[99] The *Hilton* Court held that comity dictates that United States courts should usually grant recognition where the foreign proceeding afforded "a full and fair trial abroad before a court of competent jurisdiction."[100] However, the Court also held that comity should not operate such that any "nation will suffer the laws

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[95] 11 U.S.C. § 304 (2000), *repealed by* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 802(d)(3), 119 Stat. 23, 146 (2005); *see also* Cunard S.S. Co. v. Salen Reefer Servs. AB, 773 F.2d 452, 454 (2d Cir. 1985).

[96] 11 U.S.C. § 304(c).

[97] *Id.* The other factors are the prevention of preferential or fraudulent transfers, the fair distribution of proceeds of the estate to each creditor, and the provision of a fresh start, where appropriate. *Id.*

[98] Hilton v. Guyot, 159 U.S. 113 (1895).

[99] *Id.* at 164.

[100] *Id.* at 202.

of another to interfere with her own to the injury of her citizens."[101] As courts have continued to analyze the principle of comity, this tension between respecting fair foreign proceedings and the protection of United States citizens from foreign laws has continued to shape their analyses.

More recently, the Second Circuit Court of Appeals decided a pair of cases involving related bankrupt Swedish corporations; both opinions discussed this principle of comity. The first case was *Cunard Steamship Co. v. Salen Reefer Services AB*, where the court found that protecting the forum state's public policy interests and the rights of its residents should guide the comity analysis.[102] Salen filed for bankruptcy in Stockholm, and the Swedish court appointed an interim administrator.[103] Despite this pending action, Cunard commenced an action in the District Court for the Southern District of New York and obtained an order of attachment against Salen's assets in the United States.[104] Salen moved to vacate the attachment, arguing the United States should grant comity to the Swedish court's stay on all creditor actions, including Cunard.[105]

As a threshold to the comity analysis, the court found that the Swedish court had valid jurisdiction over Cunard.[106] The guiding principle in a comity analysis under § 304(c) is the just treatment of all creditors and security holders, and comity should be granted if the public policy of the forum state and the rights of its residents would not be violated.[107] Citing a Third Circuit opinion, the court determined "[c]omity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect."[108] The court held that granting comity to the Swedish proceeding would not violate United States public policy; furthermore, granting recognition would also give effect to the purpose of the automatic stay when the debtor files.[109] In so holding, the court affirmed the decision to vacate Cunard's attachment.[110]

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101 *Id.* at 164.
102 Cunard S.S. Co. v. Salen Reefer Servs. AB, 773 F.2d 452, 457 (2d Cir. 1985).
103 *Id.* at 454.
104 *Id.*
105 *Id.*
106 *Id.* at 457–59.
107 *Id.* at 457.
108 *Id.*
109 *Id.* at 457–60.
110 *Id.* at 461.

Two years later, the Second Circuit decided *Victrix Steamship Co., S.A. v. Salen Dry Cargo A.B.*, a case with facts very similar to those in *Cunard*.[111] After Salen declared bankruptcy in the Swedish court, Victrix pursued arbitration in London to recover damages for Salen's breach of their contract, while also pursuing an admiralty claim in the District Court for the Southern District of New York.[112] After the London arbitrator held in favor of Victrix, Victrix moved the district court to attach Salen's property in the United States and to recognize the London arbitration award.[113] In response, Salen moved to vacate the attachment, which the district court granted.[114] Salen argued the United States court should grant comity to the Swedish bankruptcy action, while Victrix argued the United States court should grant comity to both the London arbitration award and the British court judgment.[115] Again, the court found that comity should be extended where recognition of the foreign proceeding "does not prejudice the rights of United States citizens or violate domestic public policy."[116] In weighing the two arguments, the court held that pursuing an economical and expeditious administration of the bankruptcy case, as dictated by § 304, compelled the court to grant comity to the Swedish proceeding and deny comity to the London arbitration.[117] In so holding, the court was protecting the United States' "public policy of ensuring equitable and orderly distribution of local assets of a foreign bankrupt."[118]

Further, in *In re Hourani*, the Bankruptcy Court for the Southern District of New York held that a United States court should only grant comity to a foreign proceeding when that proceeding is in accord with United States' general principles of justice.[119] The case began when the Central Bank of Jordan declared Petra Bank of Amman (Petra), a Jordanian bank, insolvent and forced Petra into liquidation proceedings.[120] Seven months before Petra went into liquidation proceedings, A.I. Trade (A.I.), an international financing firm,

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111 Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709 (2d Cir. 1987).

112 *Id.* at 711. At the same time Victrix was pursuing the arbitration in London, Victrix also brought cases in both the District Court for the Southern District of New York as an admiralty action and in New York Supreme Court for breach of contract. Salen then removed the state case to federal court, and both cases were then combined. *Id.*

113 *Id.* at 710–12.

114 *Id.* at 712.

115 *Id.* at 714 ("Victrix contends that comity itself provides justification for enforcing the London award and the British judgment.").

116 *Id.* at 713.

117 *Id.* at 714.

118 *Id.*

119 *See In re* Hourani, 180 B.R. 58, 69–70 (Bankr. S.D.N.Y. 1995).

120 *Id.* at 61.

commenced an action in the district court when Petra refused to pay certain promissory notes A.I. held.[121] The liquidation committee moved the bankruptcy court to grant summary judgment in its favor and to defer to the Jordanian insolvency proceeding.[122] In deciding whether to defer to the Jordanian proceeding, the court first noted that deference should be granted only if the Jordanian proceeding would be fair and impartial.[123] The court then held that comity should only be granted where the foreign proceedings are in accord with American notions of justice.[124] In other words, "[t]he key is that the insolvency laws in the foreign proceeding must not be repugnant to this nation's general principles of justice, regardless of the form in which those principles are manifested."[125] Because the Jordanian proceeding failed to protect due process or to "ensure fair and equal treatment of all creditors," the United States court did not defer to that proceeding and denied the liquidation committee's motion for summary judgment.[126]

The next year, in *Maxwell Communication Corp. v. Societe Generale (In re Maxwell Communication Corp.)*, the Second Circuit found that the comity analysis is only triggered when there is a genuine conflict between foreign and domestic law.[127] Maxwell Communication Corporation (Maxwell) was a public holding company headquartered in England; however, 80% of its assets were located in the United States.[128] When Maxwell went into bankruptcy, it filed both a chapter 11 petition in the United States and a petition for an administration order in Great Britain.[129] Within ninety days of filing for chapter 11 relief, Maxwell made several transfers to three banks and sought to recover those transfers in the United States case.[130] The issue before the court

[121] *Id.* at 60–61. A.I. was able to successfully obtain an attachment of approximately $4 million of Petra's funds that were being held in the United States. *Id.* at 61.

[122] *Id.* at 60. Petra also moved the court to vacate the attachment. *Id.*

[123] *Id.* at 64.

[124] *Id.*

[125] *Id.* at 65.

[126] *Id.* at 70. For example, the Jordanian proceeding did not provide open access to information regarding Petra, did not require reasonably adequate notice, and had no method for preventing or undoing fraudulent transfers of preferences. *Id.* at 67–68.

[127] Maxwell Commc'n Corp. v. Societe Generale (*In re* Maxwell Commc'n Corp.), 93 F.3d 1036, 1049 (2d Cir. 1996).

[128] *Id.* at 1040.

[129] *Id.* at 1041. An administration is the closest British law to chapter 11 in the United States. The British petition was filed the day after the U.S. petition. *Id.*

[130] *Id.* at 1040. About seven months after Maxwell's filing, one of the banks obtained an order from the British court barring Maxwell from commencing a suit to recover the amount. The British court later vacated the order, and deferred to the U.S. court as to whether U.S. or British avoidance law would apply to Maxwell's suit. *Id.* at 1042–43.

was whether American or British avoidance law should apply; this was an important distinction because transfers are only voidable under British law when the debtor intended to put the transferee in a better position.[131] The court began its analysis by noting the doctrine of comity is only relevant when there is a "true conflict between American law and that of a foreign jurisdiction."[132] Such a true conflict exists, as in this case, where it is impossible to comply with the laws of both jurisdictions.[133] The court went on to hold that because Maxwell was a British corporation with mostly British creditors, the British court had a greater interest in the litigation and, therefore, British law should control.[134]

Recently, the Fourth Circuit decided *French v. Liebmann (In re French)* and held that ease of administration of a bankruptcy case is an important consideration for a comity analysis.[135] The case involved a fraudulent transfer of property in the Bahamas where the debtor deeded her Bahamian property to her children in 1981.[136] To avoid Bahamian transfer taxes, however, the recipients did not record the deed until the year 2000 when the debtor was on the verge of bankruptcy.[137] After the debtor filed for bankruptcy, the trustee commenced an adversary proceeding to recover the transfer.[138] The transferees argued that "considerations of international comity counseled the application of Bahamian (rather than United States) bankruptcy law."[139] The court recognized that granting comity involves recognizing that the application of foreign law is more appropriate than the application of U.S. law.[140] The court also found that the Supreme Court looks to the factors stated in the Restatement (Third) of Foreign Relations to decide whether comity controls.[141]

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131 *Id.* at 1043.

132 *Id.* at 1049.

133 *Id.* at 1050 ("[W]hat was required to establish a true conflict was an allegation that compliance with the regulatory laws of both countries would be impossible." (citing Hartford Fire Ins. Co. v. California, 509 U.S. 764, 799 (1993))); *see also* Argo Fund Ltd. v. Bd. of Dirs. of Telecom Arg., S.A. (*In re* Bd. of Dirs. of Telecom Arg., S.A.), 528 F.3d 162, 173 (2d Cir. 2008) ("Comity, however, does not require that foreign proceedings afford a creditor identical protections as under U.S. bankruptcy law.").

134 *In re Maxwell Commc'n Corp.*, 93 F.3d at 1051–52.

135 *See* French v. Liebmann (*In re* French), 440 F.3d 145, 154 (4th Cir. 2006); *see also id.* at 155 (Wilkinson, J., concurring) ("Ease and centrality of administration are thus foundational characteristics of bankruptcy law.").

136 *Id.* at 148.

137 *Id.*

138 *Id.*

139 *Id.* at 149. Bahamian law would have allowed them to keep the deed to the property. *Id.*

140 *Id.* at 153.

141 *Id.*; *see also* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 818–19 (1993) (Scalia, J., concurring in part and dissenting in part). Those factors are: "the extent to which the activity takes place within the

Ultimately, the court held that because much of the activity being litigated—the transfer of the deed—occurred in the United States and because the property was part of a larger estate located in the United States, comity should be denied and United States law should apply.[142] Judge Wilkinson, in his concurring opinion, further noted that "[e]ase and centrality of administration are . . . foundational characteristics of bankruptcy law," and should be considered when determining whether a foreign country's law is the appropriate law to apply.[143]

In sum, the doctrine of comity, formerly codified at § 304(c)(5), strongly encourages United States courts to cooperate with foreign courts. As a threshold, the court need not analyze whether to recognize foreign law or a foreign proceeding when there is no genuine conflict between the law or proceeding and United States law.[144] When there is such a conflict, the court should only grant comity when the foreign proceeding provides a fair and complete trial and otherwise comports with American notions of due process.[145] Even if the foreign proceeding provides for due process, comity should be denied under § 304(c)(5) if granting recognition would violate the rights of American citizens or the public policy of the Unites States.[146] Finally, comity should be granted where the foreign proceedings are in accord with U.S. notions of justice.[147] Again, while § 304 has been repealed by the adoption of chapter 15, this idea of comity is important because chapter 15, and specifically § 1506, were meant to work within existing U.S. case law.[148] Therefore, § 1506 does not present a new standard but rather refines and, as the following section will show, substantially narrows the concept of comity.

territory," "the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated," "the extent to which other states regulate such activities," "the importance of the regulation to the international political, legal, or economic system," "the extent to which the regulation is consistent with the traditions of the international system," "the extent to which another state may have an interest in regulating the activity," and "the likelihood of conflict with regulation by another state." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(2) (1987).

142 *In re French*, 440 F.3d at 154.

143 *Id.* at 155 (Wilkinson, J., concurring).

144 Maxwell Commc'n Corp. v. Societe Generale (*In re* Maxwell Commc'n Corp.), 93 F.3d 1036, 1049 (2d Cir. 1996). The principle of comity is used to determine whether it is appropriate to recognize the foreign law when there is such a conflict. *Id.*

145 Hilton v. Guyot, 159 U.S. 113, 202 (1895).

146 Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709, 713 (2d Cir. 1987); Cunard S.S. Co. v. Salen Reefer Servs. AB, 773 F.2d 452, 457 (2d Cir. 1985).

147 *In re* Hourani, 180 B.R. 58, 65 (Bankr. S.D.N.Y. 1995).

148 *See* MODEL LAW ON CROSS-BORDER INSOLVENCY, *supra* note 3, at pt. 2, para. 20.

B. The Public Policy Exception of § 1506

Since Congress adopted chapter 15, there have been very few cases that have dealt with § 1506, and these cases have narrowly construed the public policy exception.[149] In fact, only two cases have invoked § 1506 to deny recognition of a foreign proceeding.[150] Despite the limited case law, these cases demonstrate how the courts have interpreted § 1506 thus far. Because the Model Law and chapter 15 were intended to augment, but not replace, existing bankruptcy laws,[151] the interpretations of the former § 304(c)(5) help provide a context for how §1506 should be construed. While the grounds for which recognition should be denied were relatively broad under § 304(c), § 1506 is a much more limited exception.[152] Section 1506 narrows the scope of § 304(c) and instructs United States courts to grant recognition of foreign proceedings or law unless they violate fundamental policies of the United States.[153] The cases that follow present the framework that has been established for analyzing whether a § 1506 exception is appropriate; the courts that have considered § 1506 have followed the warrant in the legislative history[154] and restricted § 1506 to only fundamental policies of the United States. However, even following this narrow framework, courts should invoke § 1506 where foreign law threatens the rights of an intellectual property licensee.

One of the first § 1506 cases, *Iida v. Kitahara (In re Iida)*, held that a litigant must show a fundamental policy of the United States is threatened by a foreign proceeding before the court may use § 1506 to deny recognition of that proceeding.[155] After the Japanese debtor, Iida, filed for bankruptcy in Japan, a trustee was appointed pursuant to Japanese bankruptcy law.[156] The debtor was

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[149] *See, e.g.*, Scott C. Mund, Comment, *11 U.S.C. 1506: U.S. Courts Keep a Tight Rein on the Public Policy Exception, but the Potential to Undermine International Cooperation in Insolvency Proceedings Remains*, 28 WIS. INT'L L.J. 325, 340 (2010).

[150] *In re* Toft, 453 B.R. 186, 196–201 (Bankr. S.D.N.Y. 2011); *In re* Gold & Honey, Ltd., 410 B.R. 357, 372–73 (Bankr. E.D.N.Y. 2009).

[151] MODEL LAW ON CROSS-BORDER INSOLVENCY, *supra* note 3, at pt. 2, para. 20; *see also* ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS: TEXT, CASES, AND PROBLEMS 854 (6th ed. 2009) (stating that chapter 15 "was not intended to change greatly United States law as it had developed under [§] 304").

[152] *See* 11 U.S.C. § 1506 (2006); *see also* H.R. REP. NO. 109-31(I), at 88 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 172.

[153] 11 U.S.C. § 1506; *see also* H.R. REP. NO. 109-31(I), at 88.

[154] H.R. REP. NO. 109-31(I), at 88 (noting that including "manifestly" restricts § 1506 to fundamental policies).

[155] *See* Iida v. Kitahara (*In re* Iida), 377 B.R. 243, 259 (B.A.P. 9th Cir. 2007).

[156] *Id.* at 247.

the owner, an officer and director of three Hawaiian corporations.[157] Pursuant to his power under Japanese insolvency law, the trustee removed the debtor as officer and director of the three Hawaiian corporations and sought to sell some of the companies' real property.[158]

More than a year later, the debtor filed a complaint in Hawaiian court seeking to undo the trustee's actions.[159] The trustee filed a chapter 15 petition for recognition of the Japanese bankruptcy case as a foreign main proceeding and commenced an ancillary proceeding.[160] The debtor objected to the trustee's petition and relied on § 1506 to argue that granting the petition and recognizing the trustee's actions after the fact would be manifestly contrary to public policy.[161] The debtor claimed that the trustee was required to seek permission from the United States court before removing the debtor from the Hawaiian corporations.[162]

The Bankruptcy Court for the District of Hawaii dismissed the debtor's § 1506 claim, and the Bankruptcy Appellate Panel of the Ninth Circuit (BAP) affirmed, finding the debtor failed to state a fundamental policy of the United States that would conflict with recognition of the Japanese proceeding.[163] In fact, the Japanese court was exercising jurisdiction over the debtor's property as part of the debtor's estate, regardless of where it was located; this coincides with a fundamental United States bankruptcy policy that the debtor's estate includes all of the debtor's "property, wherever located and by whomever held."[164] The bankruptcy court held, and the BAP again affirmed, that as soon as the Japanese court appointed the trustee, all of the debtor's rights and interests vested in that trustee.[165] In this case, there were no problems with full cooperation with the Japanese proceeding because Japanese law corresponded with United States bankruptcy policy.[166] Therefore, a debtor cannot invoke

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[157] *Id.* at 247–48.

[158] *Id.* at 249–50.

[159] *Id.* at 250. The Japanese bankruptcy court specifically authorized the trustee to obtain full legal effect in the U.S. courts of both Japanese court's orders and the trustee's actions. *Id.*

[160] *Id.* at 250–51.

[161] *Id.* at 251. Specifically, the debtor argued the trustee was required to obtain recognition and permission by the U.S. courts before exercising authority over the debtor's U.S. corporate assets. *Id.*

[162] *Id.*

[163] *Id.* at 259.

[164] 11 U.S.C. § 541(a) (2006).

[165] *In re Iida*, 377 B.R. at 263.

[166] *Id.*

§ 1506 without also claiming a fundamental policy of the United States is threatened by granting recognition of a foreign proceeding.[167]

In 2008, the Bankruptcy Court for the District of Colorado decided *In re Ernst & Young, Inc.* and held that a foreign proceeding does not violate a fundamental policy of the United States simply because it would produce a different result than would a proceeding wholly under U.S. law.[168] Efrat and Hidai Friedman, Israeli citizens living in Canada, formed a corporation called Klytie's Developments, Inc. (KDI) with Jason Sharkey, a Colorado resident.[169] KDI in turn created Klytie's Developments, LLC (KD/CO).[170] Following investigations by both the Colorado Securities Commissioner and the Alberta Securities Commissioner (ASC), the ASC froze all of the Friedmans' and KDI's assets.[171] Defrauded U.S. investors (Plaintiffs) filed suit in Colorado against KDI, KD/CO, the Friedmans, and Sharkey, alleging fraud and violations of Colorado securities law.[172] The Court of Queen's Bench of Alberta, District of Calgary (Canadian Court), began a receivership proceeding and appointed Ernst & Young, Inc. as receiver for KDI.[173] The Canadian Court later expanded the order to include the Friedmans and related entities such as KD/CO; the expanded order also stayed all legal proceedings involving KDI, the Friedmans, or either's property.[174] The receiver then filed a petition for recognition of the receivership proceeding under chapter 15 in the bankruptcy court.[175]

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167 *See id.* at 259.

168 *See In re* Ernst & Young, Inc., 383 B.R. 773, 781 (Bankr. D. Colo. 2008).

169 *Id.* at 774.

170 *Id.* The Friedmans and Sharkey used KDI and KD/CO to obtain investments to finance the purchase of real estate around the world, which would act as the assets of an investment fund. *Id.* at 774–75. The money that was raised was deposited in U.S. banks, and a significant amount was transferred to KDI and the Friedmans. *Id.*

171 *Id.* at 775.

172 *Id.*

173 *Id.*

174 *Id.* at 775–76. This later order also authorized the receiver to manage the affected businesses and explicitly "authorized the [r]eceiver to seek recognition of its orders and to seek 'aid and recognition' of courts in the United States." *Id.* at 776.

175 *Id.* The petition stated that the receivership proceeding, arising under the insolvency laws of Canada, was a foreign main proceeding, and that recognition was necessary for the receiver to pursue the assets of KDI, the Friedmans, and Sharkey located in the United States. *Id.* The case was properly under chapter 15 because the receivership proceeding arose under insolvency law and sought to collect the assets of the Friedmans, KDI, and KD/CO, and distribute those assets to defrauded investors who became involuntary creditors due to the fraud. *See id.*

The Plaintiffs objected to recognition of the foreign proceeding on the ground that it would be manifestly contrary to public policy and thus violate § 1506.[176] The Plaintiffs first argued that United States investors would receive less under the Canadian receivership proceeding, which also included Canadian and Israeli investors, than they would from the U.S. bankruptcy court.[177] Additionally, the costs of the receivership proceeding, the Plaintiffs further argued, would deplete the assets of KDI and KD/CO to the point that distributions to investors would be minimal.[178] After first recognizing that § 1506 is a narrow exception, the bankruptcy court rejected Plaintiffs' arguments.[179] Specifically, the court held that a plaintiff receiving a smaller distribution in a foreign proceeding is not by itself manifestly contrary to United States public policy and is thus insufficient to invoke § 1506.[180]

Together, *In re Ernst & Young, Inc.* and *In re Iida* demonstrate that the threshold to invoke § 1506 is very high.[181] Courts will not deny recognition pursuant to § 1506 in the absence of a threat to a fundamental policy.[182] A foreign proceeding does not violate a fundamental public policy simply because it may produce smaller distributions for each creditor; neither does a foreign proceeding violate a fundamental public policy because the proceeding would deplete the debtor's assets more than a United States proceeding.[183] These holdings demonstrate that, because not every American law implements a fundamental policy, a foreign law which simply functions differently than a domestic law does not necessarily violate a fundamental policy.

More broadly, the Bankruptcy Court for the Southern District of New York held in *In re Metcalfe & Mansfield Alternative Investments* that a fundamental policy of the United States is not necessarily violated simply because a foreign

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176 *Id.* at 781.

177 *Id.*

178 *Id.*

179 *Id.*

180 *Id.* First, the court ruled all wronged investors should share in recovery from KDI and KD/CO, not just U.S. investors. *Id.* Second, the court also found no support that the costs of the Canadian proceeding would deplete KDI and KD/CO's assets so drastically as to violate public policy; after all, liquidation costs are to be expected, regardless of whether they arise in a foreign proceeding or a U.S. bankruptcy case. *Id.*

181 *See* Iida v. Kitahara (*In re* Iida), 377 B.R. 243, 259 (B.A.P. 9th Cir. 2007); *In re Ernst & Young, Inc.*, 383 B.R. at 781.

182 *See In re Iida*, 377 B.R. at 259; *In re Ernst & Young, Inc.*, 383 B.R. at 781 ("[T]his exception is to be applied narrowly[] and should be invoked only when the most fundamental policies of the United States are at risk.").

183 *In re Ernst & Young, Inc.*, 383 B.R. at 781.

proceeding provides relief that is typically unavailable in American courts.[184] The sub-prime mortgage collapse in the United States severely disrupted the Canadian asset-backed commercial paper (ABCP) market, which froze in August 2007.[185] Primary actors in the ABCP market sought to limit their exposure by restructuring their obligations.[186] The largest noteholders and asset providers signed an agreement establishing a reorganization plan that provided for, among other things, a third-party release[187] and an injunction.[188] Metcalfe & Mansfield Alternative Investments II Corporation and other foreign investors (together, Metcalfe) were parties to the Canadian proceedings that sought to restructure all outstanding ABCP obligations that were not bank-sponsored.[189] The third-party release would apply to Metcalfe and release Metcalfe from liability for any third-party ABCP market claims.[190]

Ernst & Young, Inc., the court-appointed monitor and foreign representative for Metcalfe, sought United States recognition of the Canadian proceeding, including its claims procedure, under chapter 15.[191] The bankruptcy court, in considering whether to recognize the Canadian proceeding, raised the § 1506 exception sua sponte.[192] The bankruptcy court recognized that § 1506 should be construed narrowly and held that the relief available in the foreign proceeding need not match the relief the bankruptcy court would provide.[193] Instead, the bankruptcy court held that courts should not judge the appropriateness of the actions of the foreign court but rather determine "whether the procedures used in Canada meet our fundamental standards of fairness."[194] The court looked to Second Circuit precedent, which significantly restricted bankruptcy courts' ability to grant releases to non-

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184 *See In re* Metcalfe & Mansfield Alt. Invs., 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010).

185 *Id.* at 690. In the ABCP market, money used to purchase new ABCP was used to purchase financial assets that would then support the repayment of each ABCP. Because of the lack of transparency in the ABCP market, some feared that the sub-prime mortgage crisis would negatively impact the value of the underlying assets in the ABCP. Investors stopped buying ABCP, and as more and more ABCP became due, the asset providers had no money with which to repay them. *Id.* at 689–90.

186 *Id.* at 689–90.

187 *Id.* at 692. The third-party release "provide[d] each participant in the Canadian ABCP market . . . with a release that protect[ed] them from liability and actions . . . in any way related to the third-party ABCP market in Canada." *Id.*

188 *Id.* at 693.

189 *Id.* at 687. At the time the Canadian Proceeding commenced, these outstanding obligations were valued at "approximately CAN$ 32 billion." *Id.*

190 *See id.* at 692.

191 *Id.* at 687.

192 *See id.* at 697.

193 *Id.*

194 *Id.* (citing Cunard S.S. Co. v. Salen Reefer Servs. AB, 773 F.2d 452, 457 (2d Cir. 1985)).

debtors; however, as the court noted, such releases are not prohibited per se but may be approved if necessary to the success of a reorganization plan.[195] The court therefore held that because the Canadian proceeding reflected a similar restraint regarding such releases, granting recognition of the Canadian proceeding would not violate § 1506.[196]

This case is illustrative in two ways. First, the court held that simply because the foreign court would produce a different result than a United States court does not necessarily constitute a violation of fundamental public policy.[197] Second, the court noted, albeit briefly, that fairness is a fundamental policy of the United States.[198] While the § 1506 objections failed in *In re Iida* and *In re Ernst & Young* because they did not claim a fundamental policy,[199] the court in *In re Metcalfe* did not find a § 1506 exception because the fundamental policy, fairness, was not threatened merely because the foreign court did not provide the same solution as a United States court.[200]

Building off the preceding cases, the Southern District of New York case, *RSM Richter Inc. v. Aguilar (In re Ephedra Products Liability Litigation)*, provides additional guidance on how to analyze a § 1506 claim.[201] The district court held that a fundamental policy is not violated because a helpful or even preferred tool for implementing that policy is not present in the foreign proceeding, provided the proceeding otherwise protects that policy.[202] The case involved Muscletech Research and Development, Inc., a Canada-based company that marketed ephedra-containing products in the United States before the FDA banned ephedra.[203] As a result of consumer litigation, Muscletech filed for bankruptcy in the Ontario Superior Court, and RSM Richter was appointed monitor (Monitor).[204] The Monitor applied for recognition of the Muscletech insolvency proceeding as a foreign main proceeding, which the Bankruptcy Court for the Southern District of New

195 *Id.*

196 *Id.* at 697–98.

197 *See id.* at 697.

198 *Id.* (citing Cunard S.S. Co. v. Salen Reefer Servs. AB, 773 F.2d 452, 457 (2d Cir. 1985)).

199 Iida v. Kitahara (*In re* Iida), 377 B.R. 243, 259 (B.A.P. 9th Cir. 2007); *In re* Ernst & Young, Inc., 383 B.R. 773, 781 (Bankr. D. Colo. 2008).

200 *See In re Metcalfe & Mansfield Alt. Invs.*, 421 B.R. at 697–98.

201 RSM Richter Inc. v. Aguilar (*In re* Ephedra Prods. Liab. Litig.), 349 B.R. 333, 336–37 (S.D.N.Y. 2006).

202 *Id.* at 337 ("[T]he Procedure here in issue, as amended, plainly affords claimants a fair and impartial proceeding.").

203 *Id.* at 334.

204 *Id.*

York granted.[205] The Ontario court negotiated and approved a claims procedure to value the plaintiffs' claims.[206] The district court granted the Monitor's motion for recognition of the claims procedure "contingent on the Ontario court's approving certain amendments to the Procedure designed to assure greater clarity and procedural fairness."[207] Several U.S. plaintiffs objected to recognition of the claims procedure as a violation of § 1506 because it did not include a jury trial, a right to which they would have been entitled if they had brought their claims in the United States.[208]

The district court began its analysis by recognizing that the § 1506 exception should be construed narrowly and restricted to only the most fundamental policies of the United States.[209] The court examined a case decided the previous year that recognized a foreign judgment that was rendered without a jury.[210] That court found that, despite not providing for a jury, the foreign court included "substantially the same substantive and procedural due process protections."[211] The district court held:

> Obviously, the constitutional right to a jury trial is an important component of our legal system, and [28 U.S.C.] § 1411 stresses its importance in the context of personal injury cases. But the notion that a fair and impartial verdict cannot be rendered in the absence of a jury trial defies the experience of most of the civilized world.[212]

Rather than holding that the right to a jury was a fundamental public policy, the court emphasized the purpose of a jury is to protect litigants from any unfairness during a trial.[213] The objecting plaintiffs argued the lack of a jury trial would hinder their bargaining position, but the court held that such a hindrance did not constitute "fundamental unfairness."[214] The court found the Ontario court adopted amendments to the claims procedure that ensured due process, so the claims procedure was a fair hearing and should be granted

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[205] *Id.*
[206] *Id.*
[207] *Id.* The Ontario court approved the amendments within three weeks of the U.S. Court's order. *Id.*
[208] *Id.* at 335.
[209] *Id.* at 336.
[210] *Id.* at 336–37 (citing Samyang Food Co. v. Pneumatic Scale Corp., No. 5:05-CV-636, 2005 WL 2711526, at *6–7 (N.D. Ohio Oct. 21, 2005)).
[211] *Id.* at 337 (quoting *Samyang Food Co.*, 2005 WL 2711526, at *6). The Korean court provided the rights to notice, legal counsel, to present evidence and witnesses, to examine evidence offered against the party, and to appeal to a higher court. *Id.*
[212] *Id.* at 334.
[213] *See id.* at 337.
[214] *Id.*

recognition in the United States.[215] Thus, where a fundamental policy of the United States is protected in a foreign proceeding, even in the absence of a preferred method for pursuing that policy, there is no § 1506 claim.[216]

In *In re Ephedra*, the § 1506 objection failed because a jury trial is not necessary to protect a fundamental policy.[217] Although the objecting plaintiffs did raise a fundamental policy—the notion of fairness and due process—the court held that the foreign proceeding adopted procedures to protect that policy.[218] The court found that a fundamental policy is not contravened merely because one possible means for enforcing it is denied.[219] The court only approved the Canadian proceeding after the Ontario court adopted certain procedures to ensure that all claimants would be afforded due process and fairness.[220] Because a jury trial is not an essential aspect of ensuring due process fairness, recognizing a foreign proceeding that lacks a jury is not manifestly contrary to public policy.[221]

In re Gold & Honey, Ltd. is the first U.S. case to deny comity under the § 1506 exception.[222] Although the Bankruptcy Court for the Eastern District of New York correctly invoked § 1506, this case is so exceptional that *In re Gold & Honey* is far beyond the threshold of what § 1506 requires and should not be considered a model § 1506 case. The debtors were collectively Gold & Honey, Ltd., Gold & Honey, LP, and Almond Jewelers (Debtors).[223] The Debtors moved their precious metal manufacturing facility to Israel.[224] Three years later, Israel agreed to guarantee a working line of credit, and the Debtors selected the First International Bank of Israel (FIBI) to finance the credit line.[225] Gold & Honey, LP pledged a floating lien over all of its assets to secure

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215 *Id.* at 335, 337.

216 *Id.*

217 *Id.* at 337. The court found that the purpose of the jury trial is to protect litigants' fundamental right to fairness. *Id.*

218 *Id.*

219 *See id.*

220 *Id.* at 335.

221 *See id.* at 337.

222 *In re* Gold & Honey, Ltd., 410 B.R. 357, 371, 371–73 (Bankr. E.D.N.Y. 2009).

223 *Id.* at 360–61. Gold & Honey, Ltd. (LTD) was an Israeli corporation that was also a general partner and a 49.5% equity holder of Gold & Honey, LP (LP), a New York limited partnership. *Id.* LP's main business was the design, manufacture, and sale of jewelry around the world. *Id.* at 361. LP's designing, marketing and management was located primarily in New York. *Id.* at 360–61. Almond Jewelers (Almond) was a New York corporation and a general partner and 49.5% equity holder of LP. *Id.* at 361.

224 *Id.* at 361.

225 *Id.* at 361–62. The Debtors' primary bank accounts were at FIBI. *Id.* at 362.

the credit line.[226] The credit line initially was $9 million, later increased to $12 million, and then increased once again to $16 million.[227]

Shortly after the final extension of their credit line, FIBI seized almost all of the Debtors' assets and accounts, and began an Israeli receivership proceeding.[228] Two months later, the Debtors filed for chapter 11 bankruptcy in the United States.[229] Despite the imposition of the automatic stay upon filing for chapter 11, FIBI continued to pursue the Israeli receivership proceeding.[230] The Debtors applied to the bankruptcy court for an order that said the automatic stay applied to the Debtors' property regardless of location and, more importantly, to the Israeli receivership proceeding.[231] FIBI specially appeared to argue that the automatic stay did not apply because courts in the United States did not have jurisdiction over either FIBI or the receivership proceeding.[232] The court disagreed with FIBI and issued an order, pursuant to § 541(a), applying the automatic stay to all of the Debtors' property "wherever located and by whomever held."[233] The stay order also precluded "the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title."[234]

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[226] *Id.* at 362. LP also pledged some of its machinery and equipment. *Id.*

[227] *Id.* LTD and LP pledged additional machinery and equipment to secure the final increase to $16 million. *Id.* Dollar amounts are in U.S. dollars.

[228] *Id.* The court does not explain why FIBI chose to commence this litigation. *See id.* There was no mention of any default or breach on the part of the Debtors. *See id.* Further, Almond is not a party to the receivership proceeding. *Id.* at 360 n.6. A receivership proceeding is a proceeding in which a receiver is appointed to preserve the property of the estate for the benefit of the creditors. *See* BLACK'S LAW DICTIONARY 1383 (9th ed. 2009).

[229] *In re Gold & Honey, Ltd.*, 410 B.R. at 363. The U.S. bankruptcy court had jurisdiction over LTD, despite LTD being a foreign corporation, because § 109(a) allows anyone who resides or has a domicile, place of business, or property in the United States to file for bankruptcy in U.S. courts. *Id.* at 360 n.7.

[230] *Id.* at 363. FIBI argued to the Israeli court that the automatic stay should not apply to FIBI or FIBI's attempts to seize LTD and LP's property because the automatic stay stems from the U.S. chapter 11 cases and not any Israeli case. *Id.* FIBI sought and obtained the appointment of a receiver who then began to actively supervise the Debtors' business. *Id.* The Debtors maintain that they did not voluntarily agree to this appointment, but rather signed under pressure. *Id.* at 363 n.10.

[231] *Id.* at 363.

[232] *Id.*

[233] *Id.*

[234] *Id.* at 363–64. The Court did not explicitly address whether the stay applied to the Israeli receivership proceeding, but it warned FIBI that if FIBI chose to pursue the receivership proceeding, it would be at FIBI's own risk. *Id.* at 363.

Disregarding the bankruptcy court's stay order, FIBI pursued the Israeli receivership proceeding.[235] The Israeli court heard evidence regarding the stay order but ruled that the automatic stay still did not apply and allowed the receivership proceeding to continue.[236] The Debtors then began an adversary proceeding in the bankruptcy court and sought a temporary restraining order against FIBI.[237] The bankruptcy court denied the motion for a temporary restraining order because it "would be redundant to the automatic stay," which prohibited FIBI from pursuing the receivership proceeding.[238] FIBI then filed a motion to lift the automatic stay with the bankruptcy court, and the permanent receivers filed for recognition of the Israeli receivership proceeding as a foreign main proceeding under chapter 15.[239]

The bankruptcy court denied the receivers' petition for recognition on several grounds. First, the court held that the receivers failed to present evidence to satisfy the threshold of § 101(23), which defines a "foreign proceeding" as "collective" in nature.[240] The bankruptcy court held that the receivers had not demonstrated that the receivership proceeding was collective in nature, and thus the court could not recognize it as either a foreign main or nonmain proceeding.[241] Additionally, the court reasoned that even if the receivership proceeding was collective in nature, recognition should be denied with respect to both LP and LTD because the proceeding was taken in violation of the automatic stay and because recognition "would have an adverse effect on public policy, pursuant to [§] 1506."[242] The court denied recognition because FIBI pursued the receivership proceeding "in spite of and in the face of this Court's Stay Order."[243] Strongly condemning FIBI's actions, the bankruptcy court said, "It would fly in the face of the Code for this Court to recognize the petitions here and authorize the post-petition appointed

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235 *Id.* at 364.

236 *Id.* The U.S. Court noted the Israeli court's analysis was flawed because the Israeli court failed to recognize that § 362 automatically applies. *Id.* at 364 n.12.

237 *Id.* at 364. While the bankruptcy court was considering this motion, the Israeli court appointed permanent receivers. *Id.* FIBI then moved to dismiss the adversary proceeding and included the Israeli court's ruling in the receivership proceeding. *Id.*

238 *Id.* at 365.

239 *Id.*

240 *Id.* at 367–68 (interpreting 11 U.S.C. § 101(23) (2006)).

241 *Id.* at 369–70. The bankruptcy court also held that, with respect to LP, the receivers failed to prove that a foreign court properly had control or supervision over LP's assets, as required by § 101(23). *Id.* at 371–73.

242 *Id.* at 368.

243 *Id.*

Receivers to proceed in the United States when they were appointed as a result of a knowing and willful violation of the automatic stay by FIBI."[244]

Finally, the bankruptcy court held that granting recognition of the receivership proceeding would be manifestly contrary to public policy.[245] Despite the narrow construction of § 1506, the court held that granting recognition of the receivership proceeding "would reward and legitimize FIBI's violation of both the automatic stay and this Court's Orders regarding the stay."[246] The court distinguished *In re Gold & Honey* from *In re Ernst & Young* because *In re Ernst & Young* did not involve a fundamental policy.[247] The court also distinguished *In re Ephedra* by finding that, although the fundamental policy of procedural fairness was at stake, the *In re Ephedra* court had taken sufficient steps to protect procedural fairness before granting recognition.[248]

Here, the bankruptcy court explicitly held that there were fundamental policy interests at stake, specifically the extent of U.S. courts' jurisdiction in bankruptcy and the importance of the automatic stay.[249] If the court recognized the receivership proceeding, it would restrict federal jurisdiction over a debtor's property "wherever located and by whomever held."[250] Further, if the court granted recognition, it would diminish the value of the automatic stay, a fundamental component of the United States bankruptcy system.[251] FIBI acted, and the Israeli court ruled, on the theory that the bankruptcy court's stay order must have first been registered as a foreign judgment in Israel before it had any impact.[252] The Israeli court further held that the bankruptcy court did not have jurisdiction over a debtor's assets in a foreign country without the aid of the foreign court.[253] If the bankruptcy court granted recognition of the receivership proceeding, it would limit United States courts' jurisdiction over a debtor's

244 *Id.*
245 *Id.* at 371.
246 *Id.* at 371–72.
247 *Id.* at 372 (citing *In re* Ernst & Young, Inc., 383 B.R. 773, 781 (Bankr. D. Colo. 2008)).
248 *Id.* (citing RSM Richter Inc. v. Aguilar (*In re* Ephedra Prods. Liab. Litig.), 349 B.R. 333, 334–37 (S.D.N.Y. 2006)).
249 *Id.*
250 11 U.S.C. § 541(a) (2006); *In re Gold & Honey, Ltd.*, 410 B.R. at 372; *see also* 28 U.S.C. § 1334(e) (giving the district court reviewing a title 11 case exclusive jurisdiction over "all the property, wherever located, of the debtor as of the commencement of the case, and of property of the estate").
251 *In re Gold & Honey, Ltd.*, 410 B.R. at 372.
252 *Id.* at 368.
253 *Id.* at 369.

worldwide assets, despite clear statutory language to the contrary.[254] The court refused to recognize the Israeli receivership proceeding due to the "serious ramifications that would ensue in derogation of fundamental United States policies."[255]

Although *In re Gold & Honey* is the first case finding an exception to the rule of comity under § 1506, it does not demonstrate the threshold violation to invoke § 1506. The court found three separate reasons why recognition of the foreign proceeding would be manifestly contrary to public policy,[256] but each of those reasons individually would have been sufficient to satisfy even a narrow construction of § 1506. First, although the court did not explicitly hold FIBI's malfeasance to be a controlling factor, the court noted that "allowing the *offensive use* of a stay violation here would severely impinge the value and import of the automatic stay."[257] Notwithstanding the impact on the automatic stay's significance, the court would be validating FIBI's "knowing and willful" misconduct if it granted FIBI's petition.[258] Allowing a foreign representative to violate direct orders from United States courts and then force United States courts to grant recognition based on international comity would harm the legitimacy of the United States court system. Such a ruling would create an incentive for other foreign representatives to ignore or violate unfavorable United States rulings and would permit foreign representatives to force the United States court to comply under the guise of comity.[259] Recognizing the receivership proceeding would therefore be manifestly contrary to public policy.[260]

Second, if the bankruptcy court granted recognition of the receivership proceeding, the impact on the authority of United States courts to exercise jurisdiction over a debtor's assets, irrespective of where the assets are located,

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254 *Id.* at 372–73; *see also* 11 U.S.C. § 541(a); 28 U.S.C. § 1334(e) (giving the district court reviewing a title 11 case exclusive jurisdiction over "all the property, wherever located, of the debtor as of the commencement of the case, and of property of the estate").

255 *In re Gold & Honey, Ltd.*, 410 B.R. at 372–73.

256 *Id.* at 371–73.

257 *Id.* at 372 (emphasis added).

258 *Id.* at 368, 372.

259 *See id.* at 368–69, 371–72.

260 *See id.* at 373. This does not suggest that § 1506 does or should require a foreign representative's knowing malfeasance before denying recognition. Nothing in either the text of the statute or its legislative history suggests such a requirement. *See* 11 U.S.C. § 1506 (2006); *see also* H.R. REP. NO. 109-31(I) (2005), at 88, *reprinted in* 2005 U.S.C.C.A.N. 88, 172. Rather, it would be manifestly contrary to public policy to enable a foreign representative to violate a court order and then seek recognition of that violation under the guise of international comity. *See In re Gold & Honey, Ltd.*, 410 B.R. at 373.

would contravene fundamental public policy.[261] In two separate statutes, Congress provided that a U.S. court's jurisdiction over a debtor's property does not stop at the U.S. border. First, 11 U.S.C. § 541(a) defines the debtor's estate as including "all of the following property, wherever located and by whomever held."[262] Even the Israeli court recognized that this provision authorized a "broad, worldwide grant of jurisdiction . . . over a debtor's assets wherever located."[263] Second, 28 U.S.C. § 1334(e) provides that district courts and bankruptcy courts shall have sole jurisdiction over "all the property, wherever located, of the debtor as of the commencement of the case."[264] If U.S. courts were not able to exercise jurisdiction over a debtor's property held abroad, it would hinder the efficient administration of the bankruptcy case.[265] More importantly, it would incentivize debtors to move their property out of the country to avoid creditors. The bankruptcy court found that if it granted recognition, "any future creditor could follow FIBI's lead and violate the stay in order to procure assets that were outside the United States, yet still under the United States court's jurisdiction."[266]

Finally, the bankruptcy court held that recognition of the receivership proceeding would be manifestly contrary to public policy because FIBI pursued the proceeding despite the imposition of the automatic stay.[267] Irrespective of FIBI's and the Israeli court's reasoning, it "is axiomatic that when the [c]hapter 11 [c]ases were filed, the automatic stay went into effect."[268] The automatic stay is essential to the bankruptcy system and serves to freeze all actions regarding the debtor and the debtor's estate.[269] It "give[s] the debtor a breathing spell from litigation and collection activities,"[270] but may benefit creditors as well. The automatic stay prevents any particular creditor from gaining an unfair advantage over other creditors by quickly seizing assets.[271] Just as importantly, the automatic stay allows a court to assess each creditor's claim as it exists at the moment of filing and provides an

[261] *In re Gold & Honey, Ltd.*, 410 B.R. at 372–73.
[262] 11 U.S.C. § 541(a).
[263] *In re Gold & Honey, Ltd.*, 410 B.R. at 369.
[264] 28 U.S.C. § 1334(e)(1).
[265] *In re Gold & Honey, Ltd.*, 410 B.R. at 372.
[266] *Id.*
[267] *Id.* at 372–73.
[268] *Id.* at 368; *see also* 11 U.S.C. § 362(a).
[269] *See In re Gold & Honey, Ltd.*, 410 B.R. at 369.
[270] *Id.* (citing Interstate Commerce Comm'n v. Holmes Transp., Inc., 931 F.2d 984, 987–88 (1st Cir. 1991)).
[271] *See id.* at 372.

efficient means for distribution on the basis of the creditor's relative priority.[272] The fact that the automatic stay applies the moment the debtor files for bankruptcy without the need for any other affirmative act demonstrates the automatic stay's importance for the administration of a bankruptcy case.[273] Therefore, since "actions taken in violation of the stay are void,"[274] FIBI's contravention of the automatic stay and the receiver's appointment constituted grounds for a § 1506 exception because they undermine these fundamental policies.[275]

In re Gold & Honey provides two examples of when it is appropriate for the court to invoke § 1506. First, courts should not cooperate with a foreign proceeding when doing so would condone a violation of the stay[276] because the automatic stay is indispensable in the American bankruptcy system.[277] Second, *In re Gold & Honey* correctly suggests that comity should be denied under § 1506 when a petition for recognition threatens a fundamental public policy and the court is not able to otherwise protect that policy.[278]

The only other case to date to invoke the § 1506 exception to deny recognition to a foreign proceeding is *In re Toft*.[279] Like *In re Gold & Honey*, there were multiple grounds on which to deny recognition under § 1506.[280] The debtor, Dr. Jürgen Toft, was a surgeon in Germany with more than $7 million in debt.[281] Apparently, Toft did not cooperate with the German insolvency proceeding and attempted to hide some assets outside of Europe.[282] To assist

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272 *Id.*

273 *See* 11 U.S.C. § 362(a); *see also id.* § 1520(a)(1) (providing that § 362 applies upon recognition of a proceeding under chapter 15).

274 *In re Gold & Honey, Ltd.*, 410 B.R. at 369 (citing 48th St. Steakhouse, Inc. v. Rockefeller Center, Inc., (*In re* 48th St. Steakhouse, Inc.), 61 B.R. 182, 189 (Bankr. S.D.N.Y. 1986), *aff'd*, 77 B.R. 409 (S.D.N.Y. 1987), *aff'd*, 835 F.2d 427 (2d Cir. 1987)).

275 *See id.* at 371–73.

276 *Id.* at 369, 372–73.

277 The automatic stay is necessary for the fair and efficient administration of the bankruptcy case, and thus applies immediately upon filing, with no other affirmative action required. *See, e.g.*, WARREN & WESTBROOK, *supra* note 151, at 131 ("Eventually, the court will oversee the gathering and distribution of the assets, but until that time or until the stay is lifted, creditors are generally precluded from taking any individual action against the . . . estate."); *see also* 3 COLLIER, *supra* note 75, ¶ 362.02 ("The stay is effective automatically and immediately upon the filing of a bankruptcy petition, whether voluntary, joint[,] or involuntary. Formal service of process is not required, and no particular notice need be given in order to subject a party to the stay." (footnotes omitted)).

278 *See In re Gold & Honey, Ltd.*, 410 B.R. at 372.

279 *In re* Toft, 453 B.R. 186, 189 (Bankr. S.D.N.Y. 2011).

280 *Id.* at 196–201.

281 *Id.* at 188.

282 *Id.*

Dr. Martin Prager, the insolvency administrator, the German Court entered an order authorizing Prager "to intercept Toft's postal and electronic mail."[283]

Prager then filed the chapter 15 petition in the Bankruptcy Court for the Southern District of New York because Toft's email accounts were stored on servers that belonged to internet service providers (ISPs) located in the United States.[284] Toft had no assets in, nor any other evident connection to, the United States.[285] In initiating the chapter 15 proceeding, Prager did not provide any notice to Toft, and Prager "requested no notice be required if relief is granted so that [Prager] can continue to investigate the affairs of" Toft without his knowledge.[286] Prager also asked the court to grant comity to the German mail interception order by compelling the ISPs "to disclose to Prager all of the Debtor's e-mails currently store on their servers and to deliver to Prager copies of all e-mails received by the Debtor in the future."[287]

After reiterating that the public policy exception should be construed narrowly,[288] the court denied Prager's requests under § 1506 because the relief sought would be manifestly contrary to public policy.[289] The court based its decision on the implications for Toft's privacy rights and the lack of notice to Toft. First, the court held that Prager's request for all past and future emails would violate both statutory and constitutional rights.[290] Specifically, the court found that numerous statutes protect the privacy of electronic communications.[291] These statutes require that to lawfully obtain electronic communications without the consent of the recipient, a court must issue a warrant upon a showing of necessity.[292] Further, the Electronic Communications Privacy Act "imposes criminal and civil penalties when a person 'accesses an electronic communication service, or obtains an electronic communication while it is still in storage, without authorization.'"[293] The court held that United States law forbade the relief requested and would, in fact,

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283 *Id.* Under the belief that Toft was in London, Prager successfully sought to have the interception order enforced by the English High Court of Justice. *Id.*

284 *Id.*

285 *Id.*

286 *Id.* at 189.

287 *Id.*

288 *Id.* at 193.

289 *Id.* at 189, 201.

290 *Id.* at 196–200.

291 *Id.* at 196–97.

292 *Id.* at 197.

293 *Id.* (quoting Pure Power Boot Camp v. Warrior Fitness Boot Camp, 587 F. Supp. 2d. 548, 555 (S.D.N.Y. 2008) (emphasis omitted)).

likely result in criminal liability for Prager if he performed the wiretap without a warrant.[294] Because "[t]he relief sought would directly compromise privacy rights subject to a comprehensive scheme of statutory protection, available to aliens, built on constitutional safeguards incorporated in the Fourth Amendment," the court denied Prager's request under § 1506.[295]

However, the court did not base its decision on privacy rights alone. Prager pursued his motion for relief without any notice to Toft and requested that the court not provide any notice if relief were granted.[296] Under Bankruptcy Rule 2002(q)(1), the court must provide notice to the debtor when a chapter 15 petition is filed.[297] If the court were to grant the relief Prager requested, it would be violating both Bankruptcy Rules of Procedure and procedural due process rights.[298] Therefore, the court denied the relief sought under § 1506 because it would be manifestly contrary to public policy.[299]

While *In re Toft* properly found a § 1506 exception, this case does not demonstrate the threshold required to invoke § 1506 because the court found multiple reasons to deny Prager's request, two of which alone would have been sufficient to deny Prager's request.[300] First, the court held that because the mail interception order would violate United States law regarding privacy in communications, the relief should be denied as manifestly contrary to public policy.[301] The privacy policy interest embodied in these statutory protections rises to the level of a fundamental policy because they are grounded, at least partially, in the Fourth Amendment.[302] The mail interception order would amount to a warrantless search and seizure of Toft's email.[303] It is important to note that the court did not reach the question of whether the relief requested violated constitutional guarantees of privacy because it is not entirely clear whether those constitutional guarantees were available to Toft, a foreign

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294 *Id.* at 198.
295 *Id.*
296 *Id.* at 189.
297 *Id.* at 200; *see also* FED. R. BANKR. P. 2002(q)(1).
298 *In re Toft*, 453 B.R. at 198, 200.
299 *Id.* at 200.
300 *Id.* at 196–201. The second of the court's reasons, that the relief requested would be beyond the power of an U.S. estate representative, would not be sufficient to invoke § 1506 without more because the relief available in the foreign proceeding need not be identical to the relief available in the United States. *See, e.g.*, *In re* Metcalfe & Mansfield Alt. Invs., 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010).
301 *In re Toft*, 453 B.R. at 196–98.
302 *See id.* at 197–98.
303 *Id.*

national who was not in the United States.[304] Nevertheless, the court found that the right to privacy in electronic communications was fundamental because there was a "comprehensive scheme of statutory protection" based on constitutional guarantees.[305] Therefore, because Prager requested relief that would violate the fundamental policy of protecting the privacy of communications, the court denied his motion under § 1506.[306]

Even if the violation of privacy rights were not sufficient to invoke § 1506, the lack of notice to Toft, and therefore the lack of procedural due process, justifies the court's decision to deny the relief requested.[307] The court's analysis on this point was brief and focused primarily on Bankruptcy Rule 2002, but the § 1506 issue on this point goes much deeper than the Bankruptcy Rules of Procedure. One of the most important considerations for courts when determining whether to grant recognition to a foreign proceeding is whether the foreign proceeding is fair and assures procedural due process.[308] In this case, Prager requested relief that would deny Toft due process by failing to provide notice of either the hearing or of any relief the court granted.[309] Because the relief would violate the fundamental policy of due process, the court correctly invoked § 1506 to deny Prager's motion.

Like *In re Gold & Honey*, *In re Toft* is still useful for understanding the § 1506 analysis, even though it does not answer the "threshold" question of when courts should invoke § 1506. *In re Toft* presents two occasions on which a court could invoke § 1506,[310] while presenting a third that would be insufficient.[311] This juxtaposition demonstrates that even though the relief available may be different under foreign law, that law should be respected unless it violates a fundamental policy of the United States.[312] Here, because the foreign law violated both communications privacy, based in part on the

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304 *Id.*

305 *Id.* at 198.

306 *Id.*

307 *See id.* at 200.

308 *See* RSM Richter Inc. v. Aguilar (*In re* Ephedra Prods. Liab. Litig.), 349 B.R. 333, 335, 337 (S.D.N.Y. 2006); *In re* Metcalfe & Mansfield Alt. Invs., 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010); *see also* Hilton v. Guyot, 159 U.S. 113, 202–03 (1895); *In re* Hourani, 180 B.R. 58, 64 (Bankr. S.D.N.Y. 1995).

309 *In re Toft*, 453 B.R. at 189, 200.

310 Those occasions are the violation of communications privacy and the lack of notice provided to the debtor. *Id.* at 196–98, 200–01.

311 The court discussed that Prager requested relief that would be beyond the power of a similar United States representative. *Id.* at 198–200. However, that alone is insufficient to qualify for a § 1506 exception. *See, e.g.*, *In re Metcalfe & Mansfield Alt. Invs.*, 421 B.R. at 697–98.

312 *See, e.g.*, *In re Metcalfe & Mansfield Alt. Invs.*, 421 B.R. at 697–98.

Fourth Amendment, and due process protections, based in part on the Fourteenth Amendment, the court properly denied Prager's motion under § 1506.[313]

The limited § 1506 case law to date demonstrates several important points. The principles of international cooperation and comity are strong guiding concepts that compel United States courts to grant recognition of a foreign proceeding despite potentially producing a different or less desirable result than a U.S. proceeding.[314] International cooperation is not an absolute rule, though, and § 1506 gives bankruptcy courts some discretion in whether to cooperate with a foreign proceeding. However, the policy exception in § 1506 should be construed narrowly,[315] and the limited case law on point has done so.[316] As a matter of law, a party must claim that a fundamental policy is threatened by recognition of a foreign proceeding to invoke § 1506.[317] Even absent an efficient means for protecting a fundamental policy, the United States court still should recognize foreign proceedings as long as the fundamental policy is otherwise protected.[318] When foreign law or a foreign proceeding does violate a fundamental policy of the United States, the court may deny recognition under § 1506.[319] The major failure of these cases is that they fail to articulate what makes a policy "fundamental," even though they name several fundamental policies. This Comment will next explore what makes a policy "fundamental" and why advancing the growth of intellectual property should be considered a fundamental policy.

313 *In re Toft*, 453 B.R. at 201. Again, although the court did not rely on or substantially analyze a constitutional argument, these policies are fundamental because they are grounded in the text of the constitution and in the history and traditions of the United States. *See infra* Part III.A.

314 *See In re Metcalfe & Mansfield Alt. Invs.*, 421 B.R. at 697; *see also In re* Ernst & Young, Inc., 383 B.R. 773, 781 (Bankr. D. Colo. 2008) (granting recognition to a foreign proceeding even though the creditors would receive less than in a United States proceeding).

315 *See, e.g.*, H.R. REP. NO. 109-31(I), at 88 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 172 (2005); *see also* MODEL LAW ON CROSS-BORDER INSOLVENCY, *supra* note 3, at pt. 2, para. 89.

316 *See* Mund, *supra* note 149, at 340–48, 356.

317 *See* Iida v. Kitahara (*In re* Iida), 377 B.R. 243, 259 (B.A.P. 9th Cir. 2007).

318 RSM Richter Inc. v. Aguilar (*In re* Ephedra Prods. Liab. Litig.), 349 BR 333, 335–37 (S.D.N.Y. 2006) (holding that the absence of a jury trial is not grounds for denying recognition under § 1506 where the foreign proceeding adopts other measures to ensure procedural due process).

319 11 U.S.C. § 1506 (2006).

III. THE FUNDAMENTAL PUBLIC POLICY OF ADVANCING AND PROTECTING THE GROWTH OF INTELLECTUAL PROPERTY

The section that follows begins by analyzing what makes something "fundamental" to the United States in a nonbankruptcy context and analogizing that definition to bankruptcy law, specifically § 1506. Next, this Comment argues that, using the nonbankruptcy "fundamental" definition, the policy of protecting intellectual property licenses is sufficiently "fundamental" to justify a § 1506 exception in a chapter 15 bankruptcy case. Finally, this Comment suggests several solutions to ensure that the security of intellectual property licenses does not rely on the licensor's financial success.

A. Defining "Fundamental" and the Importance of Advancing Intellectual Property

While the case law demonstrates that § 1506 should only be invoked to protect fundamental policies of the United States, there is no clear explanation of what makes a policy "fundamental" in either bankruptcy case law or elsewhere in the Code. Consequently, it is necessary to look to other areas of United States law to determine what policies can be considered "fundamental" and, therefore, when bankruptcy courts should invoke § 1506. With that in mind, there is substantial relevant case law regarding the Equal Protection and Due Process clauses;[320] while these cases do not involve the Code or insolvency proceedings, the established doctrine provides an analogous framework for what makes a right "fundamental."[321] That framework can then be applied to bankruptcy law to demonstrate which policies of the United States are sufficiently "fundamental" to justify a § 1506 exception. In this context, there are numerous approaches to determining fundamental rights, but this Comment focuses on two: the originalist approach and the historical approach. This section will show that both of these approaches support the conclusion that advancing intellectual property is a fundamental policy of the United States.

The originalist position is premised on the idea that, when deciding whether something is "fundamental," courts should confine themselves to the original meaning and the clear intent of the framers of the Constitution.[322]

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[320] U.S. CONST. amend. XIV, § 1.

[321] *See, e.g.*, David Schraub, Comment, *The Price of Victory: Political Triumphs and Judicial Protection in the Gay Rights Movement*, 77 U. CHI. L. REV. 1437, 1441–42 (2010).

[322] *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 795 (3d ed. 2006).

Under this approach, a right or a policy is only fundamental when it is explicitly stated in the text or clearly intended thereby.[323] For example, the right to vote is explicitly protected in the Constitution in multiple places.[324] A strict originalist approach would conclude that, because the right to vote is plainly covered in the Constitution, it is fundamental; in fact, the Supreme Court has held that the right to vote is a fundamental right.[325]

Under the originalist approach, promoting intellectual property is a fundamental policy of the United States. The Constitution explicitly directs Congress to "promote the Progress of Science and useful Arts," referring to copyright and patent law, respectively.[326] Article I, which contains the Intellectual Property Clause, vests in Congress certain powers[327] and charges it with specific responsibilities. Promoting the growth and development of intellectual property is a fundamental policy of the United States because it is one of the few policies the Constitution explicitly directs Congress to pursue.[328]

Another main approach to determining whether a right or a policy is fundamental looks to the historical importance of that right or policy.[329] Under this approach, a right or policy is fundamental when it is "deeply rooted in this

323 *See, e.g.*, *id.*

324 *See* U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); *see also* U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."); U.S. CONST. amend. XXIV, § 1 ("The right of citizens of the United States to vote in any primary or other election for [various federal offices] shall not be denied or abridged by the United States or any State by reason of failure to pay poll tax or other tax.").

325 *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (holding that voting is a "fundamental" right because it is "preservative of all rights"); *see also* Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society . . . ."). While these cases did not explicitly rely on a textualist rationale, they reach the same conclusion that the right to vote is a fundamental right. Furthermore, although the right to vote in any election is not constitutionally protected, see, for example, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 n.78 (1972), voting in federal elections is nevertheless a fundamental right because Amendment XXIV explicitly protects that right. *See Reynolds*, 377 U.S. at 567 ("To the extent that a citizen's right to vote is debased, he is that much less a citizen.").

326 U.S. CONST. art. I, § 8, cl. 8. This is known as the Intellectual Property Clause. Menell, *supra* note 15, at 738.

327 U.S. CONST. art. I, § 1.

328 *See* U.S. CONST. art. I, § 8, cl. 8.

329 *See, e.g.*, CHEMERINSKY, *supra* note 322, at 795.

Nation's history and tradition,"[330] or "implicit in the concept of ordered liberty."[331] The historical approach has been a particularly productive approach for arguing that a right is fundamental because there are so few explicitly enumerated in the Constitution. The Supreme Court has found a number of fundamental rights in this manner: for example, the right to family in *Moore v. City of East Cleveland*.[332] *Moore* involved a statute restricting the occupancy of a single dwelling unit to a single family, and the statute's definition of "family" did not include a grandmother and two grandsons living together.[333] In finding the law unconstitutional, the plurality held that the right to family, including living with one's extended family, is fundamental because that right is ingrained in the history and traditions of the United States:

> The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. . . . [I]t has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home. . . .
>
> Whether or not such a household is established because of personal tragedy, the choice of relatives in this degree of kinship to live together may not be lightly denied by the State.[334]

The Court held that the rights to family and to include extended family in a household are fundamental rights because families in the United States have historically been defined to include relatives beyond parents and children.[335]

Similarly, scientific progress and innovation have consistently been a part of the traditions of the United States, and laws protecting intellectual property have been around since the first Congress. That first Congress passed both the Copyright Act of 1790[336] and the Patent Act of 1790.[337] These Acts have been revised and reformed many times, from alterations to the length of time they provide protection to the subject matter they cover,[338] but there has always

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330 Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977); *see also* Lawrence v. Texas, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting) ("[F]undamental rights . . . are 'deeply rooted in this Nation's history and tradition . . . .'" (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997))).

331 *See Washington*, 521 U.S. at 721 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

332 *Moore*, 431 U.S. 494.

333 *Id. at* 495–98.

334 *Id.* at 504–06 (footnotes omitted).

335 *See id.* at 505–06.

336 Copyright Act of 1790, ch. 15, 1 Stat. 124 (repealed 1803).

337 Patent Act of 1790, ch. 7, 1 Stat. 109 (repealed 1793).

338 *See, e.g.*, Patent Act of 1952, Pub. L. No. 553, 66 Stat. 792 (expanding coverage to "processes" and allowing for a patent to remain valid even if some claims have been invalidated); Patent Act of 1836, ch. 357,

been some form of intellectual property law in the United States. Thus, even as United States society has evolved and changed, the protection of intellectual property has remained an important tradition.[339] Additionally, the United States was a party to some of the earliest international intellectual property treaties, which further supports the conclusion that promoting the growth of intellectual property has long been an important goal of the United States.[340] Under this nontextual, historical approach to the "fundamental" analysis, protecting and promoting intellectual property is fundamental because there has been consistent protection for those who invest in creating intellectual property, dating back to the first laws of the United States.

B. Intellectual Property, Licenses, and Bankruptcy

Only two United States cases to date, *In re Gold & Honey* and *In re Toft*, have used § 1506 to deny recognition to a foreign proceeding because recognition would contravene fundamental policies, and both courts based their decisions on multiple grounds.[341] The court in *In re Gold & Honey* denied the foreign representative's petition for recognition because the foreign proceeding occurred in violation of direct court orders.[342] While the court did not discuss this point in depth, allowing actions under these circumstances would harm the legitimacy of the court's authority.[343] A court's authority over litigants is fundamental because it is "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[344] Further, the court held that

5 Stat. 117 (creating the Patent Office and hiring of a Patent Examiner to analyze the prior art before acceptance of an application) (repealed 1870); *see also* Copyright Act of 1976, Pub. L. No. 94-551, 90 Stat. 2541 (broadening the coverage of protection to works that are fixed rather than only published); Copyright Act of 1831, ch. 16, 4 Stat. 436 (changing terms of copyrights from fourteen to twenty-eight years and adding protection for musical compositions) (repealed 1870).

[339] *See generally* Edward C. Walterscheid, *Divergent Evolution of the Patent Power and the Copyright Power*, 9 MARQ. INTELL. PROP. L. REV. 307 (2005).

[340] For example, the Paris Convention for the Protection of Industrial Property was written in 1883 and provides for cooperation and clarity regarding intellectual property rights (including, among others, patents, industrial designs, and trade names) between all member nations. *See Summary of the Paris Convention for the Protection of Industrial Property (1883)*, WIPO.INT, http://www.wipo.int/treaties/en/ip/paris/summary_paris.html (last visited Mar. 1, 2011). The United States became a contracting party of the Paris Convention in 1887. *See, e.g.*, *Contracting Parties to Paris Convention*, WIPO.INT, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=2 (last visited Mar. 1, 2011).

[341] *See In re* Toft, 453 B.R. 186, 196–98, 200 (Bankr. S.D.N.Y. 2011); *In re* Gold & Honey, Ltd., 410 B.R. 357, 372–73 (Bankr. E.D.N.Y. 2009).

[342] *See In re Gold & Honey, Ltd.*, 410 B.R. at 372.

[343] *See id.*

[344] Griswold v. Connecticut, 381 U.S. 479, 487 (1965) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

granting recognition would affirm a violation of the automatic stay.[345] The automatic stay serves to "prevent[] one creditor from obtaining an advantage over other creditors[] and provid[es] for the efficient and orderly distribution of a debtor's assets to all creditors."[346] Finally, the court held that granting recognition would harm the jurisdiction of bankruptcy courts.[347] Two separate statutes grant federal courts jurisdiction over a debtor's property "wherever located and by whomever held."[348] This broad grant of jurisdiction is fundamental to an effective bankruptcy system because it prevents a debtor from simply moving his property out of the United States to avoid his creditors.[349]

The court in *In re Toft* denied the foreign representative's motion to allow delivery of the debtor's present and future emails without the debtor's permission because the relief would violate "a comprehensive scheme of statutory protection . . . built on constitutional safeguards."[350] The foreign representative did not have a warrant, and, if the court had granted the foreign representative's motion, the relief would have triggered criminal liability.[351] Additionally, the foreign representative requested that the relief be granted without any notice to the debtor,[352] which would violate both Bankruptcy Rule 2002 specifically[353] and procedural due process generally. Ensuring fairness and due process is a fundamental policy of the United States because it is protected by the Constitution, via the Fourteenth Amendment.[354] Further, protecting fairness and due process is one of the primary considerations in determining whether to extend comity to a foreign proceeding.[355]

Promoting intellectual property is a fundamental policy that justifies a § 1506 exception.[356] Furthermore, protecting intellectual property licensees' rights and securing a strong licensing market is a critical part of promoting the growth of intellectual property and should itself be protected under § 1506.[357]

345 *In re Gold & Honey, Ltd.*, 410 B.R. at 372.
346 *Id.*
347 *Id.* at 372–73.
348 11 U.S.C. § 541(a) (2006); *see also* 28 U.S.C. § 1334(e)(1).
349 *See In re Gold & Honey, Ltd.*, 410 B.R. at 372.
350 *In re* Toft, 453 B.R. 186, 198 (Bankr. S.D.N.Y. 2011).
351 *Id.*
352 *Id.* at 189.
353 *Id.* at 200.
354 U.S. CONST. amend. XIV, § 1.
355 *See supra* Part II.
356 *See supra* Part III.A.
357 *See generally infra* text accompanying notes 367–401.

The parallels between this conclusion and the implicit reasoning in *In re Gold & Honey* are easy to demonstrate. The Constitution explicitly directs Congress to establish a federal bankruptcy system;[358] the first attempts at establishing such a system were as early as 1800,[359] but the first bankruptcy law that was able to endure more than a few years was the Bankruptcy Act of 1898.[360] Both the originalist and historical approaches for defining "fundamental" thus support the conclusion that maintaining a stable and effective bankruptcy system is a fundamental policy of the United States.[361] The automatic stay and worldwide jurisdiction over a debtor's property are both critical components of the Code,[362] and the court in *In re Gold & Honey* properly invoked § 1506 to protect them. Permitting or validating a violation of either the stay or worldwide jurisdiction would substantially contravene the fundamental policy of maintaining a bankruptcy system; therefore, the stay and worldwide jurisdiction are themselves fundamental and justify a § 1506 exception when threatened.[363]

As licensing is an equivalently essential part of promoting the growth of intellectual property, it should be considered a fundamental policy as well. Failing to protect the licensees of intellectual property substantially impedes the growth of intellectual property by removing one of the main sources of revenue for inventors and creators.[364] In purely domestic bankruptcy cases, bankruptcy law recognizes this connection and protects such licenses in § 365(n).[365] Indeed, the fact that § 1520[366] does not specifically include § 365(n), or even § 365 more broadly, does not negate the fundamental nature of protecting intellectual property licenses. For example, § 1520 makes no mention of either § 541 or 28 U.S.C. § 1334, both of which establish that

358 U.S. CONST. art. I, § 8, cl. 4 ("The Congress shall have Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies . . . .").

359 Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (repealed 1803).

360 Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 401(a), 92 Stat. 2549, 2682.

361 The originalist approach would emphasize the constitutional warrant to create a bankruptcy system, while the historical approach would emphasize the early and continued attempts at creating and maintaining a bankruptcy system; regardless, both approaches support the conclusion that having a stable bankruptcy system is a fundamental policy of the United States.

362 *See In re* Gold & Honey, Ltd., 410 B.R. 357, 372 (2009).

363 *See id.* at 371–73.

364 *See* Menell, *supra* note 15, at 737.

365 *See supra* Part I.A.

366 11 U.S.C. § 1520 (2006) (governing the effects of recognition of a foreign main proceeding and indentifying certain provisions that automatically apply once the United States court grants recognition).

bankruptcy courts have worldwide jurisdiction over a debtor's property.[367] The court in *In re Gold & Honey* held that where granting recognition of a foreign proceeding would interfere with worldwide jurisdiction, § 1506 may be invoked to protect that fundamental policy, notwithstanding the omission of jurisdictional statutes from the automatic application provision.[368] Thus, as this Comment will now show, protecting intellectual property licenses is a fundamental policy of the United States within the meaning of § 1506, despite its absence from § 1520. While § 365(n) protects such licenses in purely domestic bankruptcies, courts should use § 1506 to extend bankruptcy protection of intellectual property licenses to chapter 15 cases.

A brief overview of patent and copyright law will help demonstrate why bankruptcy law, even in cross-border cases, should protect intellectual property licenses as it already does domestically with § 365(n). The United States patent and copyright systems give the creators exclusive control over their works for a limited period of time. Generally, "granting intellectual property rights in innovations . . . provide[s] an incentive or reward for the sizeable investments needed to create the intellectual property . . . ."[369] Granting property rights encourages investment into such productive activities by removing the possibility of free riders, or parties that may attempt to copy an inventor or author's work. Further, it gives those inventors and authors the ability to control the pricing of their products, allowing them to recoup their production costs and potentially make a profit by commercializing their intellectual property.[370] This control over use allows the inventor or author to make money by selling the right to use his or her creation by granting licenses.[371] In other words, "[t]he intellectual property laws are generally concerned with asset creation. Therefore, they encourage conditions that promote investment in research and development, as well as the maximization of value that can be derived from such assets. Much of the value of intellectual property flows from licensing goods and services."[372]

This ability to contract freely plays a crucial role in "maximizing the potential value of intellectual property by encouraging a robust licensing

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[367] *See id.* § 541(a) (defining the property of the estate to include the debtor's property "wherever located and by whomever held"); *see also* 28 U.S.C. § 1334(e) (granting the district court "exclusive jurisdiction" over all of the property of the debtor "wherever located").

[368] *In re Gold & Honey, Ltd.*, 410 B.R. at 372–73.

[369] John F. Duffy, *Rethinking the Prospect Theory of Patents*, 71 U. CHI. L. REV. 439, 439 (2004).

[370] *See* Menell, *supra* note 15, at 738–40.

[371] *Id.* at 741.

[372] *Id.* at 737.

market to exploit the value of intellectual creativity."[373] Economically speaking, most individuals will not invest in creating intellectual property unless they reasonably believe they will be able to profit from their investments.[374] Usually, that profit is largely derived from being able to license the creation to others or using the creation to create some "competitive advantage in the marketplace."[375] The strength of licensing markets thus plays a critical role in funding the development of technology and intellectual property.[376] The relationship between licensing and promoting the growth of intellectual property is a fundamental one and distinct from the relationship between the right to a jury trial and procedural due process at issue in *In re Ephedra*.[377] While a jury trial is a useful tool for ensuring procedure due process, it is not necessary, and due process can be assured in other ways.[378]

In contrast, licensing is a necessary part of promoting the growth of intellectual property because "[l]icensing provides the mechanism by which the original innovator can retain sufficient ownership of his innovation so that he shares in the ultimate economic reward, while sharing that reward as remuneration to those who would provide the financing and refinement necessary to achieve economic success."[379] Further, licensing allows people other than the creator to exploit the intellectual property in ways that the creator may not have imagined because "once [a creator or inventor] becomes competent in pursuing one avenue of development, [that creator or inventor] may have difficulty keeping track of other potential avenues."[380] Thus, because licensing is the primary way authors and inventors recoup their initial costs and make a profit, and because licensing allows further development of intellectual property in new and different ways, licensing is a crucial part of encouraging the development of intellectual property.[381]

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373 *Id.*; *see also* S. REP. NO. 100-505, at 3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3200, 3202.

374 *See* Menell, *supra* note 15, at 738.

375 *Id.* at 738–39.

376 *See id.* at 741; *see also* S. REP. NO. 100-505, at 3.

377 RSM Richter Inc. v. Aguilar (*In re* Ephedra Prods. Liab. Litig.), 349 B.R. 333, 335–37 (S.D.N.Y. 2006); *see also* discussion *supra* Part II.B.

378 *See id.* at 335, 337 (finding due process satisfied when the Canadian court adopted certain amendments to its claims procedures).

379 S. REP. NO. 100-505, at 3.

380 F. Scott Kieff, *Property Rights and Property Rules for Commercializing Inventions*, 85 MINN. L. REV. 697, 726 (2001); *see also* S. REP. NO. 100-505, at 3 ("Licensing . . . provides a mechanism whereby the innovator who has identified more than one domain in which his invention may have application can seek partners for each field of use without risking the probability that one developer's narrow focus will deny him the rewards of development in another area.").

381 *See* Menell, *supra* note 15, at 741.

Failing to protect intellectual property licenses from complete rejection under foreign law, in contravention of a fundamental policy, will have a disastrous effect on the advancement of intellectual property in the United States. If debtor-licensors have the absolute ability to revoke a license, "the trustee might seek to rescind licenses in an effort to negotiate better terms."[382] By the time the licensor has gone into debt, "the licensee may have made substantial specific investments in reliance on the continued licensing of intellectual property rights."[383] This may mean substantial losses to the licensee, potentially leading to bankruptcy, or it may leave the licensee without the bargaining power to negotiate a reasonable new license.

Another problem with leaving intellectual property licenses vulnerable to foreign law is that it is not always clear which country's law will apply. When a foreign representative petitions a court for recognition of a foreign proceeding, the court can rule that the proceeding is either a main or a nonmain proceeding.[384] This distinction is important because "the bankruptcy proceeding [is] governed in accordance with the bankruptcy laws of the nation in which the main case is pending."[385] A main proceeding is one that is "pending in the country where the debtor has the center of its main interests."[386] While there is a presumption that a debtor's "center of main interests" is in the country where it is headquartered, this presumption is not absolute.[387] Because determining the center of main interests often depends on the discretion of the court and there is a lack of certainty about where a court will decide the center main of interest is located, "multinational entities are burdened by not knowing, at the time of licensing, what jurisdiction's laws will determine the rights . . . under a license . . . ."[388] Not applying § 365(n) leaves the licensee uncertain about which country would be the licensor's center of main interest, which determines the laws that govern the bankruptcy case.[389]

[382] *Id.* at 768.
[383] *Id.*
[384] *See* 11 U.S.C. §§ 1515, 1517 (2006).
[385] *In re* Qimonda AG, No. 09-14766-RGM, 2009 WL 4060083, at *1 (Bankr. E.D. Va. Nov. 19, 2009).
[386] 11 U.S.C. § 1502(4).
[387] *See id.* § 1516(c).
[388] Nadine Farid, *The Fate of Intellectual Property Assets in Cross-Border Insolvency Proceedings*, 44 GONZ. L. REV. 39, 71 (2008).
[389] *Cf. id.* at 68 (noting that foreign main proceedings are in the state where the debtor's center of main interests is located and "the laws of the state housing the main proceeding are the laws which dictate the assets within the bankruptcy estate and the rights of the debtor").

Without protecting intellectual property licenses, a business that relies on the right to use that intellectual property faces a great deal of risk in entering into a license contract.[390] The damage done by one party's bankruptcy should be limited so as to prevent additional harm to third parties who relied on the license to a substantial degree.[391] Failure to protect licenses might lead investors to demand assignments[392] in order to guarantee they will have the right to use the intellectual property.[393] The vulnerability of these licenses, then, hinders the full development of intellectual property and can cause severe financial distress to inventors either by forcing the inventor to give up his legal rights to the intellectual property through assignment or by discouraging potential licensees from contracting.[394] Reliance on sale rather than licensing restricts the number of people who can participate in the development of technology[395] and limits future investment in productive activities.

With the current law under chapter 15, intellectual property licenses exist in a pre-*Lubrizol* state, vulnerable to complete rejection in the licensor's bankruptcy.[396] After *Lubrizol*, Congress acted to prevent the "threat to the development of American Technology" caused by the vulnerability of intellectual property licenses in bankruptcy.[397] If, however, either Congress or the courts fail to act and leave intellectual property licenses vulnerable in international bankruptcies, they will continue to allow a substantial obstacle to developing science and technology, in derogation of the fundamental policy of the United States to promote the growth of intellectual property. Maintaining a strong international licensing market, on the other hand, would protect the incentives for investing in creative activities.[398] Without adequate protection for intellectual property licenses in the context of chapter 15 bankruptcies, the vulnerability of such licenses will remain "a fundamental threat to the creative process that has nurtured innovation in the United States."[399]

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390 *Id.* at 43.

391 Jon Minear, *Your Licensor Has a License to Kill, and It May Be Yours: Why the Ninth Circuit Should Resist Bankruptcy Law That Threatens Intellectual Property Licensing Rights*, 31 SEATTLE U. L. REV. 107, 133–34 (2007).

392 *See* Menell, *supra* note 15, at 780–81.

393 S. REP. NO. 100-505, at 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3200, 3202.

394 *Id.* at 3.

395 *Id.*

396 Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc. (*In re* Richmond Metal Finishers, Inc.), 756 F.2d 1043 (4th Cir. 1985), *superseded by statute*, 11 U.S.C. § 365(n) (2006); *see also supra* Part I.A.

397 S. REP. NO. 100-505, at 1.

398 *See* Menell, *supra* note 15, at 741.

399 *See* S. REP. NO. 100-505, at 2.

IV. RECOMMENDATIONS FOR PROTECTING INTELLECTUAL PROPERTY LICENSES

This Comment proposes three solutions to the problem of leaving intellectual property licenses vulnerable to potentially hostile foreign law in violation of the fundamental policy of the United States. Each proposed solution, by itself, would protect licensees and continue to promote the growth of intellectual property. First, courts should recognize that protecting intellectual property licenses qualifies as a fundamental policy of the United States and should invoke § 1506 whenever a foreign proceeding threatens those licenses. Second, Congress should amend § 1520 to automatically apply § 365(n) in cases under chapter 15. Third, potential licensees should negotiate a choice of law clause in their licenses to ensure clarity as to which law will apply should the licensor go bankrupt.

First and foremost, bankruptcy courts should find that protecting intellectual property licenses is a fundamental policy of the United States and should deny recognition of foreign proceedings under § 1506 when foreign law allows total rejection of the license. Section 1506 is a narrow grant of discretion meant to give United States courts the ability to protect public policy instead of granting recognition to a foreign proceeding. Every case to consider § 1506 has affirmed that it should be interpreted narrowly and should only be invoked when foreign law is manifestly contrary to public policy.[400] Both the Model Law and the House Report accompanying chapter 15 state that the inclusion of the word "manifestly" in the text of Article 6 and § 1506, respectively, "restricts the public policy exception to the most fundamental policies of the United States."[401]

The case law concerning § 1506 has not clearly demonstrated what makes a policy "fundamental," but other United States case law has.[402] Whether the justification is the intellectual property clause of the Constitution[403] or the history and traditions of United States society, the policy of promoting intellectual property growth certainly falls within the definition of "fundamental" established by constitutional precedent.[404] Further, because a

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400 *See, e.g.*, *In re* Gold & Honey, Ltd., 410 B.R. 357, 372 (Bankr. E.D.N.Y. 2009).

401 H.R. REP. NO. 109-31(I), at 88 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 172; *see also* MODEL LAW ON CROSS-BORDER INSOLVENCY, *supra* note 3, at pt. 2, para. 89.

402 *See supra* Part III.A.

403 U.S. CONST. art. I, § 8, cl. 8.

404 *See supra* Part III.A.

secure licensing market is necessary to promote intellectual property development, U.S. courts should hold that protecting intellectual property licenses is itself a fundamental policy.

Given this fundamental policy, United States courts should use § 1506 to apply United States law, specifically § 365(n), to protect intellectual property licenses. Section 365(n) protects the essential purposes of a license: the licensee's right to use the intellectual property[405] and the licensor's right to receive payments.[406] Section 365(n) is how Congress chose to protect this fundamental policy within the Code;[407] however, it is important to note that the fundamental policy is the protection of intellectual property licenses, which might not be fully enveloped within the bounds of § 365(n). If the court finds that the foreign proceeding otherwise protects the license or the licensee's right to use the intellectual property, then the court would not need to deny recognition under § 1506.[408] For instance, the foreign representative could petition the court under § 1521 to not apply § 365(n), if it can demonstrate that the licensee's rights are protected by other means.[409] However, if a foreign proceeding genuinely fails to protect intellectual property licenses, the United States court should deny recognition under § 1506.

The second solution to prevent licensees from losing the right to use the intellectual property is for Congress to amend § 1520 to include § 365 generally, or § 365(n) specifically. One of the most important purposes of chapter 15 is to foster "greater legal certainty for trade and investment,"[410] and this solution would foster greater legal certainty regarding the status of intellectual property licenses in chapter 15 bankruptcies. The existing U.S. case law regarding international intellectual property licenses substantially undercuts that goal.[411] It demonstrates that, even though courts should invoke § 1506 to protect licenses from hostile foreign law, it is not at all clear that

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405 11 U.S.C. § 365(n)(1)(B) (2006).

406 *Id.* § 365(n)(2)(B).

407 *See* S. REP. NO. 100-505, at 4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3200, 3203.

408 *See, e.g.*, RSM Richter Inc. v. Aguilar (*In re* Ephedra Prods. Liab. Litig.), 349 B.R. 333, 335–37 (S.D.N.Y. 2006) (holding that if a foreign proceeding offers comparable, if not wholly similar, protections of a fundamental policy, § 1506 does not apply).

409 11 U.S.C. § 1521(a) ("Upon recognition of a foreign, whether main or nonmain, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief . . . .").

410 *Id.* § 1501(a)(2).

411 *See In re* Qimonda AG, No. 09-14766-RGM, 2009 WL 4060083, at *1 (Bankr. E.D. Va. Nov. 19, 2009) (granting recognition to a German proceeding that licensees feared might strip their licenses to use the debtor's intellectual property), *aff'd in part, remanded in part*, 433 B.R. 547 (E.D. Va. 2010).

courts would in fact do so. A court could find that advancing intellectual property development is not a fundamental policy despite its roots in both the Constitution and the history and traditions of the United States. Alternatively, a court could find that protecting licenses is not necessary to advancing intellectual property development despite licensing's indispensibility in recouping investment costs, making a profit, and allowing revisions to the intellectual property by those best able to recognize possible weaknesses.[412] Potential licensees who note this uncertainty may choose not to contract or may demand an outright sale of the intellectual property, neither of which is an effective use of resources.[413] However, if § 365(n) were to apply automatically upon recognition of a foreign proceeding, there would be no such uncertainty, and potential licensees would feel confident that their rights would be preserved even if the licensor were to go into bankruptcy. If allowing the debtor to completely reject the license would be in the debtor's best interest, then the foreign representative could petition the court under §§ 1521 and 1522 to stop § 365(n) from being applied.[414] The court would grant the foreign representative's request only if the representative showed that the interests of the creditor—the licensee, in this case—were sufficiently protected.[415] Either way, this solution would ensure that a licensee's rights were protected in the event of the licensor's bankruptcy, thereby alleviating any potential harm to the licensing market.

Amending the Code to automatically apply § 365(n) specifically, or § 365 generally, in a chapter 15 case would not prevent a foreign court from exercising its jurisdiction over a foreign national debtor's property wherever it is located. Further, when a U.S. court asserts the § 1506 policy exception, this does not substantially impair a foreign court's jurisdiction over any debtor's world-wide property. If that were the case, these suggestions would violate the fundamental policy of ensuring that the court must have jurisdiction over the debtor's property, wherever held.[416] Foreign debtors may still assume or reject licenses as they see fit, under either American law or their countries' laws, and they may free themselves from having to perform burdensome affirmative acts under the licenses. However, they may not unilaterally prevent licensees from

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[412] *See* Menell, *supra* note 15, at 737–41.

[413] S. REP. NO. 100-505, at 3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3200, 3202–03.

[414] 11 U.S.C. §§ 1521(a), 1522 (allowing the court to grant "any appropriate relief" under § 1521 but restraining this power by only allowing the court to grant relief under § 1521 "if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected").

[415] *See id.* § 1522(a)–(c).

[416] *See In re* Gold & Honey, Ltd., 410 B.R. 357, 372–73 (2009).

continuing to use the intellectual property merely by a rejection. While the suggested application of § 365(n) does somewhat limit a foreign debtor's ability to reject an executory contract, such limitation is not fundamentally unfair. In fact, § 365(a) does not give a debtor plenary power to reject executory contracts but subjects that power to the court's approval.[417] Similarly, limiting a foreign debtor's rejection of a United States license does not prevent the debtor or the foreign court from exercising jurisdiction over the license, but instead properly protects the interest of the non-debtor party, the licensee, and the fundamental policies of the United States.

Regardless of any future judicial or congressional action, potential intellectual property licensees already have two options to protect their rights if their licensor goes bankrupt. First, if a party is already a licensee and their licensor is a foreign company that has gone bankrupt, that party may be able to protect itself under § 1522.[418] Section 1522 requires the court to grant or modify relief only if the interests of all related parties are protected.[419] If a licensee risks losing his contractual right to use intellectual property, he could invoke § 1522 to guarantee that his rights are protected. This is not the most desirable option,[420] but once the licensor is already in bankruptcy and his license is at risk, it provides an option for a licensee to try to protect his rights.

Second, potential licensees can act affirmatively rather than rely on either Congress to act, or wait for the courts to act, once the licensor has declared bankruptcy. Potential licensees, when negotiating their license agreements, should include choice of law clauses to guarantee certainty about the nature of their rights should their licensors go into bankruptcy. This would allow United States courts to cooperate fully with foreign proceedings while avoiding potential harm to the fundamental policy of promoting the growth of intellectual property. It is important to note that such a contract provision is likely to stand up in court because the United States has a very strong policy of

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417 11 U.S.C. § 365(a) (providing that "the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor").

418 *Id.* § 1522(a) (authorizing the courts in chapter 15 cases to "grant relief under [§] 1519 or 1521, or . . . modify or terminate relief under subsection (c), [but] only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected").

419 *Id.*

420 The court could decide that the foreign proceeding sufficiently protects his interest even though he loses his license. *See id.* § 1522(a), (c) (allowing a court to order such relief if the interests are sufficiently protected). Alternatively, the court could hold that a general unsecured claim for damages under § 365(g) is sufficient to protect the licensee's interest and that the debtor may therefore reject the license. *See id.* §§ 365(g), 1522(a), (c).

encouraging freedom of contract.[421] Additionally, courts are unsympathetic to proceedings that violate contractual choice of law, and they need not recognize such judgments or proceedings.[422] This would solve the problem of any possible uncertainty and encourage parties to protect their interests themselves without relying on the potential help of either the courts or Congress.

CONCLUSION

Section 1506 provides a public policy exception that allows courts to refuse to recognize foreign proceedings when those proceedings would be manifestly contrary to the public policy of the United States. Prior to 2005, § 304(c) and the principle of international comity governed the issue of recognizing foreign proceedings. When § 1506 was adopted, it was intended to not only fit within the existing case law but also to restrict the situations in which comity could be denied. Both the Senate Report accompanying the passage of § 1506 and the Model Law that inspired the statute demonstrate that this exception should be construed much more narrowly than was § 304. Courts that have considered § 1506 have done just that by consistently holding that they can deny recognition of a foreign proceeding only when recognizing the proceeding would violate a fundamental policy of the United States.

Despite a lack of cases to date defining precisely what "fundamental" means with respect to § 1506, there is considerable case law outside of bankruptcy that defines "fundamental" within the context of individual rights. Courts may look to the original meaning of the Constitution to determine whether something is "fundamental," or they may look to the history and traditions of the United States. In terms of U.S. policies, promoting intellectual property growth and development is clearly "fundamental" regardless of the approach. The United States has a fundamental interest in promoting intellectual property development and the economic, scientific, and artistic benefits that it brings to society. Licensing plays a crucial role in this process and is a necessary means for incentivizing investment in such productive activities. Therefore, encouraging and protecting a robust licensing market

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421 For example, the Contracts Clause of the Constitution explicitly prohibits states from interfering with valid contracts. U.S. CONST. art. I, § 10, cl. 1. One could even say that freedom of contract is a fundamental policy of the United States because it is clearly implied from the text of the Constitution. However, that argument is best left for another article.

422 *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1971) (amended 1988) (providing that, subject to two narrow exceptions, the law of the state chosen by the parties will "govern their contractual rights and duties").

must also be a fundamental policy of the United States. However, U.S. bankruptcy law currently fails to protect such intellectual property licenses when the law of the foreign proceeding could allow the debtor to completely reject them. Either the courts or Congress should pursue the solutions suggested by this Comment to remedy the problem; in the interim, individual parties should include a choice of law clause to protect their license rights.

Promoting the advancement of science and technology is a fundamental policy of the United States, but the increasingly international nature of the American economy threatens to substantially weaken the "Progress of Science and [the] useful Arts"[423] in America. The United States must make changes to its international bankruptcy law to protect intellectual property licenses, even in a chapter 15 bankruptcy proceeding. With such protections in place, the United States can continue to pursue its fundamental policy of promoting technological innovation.

DANIEL A. NOLAN IV[*]

[423] U.S. CONST. art. I, § 8, cl. 8.

[*] Executive Notes and Comments Editor, *Emory Bankruptcy Developments Journal*; J.D. Candidate, Emory University School of Law (2012); B.A., University of Notre Dame (2009). I would like to thank Professor Timothy Holbrook for his exceptional and invaluable guidance in writing this Comment; the Staff of the Emory Bankruptcy Developments Journal, particularly Sonali Chitre for reading countless drafts and Matthew Pechous for his tireless editing; and Julia Hueckel for reading and editing an 11th-hour draft. Finally, I would especially like to thank Jeremy Cauffman, for his endless love, support, and humor and for teaching me not to take myself so seriously.