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International Copyright: From a “Bundle” of National Copyright Laws to a Supranational Code?

–Jane C. Ginsburg*

Introduction

In *Federalist* No. 43, James Madison, justifying the new U.S. Constitution’s patent-copyright clause, declared, “The States cannot separately make effectual provision” for the protection of the exclusive rights of authors.¹ Territorial regimes limited by state borders could not ensure effective protection for works whose distribution inevitably (and designedly) crossed state lines.² For that reason, Congress required the authority to “secur[e] for limited Times to Authors the exclusive Right to their . . . Writings,”³ lest the interstate movement of works of authorship deprive authors of effective coverage.⁴

Today, in an era of instantaneous transnational communication of copyrighted works, the same concerns that faced the Framers of the Constitution

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¹A. HAMILTON, J. JAY, J. MADISON, *THE FEDERALIST*, No. 43, 279 (Modern Lib. ed.).

²During the period of the Articles of Confederation, the separate States were urged to pass copyright laws; all but Delaware did. See, “Resolution passed by the Colonial Congress, recommending the several States to secure to the authors or publishers of new books the copyright of such books,” May 2, 1783, *reprinted in* THORVALD SOLBERG, ED. *COPYRIGHT ENACTMENTS OF THE UNITED STATES* 11, 29 (1906). These piecemeal measures, however, proved inadequate, at least for entrepreneurial authors, like Noah Webster, who sought a nationwide audience. See, NOAH WEBSTER, *Origin of the Copy-Right Laws in the United States*, in *A COLLECTION OF PAPERS ON POLITICAL, LITERARY AND MORAL SUBJECTS 173-78* (New York 1843) (Burt Franklin reprint 1968).

³U.S. CONST., art. I, sec. 8, cl. 8..

⁴After ratification of the Constitution, but before the new U.S. Congress enacted the first copyright law in 1790, authors sought nationwide coverage, by petitioning Congress for special protections. See, *Proceedings in Congress During the Years 1789 and 1790, Relating to the First Patent and Copyright Laws*, 22 J. PAT. OFF. SOC. 243 (1940) (reproducing the text of the petitions).

of the United States in 1789 have surfaced in the international context. There is reason to doubt that the nation states that comprise the Berne Union, the World Trade Organization, and beyond can “separately make effectual provision” for the protection of authors’ rights. Yet “international copyright,” in the sense of a uniform law binding all nation states, does not exist.⁵ Rather, at present we have a system of interlocking *national* copyrights, woven together by the principle of national treatment. While the Berne Convention has imposed a minimum standard as to subject matter and rights protected, this multilateral overlay cannot conceal the traditional image of international copyright as essentially a bundle of national, territorially defined, rights.⁶

But this traditional image may be increasingly misleading. In recent years, the number and content of substantive norms that multilateral instruments impose on member states have increased considerably. This is, therefore, a good time to consider the extent to which those instruments have created an international (or at least multinational) copyright code, as well as to inquire what role national copyright laws do and should have in an era not only of international copyright norms, but of international dissemination of copyrighted works. In this Article, I first consider the displacement of national norms through the evolution of a de facto international copyright code, elaborated in multilateral instruments such as the Berne Convention, the TRIPs Accord, and the pending WIPO Copyright Treaty, as well as by harmonization measures within the European Union. In the second part of this Article, I address the place that remains for national copyright norms, first through gaps left in the WIPO, WTO and EU multilateral instruments, and second, through choice of law. In the latter instance, a national norm will govern a multinational copyright contract or dispute, but other national copyright norms may be eluded.

Finally, in an era of international trade and norms, I consider what role *should* remain for national copyright laws. National copyright laws are a component of local cultural and information policies. As such, they express each sovereign nation’s twin aspirations for its citizens: exposure to works of

⁵See, e.g., Copyright Office Home Page, <<http://lcweb.loc.gov/copyright/fls/fl100.pdf>> (visited Oct. 1, 1999) (“There is no such thing as ‘international copyright’ that will automatically protect an author’s writings throughout the world.”).

⁶See, e.g., Jon Baumgarten, *Primer on the Principles of International Copyright*, in FOURTH ANNUAL U.S. COPYRIGHT OFFICE SPEAKS: CONTEMPORARY COPYRIGHT AND INTELLECTUAL PROPERTY ISSUES 470, 471 (1992) (Prentice-Hall Law & Business): “The term ‘international copyright’ is something of a misnomer, for neither a single code governing copyright protection across national borders, nor a unitary multi-national property right, exists. What does exist is a complex of copyright *relations* among sovereign states, each having its own copyright law applicable to acts within its territory.” (emphasis in original)

authorship, and participation in their country's cultural patrimony. Perhaps that simply means that each country's local policies should prevail within its borders, whatever the national origin of the work locally received. On the other hand, the pervasive international dissemination of works of authorship also calls into question the extent to which authors and their works should be subject to different national standards. I conclude that national laws allocating copyright ownership form the strongest candidates for preservation; national exceptions to copyright present a more difficult, but potentially persuasive, case for persistence of national norms as well.

I. Toward an international copyright code

A. Berne Convention, the TRIPs Accord, and the Pending WIPO Copyright Treaty

1. The genesis of the Berne Convention: roots of the debate between supranational norms and national treatment

From the outset of the movement for international copyright protection, two distinct principles have vied for primacy. On the one hand, the non-discrimination principle of national treatment preserves the integrity of domestic legislation, but ensures that foreign authors will be assimilated to local authors. On the other hand, supranational norms guarantee international uniformity and predictability, and thus enhance the international dissemination of works of authorship. A compromise approach institutes national treatment, but avoids local underprotection by imposing minimum substantive standards that member countries must adopt. The development of the Berne Convention illustrates all three of these approaches.

In 1858, the first international Congress of Authors and Artists met in Brussels.⁷ The resolutions the Congress passed laid the groundwork for the writing and drafting of the Berne Convention. The Congress' resolutions urged elimination of formalities, national treatment, and uniform national legislation.⁸

⁷See S. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS 41 (1983).

⁸See S. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 72 (1938). The Congress of Authors and Artists met three times (1858, 1861, and 1877) and each time adopted resolutions asking governments to join together in passing legislation for the international protection of authors. The resolutions they passed in 1858 were:

That the principle of international recognition of copyright in favor of authors must be made part of the legislation of all civilized countries.

Thus, from the outset, national norms were to work in tandem with international norms, but the latter were to be implemented through uniform domestic legislation.

At the first intergovernmental meeting in 1883 to form the Berne Union, however, the emphasis initially shifted away from the non-discrimination principle of national treatment, and toward international uniformity. The German delegation, in a diplomatic questionnaire, asked whether it might be better to abandon the national treatment principle in favor of a treaty that would codify the international law of copyright and establish a uniform law among all contracting states. Although most participating countries viewed the proposition as a desirable one, they voted against it because it would have required great modifications of their domestic laws, which many countries could not implement all at once. Thus, rejecting a treaty that would institute a uniform law of international copyright, the fourteen participating nations chose to retain the national treatment approach.

The German proposition was nevertheless critical in that it revealed the differing copyright philosophies of the participants: while one group favored a codified and uniform law of international copyright, another preferred as little unification and as much national independence as possible.⁹ These differing

This principle must be admitted regardless of reciprocity.

The assimilation of foreign to national authors [national treatment] must be absolute and complete.

Foreign authors should not be required to comply with any particular formalities for the recognition and protection of their rights, provided they have complied with the formalities required in the country where publication first took place.

It is desirable that all countries adopt uniform legislation for the protection of literary and artistic works.

Id. See also SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986 42-43 (1987) [HEREINAFTER RICKETSON].

⁹Professor Sam Ricketson divides the differences in ideology into two groups: the universalist, and the pragmatic view. While the universalists wished for a uniform law of copyright to be adopted either through a multilateral convention or through each country's adoption of uniform, general laws applicable to both nationals and foreigners alike, the pragmatists criticized them as unrealistic and utopian. The pragmatists argued that true universality would be impossible in the absence of agreement on the fundamental nature of authors' rights (whether grounded in moral or economic rights). The pragmatists thus focused on the need for compromise and advocated the adoption of a minimal universality to which the largest number possible could adhere. Ricketson underscores that the tension between these

philosophical positions became manifest in the ensuing discussions of the substantive provisions of the Berne Convention. For example, countries that favored a universal law argued that the Convention should protect all authors who published in a Union state regardless of nationality.¹⁰

When the 1884 Conference began, an eighteen article draft awaited the participants. The draft contained all of the basic principles adopted at the 1883 conference: national treatment, abolition of formalities as a prerequisite for copyright protection, recognition during the entire term of the copyright of the author's exclusive right to authorize translations of her work, and the establishment of an International Bureau of the Union.¹¹ However, in light of the differing philosophies of international copyright protection, the 1884 draft was changed to protect only authors who were nationals of Union countries and publishers of works published in the Union. In general, in comparison to the universalist draft adopted at the 1883 Conference, the final draft of 1884 moved away from the idea of a comprehensive uniform international law of copyright.¹²

The draft introduced by the 1885 Conference was even less protective and less universal in scope than the 1884 version. The participants declined to adopt universally binding legislation, and instead left to the individual countries decisions as to the nature and the scope of copyright protection for foreign authors.¹³ The underlying rationale was that a flexible international treaty would permit more countries to accede to the Union, thus increasing membership.¹⁴ The

conflicting viewpoints strongly influenced the initial and subsequent development of the Berne Convention. The universalists have been responsible for the steady increase in measures to such an extent that the Berne Convention is sometimes viewed as an international code of copyright. On the other hand, the "modifying influence" of the pragmatists has ensured that these changes enjoyed the widest possible support; as a result, these measures often emerged in somewhat diluted form. *See id.* at 39-41.

¹⁰The universalist countries generally included France, Switzerland and Belgium. *See* BERNE CONVENTION 90-92 (WIPO ed. 1986) (recording comments and positions of these countries).

¹¹*See id.* at 83-86.

¹²For example, the participants granted each contracting state the right to establish conditions under which works could be freely reproduced in certain types of publications (ie scientific ones) and recognized the translation right for ten years only. *See* LADAS, *supra* note 8, at 79.

¹³*See Records of the Second International Conference for the Protection of Literary and Artistic Works in* BERNE CONVENTION, *supra* note 10, at 108.

¹⁴*See* LADAS, *supra* note 8, at 80-81.

adoption of a comprehensive and universal copyright law was thus sacrificed for a narrower body of rules accepted by a wide array of countries.

In order to further this goal of greater adherence, a number of provisions were amended and replaced by references to national law for provisions that previously constituted the beginning of a uniform codification of international copyright law.¹⁵ This draft was then ratified and signed at the 1886 Conference. Although the Convention did not achieve every goal outlined at the first Congress of 1858, it represented a major step towards international copyright protection. More significantly, despite the diverging philosophies of the participating countries, the 1886 Berne text lay the groundwork for later evolution toward the more universalist ideal expressed in earlier drafts.

2. The 1886 Berne Convention and its successors: the growth of supranational norms

The basic structure of the Berne Convention has remained relatively unchanged throughout each of its revisions. It contains substantive minimum standards of protection, as well as a general directive to accord Unionist authors national treatment. Each subsequent revision of the Berne Convention, from 1896 through 1971, as well as the 1994 Trade Related Aspects of Intellectual Property [TRIPs] accord,¹⁶ and the 1996 WIPO Copyright Treaty [WCT],¹⁷ however, have adopted more substantive minimum standards to which Union members must adhere, while retaining a key “pragmatic” feature: the Berne minima apply to a Union member’s protection of works from *other* Berne members; no Berne member is obliged to accord its *own* authors treaty-level protection.¹⁸ Thus domestic norms may continue to apply to purely domestic

¹⁵Among the amended provisions were those concerning translation rights, adaptations, the right of presentation of dramatic and dramatico-musical works, the protection of photographs and choreographic works, and the reproduction of articles in chrestomathies and in selections intended for instruction and the reproduction of articles of newspapers and periodicals. See LADAS, *supra* note 8, at 81.

¹⁶Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instrument — Results of the Uruguay Round, vol. 321, 33 I.L.M. 81 (1994).

¹⁷WIPO Copyright Treaty, CRNR/DC/94 (adopted by the Conference, December 20, 1996).

¹⁸See Berne Convention for the Protection of Literary and Artistic Works (1971 text) 1161 U.N.T.S. 3 arts. 5.1, 5.3 [hereinafter Berne Conv.].

copyright controversies, although, as a practical matter, local legislators may have difficulty justifying better treatment of foreign than domestic authors.¹⁹

The original Berne Convention provided an explicit, but not exclusive, list of works to be protected.²⁰ The Berne Convention also defined the conditions for protection, known as points of attachment, and also specified rules governing the term of protection.²¹ Subsequent conferences have amended each of these provisions in order to increase the scope of authors' rights. Among the minimum standards that all member countries were required to recognize, the original Berne Convention first established the translation right;²² more exclusive rights, as well as some optional exceptions, were added over the course of subsequent revisions.²³

The actual impact of the Berne Convention on national norms also depends on whether or not the member State treats the Convention as self-executing. If it does not, but instead executes its treaty obligations by implementing the substantive dispositions through its national law, there is a risk

¹⁹*But see, e.g.*, 17 U.S.C. § 104A (restoring copyright in non-U.S. Berne and WTO works whose copyrights expired due to failure to comply with U.S. formalities).

²⁰*See* Berne Conv. (1886 text), art. 4 *in* BERNE CONVENTION, *supra* note 10.

²¹*See id.*, arts. 2 & 3.

²²*See id.*, art. 5.

²³For example the exclusive recording right of musical works and the right of authors to authorize the reproduction and public performance of their work by means of a cinematograph were introduced by the Berlin Revision of 1908 (art. 13 and art. 14), the moral right to claim paternity of a work and the right to "object to any deformation, mutilation or other modification" of the work as well as the broadcasting right were introduced at the Rome Revision Conference of 1928 (arts. 6bis and 11bis), and the *droit de suite* was added at the Brussels Revision of 1948 (art. 14bis para. 1). The 1971 revision set forth the reproduction right, but also posed general terms under which member states could provide for exceptions to that right (arts. 9.1, 9.2) *See* BERNE CONVENTION, *supra* note 10.

that the national legislation will not fully conform to the Berne Convention's text.²⁴

The adoption by members of the World Trade Organization of the TRIPs accord further extended the Berne Convention minimum standards to countries beyond the Berne Union who are members of the World Trade Organization.²⁵ The TRIPs accord also imposed new substantive minima, both with respect to subject matter (computer programs and original compilations of data),²⁶ and to rights protected (rental right).²⁷ TRIPs also generalizes the conditions for limitations and exceptions to protection.²⁸ In a significant enhancement to the Berne Convention's substantive minima, the TRIPs accord contains detailed provisions on enforcement of copyright.²⁹ Thus, while the TRIPs continues to leave to national legislation many details of copyright scope and enforcement, the outline of uniform mandatory measures has become increasingly explicit. The place of national policy thus shrinks accordingly.

Finally, the 1996 WCT, now open for ratification, not only continues the trend of increased specification of the minimum international content of copyright subject matter and rights, but creates new obligations to protect against the circumvention of technological protection measures, and against the removal or tampering with copyright management information.³⁰ While member states may

²⁴For example, in 1989, when the U.S. adhered to the Berne Convention, it did not amend the 1976 Copyright Act to provide for the rights of attribution and integrity guaranteed by Berne Conv. Art. 6bis. Congress took the position that these rights already existed in the Copyright Act, or in other dispositions in the trademarks law or at common law. *See* H.R. Rep No. 609, 100th Cong., 2d sess. at 37 (stressing that then-Director-General of WIPO Arpad Bogsch endorsed the U.S. view that its pre-Berne adherence positive law satisfied art. 6bis). This assertion has prompted considerable skepticism, see, e.g., Adolf Dietz, *The United States and Moral Rights: Idiosyncrasy or Approximation? Observations on a Problematical Relationship Underlying United States Adherence to the Berne Convention*, 142 RIDA 222 (Oct. 1989).

²⁵TRIPs does not, however, incorporate article 6bis of the Berne Convention (moral rights). *See* TRIPs art. 9.1.

²⁶*Id.* art. 10.

²⁷*Id.* art. 11.

²⁸*Id.* art. 13.

²⁹*Compare* TRIPs arts. 41 - 61 *with* Berne Convention art. 16.

³⁰WCT arts. 11, 12.

implement these new obligations in different ways, the terms of the new provisions may not leave substantial room for differing interpretations.³¹

B. Harmonization measures within the European Union

Beginning in 1991, the European Commission issued five Directives concerning copyright and neighboring rights³²; another is currently pending³³. Designed to lift impediments to the free movement of goods and services within the European Union, and to relieve the uncertainty caused by disparities in national laws,³⁴ the Directives target subject matter or rights that member states have treated differently, for example, by imposing divergent standards of originality (computer programs; databases), or inconsistent levels of protection (duration, rental rights, cable and satellite retransmission). Significantly, unlike the Berne Convention and related multilateral accords, whose minimum standards

³¹With the following important exception: art. 11 requires member states to protect against “the circumvention” of technological measures; it is not completely clear whether this text requires prohibition not only of direct acts of circumvention, but also of the manufacture and dissemination of circumvention devices. The U.S. and the E.U. have interpreted art. 11 in the latter sense. See 17 U.S.C. § 1201(b); Amended Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society (COM 1999 250 final 97/0359/COD) (May 21, 1999) [hereinafter Information Society Draft Directive], art. 6.2.

³²Council Directive of 14 May 1991 on the legal protection of computer programs, 91/250/EEC, O.J.E.C. L 122 [hereinafter Software Directive]; Council Directive of 19 November 1992 on the rental and lending right and on certain rights related to copyright in the field of intellectual property, 92/100/EEC, O.J.E.C. L. 346 [hereinafter Rental Right Directive]; Council Directive 93/83/EEC of 27 September 1993, on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmissions, O.J.E.C. L. 248/15 [hereinafter Cable and Satellite Directive]; Council Directive 93/98/EEC of 20 October 1993 harmonizing the term of protection of copyright and certain related rights, O.J.E.C. L. 290/9 [hereinafter Duration Directive]; Directive 96/9/EC of the European parliament and of the Council of 11 March 1996 on the legal protection of databases, O.J.E.C. L. 77/20 [hereinafter Database Directive].

A “Directive” sets forth substantive rules that European Union Member States must transpose into their domestic laws. Member States need not incorporate the text of Directives verbatim (although they may), so long as the domestic law implements the substance. *See generally*, P.J.G.KAPTEYN & P. VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES 193-97 (2d ed. 1989, Laurence W. Gormley, ed.).

³³Information Society Draft Directive, *supra* note 31.

³⁴*See* arts. 30, 336, 57(2), 100(a) of the EC Treaty (now arts. 28, 30, 47(2), 95 EC), 1997 O.J.E.C. (C340) 173.

apply only to member states' treatment of foreign works³⁵, the Directives require harmonization of E.U. members' substantive norms as a matter of internal domestic law, as well as a matter of treatment of foreigners.

The Directives do not purport to regulate all of copyright. Rather, pursuant to the rule of "subsidiarity,"³⁶ the Directives claim to address only those areas of copyright law in which national disparities threaten the smooth functioning of the internal market. As we shall see, however, particularly taking into account the pending Information Society Directive, the Directives in fact address many, if not most, issues in copyright law.

First, with respect to the subject matter of copyright, the Directives advertise only their coverage of software and databases, bringing them into the subject matter of copyright, and subjecting them to a uniform standard of originality: the work must be the "author's own intellectual creation."³⁷ But the Duration Directive, albeit a text concerning the regime of rights, also includes a subject matter provision: it imposes the same standard of originality on photographs, and further stresses that photographs are thereby brought within a uniform copyright fold, by cautioning: "No other criteria shall be applied to determine their eligibility for protection."³⁸ One might predict that the European Union-wide "author's own intellectual creation" standard of originality will eventually replace divergent national norms, such as the lower U.K. "skill and labour,"³⁹ or the higher French "imprint of the author's personality,"⁴⁰ thresholds.⁴¹

³⁵See discussion *supra*, text at and note 18.

³⁶See art. 3(b) of the Treaty on European Union (now art. 5 EC) 1997 O.J.E.C. (C340) 145. On subsidiarity, see generally, George Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and in the United States*, 94 COLUM. L. REV. 331 (1994); George Bermann, *Subsidiarity and the European Community*, 17 HASTINGS INT. & COMP. L. REV. 97 (1993).

³⁷Software Directive, art. 1.3; Database Directive, art. 3.1.

³⁸Duration Directive, art. 6. The same cautionary note appeared in the Software Directive, art. 1.3, and the Database Directive, art. 3.1.

³⁹See, e.g., W.R. CORNISH, INTELLECTUAL PROPERTY 334-35 [¶ 10-18] (3d ed. 1996).

⁴⁰See, e.g. ANDRÉ LUCAS & HENRI-JACQUES LUCAS, PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE ¶¶ 80-86. See also W.R. CORNISH, *supra* note 39 at ¶¶ 10-09 - 10-10, comparing British, "authors rights" countries, and EU concepts of originality.

⁴¹*Cf.* Gerhard Schricker, *Farewell to the "Level of Creativity" (Schopfungshöhe) in German Copyright Law*, 26 I.I.C. 41, 46 (1995) (suggesting that EU standard precludes application of higher German "level of creativity" standard "for a growing numbers of types

Second, with respect to copyright ownership, the Directives do not harmonize all ownership rules, but they do pose some significant uniform norms, for example, employer-ownership of computer programs⁴², and author-entitlement to equitable remuneration for exploitation of the rental right in films or phonograms.⁴³ Nonetheless, as we shall see in Part II, the Directives do not harmonize ownership rules as intensively as they might.

Third, with respect to the regime of protection, the combination of the first five Directives and the pending Information Society Directive covers almost all of the rights and exceptions and limitations on copyright. Where the first five Directives detailed “restricted acts” and “exceptions to restricted acts” with respect to particular subject matter (software, databases) or rights (rental, lending, transmissions by cable and satellite), the Information Society Directive is based on the 1996 WIPO Copyright Treaty, and thus synthesizes most of the rights under copyright. The Directive therefore articulates a very broad scope for the reproduction right, specifically including temporary reproductions, in any manner or form.⁴⁴ The Directive also phrases the right of communication to the public in very broad terms, notably obliging member states to include making the work available to the public “in such a manner that members of the public may access the work from a place and at a time individually chosen by them.”⁴⁵ As a result, the Directive requires member states to cover an extremely wide range of public performances and public displays of works of authorship, including all forms of transmissions, whether or not made by wire. The Directive also mandates a right of distribution of physical copies of works of authorship, and specifies that the right is not exhausted unless copies have been sold within the E.U. by or under the authority of the rightholder.⁴⁶ The Directive also implements the WCT’s provisions on technological protections and copyright management information. It therefore requires member States to prohibit both the circumvention (direct or by means of dissemination of circumvention devices) of

of work”).

⁴²Software Directive, art. 2.3.

⁴³Rental Right Directive, art. 4.1.

⁴⁴Draft Information Society Directive, art. 2.

⁴⁵*Id.* art. 3.1. The language comes from the WCT, art. 8.

⁴⁶Draft Information Society Directive, art. 4.

technological protection measures, and the removal or distortion of copyright management information.⁴⁷

Equally, if not more importantly, in enumerating the limitations and exceptions to copyright for which member states may provide, the Information Society Directive appears to preclude Member States from introducing further exceptions or limitations. The Directive states, “Member States may provide for limitations to the exclusive right of reproduction provided for in Article 2 in the following cases: . . .” and “Member States may provide for limitations to the rights referred to in Articles 2 [reproduction] and 3 [communication to the public] in the following cases: . . .”⁴⁸ This suggests that, outside the listed cases, Member States may *not* provide for additional exceptions or limitations. Moreover, the proposed Directive, as amended by the European Parliament and revised by the Commission, further requires Member States to provide “equitable compensation” for many of the permitted acts, such as private copying (analog and digital), photocopying, and certain educational and research reproductions or transmissions.⁴⁹ Finally, even with respect to the listed cases, the Directive imposes the Berne Convention’s “three step test:”⁵⁰ the exceptions and limitations must be restricted to “certain specific cases, and may not be interpreted in such a way as to allow their application to be used in a manner which unreasonably prejudices the rightholders’ legitimate interests or conflicts with a normal exploitation of their subject matter.”⁵¹

There is another class of exceptions for which the Directives mandate even greater intra-Union uniformity. Unlike the exceptions reviewed above, which member States *may*, but need not, implement, the Directives require member States to provide for certain exceptions to or limitations on copyright. These EU-imposed restrictions on the scope of copyright concern the rights of lawful acquirers of copies to make backup copies of computer programs, to access the content of computer programs and databases,⁵² and to decompile

⁴⁷*Id.* arts. 6, 7.

⁴⁸*Id.* arts. 5.2, 5.3

⁴⁹*Id.* arts. 5.2(a)(b)(b bis), 5.3(a).

⁵⁰See Berne Conv. Art. 9.2. See Mihály Ficsor, *Copyright for the Digital Era: The WIPO “Internet” Treaties*, 21 COLUM.-VLA J. L. & THE ARTS 197, 214-15 (1997).

⁵¹Draft Directive, art. 5.4; the language paraphrases Berne Convention art. 9.2 and WCT art. 10.

⁵²Software Directive, art. 5; Database Directive, art. 6.1; see also *id.*, art. 8.1 (exception to *sui generis* right).

computer programs under certain circumstances.⁵³ The Draft Information Society Directive introduces an exemption from liability for “temporary reproductions which are an integral part of a technological process for the sole purpose of enabling use to be made of a work . . .” whether or not the initial communication of the work was lawfully made.⁵⁴

The Directives thus set an overall, often quite detailed, framework guiding national legislators, considerably limiting the opportunities for national variance regarding the scope of copyright protection. I would further suggest that the uniform originality standard adopted in the Directives will come to constrain the freedom of national legislatures to vary the subject matter of copyright. In the case of copyright ownership, by contrast, the Directives do allow Member States a considerably freer hand to allocate rights among authors, employers, and transferees.

II. What place remains for national copyright norms?

Given the substantial muting of national norms by multilateral instruments, it is now appropriate to inquire what place remains for national copyright norms.

A. Gaps left in the WIPO, WTO, and EU Multilateral Instruments

1. Berne Convention, TRIPs, and WCT

While the multilateral treaties are increasingly comprehensive with respect to the subject matter and scope of copyright, significant gaps remain, particularly with respect to authorship and ownership of copyright. Indeed, apart from the Berne Convention’s much-criticized art. 14bis.2,⁵⁵ concerning ownership of rights in cinematographic works, none of the three principal treaties contain detailed

⁵³Software Directive, art. 6.1.

⁵⁴Information Society Directive, art. 5.1. The European Parliament amended this provision to require that the communication have been lawfully made (amendments 16 and 33), but the Commission rejected the amendment. See Amended Proposal, *supra* note 31, Explanatory Memorandum, 4.1.

⁵⁵*See, e.g.*, HENRI DESBOIS, ANDRÉ FRANÇON, ANDRÉ KÉRÉVER, LES CONVENTIONS INTERNATIONALES DU DROIT D’AUTEUR ET DES DROITS VOISINS 216-21 (1976); RICKETSON, *supra* note 8, at 589.

provisions on copyright ownership.⁵⁶ The Berne Convention does, however, announce that authors are “entitled to institute infringement proceedings in the countries of the Union,” and that authorship status shall be presumed if the author’s name “appear[s] on the work in the usual manner.”⁵⁷ If authors may enforce copyright, it follows that they are, at least initially, the owners of the rights they seek to enforce. On the other hand, the Berne Convention does not *require* that the actual creator’s name appear on the work in the usual manner. As a result, its coverage of “authorship” and ownership is only partial. The TRIPs and the WCT do not supply further guidance.

With respect to the subject matter of copyright, the Berne Convention does not articulate a standard of originality, and thus may leave open the possibility of national variation.⁵⁸ TRIPs and the WCT, however, have closed that gap, at least in part, by imposing an “intellectual creation” standard for computer software and databases;⁵⁹ as with the E.U.’s “author’s own intellectual creation” standard, this threshold for originality may be generalized across copyrighted works.⁶⁰ The TRIPs and WCT also specify that “Copyright protection extends to expressions, and not to ideas, procedures, methods of operation or mathematical concepts as such,”⁶¹ but do not define the excluded elements. As domestic caselaw, at least in the U.S., reveals, courts may differ as to what constitutes an “idea” or “method of operation.”⁶² Perhaps countries party

⁵⁶But see Sam Ricketson, *People or Machines? The Berne Convention and the Changing Concept of Authorship*, 16 Colum.-VLA J. L. & the Arts 1 (1991) (contending that the Berne Convention implicitly designates the human creator, rather than juridical persons, as the author and initial copyright owner).

⁵⁷Berne Conv., art. 15.1.

⁵⁸See Jane C. Ginsburg, *Surveying the Borders of Copyright*, 41J. Copyr. Soc. 322, 327 (1994).

⁵⁹TRIPs, art. 10; WCT, art. 5 (databases).

⁶⁰See discussion *supra*, text at notes 36-39. Query whether the EU’s “*author’s own intellectual creation*” standard (emphasis supplied) is higher than the TRIPs-WCT “intellectual creation” standard.

⁶¹TRIPs, art. 9.2; WCT art. 2.

⁶²Compare *Lotus v. Borland*, 49 F.3d 807 (1st Cir. 1995), *aff’d* by an equally divided Court, 116 S.Ct. 804 (1996) (spreadsheet program’s menu commands held a “method of operation”) with *American Dental Association v. Delta Dental Plans Ass’n.*, 126 F.3d 977 (7th Cir. 1997) (“taxonomy,” system of classifying dental procedures, held not a “method of operation”).

to the TRIPs and/or WCT will so diverge as well, leaving open the possibility that the same work may be copyrightable in one country, but not another.

With respect to the scope of rights and of exceptions, the 1971 Berne Convention text tended to address specific issues, rather than synthesizing rights and exceptions. The TRIPs and WCT, however, have undertaken the synthesis, and thus have largely filled gaps left by the Berne Convention's rather more pointillist approach.⁶³ Two significant gaps nonetheless remain. First, although art. 6bis of the Berne Convention requires Union members to protect authors' rights of attribution and of integrity, the TRIPs explicitly excludes art. 6bis from its incorporation of Berne Convention norms.⁶⁴ As a practical matter, this leaves a gap because failure to implement unincorporated Berne Convention norms carries no meaningful sanction, while non compliance with TRIPs obligations can lead to trade sanctions against the recalcitrant country.⁶⁵ Second, while the Berne Convention does not specify a right to distribute copies, both the TRIPs and WCT do; both treaties, however, explicitly leave it to member countries to determine under what circumstances, if any, that right will be deemed exhausted.⁶⁶

Finally, it is important to note that the rights concerned are minimum rights: signatory countries may provide for greater rights than those required, so long as they accord national treatment.⁶⁷ Similarly, the treaties set forth maximum exceptions: signatory countries *may* restrict the scope of protection, to the extent permitted by the treaties, but signatories are not obliged to impose all (or any) of

⁶³Compare Berne Conv. Arts. 10 (certain exceptions), 10bis (certain exceptions), 11 (certain public performance rights), 11bis (broadcasting rights), 11ter (certain public performance rights) with TRIPs art. 13 (exceptions); WCT arts. 8 (right of communication to the public); 10 (exceptions and limitations).

⁶⁴See TRIPs, art. 9.1.

⁶⁵See TRIPs, art. 64 (dispute settlement). The U.S. is currently the target of a dispute resolution proceeding brought by the European Union regarding 17 U.S.C. § 110(5)(B), which exempts certain commercial establishments from liability for public performances by means of performing works by radio and television, WT/DS160/1-IP/D/16, filed January 26, 1999. Art. 33 of the Berne Convention provides for intergovernmental resort to the International Court of Justice, should one country of the Union object to another's interpretation or application of the Convention's provision, but Art. 33 also permits a union member, upon ratifying to "declare that it does not consider itself bound" by that provision. 22 of the 140 Berne Union members have reserved on art. 33. See <<http://www.wipo.org/eng/ratific/e-berne.htm>>(visited Sept. 29, 1999). It appears that no ICJ proceeding has been brought pursuant to art. 33. See <<http://www.icj-cij.org/icjwww/idecisions.htm>> (visited Sept. 29, 1999).

⁶⁶See TRIPs, art. 6; WCT, art. 6.2.

⁶⁷See TRIPs, art. 3; Berne Conv., art. 19.

the limitations that the treaties authorize. This means that multilateral instruments set a floor, but no ceiling, for the scope of copyright protection. National copyright laws thus retain a role to set the upper limits of copyright, by affording greater rights, or by selecting which permitted exceptions to impose.

2. EU Directives

The European Union, however, by imposing certain restrictions on the scope of copyright, and by giving greater detail to permitted exceptions, has constricted the role of national law to vary the height of the ceiling, as we have already seen.⁶⁸ On the other hand, if the mandatory exceptions ensure that member States must impose a ceiling on copyright, member States nonetheless may further drop the ceiling by adopting some or all of the various Directives' authorized (as opposed to obligatory) exceptions. For example, one E.U. member State may exempt certain uses of works on behalf of the visually- or hearing-impaired (subject to "equitable compensation"), as authorized by art. 5.3(b) of the Draft Information Society Directive, while another may choose not to limit copyright in that way. Thus, exceptions to copyright remain an area of potential, albeit tempered, disparity within the E.U.

Regarding the rights protected, the Duration Directive specifies that it does not purport to harmonize moral rights; none of the other Directives touch moral rights, either.⁶⁹ Thus, the content, as well as the duration, of rights of attribution, and particularly of integrity, may vary considerably among the fifteen member States.

But the principal gaps in the E.U. regime concern authorship and ownership. The Directives continue to tolerate divergent national laws governing authorship status, initial rights ownership, and presumptions of transfer. With respect to authorship status, for example, the Software Directive and the Database Directive leave to national law the determination of whether the "author" may be a juridical, as well as a natural, person.⁷⁰ Those Directives, as well as the Duration Directive, refer to joint works and to collective works, but do not define these terms.⁷¹ Indeed, the Rental Right Directive and the Satellite Directive explicitly permit member States to designate who, in addition to the

⁶⁸See discussion *supra*, text at notes 47-53.

⁶⁹See Duration Directive, art. 9; Recital 21.

⁷⁰See Software Directive, art. 2.1; Database Directive, art. 4.1.

⁷¹See Software Directive, art. 2.1; Database Directive, art. 4.2; Duration Directive, arts. 1.2, 1.4.

principal director, shall be considered a co-author of an audiovisual work.⁷² Different national laws may supply differing definitions, not only of who is a co-author, but of the category of joint works. For example, are “joint works” only those in which the contributions are inseparable, or may they also be discrete, but interdependent, as are the music and lyrics comprising a song?⁷³ It seems that the Directives deliberately avoid more precise definition of joint works. Indeed, the Duration Directive appears to want it both ways: art. 1.4 provides that either the duration for a single authored work, *or* the duration for a work of joint authorship shall apply to “identified authors whose *identified contributions* are included in [collective] works.” (Emphasis supplied)⁷⁴ To be “identified,” the “contributions” would be interdependent, rather than inseparable; the Directive thus leaves it to national law to determine whether such contributions should be considered individual or joint works.

With respect to initial rights ownership, the Software, Duration, and Database Directives allow those member countries that vest initial ownership in collective works (a term the Directives do not define) in juridical persons, to continue to do so.⁷⁵

With respect to presumptions of transfer, the Rental Right Directive permits member States to provide for presumptions of transfer of rental rights from authors to the film producer.⁷⁶ The Directives do not require revision of national laws setting forth other presumptions of transfer from authors to film producers, producers of collective works, or other employers or commissioning parties.

⁷²See Rental Right Directive, art. 2.2; Satellite Directive, art. 1.5..

⁷³*Compare.* Federal Republic of Germany, Copyright Law of 1965 (as amended), art. 8.1 (joint works are those whose “respective contributions cannot be separately identified”); U.K., 1988 Copyright Designs and Patents Act, art. 10(1) (“contribution of each author is not distinct from that of the other author or authors”) *with* Belgium, Copyright Law of June 30, 1994, art. 5.1 (joint works contributions may be “individualized”); France, Code of Intellectual Property, art. L-113-2.1 (joint work is “a work in the creation of which more than one natural person has participated”).

⁷⁴See Duration Directive, art. 1.1 (single authored work’s duration), 1.2 (joint work’s duration), 1.4 (collective work’s duration).

⁷⁵See Software Directive, art. 1.2, Duration Directive, art. 1.4; Database Directive, art. 4.1.

⁷⁶See Rental Right Directive, art. 1.6.

B. Choice of law: manipulating the applicable national norm

Choice of law strategies become increasingly important as copyright disputes range over multiple territories. Within those disputes, manipulation of legislative competence relies on the persistence of national copyright norms, but seeks to make one country's norms prevail over competing national norms.

1. Contractual clauses

Choice of law and of forum clauses offer a primary means of sidestepping the potentially applicable norms of other countries (subject to exceptions such as *ordre public*). Choice of law clauses can be especially relevant to resolution of disputes concerning copyright ownership when the work involves the participation of multiple authors from many different countries. Similarly, choice of law clauses may simplify issues concerning the scope of a grant of multiterritorial rights under copyright.

Choice of forum clauses are also important. The choice of the forum does not, by itself, determine the applicable law.⁷⁷ But, because each forum applies its own conflict rules to characterize the nature of the claim and to designate the choice of law rule that applies to that kind of claim, forum selection can favor some laws over others. For example, some fora may consider some features of the national copyright law, such as moral rights, to be mandatory even in international situations;⁷⁸ choosing a forum that does not impose its own laws as laws of immediate application (or "*lois de police*") can amount to avoiding a specific set of mandatory national rules regarding copyright.

Similarly, with respect to the forum's characterization of claims, in disputes between authors or copyright owners and their grantees, some fora may characterize the dispute as one involving contract law, while others might characterize the controversy as a matter of substantive copyright law. For example, in the U.S. the scope of a grant of copyright law is considered a contract

⁷⁷Choosing a forum in State A does not necessarily mean that A's law will apply. The international private law rules of the forum will determine the applicable law.

⁷⁸*See, e.g.*, France, Judgment of May 28, 1991, Cass. Civ. Ire, JCP II 21731, note Françon (foreign authors enjoy moral rights in France, regardless of whether authors enjoyed or waived moral rights in the work's country of origin).

law question,⁷⁹ while in Germany it is a matter of substantive copyright law.⁸⁰ Or, in Brazil, the contract governs the duration of a grant effected by a Brazilian author under Brazilian law, but in the U.S., U.S. copyright rules determine whether the Brazilian author's grant of the second term of U.S. copyright (for works first published while the 1909 Act was still in force) was properly effected.⁸¹ By choosing a forum that characterizes the dispute as one in contract, the parties may avoid national copyright regulation.

Substantive copyright issues other than ownership may not as easily be resolved by contractual manipulation of the forum or applicable law. Notably, it is not clear that a court will apply the law of the contract to determine whether the work is copyrightable. Suppose, for example, that I produce a CD ROM of digitized photographic images of public domain paintings. The contracts under which I license reproduction rights are subject to U.K. law, whose "skill and labour" originality standard these images would meet. By contrast, suppose that the images lack the requisite minimum of creativity to qualify for U.S. copyright.⁸² Suppose further that my U.S. licensee distributes copies of the images in the U.S. in excess of the terms of the license. If I bring a copyright infringement suit in the U.S., will the court apply U.K. law to determine the images' copyrightability? Or will the court conclude that, since the alleged infringement is occurring in the U.S., only U.S. law is competent to govern the questions whether the work is protectable and has been infringed?⁸³

U.S. courts have not addressed the question whether parties to a contract may opt out of territoriality, and into one particular municipal copyright law to govern non contractual issues,⁸⁴ although they have generally considered copyrightability and infringement issues to be especially territorial. For example, in *Computer Associates v. Altai*⁸⁵, The Second Circuit declined to enjoin

⁷⁹See, e.g., *Bartsch v. MGM*, 391 F.2d 150 (2d Cir. 1968).

⁸⁰See German copyright law, art. 31; Michael Walter, *La liberté contractuelle dans le domaine du droit d'auteur et des conflits de lois*, 87 RIDA 45, 71-83 (1976).

⁸¹See *Corcovado v. Hollis Music*, 981 F.2d 679 (2d Cir. 1993).

⁸²See *supra* note 39. This hypothetical is based on *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F.Supp. 2d 191 (S.D.N.Y. 1999).

⁸³See *Bridgeman Art, supra*; *Itar Tass v. Russian Kurier*, 153 F.3d 82 (2d Cir. 1998).

⁸⁴*Cf. Turtur v. Rothschild Registry Int'l.*, 26 F.3d 304 (2d Cir. 1994); *Nedlloyd Lines BV v. Superior Court*, 3 Cal. 4th 459, 834 P.2d 1148 (Cal. 1992) (both assuming that parties to the contract may submit contract-related tort claims to the law chosen to govern the contract).

⁸⁵126 F.3d 365 (2d Cir. 1997).

Computer Associates from pursuing its appeal in a French copyright action against Altai, on the ground that the French action addressed an alleged violation of French copyright law, while the U.S. action concerned an alleged violation of U.S. copyright law, and Altai did not show that the standards for copyrightability of computer software were “identical” under French and U.S. law. Because the French claim was distinct from the U.S. claim (even if both arose out of alleged reproduction of part of the CA operating system), the French judgment could not have preclusive effect in the U.S.

Finally, choice of forum or of law clauses cannot select or avoid national copyright norms when the dispute concerns parties not in privity with each other (or when the parties have failed to effect a contractual choice of forum or of law). On the other hand, principles of private international law may similarly result in favoring some national norms over others, at least when the relevant principle designates a single applicable national law in lieu of several national norms.

2. Principles of private international law

Conflict of laws rules can temper the territorial application of national legislation. That is, unless the choice of law rule requires that local law always apply to all aspects of a copyright dispute litigated in the local courts, then choice of law rules may lead local courts to apply a foreign country’s law, even with respect to persons or acts that have some connection with the local territory. In this case, the court is not substituting an international norm for the forum’s domestic law, but the court’s resort to another country’s domestic law nonetheless ousts the forum’s own norm (and may well also exclude the application of other national laws).

Copyright ownership is a particularly important area for choice of law, since the applicable rule will determine whether copyright ownership will vary with each national territory on which the work is exploited,⁸⁶ or instead will remain constant, whatever the territory of exploitation. A conflicts rule that designates the law of the work’s country of origin (or country with which the work has the “most significant relationship”⁸⁷) will mean that, for the forum that hears the claim, the

⁸⁶Favoring such a rule, see, e.g., ANDRÉ LUCAS, ASPECTS DE DROIT INTERNATIONAL PRIVÉ DE LA PROTECTION D’OEUVRES ET D’OBJETS DE DROITS CONNEXES TRANSMIS PAR RÉSEAUX NUMÉRIQUES MONDIAUX, <http://www.wipo.org/fre/main.htm> doc. no. GCPIIC/1 (visited Oct. 4, 1999); JEAN-SYLVESTRE BERGÉ, LA PROTECTION INTERNATIONALE ET COMMUNAUTAIRE DU DROIT D’AUTEUR: ESSAIE D’UNE ANALYSE CONFLICTUELLE 320-22 (1996).

⁸⁷See, e.g., *Itar-Tass v. Russian Kurier*, 153 F.3d 82 (2d Cir. 1998) (in action alleging infringement in U.S., U.S. court applied Russian law to determine initial ownership of copyright in work first published in Russia, by a Russian publisher, and written by Russian authors).

copyright owner will be the same both at home, and abroad.⁸⁸ But copyright ownership will not achieve complete transnational consistency unless all fora subscribe to the same conflicts rule. If one forum applies the law of the country of the “most significant relationship” while another applies the law of the country of exploitation, then we will continue to encounter variance in ownership status.

In the context of international copyright infringement actions, particularly those involving digital media, some commentators have favored application of the law of the point from which the infringement becomes available to the public, to the full, multi-territorial, extent of the claim.⁸⁹ This approach substitutes a single national law for a plethora of potentially applicable laws, and thus simplifies the action, while still maintaining a territorial nexus to the country from which the root act occurred. Other commentators have favored the law of the countries where the infringement occurs. This highly territorial approach preserves a maximum role for national norms.⁹⁰

Another approach to choice of law for multinational copyright infringement claims would nominally apply the rule of territoriality, but, at least where all relevant countries are Berne Union or WTO members, would presume that all affected territories adhere to Berne-TRIPs minima. Since the forum under these circumstances would also be a Berne-WTO country, the court might further presume that all the relevant countries’ laws are like the forum’s.⁹¹ The court would then apply its own law to the full extent of the claim, subject to a showing

⁸⁸The same result might be achieved through resort to a different point of attachment, for example, country of first publication. But that country may not always be easy to identify, especially if first publication occurs over the Internet. *See* JANE C. GINSBURG, *THE PRIVATE INTERNATIONAL LAW OF COPYRIGHT IN AN ERA OF TECHNOLOGICAL CHANGE*, 1998 RECUEIL DES COURS DE L’ACADÉMIE INTERNATIONALE DE LA HAYE PART 273, 239-405 (1999) [hereinafter GINSBURG, HAGUE LECTURES] 267-71 (discussing the problem of discerning the country of first publication).

⁸⁹*See generally*, *id.* Chapter 3 (discussing theories and cases).

⁹⁰*See, e.g.*, LUCAS, *supra* note 86 (laws of each country of receipt should apply to multinational copyright infringement committed over digital networks).

⁹¹*See, e.g.*, *Louknitsky v. Louknitsky*, 266 P.2d 910 (1954) (presuming similarity of Chinese marital property law to California’s); *Leary v. Gledhill*, 84 A.2d 725 (1951). *But cf.* *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (declining to apply Kansas law when that law conflicted with that of other jurisdictions, and Kansas had little connection to either the class action plaintiffs or the suit’s subject matter); *Castano v. American Tobacco Co.*, 84 F.3d 734, 740-44 (5th Cir. 1996) (decertifying multistate class action because the district court failed adequately to analyze possible variations in state law).

that in certain countries, local norms are either more or less protective than the forum's.⁹²

This survey has shown that national copyright laws retain some vitality, particularly regarding copyright ownership, and, to a lesser extent, copyright exceptions. But this does not mean that all national norms will apply all the time in multinational settings. Legislative competence over copyright disputes may in fact be narrowed by contract or by choice of law principles.

III. What Role *Should* Remain For National Copyright Law in an Era of International Norms?

International uniformity of substantive norms favors the international dissemination of works of authorship. If the goal is to foster the world-widest possible audience for authors in the digital age, then one might conclude that national copyright norms are vestiges of the soon-to-be bygone analog world. But not all copyright exploitations occur over digital networks, and, more importantly, national laws remain relevant, even for the Internet.

Two principal areas for national preservation are copyright ownership and exceptions. The interplay of these national norms with choice of law rules, however, may differ. In the case of allocation of ownership rights, the multilateral treaties' and E.U. Directives' deference to national law in matters of copyright ownership indicates that national norms regarding employment or commissioned work relations should prevail. But should they prevail within each territory on which the work is exploited, or should the norm in the territory of the State with the most significant relationship to the work (usually, the country of origin) also govern in other countries in which the work is exploited? The management of rights under copyright might be simplified if choice of law rules designated a single applicable law, that of the country with the most significant relationship to the work's creation.⁹³ In that case, copyright ownership would remain constant across national borders, thus facilitating licensing.⁹⁴ In support of such a choice of law rule, one might contend that countries with less significant relationships to the work's creation rarely have an interest in contravening employer-employee (or

⁹²See generally GINSBURG, HAGUE LECTURES, 336-38.

⁹³This is usually the country of origin, but it could also be the one whose law is designated in the employment or commissioned work contract.

⁹⁴See discussion *supra*, text at and notes 86-88.

commissioned work) relationships among foreign parties. On the other hand, one might also observe that local laws' allocation of copyright ownership defines labor relations in the country of exploitation, and that recognition of another country's less author-favorable ownership allocations with respect to foreign authors may result in an unfair competitive advantage against local authors, at least if local law makes local authors more expensive to deal with. Arguably, these concerns could find expression in application of the *ordre public* exception, leaving as the default rule the application of the law of the country with the most significant relationship to the work. In that case, with respect to ownership of the economic rights under copyright, national norms that implement the country of most significant relationship's policies about labor markets would continue to play an important role not only within that country's borders, but outside as well.⁹⁵

What approach should one follow when the issue concerns not ownership of economic rights, but assertion of moral rights? Here, the multilateral instruments and institutions send mixed signals: the Berne Convention sets a substantive minimum, that TRIPs does not enforce, and the E.U. has shied away from harmonizing national standards.⁹⁶ This certainly suggests that national norms may

⁹⁵A different analysis may be warranted when the compensation issue turns not on copyright ownership, but authorship status, cf. discussion of moral rights, *infra*. For example, the European Rental Rights Directive, Council Directive 92/100/EEC, O.J.E.C. No. L 346/61, art. 4.1, provides authors and performers an inalienable right to "equitable remuneration" for rentals of phonograms and copies of audiovisual works. Thus, no matter who owns the copyright in the motion picture or sound recording, the authors and performers must be compensated for the exploitation by means of rental. Similarly, private copying levies on the media and/or machinery of copying often prescribe the division of the collected levies among authors, performers, and producers,. See, e.g., 17 U.S.C. § 1006(b)(1)(2) (designating distribution of royalties from levy on digital audio recording devices and media, 40% of "sound recordings fund" to "featured performers"; 50% of "musical works fund" to "writers"); France, CODE DE LA PROPRIÉTÉ INTELLECTUELLE, art.L.311-7 (setting forth division of private copying compensation among authors, producers, and performers). Moreover, the French law specifies that the "author" to be compensated for private copying is the author "within the meaning of the [French] code," *id.* See Jean-Sylvestre Bergé, *La loi applicable à la circulation des oeuvres de l'esprit sur les réseaux numériques; Le point de vue d'un juriste français* 33-34 (report submitted to the Ministry of Culture and Communication, 1999) (on file with author).

A choice of law rule governing copyright ownership thus would not address a foreign author's or performer's standing to invoke the benefits of status-specific local measures. Rather, where a copyright or performer's rights treaty exists between the foreign claimant's country and the country of exploitation, the general principle of non discrimination against foreign authors or performers should govern, and the foreign claimant would enjoy the status of a local author or performer.

⁹⁶See discussion *supra*, text at and notes 25, 69. The WCT art. 12 requirement that member States protect "rights management information," including information identifying the author of the work, may strengthen the Berne art. 6bis protection of the author's right of attribution; however, copyright owners are not obliged to add rights management information.

continue to differ, but, as with economic rights, does not tell us whether each norm should apply territorially, or whether the national norms of the country with the most significant relationship to the work's creation and initial dissemination also apply abroad. Two features of moral rights point towards discrete territorial application of local protections. First, the interests that moral rights secure are supposed to be "personal" to the author, for, in the terms of the Berne Convention, they address the author's "honor or reputation."⁹⁷ Arguably, the relevant locus of the author's honor or reputation (and, therefore, the competent national norm) is the author's residence or domicile, since that is where the author subjectively experiences the harm.⁹⁸ Nonetheless, "reputation" concerns how the author is perceived in other people's eyes. Harm to reputation is proved not by showing that the complainant was distressed by the alleged libel, but that others did or were likely to believe the libel, and accordingly treat the complainant the worse for it.⁹⁹ In some countries, authors may be more (or less) honored than in others; an alleged moral rights violation differently affects their local reputations.

Second, moral rights are not just personal to authors, they express national cultural policy concerning the recognition of authorship and the maintenance of the integrity of works. The more a country respects, not to say reveres, authorship, the more willing it is (at least in theory) to tolerate authors' disruption of the local commercial market for the work, by allowing authors to seek legal redress against its exploiters. This tolerance, however, should only extend to the local market. It follows for both of these reasons that the availability of a moral rights claim, and its assessment on the merits, should be determined by each country for its own territory.

Regarding exceptions to copyright, a strong case may also be made for application of each country's laws on its own territory. While international instruments impose a general framework, they preserve some national autonomy regarding the content (and, outside the E.U., the form) of copyright exceptions. Thus, the flexible (perhaps unpredictable) U.S. fair use exception may co-exist with a more rigid continental-style closed list of specific exemptions and

⁹⁷Berne Conv., art. 6bis.

⁹⁸See, e.g. Pierre Bourel, *Du rattachement de quelques délits spéciaux en droit international privé*, 214 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE 251(1989). Not surprisingly, perhaps, in France, violations of moral rights are gauged subjectively, rather than with reference to public perception of the author's honor or reputation, see ANDRÉ LUCAS & HENRI-JACQUES LUCAS, *TRAITÉ DE LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE* 332 (1994).

⁹⁹See, e.g., *Schlegel v. Ottumwa Courier*, 585 N.W.2d 217 (Iowa 1998); *Urban v. Dollar Bank*, 725 A.2d 815 (Pa. Super. 1999).

limitations.¹⁰⁰ Arguably, the multilateral instruments' tolerance of substantive diversity says nothing about whether a single national norm limiting copyright should apply (for example, the law of the country from which the work is made available to the public, particularly via digital communications), or whether each country of receipt should apply its own norms regarding exceptions and limitations. Several considerations nonetheless point toward discrete territorial application of local norms limiting copyright, even for digital transmissions.

National legislatures establish copyright exceptions for the benefit of local users. This is particularly true of the "pork barrel" and "subsidy" kinds of limitations.¹⁰¹ For example, the U.S. may wish (perhaps in contravention of its TRIPs obligations) to exempt small businesses and restaurants from paying performance rights royalties for radio and television performances;¹⁰² there is no reason that this solicitude should benefit restaurants outside the U.S. Or the German federal legislature may compel authors to subsidize German schools by subjecting works used in school anthologies to compulsory licensing;¹⁰³ there is no reason this subsidy should extend to schools outside Germany, in countries that lack similar provisions.

Even with respect to free speech-motivated exceptions, such as criticism, commentary and parody, in the absence of greater international harmonization, local norms should determine how much free or price-controlled use the exception permits. For example, the Draft Information Society Directive permits quotation for purposes of criticism or review, if the use is "in accordance with fair practice, and to the extent required by the specific purpose."¹⁰⁴ Fair practice according to each member State's norms? According to a harmonized E.U. norm? National norms of fairness may differ: for example, the *revue de presse* may be a tradition in some countries, but not in others.¹⁰⁵ It is not obvious that an extensive *revue de*

¹⁰⁰ Compare 17 U.S.C. § 107 (fair use) with Draft Information Society Directive, art. 5.2 - 3 (list of authorized exceptions).

¹⁰¹ See Jane C. Ginsburg, *Copyright or "Infograb"? Comment on General Report on Limitations Found Outside Copyright* (forthcoming in the proceedings of ALAI Study Days, Cambridge, U.K. 1998).

¹⁰² See 17 U.S.C. § 110(5)(B), and pending WTO dispute resolution procedure, discussed *supra* note 65.

¹⁰³ German copyright law, art. 46.

¹⁰⁴ Draft Information Society Directive, art. 5.3(d).

¹⁰⁵ Compare, German copyright law, art. 49.1; France CPI, art. L-122-5, 3o(b) (both specifying *revue de presse* exceptions) with U.K. CDPA, art. 30; Belgian copyright law, arts. 21-22 (neither specifying a *revue de presse* exception).

presse exception in the country from which the work is made available to the public should apply in countries of receipt that lack such an exception.

If the country of a digital communication's origin should not extrude its copyright exceptions to countries of receipt, what about the reverse proposition? Should countries of receipt apply their own exceptions, regardless of the law of the country of departure? Suppose for example, that a U.S. party made available over a digital network (and U.S.-based server) a parody whose copying exceeded U.S. fair use bounds, but was consonant with French practice. Should France apply its exception to parodies received in France? Outside the context of digital communications, for example, were the parody of a U.S. work created or exploited by analog media in France, principles of national treatment would subject the U.S. work to the same copyright limitations as French works incur. While simplicity, and ease of international commerce, counsel against the same result when a work is simultaneously made available in innumerable countries via the Internet, logical consistency would retain the application of the national norm. Moreover, the norm is an expression of the receiving country's cultural and information policy, manifested here by a choice to enhance its residents' exposure to certain kinds of works based on or incorporating portions of copyrighted works (e.g., parody). To the extent that the receiving country can apply its norm, without foisting that norm on other countries, it should be able to do so.

Conclusion

"International copyright" can no longer accurately be described as a "bundle" consisting of many separate sticks, each representing a distinct national law, tied together by a thin ribbon of Berne Convention supranational norms. Today's international copyright more closely resembles a giant squid, whose many national law tentacles emanate from but depend on a large common body of international norms. In the meantime, while international norms continue to constrain, if not supercede, national copyright laws, some national norms remain significant. Sometimes national norms persist by designed deference to local labor and cultural policies, as seems to be the case with copyright ownership, and may be the case with exceptions and limitations on copyright. Sometimes, however, national norms endure from a failure of the political will of the drafters of multilateral instruments, as may also be the case with exceptions and limitations on copyright.