Berne Without Borders: Geographic Indiscretion and Digital Communications

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**Berne Without Borders: Geographic Indiscretion and Digital Communications**

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Let me begin by referring to an export of middle-brow American culture (some of you may find the terms “middle-brow” and “American culture” redundant). In this case, I refer to the once-famous television Western series, “Bonanza.” Those of you who remember this broadcasting icon may be wondering what a show about the do-gooder adventures of the cattle-ranching Cartwright family – composed for most of the series of “Pa” (played, in fact, by a Canadian actor), “Hoss” and “Little Joe” – could possibly have to do with international copyright law. But you would be underestimating the cosmopolitan sophistication of those early 1960s screen writers. Episode number 136, first broadcast on September 29, 1963, and titled “A Passion for Justice,” is all about vindicating authors’ rights against transnational copyright infringement. The plot synopsis reads as follows:

When a Virginia City [Nevada] newspaper prints his novels as serials . . . , Charles Dickens [then on a U.S. lecture tour] goes to the newspaper office to confront them. He walks in to a ransacked office and is arrested for the crime and fined. But Dickens refuses to pay or talk, and the Cartwrights believing him innocent set out to prove it.

I have not been able to obtain a copy of the script or of the show. (Or, more accurately, my scruples have prevented me from downloading a copy off of one of “Bonanza’s” many fan websites.) So I don’t know how it ends. But we can imagine a few scenarios: For example, the Cartwrights find the real perpetrator, and in gratitude, the Virginia City Bugle (or

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1 Many thanks for research assistance to Carolyn J. Casselman, Columbia Law School class of 2003.  

whatever the newspaper’s name) agrees to pay Dickens royalties for the novels it serialized.

Or perhaps: Dickens finds the real perpetrator, congratulates him on a job well done at the Bugle, and enlists him, together with the Cartwrights, to trash the printing presses of other US pirate publishers.

Or even: awakened by Dickens to the plight of foreign authors in the U.S., the Cartwrights gallop from Virginia City, Nevada to Concord, Massachusetts, where they persuade Ralph Waldo Emerson to join the Comité d’Honneur of the newly formed Association Littéraire et Artistique Internationale (ALAI), to work toward drafting and passing the document that became the Berne Convention. The rest is history.

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I. Borders Before Berne

“Bonanza” notwithstanding, the late 19th-century was in fact an era of increasing commerce and communication among countries whose domestic production and reproduction of works of authorship had vastly increased, thanks in part to new technologies, such as photography, lithography, and high-speed printing. But the frontiers between nations often frustrated authors’ hopes for control over, or at least compensation for, the international exploitation of their works. Authors’ rights ceased at their national boundaries; the world beyond foreboded not dragons, but pirates. Between some countries, bilateral treaties alleviated the situation to some extent, but formalities whose compliance could be elusive often freighted these agreements. Thus, when the members of the ALAI gathered in Paris in 1878, with Victor Hugo at their head (Emerson in fact joined in

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3 See, e.g., 2 J. Tebbel, A HISTORY OF BOOK PUBLISHING IN THE UNITED STATES 655 (1972); H. Lehmann-Haupt, THE BOOK IN AMERICA 137-38 (1939); PUBLISHERS WEEKLY, Nov. 1, 1890 at 642 (all documenting improvements in the technology of publishing and mechanical reproduction).


1879), to devise the first multilateral copyright treaty, authors were contending with copyright in a world bristling with borders.

In the absence of a web of enforceable (and enforced) bilateral agreements, protection stopped at the frontiers between nation states. In some instances, for example, during the Enlightenment, this structure favored the dissemination of controversial ideas, as proscribed authors could publish from such havens as Holland or Switzerland.\(^7\) It also, of course, favored piracy, particularly in the 19th-century U.S., as Dickens and Trollope, among other frequently-pirated English authors, incessantly bemoaned.\(^8\) Indeed, even non English commentators deplored the situation in the U.S. For example, in 1851 Alfred Villefort, a French lawyer in his country’s foreign service, compiled an international survey of copyright laws. Of the 1831 U.S. copyright law, he said the following:

A curious provision of this law declares with the greatest clarity that one may import from abroad any kind of work of authorship without exception. One could not have made a more welcoming appeal to infringement. The supply was worthy of the demand: piracy has flooded America with its products.\(^9\)

This same author did not limit his indignation to overseas transborder piracy. If anything, European piracy was worse because, unlike the U.S., which primarily pirated foreign works for local consumption, some European countries pirated foreign works in order to export them back to their countries of origin and elsewhere. Neighboring Belgium attracted Villefort’s particular ire. He ranted:

\(8\)See ASSOCIATION LITTÉRAIRE & ARTISTIQUE INTERNATIONALE, SON HISTOIRE, SES TRAVAUX 1878-1889, 35-36 (1889) (letter dated Sept. 9, 1879 from Ralph Waldo Emerson accepting invitation to join the Comité d’honneur).


\(9\)ALFRED VILLEFORT, DE LA PROPRITÉ LITTÉRAIRE ET ARTISTIQUE AU POINT DE VUE INTERNATIONAL: APERÇU SUR LES LEGISLATIONS ÉTRANGÈRES 9 n.1 (1851)
There is a country at our gates, whose territory is separated from ours only by the imaginary line drawn in treaties, and whose name is in effect synonymous with piracy.\textsuperscript{10}

The figures Villefort adduced are revealing: in 1847, France exported approximately 175,000 kilos of books to Belgium; Belgium exported to France and elsewhere 195,000 kilos – that is 20,000 kilos more books.\textsuperscript{11} I acknowledge little familiarity with mid 19\textsuperscript{th}-century Belgian literature, but it seems to me unlikely that these export figures represent solely domestic Belgian authors.

During the later 19\textsuperscript{th} century, however, a different current ran against this kind of opportunistic exploitation of national boundaries. David Saunders has pointed to a relationship between the development of international norms, including copyright, and the rise of the international trade expositions in London, and, especially, Paris. The proponents of these Universal Expositions aspired to universal, or at least uniform, standards governing the subject matter and means of international trade. This was the period that produced not only the Berne Convention, but the International Telegraph Union and the Universal Postal Union.\textsuperscript{12} Of course, in matters of international trade, what universalism meant might be in the national eye of the beholder. Thus, David Saunders tells us, Victor Hugo, eleven years before he presided over the organization that initiated the Berne Convention, expostulated the eradication of national borders to the 1867 Paris Exposition Universelle as follows:

O France, adieu! You are too great to be merely a country. . . You will cease to be France, you will be Humanity; you will cease to be a nation, you will be ubiquity. You are destined to dissolve into radiance and nothing of this is so majestic as the visible obliteration of your frontier. Resign yourself to your immensity. Goodbye, people! Hail man!\textsuperscript{13}

These universalist – not to say Franco-centric – enthusiasms appear not have been shared by all advocates of international copyright. In fact, when the delegates of 10 countries convened in Berne in 1883, two visions

\textsuperscript{10}Id. at 11.

\textsuperscript{11}Id. at 11-12.

\textsuperscript{12}See DAVID SAUNDERS, AUTHORSHIP AND COPYRIGHT 169-70 (1992).

\textsuperscript{13}Quoted in AUTHORSHIP AND COPYRIGHT at 172.
of international copyright competed for the adherence of the framers of the document that would become the Berne Convention. Under one view, utopian in both senses of the term, an international copyright code would supersede domestic legislation, imposing uniform rules, and thus sweeping away national boundaries and distinctions. Stephen Stewart dubbed this view of international copyright “the elegant expression of a pious hope.”\textsuperscript{14} Under a less elegant, but more pragmatic, and therefore more modest and national sovereignty-sensitive approach, borders would remain, as domestic legislation would continue to define the existence and scope of copyright for each member State, but the rule of national treatment would assimilate foreign authors to locals, entitling them to the same protections.

As we know, the Berne Convention ultimately adopted a combination of approaches, making national treatment the principal rule, but accompanied by minimum standards of protection that member States must grant to Berne Union authors, whatever the level of coverage afforded local authors.\textsuperscript{15} These standards were intended to encourage international harmonization of substantive rules, as the Berne Convention’s drafters anticipated that few member states would choose to accord their own authors less protection than those states granted to foreign creators. With each revision of the Berne Convention, the number of supranational norms has grown. Nonetheless, the border-preserving rule of national treatment remains the cornerstone of Berne and its successor agreements.

I emphasize the role of borders in the Berne Convention because, at the inception of the 21\textsuperscript{st} century, thanks to digital communications, authors are again encountering a world of increased international commerce in works of authorship, a world in which the persistence of national borders, and the disparate national regulation they entail, may seem even more frustrating than before. (Though, admittedly, the consequences of disparity are less dire than before; today, in lieu of expiration of protection, authors primarily face inconsistency of protection.) Moreover, the simultaneous and geographically pervasive nature of digital communications may undermine some basic rules of the Berne Convention. As we have seen, while the Berne Convention was designed to mute the significance of international boundaries, much of its structure presumes those borders. Their effective absence may provoke perverse results. This lecture will consider the extent to which Berne relies on national boundaries. It will also suggest measures

\textsuperscript{14}See Stephen Stewart, International Copyright and Neighboring Rights ¶ 3.08 (2d ed. 1989).

\textsuperscript{15}See generally, Ricketson ¶¶ 2.10-2.52.
that might be taken to alleviate the unintended consequences of the application of Berne’s rules to the geographically indiscreet communication of copyrighted works, especially by digital media.

II Berne With and Without Borders

I first will discuss how the Berne Convention, despite its border-muting goals, in fact presumes and relies upon the persistence of national frontiers. Then I will turn to the challenges that digital communications pose to the Berne structure.

The principal rule, of “national treatment,” set out in Berne art. 5.2, ensures that Berne Union authors will receive the same treatment, i.e., will be subject to the same rules, as local authors. This rule accommodates differences in the treatment of authors from one country to another across the Berne Union, but within each country, Berne authors receive the same protection as domestic authors (subject to the supranational minima of protection). As to differences between countries, Berne tolerates considerable divergence. Indeed, where two of the principal exceptions to or limitations on protection are concerned, Berne in effect ratifies the border-raising effect of disparate national standards, by providing that the limitations “shall apply only in the countries in which they have been prescribed.”16 This approach is politically shrewd, in that it preserves the autonomy of national cultural policies, but endeavors to contain the damage to “Hugolian” universalist visions of international copyright by forbidding international spillover of those policies.17 We shall consider whether this combination of deference to local policy with a caution to contain the policies’ effects within national bounds can in fact work in a world of digital communications.

The first of these nationally-bounded limitations concerns the art. 11bis right of communication to the public, including by broadcasting and by primary and secondary wire transmissions. Member States may subject these rights to compulsory licensing. But if the communication traverses the member State’s border, it would seem that the author could demand a negotiated license for the extraterritorial reach of the broadcast (unless the country of receipt also imposed a compulsory license). In practice, at least until satellite transmissions, transborder broadcast “signal bleed” may not have placed compulsory and negotiated license States in conflict, or any such

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16Berne Convention, arts. 11bis.2, 13.1.

17I have borrowed the term “Hugolian” from David Saunders, supra, at 176.
conflicts were ignored. Once it became possible to cover a great many countries at once, however, the prospect of such conflicts seemed more likely. The E.U. Satellite Directive resolves the conflict in part by determining that the “communication” occurs only in the State from which it originates. But, fearing a race to underprotective “copyright havens,” E.U. and other copyright-producing States have resisted the point of origin approach for Internet transmissions. At the same time, the globally ubiquitous nature of an Internet transmission would seem to defeat the Berne proviso that a member State limit the reach of its compulsory license regime to its borders.

Similarly, art. 13.1 permits member States to impose compulsory licenses on the reproduction of musical works in sound recordings, again so long as these conditions “shall apply only in the countries which have imposed them.” One might have thought that the manufacture and distribution of phonograms can be sufficiently geographically circumscribed, that this proviso poses no significant practical problems. But now we have what in U.S. copyright law are called “digital phonorecord deliveries” – the sending of digital files that the recipient downloads in order to create a copy in her hard drive or recordable free-standing disk. If the State from which the file is sent imposes a compulsory license, but the State in which the recipient’s copy is made does not, then to make that digital phonorecord delivery subject to a compulsory licence would seem in tension with the Berne requirement.

Limitations on exclusive rights are not the only areas in which Berne’s deference to geographic frontiers now becomes problematic. The perverse effect of national boundaries may be most significant in Berne’s designation of the “country of origin” of a work. Two key consequences flow from this designation. First, the “country of origin” is the country whose law applies to calculate the duration of protection under the “rule of

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18Council Directive 93/83 of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmissions, 1993 O.J. (L 248) 15, art 2(b). This Directive localizes the act of communication “solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication . . .”


the shorter term.”

Second, because the Berne Convention’s substantive minima apply only to works from other Berne Union countries, member States need not give Berne-level protection to their own works.

To understand what are the perverse effects, and how they may come about, it is necessary first to work one’s way through the Berne concept of “publication.” The member State in which first publication takes place is considered the “country of origin.” Under art. 3.3’s definition of “published works,” a work will be considered “published” if copies are made available to the public in a manner that satisfies the public’s reasonable requirements. If one interprets “copies” to include reproductions in RAM (a computer’s temporary memory), then posting a work on a website makes “copies” available to anyone who accesses the website. If one rejects the RAM copying theory, one might contest the characterization of the posting as a “publication,” on the ground that the website is simply making the material available as a public performance or display. These are not “publications” under the Berne Convention. Nonetheless, even if one interprets “copies” under art. 3.3 to mean more permanent embodiments, then any website that permits downloading (as opposed to streaming-only), would effect a publication because the downloading public can store the work to a more permanent format, such as hard disk, floppy disk, or printout.

Let’s now move to the second prong of the definition of publication: Internet disclosure makes copies available for downloading. Are these copies “made available to the public in a manner that satisfies its reasonable requirements”?

The Internet culminates the passage from a model of communication of works to a public of passive recipients of a distribution or performance to a model where networks offer interactive consultation of works at the initiative of that very same public. Public access now can be immediate, individual and instantaneous. These copies are made available “on demand.” Reversing the Rolling Stones’ anthem, if you have a computer and Internet access, “you can[] always get what you want” (if it’s made digitally available); this is probably at least as much as “what you need,” for purposes of the Berne Convention. As a result, the posting of a work on a website can fulfill the reasonable requirements standard for publication, and thus effect publication in any country in which a sufficient

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21 Berne Convention, art 5.4(a). 

22 Id. art. 5.3. 

23 Id. 

24 Id. art. 3.3. 

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portion of the public is computer-equipped. This, in turn, would mean that copies are simultaneously made available in every country of the world in which there is adequate Internet access at least for downloading. Currently, over one hundred thirty countries are Berne Union members. Many, if not all, will have sufficient computing resources to qualify as places of publication.

Now, if a work initially disclosed over the Internet is simultaneously “published” in up to 130 countries, does that mean that every one of those countries is the “country of origin”? The consequences of such a conclusion are bizarre indeed. Recall that the Berne Convention explicitly excuses Union members from according Berne-level protection to its members’ domestic works of authorship. A Union member meets its Berne obligations if it accords protection consonant with Convention minima to foreign Berne-Union works. If, however, with simultaneous universal publication via the Internet, every work of authorship could be considered a domestic work in each country of the Berne Union, then, ironically, Berne Convention minimum standards of protection might never apply, because there will be no foreign works.

To avoid this preposterous result, one might apply article 5.4 of the Convention to conclude that, when there are multiple countries of first publication, the “country of origin” is the country whose term of protection is the shortest. This too, however, creates problems. The problems arise from the article 7.8 “rule of the shorter term.” According to this rule, if the term in the country of origin is shorter than that of the country where protection is sought, then the country of origin’s term applies, rather than term of the country of protection. But if, in the case of multiple countries of first publication, the “country of origin” is the country whose term is the shortest, then all Internet-published works will be localized in the country with the shortest term.

These anomalies suggest that the notion of Internet “publication” should be limited to a single Berne Union country: but which one? One might designate as the country of first publication the country from which the author communicated the work to the server, but this characterization has some disadvantages. First, that country may have little relationship to the work, as the author may upload the work from a modem-equipped computer anywhere in the world (including from countries through which the author is merely traveling). Second, putting aside peer-to-peer file-sharing, the work is not yet available to the public until it arrives at its place of residence on the website that members of the public will access. This in turn suggests that the country of first publication is the one from which the work first becomes
available to the public; that is, the country in which it is possible to localize
the website through which members of the public (wherever located) access
the work.

This choice, however, is not problem-free, either. Unlike countries
of traditional, physical first publication, in which authors or publishers
consciously organize the economic center of the exploitation of their work,
the country in which the server that hosts the website is located may be
completely indifferent, or even unknown, to the author. Moreover, the
downloading web-user may not even be aware of the location of the website
or its host server. Not only is the criterion of the physical location of the
webserver irrelevant, but the location of the effective business establishment
of the website operator may be insignificant to an author’s selection of that
site to disseminate the work. That is, if the conditions of publication are the
same whatever the geographic location of the website operator’s business
establishment, then that country’s relationship to the publication would seem
purely fortuitous.

We have come a long way from the Berne drafters’ preoccupation to
enhance the likelihood that works of authorship would find some point of
attachment to the Convention. At the time, multiple points of attachment
helped ensure that a work would not be “stateless” in the Berne Union, but
instead would find refuge on some Berne shore. Now we have the opposite
problem: a plethora of contacts, but none of which may be particularly
meaningful. Is there a way out of the morass?

III Finding a Way out of the Impasse a Borderless Digital World Creates

Given the increasing incoherence of a treaty that is based on borders
but that attempts to transcend them, we confront two choices: either we
must complete the task of creating supranational substantive copyright rules,
so that borders no longer matter, or we should at least create uniform choice
of law rules.

With respect to the first course, we find ourselves back where the
original Berne drafters found themselves, debating between a supranational
copyright code and national treatment. Or maybe we are a little farther
along, for not only have more substantive minima been added to Berne, but
other international agreements have come along to supplement those norms.
Most significantly, we have the TRIPs accord, appended to the 1994 WTO
Agreement. This text incorporates the Berne norms (minus moral rights),
while amplifying copyright and neighboring rights subject matter, exclusive
rights, and exceptions. Moreover, it puts teeth into the Berne standards by providing sanctions for non implementation, and by designating a supranational adjudicative body to resolve inter-governmental disputes regarding adherence to TRIPs requirements. To date, we have had only one WTO Dispute panel resolution regarding copyright, but it comes in the key area of exceptions to copyright, and may well mark a start toward truly supranational copyright law.

But it is only a start, and the road may be long and uncertain. First, only governments may bring a complaint to a WTO Dispute panel; a given country’s non implementation of TRIPs norms therefore must be fairly extreme. Second, whatever the precedential effect of Panel decisions is within the WTO, we do not yet know whether member State courts will adopt Panel interpretations of the Berne Convention. Third, and most embarrassingly for an American, compliance with an adverse Panel decision need not take the form of amendment of the offending local law. Having lost the one copyright case so far to come before the WTO, the U.S. has not appealed, but also has not changed its law. Indeed, the current powers in the U.S. Congress show no disposition to withdraw the condemned provision. Rather, we appear to be discussing payment of damages to the complaining countries. Should we persist in this approach, we could be leading the way toward the development of supranational standards that produce no harmonizing effect in fact. We will know that our law is inconsistent with the norm, and those who emulate our lamentable example will know that their local departures from TRIPs are also inappropriate, but all the same these laws will not be corrected. TRIPs will be a supranational code only for those too principled or too poor to opt out by paying compensation.

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26 Id. arts. 41-61, 64.


If we can't secure agreement on or implementation of supranational substantive rules, perhaps we should try for uniform choice of law rules. This route may be just as unlikely in fact, but it is worth evoking. The principal difficulty may be identifying a meaningful point of attachment, as we have seen. Is there a nation-state with a particularly significant relationship to the creation or communication of the work? If we can find it, perhaps we should make its law govern all issues, from protectability through infringement.

Given the effects of digital communications, maybe the only fixed point in all of this is the Author. For example, we might address the country of origin problem by making that country the country of the author's residence at time of the work's first public disclosure. We might make the law of the Author's residence competent to adjudicate claims of copyright ownership. And we might make that law the one that governs multi-territorial infringements. An obvious objection to this proposal is that it will promote a peculiar variant of what American conflicts scholars call the "race to the bottom." That is, that persons subject to the law's regulation will seek the most forgiving jurisdiction possible, such as, in financial matters, the Cayman Islands. The variant here would be the opposite: authors will flock to the jurisdiction offering the most author-favorable norms. Perhaps, but is that such a bad thing? Worse things could happen than that nation-states would compete to attract authors to their shores. (One might argue that France’s appeal for American writers has something to do with its more author-friendly copyright laws, but I suspect I’d have to acknowledge that other attractions, notably gastronomic, may also be in play. By that token, perhaps the historic imperviousness of the British palate has something do with the relatively light pull France has exercised on English writers. And you can get better claret in London than Paris, anyway.)

I note that this proposal brings us full-circle to the 19th-century debate (at least in France) over whether the State of the Author, or the State of first publication, or the State where the alleged infringement occurs is the relevant point of attachment for international copyright. Arguments favoring the law of the author (then meaning nationality rather than residence), tended to rely on the personal nature of author’s rights law in general: the work, as an emanation of the author’s personality, ought to be governed by the national law governing the author’s person.29 The civil law tradition, going back to Roman times, considered that one’s personal law

followed one even to other countries; thus foreigners, even resident in Rome, were not covered by the *ius civilis*. But, if the position favoring the author’s personal law could claim philosophical coherence, it also posed some practical problems. For example, what if the author was a dual national? What if the author’s nationality changed, due to marriage or emigration? What if the author was Stateless? (Note that substituting residence for nationality cures some but not all of these problems.)

Most importantly, the author point of attachment might have made most sense for the extra-patrimonial aspects of authors’ rights (moral rights), but did not adapt well to the economic aspects of copyright. Some commentators therefore sought to graft the philosophical advantages of the author-centric point of attachment onto the practical advantages of designating the country of first publication: when the author chose the country of first publication, the author became a “cultural citizen” of that country. It was therefore appropriate that the law of the chosen country accompany the work wherever it went.

The third approach, looking to the law of the country of infringement, is essentially the national treatment rule; it disregards the work’s personal affinities in favor of its treatment as an object of property whose situs is wherever it is exploited. Thus the work will be governed by the laws of each country where infringement allegedly occurs. This has the tremendous advantage of simplifying matters for the local judge, as well as demonstrating the high-minded approach of non discrimination. It also echoed the French aspirations to universality: all works on French soil would be treated alike, that is, by French rules. But even the French were not completely at ease with this solution. The sticking point was whether to protect a work that enjoyed no copyright in its country of first publication. Even today, in those rare situations in which the Berne Convention does not apply, France will not protect patrimonial rights unless the claimant can show that the work is protected in its country of origin. The reference to the country of first publication can be understood in economic terms, for

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30 See, e.g., BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 57-59, 64-65 (1962).

31 See ANDRÉ WEISS, TRAÎTÉ THÉORIQUE ET PRATIQUE DE DROIT INTERNATIONAL PRIVÉ 484 (1912).

32 Id. at 478-82.

example, as an encouragement to publish in France, rather than in some benighted under-protective place (which might be the author’s home State). But it can also be appreciated in light of the debate over how closely linked authors’ rights are or should be to authors themselves.

Why should the author’s residence be a more convincing criterion today? As we have seen, the Internet drastically compromises the place of first publication point of attachment. It also extravagantly multiplies the countries of exploitation/infringement. The practical advantages of the rule of national treatment seem less compelling if litigating the infringement means litigating multiple national claims in a single action. (This is something to which U.S. courts are more inclined than U.K. courts have been, particularly when U.K. courts are not obliged to exercise jurisdiction over foreign copyright claims by the Brussels Convention). The advantages are similarly evanescent if the national treatment rule ends up meaning having to litigate in multiple jurisdictions, a dauntingly time and resource-consuming prospect.

Let me conclude by casting the apparent neatness of my own suggestion into disarray: If the Author is to be the fixed point of attachment for a choice of law approach to resolving the dissolution of borders in the Berne system, do we nonetheless need international agreement as to who is an Author? It suffices to recall the disparities between common law copyright and civil law droit d’auteur systems to realize that one country’s author is another’s mere employee. And what do we do with systems that trumpet the personalist conception of author’s rights, but then effect statutory transfers of most or all rights to an exploiter who may be a juridical person? Do we follow the creator, or the all-rights exploiter? Or, how should we address systems in which the creator isn’t a person at all, not even a juridical one, but a computer? So maybe we need a supranational standard for authorship. But if we can agree on that, then perhaps we can agree on the rest of the substantive rules (one may be as

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35See, e.g. 17 U.S.C. § 201(b) (works made for hire).


37See, e.g., Copyright, Designs and Patents Act, 1988 c. 48, §§9(3), 178 (Eng.).
likely as the other). And if we get that far, perhaps we won’t need choice of law. Or even the Berne Convention as we now know it.