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Conundra of the Berne Convention Concept of the Country of Origin

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Abstract

This essay explores one of the most important, but occasionally intractable, issues under the Berne Convention, the concept of Country of Origin. Article 5(4) of that treaty defines a work's country of origin, but leaves out several situations, leaving those who interpret and apply the treaty without guidance in ascertaining the country of origin. I will call those situations the "Conundra of the country of origin," and will explore two of them here. First, what is the country of origin of an unpublished work whose authors are nationals of different countries? Second, what is the country of origin of a work exclusively made available over digital networks? In both situations, in the absence of treaty specification, the work may have multiple countries of origin. A plurality of countries of origin may be problematic because, under Berne art. 5(3) "Protection in the country of origin is governed by domestic law." Berne minimum protections do not apply to local works in their countries of origin. As a result, the greater the number of countries of origin, the fewer the number of countries in which the work must receive the minimum Conventional coverage. Even where minimum protections may apply, variations in the country of origin can affect the calculus of copyright term under art. 7(8), the availability of coverage for works of applied art under art. 2(7), and claims to artists' resale royalties under art. 14ter; in all those cases, the availability of protection turns not on national treatment, but on reciprocity with the country of origin.

This essay explores one of the most important, but occasionally intractable, issues under the Berne Convention, the concept of Country of Origin. Under article 5(4),

The country of origin shall be considered to be:

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> *(a)* in the case of works first published in a country of the Union, that country; in the case of works published simultaneously in several countries of the Union which grant different terms of protection, the country whose legislation grants the shortest term of protection;
>
> *(b)* in the case of works published simultaneously in a country outside the Union and in a country of the Union, the latter country;
>
> *(c)* in the case of unpublished works or of works first published in a country outside the Union, without simultaneous publication in a country of the Union, the country of the Union of which the author is a national . . .

Article 5(4) makes publication the principal point of attachment for determining the country of origin; article 3(3) defines published works as:

> works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work.

But, the definition further specifies:

> The performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication.

As we will see, this qualification will create significant ambiguity with respect to works communicated over digital networks, but not distributed in tangible copies to the public.

Despite its detail, art. 5(4) leaves out several situations, leaving those who interpret and apply the treaty without guidance in ascertaining the country of origin. I will call those situations the "Conundra of the country of origin," and will explore two of them here. First, what is the country of origin of an unpublished work whose authors are nationals of different countries? Second, what is the country of origin of a work exclusively made available over digital networks? In both situations, in the absence of treaty specification, the work may have multiple countries of origin. A

plurality of countries of origin may be problematic because, under Berne art. 5(3) "Protection in the country of origin is governed by domestic law." Berne minimum protections do not apply to local works in their countries of origin. As a result, the greater the number of countries of origin, the fewer the number of countries in which the work must receive the minimum Conventional coverage. Even where minimum protections may apply, variations in the country of origin can affect the calculus of copyright term under art. 7(8), the availability of coverage for works of applied art under art. 2(7), and claims to artists' resale royalties under art. 14ter; in all those cases, the availability of protection turns not on national treatment, but on reciprocity with the country of origin.

I. Works with several co-authors from different Union countries:

The Berne Convention acknowledges that some works will be co-authored, hence its provision for the calculation of the copyright term of joint works based on the death of the last surviving co-author.[1] But the Convention does not address the attribution of a country of origin to joint works whose authors are nationals of different Union states. This omission will not cause difficulties where first publication occurs in a Union country; that country will clearly be the country of origin under article 5(4)(a). But problems will arise where the works remain unpublished or are first published in one of the few remaining non-Union, non-WTO countries[2] (without simultaneous publication within 30 days in a Union state).

[1] Berne Conv. art. 7bis.

[2] Aruba, Eritrea, Kosovo, Marshall Islands, Palau, and Sint Maarten are neither Berne nor WTO countries. Curaçao, Ethiopia, Iran, Iraq, Somalia, South Sudan, Timor-Leste are not Berne signatories, and are not yet members of the WTO, but *are* observer countries still in the application process. See, WTO, *Members and Observers*, WTO.org, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last accessed Jan. 22, 2021); WIPO, *WIPO-*

While Berne's failure to provide explicit guidance gives rise to the problems, the Convention's interstices may point toward a variety of solutions. One may suggest four alternative approaches to designating the country of origin for unpublished joint works. First, one might borrow from Berne's approach to works simultaneously published in more than one Union country: where the countries of first publication have differing terms, article 5(4)(a) designates as the country of origin the country with the shorter or shortest period of protection.[3] Accordingly, when co-authors' countries of nationality provide for different terms, the country of origin of the unpublished work will be the Union country with the shorter or shortest term of protection. This approach could, however, have deleterious consequences for co-authors whose home countries have longer terms of protection than the country designated as the country of origin precisely because of its shorter (but still Berne-compatible) term. The rationale for choosing the shortest term appears to have been to ensure that the work fell into the public domain at the same time throughout the Berne Union, especially given the considerable disparities in the length of the copyright term in different Union states at the end of the 19th century.[4] Without such a rule, authors (or, more likely, publishers) might have engaged in country-of-origin-shopping, that is, the simultaneous publication of a work in a

Administered Treaties, Contracting Parties, Berne Convention, WIPOLex.WIPO.int, https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=15 (last accessed Jan. 22, 2021)

[3] ibid.

[4] The rule of the shorter term has been part of the Berne Convention since the original 1886 text. *See* WIPO, *Draft Convention, Minutes of the Fifth Meeting of the Conference for the Protection of Authors' Rights, Records of the International Conference for the Protection of Authors' Rights Convened in Berne* (1884), available on page 94 at: https://www.wipo.int/edocs/pubdocs/en/copyright/877/wipo_pub_877.pdf ; *Report of the Committee, Second Conference in Berne*, (1885), available on page 119 at: https://www.wipo.int/edocs/pubdocs/en/copyright/877/wipo_pub_877.pdf ("By giving preference to the system that made the term of protection depend on the law of the country in which publication had first occurred, the Committee also had to provide for the case in which such publication occurred in a number of countries in the Union at the same time, and it settled it by providing that the term of protection could not exceed that of the country in which the work fell into the public domain soonest.").

country not otherwise connected with the author or the work, in order to obtain the benefits of its longer term. (Although an author could obtain those benefits simply by first publishing in that country, and not simultaneously publishing in a country with a shorter term.) Duration-shopping is less likely to be a concern when the point of attachment is the author's nationality, since it seems farfetched to expect that an author will seek citizenship in another country merely to claim its longer copyright term.

Second, where the countries of the different co-authors have identical terms of protection, alternative 1 will result in as many countries of origin as there are authors, and therefore will not achieve the goal of avoiding a multiplicity of countries of origin.

Another principle to enable choosing among the possible countries of origin would look to the Union state of which a co-author is a national, and whose domestic law is the most author-favorable. One may justify this bias on the ground that the Berne Convention embraces it; the Preamble declares: "The countries of the Union, being equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works," Selecting the most author-favorable law among the co-authors' domestic copyright laws could give co-authors an advantage in other cases where a rule of reciprocity under the Convention requires reference to the law of a work's country of origin, for example, with respect to the *droit de suite* under article 14^{ter} or the protection of works of applied art under article 2(7). For the reasons akin to those evoked in connection with alternative 1, reciprocity-shopping does not seem a real concern here: manipulation of the point of attachment in the event that none of the co-authors' countries of nationality afford reciprocal protection of applied art or of artists' resale royalties would

require adding to the roster a specious co-author of advantageous citizenship. Reciprocity-avoidance moreover concerns a narrow subset of works protected under the Berne Convention: works of applied art and fine art originals for purposes of the *droit de suite*. As for the broader group of Berne works in general, disparities in domestic laws might inspire co-authors to seek a national law that grants a level of protection higher than the Berne minima, and potentially higher than the level afforded by other national laws, but if none of the co-authors are nationals of such a country, it would be necessary to attach a spurious co-author who was a national of such an authors' paradise. Even well-counselled authors are not likely to follow such a tortuous (not to mention fraudulent) track.

Third, one might designate the country of origin of a multiple-authored unpublished work as the country of nationality (or residence) of a majority of the co-authors. Failing a majority country, or in lieu of such a point of attachment, the joint authors might agree to designate one co-author's country as the country of origin.[5]

This gap-filling, while perhaps consistent with the overall goals of the Berne Convention, may be supplying a lot of stuffing for the lacuna in the treaty text. A fourth approach to the problem of multiple countries of origin where the domestic legislation of any of these countries denies domestic authors the benefits of Berne minima, as the United States has done with respect to certain

[5] The International Law Association Guidelines on Intellectual Property and Private International Law (adopted in Kyoto by the International Law Association, 2020) [ILA Kyoto Guildelines], adopts this approach to designate the state whose laws will determine initial ownership of copyright in a multiple-authored work. Kyoto Guideline 20(2)(a) provides:

> Initial ownership in copyright is governed by the law of the State with the closest connection to the creation of the work. This is presumed to be the State in which the person who created the subject-matter was habitually resident at the time of creation. *If the protected subject-matter is created by more than one person, they may choose the law of one of the States of their habitual residence as the law governing initial ownership.* This paragraph applies mutatis mutandis to related rights. (Emphasis supplied)

formalities,[6] or scrapes beneath the bottom of a Berne-permissible range, for example, by adopting multiple and wide-ranging copyright exceptions[7] (recall that under art 5(3) the country of origin need not accord Berne-level protection to its own works) hews more closely to the Berne text. While in the case of multiple authors, the country of origin may be all the countries of the authors' nationalities, this does not necessarily mean that the *work* will be subject to sub-Berne protection in each of those countries. Rather, under art. 5(1),[8] which references the protection Union authors enjoy, arguably only the local *author* might be covered by her national law (which might be less protective than Berne minima); non local authors would still be entitled to Berne minimum protection. Under this reading, if one author's country of origin is not the country of origin for the other authors, Berne member States may not accord less than Berne-minimum protection to multiple-authored works whose authors are nationals of other countries.[9] By the same token, if one co-author's national law did not offer the Berne-optional protections of applied art and artists' resale royalties, but the others' did, the others would still enjoy those protections. Thus if one co-author's national law did not provide for artists' resale royalties, but her co-author's national law did, then the first co-author's country of nationality would still be obliged to include the other co-

[6] See 17 U.S.C. sec. 411(a) (requiring registration of a US work as a prerequisite to initiating an infringement action).

[7] For another US-law example, see 17 U.S.C. sec. 110(5)(B) (imposing an exception to the public performance right with respect to retransmissions of performances of nondramatic musical compositions in restaurants and retail establishments; the WTO Panel's ruling that this exception exceeded the boundaries of TRIPS art. 13 permissible exceptions concerned the application of the exception to non-US works). See WT/DS160/R (June 15, 2000)

[8] Article 5(1) provides: "Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention."

[9] See ALAI, DETERMINATION OF COUNTRY OF ORIGIN WHEN A WORK IS FIRST PUBLICLY DISCLOSED OVER THE INTERNET 5-6 (2012), https://www.alai.org/en/assets/files/resolutions/country-of-origin.pdf. A disadvantage of this approach is that, in the event of sub-Berne protections in a particular Member State, the plaintiffs in any copyright action will have to be the non-local authors. This may increase the cost of litigation, and, conceivably, deny monetary recovery to the local author.

author as a beneficiary of the local *droit de suite*. The first co-author would have no claim in that country, but the second co-author would (and the co-authors could by contract resolve the distribution of the proceeds). This approach, which could avoid prejudicing the other co-authors when one co-author's home country offers less protection than the others, nonetheless carries the complication of requiring courts or other relevant authorities to ascertain the domestic laws of multiple countries, a task whose complexity increases with the number of co-authors.

Of course, in theory, co-authors might seek to avoid all this complexity simply by publishing their work. In the analog world, the Berne country of first distribution of tangible copies will be the country of origin.[10] But for the burgeoning category of digital-only creations, ascertaining the country of first publication provides its own puzzles, as the next Part will show.[11]

II. What is the country of origin of a work exclusively made available over digital networks?

The Internet embodies a change from a model of communication of works to a public of passive recipients of a distribution or performance to a model where individuals, and networks offer interactive enjoyment of works at the initiative of members of that very same public. Public access on demand by streaming or downloading now is immediate, individual and instantaneous. Digital communications both challenge traditional Berne concepts of publication, and bring to the fore the problem of a multiplicity of possible countries of origin.

[10] Berne Conv. art. 3(3).

[11] In that respect, one might bear in mind that digital media not only may augment an unpublished work's number of collaborators, but also may foster dynamic collaborations: as more creators join the evolving work, the countries of origin will continue to swell.

Under the article 3(3) 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, "having regard to the nature of the work." 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 by any means, whether streaming or downloading. In effect, the work would be simultaneously "published" in every country from which the public could access it, thus giving rise to a plethora of countries of origin. If one rejects the RAM copying theory, on the ground that a more permanent embodiment is required,[12] then any website that permits downloading (as opposed to streaming-only), could still effect a publication if the downloading public can store the work to a non-volatile format, such as hard disk, CD, flash drive, memory card, or printout. As a result, merely making works available for more permanent forms of embodiment may reduce the number of putative countries of origin to exclude countries where access is limited to streaming, but still is likely to leave a multiplicity of countries of origin.[13]

More fundamentally, drawing a line between dissemination in the form of downloads and making works available via streaming, with only the former constituting publication, introduces arbitrary distinctions that no longer correspond to the contemporary exploitation and enjoyment of

[12] There is considerable disagreement over whether a RAM copy is a copy within the meaning of the Berne Convention. See generally, San Ricketson and Jane C. Ginsburg, *International Copyright and Neighboring Rights: The Berne Convention and Beyond* paras, 11.69-11.71 and works cited therein (2d ed. 2006).

[13] Cf. ALAI, DETERMINATION OF COUNTRY OF ORIGIN WHEN A WORK IS FIRST PUBLICLY DISCLOSED OVER THE INTERNET 3 (2012) (suggesting art 3(3) implies a 'traceable attachment' to a specific country through publication. But if publication in the sense of art 3(3) focuses on the country of the receiving public, rather than the country from which copies are made available, then even were it possible to ascertain the country in which a download first occurred, this country may have no particularly significant relationship to the author or to the development or exploitation of the work. The same problem arises were one to focus on the country from which copies were made available, because the country where the server is located may have little relationship to the creation of the work or any chosen public.

works. It hardly makes sense to label a work "published" if the public can download copies of a work for subsequent listening or viewing, but "unpublished" if the public can only listen to or view it online in real time. Happily, the phrase, "the availability of such copies," need not mean that the members of the public must be able to possess the copies. The "reasonable requirements of the public" may depend on "the nature of the work." For example, in connection with distribution intermediaries, 'the availability of such copies' could mean the reasonable requirements of the public for possession of copies, as with books offered for sale in bookstores, but it could also mean access to the work, as with copies distributed to motion picture theatres or broadcasting entities for public performance or transmission of the work. Distribution of copies to intermediaries, such as cinemas where the public could view the film (but not obtain copies of it), would therefore suffice to "publish" the work. "[H]aving regard to the nature of the work" thus suggests that "reasonable requirements of the public" should be understood as referencing the enjoyment of the work, not necessarily the possession of copies.

This interpretation may, however, strain the concluding carve-out from article 3(3)'s definition of "published work": "The performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication." Thus, exhibiting a film in a cinema, or broadcasting it on television are not publication. The prior paragraph's argument essentially contends that what "publishes" a cinematographic work is its predicate distribution in copies to movie theatre operators or broadcasting stations. But what if today's or tomorrow's wired or wireless means of communicating works to the public do not require predicate distribution of a

tangible copy? The publication status and therefore the country of origin would turn on artificial, technology-based distinctions no more convincing in this context than the attempt to distinguish downloadable from copy-protected streams previously essayed.

Moreover, if the predicate distribution of a copy for the purpose of further communication constitutes publication,[14] then making one source copy available on a website for access by streaming would "publish" the work in every country from which the public could access the work, by whatever means. This reasoning exacerbates the problem of a multiplicity of countries of origin. Currently, one hundred and seventy nine countries are Berne Union members.[15] Most, if not all, will have sufficient computing resources to qualify as places of publication. If, following this argument through, a work initially disclosed over the Internet is simultaneously 'published' in 179 countries, does that mean that every one of those countries is the 'country of origin' for the purposes of the Berne Convention? The consequences of such a conclusion are bizarre indeed. Recall that article 5(3) 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

[14] This formulation corresponds to the U.S. copyright act's definition of "publication." 17 USC sec. 101 provides ". . . The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication."

[15] See https://wipolex.wipo.int/en/treaties/ShowResults?start_year=ANY&end_year=ANY&search_what=C&code=ALL&treaty_id=15 (accessed January 18, 2021)

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.[16]

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 art. 5(4)(a) rule designating as the country of origin the country with a shorter term of protection will not significantly alleviate the problem if multiple countries share that shorter term, as we have already seen in Part I in connection with multiple-authored unpublished works. And if only one country's law provided the shortest term, another anomaly would result: the country of origin of all Berne works would be that country, even though, apart from simultaneous publication, that country has no significant relationship to the work. 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.[17]

These anomalies suggest that the notion of Internet publication for purposes of determining the country of origin 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

[16] ALAI argues that recognizing each receiving country of a digital transmission as joint COs would 'effectively eviscerate' the Berne Convention., DETERMINATION OF COUNTRY OF ORIGIN WHEN A WORK IS FIRST PUBLICLY DISCLOSED OVER THE INTERNET 3-4 (2012).

[17] If the country of origin's domestic law provides a shorter term of protection than life plus fifty years, other Berne countries would nonetheless accord that work the Berne minimum term. But that is a different matter than the one discussed here, in which one would fix the country of origin in the country with the shortest term; to avoid anomalies, it is necessary to conclude that art 5(4)(a) implies the shortest *Berne-compatible* term. *See also* Thomas F. Cotter, *Toward A Functional Definition of Publication in Copyright Law*, 92 Minn. L. Rev. 1724, 1750 (2008).

little relationship to the work, as the author may upload the work from an appropriately equipped computer anywhere in the world (including from countries through which the author is merely travelling). Secondly, if the public accesses the work from a website, the work is not yet available to the public until the work arrives at its place of residence on that website. 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. If the author operates her own website, it might be localized at the author's habitual residence, but that will not be the case if the server or platform, such as Facebook, hosting the author's website is localized in a different country. Similarly, if the author is making the work available through a third-party site, localization may prove uncertain. Unlike countries of traditional, physical first publication, in which authors or publishers consciously organize the locus of 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. Similarly, 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. For example, 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. Moreover, the Web-user who accesses the site may not even be aware of the location of the website operator or its host server.

In these circumstances, it becomes clear that there are significant difficulties in the digital context with making 'publication' a criterion for determining the 'country of origin'. When there is a plethora of places of publication, perhaps the simplest solution would be to link the country of origin to that of the author's nationality or residence, at least where that country's domestic law conforms to Berne minima. That solution, however, is not consistent with the text of art. 5(4) which applies the authorship point of attachment only in the event of non-publication, or publication exclusively in non-Union States. If, however, one were to revisit the definition of published works in art 3(3) to exclude making works available online, then the work, albeit amply disseminated, would technically not be 'published', and falling back on the authorship points of attachment would be Berne-compatible.

ALAI has proposed such a rethinking of the art 3(3) definition in the context of digital dissemination. In a 2012 Report on *Determination of the Country of Origin When a Work is First Publicly Disclosed over the Internet*,[18] adopting both a textualist and a consequentialist analysis, ALAI concluded:

> The Study Group determined that under the 1971 Paris Act articles 5(4) and 3(3), a work made available over the Internet for downloading is not "simultaneously published" all over the world because the copies referred to in art 3(3) are physical copies, not digital copies. We infer this from the words "manufacture of copies" or, in the authoritative French version, "fabrication d'exemplaires," and the term "availability of *such copies*" (emphasis supplied), which would seem to refer back to the material copies that are made available by the author or authorized intermediary distributor. . . . [T]he conclusion that the copies envisioned in article 3(3) are pre-existing physical copies also follows from the comparison of the first and second phrases of art 3(3): the exclusion from the definition of "published works" of literary or artistic works communicated by wire or broadcasting casts doubt on the characterization of works "made available" to the public over digital networks as "published." Moreover, in light of the purpose of the Berne Convention to promote the international protection of

[18] ALAI, DETERMINATION OF COUNTRY OF ORIGIN WHEN A WORK IS FIRST PUBLICLY DISCLOSED OVER THE INTERNET 2–3 (2012).

> authors, it would be counterproductive (not to say perverse) to adopt a concept of "publication" that, by multiplying the work's countries of origin, would have the effect of disqualifying internet-disclosed works from the treaty's minimum standard of protection. The abandonment during the 1996 Diplomatic Conference of the draft art. 3 of the WCT, which would have equated the making available of copies for public access with published works under Berne art. 3(3), presents a further impediment to extending the Berne text to encompass copies materialized only on receipt. Thus, works made available only on the Internet, even when globally accessible, are not "published" according to the definition in art. 3(3), because the required distribution of pre-existing physical copies to serve the needs of the general public has not taken place.

One may readily share the consequentialist concerns underlying the ALAI recommendation,[19] but how persuasive is the Report's textualist analysis? Does 'manufacture of copies' necessarily restrict the form of the copies to physical ones? Article 3(3)'s open-ended designation of 'whatever may be the means of manufacture of the copies' appears agnostic as to the form. But, the phrase 'availability of such copies' that follows may imply specific physical copies.[20] A digital copy may be evanescent, replaced by another digital instantiation of the work, but without constancy in the 1s and 0s that compose any particular copy because copies residing in a computer's temporary memory may in fact be constantly refreshed. As a result, the owner of a digital copy may always have access to *a* copy, but not necessarily the same copy. If one equates 'such' copies to particular copies,[21] then art 3(3) might not deem the purely digital copy 'published' (or might not deem some digital copies 'published') and, accordingly under art 5(4), at least some of the countries of receipt of digital copies would not qualify as countries of origin.

[19] Accord, S. von Lewinski, International Copyright Law and Policy, paras. 7.31-33 (2008).

[20] Cf. Agreed Statement to WCT art. 6: "As used in these Articles, the expressions 'copies' and 'original and copies,' being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects."

[21] Cf. 17 USC sec 109(a); Capitol Records v. ReDigi, 934 F. Supp. 2d 640 (S.D.N.Y. 2013) affd. on other grounds, 910 F.3d 649 (2d Cir. 2018) (owner of a "particular copy" may resell "that copy"; online communication of a work makes new copies, rather than transferring a "particular copy").

An approach that disqualifies digital copies, regardless of whether their recipients subsequently save them to non-volatile formats, has the merit of treating downloading and streaming alike. As previously indicated, it makes little sense to distinguish between these forms of access to works. But that analysis posited treating both forms of communication as publishing the works. That approach in turn presented the problem of proliferation of countries of origin. If one accepts the ALAI position that digital communication (whether for downloading or for streaming), does not publish works, then a work's country of origin will be the author's nationality or residence, unless or until the works are disseminated in hardcopy format.

Of course, it may seem counterintuitive (or even Luddite) to contend that works widely disseminated in digital form have not been 'published.' But recall that under art. 3(3), publication is not the same thing as public disclosure: as we have seen, art 3(3) clearly excludes "The performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works." Under art 3(3), then, a work may have been widely disseminated and exploited without having been 'published' (assuming one does not treat any predicate act of distribution of copies as effecting publication). It therefore seems textually tenable as well as normatively sensible to revert to authorship points of attachment to determine the country of origin of a work disseminated only in digital form, whether by means of streaming or downloading. Ultimately, the country of origin concept maps poorly to digital dissemination, and whether or not such dissemination constitutes publication for Berne purposes is an unresolved issue. Resolving the issue of digital publication may ultimately require a radical overhaul of the concept of publication, whether it comes in the form of new statutory solutions in member States, like a free online registration option, designed specifically for

ascertaining the place of publication over the internet,[22] or by decoupling the various consequences of publication from the acts that now constitute publication.[23] The latter solution may require amending the Convention – an unlikely prospect, but perhaps national court or WTO interpretations of the Convention might arrive at a similar result.

Reverting to authorship points of attachment does not, however, solve all the country of origin problems engendered by digital communications. Those points of attachment look to the author's nationality or residence in a Union country. These are relatively stable criteria and therefore supply a workable point of reference, at least when the work is single-authored. However, the more co-authors a work has, the more it may have potential countries of origin, particularly in the digital environment, which may foster collaborations across many countries. Part I has explored a variety of approaches to identifying the country of origin of unpublished joint-authored works. As we look to these to alleviate the problem of a multiplicity of countries of origin in the digital context as well, we see that the conundra of the concept of country of origin in the Berne Convention have brought us full circle.

[22] See, e.g., *see* Julia Marter, *When and Where Does an Internet Posting Constitute Publication? Interpreting Moberg v. 33t LLC*, 21 Fordham Intell. Prop. Media & Ent. L.J. 495, 534-35 (2011) (proposing a registration requirement; a mandatory obligation, however, would conflict with the Berne art. 5(2) no-formalities rule).

[23] *See, e.g.*, Thomas F. Cotter, *Toward A Functional Definition of Publication in Copyright Law*, 92 Minn. L. Rev. 1724, 1788-95 (2008).