

## LEGAL TRANSPLANTS IN INTERNATIONAL COPYRIGHT: SOME PROBLEMS OF METHOD

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All I could think of was the arrogance that had gone unnoticed. It had been taken for granted not only that our system was the best and the most sensible one in the world, but that we had a right to impose it on anyone in our power. I now know, however—lest I appear to be unnecessarily hard on my fellow countrymen—with the benefit bestowed by years, that it isn't just my own culture but all cultures that act in these ways. Each culture has its own reasons and rationalizations for forcing its way on others.

—Edward T. Hall<sup>1</sup>

### I. INTRODUCTION

A “legal transplant” may be defined as any legal notion or rule which, after being developed in a “source” body of law, is then introduced into another, “host” body of law. A classic example is found in the *Corpus Juris Civilis*, the compendium of Roman Law which the Emperor Justinian commissioned almost fifteen centuries ago. Law encapsulated in the *Corpus Juris* has found a host in Continental European law over the last thousand years. This process has been called the “reception” of Roman law into modern European law.<sup>2</sup>

Copyright law governs how literary and artistic works may be exploited. The rise of copyright might have begun when pa-

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1. EDWARD T. HALL, *WEST OF THE THIRTIES: A STORY OF DISCOVERIES AMONG THE NAVAJO AND HOPI* 70 (1994).

2. See ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 36-43, 79-101 *passim* (2d ed. 1993).

per and printing were first invented in China.<sup>3</sup> Copyright statutes were in fact first instituted during the eighteenth century in Europe. With ever-accelerating technological advances, media exploitation has crossed national borders with increasing frequency and speed. As a result, there has been increasing pressure to extend and harmonize copyright law internationally. Legal transplants have served as a common device for achieving this end.<sup>4</sup>

For example, in the middle of the nineteenth century, France threatened not to renew its commercial treaty with Belgium. As a condition of renewal, France required Belgium to adopt a copyright law, this at a time when French law provided a model for copyright on much of the European continent.<sup>5</sup> The British Copyright Act of 1911 is another example: it was transplanted throughout the British Empire in the twentieth century, until such time as British colonies and dominions became independent and enacted their own copyright laws, more or less on the British model. Not all of these jurisdictions, however, fall squarely within Anglo-American legal culture: Quebec, India, and Israel, most notably, also draw upon different, pre-existing traditions.<sup>6</sup>

In 1886, ten countries, seven of them European, established the Berne Convention. In revised acts, the Berne Convention has since bound more than one hundred countries.<sup>7</sup> It has thus served as the most important instrument for transplanting copy-

3. See LUCIEN FEBVRE & HENRI-JEAN MARTIN, *L'APPARITION DU LIVRE*, chs. 1 and 2 (2d ed. 1971); Zheng Chengsi, *Ting and Publishing in China and Foreign Countries and the Evolution of the Concept of Copyright*, 1 CHINA PAT. & TRADEMARKS 41 (Part 1), 47 (Part 2) (1988).

4. See generally Paul Edward Geller, *New Dynamics in International Copyright*, 16 COLUM.-VLA J.L. & ARTS 461 (1992) [hereinafter Geller, *New Dynamics*] (minimum Berne rights, on European model, respond to increasingly transterritorial reach of media).

5. See 1 STEPHEN P. LADAS, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* 25-26 (1938). Cf. Jan Corbet, *Belgium*, § 1, in 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE (Paul Edward Geller & Melville B. Nimmer eds., 1993) [hereinafter INTERNATIONAL COPYRIGHT] (French influence on Belgian copyright law).

6. See, e.g., David Vaver, *Canada*, § 1, in 1 INTERNATIONAL COPYRIGHT, *supra* note 5 (British, French, and U.S. influences); S. Ramaiah, *India*, § 1[3], in 2 INTERNATIONAL COPYRIGHT, *supra* note 5 (British precedents only apply in Indian jurisprudence where statutes are similar); Joshua Weisman, *Israel*, § 1, in 2 INTERNATIONAL COPYRIGHT, *supra* note 5 (British statute, but legal concepts of "Israel's heritage" replace English common law and equity).

7. Berne Convention for the Protection of Literary and Artistic Works [hereinafter Berne Convention]. Unless otherwise specified, the text and notes refer to the Paris Act of the Berne Convention. For the English texts of the revised Rome (1924), Brussels (1948), and Paris (1971) Acts, respectively, see 3 SOURCES OF INTERNATIONAL UNIFORM LAW, E301 (Konrad Zweigert & Jan Köpholler eds., 1973). For a list of adhering countries as of January 1, 1995, see 1 INDUSTRIAL PROP. & COPYRIGHT 14 (1995).

right law worldwide. In particular, the national laws of Berne countries directly apply, or legislatively implement, Berne minimum rights.<sup>8</sup> For example, in anticipation of Berne adherence, the United States shifted from a renewal system of copyright terms, inherited from the British Statute of Anne of 1710, to the minimum Berne term lasting the life of the author plus fifty years.<sup>9</sup> This Berne term derived from the seminal French copyright laws of 1791 and 1793 which, serving as models for other European copyright laws, had originally instituted a "life-plus" term.<sup>10</sup> While the Berne Convention has served as the most important instrument for transplanting copyright law in most countries, there remain some countries which it does not bind. Nonetheless, incorporating and supplementing Berne provisions, the TRIPS Agreement extends them to non-Berne members bound by the GATT Uruguay Round.<sup>11</sup>

The Conference on Intellectual Property in East Asia, held at Washington University on February 25 and 26, 1994, dealt with issues raised by legal transplants at some length. In particular, the history of France's threat of trade reprisals against Belgium in the nineteenth century seems to have repeated itself, albeit with new historical twists.<sup>12</sup> Conference participants explained how the United States, in the twentieth century, had threatened certain East Asian countries with trade sanctions unless they adopted copyright statutes based on the Berne Convention and, at certain points, U.S. copyright law.<sup>13</sup> Some participants observed that typically Anglo-American premises of copyright, for example, the assumption that copyright secures

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8. See WILHELM NORDEMANN, KAI VINCK, PAUL W. HERTIN, & GERALD MEYER, *INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS LAW: COMMENTARY WITH SPECIAL EMPHASIS ON THE EUROPEAN COMMUNITY 16-17* (R. Livingston trans., 1990) [hereinafter NORDEMANN]; SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986*, 129-32 (1987).

9. Compare 8 Anne, ch. 19 (1710) (Eng.) (14-year term, renewable for 14 years by surviving authors) and 17 U.S.C. § 302(a) (1909 U.S. Act, last amended 1974) (28-year term, renewable for 28 years) with Berne Convention, *supra* note 7, art. 7(1)(minimum term of life plus 50 years) and 17 U.S.C. § 302(a) (1976 Copyright Act, last amended 1994) (life plus 50 years).

10. See generally André Kerever, *Copyright: The Achievements and Future Development of European Legal Culture*, 26 *COPYRIGHT* 130 (1990) (role of seminal French laws in the development of copyright).

11. Agreement on Trade-Related Aspects of Intellectual Property, arts. 9-14 (MTN/FA II-A1C) [hereinafter TRIPS Agreement], text reprinted in 25 *INTERNATIONAL REVIEW OF INDUSTRIAL PROPERTY & COPYRIGHT LAW* [I.I.C.] 209 (1994).

12. See *supra* text accompanying note 5.

13. See Paul C.B. Liu, *U.S. Industry's Influence on Intellectual Property Negotiations and Special 301 Actions*, 13 *UCLA PAC. BASIN L. J.* 87 (1994).

crucial economic incentives for authorship, did not necessarily correspond to traditional East Asian values.<sup>14</sup>

How do transplants work? This question may take empirical and normative forms. Empirically, we may ask about the fate of transplanted law in passing from a source to a host body of law. This inquiry becomes problematic to the extent that linguistic, cultural, or historical perspectives change when moving from the source to the host body of law. Does the transplant nonetheless work much as it did in the source law, is it modified in form or substance in the different host law, or is it simply rejected by it? Normatively, to the extent the transplant takes place without significant change, we have to ask: is such slavish reception justified? And, if so, by reference to whose values?

This paper will address these questions as they arise in international copyright. First, it will very briefly outline arguments for and against legal transplants. Second, it will examine problems of method that arise in the light of such arguments. Third, it will propose approaches to resolving some of these problems.

## II. ARGUMENTS FOR AND AGAINST TRANSPLANTS

Reviewing the major arguments for and against legal transplants will highlight empirical and normative premises of transplants. This review will prepare the way for analyzing methods for effectuating copyright transplants.

### A. REALIST ARGUMENTS FOR TRANSPLANTS

A legal "realist" would treat the law, to quote Oliver Wendel Holmes, as a "body of systematized prediction" concerning the likely behavior of lawmakers and agents, from legislators through judges to the police.<sup>15</sup> One could then make decisions in the light of such predictions or, where necessary, attempt to change the institutions of the law resulting in predicted, but unfavorable behavior.

If, for example, a lawyer warned a business client that the law of another country was not adequate to protect creations in which the business had invested, the business could then seek to have copyright law thought to be effective at home transplanted into that country. The rationale seems simple enough: a country protects its nationals' property on its own soil with its laws, and

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14. See generally LIU WU-CHI, AN INTRODUCTION TO CHINESE LITERATURE 4-7 (1966) (many classical Chinese writers, earning their living as government officials, approached authorship in the Confucian tradition of a moral undertaking).

15. Oliver Wendel Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897).

comity generally leads other countries to protect foreigners' property on their soil, except for intellectual property which has not benefitted from this approach.<sup>16</sup> One response to foreign failure to protect copyright would be proceedings, such as those in the United States, in which the business may petition its own government to use threats of trade retaliations against countries abroad serving as pirate havens.<sup>17</sup>

On this realist theory, it might seem sufficient to have the foreign country simply put its police to the task of keeping its territory free of pirates of foreign media productions. In practice, however, it is not obvious that police measures, perhaps effective in a small state, can succeed in controlling modern media spread throughout a continent-wide country.<sup>18</sup> A full-scale copyright law, backed by widespread values supporting its enforcement, would seem more effective. There are, inevitably, many steps to take between policing copyright compliance and licensing the large-scale uses of works. Such mass exploitation seems to require legally mandated institutions, coupled with organized business practices.<sup>19</sup>

As this analysis moves from a simple-minded to a more comprehensive realism, predicting behavior becomes less important. Realistic inquiry rather takes increasing account of an ever-bigger variety of factors that influence how law might in fact work. Thus, as realism becomes more "realistic," it looks away from the narrow interests of the source jurisdiction seeking to transplant its own law and looks to a variety of factors at work in the host jurisdiction that might receive foreign law.<sup>20</sup>

## B. NORMATIVIST ARGUMENTS ABOUT TRANSPLANTS

What might be called "normativist" positions pick up where realist arguments leave off. In this century, Hans Kelsen re-articulated the basic argument of such positions, namely that state-

16. *But cf.* J.H. Reichman, *Intellectual Property in International Trade: Opportunities and Risks in a GATT Connection*, 22 *VAND. J. TRANSNAT'L L.* 747, 806-11 (1989) (any distinction between protecting foreigners' tangible and intangible property interests no longer makes sense in a rapidly integrating world market).

17. For the statutory basis of such "Section 301" proceedings, see the Trade Act of 1974, 19 U.S.C. §§ 2411 *et seq.* (1988).

18. *See, e.g.*, Philip Shenon, *A Repressed World Says, 'Beam Me Up'*, *N.Y. TIMES*, Sept. 11, 1994, at E4 ("In a few small, rigidly controlled countries, the crack-down on satellite TV has been reasonably successful . . .," but not in China).

19. *See generally* Adolf Dietz, *Transformation of authors rights: change of paradigm*, 138 *REVUE INTERNATIONALE DU DROIT D'AUTEUR [R.I.D.A.]* 22, 46-56 (1988) (copyright as "a global system" constituted of substantive rights, enforcement of rights, collecting societies, and copyright contracts).

20. *See* KARL N. LLEWELLYN, *Some Realism about Realism, in JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 42, 60-61 (1962) [hereinafter *JURISPRUDENCE*].

ments about facts, about what "is," cannot serve as adequate bases for statements about how the law "ought" to work.<sup>21</sup> While realists might dwell on how a notion or rule "is" transplanted from one body of law into another, normativists would ask why the transplant "ought" to have effect as law. Normativism can be elaborated into different approaches to transplants.

The most ambitious of these approaches is "universalist" normativism. In a seminal analysis, Kant attempted to derive one overriding norm universally valid for any system of law.<sup>22</sup> In copyright, arguments have been made for legal transplants on the basis of supposedly universal, "permanent cultural values."<sup>23</sup> The title of the first copyright statute, the British Statute of Anne of 1710, already anticipates this sense of some common, higher aim of copyright law by setting out "the Encouragement of Learning" as the purpose of the statute.<sup>24</sup> During the eighteenth century, in Enlightenment Europe, such notions as "learning" or "science" were broadly understood to include all products of mind, including literature, music, and the fine arts, that might advance human consciousness of the world.<sup>25</sup> In 1884 the first Diplomatic Conference to institute the Berne Convention started by universalizing this normative basis for transplanting copyright law worldwide. The record of the Conference begins on this Kantian note: "Literary and artistic property has the same cosmopolitan character as thought itself."<sup>26</sup>

Another approach might be called "systemic" normativism. Kelsen elaborated such a position, defining a system of law as including only such rules as may be generated consistently with its own underlying norms.<sup>27</sup> This position may serve as the basis for arguing that transplants may not be understood as foreign notions or rules that a system of law passively takes on. If one system received law from another, as European civil law incorpo-

21. HANS KELSEN, *PURE THEORY OF LAW* 4-6 (Max Knight trans., 2d ed., Univ. of Cal. Press 1967) (1934).

22. See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 55-58 (Mary Gregor trans., 1991).

23. F. Willem Grosheide, *Paradigms in Copyright Law* (quoting Josef Kohler), in *OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW* 203, 206 (Brad Sherman & Alain Strowel eds., 1994) [hereinafter *OF AUTHORS AND ORIGINS*].

24. 8 Anne, ch. 19 (1710). See also U.S. CONST. art. I, § 8, cl. 8 (copyright law "[t]o promote the progress of science").

25. For a representative Enlightenment view, see JEAN LE ROND D'ALEMBERT, *DISCOURS PRÉLIMINAIRE DE L'ENCYCLOPÉDIE* 49-51 (Éditions Gonthier 1965) (1763).

26. Records of the International Conference for the Protection of Author's Rights convened in Berne, Sept. 8 to 19, 1884, Preliminaries to the Conference, reprinted in *BERNE CONVENTION CENTENARY* 83 (World Intellectual Property Organization [WIPO] ed., 1986).

27. See KELSEN, *supra* note 21, at 205-08, 221-24, 233-36.

rated Roman notions, its own constitutive norms would at least have to validate them.<sup>28</sup> From this point of view, universalist aims for copyright, such as “learning,” “human consciousness,” or “permanent cultural values,” are at best window dressing, not justifications. Indeed, for systemic normativism, values as such, whether universal or local, cannot form the basis for adopting legal rules, since values themselves must derive from underlying norms for legal purposes.<sup>29</sup> As a result, to understand the normative basis, for example, for the reception into China of the Berne model of copyright, some norm of Chinese law would have to be invoked. One could invoke the Chinese provision that, in the event of any difference “between the Civil Law of the People’s Republic of China and [its] international treaties . . . , the latter shall prevail . . . .”<sup>30</sup> However, this principle itself seems to be borrowed from Continental European approaches to international treaties, raising the question of what underlying Chinese norm in turn validates it as a basis for further transplants.<sup>31</sup>

I will take a still different position, which is “mixed” in more than one sense. It has, admittedly, an admixture of realism, sharing the premise that “interests,” each with “value independent of the law,” in fact motivate the law.<sup>32</sup> It also allows for different hypotheses concerning any effective mix of values: some might be universal or shared; some, local to the group in question; and some, specific to a field of law. Thus, in lawmaking, values universal to all groups or shared by some, as well as values specific to a field of law, would provide the basis for transplants, and those altogether local to a group would also contribute to the mix. Alan Watson, while admitting that “social, economic, and political factors impinge on legal development,” posits that “law is largely autonomous” and suggests that many transplants bring their specific motivating values with them.<sup>33</sup> Other researchers stress that lawmakers are above all thrown back on the tacit values underlying their social context in “hard” or “trouble cases,”

28. *See id.* at 209.

29. *See id.* at 17-23.

30. People’s Republic of China, General Principles of the Civil Code, art. 142(2) (effective January 1, 1987), translated in ZHENGJI CHENGSI & MICHAEL D. PENDLETON, *CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY TRANSFER LAW* 322 (1987).

31. For an example of this principle in European approaches to international copyright, see NORDEMANN, *supra* note 8, at 21-23. For an overview of transplants into Chinese law generally, see William C. Jones, *Editor’s Introduction*, in *BASIC PRINCIPLES OF CIVIL LAW IN CHINA*, xv (William C. Jones ed., 1989).

32. *See* KARL N. LLEWELLYN, *A Realistic Jurisprudence—The Next Step*, in *JURISPRUDENCE*, *supra* note 20, at 3, 14-15, 18-20.

33. ALAN WATSON, *THE EVOLUTION OF LAW* 118-19 (1985) [hereinafter *WATSON, EVOLUTION OF LAW*].

in which legal notions lose clear meaning or even clearly formulated legal rules fail to provide any fully satisfactory outcome.<sup>34</sup> It is as if the relations between values and law snap when they become too tense, leading to crises, sometimes revolutions, that call for changes in the law.<sup>35</sup>

Different hypotheses are possible regarding the mix of values that have actually motivated copyright law. The legislative record of the seminal French copyright law of 1791 proclaims authors' rights to be the "most sacred of properties."<sup>36</sup> This phrase continues to resonate in commentary that pleads in favor of remaining faithful to values specific to authors' rights, no matter what body of law incorporates them.<sup>37</sup> Historical study, however, reveals diverse values at work in the development of seminal English, French, and U.S. copyright laws in the eighteenth century, ranging from protecting private investment in the media to advancing public instruction.<sup>38</sup> Other commentators stress the need to find the right balance between copyright norms—a balance that might well vary from law to law—in accommodating diverse underlying values.<sup>39</sup>

The reason for starting from mixed normativism is simple: this position leaves the path of research open. Indeed, it leads us to sort out universal values, such as justice, from those local to particular groups, as well as those specific to fields of law, such as copyright, in examining any given transplant. That is, it only serves as a heuristic basis for inquiries that would elucidate the mix of such values relevant for studying copyright transplants in specific empirical contexts.<sup>40</sup>

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34. See KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* 274-83 (1941).

35. Compare ANDRÉ-JEAN ARNAUD, *CRITIQUE DE LA RAISON JURIDIQUE*—1. OÙ VA LA SOCIOLOGIE DU DROIT?, pt. 2 (1981) (emerging values feed new law) with GUNTHER TEUBNER, *LAW AS AN AUTOPOETIC SYSTEM*, ch. 6 (Zenon Bankowski ed., Anne Bankowska & Ruth Adler trans., 1993) (tensions, manifested between separate branches of law, prompt new law).

36. For a critical analysis of this phrase in its original context, see ALAIN STROWEL, *DROIT D'AUTEUR ET COPYRIGHT: DIVERGENCES ET CONVERGENCES* 90-91 (1993).

37. See KEREVER, *supra* note 10, at 139; DIETZ, *supra* note 19, at 46-56.

38. See MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 85-129 (1993); Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 *TUL. L. REV.* 991 (1990), reprinted in *OF AUTHORS AND ORIGINS*, *supra* note 23, at 131.

39. See STROWEL, *supra* note 36, at 290-321; Paul Goldstein, *Copyright: The Donald C. Brace Memorial Lecture*, 38 *J. COPYRIGHT SOC'Y U.S.A.* 109 (1991).

40. Cf. JOSEPH RAZ, *The Functions of Law*, in *THE AUTHORITY OF LAW* 163, 165-66 (1979) (classification of "social functions of law" no "more than an ad hoc device useful . . . for the further analysis of law"); MICHEL VAN DE KERCHOVE & FRANÇOIS OST, *LE SYSTÈME JURIDIQUE ENTRE ORDRE ET DÉSORDRE* 199-204 (1988) (diverse relations between different bodies of law).



## C. RELATIVIST CHALLENGES TO TRANSPLANT ANALYSIS

“Relativism” involves the suspicion that our own linguistic, cultural, or historical perspectives distort our knowledge of other such perspectives. Benjamin Lee Whorf encapsulated this position in speaking of language as “a vast pattern-system” made up of “culturally ordained . . . forms and categories” that channel our “consciousness.”<sup>41</sup> This point of view does not lead to arguments against transplants as much as it makes them seem difficult, if not impossible, to analyze from our own, necessarily biased perspective.

The Italian maxim *traduttore, traditore*—translator, traitor—succinctly conveys the lesson of relativism. In the common and civil laws, whose languages share European roots, basic notions like “right” or “law” do not take on meaning consistently.<sup>42</sup> Many problems of translation cannot be solved without taking account of ever-larger contexts, ultimately entire cultures and historical periods. Adda Bozeman gives the example of the generations of Chinese scholars who, over fifteen centuries ago, undertook the “bold intellectual process” of systematically translating the Buddhist scriptures from Sanskrit into Chinese: some of them concluded that “all of India and all of China had to be understood before the separate aspects of Buddhism could be made meaningful to the Chinese.”<sup>43</sup> Of course, such difficulties are mooted to the extent that what started as a transplant becomes something altogether different, for which faithful translation from the source language into host language is no longer necessary.<sup>44</sup>

Starting at the linguistic dimension of relativism, we thus quickly encounter its cultural and historical dimensions. It is well and good to say that copyright law is to enhance “permanent cultural values” or to protect “the most sacred of properties.”<sup>45</sup> Nonetheless, such notions of “law” and “culture,” not to mention “property” and “the sacred,” if taken together, seem to refer to manifold processes not easily disentangled. As a result, we run the risk of encountering radically different types of entangle-

41. BENJAMIN L. WHORF, *Language, Mind, and Reality*, in *LANGUAGE, THOUGHT, AND REALITY: SELECTED WRITINGS OF BENJAMIN LEE WHORF* 246, 252 (John B. Carroll ed., 1956).

42. See George P. Fletcher, *The Right and the Reasonable*, 98 *HARV. L. REV.* 949, 964-65 (1985).

43. ADDA B. BOZEMAN, *THE FUTURE OF LAW IN A MULTICULTURAL WORLD* 5 (1971).

44. For example, Professor Bozeman maintains that the process of transplanting Buddhism into China resulted in “the establishment of a purely Chinese kind of Buddhism.” *Id.*

45. See *supra* text accompanying notes 23, 36.

ments of law and culture; indeed, the very concept of "law," not to mention "culture," may vary from place to place and period to period.<sup>46</sup> Further, it cannot be assumed that the effect of law on culture will be as simple to see as that of a tool applied to raw material, say, the mark of a chisel used on a piece of marble. Generally, and certainly in copyright, we have to take account of intricate and subtle feed-back mechanisms between legal and other cultural processes, notably by way of the media.<sup>47</sup>

There are also politically based reasons for a certain skepticism toward any supposed consensus for adopting copyright or, indeed, any European-developed law. The Roman Empire around the Mediterranean and the Han Dynasty in China both had flourishing technologies, although little contact beyond marginal trade, some two thousand years ago.<sup>48</sup> After that, technological progress slowed to a virtual stand-still in Western Europe in the second half of the first millennium, while it continued advancing rapidly in China during just that period.<sup>49</sup> Without superior military technology, the Europeans could not penetrate China and Japan beyond limits imposed by Chinese and Japanese authorities in the sixteenth century, only succeeding after the industrial revolution armed them with new weaponry in the nineteenth century.<sup>50</sup> To placate momentarily better-equipped Western invaders, cultures to the South and East might have simulated their legal jargon, but not necessarily the values underlying their law.<sup>51</sup>

Relativism, if carried far enough, leads to a kind of solipsism. It highlights epistemological obstacles that would make it difficult, if not impossible, to know just how transplants from a source law might operate in an exotic host law.<sup>52</sup> The fact that languages are translated, however, gives us reason to believe that these obstacles are not insurmountable, even though "[t]ime, dis-

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46. For examples of different conceptions of law, see BOZEMAN, *supra* note 43, ch. 2; CLIFFORD GEERTZ, *Local Knowledge: Fact and Law in Comparative Perspective, in LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 167, 175-215 *passim* (1983).

47. See generally HAROLD A. INNIS, *EMPIRE & COMMUNICATIONS* 69-71, 90-92, 130-32, 154-61, 167-69 (David Godfrey ed., Press Porcépic 1986) (1950) (seminal analysis of interplay between media, culture, and law, including copyright).

48. See 1 JOSEPH NEEDHAM, *SCIENCE AND CIVILISATION IN CHINA*, ch. 7 (1965).

49. For examples, see JOSEPH NEEDHAM, *SCIENCE IN TRADITIONAL CHINA: A COMPARATIVE PERSPECTIVE*, ch. 1 (1981).

50. See ARNOLD TOYNBEE, *THE WORLD AND THE WEST* 268-69 (Meridian Books 1958) (1953).

51. See also BOZEMAN, *supra* note 43, at 28-31 (the West also blithely assumed its values to be universal).

52. For the notion of "epistemological" obstacles, see GASTON BACHELARD, *LA FORMATION DE L'ESPRIT SCIENTIFIQUE*, ch. 1 (13th ed. 1986) (1938).

tance, disparities of outlook or assumed reference make this act [of translation] more or less difficult."<sup>53</sup>

### III. PROBLEMS OF METHOD

I propose to approach relativist obstacles as so many problems of method susceptible of being progressively overcome. To guide elaborating particular hypotheses on transplants of copyright law, it might be useful to survey general areas in which such problems might be confronted. Quite provisionally, we might group them under three interrelated headings: language, culture, and history.<sup>54</sup>

Mixed normativism has been posited as the provisional basis for my analysis. According to this position, any given transplant may be motivated by some mix of universal, socially local, and legally specific values.<sup>55</sup> The Berne Convention indeed accommodates the potential ambivalence between such universal, local, and specific values by allowing Berne countries discretion in implementing some Berne provisions. In treating problems of method concerning transplants, I will consider such Berne provisions as examples.<sup>56</sup>

#### A. LANGUAGE: DEFINING OPEN-ENDED NOTIONS

Recall the Italian maxim: *traduttore, traditore*—translator, traitor. If one language easily and accurately translates terms in another language in the same or similar contexts, we often say that the languages share common “notions.” In hard legal cases, where the meanings of key terms are disputed, corresponding legal notions might be said to be “open-ended.” In transplants, we face the problem of translating terms from one language into another. Where transplants include open-ended notions, such translation becomes problematic.<sup>57</sup>

In one of its dominant forms, linguistic relativism has focused on the tendency of differently structured languages to lead to different descriptions of reality. For example, the Hopi Indi-

53. GEORGE STEINER, *AFTER BABEL: ASPECTS OF LANGUAGE AND TRANSLATION* 48 (2d ed. 1992).

54. For a different analysis of the difficulties of comparative law, see BERNHARD GROSSFELD, *THE STRENGTH AND WEAKNESS OF COMPARATIVE LAW*, chs. 2, 9, 11-15 (Tony Weir trans., 1990).

55. See *supra* text accompanying notes 32-40.

56. Compare NORDEMANN, *supra* note 8, at 17 (discretion in implementing “permissive” or “optional” provisions of rights) and RICKETSON, *supra* note 8, at 143 (discretion in applying provisions setting out “rules of referral”).

57. I derive the term “open-ended” from the term “open-texture” without necessarily adopting the analysis in which it arose. For this analysis, see H.L.A. HART, *THE CONCEPT OF LAW*, ch. 7 (2d ed. 1994).

ans, in the southwestern United States, have been observed to employ a verb system that enables them to make finer discriminations of the phases and unfolding of natural processes than one could easily do in any European language.<sup>58</sup> It is nonetheless possible to learn to speak an exotic language with some competence, albeit imperfectly: if, hypothetically, we were dropped into the midst of a tribe with an unknown language, we could with increasing success translate as "rabbit" a word we heard the tribe repeatedly use while hunting, pointing to, or eating what appears to us to be rabbits.<sup>59</sup> There would still remain the hard cases of all-too-frequent, open-ended notions: for example, the French word *bois* accurately translates into the English "wood" or "woods" often enough, but it is not clear whether *le Bois de Boulogne* is best translated as "Boulogne Park" or the "Boulogne Woods."<sup>60</sup>

If we shift our attention to legal language, the problem of translation becomes much more complex. Legal discourse fulfills a large range of "performative" functions in implementing norms rather than merely making "true or false" statements about facts.<sup>61</sup> To take a few instances, judges issue orders to parties in law suits, parties effectuate transactions in contracts, and legislators enact rules in statutes. However, some commentators still look to factual reference, not merely to test translations from different languages, but even interpretation within the same legal language. For example, realists suggest that, unless the law indicates the behavior it is to control by its very "words," it represents nothing but vague "paper rules."<sup>62</sup> The fact of the matter is that legal discourse remains endemically riddled with value-laden, open-ended notions that resist factual clarification. Such discourse nonetheless allows legal practitioners to communicate, at least within relatively homogeneous legal cultures.<sup>63</sup> Furthermore, conceptions of "fact" and "law," and of how facts relate to the law, vary from culture to culture. It often becomes necessary

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58. See WHORF, *An American Indian Model of the Universe*, *supra* note 41, at 57.

59. *But cf.* W.V. QUINE, *Speaking of Objects*, in *ONTOLOGICAL RELATIVITY AND OTHER ESSAYS* 1 (1969) (this translation would always be approximative: for example, the tribe could be using a word like "game animal").

60. For further analysis, see UMBERTO ECO, *A THEORY OF SEMIOTICS* 73-83 (1976).

61. See J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 19 (J.O. Urmson & Marina Sbisa eds., 2d ed. 1975).

62. See KARL N. LEWELLYN, *A Realistic Jurisprudence—The Next Step*, *supra* note 32, at 16-18, 23-25.

63. For an overview of different theories on point, see BERNARD JACKSON, *SEMIOTICS AND LEGAL THEORY* 276-306 (1985).

to understand these conceptions to disentangle meanings in other laws.<sup>64</sup>

Of course, different legal notions differ in the extent that they are open-ended. For example, in the Berne Convention, the notion of "publication" is more precisely defined than the notion of a "work." Berne "publication" is defined by rather objective criteria, notably the requirement of making hard copies available to the public. The very fact that the case law has developed converging interpretations of Berne "publication" indicates that this notion is only marginally open-ended.<sup>65</sup> By contrast, article 2 of the Berne Convention only illustrates the notion of a protected "work" with an open-ended list of examples, and there is still debate on how to interpret this notion. Commentators offer conflicting answers to the questions: does the Berne Convention or national law determine the defining criteria of works, such as "originality" and "creativity"? and what legal effects, if any, follow from placing a work in the Berne list?<sup>66</sup> Of course, if the language of the Berne Convention authoritatively defined "work," it would control how this notion was transplanted into the national laws of Berne countries; otherwise, domestic lawmakers would have discretion in defining it. The courts tend to ignore all these issues for the simple reason that there is a rough and ready consensus worldwide on the sense of "works."<sup>67</sup> There are nonetheless, frequently enough, hard cases in which courts disagree on how to apply this notion. Cases of factual compilations, industrial designs, and computer programs are among the most notable.<sup>68</sup>

Bear in mind that the notion of a "work" is understood against the background of aesthetic sensibilities that vary from

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64. See GEERTZ, *supra* note 46, at 214-34.

65. See Berne Convention, *supra* note 7, art. 4(4) (Rome & Brussels Act), art. 3(3) (Paris Act). See, e.g., Judgment of Nov. 3, 1970 (*Gold Rush*), Tribunal Fédéral [Supreme Court], ARRÊTS DU TRIBUNAL FÉDÉRAL, RECUEIL OFFICIEL [ATF] 96 II 412, translated in 2 I.I.C. 315 (1971) (Switz.); Judgment of May 19, 1972 (*Gold Rush*), Bundesgerichtshof (BGH) [Supreme Court], Case No. I ZR 42/71, 1973 GRUR INT. 49, translated in 4 I.I.C. 245 (1973) (F.R.G.) (Swiss analysis adopted by German court).

66. Compare David Vaver, *The National Treatment Requirements of the Berne and Universal Copyright Conventions*, 17 I.I.C. 578, 590-97 (1986) (Berne protection only mandatory for "works" within the Berne "core meaning" of that notion, as illustrated by the Berne list) with NORDEMANN, *supra* note 8, at 43-47 (Berne national treatment for all "works" nationally protected as such, but Berne minimum rights only for works falling in categories on the Berne list).

67. See Paul Edward Geller, *International Copyright: An Introduction*, § 2[2][c], in 1 INTERNATIONAL COPYRIGHT, *supra* note 5.

68. But cf. J.H. Reichman, *Legal Hybrids Between the Patent and Copyright Paradigms*, 94 COLUM. L. REV. 2432 (1994) (these cases also subject to principles of industrial property).

culture to culture.<sup>69</sup> For example, Brad Sherman describes the reluctance of the Anglo-Australians to dignify graphic creations by native Australians as "artistic works," much less find them to be "original" or "creative."<sup>70</sup> The Anglo-Australians encountered obstacles to understanding how the term "work," as interpreted in cases involving European art, might apply in native Australian culture in which creative works take on different, but nonetheless rich significance.<sup>71</sup> To take another example, the Peoples Republic of China, in its Copyright Act of 1990, introduced new categories of "works," for example, *quyi* works "based on traditional forms created mainly for performance through recitation, music, or both."<sup>72</sup> As indicated above, some commentators might argue that works in this new category, if it is construed to fall outside the list in article 2 of the Berne Convention, do not benefit from Berne minimum rights.<sup>73</sup> Anglo-Australian incomprehension before Aboriginal art and Berne purism concerning unlisted works tend to have comparable effects with regard to transplanting relevant law. Either way, the "common core" meaning of the Berne notion of "work," historically the European meaning, is made the standard for non-European works.<sup>74</sup>

This problem of definition runs still deeper. Both judges and legislators attempt to avoid aesthetic bias in determining what copyright should protect.<sup>75</sup> As a result, the slightest creativity in a "work" almost always suffices to trigger some copyright

69. For an overview of aesthetic sensibilities in Aboriginal Australian, Classic Chinese, Medieval European, and Modern American cultures, see YI-FU TIAN, *PASSING STRANGE AND WONDERFUL: AESTHETICS, NATURE, AND CULTURE*, pt. 3 (1993).

70. Brad Sherman, *From the Non-original to the Ab-original: A History*, in *OF AUTHORS AND ORIGINS*, *supra* note 23, at 111. See also Luc Sante, *The Genius of Blues*, N.Y. REV. OF BOOKS, Aug. 11, 1994, at 46 (tacit premises of early critics prevent them from seeing that blues songs were from the start individual creations, not anonymous folklore).

71. See Peter Sutton, *Dreamings*, in *DREAMINGS: THE ART OF ABORIGINAL AUSTRALIA* 13 (Peter Sutton ed., 1988). For a more impressionistic overview, see BRUCE CHATWIN, *THE SONGLINES*, chs. 10-29 *passim* (1987).

72. Guo Shoukang, *China*, § 2[2], in 1 *INTERNATIONAL COPYRIGHT*, *supra* note 5, vol 1.

73. See *supra* note 66. Of course, it could be argued that *quyi*, appearing in context with such Berne-listed categories of works as "dramatic or dramatico-musical works," should be assimilated to them.

74. For an argument ostensibly in favor of this position, see Vaver, *supra* note 66, at 595-96.

75. *Compare* *Bleistein v. Donaldson Lithography Co.*, 188 U.S. 239, 251 (1903) (Holmes, J.: "It would be a dangerous undertaking for persons trained only in the law to constitute themselves judges of the worth of" a work at issue) with *CODE DE LA PROPRIÉTÉ INTELLECTUELLE*, art. L. 112-1 (1992) (Fr.) (codifying principle that copyright protection arises independently "of the kind, form of expression, merit or intended use" of a work).

protection. The difficult issue is whether the scope of protection should be "thick" or "thin" in cases, not of slavish copying, but of creatively transforming a work.<sup>76</sup> It becomes all the more difficult to transplant any "common core" understanding of "work" to the extent that the courts apply varying frameworks of analysis in such cases. In Anglo-American laws, the scope of protection will largely depend on applying the distinction that precludes protecting "any idea, procedure, process, system, method of operation, concept, principle, or discovery," only leaving "expression" from prior works as protected.<sup>77</sup> Latin laws, such as the French, vary this distinction by speaking of the protected "form" or essential traits of works, while German law eschews this distinction, more often delimiting the scope of protection by allowing the "free utilization" of certain materials from prior works.<sup>78</sup>

## B. CULTURE: INTERPRETING NORMS IN HARD CASES

In moving from language to culture, we have to widen our framework of analysis. Legislators or treaty drafters might blithely use a notion like "work" without contemplating the entire range of cases in which it might not always have clear meaning. It is in applying the notion in troublesome cases that difficulties might arise in interpreting the rules that it helps to articulate. These cases are likely to be entangled in complex cultural settings, in which a variety of factors come to bear on interpreting possibly applicable rules. Provisionally, I propose to inquire into such factors as they cluster in paradigms, that is, under three headings: a community of practitioners; commitments relative to values and theory; and shared examples or models.<sup>79</sup>

Such cultural inquiry might be broken down into the following questions: First, who, in the community of legal practitioners, has power to interpret a rule? Some systems tend to decentralize such powers in judges with discretion to refashion law case by

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76. See Paul Edward Geller, *Copyright in Factual Compilations: U.S. Supreme Court Decides the Feist Case*, 22 I.I.C. 802 (1992) [hereinafter Geller, *Factual Compilations*].

77. 17 U.S.C. § 102(b) (1993). For further analysis of Anglo-American law, see BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 46-78 (1967).

78. For further, comparative analysis, see IVAN CHERPILLOD, *L'OBJET DU DROIT D'AUTEUR* 83-91, 143-52 (1985).

79. For this broad sense of "paradigm," including these three types of factors, see THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 176-91 (2d ed. 1970). Note that Bachelard's epistemological analysis, cited *supra* note 52, does not dovetail with Kuhn's. For further analysis, see DOMINIQUE LECOURT, *MARXISM AND EPISTEMOLOGY: BACHELARD, CANGUILHEM AND FOUCAULT* 7, 9-19 (Ben Brewster trans., 1975).

case, while others tend to centralize them in legislators.<sup>80</sup> Second, what values and theory direct the interpretation of rules? Some values are relevant to all law, such as equity and reliability, while others become relevant only in specific fields such as copyright. As well as encapsulating such values, legal theory may also entail premises about law itself that, depending on their tenor, differently guide the interpretation of legal language.<sup>81</sup> Third, what premises are assumed about the facts to which rules are to apply in practice? For example, different norms might apply to transportation networks: one norm might require cost-efficient transport; the other, scenic and pleasurable travel. However, whatever the normative theory, given a model of a flat land crossed by rivers and canals, such as in Holland, different practical rules follow than, say, from a model of mountainous peninsulas and islands, as found in Greece. Similarly, in the field of copyright, lawmakers need models or exemplars of how works are actually created and communicated through the media.<sup>82</sup>

Depending on whether copyright develops in "closed" or "open" frameworks, the first and second factors of copyright paradigms may apply differently.<sup>83</sup> For example, in the closed framework of Anglo-American laws, legislators specify rights in narrow and exhaustive terms, while judges may construe limitations and exceptions to rights broadly in many cases. By contrast, in the open framework of Continental European laws, legislators fashion rights in broad and flexible concepts, while limiting them in narrowly construed exceptions. Alain Strowel asks the question critical for our analysis: "what are the problems that will be created when the logic of a closed system is transplanted into an open one . . . ?"<sup>84</sup> In the Berne Convention, this question becomes more complex, since Berne revisions represent compromises between "closed" Anglo-American and "open" Continental European approaches. For example, the Berne minimum economic rights are formulated in the specific terms of the objective media in which these rights allow the copyright owner

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80. See generally MIRJAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 241 (1986) (no "pure" system). See also ECO, *supra* note 60, at 137-39 (1979) (distinction between text- and grammar-oriented cultures, one stressing case law and the other codes).

81. For an overview of copyright values, see STROWEL, *supra* note 36, at 235-55. For an overview of relationships between theories of law and interpretation, see JACKSON, *supra* note 63, ch. 1.

82. See Paul Edward Geller, *Toward an Overriding Norm in Copyright: Sign Wealth*, 159 R.I.D.A. 3, 13-25 (1994) [hereinafter Geller, *Sign Wealth*].

83. See Kerever, *supra* note 10, at 134; Alain Strowel, *Droit d'auteur and Copyright: Between History and Nature*, in OF ORIGINS AND AUTHORS, *supra* note 23, at 235.

84. Strowel, *supra* note 83, at 253.



to control the exploitation of works.<sup>85</sup> Thus articles 8, 9, 11, 11*bis*, 11*ter*, and 14 of the Berne Convention assure rather clear-cut rights to control the translation, reproduction, public communication, and cinematographic uses of works.<sup>86</sup> These rights are also often, although not necessarily always, subject to limitations and exceptions cast in terms susceptible of narrow construction.<sup>87</sup>

Article 9(2) of the Berne Convention raises particularly vexing problems of interpretation. This provision allows for restricting the right of "reproduction," that is, the making of hard copies, as follows:

It shall be a matter for the *legislation* in the countries of the Union to permit the reproduction of such works in *certain special cases*, provided that such reproduction does not conflict with a *normal exploitation* of the work and does not *unreasonably prejudice* the *legitimate interests* of the author. [emphases added]

In this quote, I have emphasized open-ended notions that call for clarification on three different levels before article 9(2) may be applied with some certainty to cases. First, on the level of authority to interpret, it is not obvious that the term "legislation" only refers to statutory law or to case law as well.<sup>88</sup> Second, on the level of values and norms, while both the criteria of the "normal exploitation" of a work and of the "legitimate interests" of the author apply concurrently, their meaning remains unclear, except that together they would preclude large-scale copying without compensation.<sup>89</sup> Third, on the level of factual models, it remains uncertain whether "normal exploitation" does not presuppose the media and market conditions current a quarter-century ago, when article 9(2) was introduced.<sup>90</sup>

85. For more detailed analysis of Berne minimum rights, see NORDEMANN, *supra* note 8, at 98-150; RICKETSON, *supra* note 8, ch. 8.

86. For the right to control adaptations, see Berne Convention, *supra* note 7, art. 12. Since it is not always clear when a new work is adapted from a prior work rather than merely inspired by it, this right is open-ended just as is the notion of the "work" being adapted. See *supra* text accompanying notes 75-77.

87. Compare NORDEMANN, *supra* note 8, at 99-100 (arguing that Berne limitations and exceptions be construed narrowly as a matter of principle) with RICKETSON, *supra* note 8, at 477-78 (distinguishing Berne limitations and exceptions subject to different approaches in the light of competing policies).

88. See Paul Edward Geller, *Can the GATT Incorporate Berne Whole?* 12 EURO. INTELL. PROP. REV. 423, 425-26 (1990).

89. See Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967, Report on the Work of Main Committee I, *reprinted in* BERNE CONVENTION CENTENARY, *supra* note 26, at 197.

90. For rather different responses, see Frank Gotzen, *Reprography and the Berne Convention (Stockholm-Paris Version)*, 14 COPYRIGHT 315, 319-21 (1978); Patrick Masouyé, *Private Copying: A New Exploitation Mode for Works*, 18 COPYRIGHT 81, 84-85 (1982).

This problem of interpretation has become more systematic. In the Berne Convention, article 9(2) only sets out criteria for restricting the right of reproduction. In article 13 of the TRIPS Agreement, the language of article 9(2) is applied to all limitations and exceptions to copyright.<sup>91</sup> At the threshold, it becomes critical to determine whether the notion of "legislation" in this provision is itself open-ended. If so, it would arguably allow legislators to delegate their power to judges to determine "certain special cases" of exceptions to copyright.<sup>92</sup> The difficulty with that interpretation is that such judges would have discretion to make exceptions to copyright even in legal cultures that neither follow the principle of *stare decisis* nor possess any well-developed case law on point. Such transplants of judicial power to limit copyright, not being subject to any jurisprudential discipline at all, could leave copyright at the mercy of unpredictable case law, if not swallowed up in resulting exceptions.<sup>93</sup>

### C. HISTORY: TRANSPLANTS WITH PREMISES IN FLUX

What happens in a paradigm shift, when one or a number of factors in a paradigm change? Such historical changes raise problems of method to the extent that they leave factors in flux—like the relevant community, its underlying values or norms, or even factual models—against which any legal transplant is to be assessed. At such volatile historical junctures, the transplant itself in question, by acting as a catalyst for ongoing changes, might render some or all of these premises even more uncertain. In such situations, it might seem as if foreign law were received without much regard to contemporaneous societal factors.<sup>94</sup>

The history of copyright has been subject to constant changes. This history has been, and continues to be, driven by increasingly powerful media, starting with printing and running through telecommunication.<sup>95</sup> Indeed, the first copyright statutes responded to crises culminating in the seventeenth and

91. TRIPS Agreement, *supra* note 11, art. 13.

92. See, e.g., 17 U.S.C. § 106 (1993) (provision allowing for fair use of U.S. copyright gives judges power to craft exceptions). See generally Ejan Mackaay, *Les notions floues en droit ou l'économie de l'imprécision*, 53 LANGAGES 33 (1979) (open-ended notions serve to delegate law-making power to judges).

93. Cf. Mihály Ficsor, *International Norm-Setting in the Field of Copyright and Neighboring Rights: A Growing Number of Unsettled Problems*, in INTERNATIONAL CONFERENCE ON INTELLECTUAL & INDUSTRIAL PROPERTY "OBJECTIVES & STRATEGIES" 53, 66 (E.C. Commission ed., 1994) (speech presented in Athens, Greece, April 13, 1994) (article 13 of TRIPS Agreement could have different results in different countries, some Berne "incompatible").

94. For examples, see WATSON, *EVOLUTION OF LAW*, *supra* note 33, at 109-14.

95. For an overview of this media history, see INNIS, *supra* note 47, at 143-69.

eighteenth centuries, when rising middle classes sought confirmation of property interests consistent with freedom of commerce and the press inside nation-states.<sup>96</sup> The Berne Convention was initially concluded in the nineteenth century to meet the needs of the European publishing media, which sought stable conditions of international copyright commerce. Subsequent Berne revisions in the twentieth century instituted minimum rights to control newer, more powerful media such as the cinema and broadcasting. Now, however, the building-blocks of the Berne system of international copyright, territorial nation-states, seem to be becoming obsolete.<sup>97</sup>

The very concept of the nation-state was developed to legitimize administrative and police control of national territory.<sup>98</sup> Copyright laws instituted rights to control the publication and staging of works, with nation-states enforcing these rights throughout their respective territories. Now, with telecommunication, authors from far-flung countries can collaborate in creating works that in turn can be accessed across many national territories, all at once.<sup>99</sup> At the same time, we are now seeing, as if in a kaleidoscope, apparently monolithic nation-states such as the former Soviet Union fall to pieces, while others such as the member-states of the European Union come together. These historical transformations call for changing the framework for analyzing and evaluating legal transplants in international copyright. We noted that the Berne Convention allowed for varying degrees of discretion in implementing different minimum rights for which it provides.<sup>100</sup> It seemed that, since nation-states bound by the Berne Convention have this discretion, national values provided criteria for its exercise. If the territorial nation-state loses relevance as the unit over which minimum rights are to be exercised, this premise need no longer apply.<sup>101</sup>

Consider articles 11, 11*bis*, 11*ter*, and 14 of the Berne Convention, which sets out rights to control the "communication" of

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96. For further analysis, see Peter Prescott, *The Origins of Copyright: A De-bunking View*, 11 EURO. INTEL. PROP. REV. 453 (1989); Carla Hesse, *Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793*, in LAW AND THE ORDER OF CULTURE 109, 117-29 (R. Post ed., 1991).

97. For further analysis, see Geller, *New Dynamics*, *supra* note 4, at 467-71.

98. See PAUL ALLIÉS, *L'INVENTION DU TERRITOIRE*, pt. 2 (1980).

99. For further analysis, see Paul Edward Geller, *The Universal Electronic Archive: Issues in International Copyright*, 25 I.I.C. 54, 55-56, 59-66 (1994) [hereinafter Geller, *Universal Electronic Archive*].

100. See *supra* text accompanying note 56.

101. Cf. György Boytha, *Fragen der Entstehung des internationalen Urheberrechts*, in *WOHER KOMMT DAS URHEBERRECHT UND WOHIN GEHT ES?* 181 (Robert Dittrich ed., 1988) (discussing the "dissolution of territoriality" as the core problem of international copyright).

works to the "public." The case law has confirmed that article 11*bis*, insofar as it assures the right to control the cable retransmission of work-carrying broadcasts, extends to areas reached by the original broadcasts.<sup>102</sup> There remains another, more basic question: how does article 11*bis* apply to broadcasts of Berne-protected works relayed by satellite across national frontiers? The courts have operated on the traditional assumption that copyright, and therefore any broadcasting right, applies territory by territory within each nation-state. They have thus ruled that broadcasts, including those relayed by satellite, take place within each receiving country, so that it would be necessary to obtain a license to broadcast a work via satellite for each country in which the broadcast was received.<sup>103</sup> By contrast, the European Community has defined satellite communication as taking place in the country where it originates, with the express purpose of allowing the broadcast of a work by satellite throughout the European Community on the basis of a license for the originally transmitting country alone.<sup>104</sup>

This split in approach results, not from any ambiguity in the text itself of article 11*bis*, or of any of the related articles 11, 11*ter*, and 14, but from a paradigm shift in the framework of analysis. The traditional framework of the territorial nation-state has begun to give way to the newer framework of the European Community—a supranational, but also a territorial jurisdiction. The test of both the traditional and newer frameworks is whether either might be transplanted throughout a world where, with the rise of telecommunication media, all territorial jurisdictions risk becoming anachronisms.<sup>105</sup>

#### IV. TOWARD SOME SOLUTIONS

My working hypothesis here has been that variable mixes of universal, socially local, and legally specific values motivate copy-

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102. See, e.g., *Ciné Vog Films c. CODITEL*, June 19, 1975, Trib. 1ère inst. [trial court] Brussels, 86 R.I.D.A. 124 (1975) (Belg.) (article 11*bis* secures right to control cable-retransmission in Belgium of television broadcast from Germany).

103. See, e.g., Judgment of Nov. 30, 1989 (*Directsatellitensendung*), Oberlandesgericht [intermediate trial court] Vienna, 1990 GRUR INT. 537, 539, *aff'd*, Judgment of June 16, 1992, Oberster Gerichtshof [Supreme Court], Case No. 4 Ob 44/92, 1992 GRUR INT. 933, translated in 24 IIC 665 (1993) (Aus.) (transfer of rights for Germany, uplinking country, insufficient to authorize reception in Austria, a downlink country).

104. Council Directive 93/83, Recital 14 and art. 1(2), 1993 O.J. (L 248) 15 (Directive on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission of September 27, 1993).

105. See WALTER B. WRISTON, *THE TWILIGHT OF SOVEREIGNTY*, chs. 3 and 8 (1992).

right transplants.<sup>106</sup> The Berne Convention starts by declaring the Berne aims of protecting “the rights of authors” and doing this “in as effective and uniform a manner as possible” worldwide.<sup>107</sup> How may the ostensibly universal values represented by these aims be accommodated with values local to particular cultures when applying the Berne Convention as an instrument for transplanting copyright? I will argue that, to this end, the Berne aims should be construed in the light of the parallel *desiderata* of enhancing the variety of works and of broadening access to works.<sup>108</sup>

Consider, first, “the rights of authors.” A theory of natural law would justify such rights as the “legal basis for cultural creation.”<sup>109</sup> Whether or not this or a more pragmatic rationale of incentives supports copyright law, we have to ask: does this law operate consistently with cultural creation? We can begin to understand the impact of copyright law on the creation of works by referring to the media in which this law allows copyright owners to control the dissemination of works. Copyright law developed initially in response to printing and continues to develop in response to the media revolution which has been driving traditional cultures to fuse into a more variegated world culture. As indicated above, even great empires bringing together myriad local cultures, such as the Roman Empire around the Mediterranean and the Han Dynasty in China, did not themselves engage in significant cultural dialogue two millennia ago.<sup>110</sup> As increasingly powerful media attain worldwide reach, they lead such local cultures to feed into a common pool of semiotic materials and devices—like plot and verse forms, rhythms and harmonies, color palettes and compositional patterns—from and with which authors may create still different works. To the extent copyright law accelerates this process, I submit, it helps to realize the *desideratum* of enhancing the variety of works created. This aim, of course, presupposes that these newer works continue to express originally diverse cultural viewpoints.<sup>111</sup>

Consider, in turn, how rights should be protected “in as effective and uniform a manner as possible.” Economic analysis would allow the argument that thus extending copyright protec-

106. See *supra* text accompanying notes 32-40.

107. Berne Convention, *supra* note 7, preamble.

108. For the argument in favor of these *desiderata*, see Geller, *Sign Wealth*, *supra* note 82, at 39-49. For the longer essay on which this article was based, see Paul Edward Geller, *Must Copyright be For Ever Caught between Marketplace and Authorship Norms?*, in *OF AUTHORS AND ORIGINS*, *supra* note 23, at 159.

109. Kerever, *supra* note 10, at 139.

110. For this example, see *supra* text accompanying note 48.

111. *But cf.* STEINER, *supra* note 53, at 467 (this process might result in “a crisis in the organic coherence between language and its cultural content”).

tion worldwide broadens access to works.<sup>112</sup> The United States, which refused to protect foreign works until the end of nineteenth century, provides an example of this process. As a result of protecting domestic but not foreign works during the nineteenth century, domestic publishers of works by American authors had to compete at a disadvantage against domestic, but unlicensed publishers of works of popular foreign authors, Dickens being the most pirated author at the time. Domestic publishers then had to factor royalties to American authors into the price of their books, while the pirate publishers, owing nothing to foreign authors, could sell their books more cheaply, and American authors lost bargaining power to demand healthy royalties for their own works at home.<sup>113</sup> Similarly, countries today that fail to protect foreign works allow pirates freely to disseminate transnationally produced works at the expense of nationally authored works. By contrast, rights that are uniform across national boundaries place works on an equal footing, not only on domestic marketplaces, but in the global marketplace. To that extent, I submit, copyright law realizes its other *desideratum*, broadening access to the variety of works, both domestic and foreign, that it has to enhance. Sure of their rights, the media may best tailor diverse strategies appropriate to disseminating all these various works.<sup>114</sup>

With an eye to these parallel aims, I will propose criteria for determining when to follow distinct approaches to legal transplants in international copyright. Where transplants affect the scope of copyright, especially its likelihood of being invoked against newly created works, they are best formulated in open-ended notions susceptible of varying judicial interpretations on a case-by-case basis. Where transplants affect the media conditions under which works are made publicly accessible, they are best formulated in uniform terms allowing parties disseminating them to rely on stable conditions in as broad a marketplace as possible.

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112. For an analogous argument with regard to patents, see Edmund W. Kitch, *The Patent Policy of Developing Countries*, 13 UCLA PAC. BASIN L. J. 166 (1994).

113. See Brander Matthews, *Cheap Books and Good Books*, in *THE QUESTION OF COPYRIGHT* 418 (George H. Putnam ed., 2d ed. 1896). Of course, piracy of domestic works at home also puts domestic authors and media enterprises at a disadvantage. For an example, see Michael Pendleton, *Blatant infringement of copyright perpetrated against one of China's most highly regarded intellectual property lawyers*, 15 EURO. INTELL. PROP. REV. D-178 (1993).

114. See Goldstein, *supra* note 39, at 113-15.

## A. HOW TRANSPLANTS ADJUST TO CULTURAL VARIETY

Reconsider the open-ended notion of a "work," along with correlate notions such as "idea" and "expression." It is well and good for an instrument such as the Berne Convention to illustrate the meaning of "work" with an open-ended list of examples.<sup>115</sup> Should any legal effects follow, however, from any particular Berne definition of this otherwise open-ended notion? I will not argue with positions based on the intent with which existing Berne language was drafted. The issue is rather what such language should optimally allow.

To quote quasi-official commentary, "the question of originality, when prescribed, is a matter for the courts . . ." <sup>116</sup> More generally, only courts can give full meaning to the open-ended notions in terms of which "works" are defined, especially in cases of creations that legislative lists of protected works have not anticipated. Berne drafters, no more than other legislators listing categories of works, are not in a position to second-guess judicial determinations of what should be protected in cases of first impression.<sup>117</sup> For example, at the start of the century, Berne drafters arbitrarily restricted judicial inquiry into the creativity of motion pictures to the "stage effects" and "the combination of incidents [they] presented," but later they opened up the "judges' power of inquiry" into any and all possibly creative cinematographic elements.<sup>118</sup> In other words, while a treaty instrument effectuating transplants, such as the Berne Convention, may well preclude courts from refusing to consider works that it lists, it seems inappropriate for such an instrument to compel courts to predicate protection on characterizing a work as falling within one category or another on that list. It would be useful to construe the Berne text so that it does not condition protection on classifying a work in one category or another of the Berne illustrative list of works. This reading would conform with the general trend of copyright law worldwide.<sup>119</sup>

A certain logocentrism has biased the interpretation that the West places on the notion of "works." In the eighteenth century, Kant only conceived of protecting literal discourse but not artis-

115. See *supra* text accompanying notes 66-78.

116. CLAUDE MASOUYÉ, *GUIDE TO THE BERNE CONVENTION* 17-18 (1978).

117. See WILLY HOFFMANN, *DIE BERNER UEBEREINKUNFT ZUM SCHUTZE VON WERKEN DER LITERATUR UND KUNST* 52 (1935).

118. See Berne Convention, *supra* note 7, art. 14(2) (Rome Act). For this insight, see HENRI DESBOIS, ANDRÉ FRANÇON, & ANDRÉ KEREVER, *LES CONVENTIONS INTERNATIONALES DU DROIT D'AUTEUR ET DES DROITS VOISINS* 24, 38, 46 (1976).

119. See, e.g., Council Directive 93/98, arts. 1, 2, 6, 1993 O.J. (L 290) 9 (Directive harmonizing the term of copyright and certain related rights of October 29, 1993, grants same term for all types of works as long as they have known authors).

tic works.<sup>120</sup> Even at the threshold of the twenty-first century, many American commentators tend to resort to literary notions like "vocabulary" and "grammar" in analyzing the infringement of all types of works.<sup>121</sup> Following this turn of mind, and fearing the legal consequences of leaving computer programs outside of clear-cut Berne categories, the European Community and the TRIPS Agreement somewhat fictively treat such programs as "literary works" under the Berne Convention.<sup>122</sup> While literary works are expressed in natural languages, computer programs are usually coded using artificial languages that have more restricted creative options, and programs can also be visually embodied in graphic flow-charts and user interfaces. Furthermore, the categorization of computer programs as literary works might limit the courts' ability to analyze protectibility, prompting them to focus exclusively on literary elements.<sup>123</sup> Acting more judiciously, the Swiss mention computer programs separately from the traditional categories of works in their newly revised copyright statute. This approach leaves the courts freer to explore the originality and creativity specific to programs.<sup>124</sup>

When Europeans first formulated the Berne Convention, they seemed to take the distinction between "literary and artistic works" for granted as basic and exhaustive. This Berne distinction divides the universe of works into literary works coded in discrete terms such as words and musical notes, on the one hand, and artistic works embodied in continuously variable materials such as line, space, color, and light, on the other.<sup>125</sup> In computer terms, this distinction separates literary works as those susceptible of translation by means of a code with a limited number of terms, like the ASCII code, from artistic works as those only susceptible of being bit-mapped. In East Asian culture, this distinction might be neither basic nor instructive: in that culture, for

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120. See Immanuel Kant, *Von der Unrechtmässigkeit des Büchernachdrucks*, 1785/5 BERLINISCHE MONATSSCHRIFT 403, reprinted in 106 ARCHIV FÜR URHEBER-FILM- FUNK- UND THEATERRECHT 137, 143-44 (1987).

121. Compare 2 PAUL GOLDSTEIN, *COPYRIGHT: PRINCIPLES, LAW AND PRACTICE* ch. 8 (1993) and Geller, *Factual Compilations*, *supra* note 76, at 85 (vocabulary and syntax) with Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 CHI. KENT L. REV. 725 (1993) (literary theory provides basic concepts of infringement analysis).

122. See Council Directive 91/250, art. 1(1), 1991 O.J. (L 122) 42 (Directive on the legal protection of computer programs on May 14, 1991); TRIPS Agreement, *supra* note 11, art. 10(1).

123. See, e.g., *Computer Assoc. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 701-12 (2d Cir. 1992) (court does not protect "non-literal elements" exclusively "dictated by efficiency" or "external factors").

124. See Martin J. Lutz, *Protection of Computer Programs in Switzerland*, 25 I.I.C. 153, 157-61 (1994).

125. See Geller, *Sign Wealth*, *supra* note 82, at 51-55.



example, literature and the visual arts have been traditionally fused in poetry cast in calligraphic forms.<sup>126</sup> Indeed, cultures may differ in appreciating the creative options available in different semiotic materials and devices, such as verse forms, harmonies, and compositional patterns, etc. To some extent, such differences will arise out of such materials and devices themselves: for example, quite aside from differences in writing, English and Chinese lend themselves to very different kinds of poetry. English is not as concise as Chinese, nor does it have as ancient a reserve of literary associations, and each language offers its own syntactic and rhythmic possibilities.<sup>127</sup>

Such differences feed into varying understandings of mental and, therefore, creative processes. In the West, the distinction between "idea" and "expression" or "form" may often seem to have some intuitively self-evident sense. This sense quickly turns out to be illusory in copyright law, where the judicial decisions applying this distinction are far from forming a coherent and reliable body of case law. The idea-expression distinction and related doctrines at best provide some guidance to the courts that have to determine which creative options to leave open by not over-protecting materials on the basis of which new works might be created. Think, for example, of studies that Van Gogh made in Paris following Japanese prints, albeit in his own emerging style:<sup>128</sup> would they have been infringing had France then protected the Japanese prints by copyright against such adaptation? Traditional Chinese aesthetic doctrine might have supported allowing these studies to the extent that they gave Van Gogh "opportunities of expression," ultimately driving him "to break from traditional methods and styles."<sup>129</sup>

For these reasons, notions such as "work," as well as constituent notions such as "idea" and "expression," are best left open-ended in transplanting copyright rules formulated in such terms. Judges would then be free to adjust the meanings of such notions in the light of differing cultural insights into the creative options that come into play in concrete cases. As a result, they could better allow for enhancing the variety of works.

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126. See MAI-MAI SZE, *THE WAY OF CHINESE PAINTING: ITS IDEAS AND TECHNIQUE* 115 (Random House, 1959) (1956). For an example of modern, but still primitive, European attempts to reconfigure literary elements into visual patterns, see GUILLAUME APPOLINAIRE, *CALLIGRAMMES* (Gallimard, 1966) (1925).

127. See Arthur Cooper, *Introduction*, in LI PO & TU FU, *POEMS* 15, 50-100 *passim* (Arthur Cooper trans., 1973).

128. See 1 INGO F. WALTHER & RAINER METZGER, *VINCENT VAN GOGH: THE COMPLETE PAINTINGS* 283-99 *passim* (Michael Hulse trans., 1993).

129. MAI-MAI SZE, *supra* note 126, at 5-6, 53-55, 115-16.

## B. DISTINGUISHING METHODS FOR TRANSPLANTS

As already noted, Berne rights are on the whole formulated in terms that, while sometimes conceptually broad, are not particularly open-ended. They tend to specify objective media, such as reproduction, broadcasting, and the cinema, in which the law entitles copyright owners to control the exploitation of works. By contrast, the terms of Berne article 9(2), which sets out parameters for limiting the right of reproduction, are applied by article 13 of the TRIPS Agreement across the entire field of copyright. The meaning of this provision, however, turns on a pair of notions, "legitimate interests" and "normal exploitation," susceptible of variable interpretation.<sup>130</sup>

As we observed above, different legal cultures tend to limit copyright differently.<sup>131</sup> Anglo-American law leaves judges with discretion to adjust some exemptions case by case. Continental European laws tend to limit copyright in narrowly construed statutory exceptions. I would propose to apply these very different approaches to very different types of cases in which copyright may be subject to limitations or exceptions. In one group of cases, where exemptions to copyright make creative options available for authors, they should be subject to broad judicial discretion exercised on a case-by-case basis, as argued above relative to the notion of a "work."<sup>132</sup> In the other group of cases, where copyright limitations or exceptions have other purposes, for example, avoiding intrusions on users' privacy or promoting public information, then they should be defined by statute to apply uniformly across specific categories of cases. This distinction, I would suggest, runs parallel to the distinct parameters which article 9(2) of the Berne Convention, as well as Article 13 of the TRIPS Agreement, set out. According to both provisions, limitations or exceptions to copyright may prejudice neither authors' "legitimate interests" nor "normal exploitation."<sup>133</sup>

Authors' "legitimate interests," as invoked in these provisions, may be understood in terms of "the rights of authors" to which the Berne Convention refers in its preamble.<sup>134</sup> Such interests include protecting both authors' privacy, where they can freely follow the timid muse that inspires new works, and authors' freedom to express themselves publicly. Both interests come into play in the large range of cases comparable to that illustrated by the example of Van Gogh who made studies closely

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130. See *supra* text accompanying notes 85-88.

131. See *supra* text accompanying notes 83-84.

132. See *supra* text accompanying notes 116-29.

133. See *supra* text accompanying notes 89-90.

134. See *supra* text accompanying notes 107-11.

following Japanese prints, albeit in his own emerging style.<sup>135</sup> A research exemption to copyright protects authors' rights in privacy by allowing them to copy prior works in such studies, just as it would allow a computer programmer to reverse-engineer other software.<sup>136</sup> What is to be done when resulting new works are made public, incorporating prior works in colorably infringing forms that, as the authors of the new works may contend, were indispensable to their creative purposes and, ultimately, their self-expression? A typical case is parody, where the trial court has to make the fact-intensive analysis necessary to determining whether, without copying otherwise protected material from the work being parodied, it would not have been possible to make the parody at all. In related cases, materials from prior works might be quoted in later works, for example, to critique these prior works, to give historical accounts of them, or to satirize social trends they represent.<sup>137</sup> In all such cases, a court best balances the "legitimate interests" of any prior author against those of the later author on a case-by-case basis. In doing so, it can bring to bear diverse cultural insights into the creative options singularly at stake in the works at issue. The case law now widening the parody exemption in the United States, Germany, and France, seems to confirm this approach.<sup>138</sup>

Article 9(2) of the Berne Convention and article 13 of the TRIPS Agreement both refer to "normal exploitation." This term may be understood in the light of the express Berne aim of protecting rights "in as effective and uniform a manner as possible" worldwide.<sup>139</sup> It would not make historical sense to understand "normal exploitation" as that of a given media industry, like publishing, at any given point in time. The reason is that copyright has had, and still has, to govern increasingly powerful

135. For this example, see *supra* text accompanying notes 128-29.

136. Compare *Sega Enter. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1520-30 (9th Cir. 1992) (judge-made exemption) with Council Directive 91/250, *supra* note 122, art. 6 (statutory exemption for decompilation).

137. For further analysis, see CHERPILLOD, *supra* note 78, at 152-71; Geller, *Sign Wealth*, *supra* note 82, at 89-93; Wendy Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *YALE L.J.* 1533, 1601-05 n.7 (1993).

138. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164 (1994) (U.S. trial court's discretion to weigh all the factors of fair use, without favoring any one of them, case by case before excusing parody); Judgments of March 11, 1993 (*Asterix*), BGH, Case nos. I ZR 263/91 and I ZR 264/91, respectively translated in 25 *I.I.C.* 605 and 610 (1994) (F.R.G.) (needs of "artistic discourse" may allow for copying old work, if "superimposed by the new work's original, creative content"); Judgment of May 11, 1993 (*Autumn Leaves*) Cour d'appel [intermediate trial court] Paris, 157 *R.I.D.A.* 340 (1993) (Fr.) (relaxing statutory French requirement that parody follow the "laws of the genre").

139. See *supra* text accompanying notes 107 and 112-14.

media, from printing through telecommunication, without biasing the competition between these media. The Berne Convention has helped to provide a level playing field by formulating minimum rights in terms of the objective media themselves, leaving room only for restricting these rights in specific cases.<sup>140</sup> Quite aside from the cases of creative and other transformative uses of works discussed in the foregoing paragraph, the limitations and exceptions in the wide range of remaining cases promote diverse policies. For example, some laws allow home copying against remuneration to avoid intruding on users' privacy, and other laws allow reproduction in news media to promote public information. Nonetheless, all these cases are optimally governed by statutory provisions that apply predictably to specifically defined categories of cases from country to country.<sup>141</sup> Such legislative uniformity allows media enterprises to give wider access to works in that they may rely on stable legal conditions in deciding how best to market works. In the United States, courts have begun to refuse to excuse non-transformative, business copying as fair use, aligning themselves with this approach.<sup>142</sup>

Thus article 9(2) of the Berne Convention, as well as article 13 of the TRIPS Agreement, may be read as providing the same alternative models for transplanting exceptions to copyright. In cases of transformative copying by which old works are creatively reprocessed or incorporated into new ones, they would allow courts to reconcile the competing "legitimate interests" of the old and new authors in their individual works on a case-by-case basis. In cases of slavish copying, either privately by members of the public or organizationally by business, schools, etc., they would guide legislators in providing reliable, media-neutral measures, on which copyright owners can rely in planning "normal exploitation."

### C. TRANSTERRITORIALLY UNIFORM TRANSPLANTS

Recall, finally, the debate about applying rights under the Berne Convention to control the telecommunication of Berne-protected works. Following traditional choice-of-law doctrine,

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140. See, e.g., Berne Convention, *supra* note 7, arts. 10 and 10bis (quotation, educational use, news uses) and arts. 11bis(2) and 13(2) (possible compulsory licenses against remuneration).

141. *But cf.* Paul Edward Geller, *Reprography and Other Processes of Mass Use*, 38 J. COPYRIGHT SOC'Y U.S.A. 21, 25-36 (1990) (legislative systems may allow different institutional implementation from country to country, for example, by way of copyright royalty tribunals or collecting societies).

142. See *American Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1 (S.D.N.Y. 1992), *aff'd*, 37 F. 3d 881 (2d Cir. 1994).

courts have tended to apply Berne rights in the country where the broadcast of a Berne work is received and the work communicated is enjoyed. Nonetheless, the European Community has defined the satellite communication of works as taking place wholly inside the country of the original broadcast, that is, the country from which the work is uplinked to a satellite. That definition seems to imply that, once licensed to originate from one E.C. country, the broadcast of a Berne work may be relayed by satellite into any other E.C. country. In other words, it may then be freely downlinked into all other E.C. countries within the satellite footprint.<sup>143</sup>

Under the Berne Convention, may the right assured by its article 11*bis* be transplanted in this E.C. form into national laws? Technically, this approach seems to be doubtful under the Berne Convention, because the right in question need no longer be nationally exclusive in the E.C. form. Suppose, for example, that the right to broadcast a Berne work via satellite is licensed in France: it may be in theory still be exclusively licensed in other E.C. countries like Belgium or Germany, but in practice the result may be quite different in these countries.<sup>144</sup> Since, by statutory definition, the license in question for France would allow broadcasting the work from France and relaying that broadcast by satellite throughout the European Community, supposedly exclusive licensees in Belgium or Germany would have no basis for suing to prevent reception of that broadcast in these other E.C. countries. In other words, the right may not be licensed on a fully exclusive basis in distinct E.C. member states, but only throughout the European Community as a whole. With regard to satellite-relayed broadcasts, the relevant jurisdictional unit then shifts from these nation-states to the European Community itself.<sup>145</sup>

This example of an ongoing paradigm shift in international copyright prompts a quite basic question: how may the Berne Convention continue to serve as an instrument for transplanting copyright when the territorial nation-state no longer necessarily provides the legal framework into which transplants are to be made?<sup>146</sup> I have argued that, optimally, Berne rights should apply uniformly across the boundaries of Berne countries, so that media enterprises can better rely on them in broadly marketing

143. See *supra* text accompanying notes 102-04.

144. It would, however, be possible contractually to require the licensed broadcast to be in a given language or encoded, thus limiting exclusivity to an area where the language was spoken or decoders available. See Council Directive 93/83, *supra* note 104, Recital 16.

145. See *supra* text accompanying note 105.

146. See *supra* text accompanying notes 95-101.

works throughout the Berne Union and so that pirates are prevented from raiding works on that marketplace.<sup>147</sup> It follows that minimum Berne rights are best defined in the more uniformly interpreted terms of objective media, leaving only such discretion for either national legislators or judges to vary these rights as is necessary to give relief in local circumstances. With regard to telecommunication media, this argument becomes stronger, and the leeway for variation between rights effective within national territories narrower, because such media allow works to be made virtually present across many borders all at once. For example, in cases of satellite-relayed broadcasts or transmissions within a global cable network, these rights would have to apply at all points from origin to reception to avoid pirates finding havens where they are not effective.<sup>148</sup> To the extent that all Berne countries provided uniform rights to control such telecommunication, the issue of whose law applies would then become moot since all Berne laws would converge in their results.<sup>149</sup>

Nonetheless, one territorial issue would still remain for the courts to decide: how should relief be crafted to be effective in any one place?<sup>150</sup> Such relief may be considered from the perspectives of courts confronted with claims arising at either the origin or the reception of communication. Starting at the point of origin, injunctive relief may be called for, the issue being how territorially extensive any given injunction ought to be. Articles 11, 11*bis*, 11*ter*, or 14 of the Berne Convention entitle copyright owners to control initial acts of "communication" to the "public," such as broadcasts or cable transmissions, as well as intermediate acts of satellite relays or retransmission.<sup>151</sup> A more subtle case arises when, pursuant to the copyright owner's authorization, a work is subject to telecommunication in encoded form, but unauthorized decoders are made available to receive the work in decoded form. For example, in the country of origin of such telecommunication, relief might be necessary against the making of unauthorized decoders, even where they are destined for sale and use at points of reception abroad. In such a case, Lord Brandon observed that, absent such remedies, rights to

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147. See *supra* text accompanying notes 112-14.

148. Cf. Judgment of May 28, 1991 (*Tele-Uno II*) Oberster Gerichtshof [Supreme Court], 1991 GRUR INT. 920 (Aus.), translated in 23 I.I.C. 703 (1992) 703, 707 ("alongside the law of the country of emission, in addition the copyright provisions of all those countries must be applied, which are situated at least to a considerable extent within the regular reception scope of such broadcasts").

149. See Geller, *Universal Electronic Archive*, *supra* note 99, at 55-58.

150. See Geller, *International Copyright: An Introduction*, *supra* note 67, § 3[1][b][iii].

151. For commentary, see NORDEMANN, *supra* note 8, at 119, 124-26, 131-32, 144-45; RICKETSON, *supra* note 8, at 431-34, 439-53.

control encoded telecommunication could “readily be bypassed by decoders being made” in one country and sold in another.<sup>152</sup> Turn to the points of reception: once the work, like the proverbial cat, being communicated, “is already out of the bag,” injunctive relief may prove futile, but damages appropriate. In that event, the measure of damages would seem to be best provided by the law or laws applicable to the markets reached by the telecommunication at issue.<sup>153</sup>

Articles 11, 11*bis*, 11*ter*, and 14 of the Berne Convention may serve as instruments for transplanting copyright rules applicable to the telecommunication of works. These rules would optimally assure the owner control of such communication from its points of origin to its points of reception and preclude illicit retransmission after reception. More basically, they provide a model for rights that would have sufficiently uniform operation at all points in the Berne Union to assure a reliable media marketplace throughout its territory, without regard for national boundaries.

## V. CONCLUSION

I have distinguished two types of methods for transplanting copyright law responsive to three types of issues: criteria of protectability, copyright limitations and exceptions, and minimum rights.

On the one hand, I have proposed that courts, on a case-to-case basis, flexibly construe certain open-ended Berne notions, notably that of the “work,” as well as those exemptions that allow transformative copying, such as parody and criticism.<sup>154</sup> On the other hand, I have proposed that legislation should approach uniformity when dealing with slavish copying, whether it takes place privately or organizationally, and rights to control potentially transterritorial exploitation.<sup>155</sup>

These issues were picked because they readily illustrated some of the problems of method that legal transplants raise in international copyright. There are all too many other issues that

152. *BBC Enter. Ltd. v. Hi-Tech Xtravision Ltd.* [1992] 9 R.P.C. 167, 202 (U.K.). Cf. *Wagman c. Canal Plus*, Cass., ch. crim. [Supreme Court, Crim. Chamber], March 23, 1992, 154 R.I.D.A. 145 (1992) (Fr.) (criminal law applied to domestic commerce in pirate decoders).

153. See, e.g., *Radio Monte Carlo c. SNEP*, Dec. 19, 1989, Cour d'appel, Paris, 144 R.I.D.A. 215, 222 (1990) (Fr.) (where broadcasts of sound recordings had been made from nearby Luxembourg and Monaco into France, law applicable to determine royalties was “that of the place where the harm occurred, in this case, French law”).

154. See *supra* text accompanying notes 115-38.

155. See *supra* text accompanying notes 139-53.

also illustrate such problems, but such issues have not been broached precisely because of their difficulty. For example, the criteria for identifying "authors" remain unsettled in international copyright, leaving the following question open: does the Berne Convention transplant a uniform definition of "author" into the laws of Berne countries?<sup>156</sup> This issue should not be confused with the rather different question: who should represent the interests of authors who, in cases such as folklore, remain unidentified?<sup>157</sup>

There is also a very different group of questions that arise out of the differences in levels of economic development in different regions of the world. The Berne Convention addresses a few of these questions in the Appendix to its Paris Act, which provides special translation and reproduction licenses for developing countries.<sup>158</sup> These licenses, however, do not necessarily dovetail with those in national laws intended to foster translations into minority languages.<sup>159</sup>

In any event, the approaches sketched out here do not pretend to be systematic. They are merely intended to illustrate the problems of fashioning copyright for a multicultural, but increasingly networked world.

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156. For a critical review of the differing positions, see Geller, *International Copyright: An Introduction*, *supra* note 67, § 4[2][a][ii].

157. See Berne Convention, *supra* note 7, art. 15(4) (national legislation to designate authors' representatives in cases of unpublished works where identity of author is unknown).

158. For the history and an analysis of these provisions, see RICKETSON, *supra* note 8, at 632-64.

159. See *id.* at 640-41. See, e.g., Guo Shoukang, *China*, *supra* note 72, §§ 6[4][b][iii], 8[2][b] (translation licenses into minority languages in one national law).