THE FRAMEWORK OF INTERNATIONAL COPYRIGHT*

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I. INTRODUCTION

If we were going to create an international copyright system from scratch today, there are at least nine different ways we could do so. There are at least nine models or methods we could use to determine whether and to what extent a copyrighted work from one country would receive copyright protection in another.

It is, of course, too late to create an international copyright system from scratch. Some countries have granted copyright protection to works from other countries for more than 100 years,[1] and the existing system for doing so is firmly in place. Nevertheless, the nine different ways an international copyright system could be designed are of more than merely theoretical interest because our present system is a fascinating and rather complicated blend of at least six of the nine alternatives. Indeed, the analysis of international copyright questions involves, first and perhaps foremost, identifying which alternative applies to the particular issue in question.

To grasp the features of these nine different models, it is helpful to picture them graphically. The grid, or framework, on the following page depicts the nine models, including their major characteristics and relationships to one another.

Part II of this Article examines the nine models on which an international copyright system could be based. Part III then suggests a method for analyzing international copyright questions that takes into account that our system is based on a blend of these models, rather than merely one.

II. MODELS FOR AN INTERNATIONAL COPYRIGHT SYSTEM

A. *Elements of International Copyright*

Our present international copyright system is comprised of

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[1] S. RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986 23 (1987) [hereinafter RICKETSON, THE BERNE CONVENTION].

Uniform International Treatment	National Treatment			
	Source of Right to National Treatment	Reciprocity of Treatment as a Condition of National Treatment	Applicable National Law	
			Country where Protection is Sought	Country of Origin
1	Treaty	Reciprocity Not Required	2	4
		Reciprocity Required	3	5
	Unilateral Grant by National Law	Reciprocity Not Required	6	8
		Reciprocity Required	7	9

two basic elements: (i) copyright treaties among countries, and (ii) the domestic copyright laws of those countries. The interaction of these treaties and domestic laws produces the principles of law that are applied in answering international copyright questions. The grid illustrates the nine different ways that international treaties and domestic laws could interact.

B. *The Nine Compartments of the Grid*

1. Uniform International Treatment

a. An Internationally Uniform System

Box 1 of the grid represents a system that would be internationally uniform. It would, in other words, be a system whose substantive provisions concerning protected works, exclusive rights, ownership and transfer, infringement, remedies, and all the rest, would be uniform throughout the world, or at least in those countries that were part of the system.

A system of this sort would apply only to international copyright matters involving the protection of works from one country in other countries. It would not apply to domestic copyright issues involving works of one country in their own country. Under this system, a work might receive a different kind or level of protection in its own country than it receives elsewhere. If this sort of a system required registration of ownership and transfers of copyrights, a single central registry somewhere in the world would be necessary. Infringement claims might even be litigated

in an international, and thus non-partisan, tribunal, rather than in a court of the country of one of the litigants.

The attractive feature of this sort of system is that copyrighted works would be protected worldwide by only two bodies of copyright law: the domestic laws of their own countries and the uniform law on which the international system was based. The analysis of international copyright issues would be no more difficult than the analysis of purely domestic issues. Furthermore, if such a system did provide for international registration of copyright ownership and transfers, transactions and litigation would be no more complicated when done internationally than when done domestically.

Despite the attractiveness of this sort of system, it is *not* the system of international copyright we have today, nor has it ever been the system actually used.[2] Instead, as a *general* rule, the international copyright system permits, and usually requires, countries to protect foreign works in accordance with the provisions of their own domestic copyright laws in the same fashion that domestic works are protected.[3] This means that worldwide, works are protected by as many different laws as there are countries in which they are protected.

b. Degree of Uniformity That Actually Exists

There is a substantial degree of similarity in the copyright laws of countries of the world, even among countries with significantly different cultures and economic systems. Thus, there is a remarkable degree of uniformity in international copyright, despite the absence of any single international system. The reason for this uniformity is that countries protect foreign works primarily because *treaties* require such protection. In order to adhere to, and thus benefit from, those treaties, countries must enact copyright laws that provide some minimum level of protection. To satisfy these minimum standards, the domestic copyright laws of some countries, including the United States, have been drafted with these standards in mind, while the laws of other countries

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[2] *But see* Treaty on the International Registration of Audiovisual Works, adopted at Geneva on April 20, 1989, in COPYRIGHT, the Monthly Review of the World Intellectual Property Organization 176 (June 1989). When ratified, this Treaty will result in the creation of a central international register of copyright ownership and transfers for audiovisual works, the contents of which will be considered "true," unless the contrary is proved, in those countries adhering to the Treaty. The Treaty does not contain substantive copyright provisions or provide an international forum for resolving international disputes. It merely creates prima facie evidence of current copyright ownership.

[3] *See infra* Part II(B)(2).

include language taken directly from the treaties to which those countries adhere. In some countries, the treaties themselves are appended and incorporated by reference. In other countries, the treaties to which they belong are "self-executing," and automatically become part of the fabric of the domestic laws of those countries.

Although a degree of uniformity has been achieved because multi-national treaties impose minimum standards, international copyright is not completely uniform. Disparities remain because there are several different treaties, each with its own standards, subject matter, and adherents.[4] Even the United States does not belong to all of the available multi-national conventions,[5] despite the fact that the United States has a highly developed copyright law of its own and is the world's leading exporter of copyrighted works.

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[4] There are two worldwide multi-national copyright conventions: the Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised* Paris, July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868, 828 U.N.T.S. 221, and the Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, T.I.A.S. No. 3324, 735 U.N.T.S. 368, *revised* July 24, 1971, Paris Text, 25 U.S.T. 1341, T.I.A.S. No. 7868.

There are three worldwide multi-national "neighboring rights" conventions: the International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43; the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication, Oct. 29, 1971, 26 U.S.T. 309, T.I.A.S. No. 7808, 866 U.N.T.S. 67; and the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, May 21, 1974, 13 I.L.M. 1444. For a list of those countries adhering to these conventions, see the tables published in COPYRIGHT, The Monthly Review of the World Intellectual Property Organization (Jan. 1989) at 7, *reprinted in* the appendix to Geller, *International Copyright: An Introduction*, in M. NIMMER & P. GELLER, INTERNATIONAL COPYRIGHT LAW AND PRACTICE INT-190 (1989) [hereinafter INTERNATIONAL COPYRIGHT LAW].

There are also several regional multi-national agreements. Certain European countries have adhered to the European Agreement Concerning Program Exchanges by Television Film and the European Agreement on the Protection of Television Broadcasts. For a list of those countries adhering to these conventions, see *id.* at INT-196. Certain Western Hemisphere countries have adhered to the Buenos Aires Convention and the Mexico City Convention.

There are also innumerable bilateral copyright treaties that have been entered into between pairs of countries. For information concerning the bilateral treaties to which the United States is a party, see Copyright Office Circular 38a (1987) [hereinafter Copyright Office Circular 38a], *reprinted in* M. NIMMER & D. NIMMER, 4 NIMMER ON COPYRIGHT, Appendix 20 (1989) [hereinafter NIMMER ON COPYRIGHT].

English language translations of the texts of these treaties, as well as domestic copyright laws of individual countries, have been published by BNA/UNESCO, through 1986, in a multi-volume set entitled COPYRIGHT LAWS AND TREATIES OF THE WORLD. Copyright treaties also have been published since 1980 in COPYRIGHT, the Monthly Journal of the World Intellectual Property Organization. Since 1987, they have been printed in COPYRIGHT on detachable pages and also are available from the World Intellectual Property Organization ("WIPO") in a separate volume entitled COPYRIGHT AND NEIGHBORING RIGHTS, LAWS AND TREATIES.

[5] For example, it has not adhered to the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations and it did not adhere to the Berne Convention until March 1, 1989.

c. Alternatives to Uniform International Treatment

Since copyrights do not receive uniform treatment pursuant to a single international copyright law adhered to by many countries, the only other source of law for the international protection of copyrights is the domestic law of individual countries. Protection of works from foreign countries pursuant to domestic copyright laws would result in "national treatment" of one sort or another in accordance with the law of some particular nation. "National treatment," however, is a concept with several possible characteristics, each of which is different from, and some of which conflict with, the others.

If national treatment is to be provided to foreign works under the domestic law of one country, it is necessary to determine: (i) which country's law will be applied; (ii) whether that law will be applied only if a treaty so requires; and (iii) whether reciprocity is necessary for that law to be applied. Here are the possibilities, each of which is depicted on the grid by the indicated boxes:

a. The country whose law is to be applied may be either: (i) the country where protection is sought (Grid Boxes 2, 3, 6 and 7); or (ii) the country of the work's origin (Grid Boxes 4, 5, 8 and 9).

b. The country where protection is sought may provide copyright protection: (i) only if it has a copyright treaty with the country-of-origin of the work seeking protection (Grid Boxes 2, 3, 4 and 5); or (ii) unilaterally, even in the absence of a treaty with the work's country-of-origin (Grid Boxes 6, 7, 8 and 9).

c. The country where protection is sought may grant protection: (i) regardless of whether the work's country-of-origin grants reciprocal protection to works from the country where protection is sought (Grid Boxes 2, 4, 6 and 8); or (ii) only if the country-of-origin grants reciprocal protection to works from the country where protection is sought (Grid Boxes 3, 5, 7 and 9).

There are eight possible ways to combine the answers to these questions (depicted on the grid by boxes 2 through 9). An analysis of international copyright questions involves determining which of these eight possibilities actually applies to the issue being considered. A closer examination of each possibility follows.

2. National Treatment, by Treaty, Under the Law of the Country Where Protection is Sought, Regardless of Reciprocity

Box 2 of the grid represents a system where national treatment is extended to foreign works because a treaty so requires, pursuant to the copyright law of the country where protection is sought, even if the copyright laws of the foreign countries-of-origin of those works do not provide reciprocal protection to works of the country where protection is sought. Under this system, the United States would protect works from every foreign country with which the United States has a copyright treaty. The protection provided to works from those foreign countries would be pursuant to United States copyright law, and such protection would be provided even if the work's country-of-origin does not provide reciprocal protection in that country for similar United States works.

For example, the United States and Canada have had copyright treaties with one another since 1924.[6] Movies and programs broadcast by television are protected by United States copyright law in a variety of ways. If television broadcasts are retransmitted by distant cable systems to their subscribers, the owners of the copyrights to the movies and programs comprising such broadcasts are entitled to receive royalities paid by the retransmitting cable systems.[7] When Canadian movies and programs are broadcast in Canada, and those signals are retransmitted by United States cable systems to their subscribers in the United States, the owners of the copyrights to such Canadian movies and programs also are entitled to receive royalties paid by the United States cable systems that retransmit those broadcasts. Moreover, this is, and has been, the law since 1978, when the Copyright Act of 1976 took effect. Canadian copyright law did *not*, until recently, require Canadian cable systems to pay royalties in connection with their retransmission of American or Canadian television broadcasts of American or Canadian movies or programs.[8]

The system represented by Box 2 is the dominant system in international copyright. It is, in other words, the general rule. However, national treatment of this sort is *not* required in all cases, nor even as to all issues within cases where it is the rule as

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6 *See* Copyright Office Circular 38a, *supra* note 4.
7 17 U.S.C. § 111 (1976).
8 Vaver, *Canada*, INTERNATIONAL COPYRIGHT LAW, *supra* note 4, at § 8[1][d].

to some issues. There are a number of exceptions to this general rule, which are represented by Boxes 3 through 9 of the grid.

3. National Treatment by Treaty Under the Law of the Country Where Protection is Sought, Provided There is Reciprocity

Copyright protection usually is extended to foreign works regardless of whether there is reciprocity, but there are exceptions to this general rule. Box 3 of the grid represents those cases where reciprocity is required.

One such case is illustrated by the international treatment of what commonly are referred to as "resale royalties," which are royalties paid to artists when owners of originals of their works resell those works to others at a profit. The Berne Convention does not require its members to grant resale royalty rights, and while some countries do grant them, other countries do not. Because of this disparity, Article 14*ter* of the Berne Convention *permits* Berne members to extend resale royalty rights to foreigners *on the condition* that resale royalty rights are granted by the foreigner's own country to artists from other countries.[9]

Germany and France provide good examples of the ways the resale royalty issue has been handled in actual practice. The copyright laws of both countries grant resale royalty rights to their own artists. However, Germany extends resale royalty rights only to foreign artists from countries that extend resale royalty rights to German artists.[10]

France, on the other hand, appears to grant resale royalty rights to foreign artists without regard to whether the foreign artists' countries grant such rights to French artists, although some

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[9] Article 14*ter* provides:

> (1) The author, or after his death the person or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sales of the work subsequent to the first transfer by the author of the work.
>
> (2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.
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> (3) The procedure for collection and the amounts shall be matters for determination by national legislation.

Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised* Paris, July 24, 1971, Art. 14*ter*, 25 U.S.T. 1341, T.I.A.S. No. 7868, 828 U.N.T.S. 221.

[10] *See* Dietz, *Germany, Federal Republic*, INTERNATIONAL COPYRIGHT LAW, *supra* note 4, at § 6[1][c][i].

"special conditions" must be satisfied.[11] Since United States copyright law does *not* grant resale royalty rights to Americans or foreigners,[12] United States artists whose works are resold in Germany would not receive resale royalties there, though United States artists whose works are resold in France might.

4. National Treatment, by Treaty, Pursuant to the Law of the Country-of-Origin of the Protected Work, Regardless of Reciprocity

While in general "national treatment" requires courts to provide copyright protection in accordance with the law of the country in which protection is sought, there are some instances in which the law to be applied is instead the law of the country-of-origin of the work seeking protection.[13] These cases are represented by Box 4 of the grid.

The duration of a work's copyright is one example of an issue where the applicable law may be the law of the work's country-of-origin, rather than the law of the country where protection is sought, if the duration of copyright in the work's country-of-origin is shorter than the duration in the country where protection is sought. This principle is known as the "Rule of the Shorter Term," and its use is authorized, but not required, by both the Berne Convention and the Universal Copyright Convention ("UCC").[14]

The application of the "Rule of the Shorter Term" is illustrated by comparing the manner in which Germany and the United States treat duration-of-copyright issues in cases involving foreign works. Consider first the German treatment of a United States work such as a book. As a general rule, the duration of copyright in Germany for books is the life of the author

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11 Plaisant, *France*, INTERNATIONAL COPYRIGHT LAW, *supra* note 4, at § 6[1].

12 Nimmer, *United States*, INTERNATIONAL COPYRIGHT LAW, *supra* note 4, at § 4[3][g]. The state of California, however, does so provide. CAL. CIV. CODE § 986 (1977).

13 As a general principle, the country-of-origin of a work is the country where the work is first published, or the country of which the author of the work is a national. *See, e.g.*, Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised* Paris, July 24, 1971, Art. 5(4), 25 U.S.T. 1341, T.I.A.S. No. 7868, 828 U.N.T.S. 221, and Geller, *International Copyright: An Introduction*, INTERNATIONAL COPYRIGHT LAW, *supra* note 4, at § 4[3][b][ii].

14 Berne Convention, for the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised* Paris, July 24, 1971, Art. 7(8), 25 U.S.T. 1341, T.I.A.S. No. 7868, 828 U.N.T.S. 221; Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, T.I.A.S. No. 3324, 735 U.N.T.S. 368, *revised*, July 24, 1971, Paris Text, Art. IV.4(a), 25 U.S.T. 1341, T.I.A.S. No. 7868.

plus seventy years,[15] while in the United States, it is the life of the author plus fifty years.[16] Thus, if an American author published a book in 1978 and died that same year, the copyright to the book would expire in the United States fifty years later in 2028. If Germany were to apply its life-plus-seventy year term to the book, the duration of the book's copyright would not expire in Germany until 2048. But insofar as the protection of foreign works is concerned, German law includes the "Rule of the Shorter Term," and thus, the book's copyright would expire in Germany in 2028 as well.[17]

Consider now the manner in which the United States would treat a German work such as a photograph. While United States law treats photographs and other types of works alike where duration of copyright is concerned, under German law photographs generally are protected for only twenty-five years from publication, or from their creation if they are not published.[18] Thus, if a German photographer created and published a photograph in 1960 and is still alive today, the copyright for the photograph in Germany expired in 1985. In the United States, however, that German photograph would still be protected by copyright because United States law does *not* include a "Rule of the Shorter Term" and makes no distinction between United States and foreign works with respect to duration of copyright.[19]

5. National Treatment, by Treaty, Pursuant to the Law of the Country-of-Origin of the Protected Work, Provided There is Reciprocity

Box 5 of the grid represents cases where one country, Country A, would protect works from other countries, pursuant to the laws of those other countries, provided those countries protected works from Country A pursuant to Country A's own copyright law.

Conceptually, this would be one rational way to organize an international copyright system. A century ago, many Western

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15 Dietz, *Germany, Federal Republic*, INTERNATIONAL COPYRIGHT LAW, *supra* note 4, at § 3[1][a].

16 For works first published on or after Jan. 1, 1978, see 17 U.S.C. § 302(a) (1976).

17 Dietz, *Germany, Federal Republic*, INTERNATIONAL COPYRIGHT LAW, *supra* note 4, at §§ 3[a] and 3[c][i].

18 *Id.* at § 3[2][a]. Historical-documentary photographs are protected for 50 years. German law also distinguishes between "mere" photographs, to which the 25- or 50-year duration applies, and photographic "works" to which the life-plus-70 year duration applies. *Id.*

19 Nimmer, *United States*, INTERNATIONAL COPYRIGHT LAW, *supra* note 4, at § 3[3].

Hemisphere countries, excluding the United States, and several European countries, including France, Germany, and the United Kingdom, ratified the Montevideo Convention, a multi-national treaty.[20] The Montevideo Convention has been superseded by later multi-national treaties. However, while in effect, the Montevideo Convention had the effect of giving each work a genetic-like set of legal rights that would travel with the work from its country-of-origin to all other countries of the world party to that convention. While the Convention was in effect, the copyright owner had a clear picture of the rights embodied in such a copyright because they were the same worldwide as they were in the work's country-of-origin.

On the other hand, such a system required attorneys and judges to become familiar not only with the copyright laws of their own countries, but also with the copyright laws of other countries. Moreover, it may have become politically difficult for a country to grant what could have been more copyright protection to foreign works than it granted to domestic works. Whether for these reasons or otherwise, it does not appear that any copyright issues actually are treated today in the manner depicted by Box 5 of the grid.

6. National Treatment, Unilaterally Granted by National Law, Pursuant to the Law of the Country Where Protection is Sought, Regardless of Reciprocity

Sometimes, copyright protection is extended unilaterally to foreign works pursuant to the law of the country where protection is sought and completely without regard to reciprocity. These cases are depicted by Box 6 of the grid.

One example of this circumstance is found in United States copyright law. Section 104 of the Copyright Act provides that unpublished works and works first published in the United States are protected here regardless of the author's nationality or domicile.[21] One application of this section of United States law is illustrated by the treatment the United States affords to works authored in the People's Republic of China by Chinese citizens. The United States has never had a copyright treaty with the People's Republic of China.[22] Moreover, at present, the People's Re-

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[20] *See* STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS 36-37 (1983).

[21] 17 U.S.C. § 104(a) (1976).

[22] The United States and China entered into a bilateral copyright treaty in 1904, but only Taiwan considers the treaty to be in force today. The People's Republic does not

public of China has no copyright law,[23] and thus does not provide copyright protection to United States works. Nevertheless, despite the absence of a copyright treaty between the two countries and the lack of reciprocal copyright protection for United States works, Chinese works *are* protected in this country until they are first published, and any Chinese works that are first published in the U.S. continue to have copyright protection in the United States, purely as a matter of United States law.

7. National Treatment, Unilaterally Granted by National Law, Pursuant to the Law of the Country Where Protection is Sought, Provided There is Reciprocity

The copyright laws of some countries unilaterally protect foreign works, even in the absence of treaty relations, *if* the copyright laws of those foreign countries provide reciprocal protection for works of their countries. Box 7 represents these cases.

France, for example, unilaterally protects works from other countries provided those countries protect French works of the same type. Thus, France protects computer software from other countries even in the absence of a treaty requiring it to, provided the law of that software's country-of-origin protects French software in return.[24] Brazil also appears to protect works from foreign countries even in the absence of a treaty as long as those foreign countries grant copyright protection to Brazilian works.[25]

The United States also grants copyright protection unilaterally to works from foreign countries that protect United States works, though the United States is somewhat more formal than France or Brazil about doing so. United States copyright law authorizes the President to issue "proclamations" pursuant to which the United States grants copyright protection to foreigners from countries which grant copyright protection to United States nationals on the same basis as to their own nationals.[26] Such a proclamation was the basis on which the United States first granted copyright protection to Canadians in 1924, long before

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consider the treaty to be binding on it. Copyright Office Circular 38a, *supra* note 4, at 3 n.1.

23 "While patent and trademark laws do exist in China, an internationally acceptable copyright law does not." Note, *The Legal Protection of Computer Software in the People's Republic of China*, 7 CARDOZO ARTS & ENT. L.J. 387 (1989) (discussing the history and possible enactment of copyright law in China). *See also* Simone, *Copyright in the People's Republic of China: A Foreigner's Guide*, 7 CARDOZO ARTS & ENT. L.J. 1 (1988), and Goldberg & Bernstein, *Proposed Chinese Copyright Law*, N.Y.L.J., Sept. 18, 1987, at 1, col. 1.

24 Plaisant, *France*, INTERNATIONAL COPYRIGHT LAW, *supra* note 4, at § 6[1].

25 Chaves, *Brazil*, INTERNATIONAL COPYRIGHT LAW, *supra* note 4, at § 6[1][b][ii].

26 17 U.S.C. § 104(b)(4) (1976).

1955 and 1962 respectively, when the United States and Canada became parties to the UCC.[27]

8. National Treatment, Unilaterally Granted by National Law, Pursuant to the Law of the Country-of-Origin of the Protected Work

The last two possibilities, represented by Boxes 8 and 9 of the grid, are those instances in which copyright protection would be granted unilaterally by the domestic law of the country in which protection is sought, where the protection provided would be pursuant to the law of the protected work's country-of-origin. Box 8 represents those cases where such protection would be granted even without reciprocity. Box 9 represents those cases in which such protection would be granted only if reciprocal protection were granted.

It does not appear that any copyright issues actually are treated today in the manner depicted by Boxes 8 or 9, probably for the same reasons copyright issues are not treated in the manner depicted by Box 5 of the grid.[28]

III. Steps in the Analysis of International Copyright Questions

It is one thing to recognize that the international copyright system we have today is a blend of the characteristics of several different models; it is another to know which model is applicable to a particular issue. This section outlines a several-step process for the analysis of international copyright questions. This process is designed to guide thinking and research about such questions in ways that ought to reveal the correct model for each issue.

As noted above, international copyright law consists, in part, of treaties.[29] Where these treaties exist between countries, they act primarily as pipelines for copyright owners in one country to reach the national copyright laws of other countries in which protection is sought. Since at the end of a pipeline, the law applied is usually the national law of the country where protection is sought,[30] international copyright consists of national laws as well.

The essence of international copyright analysis involves de-

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[27] *See* Copyright Office Circular 38a, *supra* note 4, and Vaver, *Canada*, International Copyright Law, *supra* note 4, at § 6[3].

[28] *See supra* Part II(B)(5).

[29] *See supra* note 4.

[30] *See supra* Parts II(B)(2)-(3), (6)-(7).

termining which treaty is applicable to a particular issue, what provisions of national law that treaty makes available to the copyright owner, and finally, what protection such national law provisions actually provide to the work in question. The analytical process by which this is done may be broken down into eight distinct steps.

1. *Determine the country in which protection is to be sought.*

The first step in analyzing an international copyright question is to determine the country in which protection is to be sought. This is not usually a difficult question because that country is almost always one in which a copyright infringement suit will be filed or in which the copyright owner will claim royalties.

Sometimes, however, circumstances may give copyright owners reason to hope that protection may be sought in their own countries for uses made of their works in other countries. Such hopes will *almost* always be disappointed. Consider the following hypotheticals.

a. American Computer Software Corp., a United States company, publishes popular programs sold over-the-counter in the United States and by direct mail in the United States and around the world. Each of these programs is protected by United States copyright. British Programme Distributing Ltd. is a United Kingdom company. It bought, by mail, one copy of each of American Computer's programs. British Programme Distributing then copied these programs onto blank disks and sold the copies in Britain without the authorization of American Computer. British Programme Distributing has no presence in or other connection with the United States. American Computer Software Corp. has no presence in or other connection with Great Britain.

American Computer Software may only seek protection for its programs in Great Britain. Given these facts, United States courts would not have personal jurisdiction or subject matter jurisdiction over British Programme Distributing.

b. Assume now that British Programme Distributing maintains an office in the United States, staffed by one employee whose job it is to sell to retail stores in the United States those programs published in Great Britain by British Programme Distributing. The employee based in the United States had nothing to do with British Programme's purchase, copying, or sale in Great Britain of American Computer Software's programs. Furthermore, British Programme is not selling copies of American Computer Software's programs in the United States.

American Computer Software may still only seek protection for its programs in Great Britain. Although, given these facts, United States courts would have personal jurisdiction over British Programme Distributing, the courts *probably* would not have subject matter jurisdiction of the dispute because copyright law is considered to be "territorial" in nature. The copyright law of each country is considered to have effect only within the borders of its own country. Thus, since the infringement described in hypothetical "b" occurred in Great Britain, United States law would not be applicable,[31] and United States courts do not have jurisdiction to apply British law.[32]

It was necessary to insert the word "probably" in this answer for two reasons. First, the Ninth Circuit once raised the question of whether under the UCC, rather than under United States or foreign copyright law, United States courts would have jurisdiction to hear cases involving infringements of American works in foreign countries.[33] Second, a federal district court has suggested that American courts may be able to hear suits for infringements occuring abroad if the facts are such that no other court in the world would have personal as well as subject matter jurisdiction.[34]

c. Assume now that British Programme's employee based in the United States sold a very small number of the British-made copies of American Computer Software's programs to American retail stores. Thus, the number of programs sold in the United States by British Programme was only a fraction of the much larger number it sold in Great Britain.

American Computer Software may seek protection for its programs in the United States, as well as in Great Britain. United States courts would have subject matter jurisdiction because British Programme violated American Computer's exclusive right to *distribute* its works in the United States,[35] even though the violation of its exclusive right to *reproduce* its works took place only in Great Britain.[36] If American Computer were to bring suit in the

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31 3 NIMMER ON COPYRIGHT, *supra* note 4, at § 17.02.

32 28 U.S.C. § 1338(a) (1982) (conferring jurisdiction on United States district courts to hear actions "arising under any *Act of Congress* relating to . . . copyrights. . . . " (emphasis added)); 3 NIMMER ON COPYRIGHT, *supra* note 4, at § 17.03.

33 Peter Starr Prod. v. Twin Continental Films, 783 F.2d 1440, 1443 n.3 (9th Cir. 1986). The Ninth Circuit ultimately did not decide the issue.

34 London Film Productions Ltd. v. Intercontinental Communications, Inc., 580 F. Supp. 47 (S.D.N.Y. 1984).

35 17 U.S.C. § 106(3) (1976).

36 *See, e.g.*, National Enquirer v. News Group News, Ltd., 670 F. Supp. 962 (S.D. Fla. 1987).

United States, it may be able to recover damages for sales made in Great Britain as well as in the United States.[37]

2. *Determine which treaties and national laws of that country are pertinent.*

The second step of the analysis involves determining which treaties and national laws of the country in which protection is sought are pertinent. Insofar as treaties are concerned, it is necessary to determine whether the country in which protection is sought was signatory to a treaty to which the country-of-origin of the work seeking protection also was a signatory, *as of the date* the work in question was first published.[38] If both countries are signatories to a treaty, but the work in question was first published *before* both became signatories, that treaty may not be applicable.[39] These principles are illustrated by the following hypotheticals.

d. Many years ago, American Film Production Corp., a United States company, produced a motion picture entitled "The Great Face-Off," an ice hockey epic. The movie was released in New York in October of 1950 to coincide with the opening of that year's National Hockey League season and in Canada the following May to coincide with the 1951 Stanley Cup hockey championship series. No unauthorized uses were made of the movie in those years, but when videocassettes of "The Great Face-Off" were released in Canada in March of 1989, pirated cassettes immediately began to be sold and rented in Canada. American Film had renewed its United States copyright to the movie in 1978,[40] and thus, when pirated copies appeared on the Canadian market, American Film sought to protect its copyright in Canada. The pertinent treaties and national laws are explained below.

Canada and the United States are both signatories to the Berne Convention. Canada has been since 1928,[41] and thus was a Berne member on the day "The Great Face-Off" was first released in October 1950. While the United States has been a member of the Berne Convention since March 1, 1989[42] and

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37 *See* Larball Pub. Co. v. CBS, 664 F. Supp. 704 (S.D.N.Y. 1987).

38 This may be determined from the tables published by WIPO in COPYRIGHT, *supra* note 4, which list the names of those countries that have adhered to various treaties as well as the effective dates of their adherences.

39 *See* RICKETSON, THE BERNE CONVENTION, *supra* note 1, at 665-77 (discussing the retroactive applicability of the Berne Convention).

40 17 U.S.C. § 304(a) (1976).

41 *See supra* notes 4 & 38.

42 *Id.*

therefore, was a member by the time pirated cassettes began to be sold in Canada, the United States was not a member of Berne when the movie was first released. Thus, the movie would have gone into the public domain in *Canada* as soon as it was first released and would not be protected against piracy in 1989,[43] unless some other treaty provided the necessary pipeline to Canadian law for the movie's protection there.

In addition to being members of Berne, the United States and Canada have both been members of the UCC since 1955 and 1962, respectively.[44] Although both dates precede the piracy to which American Film objects, both dates follow the date the movie was first released, and thus the movie still would have gone into the public domain in Canada unless some other treaty provided the necessary pipeline for the movie's protection there.

Fortunately for American Film, the United States and Canada have had bilateral copyright relations with one another since 1924,[45] many years prior to the movie's first release. That bilateral relationship provided the necessary pipeline to Canadian copyright law when the movie was first released, protection which is still available to American Film to prevent and be compensated for the piracy of cassettes of its movie in 1989.

With respect to national laws, it is necessary to consider the applicability of the national law of the country where protection is sought for the particular issue in question. For example, if the question being analyzed were whether a particular foreign work is entitled to protection in the United States at this time, two pertinent issues would be whether that work was published with a proper copyright notice and the duration of that work's copyright under United States law. United States law concerning both of these issues changed in 1978 when the Copyright Act of 1909 was superseded by the Copyright Act of 1976, and United States law concerning the notice issue was changed again in 1989 by the Berne Convention Implementation Act ("BCIA").[46] Thus, to analyze the notice and duration issues in this example, it would be necessary to determine which United States statute was applicable to each issue: the Copyright Act of 1909, the Copyright Act of 1976, or the BCIA.

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[43] *But see supra* note 39.

[44] *See supra* notes 4 & 38.

[45] *See* Copyright Office Circular 38a, *supra* note 4.

[46] *See* 2 NIMMER ON COPYRIGHT, *supra* note 4, at §§ 7.04-7.15 (changes in notice requirement). *See also id.* at § 9.01 (changes in duration of copyright); The Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified at 17 U.S.C. §§ 101, 104, 116, 301, 401-02, 404-08, 801 (1988)).

3. *Verify that the work or right in question is a type of work protected by the national law selected in Step 2.*

The third step of the analysis is verification that the work or right for which protection is sought is a type of work or right which is in fact protected by the national law selected in Step 2. For example, United States law protects sound recordings against unauthorized duplication in its Copyright Act.[47] Other countries, however, provide such protection for sound recordings in statutes that are separate and distinct from their copyright laws.[48] Thus, if the question were whether the unauthorized duplication of a sound recording could be prevented in such a country, the relevant national law would be something other than its copyright law. This, in turn, would raise the question of whether the treaty identified in Step 2 serves as a pipeline to the law that protects sound recordings or whether it is necessary to return to Step 2 to find another treaty that serves as a pipeline to the sound recording law.

4. *Verify that the work in question is "connected" to the country in which protection is sought in one of the required ways.*

The fourth step of the analysis is verification that the work is "connected" to the country in which protection is sought in one of the ways required by the applicable treaty or national law. The most common way to make this connection is through the author's nationality or residence or through the work's country-of-origin. This principle is illustrated by the following hypothetical.

e. Arlene Author, an American, wrote and owns the copyright to a book entitled *The Great Pyramids of Egypt* which was published in the United States on February 1, 1989 and in Canada on February 15, 1989. On March 15, 1989, unauthorized reproductions of Author's book appeared in bookstores in Canada and Egypt. Author seeks to protect her book in both countries.

Author may protect her book in both Canada and Egypt. The book is sufficiently "connected" to those countries. In her Canadian case, the UCC provides Author with a pipeline to the protection provided by Canadian copyright law because the United States and Canada were both parties to the UCC on the date her book was first published, Author is a national of the United States, and her book was first published there.[49]

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[47] 17 U.S.C. § 102(a)(7) (1976).

[48] *See, e.g.*, Ficsor, *Hungary*, INTERNATIONAL COPYRIGHT LAW, *supra* note 4, at § 9[1][b][iii]; Jehoram, *Netherlands*, INTERNATIONAL COPYRIGHT LAW, *supra* note 4, at §§ 8[5][a][i] and 9[1][c].

[49] Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, T.I.A.S. No. 3324,

In her Egyptian case, Author's nationality and residence in the United States are of no help to her because on the date her book was published, the United States did not have a copyright treaty with Egypt.[50] Although Egypt is a member of Berne and has been since 1977,[51] the United States did not join Berne until a month after Author's book was published and doing so at that time probably had no effect on the protection of Author's book in Egypt.[52] However, Canada and Egypt both were members of Berne on the date Author's book was published in Canada. Because the book was published in Canada within thirty days of its publication in the United States, Author is entitled to Berne's protection in Egypt even though she is not a national of Canada.[53] In effect, publication in Canada provided Author's book with a "back door" to protection in other Berne countries even before the United States itself joined Berne. In fact, this practice is known as the "back door to Berne."[54]

5. *Consider whether the work is not eligible for national treatment in accordance with the law of the country where protection is sought.*

The fifth step of the analysis requires consideration of whether the work is not eligible for national treatment in accordance with the law of the country where protection is sought. A work may not be eligible for such treatment for several reasons. First, copyright protection may have expired in the work's country-of-origin and the law of the country in which protection is sought includes the "Rule of the Shorter Term."[55] Second, the copyright owner may have failed to comply with some necessary formality, such as affixing a proper copyright notice, required by

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735 U.N.T.S. 368, *revised* July 24, 1971, Paris Text, Art. II, para. 1, 25 U.S.T. 1341, T.I.A.S. No. 7868 ("Published works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as that other State accords to works of its nationals first published in its own territory. . . .").

50 Copyright Office Circular 38a, *supra* note 4, at 4 n.3.

51 *See supra* notes 4 & 38.

52 *But see supra* note 39.

53 Berne Convention for Protection of Literary and Artistic Works, Sept. 9, 1886, *revised* Paris, July 24, 1971, Art. 3(1)(b) & (4), 25 U.S.T. 1341, T.I.A.S. No. 7868,-828 U.N.T.S. 221.

> (1) The protection of this Convention shall apply to: . . . (b) authors who are not nationals of one of the countries of the Union, for their work first published in one of those countries, or simultaneously in a country outside the Union and in a country of the Union. . . . (4) A work shall be considered as having been published simultanously in several countries if it has been published in two or more countries within thirty days of its first publication.

Id.

54 Geller, *International Copyright: An Introduction*, INTERNATIONAL COPYRIGHT LAW, *supra* note 4, at § 4[2][b][i].

55 *See supra* notes 14-19 and accompanying text.

the law of the country where protection is sought.[56] Third, the right claimed in the country where protection is sought may be available only if reciprocal treatment is provided by the work's country-of-origin, and it is not.[57] Fourth, the right claimed in the country where protection is sought may not be one of the rights covered by any of the treaties between that country and the work's country-of-origin and, although the right is protected by national law, it is protected by a non-copyright law that does not apply to foreigners.[58] Fifth, some other treaty, such as a free-trade treaty, may interfere with national copyright treatment.[59] Sixth, the work may have already been in the public domain in the country where protection is sought by the date the otherwise applicable treaty took effect between that country and the work's country-of-origin.[60] Consider these illustrations of some of the foregoing possibilities.

f. In 1980, Rising Sun Toy Manufacturing Ltd., a Japanese company, designed, manufactured, and began selling in Japan a clever and attractive plastic robot. The robots sold by Rising Sun did not have a copyright notice affixed to them because Japanese copyright law does not require notice.[61] In 1988, Competitive Toy Inc., a United States company, began manufacturing and selling in the United States toy robots that are copied from, and are exact copies of, the Rising Sun Toy robot. Rising Sun immediately sought to protect its rights in the United States.

This hypothetical illustrates the second of the above possibilities. The United States and Japan have both been members of the UCC since 1955 and 1956 respectively.[62] Thus, the UCC provides Rising Sun with a pipeline to United States copyright law for the protection of its plastic robot in the United States. Unfortunately for Rising Sun, when its robot was first published in 1980, United States copyright law required notices to be affixed,[63] and since Rising Sun did not attempt to protect its rights in the United States until 1988, eight years after the robot was first published, it was by then too late for Rising Sun to attempt

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56 Hypothetical "f" illustrates this possibility. *See infra* notes 61-65 and accompanying text.

57 *See supra* notes 9-12, 24-25 and accompanying text.

58 Hypothetical "g" illustrates this possibility. *See infra* notes 66-68 and accompanying text.

59 Hypothetical "h" illustrates this possibility. *See infra* notes 69-71 and accompanying text.

60 *See supra* notes 14-19 and accompanying text.

61 Doi, *Japan*, INTERNATIONAL COPYRIGHT LAW, *supra* note 4, at § 5[4].

62 *See supra* notes 4 & 38, and Copyright Office Circular 38a, *supra* note 4.

63 17 U.S.C. § 401 (1976).

to cure its omission of notice.[64] If Competitive Toy had copied Rising Sun's robot in 1984 rather than 1988, and Rising Sun had immediately sought to protect its rights, Rising Sun may have been able to do so because at that time it may have been able to cure its omission of notice.[65]

g. Andrew Author, an American, wrote and owns the copyright to a book about World War II. The book was published in the United States only, but many copies of it have been purchased by libraries in Great Britain and Sweden, from which they are frequently borrowed by British and Swedish residents.

This hypothetical represents the fourth of the above possibilities. Author is not entitled to any compensation on account of the lending of his book in either country. This answer may not surprise American copyright owners because American copyright owners do not receive royalties even when their works are lent by American libraries.[66] On the other hand, British and Swedish authors do receive royalties when their works are lent by public libraries in their countries.[67] Since the United States has long had copyright relations with Great Britain and Sweden,[68] Andrew Author might suppose that he too is entitled to compensation when his book is lent by public libraries in those countries. But he would be wrong.

Andrew Author is not entitled to compensation because "public lending rights" are *not* required by any of the copyright treaties between the United States and Great Britain and Sweden. Although Great Britain and Sweden have chosen to grant public lending rights to their own nationals, both countries have done so in laws that are separate from their copyright laws. Thus, the copyright treaties between the United States and those countries which generally require those countries to give Americans the

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64 17 U.S.C. § 405(a)(2) (1976) (omission of notice does not invalidate copyright *if* the work is registered within five years of its publication and other conditions are satisfied).

65 *Cf.* Hasbro Bradley v. Sparkle Toys, 780 F.2d 189 (2d Cir. 1985).

66 Although United States copyright law grants copyright owners the exclusive right to distribute their works under 17 U.S.C. § 106(3) (1976), this right is limited by the "first sale doctrine" which provides that owners of copies of works (other than sound recordings) may resell, rent or lend their copies without permission from copyright owners. 17 U.S.C. § 109 (1984).

67 Cornish, *United Kingdom*, INTERNATIONAL COPYRIGHT LAW, *supra* note 4, at § 9[1][a]; Karnell, *Sweden*, INTERNATIONAL COPYRIGHT LAW, *supra* note 4, at § 8[e][ii].

68 *See* Copyright Office Circular 38a, *supra* note 4 (the United States has had bilateral treaties with Great Britain and Sweden since 1891 and 1911, respectively, and has had UCC relations with both countries since 1957 and 1961, respectively). *See also* Berne membership table, *supra* notes 4 & 38 (the United States has had Berne relations with both countries since March 1, 1989).

same rights of copyright as are granted to British and Swedish authors, do not give Americans the right to claim public lending royalties.

h. Suzie Songwriter, an American, wrote a song entitled "Be Mine" and assigned its copyright to her American music publisher. The publisher then issued a license to a British record company, granting it the exclusive right to manufacture and sell recordings of the song in Great Britain in return for the customary British royalty of six and one-quarter percent of the retail price of the record. The publisher also issued another license to a German record company, granting it the exclusive right to manufacture and sell recordings of the song in Germany in return for a retail royalty of eight percent. As soon as the British-made records were put on sale in Great Britain, a German record wholesaler bought copies of those records in Great Britain and imported them into Germany where they were sold for less than the price charged by the German record company. If Songwriter's publisher and the German record company tried to prevent any further sales of the British-made records in Germany on the grounds that the German record company's exclusive distribution right in Germany was being violated, they would be unsuccessful. Similarly, if the American music publisher also sued the German wholesaler for the one and three-quarter percent difference between the six and one-quarter percent royalty the publisher collected from the British record company and the eight percent royalty the publisher would have collected from the German record company had the wholesaler not violated the German record company's exclusive territory, the publisher would be unsuccessful.

This hypothetical illustrates the fifth of the above possibilities. Both Great Britain and Germany are members of the European Economic Community ("EEC" and "Common Market"). The Court of Justice of the European Communities has interpreted the EEC Treaty of Rome to prohibit the use of copyright law to impede the free movement of goods within the Common Market, despite Article 36 which authorizes import restrictions "justified on grounds of . . . the protection of industrial and commercial property" which the Court has interpreted to include "intellectual property" in general and copyright in particular. The basis for this result was that the sale of copyrighted goods within the Common Market exhausts whatever exclusive distribution rights otherwise would exist within a Common Market coun-

try.[69] If recordings of "Be Mine" had been imported into Germany from a country outside the Common Market, the German record company would have been able to enjoin their sale because the EEC Treaty applies only to the movement of goods "between Member States."[70]

The royalty damage issue might have been decided in the publisher's favor on the grounds that the collection of royalties does not interfere with the movement of goods. However, in the case upon which the hypothetical is based, the Court of Justice ruled against music publishers on the grounds that efforts to collect the one and three-quarter percent in royalties arguably lost as a result of a wholesaler's sale of British-made records in Germany would "have the effect of entrenching the isolation of national markets which the Treaty seeks to abolish."[71]

6. *Consider whether the work is eligible for treatment that is more favorable than that granted to its own nationals by the country where protection is sought.*

The sixth step of the analysis requires consideration of the work's eligibility for treatment more favorable than the treatment granted to its own nationals by the country where protection is sought. A work may be entitled to more favorable treatment, if the pertinent treaty provision requires greater protection than that provided by national law, but the treaty provision applies only to foreigners and not nationals.

The Berne Convention, for example, contains at least one such provision. Insofar as formalities are concerned, Berne provides that the enjoyment and exercise of the rights of copyright "shall not be subject to any formality" in countries that are members of Berne "other than the [work's] country of origin."[72] Thus, within a work's country-of-origin, Berne permits the enjoyment and exercise of such rights to be conditioned on the satisfaction of formalities. When the United States joined Berne, it took advantage of this provision of Berne, so that in one respect, foreigners enjoy more favorable treatment under United States

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[69] Deutsche Grammophon Gesellschaft v. Metro-SB-Grossmarkte, 1971 ECR 487 (discussed in Jehoram and Gielen, *The Law of the E.E.C. and Copyright*, INTERNATIONAL COPYRIGHT LAW, *supra* note 4, at § 2[1][c][i]).

[70] Harlequin Record Shops Ltd. v. Polydor Ltd., 1982 ECR 329 (discussed in Jehoram and Gielen, *The Law of the E.E.C. and Copyright*, INTERNATIONAL COPYRIGHT LAW, *supra* note 4, at § 2[1][c][iv]).

[71] Musik-Vertrieb Membran GmbH and K-tel International v. GEMA, 1981 ECR 147 (discussed in Jehoram and Gielen, *The Law of the E.E.C. and Copyright*, INTERNATIONAL COPYRIGHT LAW, *supra* note 4, at § 2[1][c][ii]).

[72] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised* Paris, July 24, 1971, Art. 5, 25 U.S.T. 1341, T.I.A.S. No. 7868, 828 U.N.T.S. 221.

law than Americans themselves enjoy. Congress eliminated the formality of copyright registration as a prerequisite to filing infringement suits for foreign Berne country works only, while registration remains a prerequisite to suit for American works.[73]

7. *Consider whether there are any issues as to which the law of the work's country-of-origin applies, rather than the law of the country where protection is sought.*

The seventh step of the analysis requires consideration of any issues as to which the law of the country-of-origin applies, rather than the law of the country where protection is sought. The following hypotheticals illustrate two instances in which this may be the case.

i. Sam Songwriter, an American, wrote several popular songs in 1960, the copyrights to which he assigned "forever" to his American publisher. Songwriter died in 1970, and thus, in 1988, when the original twenty-eight-year term of the copyrights to those songs was about to expire, his heirs, rather than his music publisher, had the right to renew those copyrights in the United States,[74] and did. Now that the heirs have renewed the copyright, who is entitled to royalties earned by those songs from their public performance or other exploitation in Japan, Great Britain and Germany? Who, in other words, now owns the copyrights to those songs in those countries, the heirs or the publisher?

The renewable-term copyright found in United States law prior to 1978[75] was unique to American law. The copyright laws of Japan, Great Britain, and Germany do not have equivalent renewal provisions because their copyright terms are unitary and continuous.[76] Thus, if the general rule of national treatment, represented by Box 2, were to apply to the question posed by this hypothetical, although the heirs own the copyrights in the United

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[73] 17 U.S.C. § 411(a) (1989).

[74] 2 NIMMER ON COPYRIGHT, *supra* note 4, at § 9.06[C]. Note that Songwriter's heirs would have had the right to renew those copyrights in the United States even if Songwriter specifically had assigned his "renewal rights" to the publisher as well. *Id.* If Songwriter had lived until 1988, his express assignment of "renewal rights" would have entitled his publisher, rather than Songwriter, to renew those copyrights. Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643 (1943). If Songwriter had lived to 1988, the use of the ambiguous word "forever" to describe the duration of the assignment, as in this hypothetical, rather than the unambiguous assignment of "renewal rights," would have resulted in a question of fact, requiring inquiry into the parties' intentions. 2 NIMMER ON COPYRIGHT, *supra* note 4, at § 9.06[A].

[75] *See generally*, 3 NIMMER ON COPYRIGHT, *supra* note 4, at § 9.01[C].

[76] Doi, *Japan*, INTERNATIONAL COPYRIGHT LAW, *supra* note 4, at § 3[1]; Cornish, *United Kingdom*, INTERNATIONAL COPYRIGHT LAW, *supra* note 4, at § 3[1]; Dietz, *Germany, Federal Republic*, INTERNATIONAL COPYRIGHT LAW, *supra* note 4, at § 3[1].

States, the publisher owns them in Japan, Great Britain, and Germany. In fact, the actual answer appears to be different in each of these countries.

In Japan, although there is no reported case addressing this issue, it is the opinion of Professor Teruo Doi that the "question of the title to the Japanese copyright . . . should be determined by reference to the law of the author's home country, i.e., the United States, and the Japanese copyright after the first 28 years should be held to vest initially in the author's spouse [or other heirs]."[77]

In Great Britain, Professor William Cornish is of the opinion that British law would control, and thus, the British copyright would belong to the publisher, because the issue would be treated as one of copyright duration rather than ownership. However, Professor Cornish acknowledges that "this is a most difficult issue of private international law," and he indicates that "if, as a matter of construction, some other result was intended," the parties' intention will be given effect, because even in Great Britain, assignments may be for a limited time.[78]

In Germany, Dr. Adolf Dietz has expressed the opinion that "where the author had unconditionally and expressly granted worldwide rights for *both* the original term *and* the renewal term, this grant would be effective for the whole term granted under German copyright law. . . . "[79] In that case, the publisher would own the German copyrights to Songwriter's songs. Nevertheless, Dr. Dietz acknowledges that in some "special" cases, the author may have intended "another result," and in such cases "one could come to the conclusion that the grant for any period after the first 28 years, even in . . . Germany, was conditioned by the parties' expectation that the author would be living at the end of that first 28 years."[80] Dr. Dietz concludes that "[t]he problem, therefore, to a high degree is one of correctly interpretating the worldwide copyright grant issue."[81]

j. JapanSoft is a Japanese computer program publisher. It acquires programs and the copyrights to them from freelance independent Japanese programmers.[82] Japan's Copyright Act does

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77 Doi, *Japan*, INTERNATIONAL COPYRIGHT LAW, *supra* note 4, at § 3[3][b].

78 Cornish, *United Kingdom*, INTERNATIONAL COPYRIGHT LAW, *supra* note 4, at § 3[3].

79 Dietz, *Germany, Federal Republic*, INTERNATIONAL COPYRIGHT LAW, *supra* note 4, at § 3[3][c][ii].

80 *Id.*

81 *Id.*

82 JapanSoft's programs are not works-made-for-hire, even by Japanese legal standards. *See*, Doi, *Japan*, INTERNATIONAL COPYRIGHT LAW, *supra* note 4, at § 4[1][b].

not require assignments to be in writing[83] and JapanSoft does not use written agreements to acquire the copyrights to the programs it publishes. Instead, it pays programmers a one-time flat fee for their programs and the copyrights to them. AmeriSoft is an American computer program publisher. It has acquired from JapanSoft a license to distribute JapanSoft's programs in the United States. One of the Japanese programmers who wrote several of the JapanSoft programs has filed an infringement suit against AmeriSoft in the United States, alleging that he, rather than JapanSoft, is the owner of the United States copyrights to the programs he wrote, and thus, AmeriSoft should have obtained a license from him to distribute them in the United States, rather than from JapanSoft. Is the programmer correct? Who owns the copyrights to the JapanSoft programs in the United States?

This hypothetical presents the issue of whether copyright *ownership* issues are controlled by the law of the country where protection is sought or by the law of the work's country-of-origin. In the United States, an assignment must be in writing to be effective.[84] Since the law of Japan is otherwise, the Japanese programmer owns the United States copyrights to the programs he wrote if United States law applies as to this issue, while JapanSoft owns them if Japanese law applies.

There do not appear to be any authorities squarely on point as to this issue, in Japan or elsewhere. Nevertheless, it could be argued that in the case illustrated by the hypothetical, Japanese law ought to control because if the answer were otherwise, JapanSoft would have had to structure its transactions with Japanese programmers in a manner that satisfied the copyright laws of every country of the world, or at least every country in which it wanted to be the owner of the copyrights to the programs it acquired. The burden thus placed on JapanSoft would be enormous, while it does not appear that the United States has any interest whatsoever in influencing the method by which copyrights are transferred in Japan or any other foreign country.

On the other hand, this hypothetical is only one of many that could have been used to illustrate potential conflicts involving copyright ownership issues. In other cases, the interest of the country where protection is sought might outweigh that of the work's country-of-origin. If so, an argument could be made that

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[83] *Id.* at § 4[2][b].
[84] 17 U.S.C. § 204(a) (1976).

the law of the country where protection is sought ought to be applied.

Moreover, although this hypothetical involves a copyright ownership issue, it is only one example of many cases involving a much broader conflicts-of-laws question, namely, whether the rule of law to be applied to a particular issue is a *copyright* rule or a *contract* rule. The distinction between copyright issues and contract issues is significant because the general rule depicted by Box 2 of the grid, that national treatment requires the application of the law of the country where protection is sought, itself only applies to copyright issues.[85] As to international contract issues, conflict-of-laws analysis involves different and less settled principles.[86] While questions involving conflicts between copyright and contract issues are fascinating, they also are among the most elusive and theoretical in all of international copyright.[87] Therefore they are virtually impossible to answer briefly or with confidence.

8. *Determine what protection is available under the mix of treaty and national provisions found relevant under the preceding steps.*

After identification of the relevant treaty and national law provisions in the preceding steps, the eighth and final step simply involves determining what protection is in fact available to the work in question pursuant to the relevant law. Of course, making such a determination may be as difficult as answering purely domestic questions of United States law in matters involving transactions or disputes between two Americans.

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85 *See* 3 NIMMER ON COPYRIGHT, *supra* note 4, at § 17.11[A].

86 *Id.* at § 17.11[B]-[C].

87 For a sophisticated and detailed discussion of this area, see Geller, *International Copyright: An Introduction*, INTERNATIONAL COPYRIGHT LAW, *supra* note 4, at § 6[2].