

PART

I

**Principles of International Copyright**

CHAPTER  
1

**Introduction**

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This book surveys the law of copyright between and among nations. Apart from applicable legal rules, the book describes the practices that animate international copyright and the principles that underlie it. The practicing lawyer engaged in licensing or litigating a copyrighted work abroad, or overseeing the exploitation of a foreign work in his own country, will find guidance in these pages; so, too, will the researcher or student who wants to understand the forces that shape the copyright and neighboring rights laws of other countries and that control their interplay in the international system.

National laws on copyright and neighboring rights have far more in common than not, a fact that makes it possible to treat the laws of many countries in a single, relatively compact volume. Widespread adherence to the Berne Convention for the Protection of Literary and Artistic Works explains much of this harmony—164 countries today belong to the Berne Union—and the convergence of national laws is growing closer still as the TRIPs Agreement, with 153 adherents, has brought national laws into more immediate compliance with Berne norms, as well as with norms introduced by the TRIPs Agreement itself. For those circumstances in which national laws do diverge, the book sets out the rules of private international law that will guide determinations of applicable law.

## §1.1 Common Rules and Principles

A handful of universal rules and principles underpin national copyright laws. Around the world, copyright creates exclusive rights in “literary and artistic works” that are “original.”<sup>1</sup> Protected works range from high art, such as poems and paintings, to lowly information products, such as maps and almanacs.<sup>2</sup> The rights granted under copyright will vary with legal traditions and national implementations, but will usually, at the very least, consist of the exclusive rights to reproduce, distribute, publicly perform, broadcast, and otherwise communicate a work to the public.<sup>3</sup> Most jurisdictions also prescribe moral rights to protect an author’s reputational interests, principally, the rights of paternity (to be named as the author of a work) and of integrity (to prevent distortions of the work).<sup>4</sup>

National rules on authorship and ownership usually identify the actual creator of a work as its author and initial owner, subject to exceptions in cases of works made in the course of employment or otherwise “for hire.” All countries impose a durational limit on at least copyright law’s economic rights, normally measured by fifty or seventy years after the author’s death,<sup>5</sup> and also limits on the scope of rights, in the form of exemptions and limitations that seek to reconcile protection for the rights of authors with the interests of society at large.

Another universally acknowledged axiom is that copyright protects only original expression and leaves ideas—the building blocks of creativity—free for all to use.<sup>6</sup> Thus, legislation or case law in many countries holds that a literary work’s themes, plots, and stock characters are unprotectible, as are discrete colors and shapes in visual art, and rhythm, tone, and harmony in music.

Freedom of contract governs copyright transactions around the world. It is widely thought that contractual freedom prevails as a norm only in common law countries, and that civil law countries, by contrast, closely regulate copyright contracts. In fact, and as a rule, courts everywhere enforce copyright contracts according to their privately agreed terms. Legislatures and courts have, to be sure, carved out

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<sup>1</sup> Berne Convention, 1971 Paris Text Art. 2. See §6.1, below.

<sup>2</sup> See §6.1.2, below.

<sup>3</sup> See §9.1, below.

<sup>4</sup> See Chapter 10.

<sup>5</sup> See Chapter 8.

<sup>6</sup> See §6.1.3.1, below.

exceptions to the freedom of contract principle, but these exceptions are no more evident in civil law countries than in common law countries. For example, the German Copyright Act's "purpose of transfer" rule requires courts to narrowly interpret broadly worded transfers of rights; but most American courts will similarly construe ambiguous contract language to favor the author. Indeed, the German rule is a far less severe inroad on freedom of contract than two provisions in the U.S. Copyright Act that give authors a nonwaivable right to terminate their copyright transfers after a prescribed period.

Not all copyright principles are universal, nor are all divisions false. To take just one example, a distinctive commitment in the United States to individual autonomy in political and economic life has left a visible mark on the nation's copyright law. American fair use doctrine, permitting the free use of copyrighted works under circumstances that some other countries would find hard to excuse, clearly mirrors the special place of free speech in the American constitutional scheme. Fair use and other statutory exemptions and limitations also reflect the American resistance to collective administration, a common institution in Europe and elsewhere, as a solution to the transaction costs that so often arise at the intersection of copyright and new technologies. While collecting societies have flourished in other countries, traditions of individualized bargaining continue to constrain the role of collecting societies in the United States.

## §1.2 The Rationales of Copyright

Writers commonly identify the "author's right" tradition of civil law countries with principles of natural right and the "copyright" tradition of common law countries with the principle of utilitarianism. Whatever force this division may once have had, its practical or intellectual force today should not be overstated.<sup>7</sup> An explicit natural rights strain did not emerge in the literature on author's rights until late in the nineteenth century, well after the first enactment of copyright laws on the European continent; almost a century earlier, a distinctly utilitarian ideology was already at play in the French revolutionary copyright laws. Similarly, while an indisputably utilitarian thread runs through much of the intellectual history of English and American copyright, so, too, does a vibrant motif that the author has a natural right to profit from his creativity and labor. These traditional differences will move still further into the background as copyright and authors' rights systems gradually converge under the combined influences of international harmonization and a growing international information economy. Nonetheless, the distinction between utilitarianism and natural rights ideology that has traditionally divided national approaches to the protection of literary and artistic works continues to play a role in legal discourse. Where common law jurisdictions more evidently espouse utilitarian rationales, as exemplified in the U.S. Constitution's provision "to promote the progress of science and the useful arts,"<sup>8</sup> civil law countries, where the authors' rights tradition dominates, attend more closely to notions of natural rights, as is illustrated by the first sentence of the French Intellectual Property Code: "The author of a work of the mind shall enjoy in that work, by the mere fact of its creation, an exclusive incorporeal property right which shall be enforceable against all persons."<sup>9</sup> Civilian lawyers find additional justification for author's rights in the argument that a work of authorship bearing the personal imprint of its creator is in effect an extension of the author's personality. The "personality" argument animates not only moral rights, but also the German doctrine of "monism," i.e., the principle that economic and moral rights are inseparable.<sup>10</sup>

Although the distinction between the utilitarian and natural justice rationales may have lost much of its political significance today, it continues to explain certain substantive differences between the national

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<sup>7</sup> See Chapter 2.

<sup>8</sup> U.S. CONST. Art I, § 8, cl. 8.

<sup>9</sup> France, Intellectual Property Code Art. L. 111-1.

<sup>10</sup> See §2.2.1, below.

laws of countries following the two traditions. For example, in the United States, the preeminently utilitarian doctrine of fair use invites courts to permit a broad spectrum of socially and culturally valuable, but unauthorized, uses so long as they do not disproportionately harm the market for the copyrighted work; by contrast, courts in author's rights countries, such as France, incline to interpret statutory limitations to copyright as "exceptions" that are to be narrowly construed.

Similarly, moral rights are more deeply rooted and firmly protected in the author's rights laws of civil law countries than in common law jurisdictions. Waiver of moral rights, a practice generally allowed in common law countries, will be permitted in civil law jurisdictions only under the strictest of conditions, if at all.<sup>11</sup>

Rules on ownership of rights also reflect the division between the utilitarian and natural rights traditions. Both common law and civil law countries follow the principle that the author and initial owner of a work is its actual creator. But exceptions to this principle are more common in common law countries—for example, the British rule that designates the producer of a film as the film's author and initial owner.<sup>12</sup> By contrast, the laws of France and most other civil law countries designate every person creatively involved in making a film as a coauthor of the film, but not the film's producer.

Copyright and author's rights doctrine also divide on the legal status of performing artists and creative entrepreneurs, such as phonogram and film producers and broadcast organizations. Copyright laws in most common law countries extend their reach to include performers, producers, and other creative entrepreneurs, while author's rights regimes will deny copyright protection to these contributors, offering more limited "neighboring" rights in its place.

Apart from their philosophical underpinnings, there is worldwide consensus that copyright and author's right advance the important goals of authorial autonomy and cultural diversity. The grant to creators of exclusive rights in their works of authorship opens the door not only to reaping revenues from the work but in many cases to earning a livelihood. The universal rule that copyright protects expression but not ideas opens a second door, stimulating the production and dissemination of diverse cultural expression, by enabling successive generations of authors to draw freely on the advances wrought by their predecessors. Similarly, copyright's limited term and pervasive exceptions promote cultural diversity; literary and artistic production would stagnate if rights were to persist in perpetuity, to the detriment of follow-on creators aspiring to "stand on the shoulders of giants." Cultural and educational institutions, such as libraries and universities, would also suffer if permissions were required from right holders for every use of a copyright work, no matter how small. Thus, copyright fosters democracy and free speech by sustaining a class of independent authors who can support themselves from their works without depending on state subsidies or private hand-outs and are therefore immune to the corrosive effects of such patronage.<sup>13</sup>

### **§1.3 The Politics of International Copyright**

The history of the legislative process in civil law and common law countries reveals that, if philosophic inclinations play any role at all in current copyright lawmaking, the politically more relevant distinction is between the arguments that motivate the creation of new rights and the arguments that inform the imposition of limits on these rights. Protectionist natural right impulses, not rigorous utilitarian calibrations, have historically characterized the creation of new rights, and the extension of old ones, in common law and civil law countries alike, just as a pragmatic weighing of benefits and costs characterizes the imposition of limitations on these rights in civil law no less than common law countries.

Human rights undeniably intertwine copyright, but the predominant forces that have shaped copyright law are economic. Global communities of economic interest among copyright owners have been far more

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<sup>11</sup> See §10.5.1, below.

<sup>12</sup> See §7.5.1, below.

<sup>13</sup> See Neil Weinstock Netanel, Copyright and a Democratic Civil Society, 106 YALE L. J. 317 (1996).

potent than ideology—or, for that matter, than the preoccupations of individual nation-states—in forming copyright legislation. When, through the latter part of the nineteenth century, British authors and publishers pressed an isolationist United States to extend copyright to English works, it was American authors and publishers, not British or American readers, who rallied to their cause.

Universal legal rules may mask profound economic and political divisions. The division between economically developed and developing countries is an example, particularly as vexed by the independence movement of the 1950s that freed many less developed countries from European colonial powers. The 1971 copyright compromise in Paris between developed and developing countries only partially resolved the long-simmering discontent that had erupted in the 1967 Stockholm Protocol Regarding Developing Countries,<sup>14</sup> and the TRIPs Agreement's introduction of copyright into the trade process has done little to meliorate the persisting rift, as is apparent from the present discussions of the so-called WIPO Development Agenda.<sup>15</sup> Experience and common sense teach that copyright cannot correct such deep economic disparities; but experience just as surely teaches that a too-rigid insistence on compliance with established norms can exacerbate disparities, impoverishing the educational and political development that is essential to the growth of markets for literary and artistic works in these parts of the world.

It would however be a caricature to portray the politics of international copyright as a simple tug of war between “maximalist” developed and “minimalist” developing nations. Strong disagreements exist among developed nations themselves, such as the United States and the Member States of the European Union, on a number of important issues. One such contentious issue is moral rights; the United States' persistent refusal to fully implement its obligations under Article 6bis of the Berne Convention continues to strain relations with early Members of the Berne Union, such as Germany and France. Another is the sui generis database right that was introduced by the European Union in 1996 with the thinly disguised intention to deny protection to American database producers.

International copyright policymaking resembles a game of chess being played simultaneously on several boards. A predictable strategy for countries and trading blocks seeking political advantage is to choose a forum where their political leverage may be best exploited. This strategy of “forum shopping” at least partially explains why contentious issues are so often negotiated concurrently on multiple platforms: at the multilateral level of the WIPO or the WTO, in bilateral or regional relationships (e.g., in the context of Free Trade Agreements), and at the local level of national lawmakers. The number of regional and bilateral trade agreements, many containing intellectual property norms, has risen dramatically in recent years,<sup>16</sup> indicating that the large, economically developed nations that initiate these negotiations view themselves as having more to gain from serial bilateral bargaining than from multilateral negotiations at fora such as WIPO where the vote of each nation, large or small, counts as the same. In some cases, stakeholder nations elect to step outside the framework of intellectual property altogether and shift their efforts to regimes more favorable to their interests, such as trade law, customs law, and the law of human rights.<sup>17</sup> And, while WIPO and the WTO have signed a cooperation agreement,<sup>18</sup> institutional competition between these two large intergovernmental organizations<sup>19</sup> persists. Mediating between the norms of intellectual property and

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<sup>14</sup> See §11.5, below.

<sup>15</sup> See THE GLOBAL DEVELOPMENT AGENDA, GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES (Neil W. Netanel ed., Oxford: Oxford University Press 2008).

<sup>16</sup> See World Trade Organization (WTO), Notifications of RTAs in Force to GATT/WTO, available at <http://www.wto.org>.

<sup>17</sup> Laurence R. Helfer, Regime Shifting: The TRIPs Agreement and the New Dynamics of International Intellectual Property Making, 29 YALE J. INT'L L. 1–83 (2004).

<sup>18</sup> Agreement Between the World Intellectual Property Organization and the World Trade Organization, December 22, 1995, 35 I.L.M. 754 (1996).

<sup>19</sup> See §3.5, below.

the regime of international trade will remain one of the major challenges of international copyright lawmaking for many years to come.

### **§1.4 The Internationalization of Copyright**

Despite over a century of international, regional, and bilateral harmonization, copyright law remains essentially national law. As of January 1, 2010, 164 countries had adhered to the Berne Convention. But, although the substantive copyright norms of this gathering of national laws may gradually be converging, the territorial nature of copyright<sup>20</sup> has so far prevented the emergence of substantive norms with supranational effect. Even in 2010, the copyright law of Country X reaches no further than its borders, and no principle of international law requires Country X to protect the authors of Country Y, unless Countries X and Y have so agreed by way of a multilateral or bilateral instrument.

International copyright law seeks to coordinate protection of authors and right holders between nation-states. The reasons for international protection press ever more urgent as markets for cultural goods expand globally, and the media that disseminate these literary and artistic works extend to all corners of the world.<sup>21</sup> Indeed, calls for increased international copyright protection have issued since the nineteenth century when booksellers and printers in Belgium, the Netherlands, and the United States actively pirated French and British works. The initial answer to these calls took the form of bilateral agreements, such as the one between Belgium and France in 1854, followed in 1886 by the adoption of the Berne Convention for the Protection of Literary and Artistic Works. Amendments to the Convention in later decades reflect the impact on international copyright of the new media and technologies that were carrying works of authorship across national borders: photography (1896), cinematography (1908), radio broadcasting (1928), television broadcasting and cable distribution (1948). New information technologies were also instrumental in shaping the TRIPs Agreement (1994), and two WIPO Treaties in 1996 gave the Internet a place in international copyright.

Seven European harmonization directives also reflect the impact of information technologies and transnational media on the law of international copyright; among the issues addressed by these directives are the protection of software and databases, and the intricacies of licensing works for satellite broadcasting and cable retransmission across multiple member states.<sup>22</sup>

With copyright law well established in most countries of the world, but territoriality still firmly in place, international copyright today resembles a “patchwork”<sup>23</sup> of independent national laws, each with its own rules on subject matter, ownership of rights, and scope, and each exacting certain requirements of foreign works as a condition of protection.<sup>24</sup> It is an important contribution of the international copyright conventions, principally the Berne Convention and the TRIPs Agreement, that seriously discriminatory practices now mostly belong to the past. The ground rule of national treatment that is enshrined in all current treaties requires contracting states to protect works originating from other contracting countries on terms no less favorable than those afforded to local authors and other right holders.<sup>25</sup> In some, but far from

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<sup>20</sup> See §4.1.2, below.

<sup>21</sup> See GOLDSTEIN 2003.

<sup>22</sup> See §3.3.1, below.

<sup>23</sup> The term “patchwork” was coined by Paul Geller, *From Patchwork to Network: Strategies for International Intellectual Property in Flux*, 9 *DUKE J. COMP. & INT’L L.* 69 (1998) and 31 *VAND. J. TRANSNAT’L L.* 553 (1998).

<sup>24</sup> See §5.6, below (discussing points of attachment in national laws).

<sup>25</sup> See §4.2, below.

all, countries, qualified foreign right holders may directly invoke the minimum standards of the conventions in the event that national legislation falls below these standards.

Counseling in international copyright cases and transactions, thus, necessarily requires inquiry at several levels: first, analyzing the substance and scope of national laws and assessing whether foreigners may directly invoke local protection; second, determining whether the countries concerned are mutually bound by any relevant international, regional, or bilateral agreements, and whether in the case at hand a conventional exception to national treatment might apply; and, third, examining whether national levels of protection are on a par with minimum rights prescribed by applicable conventions. The increasingly dense network of multilateral, regional, and bilateral agreements that govern copyright relations between states has added some complexity to this analysis,<sup>26</sup> particularly in the field of neighboring rights where reciprocity still frequently prevails over national treatment. And, of course, the rules of private international law must also be consulted to answer questions of proper forum and conflict of law.<sup>27</sup>

## §1.5 Outline of this Book

This book divides into two parts. Part One (Chapters 1 through 5) describes the general principles of international copyright and the structure of the main conventions. Following Chapter 2, which sets out in more detail the historic traditions of copyright, Chapter 3 describes the substance and structure of the principal international, regional, and bilateral conventions in the field of copyright and neighboring rights. Chapter 4 discusses the principles of territoriality and national treatment that underlie these conventions and examines the often highly complex issues of private international law: jurisdiction (choice of forum) and conflict of laws (choice of law). Chapter 5 concludes Part One with a discussion of so-called “scope” rules in the international conventions and in national law, which determine the points of attachment that allow foreign authors to enjoy local copyright protection.

Part Two offers a comparative overview of the substantive norms of copyright. Guided by the substantive minima of the main international conventions, this part describes and compares the rules on copyright and neighboring rights found in national laws. Chapter 6 depicts the rules on the subject matter of copyright and neighboring rights, Chapter 7 the rules on authorship and ownership. The terms of protection for copyright and neighboring rights are examined in Chapter 8. Chapter 9 describes the main economic rights protected under copyright and neighboring rights laws, while Chapter 10 focuses on moral rights. Chapter 11 considers limitations and exemptions, and Chapter 12 analyses copyright enforcement remedies and sanctions. To keep this volume within manageable proportions, this part focuses mainly on the laws of four states: two representing the copyright tradition of the common law jurisdictions (the United States and the United Kingdom) and two representing the author’s right tradition (France and Germany). In addition to the laws of these four countries, the comparative analysis regularly refers to the substantive norms of the seven directives that have partially harmonized the laws of copyright and neighboring rights in the European Union, and it also considers diverging approaches from other countries such as Canada, Australia, Japan, Spain, Italy, and the Netherlands, as appropriate.

The reasons behind the choice of the United States, the United Kingdom, France, and Germany as the principal objects of comparison are largely self-evident. One reason is that, taken together, the laws and doctrines of these four countries embody the dominant approaches to the protection of literary and artistic works around the world. A related reason is that these laws are the most widely discussed in legal commentary, and among the most productive sources of case law. Each of these four laws also embodies an influential trait of the tradition to which it belongs. The French statute represents the dualist approach to author’s right, pragmatically separating the author’s economic rights (limited in time, transferable) from his moral rights (perpetual, inalienable), while the German statute represents the monist approach, fusing economic and moral interests into a single right that is limited in time and at least conceptually inalienable.

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<sup>26</sup> See Chapter 3.

<sup>27</sup> See §§4.3 and 4.4, below.

Britain's legislation approaches the continental model of its European Union partners in several respects—highly specific exceptions from rights, for example, though with a less robust moral right—while the U.S. legislation takes an even more stinting approach to moral right and a far looser approach to limitations, as reflected in its fair use defense.