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Universalism in International Copyright Law as Seen through the Lens of Marrakesh

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ABSTRACT

The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled mandates exceptions in national copyright laws to ensure access to special-format copies of books for people who are blind and visually impaired; it also establishes mechanisms to facilitate cross-border access to those formats. The treaty was heralded by a wide range of commentators as a step in a new direction in international copyright law. This chapter assesses the treaty's significance through the lens of a consideration that has long been part of international copyright debates, namely, the push for a universal copyright law. I explore the ways in which the Marrakesh Treaty might alter our understanding of the notion (and mechanisms) of universalism in international copyright law. The chapter considers the universalist aspiration in the development of international copyright law and examines the range of mechanisms through which universalism might now be being pursued. Furthermore, I explain the conceptual features of Marrakesh that might signal a change in the international copyright landscape, because this treaty was a milestone in international copyright law. However, its importance might lie in several aspects that are not commonly discussed.

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A. INTRODUCTION

The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (hereinafter "Marrakesh Treaty") was adopted in 2013 and came into effect in 2016.[1] It has already been ratified by more than a hundred countries.[2] It mandates exceptions in national copyright laws to ensure access to special-format copies of books, including audio books and digital files, for people who are blind and visually impaired, and it establishes mechanisms to facilitate cross-border access to those formats.[3] The treaty had an important effect even in countries that already had exceptions for the blind on the statute book. For example, the United States legislation had – for twenty years – contained limitations and exceptions that allowed certain authorized entities to provide published works in accessible formats (e.g., Braille, audio, and large print) to those who have print disabilities. However, in 2018, Congress revised that provision and inserted a new section (Section 121A) allowing authorized entities (typically non-profits operating to assist visually impaired people) to both export and import works in accessible formats between the United States and other countries that have signed the Marrakesh Treaty.[4]

[1] *See* Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 27, 2013, 52 I.L.M. 1312 (2013).

[2] *See* https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=843/. There are presently seventy-nine contracting parties, but this number includes the European Union (with – sadly – now its mere twenty-seven members).

[3] *See generally* Laurence R. Helfer, et al., The World Blind Union Guide to the Marrakesh Treaty: facilitating Access to Books for Print-Disabled Individuals (Oxford University Press 2017).

[4] *See also* Directive 2017/1564/EU of the European Parliament and of the Council of 13 September 2017 on Certain Permitted Uses of Certain Works and Other Subject Matter

The Marrakesh Treaty was heralded by a wide range of commentators as a step in a new direction in international copyright law. Justin Hughes, who headed the US delegation to the diplomatic conference at which the treaty was adopted, described it as a "new, quite extraordinary, multilateral" instrument.[5] Marketa Trimble, who has written about various complexities within the treaty, noted that "the Marrakesh Treaty is a different species of international IP treaty."[6] Mihály Ficsor reported its frequent description as "exceptional, unique and even historical."[7] And numerous other participants and commentators have described the conclusion of the treaty as "the Marrakesh Miracle."[8]

This chapter assesses the Marrakesh Treaty's significance through the lens of a consideration that has been an implicit – and sometimes explicit – part of international copyright debates since before the adoption of the Berne Convention in 1886, namely, the push for a universal copyright law. I explore whether and in what ways the Marrakesh Treaty might alter our understanding of the notion (and mechanisms) of universalism in international copyright law. To facilitate that assessment, Part B of the chapter considers the universalist aspiration in the development of international copyright law. Part C sets out the range of mechanisms by which universalism might now be being pursued in copyright law. And Part D explains the conceptual features of the Marrakesh Treaty, touching on the universalism debate that might cause it to signal a change in the international copyright landscape. The treaty was a milestone in international copyright law, as many scholars have argued. But its importance might lie in several aspects that are not often highlighted.

B. UNIVERSALISM IN INTERNATIONAL COPYRIGHT LAW

In his groundbreaking study of the first hundred years of the Berne Convention, Sam Ricketson suggested that the structure and content of the Berne Convention in 1886, and the evolution of Berne ever since, have been shaped by a battle between

Protected by Copyright and Related Rights for the Benefit of Persons Who Are Blind, Visually Impaired or Otherwise Print-Disabled and Amending Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, OJ L 242/6 (September 20, 2017).

5 *See* Justin Hughes, *The Marrakesh Treaty for the Blind – and the Future of Global Copyright*, The Media Institute (August 5, 2013), at https://www.mediainstitute.org/2013/08/05/the-marrakesh-treaty-for-the-blind-and-the-future-of-global-copyright/.

6 *See* Marketa Trimble, *The Marrakesh Puzzle*, 45 IIC 768 (2014).

7 *See* Mihály J. Ficsor, *Commentary to the Marrakesh Treaty on Accessible Format Copies for the Visually Impaired*, 1 (copy on file with author).

8 *See, e.g.*, Catherine Saez, *Miracle in Marrakesh: "Historic" Treaty for Visually Impaired Agreed*, Intellectual Property Watch (June 26, 2013), at https://www.ip-watch.org/2013/06/26/miracle-in-marrakesh-historic-treaty-for-visually-impaired-agreed/; Vera Franz, *The Miracle in Marrakesh: Copyright Reform to End the "Book Famine"*, at https://www.opensocietyfoundations.org/voices/miracle-marrakesh-copyright-reform-end-book-famine (June 28, 2013).

what he called the "universalists" and the "pragmatists."[9] At the time of the intergovernmental meeting in 1883 to form the Berne Union, attempts were made – particularly by the German delegation – to institute an internationally uniform copyright code that would apply in each member state.[10] The argument was that these universal norms would guarantee uniformity and predictability, which would result in the improved international circulation of works of authorship.[11]

This "universalist" vision, as Ricketson termed it, did not prevail in 1886. Instead, those adhering to what he called the "pragmatist" vision carried the day, with the adoption of a system grounded on the twin pillars of national treatment and low-level substantive minima. That is, signatory states undertook to provide authors from, or works first published in, other signatory states with protection as generous as that afforded to domestic authors and works. And they agreed that their national laws would adhere to a cluster of minimum substantive standards. For example, the Convention listed the types of works that a signatory state must protect. Signatory states could offer greater protection to authors but were obliged only to satisfy the minimum levels.[12]

Under this approach, the creation of a work results in a bundle of independent copyrights in all copyright-respecting nations.[13] The principle of territoriality that this approach endorses has a solid conceptual foundation.[14] As a matter of instrumental analysis, the optimal balance between incentive and access that determines the content of copyright law will necessarily vary between states of different

[9] *See* Sam Ricketson, The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986, 15–19 (1987); *see also* Sam Ricketson & Jane C. Ginsburg, International Copyright and Neighbouring Rights: The Berne Convention and Beyond, § 2.24 at 62 (Oxford University Press 2nd ed 2005).

[10] *See* Jane C. Ginsburg, *International Copyright: From a "Bundle" of National Copyright Laws to a Supranational Code?*, 47 J. Copr. Soc'y 265, 289 (2000).

[11] In one sense, the late nineteenth century might have seemed a propitious time for the development of universal substantive norms because copyright was less developed in many nations, and thus fewer countries had entrenched positions that might thwart compromise. By the same token, the notion of guaranteeing individual rights in domestic contexts through overriding international norms only really took root with the Universal Declaration of Human Rights over a half-century later.

[12] *See* Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, 1161 U.N.T.S. 3 [hereinafter Berne Convention 5(1) ("Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union . . ., the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.").

[13] *See* Berne Convention, art. 5(2) ("the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed"); *id.* (enjoyment and exercise of rights under the Convention "shall be independent of the existence of protection in the country of origin of the work").

[14] *See* Graeme B. Dinwoodie, *Developing a Private International Intellectual Property Law: The Demise of Territoriality?*, 51 Wm. & Mary Law Rev. 711 (2009). Certain features of the Berne system, such as the conditionality of protection on certain "connecting factors" and the exclusion of works of domestic origin, fit less well with non-instrumental theories of copyright.

economic, social and cultural contexts. And insofar as copyright law shapes the cultural landscape of a particular territory, sovereign states have the right to determine how that landscape should look. But this approach raises the prospect of variation in protection from one country to another.[15]

The battle between the universalists and the pragmatists has been a feature of the development of the Berne Convention ever since, just as much as the contest between adherents of the notion of *droit d'auteur* and advocates of a more utilitarian system of copyright.[16] The universalists succeeded in tweaking this model throughout the twentieth century, serially revising upwards of the minimum standards, although the pragmatists pressed to maintain as much room within the system as possible to accommodate a diverse range of participating sovereign states.

But in some sense, the pragmatists were in fact universalists. Or, at least, to state it less dramatically, the so-called pragmatists pursued a vision based upon a slightly different sense of universalism. They argued that the less demanding and less prescriptive the obligations, the more countries were likely to become members of the Union and to enforce basic notions of copyright. The group of copyright-respecting nations, in which authors' rights were protected, would thus become enlarged, and core copyright protection would be made more universal.[17] That is to say, the vision of "universalism" driving the pragmatists was focused not so much on

[15] *See* Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 471 (2000).

[16] *See* Gillian Davies, *The Convergence of Copyright and Authors' Rights – Reality or Chimera?*, 26 INT'L REV. INDUS. PROP. & COPYRIGHT L. 964, 965 (1995) (noting that the Berne Convention had "provided a bridge" between the systems of copyright found in common law countries and the *droit d'auteur* systems of civil law countries). The *droit d'auteur* system is largely premised upon notions of natural rights and the inherent right of an author to the fruits of her intellectual and creative endeavors. The common law system is more instrumentalist in orientation, conferring protection to incentivize creativity and the production of a wide variety of works, to the betterment of society. *See* U.S. Const. art. I., § 8, cl. 8 (authorizing Congress to "promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings"). France and the United States are often cited as paradigmatic examples of the two models, although the origins of protection in each of those countries contain traces of both philosophies. *See* Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, in OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW, 131 (Sherman & Strowel eds., 1994) (suggesting greater congruity between early U.S. and French literary property regimes than is conventionally understood).

[17] Nor did a focus on the geographic scope of the multilateral system preclude an international convergence of national norms through other processes, such as the articulation of model laws, *see* World Intell. Prop. Org., Tunis Model Law on Copyright, or through softer mechanisms of harmonization, *see* Graeme B. Dinwoodie, *Some Remarks on the Limits of Harmonization*, 5 J. MARSHALL REV. INTELL. PROP. L. 596, 599–604 (2006), such as private ordering by influential actors in the information ecosystem. *See* Graeme B. Dinwoodie, *Private Ordering and the Creation of International Copyright Norms: The Role of Public Structuring*, 160 J. INSTIT. & THEOR. ECONS 161 (2004). These processes have been notable in the internet era. *See* Justin Hughes, *The Internet and the Persistence of Law*, 44 BOSTON COLLEGE L. REV. 359 (2003). It is often the post-treaty implementation that determines the extent of substantive convergence.

the *uniformity* of the *content* of copyright law but on the *geographic scope* of the international system. And the fact that Berne now has 178 contracting parties surely suggests there is some basis to that strategy.[18]

Jane Ginsburg, reflecting on Ricketson's account, appeared partially to agree with this recharacterization when she differentiated between "true universality" and the "minimal universality" that the pragmatists sought.[19] But there is the sense from reading Ginsburg's account that the adoption of a more pragmatic approach is seen as an unfortunate but inevitable concession to reality.[20] Likewise, Silke von Lewinski in her text on international copyright law talks of the "idealistic" but "hardly practical" philosophy of universalism.[21] Universal standards is a goal that is tempered by political reality.

In fact, a different vision of "universality" – which stresses the global reach of the basic system over the uniformity of content – might be both more idealistic and more practical. Whether this is true will depend on the "ideal" that we have in mind in constructing the international system. This is a function as much of our relative normative commitments to difference and uniformity as it is to a particular vision of the form of copyright protection. Moreover, the balance may change over time and by context. The assessment of the question of practicality, in contrast, depends on what one thinks are the best institutional and political arrangements by which to achieve the ideal – which might also be informed by our experience in pursuing convergent norms over the last century, as well as a prediction of possible new arrangements in the future. That is to say, my (arguably too semantic) assessment of Ricketson's labels and von Lewinski's description is premised upon a more multi-dimensional understanding of universalism, and arguably on a different sense of the normative force that universalism might possess in international copyright law.

Consideration of the extent to which we should move from the national to the universal has been an ongoing assessment for international copyright policymakers and thinkers at different staging posts on the road from Berne to Marrakesh.[22] To

But the language of the treaty (including its precision and capacity for clear application in monist countries) can influence the degree of commonality that is achieved.

[18] Whether this approach to drawing countries into a copyright system and ensuring protection for authors abroad is the same approach that might be desirable in a different era and social climate is, of course, a separate question. For example, the number of autonomous foreign jurisdictions about which the original signatory states might have been concerned (given colonial extensions and the non-involvement of many nations in international trade) is surely different than the number now on the minds of copyright-intensive countries. In the contemporary climate, the focus on the geographic scope of the system may assume greater significance.

[19] *See* Ginsburg, *supra* note 10, at 268 n 9.

[20] *See id.*

[21] *See* Silke von Lewinski, International Copyright Law and Policy, 4.31 at 79 (Oxford University Press. 2008).

[22] This focus is arguably more reflected in successive conference debates and ALAI proceedings than in published scholarship. A review of the literature suggests it is mostly implicit.

give one notable and important scholarly assessment, in 1999, Jane Ginsburg asked at the ALAI Congress whether and to what extent we now had a supranational copyright law that had displaced national laws.[23] She started her talk by commenting that when invited to address the congress on the role of national copyright in an era of international copyright norms – which was one of the themes of the 1999 Congress – she inferred a question mark at the end of what appeared to be a declaratory statement. Ginsburg noted that her inference might be surprising, because it was a core tenet of international copyright law that we have a system of "interlocking *national* copyrights, woven together by the principle of national treatment."[24] Yet, after an insightful tour of both TRIPS and the WIPO Copyright Treaty, as well as developments in the European Union, she concluded that "'[i]-nternational copyright' can no longer accurately be described as a 'bundle' consisting of many separate sticks, each representing a distinct national law, tied together by a thin ribbon of Berne Convention supranational norms. Today's international copyright more closely resembles a giant squid, whose many national law tentacles emanate from but depend on a large common body of international norms."[25]

The dynamics that Professor Ginsburg detected two decades ago have only intensified. International norms continue to grow, although not with the same pace or through the same type of broad public international instruments – TRIPS and the WIPO Copyright Treaty – that characterized the five years preceding the 1999 ALAI Congress.[26] And we continue on the long and perhaps never-ending march toward the universality seen as too idealistic in 1886. But perhaps a different flavor of universalism is now being offered.

C. MECHANISMS OF UNIVERSALISM

In the concluding Part D of this chapter, I consider whether and in what ways the Marrakesh Treaty speaks to the question of universalism. But that inquiry raises some preliminary questions about what we mean by that term. Thus, in this part of the Chapter, I discuss the different mechanisms by which universalism occurs in international copyright law.

As mentioned above, the foundational choice that confronted negotiating countries in 1886 is often presented as a choice between a pluralist territorial model and a more comprehensive universal copyright law that establishes uniform standards to

[23] *See* Ginsburg, *supra* note 10.

[24] *See* Ginsburg, *supra* note 10 at 266.

[25] *See* Ginsburg, *supra* note 10 at 289.

[26] *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1C, LEGAL INSTRUMENTS –RESULTS OF THE URUGUAY ROUND, vol. 31, 33 I.L.M. 1197 (1994) [hereinafter TRIPS or the TRIPS Agreement]; World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, art. 11, 36 I.L.M. 65, 71 [hereinafter WIPO Copyright Treaty or WCT].

be applied in all adherent countries. We have tended to label the latter approach as "universalist," but its distinguishing feature, which sets it apart from the model ultimately adopted, was its desire for substantive uniformity.[27]

A pragmatist's vision might have been equally universal, but their focus was on the scope of the system. Their universalist philosophy prioritized that there be an international copyright *system* that was as broad as possible rather than that there be an international copyright *law*. And this preference might be grounded as much in a concern for appropriately tailored copyright law as resignation to the second-best reality of international relations. Focusing on extending the geographic reach of the system and allowing for variation among countries might be both a differently idealistic and a more practical course of action.

But disagreement about the concept of "universal copyright law" might be even more complicated. That is to say, universalism can be gauged – and pursued – in a number of intersecting ways, in addition to uniformity of content or geographic reach of the system. For example, in terms of universality of scope, we might wish to consider not only the geographic reach of norms but the scope of application more broadly speaking.

The Berne system was designed to apply to the treatment of foreign works in international settings. Under Article 5(3) of the Berne Convention, "protection in the country of origin is governed by domestic law."[28] The rights guaranteed by the Convention only apply "in respect of works for which [authors] are protected under this Convention, in countries of the Union *other than the country of origin*."[29] If one accepts the notion of universality that drives much thinking about human rights, that might be an inadequate implementation of universal aspirations. Although it is a contested understanding, the universality of human rights is such that those principles should apply in *internal* settings and modulate the normal sovereignty of states in domestic matters. And Article 27(2) of the Universal Declaration of Human Rights (1948) provides that "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."[30]

[27] Given the significant role of courts in interpreting open-ended concepts in copyright law, fully advancing the quest for uniformity would have required attention to institutional design, including the roles of national courts in ensuring uniformity absent a central supervising court. This is a feature that needs attention even in intellectual property systems that are created to enforce unitary rights that transcend territory. *Compare* Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union Trade Mark, OJ L 154 (June 16, 2017) 1, art. 123(1) (requiring member states of the European Union to designate national courts to sit as "EU Trademark courts," which have exclusive jurisdiction over most matters surrounding the enforcement of the unitary EU Trade Mark) with Agreement on a Unified Patent Court, OJ C 175 (June 20, 2013), 1–40.

[28] *See* Berne Convention, art. 5(3).

[29] *See* Berne Convention, art. 5(1) (emphasis supplied).

[30] *See* Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (December 12, 1948). Similar language appears in art. 15 of the

Universality might alternatively be pursued in respect of particular issues central to the international flow of copyrighted works. The territorial model results not only in variable laws but also potentially inconsistent allocation of rights.[31] The international copyright system devotes less time to this territorially induced dilemma than international trademark or patent law. This is because the prohibition on formalities now found in Article 5(2) of the Berne Convention effectuates an immediate vesting of rights internationally, in a far more comprehensive fashion than the Paris Convention does for industrial property. However, the Berne Convention provides little guidance as to the identity of an author under public international law.[32] Thus, national laws have substantial latitude as to the ways in which they approach the question of authorship. Thus, as to initial authorship, US law reflects its predominantly instrumentalist orientation by recognizing employers as authors of works prepared by employees within the scope of their employment,[33] whereas French law links ownership to the personality of the individual author by treating the employee as the author in the same circumstance.[34] Many countries that treat the individual employee as the author also include presumed transfers of rights in their law, although this is not the same as an allocation of authorship.[35]

On this issue of initial ownership, universality (of a slightly different flavor) would be enhanced by ensuring a single global author or owner of a copyright work.[36] This could be achieved by a *lex originis* rule as the choice-of-law rule for initial

International Covenant on Economic, Social and Cultural Rights (ICESCR). *See* International Covenant on Economic, Social, and Cultural Rights arts. 15(1)(b), (c), December 16, 1966, 993 U.N.T.S. 3, 5 (recognizing the right "to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author").

[31] *See* Paris Convention for the Protection of Industrial Property, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305, arts. 4 (priority rights), 6*quinquies* (*telle quelle* principle).

[32] *See* Berne Convention, art. 1 (providing that "the countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works" – but not defining "author").

[33] *See* 17 U.S.C. § 201(b) (providing that the employer or commissioning party is the author of a work made for hire); 17 U.S.C. § 101 (defining "work made for hire" as a work prepared by an employee within the scope of his employment or certain categories of specially commissioned works where the parties agree in writing that the work is made for hire); *see also* Copyright, Designs and Patents Act, 1988, c. 48, § 11(2) (Eng.) (granting employers rights in works prepared by an employee within the scope of the employee's employment).

[34] *See* Law No. 92-597 of July 1, 1992 on the Intellectual Property Code, art. L-113 (as amended) (Fr.) (providing for copyright ownership by employers only with respect to software).

[35] *See* Case C-277/10, Martin Luksan *v.* Petrus van der Let, EU:C:2012:65 at [67] & [87] (CJEU 2012); Ennio Morricone Music Inc. *v.* Bixio Music Grp. Ltd., 936 F.3d 69 (2d Cir. 2019).

[36] *Cf.* Carlos Manuel Vázquez, *Choice of Law as Extraterritoriality*, in Resolving Conflicts on the Law: Essays in Honour of Lea Brilmayer, 42–77 (Chiara Giorgetti & Natalie Klein eds., Brill Nijhoff 2019); Graeme B. Dinwoodie, *Extraterritoriality of Intellectual Property Laws: An American View*, in Intellectual Property and Private International Law (Leible and Ohly eds., Mohr 2009).

authorship.[37] And it might be a nudge toward universalism in a more effective way than a single rule on ownership in an international treaty. Of course, one might have a genuine debate about whether diverse labor structures around the world should make us hesitate before instantiating a *lex originis* rule to initial authorship, but that point could perhaps be handled by a more flexible policy-based approach to choice of law, with a default of *lex originis*.

Indeed, as this example shows, any mechanism that elevates a single applicable rule to any issue of copyright law will operate to advance the cause of universalism. Indeed, the Montevideo Convention, which endorsed a country-of-origin rule over the territorial *lex protectionis* found in the Berne Convention system,[38] has been described by Silke von Lewinski as grounded in "universality" – I assume for that very reason.[39]

Other instruments that achieve the same effect through an effective country-of-origin rule include the EU Cable and Satellite Directive, which designates the copyright law of the country of the uplink as applicable law in the event of a dispute.[40] Designating a single right owner from whom a user has to acquire rights in order to operate globally would advance universality.[41] Of course, the harmonized substantive rules in the European Union make possible what might be impossible globally. Without harmonization of substantive law, the designation of the place of uplink to govern globally might invite the prospect of copyright havens. But rules can be constructed to prevent the development of safe havens if this approach were extended internationally, as was proposed by Jane Ginsburg in her 2000 WIPO

[37] US law may approximate a *lex originis* system, albeit through the device of modern policy-based determination of the law of the place with the most significant relationship to the parties and the transaction. *See* Itar-Tass Russian News Agency *v.* Russian Kurier, Inc., 153 F.3d 82 (2d Cir. 1998).

[38] *See* Montevideo Copyright Convention on Literary and Artistic Property (1889), art. 2 ("Authors of a literary or artistic work and their successors shall enjoy in the Signatory States the rights granted to such authors by the laws of the State in which first publication or production of the work took place").

[39] *See* von Lewinski, *supra* note 21, at 4.30. The original Berne Convention did adopt this feature in part (though significant part) by providing that "the enjoyment of these rights shall be subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work, and must not exceed in the other countries the term of protection granted in the said country of origin." *See* Berne Convention (1886 text), art. 2.

[40] *See* Council Directive 93/83/EEC of 27 September 1993 on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, OJ L 248/15, art. 1(2)(b) (defining the act of communication to the public). Previously, the majority approach throughout Europe was to find that an unauthorized communication to the public occurred at the many places of receipt of the signal. *See, e.g.*, Re Cross-Border Copyright in Television Works [1992] E.C.C. 456, 468–69 (1991) (Aus.) (finding unauthorized communication occurred in all countries of reception).

[41] Of course, free alienability, divisibility of rights, and nationally defined rights (some of which also contribute positively to international exploitation of rights) all prevent initial identification of authorship from ensuring a common universal owner.

paper, in which she suggested a cascade rule for online choice of law that was also accompanied by a backstop minimum of international copyright law.[42]

Universality might be enhanced by ensuring that a global dispute about the use or exploitation of a copyright reaches a single resolution facilitating global distribution. Even substantially uniform laws can be interpreted quite differently by national courts, and the open-ended nature of many copyright principles elevates the role of the courts in law formation. A single global court applying uniform norms is an unrealistic (and perhaps undesirable) pipe-dream.[43] But procedural mechanisms that allow disputes that cross borders to be resolved in a single national forum, perhaps with appropriate recognition of national variation at the edges, might result in greater universality – without formal uniformity of norms.[44]

Yet, international policymakers have been reluctant to create what might be called "public private international copyright law,"[45] that is, instruments dictating or confining the choices that countries can make as to their rules on jurisdiction, choice of law, and recognition of judgments in copyright cases.[46] In 1991, the Hague Conference on Private International Law, at the request of the United States, embarked on a quest to negotiate a jurisdiction and judgments convention of general applicability in civil and commercial matters.[47] Those efforts floundered

[42] *See* Jane C. Ginsburg, *Private International Law Aspects of the Protection of Works and Objects of Related Rights Transmitted through Digital Networks* (2000 Update), WIPO/PIL/01/2 (December 18, 2000), at https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_pil_01/wipo_pil_01_2.pdf.

[43] The creation of dispute settlement panels of the World Trade Organization does not alter this assessment for a number of reasons.

[44] Even more ambitiously, national courts could shape substantive global norms in truly international disputes. *See* Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. Pa. L. Rev. 469 (2000). A single substantive law applicable to a global dispute might also be achieved by classic localization that adopts a choice of law rule for infringement other than l*ex loci protectionis*. Both of the leading soft law initiatives on transborder IP litigation contemplated such a possibility in a narrow range of cases involving "ubiquitous" infringement. *See* American Law Institute, Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes, § 321(1) (ALI Principles 2008); Conflict of Laws in Intellectual Property: The CLIP Principles and Commentary, European Max-Planck-Group on Conflict of Laws In Intellectual Property (CLIP), art. 3:603 (Oxford University Press 2013). All of these proposals that would apply a single norm recognised appropriate carve-outs for jurisdictions where divergent laws of facts pertained.

[45] *Cf.* Stephen B. Burbank, *Jurisdictional Equilibration, The Proposed Hague Convention and Progress in National Law*, 49 Am. J. Comp. L. 203, 204 (2001).

[46] There are important "soft law" instruments (one emanating from the United States and one from Europe). *See* ALI Principles, *supra* note 44; CLIP Principles, *supra* note 44. *See also* International Law Association Committee on Intellectual Property and Private International Law, Kyoto Guidelines on Intellectual Property and Private International Law (adopted December 13, 2020), reprinted in 12 JIPITEC (2021).

[47] *See* Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (adopted October 30, 1999), at http://www.hcch.net /e/conventions/draft36e.html; Hague Conference on Private International Law, Summary of the Outcome

in 2000–2001, in large part because of disagreement over how to handle intellectual property cases, forcing the conference to scale back its efforts and concentrate on a 2005 convention that validated exclusive choice-of-court clauses in business-to-business (B2B) contracts.[48] Intellectual property (including copyright) is excluded from the scope of the later Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.[49]

Other mechanisms can also contribute. Universality might be enhanced by knowing that nationally acquired rights can travel with a user abroad, extending the model of the EU Portability Regulation. That regulation enables consumers to access their portable online content services when they travel elsewhere in the European Union in the same way they access them at home.[50] Indeed, the European Union offers a number of exemplars in this space. For example, the EU Orphan Works Directive permits certain organizations to reproduce and make available copies of so-called "orphan works," that is, works in relation to which all or some of the right holders cannot be identified or located despite a "diligent search" having been carried out.[51] Although the diligent search condition is typically satisfied by being performed in the "Member State of first publication,"[52] if a work is regarded as orphan in one member state, then that status should be recognized in other member states.[53]

of Discussions in Commission II of the First Part of the Diplomatic Conference, June 6–20, 2001, reprinted in 77 CHI.-KENT L. REV. 1015 (2002).

[48] *See* Hague Convention on Exclusive Choice of Court Clauses, June 30, 2005, 64 I.L.M. 1294 (validating and requiring enforcement of exclusive choice-of-court clauses in business-to-business contracts, in essence extending the model of the New York Convention on Recognition of Arbitral Awards to the court system); *see also id.*, art. 2(2) (excluding most intellectual property matters *other* than copyright from the scope of the Convention).

[49] *See* Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (concluded July 2, 2019), art. 2(1)(m), at https://www.hcch.net/en/instruments/conventions/full-text/?cid=137.

[50] *See* Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 On Cross-Border Portability of Online Content Services in The Internal Market, OJ L 168/1 (June 30, 2017).

[51] *See* Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works, OJ L 299/5 (October 27, 2012).

[52] *See id.*, art. 3(3). In the absence of publication, the search shall be conducted in the place where first broadcast, except in the case of cinematographic or audiovisual works the producer of which has his headquarters or habitual residence in a Member State, in which case the diligent search shall be carried out in the Member State of his headquarters or habitual residence. *See id.* If there is evidence to suggest that relevant information on rightholders is to be found in other countries, sources of information available in those other countries shall also be consulted. *See id.*, art. 3(4)

[53] *See id.*, art. 4 ("A work or phonogram which is considered an orphan work according to Article 2 in a Member State shall be considered an orphan work in all Member States. That work or phonogram may be used and accessed in accordance with this Directive in all Member States"). The United Kingdom has enacted a separate scheme (in addition to the EU system, which also covers the United Kingdom), but that scheme only authorizes conduct within the

Likewise, the recent Digital Single Market Directive mandates extended collective licensing[54] to allow cultural heritage institutions to copy and provide access to out-of-commerce works (i.e, works not available to the public through customary channels of commerce, after a reasonable effort has been made to determine this) that are permanently in the collection of the institution. But the directive also requires that such licenses granted must allow the use of out-of-commerce works or other subject matter by cultural heritage institutions in other member states.[55]

Stated more generally, these mechanisms from Europe show that if conduct in one country that is recognized as meeting a defined standard of legality were to be recognized elsewhere, under a system of mutual recognition, that would be a move toward greater universality. To some extent, this dynamic might underlie a strong doctrine of exhaustion. Even in countries adhering to a principle of international exhaustion, ordinarily a copy of a work lawfully made in one country *by virtue of an exception or limitation* in that source country cannot automatically be lawfully imported into another country. A copy made by virtue of a national exception is not placed on the market "with the consent of the copyright owner," even if this stance interferes with the free movement of goods. This would appear to be clear in the European Union, notwithstanding a system of regional exhaustion.[56]

The language of the first sale provision is more ambiguous in the United States. Section 109(a) makes the exhaustion turn on the copy in question being "lawfully made."[57] Although the US Supreme Court has endorsed the concept of international exhaustion,[58] the goods in the case embracing that principle were lawfully put on the market because the copyright owner had itself consented to the foreign sale. It is not settled whether goods lawfully placed on a foreign market because of an

United Kingdom. *See generally* Eleonora Rosati, *The Orphan Works Provisions of the ERR Act: Are They Compatible with UK and EU Laws?*, 35 Eur. Intell. Prop. R. 724 (2013).

[54] Extended collective licensing describes licensing agreements that are deemed by law to apply to all rights holders in a class, whether they are members of the collecting society or not.

[55] *See* Directive on Copyright in the Digital Single Market, art. 9(1) ("Member States shall ensure that licences granted in accordance with Article 8 may allow the use of out-of-commerce works or other subject matter by cultural heritage institutions in any Member State").

[56] *See* Lionel Bently et al., Intellectual Property Law, 15 (Oxford University Press 2018) (suggesting that "where intellectual property rights subsist in country A, but are subject to a compulsory licence (that is, any person may exploit the intellectual property right on payment of a fee), the rights are not exhausted when goods are manufactured under such a licence. Here, the intellectual property right owner will be able to use national laws to prevent imports into country B").

[57] *See* 17 U.S.C. § 109(a) ("Notwithstanding the [exclusive right of the copyright owner to distribute copies of her work to the public], the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord").

[58] *See* Kirtsaeng *v.* John Wiley & Sons, Inc., 568 U.S. 519 (2013) (sale of copies of textbooks in Thailand with the consent of the copyright owner exhausted the U.S. distribution rights of the copyright owner and thus those copies could be imported into the United States).

exception in that country should be regarded as "lawfully made," and litigants have recently sought (unsuccessfully) to bring the issue before the US Supreme Court.[59] It might be a radical attenuation of prevailing understandings of territoriality if the US courts found that the law of the place of foreign manufacture applied, as this would effectively extend the exceptions of other countries into the United States.[60] However, this is another example of the mechanism being deployed in Europe: if conduct in one country recognized as meeting a defined standard of legality were to be recognized elsewhere, that would be a move toward greater universality.

Finally, universality might also be enhanced by ensuring that an actor can operate online, and thus improve global exchange, by complying with a single set of regulations. Or universality might even be enhanced by recognizing increasing interdependence and exploiting cross-border capacity to enable the fruits of creativity induced by the copyright system to be distributed globally. I come back to these two options below in Part D of this chapter. But importantly, this discussion shows that furthering universality does not always involve the articulation of a defined international norm of public international law in the way that the universalists of 1883 thought to be the case.

D. MARRAKESH AS INFLECTION POINT ... (BUT ON UNIVERSALITY)?

For present purposes, it is sufficient to focus on the three main provisions of the Marrakesh Treaty without going into greater detail. Article 4(1) provides as follows: "Contracting Parties shall provide in their national copyright laws for a limitation or exception to the right of reproduction, the right of distribution, and the right of making available to the public ... to facilitate the availability of works in accessible format copies for beneficiary persons [meaning mostly persons who are blind or have visual impairment]." The exception can be confined to works that are not available

[59] *See* Geophysical Service, Inc. *v.* TGS-NOPEC Geophysical Co. 850 F.3d 785 (5th Cir. 2017) (remanding to district court to "decide whose law governs the determination whether the copies imported by TGS were lawfully made under § 109"), *later* proceeding, Geophysical Serv., Inc. *v.* TGS-NOPEC Geophysical Co., 2019 Copr. L. Dec. 31, 519 (5th Cir. 2019), cert. denied, 140 S.Ct. 2802 (2020) (declining to answer whether "copies made as a result of foreign government compulsion 'lawfully made under this title' within the meaning of 17 U.S.C. § 109").

[60] A middle ground might be achieved through case-sensitive application of conflicts principles, including the extent of connection with a foreign law and compliance of the foreign country with international standards. *Cf.* Daniel Gervais, The TRIPS Agreement: Drafting History and Analysis, 2.99 at 222 (4th ed 2012) ("The question which goods are 'legitimate' is not answered in TRIPS. Some believe that only goods made with the consent of the right holder may be subject to parallel importation. Others would include also goods made under a compulsory license"). Insofar as this is treated as a matter of exhaustion rather than the creation of new exceptions, it would arguably be immune from challenge as non-compliant with the three-step test. *Cf.* TRIPS Agreement, art. 6(1) ("For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 *nothing in this Agreement shall be used to address the issue of the exhaustion* of intellectual property rights.") (emphasis supplied).

commercially in accessible format on reasonable terms, and exercise of the exception can be made subject to remuneration.

Article 4(2) offers an exemplary means of providing such an exemption, most notably including the involvement of "authorized entities," who are non-profit organizations established to provide assistance to persons who are blind or have visual impairment and who will assist in making and distributing the copies of works in accessible formats. But contracting parties can formulate an exception in their own terms to comply with their Article 4(1) obligation, as long as[61] it complies with the three-step test from Berne and TRIPS (and the WIPO Copyright Treaty).[62]

Articles 5–6 of the Marrakesh Treaty facilitate the cross-border exchange of accessible-format copies. Article 5 requires that contracting parties allow an accessible-format copy made under a limitation or exception or pursuant to operation of law to be exported by an authorized entity "to a beneficiary person or an authorized entity in another Contracting Party." Again, the treaty provides an exemplar of how a contracting party might comply with this obligation, but leaves it to contracting parties to implement the obligation in other ways too. Article 6 complements Article 5 by providing that, to the extent that the national law of a contracting party would permit the making of an accessible-format copy of a work, that law shall also permit the import of such copies by a beneficiary person or authorized entity.

Why has all of the above been said to be significant, and how real are those claims? And do any of the claims bear on the question of universality?

I. *Exceptions and Users' Rights*

The Marrakesh Treaty has been described as "the world's only IP treaty dedicated to harmonizing exceptions and limitations."[63] Such a development might be seen as the international manifestation of the users' rights rhetoric that has been a prominent part of the domestic landscape over the last two decades. Certainly, this is the first multilateral copyright treaty focused *exclusively* on exceptions and limitations to (apart from augmentation of) authors' rights.

Of course, the significance of this point can be overstated. Many copyright treaties have contained provisions regarding exceptions and limitations. To be sure, most of these earlier provisions simply *permit* exceptions and limitations, which is

[61] *See id.*, art 11. Art. 4(1)(b) of the treaty also authorizes (but does not require) other exceptions. But if Member States adopt the form of exceptions suggested by art. 4(2) of the treaty, they will presumptively be compliant with the three-step test. *See* HELFER ET AL., supra note 3 at 44.

[62] Under the three-step test, WTO Member States "shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder." TRIPS, art. 13; *see also* Berne Convention, art. 9(2).

[63] *See* Hughes, *supra* note 5.

conventionally thought to be a relatively soft tool of universal harmonization.[64] For example, Article 10bis of the Berne Convention explicitly allows exceptions for the use of works for reporting of current economic, political, or religious events, provided the source is clearly indicated.[65] And the most transcendental provision on exceptions in earlier treaties – the three-step test – has served primarily to constrain exceptions and limitations, and thus (consistent with the objectives of Berne) to protect authors' rights against substantial erosion.[66] On its face, the Marrakesh Treaty requires any of the exceptions adopted under Articles 4–6 to comply with the three-step test, which is consistent with the dictates of this prior international copyright law. Therefore, the claim needs some refinement.

II. *Mandatory Exceptions*

The Marrakesh Treaty not only addresses or permits exceptions; it *mandates* them. Optional exceptions and limitations were less effective in achieving universality because some countries did not act on their authority to create exceptions, and

[64] As a device of harmonisation, optional provisions have received a mixed reception by commentators, who have questioned their value in harmonising exceptions and limitations in copyright law. *See* P. Bernt Hugenholtz, *Why the Copyright Directive Is Unimportant, and Possibly Invalid*, 22 EUR. INTELL. PROP. REV. 499 (2000); Lucie Guibault, *Why Cherry-Picking Never Leads to Harmonisation: The Case of the Limitations on Copyright under Directive 2001/29/EC*, 1 (2010) JIPITEC 55. The experience within the European Union suggests that the inclusion of optional defenses in the Information Society Directive caused a greater convergence than perhaps some anticipated. But absent the institutional infrastructure of an engaged international court, it is hard to anticipate replication working. Indeed, it is hard to imagine agreement on an exhaustive list of optional defenses in the first place; the exceptions in national EU copyright laws might reflect distinctive cultural policies, but the law and culture of those twenty-seven countries remain more homogenous than is true at the international level.

[65] *See* Berne Convention, art. 10bis(1) ("It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire, of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. . ."); *see also id.*, art. 10bis(2) ("It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public."). Likewise, art. 10(2) permits "the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice." *See* Berne Convention, art. 10(2). Art. 10(3) imposes the condition that "mention shall be made of the source, and of the name of the author if it appears thereon."

[66] *See* TRIPS, art. 13 ("Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder"); *see also* Berne Convention, art. 9(2).

even when they did so, there was little uniformity of approach. Mandatory exceptions ameliorate the first part of that problem by requiring contracting parties to enact exceptions.[67]

But again, this feature is not entirely new. The Berne Convention, according to almost all commentators, contains mandatory exceptions – such as Article 10(1), which requires that "[i]t shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries."[68] And both TRIPS and the WIPO Copyright Treaty[69] have been read by courts to mandate non-protection for ideas or facts, which can be understood as subject matter exclusions or an exception.[70] The Comprehensive Economic and Trade Agreement (the CETA) concluded between the European Union and Canada contains mandatory exceptions or immunities.[71] And, at the regional level, we find mandatory exceptions in the recent EU Digital Single Market Directive,[72] adding to the couple we already found in the Information Society Directive and the Software Directive.[73]

[67] *See generally* P. Bernt Hugenholtz & Ruth L. Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright* (2008), available at www.ivir.nl/publicaties/hugenholtz /finalreport2008.pdf.

[68] *See* Berne Convention, art. 10(1).

[69] World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, art. 11, 36 I.L.M. 65, 71 [hereinafter WIPO Copyright Treaty or WCT].

[70] *See* TRIPS Agreement, art. 9(2) ("copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such"); WIPO Copyright Treaty, art. 2 (same); SAS Institute Inc *v.* World Programming Ltd [2010] EWHC 1829 (Ch) at [199]-[205] (Arnold J).

[71] *See* Comprehensive Economic and Trade Agreement between Canada of the One Part, and the European Union and Its Member States, of the Other Part, Can.–E.U., Oct. 30, 2016 [hereinafter CETA], OJ L 11 (January 14, 2017) 23, art. 20.11 (obligation to create certain safe harbors for intermediaries); see also art. 17.11(29) of Australia–United States Free Trade Agreement; art. 18.10(30) of the KORUS Trade Agreement.

[72] *See* Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ (L 130) 92 (May 17, 2019), arts. 3–6 (mandating exceptions for text and data mining, cross-border teaching activities, and preservation of works by cultural heritage institutions). With the exceptions of some of the text and data mining exceptions in art. 4, these exceptions cannot be overridden by contract. *See id.*, art. 7(1); *see generally* João Pedro Quintais, *The New Copyright in the Digital Single Market Directive: A Critical Look*, 42 Eur. Intell. Prop. Rev. 28 (2021).

[73] *See, e.g.*, Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the Legal Protection of Computer Programs (codified version), OJ L 111/16, art. 6 (creating a decompilation exception); Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, OJ L 167/10, art. 5(1) (requiring exceptions from scope of copyright for certain temporary acts of reproduction with no independent economic significance).

However, mandatory exceptions, at least at the international level, might not always fulfill their universalizing objective. As Tanya Aplin and Lionel Bently recount in their analysis of the mandatory exception in Article 10(1) of Berne, a provision that they contend should have required "global mandatory fair use" has resulted instead in what they call "dysfunctional pluralism."[74] Current judicial understandings of Article 10(1) may be unlikely to sustain the strong form of Aplin and Bently's argument.[75] But, whether one accepts the details of how Aplin and Bently read Article 10(1), there is certainly no universal understanding of what the article means or how it is applied – which we might, in theory, have expected to be the benefits of mandatory exceptions.

The Marrakesh Treaty *may* obviate some of these problems by including relatively detailed exemplars of how to implement Article 4 and Article 5. If experience of implementation of EU directives is anything to go by, the availability of turnkey provisions will be an attraction to legislators.[76] Not all countries possess the domestic legislative capacity to transpose general international principles into workable domestic mechanisms. The turnkey provisions might encourage such countries to make those provisions self-executing, or to copy them verbatim. It might have been better in encouraging such adoptions had the treaty drafters felt able to declare that the exemplars passed the three-step test and thus operated as what Larry Helfer, Molly Land, Ruth Okediji, and Jerry Reichman have termed a "safe harbor,"[77] or (although complicated in terms of inter-treaty relations and arguably Articles 19–20[78]

[74] *See* Lionel A. F. Bently & Tanya Aplin, *Whatever Became of Global Mandatory Fair Use? A Case Study in Dysfunctional Pluralism*, in Is Intellectual Property Pluralism Functional? (S. Frankel ed., Edward Elgar, 2019); Tanya Aplin & Lionel A. F. Bently, *Displacing the Dominance of the Three-Step Test: The Role of Global, Mandatory Fair Use*, in Comparative Aspects of Limitations and Exceptions in Copyright Law (S. Balganesh, N. Wee Loon & H. Sun eds., Cambridge University Press 2019) (mandatory quotation right in art. 10(1) of the Berne Convention requires WTO member states to validate a sizeable range of fair uses); *see generally* Tanya Aplin and Lionel Bently, Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works (Cambridge University Press 2020).

[75] *See* Case C-476/17, Pelham GmbH *v.* Ralf Hütter, EU:C:2019:624 (CJEU Grand Chamber 2019).

[76] The EU experience would also suggest the importance of a central court to ensure consistency of interpretation. But, subject to that caveat, countries frequently copy the text of each other's laws, causing convergence on the surface, and perhaps on an ongoing basis if national courts are open to expansive use of comparative method. *See* Justin Hughes, *The Charming Betsy Canon, American Legal Doctrine, and the Global Rule of Law*, 53 Vanderbilt J. of Trans. Law 1147 (2020).

[77] *See* Helfer et al., *supra* note 3 at 44.

[78] Art. 19 reflects the fact that generally the Berne Convention is a minimum standards agreement. *See* Berne Convention, art. 19 ("The provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union"). Art. 20 contemplates "special agreements" building upon the Berne Convention. *See* Berne Convention, art. 20 ("The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such

of the Berne Convention) to provide that the three-step test was inapplicable to these exceptions.[79] But given the approach of WTO panels to the harmonious interpretation of copyright instruments,[80] it is highly unlikely that a country enacting the exemplar will be successfully challenged under TRIPS.[81]

Of course, national courts may well yet interpret their common provision in disparate ways, interfering with the aspirations of the parties. And the treaty itself recognizes that different countries might adopt different conditions on commercial availability and remuneration.[82] Finally, the treaty leaves hanging a number of important choice-of-law questions that could affect the cross-border availability of works.[83]

All that speaks to, however, is the looser institutional structure of international law; no level of mandatory exception or even WTO enforcement can absolutely achieve universality. Indeed, the "autonomous reading" that the Court of Justice of the European Union has given to supposedly optional exceptions in Article 5 of the Information Society Directive may ensure a more uniform, and perhaps under one metric, more universal position than would the adoption of mandatory provisions

agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention").

[79] *See* ALAI, Report of the ALAI Ad Hoc Committee on the Proposals to Introduce Mandatory Exceptions for the Visually Impaired 1 (February 27, 2010), at http://www.alai.org/en/assets/files/resolutions/report-mandatory-exceptions.pdf ("If proposed exceptions are incompatible with the framework for exceptions and limitations set out at Berne art. 9(2), TRIPS art. 13, and WCT art. 10, then Berne art. 20 . . . would prohibit member States from enacting an international agreement mandating those exceptions. . .. At the same time, it seems that to make exceptions – that otherwise would be in accordance with the copyright treaties, and in particular with the 'three-step test' – mandatory in a treaty would be in conflict with Berne Art. 19 . . . which provides that the provisions of the Convention 'shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union.'").

[80] *See* United States – Section 110(5) of the US Copyright Act: Report of the Panel, WT/DS160/R (June 15, 2000), at 6.66.

[81] *See* Annette Kur, *From Minimum Standards to Maximum Rules*, in *TRIPS* PLUS 20 – FROM TRADE RULES TO MARKET PRINCIPLES, 133, 149 (Hanns Ullrich et al. eds., Springer 2016) ("Neutral as it is in legal effect, this regulatory detail [i.e., the lack of express reference to the three-step test in art. 4(2), as it is in art. 4(3)] seems to signal that TRIPS compliance is basically taken for granted, so that contracting parties espousing the model set out in Article 4(2) can feel safe about their international obligations"). *Cf.* Martin Senftleben, *A Copyright Limitations Treaty Based on the Marrakesh Model: Nightmare or Dream Come True?*, in THE CAMBRIDGE HANDBOOK OF COPYRIGHT LIMITATIONS AND EXCEPTIONS, 74, 79 (S. Balganesh, N. Wee Loon & H. Sun eds., Cambridge University Press 2021) (expressing concern about subjecting the turnkey provisions to the three-step test because this would preclude both certainty and flexibility).

[82] *See* Marrakesh Treaty, art. 4(4).

[83] For example, it is likely that the question of which law determines whether an accessible format copy was "made under a limitation or exception or pursuant to operation of law" under art. 5(1) refers to the country where the copy was made and from which it will be exported. But the treaty is far from clear. *See* Trimble, *supra* note 6 at 786–89 (canvassing options).

drafted for more heterogenous international application, but lacking direct enforcement power.[84]

III. *Human Rights*

A third way in which the Marrakesh Treaty is said to be unique is its endorsement of (universal) human rights, the right to read and the rights of the disabled.[85] Again, this point is overstated, even without referencing Article 27(2) of the Universal Declaration of Human Rights, which guarantees that "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."[86] Clearly, the right to read was part of any number of debates in Berne Conferences surrounding exceptions for developing countries, most notably in the Berne Appendix.[87] And the 1996 WIPO Copyright Treaty recognized "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention."[88]

Perhaps the Marrakesh Treaty is the first copyright treaty expressly to reference in its preamble a particular human rights instrument conferring rights on a group other than authors, namely, the UN Convention on the Rights of Persons with Disabilities.[89] More important than these textual niceties, however, the core human rights dimension might speak to the universality of the underlying norms.[90] As noted

[84] *See* Eleonora Rosati, Copyright and the Court of Justice of the European Union, 42–43 (Oxford University Press 2019) (tracing the history of this approach and listing the multiple occasions on which the Court has deployed it to develop a European concept that has an "independent and uniform interpretation throughout the European Union"); *see, e.g.*, Case C-201/13, Deckmyn *v.* Vandersteen, EU:C:2014:2132 (CJEU 2014) (parody as autonomous concept in defining the meaning of defense to copyright infringement even though that was a defense that was optional for Member States to provide).

[85] *See* Ruth L. Okediji, *Does Intellectual Property Need Human Rights?*, 51 N.Y.U. J. Int'l L. & Pol. 1, 45–46 (2018); Margot E. Kaminski & Shlomit Yanisky-Ravid, *The Marrakesh Treaty for Visually Impaired Persons: Why a Treaty Was Preferable to Soft Law*, 75 U. Pitt. L. Rev. 255, 286 (2014).

[86] *See* Universal Declaration of Human Rights, art. 27.

[87] The Appendix to the Paris Act of 1971, drawing upon a Protocol agreed in Stockholm four years earlier, allows developing countries to limit reproduction and translation rights in terms that might otherwise not be permitted by the Berne Convention. *See* 2 Ricketson and Ginsburg, *supra* note 9, §§ 14.69–14.106, at 925–960. This is heavily driven by educational and development goals. *See id.*, at § 14.106, at 958.

[88] *See* WIPO Copyright Treaty, preamble.

[89] *See* Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3.

[90] *Cf.* Jonathan Griffiths, *Universalism, Pluralism, or Isolationism? The Relationship Between Authors' Rights and Creators' Human Rights*, in Pluralism and Universalism in International Copyright Law (Tatiana Eleni Synodinou ed., Kluwer 2019) ("If authors' rights, as established in international copyright law, were indeed human rights, claims to the universalism of copyright norms would be significantly reinforced").

above, the universality of human rights is understood to mean that they should apply even in *internal* settings.

IV. *Scope of Application: Domestic Copyright Law*

This last point connects well with another new feature of the Marrakesh Treaty that sets the treaty apart from existing international copyright law. The obligation of Article 5(1) of the Berne Convention applied only to "in respect of works for which [authors] are protected under this Convention, in countries of the Union other than the country of origin."[91] As Article 5(3) of the Berne Convention lays out even more explicitly, "protection in the country of origin is governed by domestic law." Thus, member states are not required to grant treaty rights to domestic works; Berne only applies when there is a difference between the country for which the protection is sought and the country of origin. For example, under Section 411 of its Copyright Act, the United States imposes on US works the formality of registration prior to an action for infringement, which Article 5(2) of the Convention bars being required of foreign works.[92]

This feature of the Berne system derogated from its universality, measured in scope of application. But it was an understandable feature given the roots of the Berne system in the desire to ensure that foreign works were granted protection. And as a practical matter, notwithstanding the US rule in Section 411 noted above, national political realities meant that most protections required by treaty to be conferred on foreign works would be extended to local works.

This political tempering of theoretical legislative latitude works well for the rights of authors. It might work less well for exceptions. Thus, the French Supreme Court has held that Berne-derived rights to make a brief quotation was not applicable to an alleged infringement in France of a painting of French origin, where an auctioneer had reproduced a painting in its auction catalog.[93] Thus, under the Berne model, contracting parties could deny the application of a mandatory exception to French works, while being required to allow such exceptions to be exercised as regards foreign works. The political realities do not work the same way here. This would rarely be a problem when the international copyright instruments were largely concerned with the rights of authors. But as the debate shifts to encompass

[91] *See* Berne Convention, art. 5(1).

[92] *See* 17 U.S.C. § 411.

[93] *See* Court of cassation, decision of February 10, 1992, n 95-19030, noted in Jane C. Ginsburg & Edouard Treppoz, International Copyright Law: U.S. and E.U. Perspectives, 185 (Edward Elgar Publishing 2015); *see also* Jane C. Ginsburg, *Floors and Ceilings in International Copyright Treaties*, in Intellectual property Beyond Borders (Henning Grosse Ruse-Khan & Axel Metzger eds., Cambridge University Press 2022).

mandatory exceptions – which might be called the rights of users – this issue requires the treaties to have a broader and more universal scope of application.[94]

Article 4(1) of the Marrakesh Treaty requires that "Contracting Parties shall provide *in their national copyright laws*." Sam Ricketson reads this as applying to domestic and foreign works and has asked whether this "Marrakesh deviation" will become the model in other areas where international agreements on exceptions are being considered, such as libraries and educational institutions.[95] Although there is no clear indication in the records of the conference that this language reflected an awareness of this dynamic, the desire for universality does indeed support this approach being replicated. The political winds that prevent this derogation from the scope of the Berne system being serious might blow differently with exceptions.[96]

Indeed, more broadly, this development might make us begin to question more broadly the concept of "country of origin" in the Berne system. Article 5(4) provides a very complex definition of "country of origin."[97] That concept has been severely tested by online publication,[98] which may – if read wrongly (as it may well have been by some national courts) – unintentionally evict works from the protection of Berne.[99]

[94] There are broader systemic issues here. Rochelle Dreyfuss and I noted that as the system reorients to balance the rights of owners and users, structural protections such as national treatment should extend from authors to users. *See* Graeme B. Dinwoodie and Rochelle C. Dreyfuss, A Neofederalist Vision of TRIPS: The Resilience of the International Intellectual Property Regime, 158–170 (Oxford University Press 2012).

[95] *See* Sam Ricketson, *The International Framework for the Protection of Authors: Bendable Boundaries and Immovable Obstacles*, 41 Colum. J.L. & Arts 341, 348 (2018); *cf.* Reto M. Hilty et al., *International Instrument on Permitted Uses in Copyright Law*, 52 IIC 62 (2021) (seeking to make congruent with existing treaties and not addressing this point).

[96] The problem created by the application of the substantive provisions only to foreign works may arise not only with mandatory exceptions but also with mandatory exclusion of subject matter. *See* 1 Ricketson & Ginsburg, *supra* note 9, § 6.98 at 319 (noting that the "Conventional exclusions from coverage may constitute supranational *maxima* of protection: member states may not extend protection to foreign Berne works or provide rights that fall into these limited categories, even though local works may enjoy those benefits"); *id.*, §§ 6.110–111 at 330–332.

[97] *See* Berne Convention, art. 5(4).

[98] *Compare* Kernal Records Oy v. Mosley, 794 F. Supp. 2d 1355, 1362 (S.D. Fla. 2011), *aff'd on other grounds sub nom.* Kernel Records Oy v. Mosley, 694 F.3d 1294 (11th Cir. 2012) *with* Moberg v. 33T LLC, 666 F. Supp. 2d 415, 422–23 (D. Del. 2009) ("To hold otherwise would require an artist to survey all the copyright laws throughout the world, determine what requirements exist as preconditions to suits in those countries should one of its citizens infringe on the artist's rights, and comply with those formalities, all prior to posting any copyrighted image on the Internet. The Berne Convention was formed, in part, to prevent exactly this result"); *see also* Library of Congress, Copyright Office, Online Publication: Notice of Inquiry, Fed. Reg., Vol. 84, No. 233, Wednesday, Dec. 4, 2019 at 66328, 66330 (discussing online publication and recognizing that "access to court may depend on whether a work is considered a United States work or a foreign work, and publication is a key concept in making that determination.")

[99] *See generally* Thomas Cotter, *Toward a Functional Definition of Publication in Copyright Law*, 92 Minn. L. Rev. 1724, 1749–1740 (2008) ("Perhaps the country of origin concept needs to be rethought in the digital age"); Jane C. Ginsburg, *Berne without Borders: Geographic Indiscretion and Digital Communications*, Intell. Prop. Q. 111 (2002); International Literary

V. *Cross-border Exchange*

Even with international mandatory exceptions, which require that national laws permit particular uses, the principle of territoriality can interfere with the effectiveness of those exceptions in ensuring the universal application of the norm. Capacity to take advantage of those exceptions may vary widely from one country to another, limiting the overall distribution of socially valuable works (and in the case of Marrakesh, of accessible-format copies of works).

The Marrakesh Treaty (mirroring to some extent, if only implicitly, the treatment of patent compulsory licenses and access to medicines under the Doha Declaration and Article 31bis of TRIPS)[100] requires member states to allow for the cross-border exchange of special-format copies of books, including audio books and digital files, and other print material between those countries that are parties to the treaty (and who comply with the standard three-step test for exceptions in international copyright law).[101] This should reduce the high costs of converting books into accessible-format copies by eliminating the duplication of efforts and allow many copies to be made in one country and supplied to beneficiary persons in several countries. The scheme set up by Articles 5–6 may encourage countries to take particular positions on the exhaustion question (despite the Marrakesh text bracketing the exhaustion question).[102]

Rochelle Dreyfuss and I have previously suggested that an international IP acquis should include principles that reflect the increased interdependence of nation-states.[103] On the one hand, this requires greater attention to enforcement for authors. But it also suggests exploiting the potential for pooling of resources and thus for securing the social gains for which the copyright system exists. This is a mechanism by which to make more real both the universal aspiration of the "right to read" and the universal remit of the mandatory exception in the Marrakesh Treaty.

and Artistic Association, Determination of Country of Origin When A Work is First Publicly Disclosed Over the Internet at 5 (adopted January 14, 2012), at http://www.alai.org/assets/files/resolutions/country-of-origin.pdf (concluding that "a work disseminated only in dematerialized digital format is never published").

[100] *See* TRIPS Agreement, art. 31bis.

[101] This is achieved in two provisions. Art. 5 requires that Contracting Parties allow an accessible format copy made under an exception to be exported by an authorized entity to a beneficiary person or an authorized entity in another Contracting Party. And art. 6 complements art. 5 by providing that, to the extent that the national law of a Contracting Party would permit the making of an accessible format copy of a work, it shall also permit import of such copies by a beneficiary person or authorized entity.

[102] *See* Marrakesh Treaty, art. 5(5) ("Nothing in this Treaty shall be used to address the issue of exhaustion of rights"); *see also* Trimble, *supra* note 6 at 790 ("While the Treaty abstains from addressing copyright exhaustion in any manner, it does not prohibit countries from using the exhaustion principle to implement the Treaty"); *id.*, at 791 ("The exhaustion principle could assist countries with a partial implementation of the Treaty's cross-border exchange system"). Marketa Trimble notes that "a limited international exhaustion rule would result in the mutual recognition of countries' exceptions and limitations under the Treaty." *See id.*, at 792.

[103] *See* Dinwoodie and Dreyfuss, *supra* note 94.

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As noted above, in the regional context, the European Union has recently adopted a number of cross-border mechanisms that allow determinations or rights in one country to have effect in another.[104] This approach is likely less controversial in the more limited European context, where much of substantive copyright law has been harmonized. Even within the European Union, those mechanisms make important contributions to expanding the geographic area in which works might with certainty be exploited, because even with common legal rules, the facts and circumstances on which those rules operate may vary from country to country. Likewise, rights granted under common substantive rules might have been allocated to different grantees or granted under different conditions among different countries.

But the background commonality on substantive norms is likely to make the erasure of formal territoriality less troubling to states now required to treat a particular exploitation on their territory as lawful, without regard to domestic facts that would ordinarily inform that assessment. The realignment of outcome that is effected is likely to be minor (both because of the commonality of legal rules, but also because the more homogenous social and economic conditions make it more likely that the factual context would – if separately assessed – be similar). This seems a small price to pay for the reciprocal gains that are likely to come from these "mutual recognition" systems, especially when they contribute positively to the wider exploitation of the work, consistent with the objectives of international copyright law.

The implementation of a similar system at the global level is more radical because the global context removes the factual and legal commonality that is present within the European Union. But the Marrakesh mechanisms suggest variables that will inform the extent to which global replication is likely to ruffle feathers and the devices that might be the basis for rendering any such system more acceptable. Making the exceptions mandatory was important, as was the focus of the treaty on a topic on which there was broad agreement; most countries favored this type of exception. But so too was the provision of turnkey exemplars that is likely to effect soft harmonization as the treaty is implemented. Likewise, provisions in the treaty delineating the ways in which countries might vary their implementation (such as imposing a "commercial unavailability" condition) will, in practice, serve to cabin the extent to which the latitude to tailor implementation allows for deviation from a single norm.[105] Indeed, while the focus on the three-step test might have been problematic in some respects, it is the type of provision that helps to ensure that the

[104] *See supra* text accompanying notes 50–55.

[105] The extent of the variation will also be affected by unresolved choice-of-law issues. It is not clear from the text of the Marrakesh Treaty whether the copy must be one that could be made in the country of manufacture as well as import, but that would seem to be a plausible reading of the provision. *Cf.* Trimble, *supra* note 6 at 786 (canvassing options and noting that "applying the destination country's law to assess the lawfulness of copies' provenance prior to their importation might be a legitimate approach, given that the Treaty does not mandate any choice-of-law rules").

cross-border mechanism cannot be exploited by a rogue country. Only certain countries can be admitted to the system of mutual recognition. Finally, the involvement of intermediaries whose affinities and sources of expertise often reach across borders is also likely to exert soft harmonizing influence. All this should help to make this mechanism seem less disruptive to actors who are accustomed to operating a national model.

E. CONCLUSION

Universalism has been a goal of the international copyright system from the outset. But once the concept is understood as something more than uniformity of content, it becomes apparent that all the participants in the development of the system over the last century can be understood as universalists. Less semantically, it also calls our attention to an expanded range of mechanisms that can fulfill that aspiration. In a number of features, the Marrakesh Treaty reflects that expanded, multi-dimensional view of universalism, and as such is a significant milestone (and a potential lodestar) in the further development of international copyright law.