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# *Corcovado*: Renewal's Second Coming or False Messiah?

David Nimmer\*

## I. INVOCATION

South of Rio de Janeiro, a mountain called "Corcovado" boasts a gigantic statue of Christ the Redeemer beckoning to the faithful. The Second Circuit has erected its own *Corcovado*, jealously guarding the orthodoxy of U.S. copyright renewal against foreign encroachments. Having no quarrel with the statutory construction, this Essay argues that the intangible *Corcovado* bows to a false idol, and is hence detrimental to the world copyright order.

To evaluate U.S. cases in the context of international copyright, it is necessary to advert back to U.S. adherence to the Berne Convention in 1989.<sup>1</sup> The hallmark of the Berne Convention is its antipathy toward formalities. Adherence by the United States to the Berne Con-

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\* Of Counsel, Irell & Manella. An earlier version of this Essay appears in NIMMER ON COPYRIGHT, *infra* note 2, § 9.06[A][2]. A.B., Stanford University, 1977; J.D., Yale Law School, 1980. Editor, NIMMER ON COPYRIGHT.

1. "The Berne Convention" is the Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto. The Berne Convention represents an international consensus on copyright protection, designed to replace the patchwork of European bilateral copyright arrangements with a simple, multilateral treaty respecting authors' rights.

The original Convention was intended to promote five objectives: (1) the development of copyright laws in favor of authors in all civilized countries; (2) the elimination over time of basing rights upon reciprocity; (3) the end of discrimination in rights between domestic and foreign countries abroad; (4) the abolition of formalities for the recognition and protection of copyright in foreign works; and, (5) ultimately, the promotion of uniform international legislation for the protection of literary and artistic works.

RALPH S. BROWN & ROBERT C. DENICOLA, CASES ON COPYRIGHT 738 (5th ed. 1990).

vention occasioned a breakdown in many of the formalities that formerly characterized U.S. copyright jurisprudence.<sup>2</sup> There was even hope that treaty accession would lead to a generally anti-formal construction of U.S. law, to conform to worldwide norms—no less a figure than the Chief Judge of the Second Circuit commented favorably on such prospects.<sup>3</sup>

In contrast to that liberal approach, *Corcovado* represents the triumph of the *ancien régime*. Rio's mountain looks like a hunchback, from which its moniker springs (*corcovar* = bend). The Second Circuit's approach in the case of the same name yields bent results; for the U.S. to stand erect and hold its head high in the world copyright community,<sup>4</sup> it is suggested that we should slough off the deformity underlying the court's reasoning.

## II. CRITICAL MASS

Works that obtained a United States statutory copyright before January 1, 1978, are subject to a bifurcated copyright term: a twenty-

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2. See 2 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* §§ 7.01, 7.02 (1993). Prior to the United States' accession to the Berne Convention, United States copyright protection was often denied where formalities, such as notice and registration, were not observed. *Id.* § 7.01. The Berne Convention prohibits formalities which stand as a condition to copyright protection and is acknowledged to be the premier multilateral copyright treaty, with the highest standards of protection. 3 NIMMER § 17.01[B][1]-[2].

3. The Chief Judge quoted with approval the discussion of formalities in 2 NIMMER, *supra* note 2, § 7.01:

Now that the Berne era has dawned, it is to be hoped that courts will construe the myriad formalities of U.S. copyright law leniently. [In order to] help harmonize U.S. copyright laws with those of the rest of the Berne Union . . . particularly in resolving issues of first impression as to the formalities required under the 1976 and 1909 Acts, the courts should refrain from overtechnical constructions.

*Princess Fabrics v. CHF*, 922 F.2d 99, 105 (2d Cir. 1990) (Oakes, C.J., concurring in part and dissenting in part).

4. The Secretary of Commerce, urging Congress to pass legislation to implement our accession to the Berne Convention, quoted a former Register of Copyrights to the effect that "it will let us 'hold our heads higher' in the world of international copyright." *The Berne Convention: Hearings on S. 1301 and S. 1971 Before the Subcomm. on Patents, Copyright and Trademarks of the Senate Comm. on the Judiciary*, 100th Cong., 2d Sess. 76 (1988) (statement of C. William Verity, U.S. Secretary of Commerce).

eight-year original term, and a subsequent renewal term.<sup>5</sup> Each term is a separate estate; conveyance of one does not, standing alone, convey the other.<sup>6</sup> In particular, courts typically decline to find any transfer of the renewal term absent language expressly granting rights in “renewal of copyright” or “extension of copyright.”<sup>7</sup>

In *Corcovado Music v. Hollis Music*,<sup>8</sup> the Second Circuit confronted a contract drafted in broad terms, but which nonetheless failed to include either an explicit mention of renewal or equivalent words, such as “forever.” The court accurately reviewed the line of cases that apply the strict construction rule regarding the assignment of the renewal term, concluding that the grant at issue did not convey renewal rights. Notwithstanding the superficial congruence between that ruling and prior jurisprudence on the subject, it is submitted that *Corcovado* is both unprecedented and unfortunate.

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5. Originally, the renewal term likewise endured for 28 years. 17 U.S.C. § 24, Copyright Act of 1909, ch. 320, 35 Stat. 1075 (1909). Later, the renewal term was extended to 47 years. 17 U.S.C. § 304(a) (1988), Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

6. 2 NIMMER, *supra* note 2, § 9.06[A]. See 3 NIMMER, *supra* note 2, § 10.08 (general rules of construction for assignments and other transfers), § 10.10 (construing the scope of assignments and other transfers). For a general discussion of copyright duration and renewal, see 2 NIMMER, *supra* note 2, § 9 *et seq.*

7. See, e.g., *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737, 747 (2d Cir. 1975) (“[When] there is no specific reference in [the] assignment to the renewal term . . . [t]his deficiency has generally been held as a matter of law, absent contrary evidence, to preclude a holding that a transfer of renewal rights was intended.”), *cert. denied*, 424 U.S. 955 (1976); *Hill & Range Songs v. Fred Rose Music*, 570 F.2d 554 (6th Cir. 1978); *Edward B. Marks Music v. C. K. Harris Music Publishing*, 255 F.2d 518 (2d Cir.), *cert. denied*, 358 U.S. 831 (1958); *Marks Music Corp. v. Borst Music Publishing*, 110 F. Supp. 913 (D.N.J. 1953); *G. Ricordi & Co. v. Paramount Pictures*, 189 F.2d 469 (2d Cir.), *cert. denied*, 342 U.S. 849 (1951); *Rossiter v. Vogel*, 134 F.2d 908 (2d Cir. 1943); *Von Tilzer v. Jerry Vogel Music*, 53 F. Supp. 191 (S.D.N.Y. 1943), *aff’d sub nom. Gumm v. Jerry Vogel Music*, 158 F.2d 516 (2d Cir. 1946). See *Bartok v. Boosey & Hawkes, Inc.*, 523 F.2d 941, 949 (2d Cir. 1975) (“[A]n assignment without mention of the renewal rights conveys no interest in the renewal rights absent contrary evidence.”); *Followay Prods., v. Maurer*, 603 F.2d 72 (9th Cir. 1979); *April Prods. v. G. Schirmer, Inc.*, 308 N.Y. 366, 126 N.E.2d 283 (1955); *Yardley v. Houghton Mifflin Co.*, 25 F. Supp. 361 (S.D.N.Y. 1938), *aff’d*, 108 F.2d 28 (2d Cir. 1939), *cert. denied*, 309 U.S. 686 (1940); *World Music v. Adam R. Levy & Father Enters.*, 214 U.S.P.Q. (BNA) 854, 855 n.1 (S.D.N.Y. 1981) (“[A] general transfer of the author’s copyright that does not specifically mention renewal rights, will not effect an assignment of the renewal rights unless there is specific proof of a contrary intention.”).

8. 981 F.2d 679 (2d Cir. 1993).

The grant at issue in *Corcovado* was from Antonio Carlos Jobim, a Brazilian composer, to Editora Musical Arapua, a Brazilian music publisher, for five songs.<sup>9</sup> The contract was negotiated and executed in Brazil, and was written in Portuguese.<sup>10</sup> It was phrased in the widest possible terms, assigning and transferring “the full property, for the exercise of the corresponding rights in all countries of the world . . . by virtue of the laws and treaties in force and those which become effective hereinafter.”<sup>11</sup> Inasmuch as that contract also vested jurisdiction in the courts of Brazil to settle all disputes arising thereunder, the district court dismissed the action “on the condition that defendants submit to the jurisdiction of the Brazilian courts.”<sup>12</sup> The Second Circuit reversed, holding that plaintiff’s allegation of infringement empowered U.S. courts to adjudicate the matter and that the forum selection clause, which arose solely as a defense, did not divest such jurisdiction.<sup>13</sup>

The Second Circuit could have chosen simply to “remand the case to the district court for further proceedings, including a determination” concerning transfer of renewal rights.<sup>14</sup> Then, the trial court could have proceeded to consider the merits, weighing the evidence regarding intent of the parties in Brazil to transfer or withhold U.S. renewal rights. Instead, however, citing unspecified “principles of sound judicial administration,”<sup>15</sup> the Court of Appeals took it upon itself to resolve that issue, based on the record created by the parties ancillary

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9. 981 F.2d at 680-81. Included was the *bossa nova* classic “Desafinado.” *Id.*

10. *Id.* at 681.

11. *Id.* at 684 n.7 (defendants’ translation). “The grant is not broken down on a country-by-country basis. The only specific copyright law referred to in the Brazilian Songwriter agreements is that of Brazil. The term of the grant is for the period provided by Brazilian law.” Defendants-Appellees’ Brief at 3, *Corcovado Music v. Hollis Music*, 981 F.2d 679 (2d Cir. 1993) (No. CV 92-739).

12. 981 F.2d at 681.

13. See *John Wiley & Sons v. Fuchs*, 217 U.S.P.Q. (BNA) 741 (S.D.N.Y. 1981) (consent to jurisdiction equivalent to being “found” therein); *Shepard’s McGraw-Hill, Inc. v. Legalsoft Corp.*, 769 F. Supp. 1161 (D. Colo. 1991) (consent to forum for one purpose does not bind for another purpose); *Cheever v. Academy Chicago*, 685 F. Supp. 914, 917 (S.D.N.Y.), and 690 F. Supp. 281, 285, 289 (S.D.N.Y. 1988).

14. 981 F.2d at 683.

15. *Id.*

to the dismissal.<sup>16</sup>

The court contrasted the Brazilian contract under review with the grant construed by the court in *Siegel v. National Periodical Publications*.<sup>17</sup> The subject instrument in *Siegel* granted "exclusive right[s] . . . forever" and bound the authors not to use such property "at any time hereafter";<sup>18</sup> the court inferred that the copyright renewal rights of the renowned comic strip *Superman* had been transferred, even though none of the agreements between the parties expressly referred to renewal rights.<sup>19</sup> In distinguishing the case before it from *Siegel*, the *Corcovado* court focused on the fact that, unlike the agreements in *Siegel*, the Brazilian contract did not contain such words as "forever." Based on such a distinction, the court concluded that the contract was unambiguous and that "it is clear that Jobim did not convey his renewal rights to Arapua."<sup>20</sup> That conclusion materially diverges from *Siegel's* rationale that, absent an express reference to transfer of the renewal term, "the intent of the parties must be established from the language of the agreements *and the attendant circumstances*."<sup>21</sup> It is, moreover, almost certainly the antithesis of what the parties in Brazil intended.

To appreciate the parties' intent, it is vital to focus on "the attendant circumstances" at play in *Corcovado*. Jobim signed a contract drafted to grant worldwide copyrights as fully as the draftsman in Brazil was capable of expressing the concept,<sup>22</sup> absent exhaustive

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16. In light of the posture in which it arose, *Corcovado's* statements construing the scope of renewal rights under the pertinent contract could be regarded as dictum.

17. *Corcovado*, 981 F.2d at 684 (citing *Siegel v. National Periodical Publications*, 508 F.2d 909 (2d Cir. 1974)).

18. *Siegel*, 508 F.2d at 913-14.

19. *Id.* at 913.

20. *Corcovado*, 981 F.2d at 685.

21. *Siegel v. National Periodical Publications*, 364 F. Supp. 1032, 1037 (S.D.N.Y. 1973) (emphasis added), *aff'd*, 508 F.2d 909 (2d Cir. 1974).

22. The Second Circuit states that "the place of performance of the [Jobim-Arapua] contracts is the United States." 981 F.2d at 685. Insofar as those contracts apply worldwide, which includes the United States, and enforcement is sought of the U.S. copyright, that conclusion is technically not inaccurate. Nonetheless, it is at best a very partial truth. Under the terms of the contracts, the United States is not designated as a special forum. *Id.* at 684 n.7. Thus, it is equally true to state that, vis-a-vis enforcement of the Chilean copyright, the place of performance of the contracts is Chile; vis-a-vis Nepalese copyright, the place of

research into idiosyncratic requirements<sup>23</sup> extant under every national copyright schema.<sup>24</sup> Thus, in contrast to the court's holding, apparently—although one cannot be certain absent trial on the issue—it was not the actual intent of the parties to assign away all copyright terms everywhere in the world, necessarily including the United States, but to reserve<sup>25</sup> to the grantor solely the U.S. renewal term twenty-eight years after its subsistence began.<sup>26</sup> The crucial fact distinguishing *Corcovado* from the authorities on which it relies is that those previous cases uniformly construed contracts entered into on American soil, for which it was not wholly unreasonable to hold the contracting parties (or their drafting agents) to precise formal utterances dictated by American copyright doctrine.<sup>27</sup> By contrast, it is unreasonable, in this writer's view, to subject a contract written in Portuguese, negotiated and executed in Brazil, providing that it shall be governed by local law, and by its terms intending to be all-inclusive, to an American rule

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performance is Nepal; and likewise in 120 other countries.

23. The scheme followed by United States copyright law, of according an initial followed by a renewal term, is already idiosyncratic. See generally INTERNATIONAL COPYRIGHT LAW AND PRACTICE (Melville B. Nimmer & Paul E. Geller eds., 1988). Congress abandoned it prospectively in 1976 in order to harmonize American copyright law with the rest of the world's. See 2 NIMMER, *supra* note 2, § 9.01[A][2] (Copyright Act of 1976 commences the term of copyright protection with the "creation" of the work and extends protection for the life of the author plus fifty years). The further twist that the U.S. renewal term is not conveyed through general language of assignment or license is so unusual as to approach uniqueness in the international copyright community.

24. INTERNATIONAL COPYRIGHT LAW AND PRACTICE, *supra* note 23, examines several copyright schemes at variance with U.S. copyright principles.

25. Note that the court concluded that there was no express reservation in the various songwriting contracts between Jobim and Arapua, as those contracts "were silent as to renewal rights." 981 F.2d at 684.

26. As previously noted, the U.S. scheme for reversion of renewal rights absent an express reference to renewal is unique among countries with developed copyright systems. See *supra* note 23. Thus, the Brazilian grant would suffice to convey perpetual rights throughout the life of the copyright virtually throughout the world.

27. *Corcovado*, 981 F.2d at 684 (citing *Bartok v. Boosey & Hawkes, Inc.*, 523 F.2d 941 (2d Cir. 1975)) (mentioning issue only *en passant*); *Followay Prods. v. Maurer*, 603 F.2d 72 (9th Cir. 1979) (implicating no issue regarding contracts executed abroad); and *Rohauer v. Killiam Shows, Inc.*, 551 F.2d 484 (2d Cir. 1977) (addressing issue only obliquely, in the context of describing the facts of a previous case), *cert. denied*, 431 U.S. 949 (1977), *disapproved*, *Stewart v. Abend*, 495 U.S. 207 (1990)). Note that in *Bartok*, grantor Bela Bartok was resident in the United States when he granted his copyright to Boosey & Hawkes. 382 F. Supp. 880, 881 (S.D.N.Y. 1974), *rev'd*, 523 F.2d 941 (2d Cir. 1975).

of construction that it shall terminate following twenty-eight years in this territory alone absent incantation of the word "renewal," or its English or Portuguese equivalent.<sup>28</sup>

Indeed, the Second Circuit's interpretation seems not only unreasonable, but potentially dangerous as well. Congress brought the United States into membership in the Berne Convention in 1989 for the sake of exerting moral leadership in the world copyright sphere and benefitting American authors abroad.<sup>29</sup> *Corcovado* undermines both those goals. First, by limiting rights of all grantees in other countries unless they took cognizance in their negotiations abroad of the vagaries of American law, *Corcovado* comes close to erecting yet another formal barrier to foreigners' rights under U.S. copyright law.<sup>30</sup> This flows against the spirit (albeit probably not the letter) of Berne adherence,<sup>31</sup> thereby jeopardizing the view that other countries will

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28. Had the contract incorporated the word "forever," the opposite result would have pertained under the court's analysis. What are the chances that, when the subject contracts were entered in 1958 and 1960, Arapua was aware that it would be sacrificing rights by neglecting to incorporate such term and did so deliberately? What are the chances that Jobim, had he been presented with contracts drafted to include that word, would have thereupon refused to sign? Though it is impossible to answer those questions definitively absent development of a factual record, which was lacking on the posture in which *Corcovado* arose, the odds surely must be exceedingly small. (One would venture to say that they must be much smaller than, say, the odds of Stephen Sondheim refusing to sign a contemporaneous contract in New York had it explicitly mentioned the renewal term.) If so, the legal result in this case is an unanticipated windfall to one party to the contract, and a concomitant loss to the other, based on adventitious circumstances of drafting.

29. See 3 NIMMER, *supra* note 2, § 17.01[C][2][a] (discussing the benefits to the United States of ratifying the Berne Convention).

30. Given that the disability on foreigners who neglect to mention the word "renewal" in their assignments is no greater than that imposed on American assignees, there is no violation here of the principle of national treatment that authors should enjoy the same protection for their works in other countries as those countries accord to their own authors. See 3 NIMMER, *supra* note 2, § 17.01[B][1].

31. Through Berne adherence, Congress intended to eliminate such unfair features as the requirement that a toy published by a Japanese company in Japan needed to have an English-language copyright notice affixed to secure U.S. copyright protection, notwithstanding the absence of a requirement for any copyright notice under Japanese law. See 3 NIMMER, *supra* note 2, § 17.01[C][2][b] (citing *Hasbro Bradley, Inc., v. Sparkle Toys*, 780 F.2d 189 (2d Cir. 1985)). The rule of construction that grantees lose rights to the renewal term absent use of the word "renewal" or "forever" cannot be considered a prohibited formality on the same level as the forgoing example, but this construction does magnify the idiosyncratic elements of U.S. copyright law at the expense of claimants from other countries who may not be thoroughly



take of U.S. moral leadership.<sup>32</sup> Second, if followed by courts in other countries, the approach of *Corcovado* would be devastating to American copyright proprietors. In the United States, film companies, publishers, and other copyright proprietors typically acquire rights through grants broadly worded and intended to apply worldwide, but which—like the Brazilian contract at issue in *Corcovado*—do not attempt to address the peculiar requirements of copyright laws from Algeria to Zimbabwe.<sup>33</sup> If courts abroad became as insistent as the *Corcovado* court that the parochial requirements of their own domestic copyright laws needed to be observed at the peril of losing rights thereunder, the big losers in the world copyright marketplace would be such American companies.<sup>34</sup>

Consider, for example, the fact that United States copyright law incorporates a work-for-hire doctrine<sup>35</sup> which is absent from French

versed therein. See *supra* note 23.

32. A case handed down at the same time as *Corcovado* expresses such sensitivity to international copyright concerns, allowing unnoticed publication under American copyright law by qualifying foreign authors because “many such authors might not know of all otherwise applicable United States requirements.” *Eisen, Durwood & Co. v. Tolkien*, 794 F. Supp. 85, 88 (S.D.N.Y. 1992), *aff’d without opinion*, 990 F.2d 623 (2d Cir. 1993). See 2 NIMMER, *supra* note 2, § 7.23 [F][2]. See also *infra* note 33. Solicitude for the state of a party’s knowledge is even more apropos to the topic here under review, which nominally seeks to effectuate the intent of the parties, than it is to copyright notice jurisprudence, where intent is largely irrelevant. See 2 NIMMER, *supra* note 2, § 7.14 [A][2].

33. See, e.g., *Brown v. Twentieth Century Fox Film*, 799 F. Supp. 166, 171 (D.D.C. 1992) (American parties signing a grant of copyright “perpetually and throughout the world . . . in and by all media and means whatever,” without specifying conclusions under every national law), *aff’d*, 1994 U.S. App. LEXIS 1431 (D.C. Cir. Jan. 21, 1994).

34. The contemporaneous case, *Eisen, Durwood & Co. v. Tolkien*, cites the need for “an accommodation which is presumably necessary in order to gain the reciprocal benefit of foreign recognition of U.S. copyrights” and the need to avoid draconian consequences for “the often unintentional infraction [which] would be certain to cause resentment abroad with adverse effects on implementation of U.S. intellectual property rights in other countries.” 794 F. Supp. at 87 (citing David Nimmer, *The Impact of Berne on United States Copyright Law*, CARDOZO ARTS & ENT. L.J. 27 (1989)).

35. See 1 NIMMER, *supra* note 2, § 5.03. Under the Copyright Act, special treatment is accorded to works made for hire. The employer or other person for whom the work was prepared is considered the author for copyright purposes and is thus considered the initial copyright owner.

copyright law.<sup>36</sup> American movie studios typically acquire worldwide rights to motion pictures via a work-for-hire contract entered in Los Angeles, which does not contain special features for French or other copyright laws. If a French court were to dishonor such an American contract because of its lack of congruence with French norms, the resulting loss to Hollywood would be incalculable.<sup>37</sup> American book and music publishers frequently obtain general assignments from their authors, again not geared toward particular foreign countries.<sup>38</sup> Germany (which resembles France in that its copyright law lacks a work-for-hire doctrine)<sup>39</sup> differs from the United States<sup>40</sup> in that it disallows full assignment of copyright.<sup>41</sup> If German courts were to cease assimilating U.S. general assignments to exclusive licenses (which are permissible under German law),<sup>42</sup> and were simply to reason that German law does not allow assignments, that the contract before the German court is a copyright assignment, and that the fact that it was executed in Philadelphia is irrelevant, the result again would be disastrous.<sup>43</sup>

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36. See André Lucas & Robert Plaisant, *France* § 4[1][b], in 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, *supra* note 23, at FRA-49 to FRA-58.

37. "It is with great caution that a French judge is likely to apply French rules limiting the validity of certain contractual clauses which appear in contracts validly concluded abroad." *Id.* § 4[2], at FRA-58 to FRA-59. See *id.* § 4[2], at FRA-58 n.146 (French court enforces British contract that transfers more economic rights than would have been permitted in an internal French contract). For the treatment under French law of audiovisual works as collaborative efforts, see *id.* § 4[1][a][ii], at FRA-43 to FRA-45.

38. See, e.g., *Brown v. Twentieth Century Fox Film*, 799 F. Supp. 166, 171 (D.D.C. 1992) (grant of right to reproduce a performance "perpetually and throughout the world"), *aff'd*, 1994 U.S. App. LEXIS 1431 (D.C. Cir. Jan. 21, 1994).

39. "The concept of 'works made for hire' in any sense that might have legal consequences for the initial ownership of copyright just does not exist under German copyright law." Adolph Dietz, *Germany* § 4[1][b], in 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, *supra* note 23, at FRG-46.

40. See 3 NIMMER, *supra* note 2, § 10.03 (discussing transfer formalities).

41. Dietz, *supra* note 39, § 4[2][a], at FRG-47 to FRG-48. An exception that permits complete assignments via inheritance under German law does not apply to the inter vivos assignments discussed above.

42. *Id.* § 4[2][a], at FRG-48 to FRG-49.

43. See EUGEN ULMER, *INTELLECTUAL PROPERTY RIGHTS AND THE CONFLICT OF LAWS* 48-49 (1978) (worldwide U.S. assignment should be treated as exclusive license). In terms of the issue that launched this inquiry, *viz.* construction of a contract failing to mention U.S. renewal rights explicitly, note that German courts would not simply apply German copyright

Finally, reverting to the facts in *Corcovado* but looking through the other end of the telescope, consider how restrictively a Brazilian court could treat a copyright assignment entered into within the United States. As noted above, Jobim's grant specified that it extended to "the full property, *for the exercise of the corresponding rights* in all countries of the world."<sup>44</sup> The italicized language strikes an American copyright practitioner as stilted. It owes its origins, perhaps, to Article 53(2) of the Brazilian Copyright Act, which provides: "The instrument evidencing the legal transaction shall mention specifically the rights conveyed in the legal transaction."<sup>45</sup> From the absence of such italicized language or its Portuguese or English equivalent in a typical American copyright grant, a Brazilian court, applying *Corcovado*'s mechanical logic, could invalidate the assignment as failing to comply strictly with the internal obligations of Brazilian copyright law.<sup>46</sup> Presumably, U.S. copyright proprietors are saved from such devastation in Brazil because the country follows the principle of comity that "contractual obligations are governed by the law of the place where they were undertaken."<sup>47</sup>

That last concern implicates the question as to choice of law in determining the assignability of copyright.<sup>48</sup> *Corcovado* summarily disposes of defendants' argument that Brazilian law should govern by citing the following factors: "United States renewal copyrights reflect a vital policy of United States copyright law; the forum in which the Jobim-Arapua contracts are to be construed is in the United States (for the reasons set forth above); and the place of performance of the

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law, but may advert to U.S. law as the *lex loci contractus* for contracts entered in the United States. See Dietz, *supra* note 39, § 3[3][c][ii], at FRG-41 to FRG-42.

44. *Corcovado Music v. Hollis Music*, 981 F.2d 679, 684 n.7 (2d Cir. 1993) (emphasis added).

45. Antônio Chaves, *Brazil* § 4[2][b], in 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, *supra* note 23, at BRA-43.

46. Bolstering that construction is Article 3 of the Brazilian Copyright Act, which provides that "legal transactions in copyright shall be interpreted restrictively." *Id.* § 4[2][c], at BRA-43.

47. *Id.* § 4[2], at BRA-41.

48. See 3 NIMMER, *supra* note 2, § 17.11 (discussing choice of law in determining the assignability of copyright).

contracts is also the United States.”<sup>49</sup> Were all three of those factors applicable, the court would have been correct in its conclusion.<sup>50</sup> But in fact, we have here (to invert Shakespeare) errors of comity. The second and third factors, while arguably not literally false,<sup>51</sup> misconstrue the intent of both parties in Brazil, which was to convey the copyright worldwide, not to focus on the United States.<sup>52</sup>

What remains, therefore, is the first factor. That factor inclines towards application of U.S. copyright law if the “center of gravity” theory is applied;<sup>53</sup> it is probably of no weight, however, under either the traditional view<sup>54</sup> or the *lex validitatis* theory.<sup>55</sup> More fundamentally, the need to choose among those various theories, and to evaluate whether the first factor standing alone justifies application of the American law if the center of gravity theory is chosen, can be avoided if U.S. internal law is harmonized with Brazilian law by being applied, as suggested above, to consider prominently among *Siegel*’s “attendant circumstances” the country in which the parties entered into the subject grant, their nationality, and such similar circumstances. Through that approach, a court may simultaneously apply U.S. substantive law and reach a determination consonant with the result that would apply were Brazilian law deemed applicable under choice-of-law principles.

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49. 981 F.2d at 685. The reference to “the reasons set forth above” is presumably to the court’s previous disposition of the forum selection clause, discussed above.

50. *Id.* at 685 (citing 3 NIMMER, *supra* note 2, § 17.11[B]).

51. *See supra* note 22.

52. *See supra* note 11.

53. *See* 3 NIMMER, *supra* note 2, § 17.11[B][2]. “Under this theory, the courts, instead of regarding as conclusive the parties’ intention or the place of making or performance, lay emphasis rather upon the law of place ‘which has the most significant contacts with the matter in dispute.’” *Id.* (quoting *Auten v. Auten*, 308 N.Y. 155, 160, 124 N.E.2d 99, 102 (1954)).

54. *See* 3 NIMMER, *supra* note 2, § 17.11[B][1]. The law governing the validity of a contract is the law of the place where the contract was made. RESTATEMENT OF CONFLICT OF LAWS § 332 (1934).

55. *See* 3 NIMMER, *supra* note 2, § 17.11[B][3]. Under this theory, also called the “Rule of Validity” theory, where parties have equal bargaining power, “a contract should be upheld as valid if it would be valid under ‘any law whose application the parties can reasonably be assumed to have taken into account.’” *Id.* (quoting ALBERT A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 464 (1962)).

## III. A PROLEPTIC REQUIEM

For the foregoing reasons, the Second Circuit hopefully will reconsider its dictum<sup>56</sup> extending the strict construction rule regarding assignment of the renewal term to contracts executed abroad which are governed by domestic rather than U.S. law and are not specifically geared at the U.S. copyright exploitation, and in which all parties are non-American nationals.<sup>57</sup> If not, it remains to be seen whether other courts will decline to follow the Second Circuit's lead, or whether Congress will intervene for the sake of furthering its goals articulated at the time of adherence to the Berne Convention.

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56. See *supra* text of note 16.

57. *Corcovado* cites to *Campbell Connelly & Co. v. Noble*, [1963] 1 W.L.R. 252 (Ch.), an English case regarding U.S. renewal rights. See 3 NIMMER, *supra* note 2, § 17.11[C]. The contract construed in *Campbell Connelly* was between two British nationals, entered in the U.K., for worldwide copyright exploitation. The court enunciated language that is equally applicable to the Brazilian contract: "As regards other countries, one would expect nothing more than words of a general character and of sufficient width to bring in any right in the nature of copyright, however different from English copyright that might be." *Campbell Connelly*, [1963] 1 W.L.R. at 243. The result of *Campbell Connelly* is in accord with the analysis proposed above.