The Berne Convention's Flexible Fixation Requirement: A Problematic Provision for User-Generated Content

Elizabeth White
The Berne Convention's Flexible Fixation Requirement: A Problematic Provision for User-Generated Content

Elizabeth White

Abstract

The Berne Convention for the Protection of Literary and Artistic Works sets forth an international standard for copyright protection. However, the fixation provision directs signatories to prescribe works subject to a fixation requirement for copyright protection however they choose. This provision of the Convention and the corresponding legislation that has been generated are of particular relevance to the debate over the protection of user-generated content (UGC). UGC, which has become popular on social networking sites like Facebook and Twitter, raises an important question for the fixation standard. Specifically, it is not clear whether or not UGC is fixed, and therefore the requirements of different jurisdictions may apply unevenly to such content and subject it to different levels of protection. The problems created by this lack of consistent treatment could be solved by implementing a uniform standard in the Convention—namely, by reviving a depositary requirement for authors who seek copyright protection for their works. While this solution poses some administrative hurdles, if properly limited in scope, it would further the purposes of the Convention without substantially complicating the current system of protection.

Table of Contents

I. Introduction.............................................. 686
II. The Berne Convention and the Fixation Requirement—or Lack Thereof.. 689
    A. The National Treatment Standard and Its Impact on Fixation .............. 690
    B. Defining UGC............................................................................. 691
    C. Different Approaches to the Fixation Requirement.......................... 691
I. INTRODUCTION

Though the Internet is no longer new, its prevalence in our daily lives has no doubt increased and continues to do so because of new technology such as smart phones and tablets. Many people use the Internet and online or Internet service providers (OSPs or ISPs)\(^1\) to “check in” to locations they visit, such as restaurants and movie theaters,\(^2\) to post photos of their outings, to share what they are doing or plan to do, and to express their thoughts and feelings. The most popular websites for engaging in these activities are known as social networking sites and include services such as Facebook and Twitter.\(^3\) These sites can generally be accessed from anywhere with an Internet connection, are typically free, and allow people from many different countries to interact by commenting on, linking to, or copying postings made by each other.

These activities, which are emerging as a key component of social life, have serious implications for international copyright law, yet it has little to say about them. Specifically, the Internet and related technology have raised questions about what it means for a work to be “fixed,” that is, in what form a work must exist to gain copyright protection.\(^4\) The US and several other countries have established a fixation standard that must be met to obtain copyright protection, while several countries have no such standard at all. International law also addresses fixation.

\(^1\) The US Copyright Act defines a “service provider” as “a provider of online services or network access, or the operator of facilities therefor.” 17 USC § 512(k)(1)(B).

\(^2\) See, for example, Foursquare, online at https://foursquare.com (visited Oct 10, 2012).


\(^4\) See, for example, TyAnna K. Herrington, Controlling Voices: Intellectual Property, Humanistic Studies and the Internet 55 (SIU 2001) (“[I]ntroduction of digitized text and computer software for treatment under the intellectual property law has created problems in establishing clear definitions of fixation and tangibility.”).
The Berne Convention for the Protection of Literary and Artistic Works, concluded in 1886 in Berne, Switzerland, provides an international standard for copyright protection. It is a non-self-executing treaty with 166 contracting parties (known as the Union). With only a few exceptions in Africa, the Middle East, and Southeast Asia, most nations are signatories, including the US, which joined in 1989. The Convention was last revised in 1971 in Paris. Its aim is to ensure a minimum level of copyright protection for certain works by which all contracting states must abide. The Convention provides, for example, protection in all member states of works created in any member state.

The Convention mentions a fixation requirement, though in nonbinding and arguably unhelpful terms. It states that it “shall [] be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.” This lack of a fixation requirement is meant to allow the Convention’s 165 member nations to determine individually whether they wish to impose a requirement that the work seeking protection be fixed in a tangible format, that it need not be fixed at all, or that it must meet some other standard in between these extremes.
This Comment will explain how the flexible fixation standard may impact copyright protection for certain types of user-generated content (UGC). Users constantly create, alter, overwrite, and delete UGC, calling into question the scope and importance of fixation. Because the Convention allows differing fixation standards, some countries’ copyright laws may cover UGC while others may not, resulting in a lack of uniformity among member states. These varying levels of protection are more troublesome when it comes to Internet content, which can be accessed by hundreds, thousands, or millions of people at the same time, than it would be in the case of older media. Original pieces of visual art, for example, can be accessed by only a limited number of people at once, as in a museum.

Moreover, there is significant potential for the current flexible fixation requirement to create difficulties in the enforcement of international copyright law due to the constantly evolving nature of digital and worldwide media, particularly an increase in UGC. This Comment argues that the members of the Union should adopt a uniform fixation standard to ensure that content created by citizens of each nation gets identical protection.

Section II assesses the flexible fixation standard in the Convention and looks closely at some nations’ individual fixation standards. It will also define UGC and why it is different than other works that are subject to copyright protection. Section III explains why the copyrightability of UGC is an increasingly prominent question, whether UGC is indeed fixed, and why UGC should only be copyrightable if fixed. Section IV explores the underlying purposes fulfilled by a fixation requirement and advocates a standard that specifically encompasses social media and UGC. Ultimately the Comment proposes that UGC only be considered fixed when deposited with the copyright or intellectual property office of a Union nation. Section V concludes.

---

15 UGC is common on sites such as Twitter, Facebook and blogs, for example.
18 See Section II.A for a discussion of the national treatment standard and its effect on uniform enforcement.

688 Vol. 13 No. 2
II. THE BERNE CONVENTION AND THE FIXATION REQUIREMENT—OR LACK THEREOF

The Berne Convention for the Protection of Literary and Artistic Works, first concluded in 1886, revised in Paris in 1971 and amended again in 1979, is aimed at creating minimum global norms for copyright protection. It sets minimum protections for its 165 signatory nations but because it was last amended in the 1970s, it makes no mention of modern technologies such as the Internet. The US became a party to the Convention in 1988 (entry into force occurred the following year). The US implemented the treaty via the Berne Convention Implementation Act of 1988, which made no mention of a fixation requirement. This is in line with the Convention, which states that it “shall be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.”

For some media, this flexible fixation standard will not be a problem. Users of social networking sites who upload photos or videos may already have a copyright in that content because it is fixed elsewhere and pre-exists its use on the Internet. These users are simply uploading that content onto the Internet. The type of content that may be problematic, and which is the focus of this Comment, is content created on social networking sites and blogs that does not exist in a stored format elsewhere—for example, Tweets on Twitter, status updates on Facebook, and blog posts. Facebook’s Terms of Service, for example, implicitly recognize the difference between photos and videos and status updates: “For content that is covered by intellectual property rights, like photos and videos (IP content), you specifically give us the following permission, subject to your privacy and application settings.” Indeed, Facebook’s terms do not suggest whether status updates could be IP content, which leaves open the question of their copyrightability.

Some nations, most notably the US, maintain a fixation standard while others do not. This diversity has the potential to result in uneven copyright

---

19 Berne Convention Summary (cited in note 8).
20 Id.
21 See Dinwoodie, 149 U Pa L Rev at 490 (cited in note 9).
22 Id.
23 Berne Convention Implementation Act of 1988 (BCIA), Pub L No 100-568, 102 Stat 2853, codified in various sections of Title 17.
24 Convention, Art 2(2) (cited in note 5).
protection for UGC in particular, which may appear simultaneously to Internet users in different countries with disparate standards.

A. The National Treatment Standard and Its Impact on Fixation

Even the Convention's flexible fixation requirement is subject to what is known as the national treatment standard. The national treatment standard states that works originating in a contracting state must be given the same protection in each of the other contracting states as those states give to works of their own nationals. For example, a work created in Canada (a Union member) must receive the same copyright protection in the US that US works receive, rather than simply carrying copyright protections provided by Canadian law with it to the US or other Union nations. Stated differently, the protection granted to a work must be independent of the existence of any protection in the country of origin of the work. This is known as the principle of "independence" of protection and is typically used to stand for the proposition that foreign authors are assimilated into the status of domestic authors in a particular forum. Protection also may not be conditioned on the completion of any formality, such as registration. This is the principle of "automatic protection."

The national treatment standard lessens only some of the concerns associated with uneven protections under the Convention because it does not require that all nations adopt the same fixation standard. UGC can be accessed by hundreds, thousands or millions of people at the same time in their respective locations, thus simultaneously subjecting that content to different national rules for elements like fixation.

---

26 Convention, Art 5(2) (cited in note 5).
27 Berne Convention Summary (cited in note 8).
28 Id.
29 William Patry, Choice of Law and International Copyright, 48 Am J Comp L 383, 404 (2000). Patry notes that this characterization is not entirely accurate because the Convention requires only that member states adhere to the "convention minima," meaning that the Convention provides a floor of minimum rights to which foreign authors are entitled regardless of the rights granted by the forum state. The purpose of this, Patry asserts, is to avoid a problem whereby a member nation grants no copyright protection to domestic authors and thus need not grant any for foreign authors in line with the "national treatment" standard.
30 Berne Convention Summary (cited in note 8).
B. Defining UGC

We are in the era of “Web 2.0.” While definitions of the term vary,31 most include websites “where the line between user and contributor is blurred or nonexistent.... It is the [I]nternet of blogs, of wikis, of user-generated reviews and information.”32 UGC is a major component of Web 2.0; sites that use UGC rely on “users to contribute content. Blogs, wikis, social-networking sites, and video-sharing sites (for example, YouTube) are among the most popular UGC technologies.”33 It is undisputed that the Internet presents difficulties in the fixation arena: “The subject of fixation arises in relatively few cases—typically in connection with computer technology, when the question is whether fixation in computer memory meets the statutory requirement.”34

C. Different Approaches to the Fixation Requirement

The fact that the Convention leaves to individual member nations the option to implement a fixation standard does not in itself mean that the standard would have any substantive effect on Internet content such as UGC.35 Fixation, in light of the national treatment standard, has the potential to have a greater impact on UGC than on older media because of worldwide access to UGC, which could simultaneously subject UGC to different national laws in contravention of the Convention’s goal to internationalize minimum copyright law standards.36 Additionally, although the Convention mentions fixation, it

---

31 See, for example, Brandon Brown, Forstifying the Safe Harbors: Reevaluating the DMCA in a Web 2.0 World, 23 Berkeley Tech L J 437, 441 (2008) (noting that “[s]ignificant confusion and discussion exists over the term ‘Web 2.0’ and its true meaning” and that some argue such a term should not even exist as it implies a distinction among websites that does not exist).
34 Laura A. Heymann, How to Write A Life: Some Thoughts on Fixation and the Copyright/Privacy Divide, 51 Wm & Mary L Rev 825, 829 (2009). See also Yoav Mazeh, Modifying Fixation: Why Fixed Works Need to Be Archived to Justify the Fixation Requirement, 8 Loyola L & Tech Ann 109, 111 (2009) (“Although there is a tendency to view the requirement for fixation as something technical, even procedural, this paper argues that the importance of the fixation requirement should not be underestimated. The requirement for fixation determines, to a certain extent, which works copyright protects.”).
35 Fixation standards do have an effect on whether other categories of works, such as live performances, are protected: “[D]ifferent rules regarding fixation may determine whether or not a country protects a specific work.” Paul Edward Geller, Conflicts of Laws in Copyright Cases: Infringement and Ownership Issues, 51 J Copyright Socy USA 315, 335 (2004).
36 Indeed, the Convention, for the most part, is reflective of that goal: “the Berne Convention [] requires that the copyright laws of the treaty signatories reflect certain common rights and
nowhere defines fixation or its component parts. This in itself is problematic because countries may, and do, have radically different understandings of what fixation requires. This underscores the importance of considering a uniform standard.

Determining whether a fixation standard would make a substantive difference in international copyright law as it relates to UGC requires figuring out whether, under any conception of fixation, UGC would not be considered fixed. That is, if UGC were always considered fixed, then it would be treated identically regardless of a Union nation’s copyright law. Provided that all other requirements were met, such as originality, it would receive copyright protection. An analysis of what fixation means is thus necessary to determine whether a uniform fixation requirement ought to be incorporated in the Convention.

The primary copyright law distinction among nations regarding fixation requirements is between countries with common law systems and those with civil law systems. Common law countries such as the US, the UK, and Canada have some sort of fixation requirement, while civil law countries, including most European and Asian nations, generally do not. Paul Goldstein suggests that both differences in proof and pleading requirements and civil law nations’ more relaxed view of copyright protection drive this distinction. US copyright law, with its large role in producing copyrighted material and its significant fixation requirement, drives the role of fixation’s potential impacts on UGC. It is thus worthy of significant analysis along with a brief consideration of those nations without any fixation requirement.

---

38 For example, the US requires that fixation be “by or under the authority of the author” while the UK makes the author’s agreement to fixation unnecessary. Id.
39 For the primary discussion of whether UGC if fixed, see Section III.B.
40 Much scholarship relating to UGC is indeed focused on whether such content meets originality requirements, particularly as set out in US copyright law. See, for example, Rebecca Haas, Comment, Twitter: New Challenges to Copyright Law in the Internet Age, 10 John Marshall Rev Intel Prop L 231, 241-44 (2010); Consuelo Reinberg, Are Tweets Copyright-Protected?, BP Council Notes (June 18, 2009), reprinted in WIPO Magazine 11 (Aug 2009), online at http://www.wipo.int/wipo_magazine/en/2009/04/article_0005.html (visited Nov 16, 2012).
41 See, for example, J.A.L. Sterling, World Copyright Law 4.11 at 198–201, 7.03 at 329–33 (Sweet & Maxwell 3d ed 2008).
42 See Goldstein, International Copyright at 196–97 (cited in note 37).
1. The US and other nations with a fixation requirement

Under US copyright law, works may gain protection only if they are "fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." Fixation also requires that a work's embodiment be "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." The copyright statute specifically provides for the development of technologies not anticipated at the time of the 1976 Copyright Act. US courts have nonetheless found the question of fixation a thorny one as it relates to the Internet and digital technologies, as exemplified by the leading cases on the issue, which are in conflict.

The exemplary case is MAI Systems Corp v Peak Computer, Inc. The case centered on whether the loading of computer software was a violation of the Copyright Act because it created a fixed copy made in random-access memory ("RAM"). The Ninth Circuit held that because the alleged copyright infringer in the case could view a system error log and diagnose the problem with a computer, the representation created in the RAM was sufficiently fixed because it could be perceived for a period of more than transitory duration. However, the Second Circuit held in a more recent case, Cartoon Network LP, LLLP v CSC Holdings, Inc., that data stored for no "more than a fleeting 1.2 seconds" during a buffering process in the operation of a DVR were not fixed because they were

---

43 US Copyright Act, 17 USC § 101 et seq.
44 Id at § 102.
45 Id at § 101.
46 The exact language in 17 USC § 102(a) is "now known or later developed." The US Congress updated copyright law to address developing technology in the Digital Millennium Copyright Act (DMCA), Pub L No 105-304, 112 Stat 2860 (1998), codified in various sections of Title 17. The DMCA primarily created "safe harbors" that limit the liability for copyright infringement of OSPs. The OSPs are protected from monetary liability for infringing material that is "transmitted over networks, cached on a server, linked to, or stored at the direction of a user." While these updates were aimed at incorporating technological advances, there were no changes made to the Copyright Act's fixation definition or requirement.
47 991 F2d 511 (9th Cir 1993).
48 RAM is known as volatile (as opposed to non-volatile) memory, meaning that it is lost when a computer's power is turned off. "RAM can be simply defined as a computer component in which data and computer programs can be temporarily recorded . . . . It is a property of RAM that when the computer is turned off, the copy of the programs recorded in RAM is lost." Apple Computer, Inc v Formula Intl Inc, 594 F Supp 617, 622 (CD Cal 1984).
49 MAI Systems, 991 F2d at 518.
50 536 F3d 121 (2d Cir 2008).
"embodied in the buffer for only a transitory period, thus failing the duration requirement" of the fixation definition.

The inconsistent holdings of these cases demonstrate that what the Copyright Office noted in 2001 remains true: "Courts have not attempted to formulate a general rule defining how long a reproduction must endure to be 'fixed,' deciding instead on a case-by-case basis whether the particular reproduction at issue sufficed." Moreover, these cases, which are the most instructive on the fixation question, only directly address RAM. Courts have not considered whether Tweets, for example, are copyrightable (though the RAM cases suggest that the duration of the storage of Tweets and the form in which they are stored would be important).

The Canadian Copyright Act also applies a fixation requirement to various works, such as computer programs and dramatic works. Moreover, while the statute does not define fixation, the courts have, thus ensuring that Canada maintains a fixation requirement. The leading case on fixation is Canadian Admiral Corp v Rediffusion, Inc, in which the Exchequer Court held that for "copyright to subsist in a work it must be expressed in some material form, capable of identification and having a more or less permanent endurance." This standard is apparently stricter than the US's definition, which states that fixation must be for more than "transitory duration" but does not go so far as to include the word permanent.

The UK's requirement stipulates that a literary, dramatic or musical work does not gain protection "unless and until it is recorded, in writing or otherwise." The UK's recodnation requirement is most similar to the US's

51 Id at 129–30 (internal quotation marks omitted).
52 The Cartoon Network case has rarely been cited in appellate court opinions since the decision was issued. It was characterized, along with MAI Systems, thusly in a 2004 decision finding that RAM copies were sufficiently fixed to constitute copyright infringement: Cartoon Network "interpret[ed] MAI Systems to hold only that 'loading a program into a computer's RAM can result in copying that program,' and not that, 'as a matter of law, loading a program into a form of RAM always results in copying.'" Quantum Systems Integrators, Inc v Sprint Nextel Corp, 338 Fed Appx 329, 336–37 (4th Cir 2009).
55 Copyright Act, RSC 1985, c C-42, § 2 (Can).
56 Gendreau, 159 Revue Internationale du Droit d'Auteur at 120–21 (cited in note 14).
58 Id at 394.
59 Copyright, Designs and Patents Act 1988, c 48, § 3(2) (UK). New Zealand uses identical language. Copyright Act 1994, § 15(1) (NZ). As a contrast, Israel, for example, provides protection for
The Berne Convention's Flexible Fixation Requirement

fixation requirement and UK courts have reached largely the same conclusions as US law about the fixation of Internet content and RAM.

The relevant language in Australian law refers to a work's "material form," which is defined as "any form (whether visible or not) of storage of the work or adaptation, or a substantial part of the work or adaptation, (whether or not the work or adaptation, or a substantial part of the work or adaptation, can be reproduced)." While the material form requirement is not explicitly stated as a requirement for copyright protection, the Copyright Act of 1968 states that protection subsists in works that are "made." The Act further defines the making of a work as the time it "was first reduced to writing or to some other material form." This results in Australian law having a fixation requirement akin to that of other common law nations.

2. Nations with no fixation requirement

As a general matter, nations with civil law systems do not maintain a fixation requirement for copyright protection. Ysolde Gendreau notes that it is difficult to abandon the idea of a fixation requirement because it has been so fundamental to the very concept of copyright due to the role of printing, which "implies a physical medium." Yet several nations have done so.

France, for example, initially imposed a fixation requirement for copyright, but later abandoned it. The French copyright code states: "[t]he provisions of this Code shall protect the rights of authors in all works of the mind, whatever

---


Gendreau, 159 Revue Internationale du Droit d'Auteur at 122 (cited in note 14) ("[I]t specifically addresses the question of fixation; its provisions are intended to apply to almost all works and are not based on any particular technology.").

Copyright Act 1968 (Commonwealth) § 10 (Australia).

Id.

Id at § 32: "(1) Subject to this Act, copyright subsists in an original literary, dramatic, musical or artistic work that is unpublished and of which the author: (a) was a qualified person at the time when the work was made; or (b) if the making of the work extended over a period—was a qualified person for a substantial part of that period."

Id at § 10.

Stuart Sinder, Jonathan Reichman, and James Rosini, eds, Getting the Deal Through: Copyright in 28 Jurisdictions Worldwide 4 (Law Business Research 5th ed 2010) (stating that copyright subsists only once the "original work has been reduced to a material form").


Gendreau, 159 Revue Internationale du Droit d'Auteur at 126 (cited in note 14).

Id.
their kind, form of expression, merit or purpose."\(^{69}\) In a telling example of the code’s operation, in 2007, two appellate courts in France held that perfumes (which would not be copyrightable under US law because they are not literary or dramatic) are copyrightable under French law.\(^{70}\) However, since France’s highest court had issued a contrary but non-precedential opinion a year earlier the issue remains undecided.\(^{71}\)

Japanese copyright law does not mention fixation, and it lists lectures (which, being spoken, are not necessarily fixed) in its list of works eligible for copyright.\(^{72}\) Other nations with no fixation requirement include Germany, Spain, Switzerland, and Russia (which protects oral works such as folklore).\(^{73}\) China protects oral works\(^{74}\) and a form of unfixed ritual dance and pantomime called *quyi*.\(^{75}\)

Finally, the Convention includes “lectures, addresses, sermons and other works of the same nature” in its definition of literary and artistic works.\(^{76}\) This is followed immediately by the flexible fixation provision, which begins, “It shall, however, be a matter for legislation in the countries of the Union to prescribe that works . . . shall not be protected unless they have been fixed in some material form.”\(^{77}\)

\(^{69}\) Code de la Propriété Intellectuelle (Intellectual Property Code), Art L112-1 (Fr): “Les dispositions du présent code protègent les droits des auteurs sur toutes les œuvres de l’esprit, quels qu’en soient . . . la forme d’expression.” The Code also notes in Art L111-2 that “[a] work shall be deemed to have been created, irrespective of any public disclosure, by the mere fact of realization of the author’s concept, even if incomplete.”


\(^{71}\) Nonetheless, for a narrow category of works, such as choreography, fixation is required. See Jean-Luc Piotrault, *An Authors’ Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared*, 24 Cardozo Arts & Enter LJ 549, 572 (2006).


\(^{74}\) Zhonghua Renmin Gongheguo Zhuzuoquanfa (Copyright Law of the People’s Republic of China), Art 3(2) Fagui Huibian (1990) (China). Oral works in general seem to be a special category. For a discussion, see Gendreau, 159 Revue Internationale du Droit d’Auteur at 130 (cited in note 14).


\(^{76}\) Convention, Art 2(1) (cited in note 5).

\(^{77}\) Id at Art 2(2) (cited in note 5) (emphasis added).
III. Fixation’s Potential Impact on Web 2.0 and User-Generated Content

A. The Desire to Copyright UGC

Although it appears that UGC such as Tweets and Facebook status updates could potentially meet a general fixation requirement, it remains an open question whether the effort needed to define and adopt a uniform international fixation standard for UGC would be well spent. Indeed, many people likely have no interest in protecting their UGC. But for those who do, there is merit to having a uniform system that governs fixation because of the instantaneous access to UGC all over the world.

Currently, most matters relating to alleged copyright infringement have to do with users posting links online to copyrighted content, or to content that infringes copyrighted content, and the concomitant issues of the user’s liability and the secondary liability of the OSP. But the copyrightability of Twitter-related content has been litigated, specifically as it relates to photos. In *Agence France Presse v Morel*, photographer Daniel Morel sued news agency Agence France Press (AFP) for, among other things, copyright infringement over its use of his photos of the January 2011 earthquake in Haiti. Morel had used the third-party application Twitpic to share his pictures. Morel then linked his Twitter page to his Twitpic page. The court denied AFP’s motion for a judgment declaring that it had not infringed upon Morel’s copyright. Following this case, it has been noted that the “next wave of litigation will focus on whether [T]weets are copyrightable.”

---

78 This Comment does not address originality, a major requirement for copyright protection in US and foreign law. Whether Tweets and Facebook posts, for example, meet this threshold, which has been established as very low, is one question. Whether anyone might seek copyright protection for these types of UGC is another. Nonetheless, assuming that some UGC can meet the originality standard, the fixation question remains relevant.

79 See Section IV.

80 See, for example, *Viacom International, Inc v YouTube, Inc*, 253 FRD 256 (SDNY 2008) (Viacom filing infringement suit over copyrighted content posted on video-sharing website YouTube).

81 However, the segment of UGC that is the focus of this Comment—content that does not exist outside the Internet framework such as Tweets, Facebook status updates and the like—has not been addressed in case law. The copyrightability of Tweets has not been litigated, yet the following case indicates the direction the discussion is going and its prominence.

82 769 F Supp 2d 295 (SDNY 2011).

83 Id at 308.

84 Rustad, et al, 12 J High Tech L at 140 (cited in note 54) (noting that the “Morel case signifies how the Internet is playing havoc with the principles of copyright law”).
And that very discussion has taken hold on the Internet. Mark Cuban, owner of the National Basketball Association team the Dallas Mavericks, mused on his blog in 2009 about whether his Tweets could be copyrighted, and there are several similar blog posts online dedicated to this question. Further evidence abounds that the sites that rely on UGC increasingly have to confront the question of copyrightability. Both Facebook and Twitter state in their terms of use that users retain the rights to or own all content submitted and Facebook recently increased the number of characters that can be transmitted in each status update to more than 60,000, noting that with the new limit a typical-length novel could be shared in about nine posts.

Consequential decisions about the copyrightability of UGC such as Tweets and Facebook status updates are in the offing, and the fixation standard is implicated in this high-stakes discussion because it will determine what is protected. Along with it is the corollary question of whether a uniform international standard would resolve troublesome uneven treatment of UGC.

B. Is UGC Fixed?

Even if much content on the Internet can be deemed fixed because of its temporary storage in RAM, for UGC, and indeed many other types of online content, there remains “no bright line rule for the application of the ‘fixed’ copyright requirement to technology and [I]nternet activity.” Fixation may seem largely a formality, even among those nations that devote space in their

85 See generally Reinberg, Are Tweets Copyright-Protected? (cited in note 40).
86 Mark Cuban, Are Tweets Copyrighted?, Blog Maverick (Mar 29, 2009), online at http://blogmaverick.com/2009/03/29/are-tweets-copyrighted/ (visited Oct 11, 2012). Cuban’s question was related to whether a television station’s use of his Tweet was an infringement or fair use, but the fundamental inquiry was about copyrightability.
90 See Geller, 51 J Copyright Socy USA at 335 (cited in note 35).
91 Haas, 10 J Marshall Rev Intel Prop L at 240 (cited in note 40) (referring specifically to US copyright law). See also Melissa A. Bogden, Comment, Fixing Fixation: The RAM Copy Doctrine, 43 Ariz St L J 181, 189 (2011) (“Particularly, Congress had precious little to say about how the fixation requirement would apply to a new technology that scholars extol as having a ‘more profound effect upon copyright, upon the creative process, or for that matter upon our lives’—the computer.”).
The Berne Convention’s Flexible Fixation Requirement

laws to defining the term, but the varying standards among nations show that even where a fixation requirement exists, it is not completely uniform.  

Under US law as already examined and as considered in *Cartoon Network*, there are two requirements for fixation: embodiment and duration.  

The former requirement means the work must be in a medium “such that it can be perceived, reproduced, etc., from that medium.”  

The latter requirement means that the work must remain “thus embodied for a ‘period of more than transitory duration.’”  

UGC, like Tweets, posts on Facebook and posts on blogs, will often meet these requirements. They can be perceived and reproduced from a medium, namely a computer or servers. They also are likely available for more than a transitory duration. Tweets, it has been noted, “update constantly, but do not automatically delete, nor do they overwrite each other when a new Tweet is posted. Tweets that are not on the immediate screen are archived and retrievable.”  

Similar circumstances exist with respect to Facebook postings and blogs.

If such UGC is fixed, then letting signatory nations establish their own fixation requirements may not be of particular import. In such a case UGC will be treated the same in a nation with a stringent fixation requirement as it will be in a nation with no fixation requirement at all. However, UGC is incredibly fluid. It can be posted, edited and deleted rapidly. This is in fact part of the lure of UGC—the ability to post in an instant, just as quickly rethink the decision, and delete.

There are indications that Internet content is simply not fixed in the same way as a tangible object such as a book or piece of art. One of these is certainly intuitive. One can hold a book in his or her hand, but one cannot do the same with words on a computer screen—they are intangible—even if one can hold the computer used to create the words.

The World Intellectual Property Organization Copyright Treaty (WCT) also notes that online content is different from other content. With regard to the

---

92 See Section II.C.2.
94 *Cartoon Network*, 536 F3d at 127.
95 Id.
96 Haas, 10 John Marshall Rev Intel Prop L at 245–47 (cited in note 40). Note, however, that Twitter only allows users to retrieve their 3,200 most recent Tweets: “The good news is they’re not lost or gone! We have all your Tweets. The bad news is that we currently only allow you to see the 3200 most recent Tweets.” There is no method mentioned for how to retrieve older Tweets if desired. *Twitter Frequently Asked Questions*, Twitter (2012), online at http://support.twitter.com/entries/13920-frequently-asked-questions (visited Oct 11, 2012).
97 See Section IV for a discussion of fixing Internet content in a readable hard copy.
rights of distribution and rental that are enjoyed by copyright owners "[a]s used
in these Articles, the expressions 'copies' and 'original and copies' . . . refer
exclusively to fixed copies that can be put into circulation as tangible objects."98

The purpose of the tangibility requirement is to "ensure that transient
reproductions, such as those automatically generated by computers in Random
Access Memory (RAM) modules, are not swept under the ambit of these
provisions."99 WCT thus recognizes that fixation of online content poses distinct
and difficult questions.100

There also has been suggestion that copyright law needs to be altered in
light of recent advances in digital technology. These include the idea, from
Jessica Litman, that the Internet could become a "copyright-free zone."101 Such a
radical move would be a de facto push toward a stricter and more firmly
established definition of fixation because Internet content, which is different in
form and character from other content, would be excluded from protection.
UGC thus would not be eligible for copyright protection under a copyright-free
regime.

Others, such as Yoav Mazeh, have suggested that the fixation requirement
as espoused in American and British law is not complete because it does not
require a work to be fixed for the long term. That is, "[t]here is no requirement
that this fixed copy actually be kept for future reference. . . . Once the fixation
had been made for the required period, the work is protected by copyright,
whether the fixed copy of the work is kept or destroyed."102 The long-term
fixation question applies to much online content, including RAM, the very
element that courts have focused on in addressing fixation. Long-term storage
may not happen with RAM, since when a computer is turned off, RAM is lost.103
Mazeh elaborates that justifications can be advanced to alter the fixation
requirement to mandate that a fixed copy be kept, or archived, for copyright

98 WCT, 2186 UN Treaty Ser, Agreed statement concerning Arts 6 and 7 (cited in note 16).
100 Otherwise stated, the tangibility requirement stated with reference to the rights of distribution and
rental "reflects the view of certain states that transmitting information over the Internet is a
service and not a good . . . . Thus, the right of distribution will not apply to the Internet." Trevor
Cox, Information and the Internet: Understanding the Emerging Legal Framework for Contract and Copynght
Bright, The Current State of BitTorrent in International Law: Why Copyright Law Is Ineffecive and What
Needs to Change, 17 New Eng J Intl & Comp L 265, 284 (noting that the WCT provisions cover
only "hard copies").
102 Mazeh, 8 Loyola L & Tech Ann at 127 (cited in note 34).
103 For a definition of RAM see note 48.
The Berne Convention's Flexible Fixation Requirement

protection to adhere. Additionally, Mazeh has suggested that besides strengthening the fixation requirement to require that the fixed work be maintained, the work also must be "made broadly available." That is, a fixation accessible only by the author does not fulfill the purposes that fixation is meant to achieve.

These varying proposals for fixation, ranging from making fixation irrelevant by turning the Internet into a copyright-free zone, to allowing fixation but making the requirements stricter, demonstrate that the question of fixation is far from settled with regard to much content, not the least of which is online content such as UGC. Despite two leading US cases that attempt to define the bounds of fixation, copies, and digital technology, "this central dilemma remains unresolved." It may be true that much of what appears on the Internet is stored, even after a user hits "delete." For example, the Library of Congress announced that it would acquire and permanently store the entire archive of public Twitter posts since 2006. Yet it also is true that some content can be deleted at some point. For example, the Facebook policy states that "When you delete IP [intellectual property] content, it is deleted in a manner similar to emptying the recycle bin on a computer. However, you understand that removed content may persist in backup copies for a reasonable period of time (but will not be available to others)." This indicates that this content will eventually be permanently deleted after a so-called "reasonable period."

Finally, it has been proposed that online content be given expiration dates, set by the user in some cases, so that it will not linger on the Internet. That content, under a fixation definition that requires archiving as proposed by some, would not be fixed, and therefore not protected, in a country that adopts that fixation definition, while the content would be protected in a country that has no fixation requirement at all.

104 Mazeh, 8 Loyola L & Tech Ann at 138 (cited in note 34).
105 Id.
106 For a discussion of fixation's purposes, see Section IV.A.
107 Aaron Perzanowski, Fixing RAM Copies, 104 Nw U L Rev 1067, 1068 (2010) (noting that the Cartoon Network decision "promises not only to reignite the longstanding controversy over the RAM copy doctrine, but also to refocus a debate that has ossified over the past two decades").
109 Id.
110 Facebook Statement of Rights and Responsibilities at § 2.2 (cited in note 25).
111 Rosen, End of Forgetting, NY Times Mag at MM30 (cited in note 108).
IV. NEED FOR A UNIFORM STANDARD

In a case where UGC may not be deemed fixed, either now or in the future, protection for works that can be seen all over the world will subsist unevenly. Most UGC content would presumably get protection in France, which has no fixation requirement, but that same content would not get protection in a country where UGC is not considered fixed. Yet, in both locations that content could be viewed on the Internet. While a superficial analysis would say this is no different than a book, copies of which can be read in countries with differing copyright laws, the difference between a book and UGC in this scenario is significant. The book would get protection everywhere, with differences coming only in the extent of protection and its duration, while the demarcation for UGC would be between protection and no protection, a decidedly more severe consequence of not having a uniform fixation standard. The most efficient way of solving this problem would be by altering the Convention’s flexible fixation requirement, which currently is not one of the treaty’s minimum protection or floor requirements.

The fact that UGC could potentially get varying protection in different nations that are parties to the Convention works against the purpose of the Convention, which is to internationalize the law governing copyright. There are multiple reasons behind that goal. First, ensuring a secure environment for the creation and distribution of copyrighted works requires the cooperation of multiple nations.

Second, the international nature of communication also diminishes “the ability of a single nation-state to implement autonomous cultural and information policies.”

Differences in national law governing copyright impose costs on those who produce copyrighted works because they must accommodate different national requirements to gain protection. These costs may be passed on to users of copyrighted content. For example, registration has been required in some nations to gain copyright protection, but with an eye toward removing that

---

112 The Convention rule governing duration is known as the “rule of the shorter term.” It states that “the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work.” Convention, Art 7(8) (cited in note 5).

113 See Beck and Scott, 17 J Intel Prop L at 6 (cited in note 36).


115 Id.

116 Id.

117 Id.
The Berne Convention's Flexible Fixation Requirement

burden, the Convention, Article 5, states that “the enjoyment and the exercise of these rights shall not be subject to any formality.”

Because it is a “continuing challenge for copyright law to keep pace with the technology that assists in the production, distribution, and use of the works whose creation it encourages,” creating a uniform fixation standard makes sense because it will, at least initially, cover current technology and it can be updated in the future to reflect ongoing advances without nations having to make individual alterations in how they treat copyrighted content from other Union nations.

A. The Evidentiary Purpose of Fixation

The need for feasible enforcement of copyright protection gives support to the idea that there should be a uniform fixation standard for UGC that requires longer-term storage. Aaron Perzanowski notes that fixation serves an evidentiary purpose:

By requiring that protectable works be committed to a tangible and enduring form, copyright avoids problems of proof that would otherwise stymie enforcement efforts. Fixation clarifies questions of authorship and ownership, and it defines the bounds of the copyright grant through reference to a stable instantiation that can be compared to alleged infringements. If unfixed works could be protected, “copyright law would forever be mired in disputes over the definition and boundaries of the works claiming copyright protection.” . . . Embodiments that typically survive for only a few minutes or a few hours appear unlikely to qualify as fixed when measured against the underlying purposes of the fixation requirement. Such short-lived media will not generally provide reliable evidence of the bounds of copyrighted expression, nor will they enable dissemination and preservation of the author's contribution to public discourse.

Though UGC under some conceptions may appear to meet fixation requirements, it nonetheless often will not fulfill an evidentiary purpose because it will either be inaccessible, as in the case of old Tweets (and thus also in violation of the proposal that content be widely available to be considered fixed), or in some cases edited, overwritten, or erased. This evidentiary

118 Convention, Art 5 (cited in note 5).  
119 Dinwoodie, 149 U Pa L Rev at 484 (cited in note 9).  
121 See note 96.  
122 See Section III.B.
function of fixation\textsuperscript{123}—closely related to the idea of broad availability—sharpens the obvious policy question presented. Namely, should the fixation standard be liberal and thus encompass a great deal of UGC, resulting in broad copyright protection, or should it be strengthened to narrow that which is considered fixed and therefore protected?\textsuperscript{124} While there is merit to protecting original UGC, for it to have value it needs to be fixed long enough that it can serve as evidence of ownership during disputes over alleged infringement.

B. Proposed Standard: A Depositary Requirement

It is thus in the best interest of authors and Convention members alike that there be a uniform standard that both meets the evidentiary purposes of fixation and ensures that UGC is treated evenly based on its unique qualities of worldwide availability, ease of copying, and its public-goods aspects.\textsuperscript{125} A fixation standard to replace the flexible rule currently in the Convention would need to be workable enough to apply to online content while also leaving room for future technological advances.

While one possible proposal would have the Convention’s fixation standard look a lot like the US standard, that is problematic, particularly given the lack of clarity surrounding the US standard’s “transitory duration” language that has given courts and scholars so much trouble.\textsuperscript{126} There are three possible formulations for a fixation standard that attempt to respond to this difficulty.

The first standard would specify, in the Convention itself, a minimum amount of time for fixation, for example a week or a month. If that time period were met, the UGC would be considered fixed and thus protected. This does not alleviate several challenges with fixation, however. The first is a proof problem, specifically, how one would prove the time of inception of his or her UGC. The second problem harkens back to the evidentiary standard and the

\textsuperscript{123} Mazeh suggests additional justifications for fixation, including the author’s subjective perception of the work, the certainty of third parties and the enrichment of society. Mazeh, 8 Loyola L & Tech Ann at 140 (cited in note 34).

\textsuperscript{124} The Internet as a copyright-free zone, discussed by Litman, would deny copyright protection to most online content: “Why would a copyright exemption promote development? . . . [B]y freeing content providers from well-established rules and customary practices, a copyright shelter allows new players to enter the game.” The criticism of this method is that it reduces the incentive for people to create and share works online because they will get no protection for them and others can free ride on their creations. And, as Litman notes, “Nobody seems to be making that sort of proposal these days.” Litman, Digital Copyright at 174–75 (cited in note 101).


\textsuperscript{126} See Sections II.C.1 and III.B.
idea that something would receive copyright protection even if it were no longer accessible by others.

A second possibility would grow out of Mazeh’s suggestion that the depositary requirement of the US be changed so that any work requiring fixation must also be deposited with the US Library of Congress. Altering this for the international scope of the Convention would require the implementation of an international depositary, under the auspices of the Union, to take copies of online content or UGC in particular and to maintain these records. But an international depositary requirement would clearly be unworkable for several reasons, foremost among them that the administrative challenges of creating and maintaining the depositary would be too onerous.

The final possibility builds off of what has been suggested by Mazeh but on an international, yet individual, scale. The fixation standard would require a permanent copy be maintained in the respective depositaries of the Union members. These depositaries already exist because nations maintain their own copyright offices. Mazeh argues that it is surprising that under current law “there is no requirement for maintaining the fixed work. . . . According to current law, an author who has not fixed his work is not protected by copyright, whereas an author who has fixed his work and immediately afterwards destroyed the fixed copy is protected.” Thus, Mazeh concludes, the requirement of fixation is justified only if a further requirement is made that the fixed copy of the work be maintained.

Indeed, Mazeh is not the only author to suggest that deposits of copyrighted works may serve a useful purpose, particularly in the digital age. Mazeh’s work is part of the movement to “reformalize copyright” by making it an opt-in system. The Copyright Principles Project suggests:

If deposit continues to serve important public purposes—and we think it may—then implementing changes to the law that will induce greater compliance with this requirement needs to be given serious consideration. Also, serious thought should be given to updating and modifying deposit requirements to accommodate the digital age and deposits of works that were “born digital.”

This third option would use the existing infrastructure to avoid the almost certain failure that would come from administrative obstacles arising in

---

127 Mazeh, 8 Loyola L & Tech Ann at 140 (cited in note 34).
128 Id at 132. Mazeh suggests that this depositary requirement come into play whenever a work requires fixation to be protected under copyright. This Comment suggests this requirement should apply only to UGC because of its unique intangible and transient nature.
attempting to create and operate an international depositary. The potential success of such a standard lies in the fact that adherence is in the hands of online UGC creators. It gives those who wish to gain protection the keys and helps ensure that only work worthy of protection actually receives it because the creators themselves will have to opt in by putting in the effort to meet the fixation requirement by depositing a copy. Even those nations that currently have no fixation requirement have offices related to their intellectual property enforcement structures and could add this depositary function.

One objection to such a proposal could be that the depositary requirement creates a formality, something prohibited by the Convention. But in light of the demonstrated importance of the fixation requirement on whether a work is protected, implementing a depositary requirement for a copyright element that has such important consequences could hardly be called formalistic. Moreover, this obstacle in maintaining compliance with the Convention has been recognized but “nevertheless does not affect the analysis and the need to rethink allocations of right under copyright law.” The requirement, furthermore, would apply strictly but exclusively to UGC because of its unique, yet increasingly important, status. A depositary requirement for more traditional forms of media is unnecessary and superfluous, but UGC is unusual because attribution for original works on the Internet is easily lost.

The proposed depositary requirement also could be attacked from both sides of the policy debate surrounding the purposes of copyright. On one hand,
explicitly providing copyright protection for UGC may narrow the available expressions authors can use by taking them out of the public domain. On the other hand, requiring a deposit of UGC means not all content will be protected, thus potentially disincentivizing future creation if protection does not adhere automatically. As imagined, the depositary requirement would seek to strike a middle ground by providing a cautionary mechanism that would sift UGC worthy of protection from the rest by requiring authors themselves to invest the effort and time required to deposit a copy. It also would leave much UGC unprotected so that the Internet, while not a copyright-free zone, would continue to be a marketplace of ideas alive with intellectual exchange.

Therefore, the best option for a fixation standard would be to require that the creator of the online work deposit with his or her respective copyright office a permanent fixed record of his or her creation. This solution is fairly simple to administer, puts only a small burden on authors, and is workable in an international setting.

V. Conclusion

The Convention's flexible fixation requirement is problematic for the enforcement of copyright protection on an international scale, particularly when it comes to online UGC. UGC may be fixed under many countries' standards, but because of its fluidity and the uncertainty of domestic laws on the subject, it also may not meet the standards of fixation. In these cases, that content will get uneven protection internationally, even though it can be accessed on a worldwide scale and simultaneously in different nations. This problem can be resolved by requiring creators of online UGC who desire protection to deposit a permanent copy of their works with national copyright or intellectual property offices.

Richard A. Epstein has characterized the move in US law from requiring formalities before the 1976 Act to eliminating them as "[by degrees . . . flip[ping] over from a system that protected only rights that were claimed to one that vests all rights, whether claimed or not." Richard A. Epstein, The Dubious Constitutionality of the Copyright Term Extension Act, 36 Loyola LA L Rev 123, 124 (2002). Instituting a uniform fixation requirement, whether called a formality or something else, would ensure that unclaimed rights to UGC are not vested in cases where the content either does not merit protection or no protection is desired.