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SILENCING JORGE LUIS BORGES: THE WRONGFUL SUPPRESSION OF THE DI GIOVANNI TRANSLATIONS

Wes Henricksen*

Because Jorge Luis Borges is one of the most important writers in the history of Spanish language literature, his stories, poems, and essays have been translated into English by numerous translators. However, only one translator, Norman Thomas di Giovanni, worked side by side with Borges for years in Buenos Aires to craft translations with the author's active collaboration. This makes the di Giovanni translations unique. These translations, which were jointly copyrighted in both men's names under the Copyright Act of 1909, are considered by some to be the author's most authentic voice in English. Nevertheless, because Borges split the royalties generated by these translations fifty-fifty with di Giovanni, the financial arrangement drew the ire of Borges's estate and publisher. After Borges died, his estate and publisher commissioned new translations of all his works, forced the di Giovanni translations out of print, and quashed every effort by di Giovanni to republish or reprint his translations. The di Giovanni translations are now disappearing—they are out of print and have become difficult to find and, in some cases, exorbitantly expensive. This suppression of Borges's voice in English is offensive from an artistic and ethical standpoint. This Article argues it was also illegal. Under the Copyright Act of 1909, this Article concludes that the suppression of di Giovanni's translations violated his rights as a joint author.

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INTRODUCTION

During his life, Jorge Luis Borges lost his eyesight.¹ Now, more than 30 years after the writer's death, he is losing his voice—through the suppression of a great number of his works translated into English.²

The translation of Borges's works into English marked an important milestone as the writer's international reputation grew during the 1960s.³ Several translators translated his poems, essays, and stories.⁴ However, only one translator, Norman Thomas di Giovanni, undertook this task by meeting with Borges daily over a period of five years, translating each word and phrase to Borges's own liking.⁵ Borges worked alongside di Giovanni and,

1. Borges went blind in 1955, after his eyesight had been failing for years. See Seamus Heaney & Richard Kearney, *Borges and the World of Fiction: An Interview with Jorge Luis Borges*, 6 CRANE BAG 71, 73 (1982). This resulted from a congenital ocular defect that ran in his family. See JORGE LUIS BORGES, BORGES AT EIGHTY 34 (Willis Barnstone ed., New Directions 2013) (1982).

2. The Norman Thomas di Giovanni translations of Borges's works have been forced out of print and effectively suppressed, muting what is widely viewed as the author's most authentic voice in English. See *infra* Part I.

3. When he won the Formentor Prize in 1961, at age 62, Borges was, in his own words, "practically invisible—not only abroad but at home in Buenos Aires." V.S. Naipaul, *Comprehending Borges*, N.Y. REV. BOOKS (Oct. 19, 1972), <https://www.nybooks.com/articles/1972/10/19/comprehending-borges>. However, his reputation grew rapidly in the 1960s. By 1970, he had published stories and an autobiographical essay in the *New Yorker*. See, e.g., Jorge Luis Borges, *Jorge Luis Borges's Autobiographical Notes*, NEW YORKER (Sept. 11, 1970), <https://www.newyorker.com/magazine/1970/09/19/jorge-luis-borges-profile-autobiographical-notes> (translated by Norman Thomas di Giovanni). His newfound fame in the 1960s was due in no small part to his books being translated into English during that decade, beginning with *Ficciones* and *Labyrinths* in 1962. See JORGE LUIS BORGES, FICCIONES (Anthony Kerrigan ed., Emecé Editores, S. A., trans., Grove Press 5th prtg. 1962) (1956); JORGE LUIS BORGES, LABYRINTHS (Donald A. Yates & James E. Irby eds., 19th prtg. 1964); see also Adriana S. Pagano, *Jorge Luis Borges 1899–1986*, in 1 ENCYCLOPEDIA OF LITERARY TRANSLATION INTO ENGLISH 175, 176 (Olive Classe ed., 2000).

4. See Michael Marcus, *Dear Mr. Borges, Which Translation Should I Read?*, MEDIUM (Jan. 6, 2019), <https://medium.com/@michael.marcus/dear-mr-borges-which-translation-should-i-read-c132acf994ac> (comparing four different translators' approaches to one Borges story, *The Circular Ruins*).

5. See, e.g., JORGE LUIS BORGES, THE ALEPH AND OTHER STORIES 1933–1969, at 9 (Norman Thomas di Giovanni ed. & trans., E.P. Dutton 1970) [hereinafter BORGES, THE ALEPH]. In his autobiographical essay in the book, Borges states: "My afternoons are now usually given over to a long-range and cherished project: for nearly the past three years, I have been lucky to have my own translator at my side, and together we are bringing out some ten or twelve volumes of my work in English, a language I am unworthy to handle . . ." *Id.* at 258; NORMAN THOMAS DI GIOVANNI, THE LESSON OF THE MASTER: ON BORGES AND HIS WORK 169 (2003) [hereinafter DI GIOVANNI, THE LESSON OF THE MASTER] ("In the end, I was to see eleven of Borges's books into print in English . . ."). Also of note, the cover and title page of *The Aleph* reads: "Edited and translated by Norman Thomas di Giovanni in collaboration with the author." See BORGES, THE ALEPH, *supra*. Similarly, the cover and title page of *The Book of Imaginary Beings* reads "[r]evised, enlarged, and translated by Norman Thomas di Giovanni in collaboration with the author." JORGE LUIS BORGES & MARGARITA GUERRERO, THE BOOK OF IMAGINARY BEINGS (Norman Thomas di Giovanni & Jorge Luis Borges trans., Penguin Books 1974) (1970) [hereinafter BORGES & GUERRERO, THE BOOK OF IMAGINARY BEINGS].

together, translated 11 of his books into English.⁶ Borges stated on numerous occasions that the translations the two created together were superior to his Spanish-language originals.⁷ Superior or not, the di Giovanni translations are the only ones Borges personally involved himself in creating.⁸

This unusual collaboration between author and translator was also memorialized in their contract. Borges and di Giovanni split the royalties to the works they created fifty-fifty.⁹ This generous arrangement, though approved by Borges during his life, was not acceptable to the Borges Estate

6. BORGES, *THE ALEPH*, *supra* note 5, at 258; *see also* DI GIOVANNI, *THE LESSON OF THE MASTER*, *supra* note 5, at 49–50 (stating di Giovanni had translated “ten or so” of Borges’s books into English); *see also* Razu Alauddin, *The Unjust Fate of Borges’s Best Translator*, *DHAKA TRIB.* (Apr. 25, 2017), <https://www.dhakatribune.com/magazine/arts-and-letters/18056/the-unjust-fate-of-borges%E2%80%99s-best-translator> (“Norman lived in Buenos Aires with Borges for more than five years and within this time they together translated more than twelve books.”); Marcus, *supra* note 4 (“When preparing to return to Buenos Aires, he invited Di Giovanni to join him. Di Giovanni arrived half a year later and stayed for three years. All the while, he and Borges worked closely on new translations of his fiction to English.”); *see also* Norman Thomas di Giovanni, *The Borges Papers* [hereinafter *Borges Papers*], <http://www.digiovanni.co.uk/borges.htm> [<https://perma.cc/S5NG-J2MS>] (last visited Sept. 13, 2023 1:11AM); ILAN STAVANS & VERÓNICA ALBIN, *KNOWLEDGE AND CENSORSHIP* 152 (2008) (“In order to bring out Borges’s work in English (he signed a multi-book contract with the publisher E.P. Dutton for Borges’s stories, poems, and essays), the agreement was that Di Giovanni would move to Buenos Aires.”).

7. *See, e.g.*, José Luis A. Femosel, *Jorge Luis Borges recoge en México el Premio Xollin Yolliztli un día después de su 82 cumpleaños*, *EL PAÍS* (Aug. 24, 1981), https://elpais.com/diario/1981/08/25/cultura/367538404_850215.html (quoting Borges in an interview stating, “[e]stoy seguro de que las traducciones de mis obras que hizo Norman Thomas di Giovanni son mejores que el original,” which translates to “I am certain that the translations by Norman Thomas di Giovanni are better than the originals”); DI GIOVANNI, *THE LESSON OF THE MASTER*, *supra* note 5, at 27 (“We finished the *Imaginary Beings* on 20 May 1969; [Borges] was so delighted with the result that any future translation of the book, he insisted, must be based on our English version.”).

8. DI GIOVANNI, *THE LESSON OF THE MASTER*, *supra* note 5, at 164. Di Giovanni stated:

One day I heard [Rita Guibert, a frequent visitor at Borges’s flat at the time] ask him whether he had ever worked with any of his other translators the way he was working with me. No, never, he said. . . . The several editors and translators involved in every one of those first five books of Borges’s had, at one time or another, been in contact with him, but none had ever consulted him about his or her translation.

Id.

9. *See* NORMAN THOMAS DI GIOVANNI, *GEORGIE & ELSA: JORGE LUIS BORGES AND HIS WIFE, THE UNTOLD STORY* 73 (2014) [hereinafter *DI GIOVANNI, GEORGIE & ELSA*]. Di Giovanni recalled:

[The New Yorker magazine] offered and explained their generous contract, we accepted, and when they asked how the money should be split between us Borges lost not a beat in declaring fifty-fifty. When he and I had started out he’d asked about my money arrangement with [another author]. When I said half and half Borges’s response stunned me. “Is that enough for you?” he said. “Perhaps you should take more.”

Id.

after his passing.¹⁰ In 1998, the administrator of the Borges Estate negotiated a lucrative new English-language deal, selling the English-translation rights to Borges's complete Spanish works.¹¹ These new "official" translations rendered the work by Borges and di Giovanni redundant and unpublishable.¹² The di Giovanni translations soon went out of print, and are today ever more difficult to acquire.¹³ Indeed, their scarcity has now rendered them among the most pirated works of art in the world.¹⁴

As a result, the only English versions of Borges's poems, stories, and essays that he participated in creating, and of which he vocally approved, have been purposefully condemned to the dustbin.¹⁵ This suppression of the Borges-di Giovanni works (BDG Works)¹⁶ is offensive from an artistic and ethical standpoint, a fact lamented by numerous fans and critics.¹⁷ The purpose of this Article, however, is to explore whether this suppression might also have violated di Giovanni's copyright in the BDG Works.¹⁸

10. See Richard Flanagan, *Writing with Borges*, AGE (July 12, 2003), <https://www.theage.com.au/national/writing-with-borges-20030712-gdw1a9.html> ("Bizarrely, in the name of Borges, [Maria Kodama's deal with the publisher to make the di Giovanni translations go out of print] was condemning to obscurity those very works Borges had co-authored in English.").

11. *Id.*

12. *Id.*

13. Stephen Witt, *9 Rare Works of Art Internet Pirates Are Obsessed With*, BUZZFEED (June 10, 2015), <https://www.buzzfeed.com/stephenwitt/9-rare-works-of-art-internet-pirates-are-obsessed-with>; see also Scott Pack, *Norman Thomas di Giovanni Obituary*, GUARDIAN (Mar. 14, 2017), <https://www.theguardian.com/books/2017/mar/14/norman-thomas-di-giovanni-obituary> ("His translations, the ones Borges himself rated so highly, were allowed to fall out of print and are now collectors' items.").

14. Witt, *supra* note 13.

15. *Borges Papers*, *supra* note 6.

16. As used in this Article, the term "BDG Works" refers to all works jointly created by Borges and di Giovanni, such as those copyrighted in both authors' names. See *infra* note 135.

17. See, e.g., Bill Richardson, *Deictic Features and the Translator*, in THE PRAGMATICS OF TRANSLATION 140 (Leo Hickey ed. 1998) (calling the di Giovanni translations of Borges "superior," and noting this is "not surprising . . . given that Borges himself collaborated with N. T. di Giovanni on the work"); Murti Bing, Comment to *Norman Thomas Di Giovanni vs. Andrew Hurley*, FICTIONAL WOODS (Aug. 23, 2009), <https://www.tapatalk.com/groups/thefictionalwoods/norman-thomas-di-giovanni-vs-andrew-hurley-t1601.html> (commenting that "Di Giovanni is widely acknowledged to be the superior translator of Borges" and adding that "I certainly like him better" and that di Giovanni "worked very closely with Borges for a long time"); Jonathan Basile, *Translating Babel*, 7 INVENTORY 153, 155 (2017) [hereinafter Basile, *Translating Babel*] (opining "that di Giovanni's translations should [not] have been allowed to go out of print"). Not all agree with this assessment, of course. Other Borges translators have fans, as well. One critic, for instance, called Andrew Hurley's translations in JORGE LUIS BORGES, COLLECTED FICTIONS (Andrew Hurley trans., Viking 1998) "an unparalleled treasury of marvels." Melvin Jules Bukiet, *In the Beginnings . . .*, CHI. TRIB. (Sept. 13, 1998), <https://www.chicagotribune.com/news/ct-xpm-1998-09-13-9809130255-story.html>.

18. In addition to a possible violation of di Giovanni's rights as holder of a joint copyright in the BDG Works, the Estate's and the publisher's actions may have been a breach of the contractual agreement between di Giovanni and Borges, under which the author and the translator each received 50 percent of

Borges and di Giovanni each held a joint copyright in the BDG Works.¹⁹ This Article will analyze and attempt to answer the question of whether the Borges Estate's and the publisher's actions violated di Giovanni's rights as a joint author.

Part I will explain how and why this suppression occurred and who carried it out. I have attempted to access all publicly available information, and I have interviewed and corresponded with individuals involved, including supporters and detractors of the BDG Works, as well as the Borges Estate and di Giovanni and his family. However, this analysis must be considered with a caveat: it is based on only the information I was able to find, and there may be additional facts that, if known, might alter the outcome. Part II will then discuss the legal ramifications of the suppression of the BDG Works under United States copyright law. By applying the law to the facts available, this Article concludes the suppression of the BDG Works violated di Giovanni's rights as a joint author.

I. WHY THE DI GIOVANNI TRANSLATIONS ARE IMPORTANT, AND HOW THEY HAVE BEEN SUPPRESSED

A. *Why Borges Matters*

“Reading the work of Jorge Luis Borges for the first time is like discovering a new letter in the alphabet, or a new note in the musical scale,” according to author and literary critic Jane Ciabattari.²⁰ She is far from alone in this assessment. Indeed, Borges, whose poems, short stories, essays, and

the royalties generated from the joint works. DI GIOVANNI, GEORGIE & ELSA, *supra* note 9, at 73. However, despite diligent efforts to acquire a copy of this contract, including correspondence with Mr. di Giovanni, his publisher, and his sons, I have not succeeded. Accordingly, no meaningful analysis can be made of this important legal question.

19. Huw Nesbitt, *Jorge Luis Borges's Lost Translations*, GUARDIAN (Feb. 19, 2010), <https://www.theguardian.com/books/booksblog/2010/feb/19/jorge-luis-borges-di-giovanni> (quoting di Giovanni stating, “[i]t’s copyrighted in Borges’s and my name because they’re not just translations—it’s stuff we wrote together in English”). See also sources cited *infra* note 135, for a discussion of three Borges books in English that have been copyrighted jointly in di Giovanni’s name.

20. Jane Ciabattari, *Is Borges the 20th Century’s Most Important Writer?*, BBC (Sept. 1, 2014), <http://www.bbc.com/culture/story/20140902-the-20th-century-s-best-writer>.

screenplays have been compiled into at least 77 books as of 2020,²¹ is widely considered one of the most important writers of the 20th century.²²

Praise of Borges abounds.²³ It is rare to find a discussion of Borges where he is *not* lauded as a literary genius or hero, or where no reference is made to the pedestal he occupies within the Western literary canon. At the same time, outside of Latin America, most who have not studied Hispanic literature have no idea who Borges is. His name and reputation mean little, if anything, to the general public. This is particularly true today, in a digital age when even a moderately successful Instagrammer's or YouTuber's fanbase dwarfs that of Borges's.²⁴ If measured by name recognition among the general public, then Borges ranks low on the scale of importance in the modern world.

This makes Borges a contradictory figure. He is, on one hand, celebrated by readers, authors, academics, and philosophers as one of the greatest

21. A review of Jorge Luis Borges's bibliography as listed in the Library of Congress, Wikipedia, and GoodReads, includes 77 books that contain exclusively the work of Jorge Luis Borges. See LIBR. OF CONG., <https://www.loc.gov/item/n79007035/jorge-luis-borges-argentina-1899-1986/> (click on "Jorge Luis Borges" under "Selected Works at the Library of Congress" at the bottom of the page) (last visited Dec. 15, 2023); *Jorge Luis Borges Bibliography*, WIKIPEDIA, https://en.wikipedia.org/wiki/Jorge_Luis_Borges_bibliography (last visited Dec. 15, 2023); *Books by Jorge Luis Borges*, GOODREADS, https://www.goodreads.com/author/list/500.Jorge_Luis_Borges (last visited Dec. 15, 2023).

22. See M. Bendersky & L. Adur Nobile, *Borges: A Neuroscientific Perspective*, 10 NEUROSCIENCES & HIST. 9, 9 (2022) (stating that Borges was "one of the most important writers of the 20th century"); David Berry, *Art Can Be a Beacon of Hope or an Explanation of the World, but Whether It Can Shape It in Dark Times Is Uncertain*, NAT'L POST (Dec. 2, 2016), <https://nationalpost.com/entertainment/art-can-be-a-beacon-of-hope-or-explanation-of-the-world-but-whether-it-can-shape-it-in-dark-times-is-uncertain> (noting Borges was "unquestionably the most important Argentinian writer, if not one of the finest writers in the Spanish-language"); Mercedes Olivera, *Culture of Prevention Lost in Haze of Mexico Fires*, DALL. MORNING NEWS (May 17, 2003), 2003 WLNR 16519446 (noting Borges was "one of the most important short story writers and essayists of the last century").

23. One author, for example, said "he was so important because he is one of the three writers, together with Joyce and Kafka, who defined the 20th Century," and another called him "the most prominent and influential Argentinean writer of all times." Irene Caselli, *Why Jorge Luis Borges Matters 30 Years After His Death*, BBC (June 14, 2016), <https://www.bbc.com/news/world-latin-america-36516216>; *Jorge Luis Borges: Argentina's Most Influential Author*, POCKET CULTURES (Mar. 23, 2012), <https://pocketcultures.com/2012/03/23/jorge-luis-borges/> ("Jorge Luis Borges is considered the most prominent and influential Argentinean writer of all times."); see also JORGE LUIS BORGES, THE LAST INTERVIEW AND OTHER CONVERSATIONS 13 (Kit Maude trans., Melville House 2013) (1965) [hereinafter BORGES, LAST INTERVIEW] (showing John Barth calling Borges the author "who had succeeded Joyce and Kafka").

24. For example, Felix Arvid Ulf Kjellberg, better known as PewDiePie, is a Swedish YouTuber with more than 111 million subscribers, and his videos regularly get over tens of millions of views. See *PewDiePie*, YOUTUBE, <https://www.youtube.com/user/PewDiePie/videos> (click on "Videos;" then click on "Popular") (documenting 111 million subscribers as of Dec. 15, 2023) (last visited Dec. 15, 2023). One video, entitled "bitch lasagna," currently has over 318 million views. *Id.*

writers and thinkers of the past century.²⁵ On the other hand, the suppression of the di Giovanni—especially in English—translations are part of the reason Borges’s name and body of work become less well known and accessible every year.²⁶ To top it off, Borges himself considered his own work irrelevant. He often told interviewers he did not like any books he wrote, that he was a “nobody” as a writer, and that, after he died, he hoped he would be forgotten.²⁷

A cursory review of Borges’s influence, however, reveals why his work matters, even to those who do not recognize his name. To begin, his work inspired some of the most popular and groundbreaking literary output of the second half of the 20th century in the Spanish language, including the “Latin American Boom” and magical realism movements.²⁸ This includes the work of writers like Gabriel García Márquez, Mario Vargas Llosa, Isabel Allende, and Carlos Fuentes, not to mention Julio Cortázar, Roberto Bolaño, and Augusto Monterroso, each of whom has professed a debt of gratitude to Borges.²⁹ Plots of two of Borges’s stories have been recycled by other authors

25. See *infra*, note 29.

26. See *infra*, Part I.C.

27. Borges was dismissive of his own work in numerous interviews. See, e.g., BORGES, LAST INTERVIEW, *supra* note 23, at 91 (asking “[d]o you think you’re more gifted in fiction than in poetry or . . .” and Borges responded “I don’t think I’m gifted at all”); BORGES, LAST INTERVIEW, *supra*, at 139 (saying “come visit me in Buenos Aires, I’ll show you my library, you won’t find a single book of mine. I’m very sure of this—I choose my books. Who am I to find my way into the neighborhood of Sir Thomas Browne, or of Emerson. I’m nobody”); BORGES, LAST INTERVIEW, *supra*, at 146 (asking if Borges likes his own work, to which he responded, “I don’t like it too much. I prefer original texts. I prefer Chesterton and Kafka,” alluding to the idea that he had not written anything except reworking texts he had read years before, and that his work was not original or good); BORGES, LAST INTERVIEW, *supra*, at 166 (asking “[w]hy shouldn’t you be described as a genius?” and Borges responds, “[t]here’s no reason why I should be. What have I written? Transcriptions of writing by other people”). The interviewer also asked “[w]hat will happen . . . when you die?” and Borges responded:

It’s not important. . . . Now, what I hope is that I will be forgotten because it’s all a mistake, these superficial honors, people taking me seriously all over the place. They made me a Doctor Honoris Causa in a university in Rome this year, the University of Cambridge too; I’m not seduced by those honors or by any other.

BORGES, LAST INTERVIEW, *supra*, at 172–73; see also BORGES, LAST INTERVIEW, *supra*, at 175 (stating “[t]he books I’ve written don’t matter. They’re the least important thing”).

28. See Lanin A. Gyurko, *The Metaphysical World of Borges and Its Impact on the Novelists of the Boom Generation*, 14 IBERO-AMERIKANISCHES ARCHIV 215, 215–16 (1988).

29. See, e.g., DI GIOVANNI, THE LESSON OF THE MASTER, *supra* note 5, at 112–13. Di Giovanni stated:

Not surprisingly, Emir Rodríguez Monegal, a critic and biographer of Borges, made the claim that *A Universal History of Infamy* was ‘the book that literally transformed the Spanish prose of the thirties and whose long echoes can still be heard in [Gabriel García Márquez’s] “One Hundred Years of Solitude”’ García Márquez himself has paid tribute to Borges’s ‘extraordinary capacity for verbal artifice,’ describing how he reads him every night and on his travels carries around in a suitcase Borges’s complete works. The Mexican novelist

to create two of the most read novels in the history of literature: *The Alchemist* by Paulo Coelho and *The Name of the Rose* by Umberto Eco.³⁰ Further, Borges's influence on modern film is so great that his IMDb page now contains over 50 movie credits, including four in just the past four years.³¹ Another source lists over 30 films either written by, or based on, Borges's stories and screenplays.³² Recent movies based on Borges's plots include *Inception* (2010), *The Matrix* movie franchise (1999, 2003, 2021),³³ and the international film, *Extraordinary Stories* (2008).³⁴

Borges even shows up in literary and cinematic works he did not directly inspire. A recent example was in the film *Birdman*, which won four Academy Awards, including Best Picture.³⁵ In the film, one of the leading characters, played by Edward Norton, is shown lying in a tanning bed holding an anthology of Borges's work entitled *Labyrinths*.³⁶

Carlos Fuentes goes even further, saying that without Borges's prose 'there simply would not be a modern Spanish-American novel' and that Borges 'constitutes a new Latin-American language'

Id. (first quoting E.R. Monegal, *The Other Borges than the Central One*, N.Y. TIMES (May 7, 1972), [https://archive.nytimes.com/www.nytimes.com/books/97/08/31/reviews/borges-brodie.html]; then quoting GARCÍA MÁRQUEZ, *ONE HUNDRED YEARS OF SOLITUDE* (1967); and then quoting CARLOS FUENTES, *LA NUEVA NOVELA HISPANOAMERICANA* (1969)); see also *A Fondo: Julio Cortázar* (Radiotelevision Española television broadcast Mar. 3, 1977), translated in EDITRAMA, *Julio Cortázar "In Depth"—Complete & Restored Edition*, YOUTUBE (Mar. 20, 1977), https://www.youtube.com/watch?v=ppon2ldpJwU (documenting Julio Cortázar, in a 1977 interview on the Spanish program "A Fondo," referred repeatedly to Borges as the "great" or "master" of his literary generation); see also Roberto Bolaño Libros, *Una de las mejores entrevistas a Roberto Bolaño en Una mirada crítica*, YOUTUBE (May 6, 2020), https://www.youtube.com/watch?v=YYEObsX9kV4 (documenting Roberto Bolaño referring to Borges reverentially in several interviews, including one where he clumped together three "brilliant prose writers," Cervantes, Quevedo, and Borges, the former two dating to the 16th and early 17th centuries, and Borges to the 20th century).

30. *The Alchemist* has sold over 150 million copies. See Ezekiel Boone, *Nine Books that Sold More than 100 Million Copies and How They Compare to My Book*, PENGUIN RANDOM HOUSE CAN., https://www.penguinrandomhouse.ca/532/nine-books-sold-more-100-million-copies-and-how-they-compare-my-book (last visited Dec. 15, 2023). As of 1996, *The Name of the Rose* had sold over 50 million copies. See Umberto Eco, *The Name of the Rose*, AMAZON, https://www.amazon.com/Name-Rose-Umberto-Eco/dp/1559273615 (last visited Dec. 15, 2023).

31. *Jorge Luis Borges*, IMDB, https://www.imdb.com/name/nm0096566 (last visited Dec. 15, 2023).

32. Allen B. Ruch, *Borges & Film*, SHIPWRECK LIBR., http://shipwrecklibrary.com/borges/borges-films (last updated Oct. 22, 2022).

33. See Jaime Perales Contreras, *Inception and Jorge Luis Borges*, 62 AMERICAS 41, 41 (2010).

34. See Paul Brunick, *H Plus X Plus Z, Formula for 3 Intersecting Lives*, N.Y. TIMES (May 3, 2011), https://www.nytimes.com/2011/05/04/movies/extraordinary-stories-directed-by-mariano-llinas-review.html (noting "[m]any admirers of 'Extraordinary Stories' have invoked literary analogies to Jorge Luis Borges").

35. *Experience Over Nine Decades of the Oscars from 1927 to 2023*, ACAD. OF MOTION PICTURE ARTS & SCI., https://www.oscars.org/oscars/ceremonies/2015 (last visited Dec. 15, 2023).

36. *BIRDMAN OR (THE UNEXPECTED VIRTUE OF IGNORANCE)* (Fox Searchlight Pictures 2014).

Borges's influence goes beyond popular culture. As one researcher concluded, Borges has "inspired professional philosophers from both the continental and analytic traditions."³⁷ He has also struck a chord with writers and artists in the digital age. The *L.A. Times* dubbed Borges an "[i]nternet star."³⁸ In one particularly inspired manifestation of this ironic achievement, a graduate student launched a website to recreate, in digital form, the infinite library Borges describes in his story *The Library of Babel*.³⁹ The library in Borges's story contains limitless rooms and shelves, and all of the shelves are filled with books of the same size and shape.⁴⁰ The books contain every possible permutation of the 26 letters in the alphabet and basic punctuation.⁴¹ The website, libraryofbabel.info, offers a digitized version of Borges's infinite library by using an algorithm the website's creator developed.⁴² The total number of possible pages in the books in this virtual library is mindboggling.⁴³

It is no surprise that countless articles have been written on the importance of Borges,⁴⁴ or that eminent authors praise him,⁴⁵ or that the term "Borgesian" is widely used to describe plots and real-life circumstances reminiscent of Borges.⁴⁶ His most lasting influence, however, is on art—an influence that spans borders, oceans, and continents.⁴⁷ The works of Borges have had an enormous impact on literature, cinema, television, and theater.

37. Univ. of Cal. Television, *Jorge Luis Borges on War*, YOUTUBE (Feb. 13, 2016), <https://www.youtube.com/watch?v=5P1-q7hokE8>.

38. Hector Tobar, *The Borges Boom: He May Be Dead, but His Legacy Remains Strong*, L.A. TIMES (Aug. 1, 2013), <https://www.latimes.com/books/jacketcopy/la-et-jc-jorge-luis-borges-blindness-and-books-20130731-story.html>.

39. Katy Waldman, *Jorge Luis Borges' "Library of Babel" Is Now a Real Website. Borges Would Be Alarmed.*, SLATE (Apr. 30, 2015), <https://slate.com/culture/2015/04/jonathan-basile-brings-borges-library-of-babel-to-life-with-an-erie-gibberish-filled-website.html>.

40. See JORGE LUIS BORGES, *THE GARDEN OF BRANCHING PATHS* 74 (Norman Thomas di Giovanni trans., 2017) [hereinafter BORGES, *THE GARDEN OF BRANCHING PATHS*].

41. *Id.* at 77, 81.

42. Jonathan Basile, *Grains of Sand*, LIBR. OF BABEL, <https://libraryofbabel.info/theory4.html> (last visited Dec. 15, 2023).

43. Jonathan Basile, *About*, LIBR. OF BABEL, <https://libraryofbabel.info/About.html> (last visited Dec. 15, 2023) ("At present it contains all possible pages of 3,200 characters, about 10⁴⁶⁷⁷ books.").

44. See, e.g., Caselli, *supra* note 23; Ciabattari, *supra* note 20.

45. See DI GIOVANNI, *THE LESSON OF THE MASTER*, *supra* note 5, at 113, 164; A *Fondo: Julio Cortázar*, *supra* note 29; Libros, *supra* note 29.

46. *Borgesian*, OXFORD ENG. DICTIONARY, <https://www.oed.com/search/advanced/Meanings?textTermText0=Borgesian&textTermOpt0=WordPhrase> (last visited Dec. 15, 2023) ("Characteristic or reminiscent of [the Argentinian writer Jorge Luis Borges or his works], especially [with reference to fantasy or magic realism].").

47. See *supra*, notes 29–37.

If art matters, and many have put forth strong arguments that it does,⁴⁸ then so too does Borges.

B. What Sets the di Giovanni Translations Apart

Borges worked with numerous translators, and his works have continued to be translated after his death in 1986.⁴⁹ There are differing opinions about which translator, and which of that translator's translations, is best.⁵⁰ While certain translations have emerged as being *superior* to others, by popular opinion or critical acclaim, the perceived quality of art is always subjective.⁵¹ In short, who is to say which translation is best? But the Borges-di Giovanni works (BDG Works) differ from all other translated Borges works because, unlike all the others, they were not strictly *translated* at all, but rather *recreated* in English by di Giovanni "in collaboration with the author."⁵² In other words, the BDG Works are not pure translations. Rather, they are, in Borges's words, a "re-creation" of his stories, original works created jointly

48. See, e.g., Kirsten Weir, *Probing the Power and Importance of Art*, AM. PSYCH. ASS'N, <https://www.apa.org/monitor/2019/05/probing-art> (last visited Dec. 15, 2023); Mary Boone, *Why Art Matters*, HUFFPOST (May 25, 2011), [@ArtsEarthOrg](https://www.huffpost.com/entry/why-art-matters_b_151428), X (Apr. 2, 2020, 7:16 AM), <https://twitter.com/ArtsEarthOrg/status/1245671415828774913> (showing a viral meme on Twitter in 2020 during the COVID-19 pandemic which stated, "if you think artists are useless[,] try to spend your quarantine without music, books[,] poems, movies, paintings, and games").

49. For instance, the Andrew Hurley translations, now considered the most complete and official translations available, were all made after Borges's death. See James Halford, *Such Loneliness in that Gold: Maria Kodama on Life After Borges*, SYDNEY REV. BOOKS (Oct. 11, 2016), <https://sydneyreviewofbooks.com/essay/such-loneliness-in-that-gold-maria-kodama-on-life-after-borges/> (noting "[i]n the 1990s, Viking/Penguin commissioned new English versions of Borges's collected works in three hefty volumes" to be translated by Hurley).

50. See, e.g., Marcus, *supra* note 4 (comparing four different translators' approach to one Borges story, *The Circular Ruins*); JONATHAN BASILE, TAR FOR MORTAR: THE LIBRARY OF BABEL AND THE DREAM OF TOTALITY 23, 40, 56 (2018) (comparing the translation of certain sentences between di Giovanni, Hurley, Kerrigan, and Irby).

51. See Marcus, *supra* note 4; BASILE, *supra* note 50.

52. See THE ALEPH, *supra* note 5; BORGES & GUERRERO, THE BOOK OF IMAGINARY BEINGS, *supra* note 5.

between di Giovanni and Borges.⁵³ “Borges himself was fluent in English,”⁵⁴ but he was unable to undertake the full work of translating on his own, relying instead on di Giovanni to help choose the exact word or phrase that best conveyed the meaning Borges intended.⁵⁵

The collaboration developed after di Giovanni had translated some of Borges’s poems after the two met in Boston in November 1967.⁵⁶ Borges suggested di Giovanni work on translating some of his stories, but di Giovanni was initially hesitant.⁵⁷ According to di Giovanni: “I warned him that I did not know enough about the Argentine to translate any of his stories on my own, so would only try my hand at it if he would help.”⁵⁸ Borges agreed: “‘Of course, I’ll help,’ he said,” according to di Giovanni.⁵⁹ Borges summarized the working relationship they developed in a talk he gave at Columbia University: “When we attempt a translation, or re-creation, of my poems or prose in English, we don’t think of ourselves as being two men. We think we are really one mind at work.”⁶⁰

The work routine Borges and di Giovanni developed is described in detail in, inter alia, di Giovanni’s *The Lesson of the Master* and the preface to *The Aleph and Other Stories 1933–1969*.⁶¹ In short, the two met daily over

53. DI GIOVANNI, *THE LESSON OF THE MASTER*, *supra* note 5, at 165. In the preface to *The Aleph and Other Stories 1933–1969*, Borges and di Giovanni wrote:

Perhaps the chief justification of this book is the translation itself, which we have undertaken in what may be a new way. Working closely together in daily sessions, we have tried to make these stories read as though they had been written in English. We do not consider English and Spanish as compounded of sets of easily interchangeable synonyms; they are two quite different ways of looking at the world, each with a nature of its own. English, for example, is far more physical than Spanish. We have therefore shunned the dictionary as much as possible and done our best to rethink every sentence in English words. This venture does not necessarily mean we have willfully tampered with the original, though in certain cases we have supplied the American reader with those things—geographical, topographical, and historical—taken for granted by any Argentine.

BORGES, *THE ALEPH*, *supra* note 5, at 9–10; *see also* BORGES, *LAST INTERVIEW*, *supra* note 23, at 118 (detailing an interview from 1968 in which Borges remarked that he had recently been “going over a sonnet with di Giovanni,” by which he meant the two were working together translating Borges’s poetry).

54. Marcus, *supra* note 4.

55. DI GIOVANNI, *THE LESSON OF THE MASTER*, *supra* note 5, at 165–68.

56. *Id.* at 160–64.

57. *Id.*

58. *Id.* at 165.

59. *Id.*

60. *Id.*

61. *Id.* at 163–68; BORGES, *THE ALEPH*, *supra* note 5, at 9; *see also* EFRAÍN KRISTAL, *INVISIBLE WORK: BORGES AND TRANSLATION 12* (2002) (noting di Giovanni described the working relationship as follows: “We agree that the text should not be approached as a sacred object but as a tool, allowing us, whenever we feel the need, to add or subtract from it, to depart from it, or even, on rare occasions, to improve it”).

several years, working at a desk in the Argentine National Library, where Borges served as director.⁶² Di Giovanni would usually take a first stab at a rough draft of a sentence or paragraph of a story, and then run it by Borges, who often had revisions or clarifications for him to make.⁶³ Often, these clarifications dealt with cultural matters unique to Argentina about which di Giovanni (or any other non-Argentine) had no way of knowing.⁶⁴ Multiple days could be spent debating single sentences, and often several variants of words, phrases, and sentences were attempted, mulled over, and debated before arriving at the final *correct* version.⁶⁵

During the period they worked together, Borges had a complicated relationship with di Giovanni. Although the two worked side by side for years, Borges sometimes complained that di Giovanni was a poor translator,⁶⁶ or that di Giovanni was overbearing.⁶⁷ The two parted ways on bad terms, and Borges subsequently appeared to hold little regard for di Giovanni and his translations.⁶⁸ In fairness, however, Borges often seemed to have little good to say about translators other than di Giovanni, such as his harsh criticisms of Donald Yates.⁶⁹ Nevertheless, Borges, at times, appeared to hold in high regard the BDG Works he jointly created with di Giovanni, and even claimed on one occasion he was “certain” these translations were superior to the Spanish language originals.⁷⁰ Others, too, have lauded the di Giovanni translations as being superior to others that came both before and

62. DI GIOVANNI, *THE LESSON OF THE MASTER*, *supra* note 5, at 15, 163–65; BORGES, *THE ALEPH*, *supra* note 5, at 9; Emir Rodríguez Monegal, *Jorge Luis Borges*, *ENCYC. BRITANNICA*, <https://www.britannica.com/biography/Jorge-Luis-Borges> (last updated Oct. 12, 2023).

63. DI GIOVANNI, *THE LESSON OF THE MASTER*, *supra* note 5, at 166–67.

64. *Id.* at 165–66.

65. *Id.* at 166–68.

66. See ADOLFO BIOY CASARES, *BORGES 1436–37* (2006) (complaining about di Giovanni’s inability to translate simple Spanish phrases).

67. See *id.* at 1431 (explaining to di Giovanni that Borges was upset at him because “[h]e felt you were bossing him”); CASARES, *supra*, at 1379 (noting Borges complaining that di Giovanni is annoying him).

68. Matthew Howard, *Stranger than Ficción: The Unlikely Case of Jorge Luis Borges and the Translator Who Helped Bring His Work to America*, 1997 *LINGUA FRANCA* 40, 48.

69. See CASARES, *supra* note 66, at 1442–43, 1445–46.

70. See, e.g., FERMOSSEL, *supra* note 7 (quoting Borges in an interview stating, “Estoy seguro de que las traducciones de mis obras que hizo Norman Thomas di Giovanni son mejores que el original,” which translates to “I am certain that the translations by Norman Thomas di Giovanni are better than the originals”); DI GIOVANNI, *THE LESSON OF THE MASTER*, *supra* note 5, at 27 (“We finished the *Imaginary Beings* on 20 May 1969; [Borges] was so delighted with the result that any future translation of the book, he insisted, must be based on our English version.”). However, on some occasions, Borges expressed displeasure, if not disapproval, regarding the collaboration with di Giovanni. See, e.g., CASARES, *supra* note 66, at 1281 (writing “Borges comenta, conmigo: Si no trabajara con nosotros, sería el peor de los traductores,” which translates to “Borges told me, ‘If he [di Giovanni] was not working with us [Borges and Bioy Casares], he would be the worst of the translators’”).

after the BDG Works.⁷¹ Notably, literary critic Ronald Christ called the di Giovanni-Borges partnership “one of the most extraordinary literary collaborations of our time.”⁷² Christ added that the di Giovanni translations possess “an authority and a grace” lacking in all prior translations, because it is the product of “three minds”: “the Borges who wrote the Spanish text in the past, the Borges, fully conversant with English . . . , and the di Giovanni, nominal translator, who along with Borges has ‘shunned the dictionary as much as possible’ and cooperated in making ‘these stories read as though they had been written in English.’”⁷³ Christ gave the BDG Works his enthusiastic stamp of approval.⁷⁴

There is, however, no consensus on this judgment, and the BDG Works are praised and loathed in equal measures. Scholars and readers have sharply divergent opinions on the relative merits of Borges’s various translators.⁷⁵ Other translators have notable supporters.⁷⁶ Di Giovanni also has notable

71. Richardson, *supra* note 17, at 140 (calling the di Giovanni translations of Borges “superior,” and noting this is “not surprising . . . given that Borges himself collaborated with N. T. di Giovanni on the work”); Bing, *supra* note 17 (mentioning that “di Giovanni is widely acknowledged to be the superior translator of Borges” and adding that “I certainly like him better” and that di Giovanni “worked very closely with Borges for a long time”); Antonios, *Hurley’s Inelegant Borges: An Exegesis (Part I of II)*, ANAGRAMMATICALLY CORRECT (Aug. 14, 2008), <http://anagrammatically.com/2008/08/14/hurleys-inelegant-borges-an-exegesis-part-i/> (opining that Hurley “mangles” Borges’s prose, and giving examples); Basile, *Translating Babel*, *supra* note 17, at 155 (“Hurley’s work . . . is widely execrated by fans and scholars.”). Di Giovanni also discussed the Hurley translations commissioned to replace his own: Of the new versions of the stories, one professor from Chicago told me that he could no longer teach Borges in English because he had to spend the whole class unravelling the translation to make the stories intelligible. Paul Theroux wrote to me that a proof copy of the work had been sent to him and that “It seemed to me like a new translation of the Bible. It simply doesn’t work. It is not Borges. You are Borges.”

Borges Papers, *supra* note 6.

72. Ronald Christ, *Borges Translated*, NATION, Mar. 1, 1971, at 282.

73. *Id.* at 282–83 (quoting Norman di Giovanni, *Preface* to BORGES, THE ALEPH, *supra* note 5, at 9).

74. *See id.* at 283.

75. Wes Henriksen, *Borges’s Most Problematic Translator*, 56 VARIACIONES BORGES 159, 160–61 (2023).

76. *See id.* at 6–8.

detractors.⁷⁷ Indeed, Borges himself criticized his work with di Giovanni, even as he occasionally praised it.⁷⁸

Other authors have analyzed the distinctions between, and relative quality of, the di Giovanni, Hurley, and other translations of Borges's works.⁷⁹ This Article will steer clear of this debate. The key point here is not that the BDG Works are necessarily better from any other translation, but rather that they are fundamentally different from all others. This is because they are not, strictly speaking, pure translations at all.⁸⁰ Whether or not superior, the BDG Works are important because they contain a unique and original voice of Borges in English which Borges had a hand in writing.⁸¹ The fact that this voice has been silenced has been widely lamented by Borges's fans and scholars,⁸² particularly in light of the fact that di Giovanni "helped him, perhaps more than anyone, to become internationally known"⁸³

77. See, e.g., Ilan Stavans, *Bi(bli)ographies: The Remains of Jorge Luis Borges*, 74 *TRANSITION* 62, 76 (1997). Ilan Stavans stated:

[T]he translations by Norman Thomas di Giovanni, a savvy American who met Borges at Harvard and followed him to Buenos Aires, have a sour reputation. Borges was often forced to accept the American's translations, and di Giovanni went so far as to ask him to revise the Spanish original—a resourceful ploy, no doubt, but nothing to inspire confidence.

Id. Di Giovanni addressed many of his critics on his website. See *Borges Papers*, *supra* note 6 ("In recent years—decades after the appearance of our work—I have also begun to be pilloried by academics who, wielding their scalpels and microscopes, have sought to condemn me for translation crimes and transgressions.").

78. See, e.g., CASARES, *supra* note 66, at 1285, 1431 (complaining that di Giovanni is overbearing and overly bossy); CASARES, *supra*, at 1436–37 (complaining about di Giovanni's inability to translate simple words and phrases from Spanish to English); see also Henricksen, *supra* note 75.

79. See Marcus, *supra* note 4 (comparing four different translators' approach to one Borges story, *The Circular Ruins*); BASILE, *supra* note 50, at 23, 40, 56 (comparing the translation of certain sentences between di Giovanni, Hurley, Kerrigan, and Irby).

80. See DI GIOVANNI, *THE LESSON OF THE MASTER*, *supra* note 5, at 163–65; BORGES, *THE ALEPH*, *supra* note 5, at 9; *Borges Papers*, *supra* note 6.

81. See *Borges Papers*, *supra* note 6 (stating that the BDG Works were "Borges's own work" because they were made "in collaboration with its author and signed as such").

82. See, e.g., BASILE, *supra* note 50, at 23 n.2 ("[I]t is unfortunate that after Borges's death, his widow and executor of his literary estate María Kodama, in collaboration with Viking-Penguin, let the di Giovanni translations go out of print and commissioned the Hurley translations in order to circumvent di Giovanni's contracts").

83. See WILLIS BARNSTONE, *WITH BORGES ON AN ORDINARY EVENING IN BUENOS AIRES* 121 (1999) ("One of Borges's old friends, who helped him, perhaps more than anyone, to become internationally known, through English translation and lucrative contracts, was Norman Thomas di Giovanni.").

C. The Suppression of the di Giovanni Translations

The BDG Works were created jointly by Borges and di Giovanni under an agreement where they each received 50% of the royalties.⁸⁴ This agreement appeared to please Borges.⁸⁵ Not only did he enter into it willingly, but, on occasion, he went out of his way to compliment both the work he and di Giovanni created and the financial arrangement the two shared.⁸⁶ On at least one occasion, however, Borges was decidedly unhappy with the fifty-fifty royalty split on one translated book. When di Giovanni and Borges translated *The Book of Imaginary Beings*, di Giovanni, as per the pair's usual arrangement, contracted to split the royalties fifty-fifty, but this arrangement left out an author who had co-written the original book in Spanish, Margarita Guerrero.⁸⁷ This action greatly upset Borges.⁸⁸ Nevertheless, the collaboration lasted for years.⁸⁹ Under the agreement, di Giovanni translated 11 of Borges's books.⁹⁰

Then Borges died.

Very soon after, tensions arose between di Giovanni and the administrator of the Borges Estate, María Kodama, who Borges married two months before he died, on April 26, 1986.⁹¹ Di Giovanni received letters and phone calls from Kodama and her lawyers and agents, some of them threatening.⁹² Then, Penguin, the parent of Viking Penguin (Viking), bought E.P. Dutton, the publisher of the BDG Works.⁹³ According to di Giovanni, Viking then “unilaterally, without a single word to me, . . . nullified my contracts, an act which experts in the law have told me was illegal.”⁹⁴

84. DI GIOVANNI, GEORGIE & ELSA, *supra* note 9, at 73.

85. *See id.*

86. *See* FERMOSSEL, *supra* note 7; DI GIOVANNI, THE LESSON OF THE MASTER, *supra* note 5, at 27.

87. *See generally* JORGE LUIS BORGES & MARGARITA GUERRERO, *MANUAL DE ZOOLOGÍA FANTÁSTICA* (2d ed. 1966) (1957) (noting Margarita Guerrero co-wrote the original book with Borges).

88. *See* CASARES, *supra* note 66, at 1395–96 (describing how Borges did not want to see di Giovanni because he was upset about “problems regarding a question of money” arising out of this incident).

89. *See* authorities cited *supra* note 6.

90. DI GIOVANNI, THE LESSON OF THE MASTER, *supra* note 5, at 169.

91. Halford, *supra* note 49; Carlos Ares, *María Kodama*, *EL PAÍS* (May 14, 1986), https://elpais.com/diario/1986/05/15/ultima/516492006_850215.html; EDWIN WILLIAMSON, *BORGES* 484–89 (2004).

92. *Borges Papers*, *supra* note 6 (“Kodama phoned me from Geneva one day to tell me I knew that Borges had a trunk of manuscripts in the cellar of his flat in Maipú Street. I had been aware of no such trunk and of no such cellar.”).

93. *Id.*; Edwin McDowell, *Penguin Agrees to Buy New American Library*, *N.Y. TIMES*, Oct. 1, 1986, at C23 (“Penguin Publishing Company of London [the parent of Viking] has agreed to buy New American Library and its hard-cover affiliate, E.P. Dutton.”).

94. *Borges Papers*, *supra* note 6.

Di Giovanni further asserted Viking commissioned a new edition of Borges's poems and, in doing so, stole 38 poems from his edition without his permission or payment.⁹⁵

It is unclear what di Giovanni meant when he said Viking "nullified" his contracts.⁹⁶ It is clear, however, from di Giovanni's version of the events, as well as the observations of others, that the publisher unilaterally—and with the cooperation, if not insistence, of Kodama, as administrator of the Borges Estate—ceased production of the BDG Works.⁹⁷ According to di Giovanni's partner at the time, who witnessed the events that arose in the wake of Borges's death, di Giovanni received a letter from his agent, which said he could no longer represent di Giovanni because thenceforth he represented the Borges Estate.⁹⁸ His agent—by then, former agent—also informed di Giovanni that the BDG Works "would no longer be published and [di Giovanni] would be prosecuted if he tried to put his work on the internet or have it appear in any other form."⁹⁹ At the time, di Giovanni "still had contracts to translate more of Borges's works," but "[t]he contracts were ignored."¹⁰⁰ Di Giovanni offered to translate these last works under the remaining contracts for no payment, but he received no response.¹⁰¹ Instead, Viking commissioned a new set of translations of Borges's complete works in a lucrative arrangement more beneficial to the publisher and to the Borges Estate, which cut di Giovanni out.¹⁰² The publisher thereafter refused to print further copies of the BDG Works.¹⁰³

Accordingly, the BDG Works went out of print—not due to a lack of demand, but due to the publisher's purposeful choice to instead print new translations subject to more favorable financial terms (for the publisher).¹⁰⁴

95. *Id.*

96. *Id.*

97. For a discussion of this turn of events, see, for example, Nesbitt, *supra* note 19. See also BORGES, THE GARDEN OF BRANCHING PATHS, *supra* note 40. The back cover of the book describes:

Unfortunately, [the BDG Works] were allowed to go out of print after Borges' death, most likely because Borges' widow María Kodama and Viking-Penguin could secure more royalties for themselves if they broke the 50/50 agreement Borges had established with Di Giovanni for all their shared projects. Di Giovanni has even been legally barred from making his translations available for free on his website.

Id.

98. E-mail from Susan Ashe, di Giovanni's domestic partner of 30 years, to Wes Henricksen (June 11, 2020) (on file with the author).

99. *Id.*

100. *Id.*

101. *Id.*

102. Flanagan, *supra* note 10.

103. *Id.*

104. Witt, *supra* note 13; Pack, *supra* note 13.

This did not free di Giovanni up to shop the BDG Works around or publish them elsewhere. Quite the opposite. Every attempt by di Giovanni to make the BDG Works available, even for free on his own website, was swiftly met with threatening letters from agents and law firms of the Borges Estate.¹⁰⁵ For example, in October 2006, di Giovanni informed Kodama by letter that he planned to republish the BDG Works.¹⁰⁶ Kodama never responded.¹⁰⁷ Instead, he “received a mildly threatening letter from her New York agent.”¹⁰⁸ A few months later, one of Penguin’s lawyers warned di Giovanni that if he persisted, “[he] would be liable for willful copyright infringement, for which the U.S. Copyright Act imposes statutory damages of \$150,000 for each violation.”¹⁰⁹ Di Giovanni’s response was, in his own words, as follows: “I was elated. Viking-Penguin had stolen thirty-eight of my Borges poems for an edition of theirs. This meant I could very well be the recipient of a settlement worth \$5,750,000.”¹¹⁰

During this time, a Spanish publisher entered into an agreement with the Borges Estate to publish an autobiographical essay written by Borges and di Giovanni, which had been included in *The Aleph and Other Stories 1933–1969*, and was part of the BDG Works.¹¹¹ Neither the publisher nor Kodama told di Giovanni or asked his permission, and he responded by requesting an injunction against its publication.¹¹² The publisher responded by suing di Giovanni.¹¹³ According to di Giovanni, “[i]t got extremely complicated, but the problem arose in the first instance when Kodama presented the unwitting publisher with the autobiography while failing to explain that I owned half of it.”¹¹⁴ Although the case “took seven or eight years to run the course of the Spanish courts,” di Giovanni ultimately prevailed.¹¹⁵ Notably, however, one of the publisher’s chief arguments in the lawsuit was an allegation by Kodama that di Giovanni had not even coauthored the autobiographical essay.¹¹⁶

105. *Borges Papers*, *supra* note 6.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* (internal quotation marks omitted).

110. *Id.*

111. *Id.*; *see also* DI GIOVANNI, THE LESSON OF THE MASTER, *supra* note 5, at 152–57 (recounting the dispute with the Spanish publisher and Kodama regarding the autobiographical essay).

112. *Borges Papers*, *supra* note 6.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

In 2009, di Giovanni “attempted to publish some of the [BDG] short stories on his website,” but Viking immediately responded.¹¹⁷ First, they sent di Giovanni a letter complaining that he was not authorized to publish the stories.¹¹⁸ Then, they contacted the website host directly and had the stories removed from di Giovanni’s website without his consent or knowledge.¹¹⁹ Di Giovanni was baffled: “All of the stuff that Borges and I wrote together in English I put up there,” he wrote, “because it doesn’t exist in print anywhere anymore, and they claimed that it belonged to [Viking].”¹²⁰ However, di Giovanni noted, “[i]t’s copyrighted in Borges’s and my name because they’re not just translations—it’s stuff we wrote together in English”¹²¹

This aggressive suppression of the BDG Works by the Borges Estate and its publisher has drawn the ire of Borges fans and scholars. One English professor stated “he could no longer teach Borges” in class because the new translations, commissioned to purportedly replace those by di Giovanni, were so poorly executed that the professor “had to spend the whole class unravelling the translation to make the stories intelligible.”¹²² Award-winning author Paul Theroux,¹²³ upon reading a proof of the Hurley translations, wrote to di Giovanni stating, “[i]t seemed to me like a new translation of the Bible. It simply doesn’t work. It is not Borges. You are Borges.”¹²⁴ Many mourned the loss of the BDG Works.¹²⁵

117. Nesbitt, *supra* note 19.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* (internal quotation marks omitted).

122. *Borges Papers*, *supra* note 6.

123. See, e.g., *Paul Theroux Keynote Address 2019*, SAN MIGUEL LITERARY SALA, <https://sanmigueliterarysala.org/product/paul-theroux-keynote-address/> (last visited Dec. 15, 2023) (noting Theroux “is the recipient of the Maria Thomas Fiction Award for lifetime achievement,” that “his 1981 novel *The Mosquito Coast* won the James Tait Black Memorial prize,” and “his books have received numerous awards, including Whitbread Prize for Best Novel (*Picture Palace*), and the Thomas Cook Travel Book Award (*Riding the Iron Rooster*)”).

124. *Borges Papers*, *supra* note 6 (internal quotation marks omitted).

125. See Richardson, *supra* note 17, at 140 (describing the di Giovanni translation of Borges as “superior,” and noting that this is “not surprising . . . given that Borges himself collaborated with N. T. di Giovanni on the work”); Bing, *supra* note 17 (noting that “Di Giovanni is widely acknowledged to be the superior translator of Borges,” adding, “I certainly like him better” and di Giovanni “worked very closely with Borges for a long time”); BASILE, *supra* note 50, at 23 n.2 (“[I]t is unfortunate that after Borges’s death, his widow and executor of his literary estate María Kodama, in collaboration with Viking-Penguin, let the di Giovanni translations go out of print and commissioned the Hurley translations”); BORGES, THE GARDEN OF BRANCHING PATHS, *supra* note 40.

Although di Giovanni himself was advised that the suppression of the BDG Works was unlawful,¹²⁶ and others have questioned its legality,¹²⁷ no one has seriously investigated the legal questions involved. In researching this paper, I corresponded with Norman Thomas di Giovanni himself, as well as di Giovanni's domestic partner of 30 years, sons, publisher, and other individuals with knowledge of the matters herein. I also contacted the Estate of Jorge Luis Borges, but I was unable to secure a copy of any written agreement, if indeed one existed, memorializing the fifty-fifty royalty arrangement between Borges and di Giovanni.¹²⁸ Accordingly, the analysis in this Article is limited to whether any of di Giovanni's rights were violated under copyright law.

II. AN ANALYSIS OF WHETHER THE SUPPRESSION OF THE BORGES-DI GIOVANNI JOINT WORKS VIOLATED DI GIOVANNI'S RIGHTS

There are at least two complicating factors underpinning the analysis of whether the suppression of the Borges-di Giovanni works (BDG Works) may have been a violation of di Giovanni's rights as a joint author. First, the question of joint ownership in copyright, although relatively simple under the current law, the Copyright Act of 1976, is far more complex under pre-1976 law.¹²⁹ Because the BDG Works were created prior to January 1, 1978,¹³⁰ the law pre-1976 applies, requiring a deeper analysis of the applicable statutory and case law. Second, because I do not possess the agreement between Borges and di Giovanni, I am not privy to any terms between them that may have in any way altered the default copyright law as it applies to their collaboration.

126. *Borges Papers*, *supra* note 6.

127. Nesbitt, *supra* note 19 (noting "I do not know the strict legal position, but it's easy to see why di Giovanni is baffled" by Kodama's and the publisher's actions in suppressing the BDG Works).

128. *See, e.g.*, E-mail from Wes Henricksen to Norman Thomas di Giovanni (Jan. 17, 2017) (on file with author); E-mail from Tom di Giovanni and Derek di Giovanni, sons of Norman Thomas di Giovanni, to Wes Henricksen (May 19, 2017) (on file with author); E-mail from Susan Ashe, *supra* note 98; E-mail from Scott Pack, di Giovanni's publisher, to Wes Henricksen (Apr. 13, 2017) (on file with author); Message sent through Online Form from Wes Henricksen, to Maria Kodama, administrator of the Estate of Jorge Luis Borges (Jan. 26, 2021) (on file with author).

129. *See, e.g.*, Laura G. Lape, *A Narrow View of Creative Cooperation: The Current State of Joint Work Doctrine*, 61 ALB. L. REV. 43, 44–46 (1997) (analyzing the "joint work" doctrine under the 1909 Act).

130. *See, e.g.*, BORGES, *THE ALEPH*, *supra* note 5 at 6; BORGES & GUERRERO, *THE BOOK OF IMAGINARY BEINGS*, *supra* note 5; JORGE LUIS BORGES, *A UNIVERSAL HISTORY OF INFAMY* (Norman Thomas di Giovanni trans., Penguin Books 1975) (1972) [hereinafter BORGES, *A UNIVERSAL HISTORY OF INFAMY*].

With these issues in mind, the remainder of this Article will focus on the legal analysis, which has two primary components. First, this Part will discuss what rights di Giovanni likely had in the BDG Works. Second, this Part will discuss what violations of those rights may have occurred as a result of the Borges Estate's and the publisher's actions to suppress the BDG Works.

A. Di Giovanni Held a Copyright in the BDG Works Because They Were Published with a Copyright Notice in di Giovanni's Name and Were Likely "Joint Works" Under the 1909 Act

Copyright is the exclusive right or privilege of the author or proprietor to print, multiply, publish, and sell copies of his or her literary, artistic, or intellectual productions when secured by compliance with the copyright statute.¹³¹ Under the United States Constitution, Congress has the power to provide copyright protection to the extent it sees fit, with certain limitations.¹³² Current copyright law in the United States is generally governed by the Copyright Act of 1976.¹³³

However, for a work created prior to January 1, 1978, the date that the 1976 Act took effect, copyright ownership is governed by the Copyright Act of 1909.¹³⁴ This applies to the BDG Works, which were created between 1969 and 1972.¹³⁵ Under the 1909 Act, an author's copyright became

131. See *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932). The term "copyright" has also been defined as "a property right in 'an original work of authorship' that is fixed in 'a tangible form.'" *State v. Perry*, 697 N.E.2d 624, 631 (Ohio 1998) (quotation omitted).

132. U.S. CONST. art. I, § 8, cl. 8; *Goldstein v. California*, 412 U.S. 546, 555 (1973); *Venegas-Hernández v. Asociación De Compositores y Editores De Musica Latinoamericana*, 424 F.3d 50, 54 (1st Cir. 2005); *United States v. Martignon*, 492 F.3d 140, 149 (2d Cir. 2007) (holding that "Congress exceeds its power under the Commerce Clause by transgressing limitations of the Copyright Clause only when (1) the law it enacts is an exercise of the power granted Congress by the Copyright Clause and (2) the resulting law violates one or more specific limits of the Copyright Clause").

133. Copyright Revision Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C §§ 101-118).

134. *Roth v. Pritikin*, 710 F.2d 934, 938 (2d Cir. 1983) ("Whoever holds an interest in a copyright on or after January 1, 1978, has a right to the protections afforded by the new statute, although the creative work may previously have been governed by the 1909 Act or the common law.').

135. See, e.g., BORGES, *THE ALEPH*, *supra* note 5, at 6; BORGES & GUERRERO, *THE BOOK OF IMAGINARY BEINGS*, *supra* note 5; BORGES, *A UNIVERSAL HISTORY OF INFAMY*, *supra* note 130.

effective upon publication with notice.¹³⁶ The BDG Works were published with a copyright notice in di Giovanni's and Borges's names.¹³⁷

An author need not be the sole author of a work to hold a copyright in it. Authors of a "joint work" are, under the 1976 Act, co-owners of a copyright in the work.¹³⁸ A "joint work" is defined as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."¹³⁹ Although the 1909 Act did not expressly refer to the doctrine of joint ownership, the concept of joint ownership was well established under the prior common law.¹⁴⁰

1. The "Joint Work" Doctrine Developed at Common Law Was Broader than the Doctrine Later Defined by and Interpreted Under the 1976 Act

Although the 1976 Act defined what constitutes a joint work, the doctrine was not defined in any prior act.¹⁴¹ Instead, it was governed by common law.¹⁴² The doctrine of joint authorship, whereby multiple authors

136. The statutory formalities of the 1909 Act are "fairly simple," requiring essentially the application of a notice of copyright on the tangible embodiments of a work and the deposit of two copies of the work in the U.S. Copyright Office. The Copyright Act of 1909, Pub. L. No. 60-349, §§ 10, 13, 35 Stat. 1075, 1078, *repealed by* Copyright Revision Act of 1976, Pub. L. No. 94-553, § 101, 90 Stat. 2541; 2 DAVID NIMMER, NIMMER ON COPYRIGHT § 7.01(A) (2023); W. Russell Taber, *Copyright Déjà Vu: A New Definition of "Publication" Under the Copyright Act of 1909*, 58 VAND. L. REV. 857, 865 n.61 (2005); *see* Herman F. Selvin, *Should Performance Dedicate?*, 42 CALIF. L. REV. 40, 40 (1954); *Washingtonian Publ'g Co. v. Pearson*, 306 U.S. 30, 35 (1939); *United States v. Backer*, 134 F.2d 533, 534 (2d Cir. 1943); 1 NIMMER, *supra* § 5.01(B). Prior to such publication or registration, a work created before January 1, 1978, was protected from its creation under the state law of common law copyright. *Batjac Prods. Inc. v. GoodTimes Home Video Corp.*, 160 F.3d 1223, 1225 n.1, 1228 n.8 (9th Cir. 1998); *Capitol Recs., Inc. v. Naxos, Inc.*, 372 F.3d 471, 477 (2d Cir. 2004); *Magnuson v. Video Yesteryear*, 85 F.3d 1424, 1428 (9th Cir. 1996).

137. *See, e.g.*, BORGES, THE ALEPH, *supra* note 5, at 6; BORGES & GUERRERO, THE BOOK OF IMAGINARY BEINGS, *supra* note 5; BORGES, A UNIVERSAL HISTORY OF INFAMY, *supra* note 130.

138. 17 U.S.C. § 201(a) (2018).

139. *Id.* § 101.

140. 1 NIMMER, *supra* note 136 § 6.01; *see also* *Richlin v. Metro-Goldwyn-Mayer Pictures, Inc.*, 531 F.3d 962, 968 (9th Cir. 2008).

141. *Richlin*, 531 F.3d at 968; S. COMM. ON THE JUDICIARY, 86TH CONG., STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMM. ON THE JUDICIARY 89 (Comm. Print 1960) [hereinafter SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS] (Study No. 12 by George D. Cary) (noting the 1909 Act and its legislative history were silent on joint authorship); 1 NIMMER, *supra* note 136, § 6.01 n.1 (stating "[t]he 1909 Act did not expressly refer to the doctrine of joint ownership").

142. *See, e.g.*, *Reed v. Holliday*, 19 F. 325, 326 (W.D. Pa. 1884) (stating "plaintiffs are the proprietors . . . of two text-books . . . of which they are the joint authors and compilers"); *Shook v. Rankin*, 21 F. Cas. 1337, 1340 (D. Minn. 1875) (No. 12,805) (finding the prima facie case of joint authorship was not overcome by defendant's evidence); *Bunkley v. De Witt*, 4 F. Cas. 665, 666 (S.D.N.Y. 1855) (No. 2,134) (finding plaintiff's evidence of authorship overcame the claim of joint authorship by one of the defendants and a third person).

create a single work to which each author holds the copyright, is said to have originated under U.S. law in *Maurel v. Smith*,¹⁴³ decided by Judge Learned Hand in 1915.¹⁴⁴ However, 19th century parties were already treated as joint authors by courts.¹⁴⁵ Accordingly, by the 1960s, when the first BDG Works were created, joint authorship was well established under U.S. law. The question here is whether the BDG Works qualified as joint works under that law. To answer this question the parameters of the doctrine must be defined.

In what is considered the leading case defining the parameters of the joint work doctrine prior to the 1976 Act,¹⁴⁶ *Edward B. Marks Music v. Jerry Vogel Music*,¹⁴⁷ Judge Learned Hand clarified that joint authors need not collaborate, and only intent is required for the contributions to be used in a single work: “[I]t makes no difference whether the authors work in concert, or even whether they know each other; it is enough that they mean their contributions to be complementary in the sense that they are to be embodied in a single work to be performed as such.”¹⁴⁸ In *Marks*, the principal of the plaintiff corporation, Marks, wrote lyrics for which he intended someone else to set to music and assigned the lyrics to a publisher, who then hired a composer to write the music.¹⁴⁹ Marks and the composer did not meet until years later.¹⁵⁰ Prior to the *Marks* ruling, contemporaneous collaboration was often required to create a joint work,¹⁵¹ but *Marks* eliminated this requirement entirely.¹⁵²

143. *Maurel v. Smith*, 220 F. 195, 203 (S.D.N.Y. 1915), *aff'd*, 271 F. 211 (2d Cir. 1921).

144. *See* *Picture Music, Inc. v. Bourne, Inc.*, 314 F. Supp. 640, 645 (S.D.N.Y. 1970) (“The doctrine of joint authorship is nowhere referred to in the basic federal copyright enactment, Title 17 U.S.C., which derives from the Copyright Act of March 4, 1909, 35 Stat. 1075. Rather, it is one of judicial creation which was imported wholesale from English Law by Judge Learned Hand.” (citation omitted)).

145. *See* cases cited *supra* note 142.

146. *Lape*, *supra* note 129, at 47.

147. *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F.2d 266 (2d Cir. 1944).

148. *Id.* at 267.

149. *See id.*

150. *See id.*; *see also* *Donna v. Dodd, Mead & Co., Inc.*, 374 F. Supp. 429, 430 (S.D.N.Y. 1974) (stating where “photographs were not taken with [the writer’s] text specifically in mind” but “may have been intended from the start to become part of a joint work with text from another source”), *relying in part on Marks*, 140 F.2d 266.

151. *See* *Picture Music, Inc. v. Bourne, Inc.*, 314 F. Supp. 640, 645 (S.D.N.Y. 1970) (stating that “[t]raditionally, joint authorship contemplated collaboration by the authors,” but that “in later cases the ingredient of collaboration was eliminated on a finding of a fusion of effort”), *aff'd*, 457 F.2d 1213 (2d Cir. 1972).

152. *See Marks*, 140 F.2d at 268; *Donna*, 374 F. Supp. at 430; *Picture Music, Inc.*, 314 F. Supp. at 645.

In 1955, the *Marks* joint author doctrine was expanded further in *Shapiro, Bernstein & Company v. Jerry Vogel Music*, known as the *12th Street Rag* case.¹⁵³ There, “the Second Circuit held that the intent to contribute to a larger work can be conceived long after the first contribution has been produced, and can be conceived by someone other than the author of that contribution.”¹⁵⁴ In other words, not only did authors not need to collaborate, but mere later consent by the author of the first work sufficed.¹⁵⁵

This is far broader than the current joint author law under the 1976 Act. In fact, in the legislative history of the 1976 Act, Congress explicitly rejected the *12th Street Rag* expansion of the joint work doctrine.¹⁵⁶ Moreover, the requirement imposed by courts beginning in the 1980s, that each joint author make an independently copyrightable contribution, is not found in pre-1976 Act cases.¹⁵⁷ Accordingly, the joint work doctrine developed at common law prior to the 1976 Act, which would apply to any BDG Work, was so broad that it encompassed works not only created by joint authors who did not work side by side, but who did not even know about one another.

2. Di Giovanni Held a Copyright in the BDG Works as a Joint Author Under the Pre-1976 “Joint Work” Doctrine

The answer to the first question, whether di Giovanni held a copyright in the BDG Works, is so obvious it nearly obviates the need for analysis. He clearly did. The literary works di Giovanni created “in collaboration with” Borges¹⁵⁸ were clearly “prepared by two or more authors with the intention

153. *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co. (12th Street Rag)*, 221 F.2d 569 (2d Cir.), *rev'd on other grounds*, *Shapiro, Bernstein & Co., Inc. v. Jerry Vogel Music Co., Inc.*, 223 F.2d 252 (2d Cir. 1955).

154. Lape, *supra* note 129, at 48; *see also 12th Street Rag*, 221 F.2d. at 570 (“[T]he test [should be] the consent, by the one who holds the copyright on the product of the first author, at the time of the collaboration, to the collaboration by the second author.”).

155. *See 12th Street Rag*, 221 F.2d at 570.

156. *See* H. COMM. ON THE JUDICIARY, 89TH CONG., SUPPLEMENTARY REP. ON THE GEN. REVISION OF THE U.S. COPYRIGHT LAW 65 (Comm. Print 1965) (stating that the definition of a joint work in the bill “carries out the recommendation of the 1961 Report”); H. COMM. ON THE JUDICIARY, 87TH CONG., REP. OF THE REG. OF COPYRIGHTS ON THE GEN. REVISION OF THE U.S. COPYRIGHT LAW 90 (Comm. Print 1961) (recommending adoption of “the test laid down by the earlier [i.e., prior to the *12th Street Rag* case] line of cases—that a joint work is one created by two or more authors who intend to have their contributions joined together as a single work”); *see also* Lape, *supra* note 129, at 49 (stating that the 1976 Act “was to be consistent with the line of cases prior to the *12th Street Rag* case”).

157. Lape, *supra* note 129, at 48.

158. *See, e.g.*, BORGES, THE ALEPH, *supra* note 5; BORGES & GUERRERO, THE BOOK OF IMAGINARY BEINGS, *supra* note 5.

that their contributions be merged into inseparable or interdependent parts of a unitary whole.”¹⁵⁹

The work undertaken by Borges and di Giovanni easily satisfies the *Marks* test.¹⁶⁰ Under it, “it makes no difference whether the authors work in concert,”¹⁶¹ but Borges and di Giovanni *did* work in concert. In fact, they worked together over the course of years, first in Boston and later, for a much longer period, in Buenos Aires.¹⁶² Under *Marks*, it made “no difference . . . even whether they kn[e]w each other,”¹⁶³ but Borges and di Giovanni not only knew each other, they became intimate confidants to such a great extent that di Giovanni personally assisted Borges during overseas trips for lectures and readings, as well as during Borges’s troubled marriage to, and “escape” from, Elsa Millán.¹⁶⁴ “[I]t is enough,” under the *Marks* test, “that they mean their contributions to be complementary in the sense that they are to be embodied in a single work to be performed as such.”¹⁶⁵ Borges and di Giovanni certainly did.

Under the *12th Street Rag* case, a second author can add to an original work years or decades after the original work was created, and the first and second author can still create a joint work copyrighted in both of their names.¹⁶⁶ Even if one were to interpret this to have been the manner in which the BDG Works were created, di Giovanni would still be a joint author in the BDG Works because he and Borges memorialized in writing the fact they created the BDG Works “in collaboration” with one another.¹⁶⁷ Moreover, the fact the BDG Works are copyrighted in both authors’ names eliminates

159. 17 U.S.C. § 101 (2018).

160. *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F.2d 266, 267 (2d Cir. 1944).

161. *Id.*

162. *See* Alauddin, *supra* note 6 (“Norman lived in Buenos Aires with Borges for more than five years and within this time they together translated more than twelve books.”); Marcus, *supra* note 4 (“When preparing to return to Buenos Aires, [Borges] invited Di Giovanni to join him. Di Giovanni arrived half a year later, and stayed for three years. All the while, he and Borges worked closely on new translations of his fiction to English.” (footnote omitted)).

163. *Marks*, 140 F.2d at 267.

164. Di Giovanni has chronicled how he “travel[ed] about the United States with Borges to different universities . . .” DI GIOVANNI, *THE LESSON OF THE MASTER*, *supra* note 5, at 143. One interviewer remarked on having watched di Giovanni on stage alongside Borges in Boston reading Borges’s poems translated into English. *See* BORGES, *LAST INTERVIEW*, *supra* note 23, at 13. In *Georgie & Elsa*, di Giovanni chronicles his role in helping Borges “escape” from Elsa Millán, his first wife: taking Borges by taxi to the airport where he and Borges boarded a plane and flew to Cordoba to physically separate him from Elsa and to begin drawing up separation papers. DI GIOVANNI, *GEORGIE & ELSA*, *supra* note 9, at 215–18.

165. *Marks*, 140 F.2d at 267.

166. *See 12th Street Rag*, 221 F.2d 569, 570 (2d Cir.), *rev’d on other grounds*, 223 F.2d 252 (2d Cir. 1955).

167. *See, e.g.*, BORGES, *THE ALEPH*, *supra* note 5; BORGES & GUERRERO, *THE BOOK OF IMAGINARY BEINGS*, *supra* note 5.

any doubt.¹⁶⁸ Norman Thomas di Giovanni held a copyright in the BDG Works.¹⁶⁹

B. The Actions of the Borges Estate and the Publisher Likely Violated di Giovanni's Right to Exploit and Reproduce the BDG Works

Di Giovanni held a copyright in the BDG Works. The Borges Estate (the other copyright holder in the joint works) worked with the publisher of the BDG Works to (1) commission replacement translations of the BDG Works; (2) force the BDG Works to go out of print; (3) publish at least some BDG Works without di Giovanni's permission and without paying di Giovanni royalties; and, (4) actively and, in some cases, aggressively stop di Giovanni from publishing any of the BDG Works, even on his own personal website.¹⁷⁰ The first three of these actions likely have no redress. But the fourth violated di Giovanni's rights as a joint author.

Although di Giovanni's status as a joint author was established under the 1909 Act, his rights as a joint author are determined under the 1976 Act.¹⁷¹ Under the 1976 Act, "authors of a joint work are co-owners of copyright in the work."¹⁷² Each owns a share of an undivided whole¹⁷³ and is entitled to undivided ownership or interest in the entire work despite any differences in each author's contribution.¹⁷⁴ The presumption of equal ownership of a copyright in a joint work may only be altered by an express written agreement signed by both parties.¹⁷⁵ Importantly, for the analysis here, "no copyright

168. See BORGES, THE ALEPH, *supra* note 5, at 6 ("© 1970 by Jorge Luis Borges and Norman Thomas di Giovanni"); BORGES & GUERRERO, THE BOOK OF IMAGINARY BEINGS, *supra* note 5 ("Translation copyright © Jorge Luis Borges and Norman Thomas di Giovanni, 1969[.]"); BORGES, A UNIVERSAL HISTORY OF INFAMY, *supra* note 130, ("© Emecé Editores, S.A., and Norman Thomas di Giovanni, 1970, 1971, 1972.").

169. In addition, the 1976 Act's definition of joint work is significantly narrower than the common law doctrine. *see* 1 NIMMER, *supra* note 136, § 6.01; Richlin v. Metro-Goldwyn-Mayer Pictures, Inc., 531 F.3d 962, 968 (9th Cir. 2008); Lape, *supra* note 129, at 48. Di Giovanni would clearly be a joint author of the BDG Works even under the 1976 Act.

170. See generally *supra* Part I.C (describing Borges's and di Giovanni's relationship and the proceeding conflict between di Giovanni and Borges's estate after Borges died).

171. See Roth v. Pritikin, 710 F.2d 934, 938 (2d Cir. 1983) ("Whoever holds an interest in a copyright on or after January 1, 1978, has a right to the protections afforded by the new statute, although the creative work may previously have been governed by the 1909 Act or the common law.").

172. 17 U.S.C. § 201(a) (2018).

173. Warren Freedendfeld Assocs., Inc. v. McTigue, 531 F.3d 38, 48 (1st Cir. 2008).

174. Brownstein v. Lindsay, 742 F.3d 55, 64 (3d Cir. 2014); Janky v. Lake Cnty. Convention & Visitors Bureau, 576 F.3d 356, 361 (7th Cir. 2009).

175. Maxwood Music Ltd. v. Malakian, 713 F. Supp. 2d 327, 343 (S.D.N.Y. 2010). Moreover, "a copyright registration, standing alone, does not serve as repudiation of joint authorship because coauthors are not expected to investigate the copyright register for competing registrations." *Brownstein*, 742 F.3d at 71.

infringement action lies as between joint owners of the same copyright.”¹⁷⁶ As co-owners of the copyright, joint authors are treated as tenants in common.¹⁷⁷ Each has the right to use or license the use of the work.¹⁷⁸ Each may convey nonexclusive rights to the joint work without the consent of his or her co-author.¹⁷⁹ Still, co-owners owe a duty to account to the other co-owners for any profit.¹⁸⁰ “It follows that a joint owner may exploit the work himself, without obtaining the consent of the other joint owners.”¹⁸¹

Accordingly, “joint authors . . . have no right to interfere with a co-author’s use of the copyrighted work.”¹⁸² Where one co-owner of a copyright interferes with another co-owner’s use of or right to exploit a copyright, the aggrieved co-owner may go to court and request an injunction against such violation of the aggrieved co-owner’s rights.¹⁸³ Such injunctions are entered where merited.¹⁸⁴ In addition, depending on the type of interference, other causes of action may also be available, such as tortious interference.¹⁸⁵

Turning to the actions of the Borges Estate and the publisher, two things are clear under the foregoing legal framework. First, di Giovanni likely has no copyright infringement cause of action. He certainly has none against the Borges Estate because a co-owner of a copyright cannot bring a copyright infringement claim against another.¹⁸⁶ There also appears no basis for an

176. *Warren Freedensfeld*, 531 F.3d at 47.

177. *Id.* at 48; *Thomson v. Larson*, 147 F.3d 195, 199 (2d Cir. 1998); *United States ex rel. Berge v. Bd. of Trs. of the Univ. of Ala.*, 104 F.3d 1453, 1461 (4th Cir. 1997).

178. *Thomson*, 147 F.3d at 199; *Berge*, 104 F.3d at 1461; *Janky*, 576 F.3d at 361.

179. *Brownstein*, 742 F.3d at 68.

180. *Thomson*, 147 F.3d at 199; *Berge*, 104 F.3d at 1461; *Estate of Brown v. Arc Music Grp.*, 830 F. Supp. 2d 501, 515 (N.D. Ill. 2011), *aff’d*, 523 Fed. App’x 407 (7th Cir. 2013).

181. 1 NIMMER, *supra* note 136 § 6.10(A)(1)(a) n.3 (first citing *Oddo v. Ries*, 743 F.2d 630 (9th Cir. 1984); and then citing *Martin v. Cuny*, 887 F. Supp. 1390, 1394 (D. Colo. 1995)). *See also* *Weinstein v. Univ. of Ill.*, 811 F.2d 1091, 1095 (7th Cir. 1987) (stating that a joint owner may prepare and publish derivative work).

182. *16 Casa Duse, LLC v. Merkin*, 791 F.3d 247, 259 (2d Cir. 2015); *see also* *Childress v. Taylor*, 945 F.2d 500, 508 (2d Cir. 1991) (“Joint authorship entitles the co-authors to equal undivided interests in the work.”).

183. *See* *Accusoft Corp. v. Palo*, 923 F. Supp. 290, 297 (D. Mass. 1996) (issuing injunctions against two co-owners of a copyright to prevent them from interfering with each other’s copyrights).

184. *Id.*

185. *See, e.g., Long v. Quality Computs. & Applications, Inc.*, 860 F. Supp. 191, 196 (M.D. Pa. 1994) (holding that although the Copyright Act preempts state common law claims that fall within its scope, where an additional element not contained in the Copyright Act claim can be asserted, such as in a claim of “tortious interference with prospective contractual opportunities,” then such a claim is not preempted); *accord* *Hershey Co. v. Hotrix, LLC*, No. 10-CV-1178, 2011 WL 13214371, at *4 (M.D. Pa. Jan. 6, 2011).

186. *See* *Childress*, 945 F.2d at 508 (stating “[j]oint authorship entitles the co-authors to equal undivided interests in the work” where each can exploit the work without authorization from other joint authors).

infringement claim against any publisher because—except with regard to the autobiographical essay that the Spanish publisher attempted to publish, which was resolved in Spanish court¹⁸⁷—the actions outlined here are not concerned with unauthorized use or failure to account, but rather an interference with di Giovanni’s right to use or exploit. Second, di Giovanni’s rights as a co-owner of the copyright in the BDG Works were violated by the efforts the Borges Estate and publisher undertook to stop him from freely exploiting, reproducing, and using the BDG Works in which he held a copyright.

Although a co-owner has “no right to interfere with a co-author’s use of the copyrighted work,”¹⁸⁸ that is exactly what the Borges Estate did by prohibiting di Giovanni from publishing or making available in any format the BDG Works in which he held a copyright. The Borges Estate did this both directly, by the Estate’s administrator refusing him permission to reproduce or publish, including having its agents and attorneys send letters threatening legal action, as well as indirectly, through its publisher.¹⁸⁹ The publisher, too, undertook actions that violated di Giovanni’s right to use and exploit his copyright. By removing the stories from his website and by sending him threatening letters—including one that threatened to sue him for millions of dollars—the publisher used its greater economic position to bully di Giovanni into refraining from exercising his legal rights under the copyright he owned.¹⁹⁰

CONCLUSION

Is this the end of the story? It is hard to tell. Although di Giovanni suspected that the actions by the publisher and the Borges Estate were illegal, and that he was being unfairly and illegally denied the opportunity to publish, he never in his life had the opportunity to enforce his rights or be compensated for the interference with them. When he passed away in 2017, he maintained on his website a chronicle of how he had been “ushered out of the door” and “airbrushed out of history, out of Borges’s existence.”¹⁹¹ The

187. *Borges Papers*, *supra* note 6.

188. *16 Casa Duse v. Merkin*, 791 F.3d 247, 259 (2d Cir. 2015); *see also Childress*, 945 F.2d at 508 (“Joint authorship entitles the co-authors to equal undivided interests in the work . . .”).

189. *Borges Papers*, *supra* note 6; DI GIOVANNI, THE LESSON OF THE MASTER, *supra* note 5, at 153–55.

190. *Borges Papers*, *supra* note 6.

191. In his own words, di Giovanni wrote:

Behind my back, I was being ushered out of the door (if such a mixed metaphor is permissible [sic]) and at the same time was being airbrushed out of history, out of Borges’s existence. All of my volumes of his work—work to which he contributed

suppression of the BDG Works, however, affects not only di Giovanni, but anyone who might benefit from reading them. This suppression violated di Giovanni's rights as a joint copyright holder. It has, however, been an even greater loss to the reading public. Those who never run across Borges's unique and inimitable voice in English will never know what they were denied.

and gave a unique voice—were deliberately allowed to go out of print. No publisher, no editor, no agent, no executor of any estate ever wrote to me to explain any of this. New translations appeared. Viking-Penguin had bought up E.P. Dutton, and unilaterally, without a single word to me, they nullified my contracts, an act which experts in the law have told me was illegal. So ruthless was Viking that they even commissioned a new edition of Borges's poems, stealing from my edition, without permission, without payment, a considerable body of my work.

Borges Papers, *supra* note 6.