

# When and Where Does an Internet Posting Constitute Publication? Interpreting *Moberg v. 33T LLC*

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## INTRODUCTION

An artist posts his photography on the Internet. Is the work published? Surprisingly, the legal community has not yet answered this question. As content creators more frequently post their work on the Internet for display or sale, the international legal community should come to a consensus about how this online activity will be protected. Can it fit easily within the existing copyright protection framework? Or must we create new definitions and methods of protection for online works?

A recent case in the Delaware District Court illustrates the need for resolution of these questions. In *Moberg v. 33T LLC*,<sup>1</sup> an American corporation took a Swedish photographer’s work from a German gallery’s website and used it without authorization. The legal remedies available to the photographer depend on the legal classification of his posted photographs. This Comment will discuss the Delaware District Court’s legal categorization of the photographer’s work and will suggest alternative classifications for the future. Proper classification and the protections that come with

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<sup>1</sup> 666 F. Supp. 2d 415 (D. Del. 2009).

it will make future litigation more predictable, benefitting both plaintiffs and defendants.

Part I of this Comment will present the facts and procedural history of *Moberg v. 33T LLC*. Then, it will give an overview of the background law relevant to the defendants' arguments and the Delaware District Court's subsequent holding. Finally, Part I will briefly describe the Delaware District Court's holding and the policy considerations surrounding the court's decision. The court struggled to fit the photographer's work into the existing legal framework, and ultimately made its best effort to protect the artist and punish the infringer.

Part II will discuss the current debate over the classification of Internet postings. To do so, it will summarize the ongoing conflict among scholars who believe Internet postings like this one constitute publications, those who believe such postings constitute displays of work, and those who imagine the postings constitute something in between. This distinction is important in determining the copyright protections available to the author.

Part III offers suggestions on classifying the photographer's work. This Comment argues that the Delaware Court's holding, though well intentioned, is untenable and fully satisfies neither party. It further suggests that in order to satisfy both parties in future disputes like this one, it is necessary for the international community to modify the statutory requirements for publication. Part III also recommends a new method for registering international works. Ideally, this new system will make litigation more predictable for both authors and alleged infringers. Easily anticipated outcomes will allow content creators to feel more secure about posting their work online and more secure when making it available to an international audience—an outcome from which content creators, users and purchasers alike will benefit.

## I. BACKGROUND & HOLDING

### A. *Facts of the Case*

Plaintiff Håkan Moberg is a professional photographer living in Sweden.<sup>2</sup> In 1993, he created a series of photographs entitled “Urban Gregorian I–X.”<sup>3</sup> Each photograph portrays the same woman model standing in a plain black or white background facing the camera.<sup>4</sup> It was undisputed that Moberg was the exclusive copyright holder of these photographs for the purposes of United States law.<sup>5</sup> In 2004, Moberg allowed the photographs to be uploaded to a German website, blaugallery.com, an online art shop that sold copies of the works posted on its website as canvas prints stretched over a wooden frame.<sup>6</sup> This was the first time the images were ever viewable to the public.<sup>7</sup> Each of the posted Urban Gregorian photographs included attributions to Moberg.<sup>8</sup>

By December of 2007, five of Moberg’s photographs had been posted without permission on the websites dynamicfactory.us, my-flashxml.com, and flashtemplate.us.<sup>9</sup> These websites sell web-design templates, which customers purchase to build their own websites by uploading their personal images and text.<sup>10</sup> The first two websites were registered to 33T LLC, a limited liability company incorporated in Delaware.<sup>11</sup> Defendant Cedric Leygues was the sole operator and manager of 33T, and a registrant for the two websites.<sup>12</sup> He ran the day-to-day operations of both sites.<sup>13</sup> Erwan Leygues was the registrant for the third website, and was

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<sup>2</sup> *Id.* at 417.

<sup>3</sup> *Id.*

<sup>4</sup> Complaint at 1–4, *Moberg v. 33T LLC*, 666 F. Supp. 2d 415 (D. Del. Sept. 25, 2008) (No. 1:08-cv-00625-NLH-JS), 2008 WL 5706254 [hereinafter *Moberg Complaint*].

<sup>5</sup> *Moberg*, 666 F. Supp. 2d at 418.

<sup>6</sup> *Id.* As of August 5, 2010, blaugallery.com has moved to <http://www.blauprint.com/content/index.php>.

<sup>7</sup> *Moberg*, 666 F. Supp. 2d at 422 n.12.

<sup>8</sup> *Id.* at 418.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

responsible for the day-to-day operations of that site.<sup>14</sup> Both Cedric and Erwan Leygues are citizens of France and live there.<sup>15</sup>

From at least December 2007 through March 2008, these three websites displayed the Urban Gregorian images without authorization.<sup>16</sup> In March 2008, Moberg's attorney contacted 33T and Cedric Leygues regarding their unauthorized use of Moberg's photographs, and demanded that they remove the images.<sup>17</sup> When Moberg, the plaintiff, filed his copyright infringement complaint with the Delaware District Court in September 2008, some of the images had been removed but others remained.<sup>18</sup> Cedric and Erwan Leygues, the defendants, maintained that they did not sell and had never sold any templates containing the unauthorized images.<sup>19</sup>

### *B. Procedural History of the Case*

Moberg claimed that the Leygueses violated his reproduction rights by taking copyrighted images and posting them elsewhere.<sup>20</sup> The Leygueses moved for the dismissal of Moberg's claims on three bases, two of which are relevant for the purpose of this Comment.<sup>21</sup> First, the Leygueses asserted that Moberg's copyright infringement claims failed for lack of subject matter jurisdiction and should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1).<sup>22</sup> Second, Erwan Leygues claimed the Court lacked personal jurisdiction over him.<sup>23</sup>

The Leygueses asserted that Moberg's work was published simultaneously in Germany and the United States, and thus would have had to satisfy the procedural formalities of § 411(a) of the

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*; *see also* Moberg Complaint, *supra* note 4, at 5–6.

<sup>17</sup> *Moberg*, 666 F. Supp. 2d at 418.

<sup>18</sup> *Id.*

<sup>19</sup> Defendants' Opening Brief in Support of the Motion to Dismiss at 11, *Moberg v. 33T LLC*, 666 F. Supp. 2d 415 (D. Del. Nov. 19, 2008) (No.1:08-cv-00625-NLH-JS), 2008 WL 5706255 [hereinafter Defendants' Opening Brief].

<sup>20</sup> *Moberg*, 666 F. Supp. 2d at 418; *see also* 17 U.S.C. §§ 501, 106, 1201.

<sup>21</sup> *Moberg*, 666 F. Supp. 2d at 418.

<sup>22</sup> Defendants' Opening Brief, *supra* note 19, at 6.

<sup>23</sup> *See* discussion *infra* notes 76–82 and accompanying text.

United States Copyright Act in order for the court to have subject matter jurisdiction to hear the case.<sup>24</sup> Moberg did not dispute that he had never registered his photographs in the United States,<sup>25</sup> but argued that the court nevertheless had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338 because posting the photographs online did not constitute simultaneous publication in Germany and the United States.<sup>26</sup>

### C. Background Law

In order to understand the Leygueses' argument and the Delaware District Court's holding, the remainder of Part I will explain the legal background of classifying an Internet posting such as Moberg's. First, this section will explain the court's jurisdictional analysis. Then, it will describe the traditional definitions of publication and the effects of registering works with the United States Copyright Office. Finally, this section will discuss the Berne Convention's Policies, which are important to keep in mind for any discussion involving international content creators.

#### 1. Establishing Subject Matter Jurisdiction

At the time *Moberg* was decided, "the consensus among federal appellate courts [was] that the provisions of 17 U.S.C. § 411(a) [were] jurisdictional."<sup>27</sup> The Delaware District Court therefore reasoned that it would have subject matter jurisdiction to hear Moberg's case if his work qualified as a "United States Work" or if it fell under the purview of the Berne Convention. United States law provides that a work is a "United States work" if, "in the case of a published work, it is first published . . . simultaneously in the United States and another treaty party or parties, whose law grants a term of copyright protection that is the

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<sup>24</sup> *Moberg*, 666 F. Supp. 2d at 419; *see also* 17 U.S.C. § 411(a). *But see* discussion *infra* notes 94–101 and accompanying text. The formalities include registering the work with the United States Copyright Office and depositing copies of the registered work with the Library of Congress.

<sup>25</sup> *Moberg*, 666 F. Supp. 2d at 419.

<sup>26</sup> *Id.* at 418–19; *see also* 28 U.S.C. §§ 1331, 1338.

<sup>27</sup> *Moberg*, 666 F. Supp. 2d at 418 n.5.

same as or longer than the term provided in the United States.”<sup>28</sup> Here, Germany is a treaty party<sup>29</sup> and the United States and Germany afford the same term of protection: the life of the author plus an additional seventy years.<sup>30</sup> Thus, Moberg’s work is a “United States Work” if the posting is considered a publication, and if the publication in Germany and the United States is considered to have occurred simultaneously. If Moberg’s work were considered a “United States Work,” then Moberg would have had to at least apply for a copyright registration before filing a claim in court.<sup>31</sup> If this formality were satisfied within three months of first publication or anytime before infringement, then Moberg would be able to win statutory damages and/or attorney fees in any court victory.<sup>32</sup> Statutory damages are court-determined punitive awards that may far exceed the profits earned by the infringer or the value of an injunction.<sup>33</sup> The Copyright Act authorizes statutory damages up to \$150,000 per infringement.<sup>34</sup>

In the case of an unpublished work, the Copyright Act provides that “a work is a ‘United States Work’ only if . . . all the authors of the work are nationals, domiciliaries, or habitual residents of the United States.”<sup>35</sup> Because Moberg is Swedish and not a habitual

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<sup>28</sup> 17 U.S.C. § 101. This definition incorporates the Berne Convention’s categorization of published works, for which “[t]he country of origin shall be considered to be: (a) in the case of works first published in a country of the Union, that country; in the case of works published simultaneously in several countries of the Union which grant different terms of protection, the country whose legislation grants the shortest term of protection . . . .” Berne Convention for the Protection of Literary and Artistic Works art. 5(4), Sept. 9, 1886, *as revised*, Paris, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention].

<sup>29</sup> See U.S. COPYRIGHT OFFICE, CIRCULAR NO. 38A, INTERNATIONAL COPYRIGHT RELATIONS OF THE UNITED STATES 4, (2010), *available at* <http://www.copyright.gov/circs/circ38a.pdf>.

<sup>30</sup> 17 U.S.C. § 302(a).

<sup>31</sup> *Id.* § 411. The United States Supreme Court recently held that registration is not a jurisdictional prerequisite to filing a claim, but merely a procedural “precondition” to instituting a Copyright Act infringement claim. *Reed Elsevier v. Muchnick*, 130 S. Ct. 1237 (2010); *see discussion infra* notes 96–101 and accompanying text.

<sup>32</sup> 17 U.S.C. § 412; *see also* 2-7 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.16[C][1][b] (Matthew Bender rev. ed. 2010).

<sup>33</sup> See 17 U.S.C. § 504.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* § 101.

resident of the United States, Moberg's posting cannot be a "United States Work" if it is considered unpublished.

But, even if Moberg's photographs are not "United States Works," the court reasoned, it would still have subject matter jurisdiction under the Berne Convention whether the photographs were considered published or unpublished. In 1989, the United States acceded to the 1971 Paris Act of the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention").<sup>36</sup> The Berne Convention requires its signatories to recognize the copyrights from other signatory countries in the same way it recognizes the copyrights of its own nationals.<sup>37</sup> When actual damages are significant or an injunction is valuable to the copyright holder, the Berne Convention greatly benefits international authors. However, to receive statutory damages and attorney fees, Berne authors must still have registered their works with the United States Copyright Office.<sup>38</sup> Since it is uncommon for international authors to register their works with the United States Copyright Office, the Berne Convention is less helpful to authors who depend on those remedies. For this reason, Professor Nimmer argues that "foreigners' nominal exemption from registration" confers "only a hollow advantage" upon international authors.<sup>39</sup> Additionally, an author is normally not entitled to longer copyright protection abroad than at home, even if the laws abroad prescribe a longer term; this is commonly known as "the rule of the shorter term."<sup>40</sup>

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<sup>36</sup> 4-17 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 17.01[B][1][a] (Matthew Bender rev. ed. 2010).

<sup>37</sup> See Berne Convention, *supra* note 28, at art. 5 ("Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin . . . the rights specially granted by this Convention.").

<sup>38</sup> Since it is uncommon for Berne authors to register their works with the United States Copyright Office, most do not receive statutory damages and attorney fees. See 2-7 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.16[B][6][c] (Matthew Bender rev. ed. 2010).

<sup>39</sup> 2-7 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.16[C][1][a][iv] (Matthew Bender rev. ed. 2010).

<sup>40</sup> See Berne Convention, *supra* note 28, art. 7(8).

The Berne Convention defines the “country of origin” similarly to the Copyright Act for both published and unpublished works.<sup>41</sup> So, on the court’s reading of § 411(a), if Moberg’s works were not “United States Works,” the court would nevertheless have had subject matter jurisdiction even without Moberg having registered his works in the United States. But without registration, Moberg would not be entitled to statutory damages or attorney fees.

In sum, to decide the question of subject matter jurisdiction, the Delaware District Court reasoned, it needed to resolve two issues: (1) whether the defendants’ posting of Moberg’s photographs on the Internet constituted publication and, if so, (2) whether publication on the Internet resulted in publication only in the country where the Internet site is hosted, or in every country around the world simultaneously.<sup>42</sup>

## 2. Traditional Definitions of Publication

The statutory definition of publication for copyright purposes is quite narrow. The United States Copyright Act defines “publication” as either the distribution of copies of a work to the public (by sale, transfer of ownership or lending), or the offering to distribute copies to a group of persons for purposes of further distribution or public display.<sup>43</sup> A mere display of a work does not of itself constitute publication.<sup>44</sup> This definition is a codification of case law interpreting the 1909 Copyright Act, which did not explicitly define publication.<sup>45</sup> According to some scholars, whether a work disseminated over the Internet qualifies as

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<sup>41</sup> Under the Berne Convention, for published works “[t]he country of origin shall be considered to be: (a) in the case of works first published in a country of the Union, that country; in the case of works published simultaneously in several countries of the Union which grant different terms of protection, the country whose legislation grants the shortest term of protection . . .” *Id.* art. 5(4)(a). The Berne Convention also provides that “in the case of unpublished works” the country of origin is “the country of the Union of which the author is a national.” *Id.* art. 5(4)(c).

<sup>42</sup> *Moberg v. 33T LLC*, 666 F. Supp. 2d 415, 421 (D. Del. 2009).

<sup>43</sup> 17 U.S.C. § 101 (2006).

<sup>44</sup> *Id.*

<sup>45</sup> RayMing Chang, “*Publication*” Does Not Really Mean Publication: The Need to Amend the Definition of Publication in the Copyright Act, 33 AIPLA Q.J. 225, 232 (2005) (citing 1-4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 4.01[A] (2004)).

“published” depends on whether or not that Internet posting constitutes a *distribution*.<sup>46</sup> However, this Comment will argue in Part III that the controversy depends on whether that Internet posting is an *offer* to distribute copies.

The Berne Convention defines publication more broadly. A work is published under the Berne Convention if copies are made available in a way that satisfies the reasonable requirements of the public, and depends on the nature of the work.<sup>47</sup> Berne requires that authors must authorize any publication, and specifies that the communication by wire, the broadcasting of an artistic work or the exhibition of a work of art shall not constitute publication.<sup>48</sup>

Ultimately, the question of whether an Internet posting constitutes publication under United States law and the Berne Convention remains unresolved<sup>49</sup> with scholars noting that it is becoming increasingly difficult to define publication in the digital age.<sup>50</sup> For example, the date of publication or even the date of creation is often difficult to pinpoint for digital works, because website content changes quickly and often.<sup>51</sup> Also, the distinction between considering an Internet posting to be a public performance/display—which does not alone constitute publication—or an offer to distribute copies—which does constitute publication—may be heavily fact-intensive because not all Internet postings are alike.<sup>52</sup> Some postings, such as Moberg’s, are digital reproductions of works that exist in physical form offline. Other postings, such as homepages, do not exist offline and change frequently. For all these reasons, the question of whether an Internet posting constitutes publication under United

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<sup>46</sup> See Chang, *supra* note 45, at 234.

<sup>47</sup> See Berne Convention, *supra* note 28, at art. 3.

<sup>48</sup> Berne Convention, *supra* note 28, at art. 3, § 3.

<sup>49</sup> See Moberg v. 33T LLC, 666 F. Supp. 2d 415, 420 (D. Del. 2009); Thomas F. Cotter, *Toward a Functional Definition of Publication in Copyright Law*, 92 MINN. L. REV. 1724, 1749–50 (2008).

<sup>50</sup> See Cotter, *supra* note 49, at 1750.

<sup>51</sup> See Copyright Act of 1909, ch. 320, § 62, 35 Stat. 1075, 1087–88 (repealed 1976) (defining the term “date of publication” as “the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority . . .”); see also Cotter, *supra* note 49, at 1785.

<sup>52</sup> See Cotter, *supra* note 49, at 1768.

States law and the Berne Convention is difficult to decide and remains unanswered.<sup>53</sup>

### 3. The Benefits of Registration

United States copyright law favors registered works. The purpose of United States copyright law is to promote the progress of science and useful arts by protecting the exclusive right of authors and inventors to benefit from their works of authorship.<sup>54</sup> Determining that having a registry of published works available to the public is “useful and important to users and the public at large,”<sup>55</sup> the Copyright Act seeks to encourage creators to register their copyrights. In doing so, the law grants more protections to works that are registered.<sup>56</sup> For example, a registration filed before or within five years of first publication will serve as prima facie evidence of the validity of the copyright and the facts stated in the application.<sup>57</sup>

Of utmost importance to authors is the availability of statutory damages and attorney fees. In order for an author to recover these remedies, unpublished works must be registered prior to infringement. The authors of published works, however, enjoy a grace period of three months from the time of first publication in which to register their work even if infringement has already occurred.<sup>58</sup> Often, statutory damages are significantly larger than actual damages and lawyers may be reluctant to take on litigation without the potential of recovering attorney fees.<sup>59</sup> Moreover, the greater compensation that comes with registration better serves the Copyright Act’s “dual objectives of compensating copyright

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<sup>53</sup> See *Moberg*, 666 F. Supp. 2d at 420; *Cotter*, *supra* note 49, at 1749–50.

<sup>54</sup> U.S. CONST. art. I, § 8, cl. 8 (“The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

<sup>55</sup> See 17 U.S.C. § 412 (2006).

<sup>56</sup> See *id.*

<sup>57</sup> *Id.* § 410(c).

<sup>58</sup> See *Chang*, *supra* note 45, at 227; see also 17 U.S.C. § 412 (published works must be registered before infringement or within three months of publication). There is also an exception for works that have been pre-registered. See *id.*

<sup>59</sup> See, e.g., *Getaped.com, Inc. v. Cangemi*, 188 F. Supp. 2d 398, 400 (S.D.N.Y. 2002). In *Getaped.com*, actual damages amounted to \$1,050 and statutory damages amounted to \$30,000. *Id.*

owners for past infringement and deterring future infringement.”<sup>60</sup> Thus, the Copyright Act creates a powerful incentive for authors to both register their work and establish their work as published for purposes of the Copyright Act.<sup>61</sup>

#### 4. Berne Convention Subject Matter Jurisdiction Policies

One of the purposes of the Berne Convention was to protect artists whose work will be published in multiple countries by removing strict publication formalities for international authors.<sup>62</sup> Thus, compliance with 17 U.S.C. § 411(a) is not a “precondition” to instituting a Copyright Act infringement claim for international works.<sup>63</sup> The theory behind this exception is that the copyright formalities of registration and notice are considered to be too much of a burden for authors of international publications.<sup>64</sup> Otherwise, international copyright holders would be required to comply with the formalities of dozens, possibly hundreds of unknown jurisdictions to which their work is distributed over the Internet, often without their control.<sup>65</sup>

The Leygueses asserted that “[i]t is well settled that Internet publications are published everywhere simultaneously, regardless of the location of the server hosting the website”<sup>66</sup> and, as a result, that Moberg’s “images are ‘United States works’ . . . because they were simultaneously first published in the United States and in other treaty and non-treaty nations”<sup>67</sup> and visible instantaneously all over the world.<sup>68</sup> The Leygueses pointed to the fact that

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<sup>60</sup> *Id.* at 403.

<sup>61</sup> *See id.* at 400.

<sup>62</sup> Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 544 (2004).

<sup>63</sup> *See* discussion *supra* note 24.

<sup>64</sup> Sprigman, *supra* note 62, at 544.

<sup>65</sup> *Id.*

<sup>66</sup> Defendants’ Opening Brief, *supra* note 19, at 7 (citing *Reno v. ACLU*, 521 U.S. 844, 884 (1997) (stating that information posted on the Internet is “located in no particular geographical location [and is] available to anyone, anywhere in the world, with access to the Internet”)); *Nitke v. Gonzalez*, 413 F. Supp. 2d 262, 270 (S.D.N.Y. 2006) (finding that Internet postings are immediately viewable by members of any community)).

<sup>67</sup> Defendants’ Opening Brief, *supra* note 19, at 7.

<sup>68</sup> *Id.*

blaugallery.com's content is written almost entirely in English, even though the site is maintained in Germany, as evidence of the website's desire to publish and market the images in the United States (and presumably other English-speaking nations as well).<sup>69</sup>

The Leygueses' arguments are reminiscent of traditional American concepts of personal jurisdiction, whereby a state's long-arm jurisdiction is based on the defendants' specific contacts made with the forum state.<sup>70</sup> A court can exercise jurisdiction over an out-of-state defendant only if the defendant purposefully avails himself of the privilege of conducting activities within the forum state.<sup>71</sup> To prove that a defendant has purposefully availed himself of that state, a plaintiff may rely upon the defendant's specific contacts with the forum state,<sup>72</sup> or his "continuous and systematic contacts" with the forum state.<sup>73</sup> In assessing the sufficiency of minimum contacts for personal jurisdiction, the court must focus on the "relationship among the defendant, the forum and the litigation."<sup>74</sup> And, for personal jurisdiction to comport with "fair play and substantial justice," it must be reasonable to require the defendant to defend the suit in the forum state.<sup>75</sup>

In *Moberg*, the court found that the Leygueses might have sufficient contacts with Delaware to grant the court personal jurisdiction over them.<sup>76</sup> It was clear that the Leygueses' website targeted United States customers, but unclear whether it targeted

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<sup>69</sup> *Id.*

<sup>70</sup> *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984) (explaining that when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts within the forum, the State is exercising specific jurisdiction); *see also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

<sup>71</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985).

<sup>72</sup> *Helicopteros*, 466 U.S. at 416.

<sup>73</sup> *Id.*

<sup>74</sup> *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984).

<sup>75</sup> *World-Wide Volkswagen Corp.*, 444 U.S. at 292.

<sup>76</sup> *Moberg*, 666 F. Supp. 2d at 427 (quoting *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 452, 454 (3d Cir. 2003) ("In the Third Circuit, even though 'the mere operation of a commercially interactive web site should not subject the operator to jurisdiction anywhere in the world,' '[i]f a defendant web site operator intentionally targets the site to the forum state, and/or knowingly conducts business with forum state residents via the site, then the 'purposeful availment' requirement is satisfied.'")).

Delaware customers in particular.<sup>77</sup> Thus, the court denied without prejudice the Leygueses' motion to dismiss for lack of personal jurisdiction, pending a forty-five day period for jurisdictional discovery.<sup>78</sup> While the Delaware District Court will never rule on this specific case, the current trend seems to favor holding Internet posters accountable for their actions.<sup>79</sup> As Professor Joel Reidenberg has observed, "[t]he Internet became popular precisely because of the promise of a global audience. But, this promise could not absolve online activities of legal responsibility."<sup>80</sup> Courts have begun to look at online targeting and to any deleterious effects within the forum state to determine if personal jurisdiction is appropriate.<sup>81</sup> In this way, personal jurisdiction allows sovereign states to protect their citizens from online threats.<sup>82</sup>

#### 5. Summary of Considerations for the Delaware District Court

In 2009, the Delaware District Court had three options. It could classify Moberg's works as published United States Works (as suggested by the defendants), or as published or unpublished foreign works subject to the Berne Convention.<sup>83</sup>

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<sup>77</sup> *Moberg*, 666 F. Supp. 2d at 428 ("In this case, Erwan Leygues's website is in English and customers can purchase the website templates in U.S. dollars. Indeed, the address for the website contains a ".us" domain name. . . . Thus in contrast to *Toys "R" Us*, it is evident that Erwan Leygues, through his website is targeting United States customers. It is not clear, however, whether Erwan Leygues has targeted Delaware specifically because only Erwan Leygues holds that information.").

<sup>78</sup> *Id.* at 428.

<sup>79</sup> *See, e.g., Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 379 F.3d 1120, 1126 (9th Cir. 2004) ("Yahoo! obtains commercial advantage from the fact that users located in France are able to access its website; in fact, the company displays advertising banners in French to those users whom it identifies as French. Yahoo! cannot expect both to benefit from the fact that its content may be viewed around the world and to be shielded from the resulting costs. . . ."). The Delaware District Court will never rule on this matter because *Moberg* has been settled out of court. *See Joint Stipulation of Dismissal, Moberg v. 33T LLC*, 666 F. Supp. 2d 415 (D. Del. Dec. 3, 2009) (No. 1:08-cv-00625-NLH-JS), 2009 WL 5865842.

<sup>80</sup> Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 U. PA. L. REV. 1951, 1956 (2005).

<sup>81</sup> *Id.* at 1955.

<sup>82</sup> *Id.*

<sup>83</sup> The work could not qualify as an unpublished United States work. *See supra* note 35 and accompanying text.

If the photographs were considered published United States works, as the Leygueses contended, then Moberg would be subjected to the formalities of the United States Copyright Act, and those formalities would have to be met before he could file suit for copyright infringement.<sup>84</sup> First, registration would have had to have followed within three months of online posting in order for Moberg to qualify for an award of statutory damages and attorney fees, and second, Moberg would have had to have deposited two copies of the work with the Library of Congress. Additionally, the term of copyright would have commenced from the date of uploading, and persisted for ninety-five years. However, the fair use exception would have been marginally more favorable to the Leygueses.<sup>85</sup> Fair use is an affirmative defense to the charge of copyright infringement, and any fair use must satisfy several fair use factors as described in 17 U.S.C. §107.

If the photographs were considered non-United States works, published or unpublished, then Moberg would be exempt from the registration and deposit requirements, but would be barred from receiving statutory damages or attorney fees unless he had chosen to register prior to infringement.<sup>86</sup> Additionally, if the court found the photographs to be published non-United States works, then the fair use defense would be marginally more favorable to Moberg as the author of a published work.<sup>87</sup>

The Delaware District Court likely considered all of these consequences in deciding the *Moberg* case.

#### *D. The Court's Holding*

The Delaware District Court held that as a matter of law that Moberg's photographs were not published simultaneously in the United States, and therefore were foreign works, subject to the

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> 17 U.S.C. § 412 (2006); see 2-7 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.16[B][6][c] (Matthew Bender rev. ed. 2010) ("By reason of Section 412, in order for a copyright owner to be entitled to recover statutory damages and attorney's fees, the work must have been registered prior to commencement of the infringement for which such remedies are sought . . .").

<sup>87</sup> Cotter, *supra* note 49, at 1785–86.

Berne Convention.<sup>88</sup> Accordingly, Moberg did not have to file for registration before suing the Leygueses, and the court had subject matter jurisdiction to hear Moberg's case. In so holding, the court was able to take the first step in punishing the infringer. However, the court took no position on whether Moberg's photographs had been "published" for the purpose of the Copyright Act.<sup>89</sup>

The Delaware Court rejected the Leygueses' contention that "[i]t is well settled that Internet publications are published everywhere simultaneously, regardless of the location of the server hosting the website."<sup>90</sup> In rejecting this argument, the court noted that the cases cited by the Leygueses only made the observation that the Internet is located in no particular geographical location and that it is available to anyone worldwide.<sup>91</sup> Instead, the court reasoned, subjecting Moberg to United States formalities "would overextend and pervert the United States copyright laws, and would be contrary to the Berne Convention."<sup>92</sup> Thus, the court found in a case of first impression that Moberg's posting of his photographs to a German website did not, without more, simultaneously publish them in the United States. Accordingly, the court denied the defendant's motion to dismiss.<sup>93</sup>

Because the court found that Moberg was not required to follow the provisions of § 411(a), its ruling did not depend on whether that section is a jurisdictional requirement or simply a precondition to suit.<sup>94</sup> The court merely acknowledged in its opinion that the character of § 411(a) is unsettled.<sup>95</sup> The United States Supreme Court has since resolved this question in *Reed*

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<sup>88</sup> *Moberg v. 33T LLC*, 666 F. Supp. 2d 415, 422 (D. Del. 2009) Note that the judge ruling on the case was from New Jersey District Court, acting by designation from the Delaware District Court. *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 420.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 422, 428.

<sup>94</sup> *Id.* at 418 n.5. The court recognized in footnote 5 that the United States Supreme Court had recently granted certiorari to address this question. *See id.*

<sup>95</sup> *See id.* ("Because the Court finds that plaintiff is not required to follow the provisions of § 411(a), we need not decide whether that section is a jurisdictional requirement or simply a precondition to suit.")

*Elsevier v. Muchnick*.<sup>96</sup> The Supreme Court found in *Reed Elsevier* that § 411(a) makes registration a “precondition” to instituting a Copyright Act infringement claim, but does not restrict a federal court’s subject matter jurisdiction over such claims.<sup>97</sup> Presumably a precondition is waivable, while lack of subject matter jurisdiction is not.<sup>98</sup> Thus, the practical result of the *Reed Elsevier* holding is that federal courts cannot dismiss copyright infringement claims filed by authors with unregistered works for lack of subject matter jurisdiction,<sup>99</sup> but may still, at their discretion, dismiss claims based on unregistered works if defendants do not object to the lack of registration.<sup>100</sup> As a practical matter, most defendants will object to a lack of registration, so registration remains important. Also, a circuit split remains over whether merely filing for registration is sufficient to satisfy the registration “precondition,” or whether the application for registration must be ruled on (either granted or denied) by the Copyright Office prior to the filing of the complaint.<sup>101</sup>

As a result of the *Reed Elsevier* holding, Moberg’s case may have been able to stay in federal court even if the court had found

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<sup>96</sup> 130 S. Ct. 1237, 1241 (2010).

<sup>97</sup> See *id.* at 1247; see also 2-7 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.16 [B][2][c] (2010).

<sup>98</sup> See 2-7 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.16[B][2][c] (Matthew Bender rev. ed. 2010).

<sup>99</sup> See *Reed Elsevier*, 130 S. Ct. at 1249.

<sup>100</sup> See 2-7 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.16[B][2][c] (Matthew Bender rev. ed. 2010) (“What is clear is that, when defendants do not object and the matter proceeds through trial, it is no longer timely on appeal to raise the absence of registration (as it no longer may be viewed as a jurisdictional deficit.”)).

<sup>101</sup> See 2-7 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.16[B][3][b] (Matthew Bender rev. ed. 2010); see also 17 U.S.C. § 410(d) (“The effective date of a copyright registration is the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration, have all been received in the Copyright Office.”); Amanda Bronstad, *Circuit Split Widens on Copyright Registration Timing*, LAW.COM (May 28, 2010), <http://www.law.com/jsp/article.jsp?id=1202458862436>; Cole P. Wright & Kathleen T. Petrich, *Ninth Circuit Loosens the Copyright Registration Requirement and Widens the Circuit Split*, GRAHAM & DUNN PC (Aug. 3, 2010), <http://www.grahamdunn.com/go/articles/ninth-circuit-loosens-the-copyright-registration-requirement-and-widens-the-circuit-split>. The holding in *Reed Elsevier* arguably adds credence to the application approach, by which the precondition to suit is satisfied upon filing for registration.

that Moberg was subject to the registration requirement; he would simply have had to file for registration. However, in 2008 the Leygueses legitimately sought to dismiss Moberg's case for lack of subject matter jurisdiction because Moberg had not yet registered his work.

## II. DISCUSSION

Part II will discuss the current debate over the classification of Internet postings. To do so, it will summarize the ongoing conflict among scholars who believe Internet postings like Moberg's constitute publications, those who believe such postings constitute displays of work, and those who argue the postings constitute something in between. This distinction is important in determining the copyright protections available to the author.

### A. *Internet Posting as Publication*

The following sections explain the rationale of those who believe that Internet postings should constitute publications under the Copyright Act. Proponents of this view point to recent case law to suggest that Internet postings include the essence or feel of a publication,<sup>102</sup> or that "distribution" is synonymous with "publication."<sup>103</sup> Additionally, proponents can point to several policy reasons why authors would want their Internet postings to be considered published.<sup>104</sup>

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<sup>102</sup> *Jerome v. Twentieth Century Fox Film Corp.*, 67 F. Supp. 736, 739 (S.D.N.Y. 1946) ("To constitute 'publication' there must be such a dissemination of the work of art itself to the public as to justify the belief that it took place with the intent of rendering such work common property. . . . *The essence of publication* is that the matter must be available to all comers and not only to a class." (emphasis added) (citation omitted)).

<sup>103</sup> *See, e.g., A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) (holding that uploading music files to the Internet for others to copy violates copyright holder's exclusive publication right); *State v. Perry*, 697 N.E.2d 624, 628 (Ohio 1998) (holding that "posting software on a bulletin board where others can access and download it is distribution," i.e., publication).

<sup>104</sup> *See Chang, supra* note 45, at 227–29.

### 1. The *Getaped* Case

The only reported decision specifically addressing the issue of whether posting a work on the Internet, without more, constitutes publication for purposes of the Copyright Act is *Getaped.com, Inc. v. Cangemi*.<sup>105</sup> In *Getaped*, the owner of a website advertising motorized scooters sued his competitor, alleging copyright infringement in connection with the creation of a rival website. The plaintiff had registered his copyright after infringement occurred, but within three months of having posted the content to the public website.<sup>106</sup> If the court determined that the plaintiff's Internet posting was a publication, then the plaintiff would be entitled to statutory damages and attorney fees, even for acts of infringement committed prior to registration.<sup>107</sup> If considered unpublished, then the plaintiff would only be entitled to actual damages, of which there were very little.<sup>108</sup> Relying on case law holding that a defendant's unauthorized transmission of copyrighted works over the Internet violates the copyright owner's exclusive right to distribute copies, the district court determined that the Internet posting did indeed constitute a publication.<sup>109</sup> The court equated the Internet posting in *Getaped* to the publication of music files or copyrighted images to the Internet with the knowledge that the files would be downloaded.<sup>110</sup>

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<sup>105</sup> 188 F. Supp. 2d 398 (S.D.N.Y. 2002).

<sup>106</sup> *Id.* at 400.

<sup>107</sup> 17 U.S.C. § 412 (2006).

<sup>108</sup> *Id.*; see also discussion *supra* note 59. In *Getaped.com*, actual damages amounted to \$1,050 and statutory damages amounted to \$30,000. See *Getaped.com, Inc. v. Cangemi*, 188 F. Supp. 2d 398 (S.D.N.Y. 2002).

<sup>109</sup> *Getaped*, 188 F. Supp. 2d at 402.

<sup>110</sup> *Id.* at 401; Cotter, *supra* note 49, at 1769 (“[M]erely by accessing a webpage, an Internet user acquires the ability to make a copy of that webpage, a copy that is, in fact, indistinguishable in every part from the original. Consequently, when a website goes live, the creator loses the ability to control either duplication or further distribution of his or her work. A webpage in this respect is indistinguishable from photographs, music files or software posted on the web—all can be freely copied. Thus, when a webpage goes live on the Internet, it is distributed and ‘published’ in the same way that music in *Napster* or the photographs in the various *Playboy* decisions were distributed and ‘published.’” (quoting *Getaped*, 188 F. Supp. 2d at 402)); see, e.g., *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) (placing mp3 files on the Internet for others to download violates the exclusive publication right of the copyright holder); *Playboy Enters., Inc. v. Chuckleberry Publ’g, Inc.*, 939 F. Supp. 1032, 1039 (S.D.N.Y.

To support its holding, the *Getaped* court tried to identify the essence of publication. According to the premiere copyright treatise “a *sine qua non* of publication [is] the acquisition by members of the public of a possessory interest in tangible copies of the work in question.”<sup>111</sup> Since a person cannot take any sort of possession or control of a painting or a play merely by viewing it, the public display of a work of art or the public performance of a play does not constitute publication.<sup>112</sup> However, the *Getaped* court reasoned, webpages are materially different from artwork or plays; by accessing a webpage, the user not only views the page but can also copy the code used to create the page or copy the image on the screen.<sup>113</sup> Even if the images on the screen are encrypted so that they cannot be directly copied or saved to the user’s computer, “screenshot” software can be used to take a digital picture of whatever is on the screen.<sup>114</sup> For this reason, the *Getaped* court and several others have held that posting music files, software or photographs to a webpage constitutes publication for purposes of the Copyright Act.<sup>115</sup> Other courts in addressing this question have simply equated Internet posting with publication without analysis.<sup>116</sup>

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1996) (posting content on Internet and inviting others to download it violates exclusive publication right); *Playboy Enters., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 513 (N.D. Ohio 1997) (moving subscriber-uploaded photographs to common bulletin board violates plaintiff’s exclusive publication right); *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552, 1556 (M.D. Fla. 1993) (uploading of copyrighted images with the knowledge that the images would be downloaded by other bulletin board subscribers infringes exclusive publication right of the plaintiff).

<sup>111</sup> 2-7 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 4.07 (Matthew Bender rev. ed. 2010).

<sup>112</sup> *Getaped.com*, 188 F. Supp. 2d at 401–02; *see also* 17 U.S.C. § 101.

<sup>113</sup> *Getaped.com*, 188 F. Supp. 2d at 402.

<sup>114</sup> A “screenshot” is an image taken by the computer to record the visible items displayed on the monitor. *See, e.g., Screen Shot 1.0*, CNET, [http://download.cnet.com/ScreenShot/3000-2192\\_4-10423334.html](http://download.cnet.com/ScreenShot/3000-2192_4-10423334.html) (last visited Sept. 16, 2010).

<sup>115</sup> *Getaped.com*, 188 F. Supp. 2d at 401 (citing *Napster*, 239 F.3d at 1014; *Hardenburgh*, 982 F. Supp. at 513; *Chuckleberry*, 939 F. Supp. at 1039; *Frena*, 839 F. Supp. at 1556 and *Perry*, 697 N.E.2d at 628).

<sup>116</sup> *See, e.g., Oja v. U.S. Army Corps. of Eng’rs*, 440 F.3d 1122, 1130–31 (9th Cir. 2006).

## 2. Equating Distribution with Publication

Several courts (including the Supreme Court) that have wrestled with the Copyright Act's definition of publication have found "distribution" and "publication" to be synonymous.<sup>117</sup> To arrive at this conclusion, these courts relied on the legislative history of the Copyright Act;<sup>118</sup> the House and Senate Judiciary Committees of the Ninety-Fourth Congress consistently described Section 106(3)<sup>119</sup> of the Copyright Act as protecting the "first public distribution of an authorized copy" of a work, conflating the concepts of distribution and publication.<sup>120</sup> Under this interpretation, an Internet posting that qualifies as "distributed" would then qualify as "published."

## 3. Policy Benefits of Publication

Equating Internet posting with publication can confer many benefits on the copyright holder, such as the ability to invoke the three-month window of opportunity after first publication to seek registration, as the author did in the *Getaped* case.<sup>121</sup> Publication confers other benefits as well—both to authors and to the public. For example, if registration occurs within five years of the first publication, the registration certificate constitutes prima facie

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<sup>117</sup> *Elektra Entm't Grp., Inc. v. Barker*, 551 F. Supp. 2d 234, 241 (S.D.N.Y. 2008) (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) ("[The Copyright Act of 1976] recognized for the first time a distinct statutory right of first publication, which had previously been an element of the common-law protections afforded unpublished works. The Report of the House Committee on the Judiciary confirms that 'Clause (3) of section 106, establishes the exclusive right of publications . . . Under this provision the copyright owner would have the right to control the first public distribution of an authorized copy . . . of his work.'")); *see, e.g.*, *Ford Motor Co. v. Summit Motor Prods., Inc.* 930 F.2d 277 (3d Cir. 1991) ("'Publication' and the exclusive right protected by section 106(3) . . . are for all practical purposes, synonymous. Therefore, any clarification of what is meant by 'publication' would also clarify what is meant by section 106(3) . . ."); *Agee v. Paramount Commc'ns, Inc.*, 59 F.3d 317, 325 (2d Cir. 1995) (agreeing that the terms "distribution" and "publication" are "essentially synonymous," but deciding the case on other grounds).

<sup>118</sup> *Elektra*, 551 F. Supp. 2d at 241.

<sup>119</sup> The distribution right under § 106(3) is the right of the copyright holder "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." 17 U.S.C. § 106(3) (2006).

<sup>120</sup> *Elektra*, 551 F. Supp. 2d at 241–42 (quoting H.R. REP. NO. 94-1476, at 62 (1976)).

<sup>121</sup> *Cotter*, *supra* note 49, at 1786.

evidence of ownership, benefitting the author.<sup>122</sup> However, if a work has been published it is considered to be in the public sphere and thus open to criticism and comment. As a result, it is easier to have a “fair use”<sup>123</sup> of a published work than of unpublished work, benefitting the public. These are just some of the numerous important implications of classifying a work as “published.”<sup>124</sup>

### *B. Internet Posting as Limited Publication*

If not full publications, could we consider Internet postings to be limited publications? The designation of “limited publication” was meant to alleviate the penalties imposed on works bearing unsatisfactory notice under the 1909 Act.<sup>125</sup> Under the 1909 Act, a limited publication was still protected under common law copyright even if it did not bear a copyright notice.<sup>126</sup> Although the term “limited publication” does not appear in the 1976 Act, the definition is still used today by judges and scholars to describe works that do not fully satisfy the definition of publication in the Copyright Act.<sup>127</sup> To qualify as limited publications, works must satisfy a three-part test:<sup>128</sup> the work must be communicated (1) only to a select group, (2) for a limited purpose, and (3) those to whom the work has been communicated must have no additional distribution rights to the work.<sup>129</sup> The limited purpose can be

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<sup>122</sup> 17 U.S.C. § 410(c).

<sup>123</sup> *Id.* § 107.

<sup>124</sup> Other ramifications concern the presumption of an author’s death, termination of transfers, legal deposit (mandatory and registration), the scope of protection of foreign authors, reproduction by libraries and archives, exemptions for the blind and handicapped, good faith encryption research and public broadcasting. Chang, *supra* note 45, at 228–29; *see also* discussion *infra* at notes 148–54 and accompanying text.

<sup>125</sup> Elizabeth Townsend Gard, *January 1, 2003: The Birth of the Unpublished Public Domain and Its International Implications*, 24 CARDOZO ARTS & ENT. L.J. 687, 693 (2006) (“The 1909 Act required that when a work was published, an accompanying © symbol be attached to the work, along with the name of the copyright holder and the date, and that the work be properly deposited and registered with the Copyright Office. If any of these elements was missing, the newly published work immediately became part of the public domain.”).

<sup>126</sup> *See id.*

<sup>127</sup> *See* 2-7 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 4.13[A] (Matthew Bender rev. ed. 2010).

<sup>128</sup> Gard, *supra* note 125, at 693.

<sup>129</sup> *Id.* at 693–94.

express or implied from the circumstances.<sup>130</sup> Examples of limited publication works include the display of a painting in a gallery, access by scholars to archival collections, and, perhaps most famously, the advance transcript given to the media of Martin Luther King, Jr.'s "I Have a Dream" speech.<sup>131</sup> Also, making copies of a work available merely for review, criticism or performance constitutes limited publication.<sup>132</sup> For example, one court held that the transfer of a film without the right of distribution or sale, but with the right to make one copy and to broadcast the film on noncommercial television constituted a limited, not general, publication.<sup>133</sup> However, giving copies of books to retailers has been held to constitute general publication, even before those copies hit the shelves.<sup>134</sup>

Currently, cases applying the definition of limited publication "are not totally consistent,"<sup>135</sup> and the definition of "limited publication" leaves much to be desired because it is so vague:<sup>136</sup> Who comprises a "limited group"?<sup>137</sup> What constitutes a "limited purpose"?<sup>138</sup> And what does it mean to be "without the right of diffusion, reproduction, distribution or sale"?<sup>139</sup> According to Professor Melville B. Nimmer it is unclear whether the doctrine of limited publication continues to exist today for its original purpose, but he thinks that it must, since the statutory definition of publication is limited to a "distribution of copies or phonorecords of a work *to the public . . .*"<sup>140</sup> Theoretically, the doctrine of

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<sup>130</sup> 2-7 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 4.13 (Matthew Bender rev. ed. 2010).

<sup>131</sup> Gard, *supra* note 125, at 693–94.

<sup>132</sup> 2-7 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 4.13[A] (Matthew Bender rev. ed. 2010).

<sup>133</sup> See *Burke v. Nat'l Broadcasting Co.*, 598 F.2d 688 (1st Cir. 1979), *cert. denied*, 444 U.S. 869 (1979).

<sup>134</sup> See Cotter, *supra* note 49, at 1763 (citing *Data Cash Sys., Inc. v. JS&A Grp., Inc.*, 628 F.2d 1038, 1042–43 (7th Cir. 1980)).

<sup>135</sup> See Cotter, *supra* note 49, at 1764 (citing *William A. Graham Co. v. Haughey*, 430 F. Supp. 2d 458, 471 (E.D. Pa. 2006)).

<sup>136</sup> See Cotter, *supra* note 49, at 1772.

<sup>137</sup> *Id.* at 1772.

<sup>138</sup> *Id.* at 1772–73.

<sup>139</sup> *Id.* at 1773–74.

<sup>140</sup> 2-7 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 4.13[B] (Matthew Bender rev. ed. 2010) (citing 17 U.S.C. § 101) (emphasis added).

limited publication remains a tool that could be used by future judges to effectuate just outcomes. To the extent that limited publications lie somewhere in between formal publications and mere displays of work, they are helpful to any inquiry into Internet postings, which fit the same description.

### C. *Internet Posting as Display*

The following three sections will describe the rationale of those who view Internet postings as mere displays, and not publications. In stark contrast to the other reputable sources mentioned in the preceding sections, a leading intellectual property treatise by experts Roger Schechter and John Thomas states that works distributed electronically (such as Internet postings) are not “published” because they have not been distributed to the public.<sup>141</sup> Other opponents of Internet-postings-as-publications criticize the rationale of the *Getaped* case and the case law that equates distribution with publication. Moreover, these opponents point to several policy reasons why Internet authors may not want their works to constitute publications.

#### 1. Criticizing *Getaped*

Critics of the *Getaped* holding claim that the decision is irreconcilable with the statutory principle that a public display of work is not a publication.<sup>142</sup> They argue that the plaintiff’s site going live in the *Getaped* case is more akin to a public display or transmission than to a publication.<sup>143</sup> To make this argument, these critics point to the fact that Getaped.com currently does (and likely at the time did) have a copyright notice that explicitly states: “the contents of this web site are the copyrighted property of

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<sup>141</sup> ROGER E. SCHECHTER & JOHN R. THOMAS, INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS AND TRADEMARKS 81 (2003) (“It is clear . . . that under the statutory language now in effect there has been no *distribution of copies or phonorecords . . . to the public* and hence no publication when a work is disseminated electronically.”) (emphasis added).

<sup>142</sup> BRUCE P. KELLER AND JEFFREY P. CUNARD, PRACTISING LAW INSTITUTE REFERENCE: COPYRIGHT LAW § 6.12 n.94 (2009).

<sup>143</sup> *See id.* (suggesting that the holding contradicts the principle that a public display is not a publication); *see also* Chang, *supra* note 45, at 241 (arguing the court was remiss in failing to address the possibility that a transmission may not result in publication).

Getaped.com, Inc., and are protected by U.S. copyright and international treaties and *may not be copied without the express written permission of Getaped.com, Inc.*<sup>144</sup> Since the authors did not want others to copy their material, arguably the posting does not rise to the level of a “distribution” or “offer to distribute” required for a publication.<sup>145</sup> Moreover, these critics contend, the fact that the authors of the *Getaped* site lost control of their work when others made an unauthorized copy of their site does not, without more, create a “distribution” or “offer to distribute.” In other words, these critics argue that we cannot force an author to consider a work published that the author does not intend to be published just because someone else made a copy of the work.<sup>146</sup> Lastly, these critics argue, if a web posting becomes “published” once it is copied, then by analogy, any broadcast television program is “published” the moment someone makes a video or digital video recording of the broadcast.<sup>147</sup> Such an analogy eradicates the current statutory distinction between displays and publications in United States copyright law.

## 2. Responding to the “Distribution as Publication” Argument

Those who contend that Internet postings are not publications point out that publication and distribution are not synonymous, but are two distinct rights within the Copyright Act.<sup>148</sup> Although the

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<sup>144</sup> Chang, *supra* note 45, at 240 (quoting *Copyright and Trademark Notice*, GETAPED.COM, <http://www.getaped.com/copyright> (last visited July 30, 2005)) (emphasis added).

<sup>145</sup> 17 U.S.C. § 101 (2006).

<sup>146</sup> See *Zito v. Steeplechase Films, Inc.*, 267 F. Supp. 2d 1022, 1026 (N.D. Cal. 2003) (“[A]n act that commences infringement does not publish an otherwise unpublished work.”).

<sup>147</sup> Chang, *supra* note 45, at 241.

<sup>148</sup> The right of publication is defined at 17 U.S.C. § 101 (“‘Publication’ is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.”). The right of distribution is codified at 17 U.S.C. § 106(3) (“Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: . . . (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.”).

language of the distribution right is almost identical to the first sentence of the definition of publication,<sup>149</sup> a distribution is not necessarily published because the copyright holder must always approve publication.<sup>150</sup> Likewise, the Copyright Office reads the Copyright Act to provide that unauthorized publication—even if it is benevolent in intent—does not constitute statutory publication.<sup>151</sup> Thus, “an unauthorized distribution of a work would violate the copyright owner’s § 106(3) right of distribution, but would not result in publication.”<sup>152</sup> Conversely, the mere *offering* to distribute copies constitutes publication, but does not infringe the distribution right.<sup>153</sup> Therefore, some scholars argue that the distribution right is not equivalent to publication, but is in some ways broader and in other ways narrower than the definition of publication.<sup>154</sup>

### 3. Policy Detriments of Publication

Defining Internet postings as publications presents several potential difficulties for authors. First, the registration process is complex for published works and the burden of depositing copies with the Copyright Office is potentially tremendous due to the volume of postings on the Internet and the frequency with which they change.<sup>155</sup> Moreover, the purpose of depositing copies (to have a record available to the public) is essentially moot in the Internet posting context, where the content is already readily

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<sup>149</sup> *See id.*

<sup>150</sup> Chang, *supra* note 45, at 232–33. Though not stated in the definition of publication, the consent of the copyright owner is necessary for a publication to occur. 1-4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 4.04 (Matthew Bender rev. ed. 2010) (citing Childers v. High Soc’y Magazine, Inc., 557 F. Supp. 978 (S.D.N.Y. 1983), *reh’g granted*, 561 F. Supp. 1374 (S.D.N.Y. 1983)).

<sup>151</sup> Gard, *supra* note 125, at 701 (citing U.S. COPYRIGHT OFFICE, CIRCULAR NO. 22, HOW TO INVESTIGATE THE COPYRIGHT STATUS OF A WORK (July 2006), *available at* <http://copyright.gov/circs/circ22.pdf> (“[U]nauthorized publication without the copyright notice, or with a defective notice, does not affect the validity of the copyright in the work.”)).

<sup>152</sup> Chang, *supra* note 45, at 232 (citing Zito v. Steeplechase Films, Inc., 267 F. Supp. 2d 1022, 1026 (N.D. Cal. 2003) (“[A]n act that commences infringement does not publish an otherwise unpublished work.”)).

<sup>153</sup> Chang, *supra* note 45, at 233.

<sup>154</sup> *Id.*

<sup>155</sup> Cotter, *supra* note 49, at 1786–87.

accessible to the public.<sup>156</sup> Additionally, authors may not like having their work considered part of the public sphere where the work is available for “fair use” by the public.<sup>157</sup>

Finally, jurisdictional considerations make equating Internet postings with publications problematic. Often, Internet postings are available around the world simultaneously, like books that appear on shelves all over the world at the same time upon publication.<sup>158</sup> But while book authors choose where to publish and where their books will first be sold, Internet authors cannot control who is looking at their work. Assuming that an Internet posting is considered “first published” at the time of first download (first distribution), if the first person to legally download the work is logging on from China, then the work is considered first published in China pursuant the 1976 Copyright Act. Assuming that an Internet posting is considered “first published” upon uploading (offering to distribute), if the upload makes the work available around the world simultaneously, then the work will be considered first published in the country offering the shortest term of copyright protection (per the rule of shorter term).<sup>159</sup> Neither of these outcomes is likely to align with the reasonable expectations of an Internet author.<sup>160</sup> Rather, an author who posts to a United States website from the United States probably considers her work to be a United States work. Because the 1976 Copyright Act is inappropriate for the digital age, authors may not want their Internet postings defined as publications.

#### *D. Congressional Intent*

It is unclear whether Congress intends for Internet postings to constitute publications. Currently, neither Berne nor the 1976 Copyright Act equates transmission with publication. The Berne Convention states that “communication by wire or the broadcasting of literary or artistic works . . . shall not constitute publication.”<sup>161</sup>

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<sup>156</sup> *Id.* at 1787; *see also* discussion *supra* Part I.A.3.

<sup>157</sup> Cotter, *supra* note 49, at 1786–87.

<sup>158</sup> *Id.*

<sup>159</sup> *See* discussion *supra* note 40 and accompanying text.

<sup>160</sup> *Id.*

<sup>161</sup> *See* Berne Convention, *supra* note 28, art. 3.

The 1976 Copyright Act House Report reads, “any form or dissemination in which a material object does not change hands—performances or displays on television, for example—is not a publication no matter how many people are exposed to the work.”<sup>162</sup> Furthermore, the methods of distribution enumerated in the statutory definition of publication are: “by sale or other transfer of ownership, or by rental, lease, or lending,”<sup>163</sup> and legislative history suggests that transmissions do not fall within these methods.<sup>164</sup> Moreover, Congress knew about airwave transmissions of data (such as radio and television) in 1976 when it passed the most recent Copyright Act.<sup>165</sup> Arguably, Congress would have inserted statutory language if it wanted these transmissions to constitute publication.<sup>166</sup> Thus, if Internet postings must occur by transmission alone, they cannot be defined as publications under the current law.<sup>167</sup>

Most recently, in 1995, a bill called the National Information Infrastructure Copyright Protection Act of 1995 (NII) proposed to amend the definition of “publication” by adding “transmission” as a means of publication.<sup>168</sup> But the bill failed in both houses, likely

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<sup>162</sup> H.R. REP. NO. 94-1476, at 138 (1976).

<sup>163</sup> 17 U.S.C. § 101 (2006).

<sup>164</sup> See *NII Copyright Protection Act of 1995: Hearing on H.R. 2441 Before the H. Subcomm. on Courts and Intell. Prop.*, 104th Cong. (1996) (statement of Frances Preston, President and Chief Executive Officer, Broadcast Music, Inc. (“BMI”)) (“Home taping of conventional television and radio signals is, of course, a widespread practice. The fact that on-demand transmissions might be downloaded or otherwise reconverted into audible sound at a time after the transmission has occurred would seem to be made irrelevant by a provision in the Copyright Act that a transmitted performance remains ‘public’ even if it is received ‘at different times’ by each member of the public.”).

<sup>165</sup> See H.R. REP. NO. 94-1476, at 80 (1976) (“[S]ection 109(b) takes account of the potentialities of the new communications media, notably television, cable and optical transmission devices, and information storage and retrieval devices, for replacing printed copies with visual images. . . . In other words, the display of a visual image of a copyrighted work would be an infringement if the image were transmitted by any method (by closed or open circuit television, for example, or by a computer system) from one place to members of the public located elsewhere.”).

<sup>166</sup> Chang, *supra* note 45, at 235.

<sup>167</sup> *Id.* at 234.

<sup>168</sup> National Information Infrastructure Copyright Protection Act of 1995, H.R. 2441, 104th Cong. (1995) (“(a) DISTRIBUTION—Section 106(3) of title 17, United States Code, is amended by striking ‘or by rental, lease, or lending’ and inserting ‘by rental, lease, or lending, or by transmission.’”).

due to the lobbying efforts of Internet Service Providers.<sup>169</sup> To date, Congress has refused to equate transmission with publication. What remains to be seen is whether Congress will ever recognize the Internet as a form of transmission that is not entirely analogous to radio or television.

*E. The Position of the Copyright Office*

The Copyright Office has not formally taken a position on this matter.<sup>170</sup> Instead, it leaves the decision of whether an Internet posting is published or unpublished up to the individual registering the online work.<sup>171</sup> However, whether an individual's choice will bear any weight in court it is still unclear.<sup>172</sup> That the Copyright Office even permits works transmitted over the Internet to be self-identified as published on registration forms implies that the Copyright Office at least tacitly supports construing Internet posting as publication in some circumstances.<sup>173</sup>

Furthermore, the Register of Copyrights testified at the 1995 joint hearing on the amendment to the Copyright Act, supporting all of the amendments in their entirety.<sup>174</sup> At that time, it was the position of the Copyright Office that:

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<sup>169</sup> See Chang, *supra* note 45, at 235. As a side note, the bill probably failed as a result of heavy lobbying from those who opposed the bill (including Internet Service Providers) because these opponents feared a potential widening of the scope of infringement. *Id.* at 249. They “feared that liability would extend to sending email, posting messages, web browsing, and many other activities done on the Internet.” *Id.*

<sup>170</sup> Cotter, *supra* note 49, at 1770 (citing U.S. COPYRIGHT OFFICE, CIRCULAR NO. 65, COPYRIGHT REGISTRATION FOR AUTOMATED DATABASES 2 (2006) (“It is unclear whether online availability for the user constitutes publication of the work under the copyright law.”); U.S. COPYRIGHT OFFICE, CIRCULAR NO. 66, COPYRIGHT REGISTRATION FOR ONLINE WORKS 3 (2006) (“The definition of ‘publication’ in the U.S. copyright law does not specifically address online transmission.”)).

<sup>171</sup> Gard, *supra* note 125, at 699 (citing U.S. COPYRIGHT OFFICE, CIRCULAR NO. 66, COPYRIGHT REGISTRATION FOR ONLINE WORKS, INFORMATION 2 (2000), available at <http://www.copyright.gov/circs/circ66.pdf>).

<sup>172</sup> Gard, *supra* note 125, at 700.

<sup>173</sup> Chang, *supra* note 45, at 237.

<sup>174</sup> See generally *NII Copyright Protection Act of 1995: Joint Hearing on H.R. 2441 and S. 1284 Before the H. Subcomm. on Courts and Intell. Prop. and the S. Comm. on the Judiciary*, 104th Cong. (1996) (statement of the Hon. Marybeth Peters, Register of Copyrights, U.S. Copyright Office, The Library of Congress), 1995 WL 677006.

The key to publication should be whether or not copies or phonorecords of the work have been *made available* to the public, in whatever form is desired. When members of the public have received copies of the work through digital networks, the work has been published to the same extent as if physical disks had been purchased at a store.<sup>175</sup>

Within these remarks, the Copyright Office expressed its belief that it is possible for publication to occur via the Internet, but it did not express its opinion on whether all Internet postings necessarily constitute published works.<sup>176</sup>

#### *F. Internet Posting as Publication for Limited Purposes*

Given the various pros and cons described above, Professor Thomas F. Cotter of University of Minnesota Law School argues that while defining Internet posting as publications is logical, the results of doing so do not necessarily benefit authors.<sup>177</sup> Professor Cotter suggests that although equating Internet postings with publications is undesirable for *all* purposes,<sup>178</sup> it would benefit authors to equate the two for *limited* purposes.<sup>179</sup> To make this happen, Cotter recommends defining “publication” either broadly or narrowly for various purposes.<sup>180</sup> For example, a broad definition of publication (which includes Internet postings) would apply for the purposes of receiving the registration grace period, benefitting authors. Also, this broad definition would apply for the purpose of fair use analysis, benefitting the public.<sup>181</sup> However, a

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<sup>175</sup> *Id.* (emphasis added).

<sup>176</sup> Chang, *supra* note 45, at 252.

<sup>177</sup> Cotter, *supra* note 49, at 1787–88.

<sup>178</sup> *Id.* at 1771.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 1793 (citing *Am. Visuals Corp. v. Holland*, 239 F.2d 740, 742–43 (2d Cir. 1956)).

<sup>181</sup> Cotter, *supra* note 49, at 1793. Cotter also suggests that several courts may be tending in this direction. *See Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003) (noting that “[p]ublished works are more likely to qualify as fair use because the first appearance of the artist’s expression has already occurred,” and that “Kelly’s images appeared on the Internet before Arriba used them in its search engine,” so that the nature of the copyrighted work, the second fair use factor, weighed “only slightly in favor of Kelly”); *Video-Cinema Films, Inc. v. Cable News Network, Inc.*, Nos. 98 Civ.

narrow definition of publication (excluding Internet postings) would apply for the purpose of imposing a duty to deposit, and for determining a work's country of origin.<sup>182</sup> Adopting these proposed changes would necessitate several refinements to the definition of publication.<sup>183</sup> By defining publication either broadly or narrowly for different purposes, the Internet authors receive the benefits of being published without the illogical drawbacks. Cotter's approach thus attempts to satisfy an author within the bounds of the current Copyright law. The other option is, of course, to change the law.

### *G. Internet Posting as Publication for Limited Works*

Yet another proposed remedy for the publication problem is to consider only certain postings as published works. This approach would limit publication status to works that most closely resemble distributions "by sale or other transfer of ownership, or by rental,

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7128(BSJ), 98 Civ. 7129(BSJ), 98 Civ. 7130(BSJ), 2001 WL 1518264, at \*7 n.17 (S.D.N.Y. Nov. 28, 2001) (finding that both general and limited publication weighs in favor of the use being a fair use). Fair use is an affirmative defense to the accusation of copyright infringement, and any fair use must satisfy several fair use factors as described in 17 U.S.C. § 107 (2006).

<sup>182</sup> Cotter, *supra* note 49, at 1793 ("[F]or purposes of determining country of origin, the narrower criterion may make sense, so that a work first made available in one country by a citizen or resident of that country is not deemed to be first published in some entirely unrelated place.").

<sup>183</sup> *Id.* at 1794 ("First, a general publication would take place if the author (or her agent) distributed or offered to distribute at least one copy (including a RAM copy) to the general public—that is, to a more-than-limited group (anyone who is interested) or to members of the public indiscriminately. Second, a general publication also would occur if (1) the author (a) actually distributed at least one copy (including a RAM copy) to at least one person, and (b) authorized that person to effect or authorize a general publication; and (2) the person so authorized, or someone that person himself authorized, actually distributed or offered to distribute at least one copy to members of the general public. Third, for certain special purposes, no general publication would occur unless the author also authorized the recipient to copy the work, and the recipient actually exercised his authority both to copy and distribute (or offer to distribute) copies to the general public. These certain special purposes include imposing the duty to deposit, determining the status of personal correspondence and other private documents, requiring affixation of copyright notice that might deface unique works of art, or determining country of origin. What this proposed redefinition loses in conciseness, it gains in terms of being more closely aligned with sound copyright policy, and serving as a better predictor of courts' actual behavior in close cases.").

lease, or lending”<sup>184</sup>—in other words, to postings uploaded with the author’s permission to websites that permit downloading.<sup>185</sup> Adopting this definition acknowledges that many Internet sites, such as the one at issue in *Getaped*, forbid downloading or copying through the site’s terms of service, or try to prevent such conduct by encryption.<sup>186</sup> Such a definition also arguably comports with the traditional idea of analog transmissions, which are not intended to be taped or otherwise recorded (except for personal use).<sup>187</sup> Just as analog transmissions are not publications,<sup>188</sup> under this approach, Internet postings designed not to be copied or downloaded would not constitute publications.

### III. RECOMMENDATIONS

*Moberg v. 33T LLC* has been cited for the proposition that “[t]he appearance of a foreign work on a foreign Web site accessible from the United States does not, without more, transform it into ‘a United States work’ for which registration is a prerequisite for litigation.”<sup>189</sup> While the Delaware District Court came to the fair conclusion—allowing the plaintiff’s meritorious case to stay in court—its holding is a troubling one. By finding the posting to be a foreign work, the court did not need to decide if it was published or unpublished. Thus, the court gave us no new insight into how online postings fit into existing statutory definitions.<sup>190</sup>

Part III will argue that under current copyright law definitions, Moberg’s posting should constitute a publication, and that the photographs were potentially published simultaneously in the United States and Germany. Also, this part will describe how the

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<sup>184</sup> Chang, *supra* note 45, at 238.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 239.

<sup>187</sup> See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (finding that the making of individual personal copies of complete television shows for purposes of time-shifting does not constitute copyright infringement, but is fair use).

<sup>188</sup> See discussion *supra* Part II.D.

<sup>189</sup> JOHN GLADSTONE MILLS III ET AL., 2 PATENT LAW FUNDAMENTALS § 6:116 (2d ed. 2010).

<sup>190</sup> See *Moberg v. 33T LLC*, 666 F. Supp. 2d 415, 421–24 (D. Del. 2009).

international copyright registration system must be changed to adequately address the needs of future international Internet authors.

*A. Is it a Publication?*

It is plausible that Moberg's posting of a series of photographs to the blaugallery.com website constitutes a general, not limited publication under the Copyright Act and the Berne Convention definitions. The posting was not merely a broadcast, transmission, public performance or display.

Moberg's postings can fit into the Copyright Act's definition of publication. Blaugallery.com is "an online art shop that offers copies of [its] works for sale as canvas prints stretched over a wooden framework."<sup>191</sup> So, by posting photographs to the gallery website Moberg offered to distribute copies "to a group of persons for purposes of further distribution . . . or public display."<sup>192</sup> By posting the works to the gallery site, Moberg manifested his intent for consumers (a "group of persons") to purchase the works for use. In this way, Moberg's posting of photographs to the gallery website is very similar to the distribution of books to bookstores; the books are considered published not upon transfer of ownership to customers, but earlier, upon being offered for sale.<sup>193</sup>

The postings can also fit into the Berne Convention's definition of publication. The Berne Convention's definition of publication is even broader than that of the 1976 Copyright Act, requiring only the availability of copies in a way that satisfies the reasonable requirements of the public (which depends on the nature of the work).<sup>194</sup> The postings may indeed have provided sufficient copies to satisfy the reasonable requirements of the public. Copies of the photographs could easily be obtained by consumers—either by copy-pasting the digital image or ordering a copy from the gallery. Also, Moberg's works were certainly posted with his consent—another requirement of the Berne definition.

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<sup>191</sup> *Id.* at 418.

<sup>192</sup> *See* 17 U.S.C. § 101.

<sup>193</sup> *See* discussion *supra* notes 134, 153 and accompanying text.

<sup>194</sup> *See supra* notes 49–50 and accompanying text.

Furthermore, it is plausible that Moberg's postings were not merely limited publications,<sup>195</sup> but were general publications. Although photographs displayed in physical galleries typically constitute limited publications,<sup>196</sup> Moberg's online postings were far more accessible to the public than works in a physical gallery. One can only take a picture of a photograph in a gallery, but one can download an identical copy of a photograph online.<sup>197</sup> Thus, the works satisfied only two of the three limited publication requirements: 1) the posting had been communicated for a limited purpose—to enable blaugallery to sell copies—and 2) those to whom the work had been communicated had no additional distribution rights to the work. But the works failed the third requirement because they were not communicated only to a select group; the entire world could access the blaugallery website. Moreover, the English language used on the site made it more accessible to foreign parties than it would have been had the site been in German.

Moberg's posting did not constitute merely a transmission<sup>198</sup> or public display. The *Getaped* court elucidated the key distinction between these two concepts and publication.<sup>199</sup> Since a person cannot take any sort of possession or control of a photograph merely by viewing it at a gallery, or watching it on TV, the public display of a photograph in a brick-and-mortar gallery does not constitute publication.<sup>200</sup> However, by accessing a webpage, the user not only views the page but can also copy the code used to create the page and can download or copy-paste an image from the screen. Whether the website has a privacy policy or encrypts its data has no bearing on a user's ability to do so;<sup>201</sup> even if the

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<sup>195</sup> See *supra* Part II.B.

<sup>196</sup> See *supra* note 132 and accompanying text.

<sup>197</sup> See discussion *supra* note 114 and accompanying text.

<sup>198</sup> The Copyright Act provides: "To 'transmit' a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent." 17 U.S.C. § 101 (2006). The Copyright Act defines a "digital transmission" as "a transmission in whole or in part in a digital or other non-analog format." *Id.*

<sup>199</sup> See *supra* Part II.A.i.

<sup>200</sup> See *id.*

<sup>201</sup> See *id.*

images on the screen are encrypted so that they cannot be directly copied or saved to the user's computer, one can use screenshot software to make a copy of whatever is on the screen.<sup>202</sup> For all intents and purposes, then, the image has been made available for use immediately upon posting.<sup>203</sup> Moreover, as the Copyright Office has maintained, “[t]he key to publication [is] whether or not copies . . . have been *made available* to the public, in whatever form is desired.”<sup>204</sup> This view is echoed in a recent practitioner's guide, which recommends filing for registration within three months of the work first “becoming publicly available.”<sup>205</sup> As long as pixilation is sufficient for re-use—meaning that the image file is large enough to be viewed clearly—Internet posting makes copying (and infringement) of visual art easier than ever before.<sup>206</sup> On a side note, measuring pixilation is one way to have a bright-line rule for determining if a work has been “made available.” Professor Cotter argued that analyzing whether an online work was published would be too “fact-intensive” to be practical.<sup>207</sup> Finding a bright-line rule like pixilation measurement would make this inquiry much easier.

When online content creators click the button that makes their website “go live,” the industry terminology is that the interface has now been “published” to the website.<sup>208</sup> More and more authors and artists are publishing online, instead of in physical form. Although the statutory definition of the word “published” means

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<sup>202</sup> See discussion *supra* note 114.

<sup>203</sup> See *supra* note 175 and accompanying text.

<sup>204</sup> *NII Copyright Protection Act of 1995: Joint Hearing on H.R. 2441 and S. 1284 Before the H. Subcomm. on Courts and Intell. Prop. and the S. Comm. on the Judiciary*, 104th Cong. (1996) (statement of the Hon. Marybeth Peters, Register of Copyrights, U.S. Copyright Office, The Library of Congress), 1995 WL 677006 (emphasis added).

<sup>205</sup> *FASHION LAW: A GUIDE FOR DESIGNERS, FASHION EXECUTIVES, AND ATTORNEYS* 57 (Guillermo C. Jiminez and Barbara Kolsun eds. 2010).

<sup>206</sup> The images in *Moberg* and the *Playboy* cases were posted in full resolution. This distinguishes them from the thumbnail images posted in *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 850–51 (C.D. Cal. 2006), which would not constitute publication because the “thumbnail” images were too small and blurry to be reused.

<sup>207</sup> See *supra* note 52 and accompanying text.

<sup>208</sup> Cf. *3 Steps in Publishing Your Website*, WEB HOSTING SEARCH (Jan. 1, 2010), <http://www.webhostingsearch.com/articles/how-to-publish-your-website.php>.

something far different from the lay definition of the term,<sup>209</sup> an author of a published book still has expectations of how the book will be protected: This author expects to be able to sue if her book is infringed. Since she has chosen an American publisher she expects her book will be a United States work. Internet authors have the same expectations. An author of a book published online does not expect to have different rights from an author who publishes in print. United States Internet authors thus expect to receive statutory damages and attorney fees if their work is taken without authorization, just as their print counterparts do. And, ideally, nations party to the Berne Convention should receive the same.<sup>210</sup>

*B. Was it Published Simultaneously?*

Many Internet publishers knowingly target international consumers. What Internet publishers might not anticipate, however, is that posting to the Internet may subject them to the jurisdiction of every country they target.<sup>211</sup> In the *Moberg* case, the Leygueses posed an appealing argument that foreign postings directed towards American consumers are posted simultaneously in the United States.<sup>212</sup> The *Moberg* court did not agree, acknowledging only that “the Internet is located in no particular geographical location and is available to anyone worldwide.”<sup>213</sup> However, it is hard to dismiss the Leygueses’ argument so easily. They tried mightily to establish an intention on behalf of Moberg to market to American consumers.<sup>214</sup> In attempting to define “simultaneous publication,” the Leygueses introduced traditional personal jurisdiction notions of minimum contacts and fair play

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<sup>209</sup> 1-4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 4.01 (Matthew Bender rev. ed. 2010) (“The concept of publication was of immense importance under the 1909 Act. It became a legal word of art, denoting a process much more esoteric than is suggested by the lay definition of the term.”).

<sup>210</sup> See *supra* note 39 and accompanying text.

<sup>211</sup> See *Dow Jones & Co. v. Gutnick* (2002) 210 CLR 575 (Austl.) (Australian high court upheld jurisdiction over United States company in a libel suit, noting that the material posted on a New Jersey website was viewable in Australia).

<sup>212</sup> Defendants’ Opening Brief, *supra* note 19, at 7.

<sup>213</sup> *Moberg*, 666 F. Supp. 2d at 420.

<sup>214</sup> Defendants’ Opening Brief, *supra* note 19, at 7.

and substantial justice into the publication inquiry.<sup>215</sup> The record ultimately is insufficient about the extent to which blaugallery targeted American consumers. However, the website's text is in English and has a simple ".com" web address, common for United States websites.<sup>216</sup> Indeed, it is not even obvious from the homepage that the gallery is not based in the United States. All of these facts suggest that the gallery was almost certainly targeting American consumers. Even if Moberg's postings do not fit the current definition of United States works, conceptually they are not as "foreign" as the Delaware District Court might have us imagine.

*C. The Court's Holding is Untenable*

By failing to state definitively that Moberg's photographs were unpublished, the District Court implied that the Internet posting was possibly a publication, but then refused to take that assumption to its logical conclusion because of the injustice this conclusion would create (i.e., Moberg's case might be dismissed for lack of subject matter jurisdiction). Even publishers who intend to target American consumers often do not think about satisfying American copyright formalities—and may lack the resources to do so. Indeed, few United States copyright owners comply with the registration and deposit requirements of § 411(a).<sup>217</sup> Thus, the Berne Convention laudably proposes to eliminate these requirements, but with the consequence of removing statutory damages and attorney fees from the equation.<sup>218</sup> Ideally, authors who intend to publish in the United States would enjoy all the protections of United States authors (including statutory damages and attorney fees), without having to comply with a host of individual copyright formalities.

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<sup>215</sup> See *supra* notes 70–75 and accompanying text.

<sup>216</sup> See BLAUPRINT, <http://www.blaugallery.com> (last visited Feb. 20, 2011).

<sup>217</sup> See generally *Failure to Comply with the Copyright Registration Requirement of Section 411 Does Not Deprive Federal District Courts of Subject Matter Jurisdiction*, GORDON & REES LLP (MARCH 2010), <http://www.gordonrees.com/publications/viewPublication.cfm?contentID=1082>.

<sup>218</sup> See Berne Convention, *supra* note 28. Statutory damages and attorney fees are only available when Berne Authors have registered within the allotted time, which is rare. See *supra* note 38.

This win-win situation for international authors, however, seems a little unfair to those of us who believe a registry is important—perhaps to verify ownership in cases of infringement—or to those of us who feel like there should be a quid pro quo, that an author must give us something in return for her heightened remedies. Indeed, critics of the Berne Convention argue that perhaps Berne already treats copyright too much like a fundamental property right by not subjecting Berne authors to any formalities. Copyright is a body of law that “both creates property rights and, at the same time, [regulates them], which is different in a significant way from some standard bodies of property law” that embody more fundamental rights of ownership and are far less regulated.<sup>219</sup> Regardless of what one thinks of Berne, it is clear that the current U.S. copyright formalities are outdated. Neither domestic nor international authors are satisfied with them, and as a result, both resist complying with them.

To satisfy modern day authors, copyright formalities must evolve with technology and market conditions,<sup>220</sup> and the market has changed dramatically in the last thirty-five years. Indeed, the Internet has outstripped the expectations of even the most forward-thinking drafters of the 1976 Copyright Act. Bringing U.S. copyright law up to date will require re-evaluating several definitions. For example, are the types of data transmissions Congress considered in 1976 or 1995 really analogous to the types of “transmissions” which now occur over the Internet?<sup>221</sup>

In addition to addressing the definition of key terms in the Copyright Act, we must also address jurisdictional concerns in an increasingly international copyright community. For example, it is somewhat inconsistent that the Leygueses suggested that their website, created abroad but in English, did not establish sufficient contacts with the state of Delaware for the Delaware District Court to exercise personal jurisdiction over them, but that Moberg’s website, also created abroad in English, was a United States work. Similarly paradoxical is the Delaware District Court’s finding that

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<sup>219</sup> Brett Frischmann, *Panel II: The Death or Rebirth of the Copyright?*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1095, 1106 (2008).

<sup>220</sup> *See id.*

<sup>221</sup> *See discussion supra* part II.D.

the Leygueses probably had sufficient contacts to satisfy personal jurisdiction requirements because their websites targeted United States consumers,<sup>222</sup> but that Moberg's website, which also arguably targeted United States consumers, did not constitute a United States Work.<sup>223</sup> Perhaps, then, our concepts of personal jurisdiction and our definition of a United States work do not follow the same public policy. Due to these inconsistencies, the *Moberg* court's holding, while the fairest solution under current law, is untenable.

#### *D. Possible Solutions*

While the solutions to classification of Internet postings set forth in Part II are creative and well intentioned, they are too complicated to practically put into action. Any workable solution must be comprehensive in nature—addressing the definition of publication, the copyright formalities, and jurisdictional questions all together. Such a solution should grant authors the appropriate protection, but should also require them to be accountable through some formality. The solution must be international in scope, and must include cheap and easy access to registration.

Allowing Internet postings to be published for some purposes but not others is ultimately undesirable. The Delaware District Court's holding is essentially in accordance with Professor Cotter's suggestion that Internet postings be construed as "published for certain purposes." As discussed above, the view that Internet postings can count as a publication for some purposes but not for others<sup>224</sup> splits the baby, and fully satisfies neither authors nor infringers. Plaintiffs like Moberg will be unsatisfied that they have no prima facie evidence of ownership, no three-month grace period, and are ineligible for statutory damages and attorney fees (and may not find representation as a result). Alleged infringers like the Leygueses will likely feel a sense of injustice when hauled into court to defend against an author who was not made to comply

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<sup>222</sup> See discussion *supra* notes 76–82 and accompanying text.

<sup>223</sup> Of course, we should not forget that one of the defendants is linked to a Delaware corporation, 33T LLC, vastly strengthening his ties to the United States.

<sup>224</sup> Cotter, *supra* note 49, at 1771, 1788–94.

with the § 411(a) preconditions to instituting a Copyright Act infringement claim.<sup>225</sup>

Additionally, the option of allocating published status to some online works but not others is nearly impossible.<sup>226</sup> One can argue academically that there is a difference between a photo posted on the Internet without restriction and one posted that is encrypted or “protected” by a privacy policy. Practically, though, there is no difference because there are still easy ways of co-opting these so-called “protected” works.<sup>227</sup> The only distinction that a revised statute can realistically make is between works intended for use by the public (e.g., posting to an art gallery website), or personal use (e.g., e-mails).<sup>228</sup> In fact, this distinction is already accounted for in the current definition of publication, which requires intent to transfer ownership or display *to the public*.<sup>229</sup> Thus, any fear that e-mails will ever qualify as protected publications is unfounded. Since there is no way to truly distinguish between works that are intended to be downloaded or copied and works that are not, it would be impossible to grant published status to some online works and not others.

Instead of these proposed solutions, this Comment proposes that the statutory requirements for publication must necessarily be modified for at least the Internet posting context. Works made available on the Internet should be submitted to a centralized copyright registry for Berne members, subject to uniform standards and to the condition that all Berne nations grant reciprocity.<sup>230</sup> Once a work is registered in one jurisdiction or in a centralized registry, it will be registered in all Berne Union jurisdictions.<sup>231</sup> Registration should not require a deposit of physical copies to any office, and should be inexpensive, if not free. Moreover, registration should be possible to complete online, and should

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<sup>225</sup> See *supra* note 24.

<sup>226</sup> See Part II.F.

<sup>227</sup> By using ‘screenshot’ technology, for example. See *supra* note 114.

<sup>228</sup> See Chang *supra* note 45, at 249; see also discussion *supra* note 114 and accompanying text.

<sup>229</sup> 17 U.S.C. § 101 (2006).

<sup>230</sup> See Sprigman, *supra* note 62, at 547.

<sup>231</sup> *Id.* at 549.

require no more than a few clicks of a button. With a system like this, more people will register their copyrights, furthering the purpose of the Copyright Clause.<sup>232</sup> Domestic authors may also like this solution; indeed, American authors have been asking for many years to have a more accessible registration process.<sup>233</sup> The Copyright Office has sought ways of lessening the burden of registration, but so far has resisted substantial reform.<sup>234</sup>

#### CONCLUSION

Surprisingly little has been written about the classification of works posted to the Internet considering how frequent this practice has become. As one of the few cases to approach the subject, *Moberg* is as notable for what it does not say as for what it does. *Moberg*'s silence on the issue of classification encourages us to ask ourselves: What can we do to help Internet authors protect their work? In answering this question, we must keep in mind that authors desire the ability sue, the availability of statutory damages and attorney fees if their Internet postings are infringed, and want any required formalities to be easy and practical, even internationally. Defendants want anyone who does business in a jurisdiction to be held accountable in that jurisdiction. Satisfying these interests will make litigation more predictable, allowing authors and artists to feel comfortable posting their works online, for the benefit of an international audience.

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<sup>232</sup> U.S. CONST. art. I, § 8, cl. 8; *see supra* notes 54–55 and accompanying text.

<sup>233</sup> As evidenced by the numerous alternative copyright registration services.

<sup>234</sup> *See, e.g., Electronic Copyright Office*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/eco/index.html> (last visited Aug. 23, 2010); *Group Registration of Published Photographs*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/fls/fl124.html> (last visited Feb. 20, 2011).