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**Internet publication and U.S. copyright imperialism**

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When a work is first made available over the Internet, what is its "country of origin?" In a previous column, "Borderless Publications, the Berne Convention, and U.S. Copyright Formalities," http://www.mediainstitute.org/new_site/IPI/2009/102009_BorderlessPublications.php, I addressed this question in connection with the decision in *Moberg v. Leygues*, 666 F.Supp.2d 415 (D. Del. 2009). There, the court declined to rule that a work first publicly disclosed over a German website accessible in the U.S. was a "United States work" subject to the U.S. requirement to register the work as a prerequisite to bringing an infringement action. Consistently with the U.S.' obligations under the Berne Convention, which prohibits conditioning the exercise of copyright on any formality, the U.S. does not impose the pre-suit registration duty on foreign works.

In my previous column, I concluded that first disclosure of a work via an off-shore website may make the work accessible all over the world, but it did not follow, either as a matter of U.S. copyright law, or as a matter of Berne Convention policy, that the work thereby roots its "origin" in every country of potential receipt. As a result, works accessible in the United States via a foreign website do not per se lose their foreign country of origin, and do not therefore incur the pre-suit registration formality that the US imposes on domestic works. In *Moberg*, the principal focus of the website was the public in Germany, where the photographer's works were on display in a gallery.

Does this conclusion change when the author aims more globally, and has in fact chosen to make her work available throughout the world? In *Kernal Records OY v Moseley*, 2011 U.S. Dist. LEXIS 60666 (S.D. Fla. June 7, 2011), a recorded musical work by a Norwegian composer was first published in an online magazine produced in Australia. The composer did not seek to limit to Australians the audience for the work's initial disclosure. In these circumstances, the district court upheld the defense that first publication of a work on the Australian website constituted "simultaneous publication all over the world," and therefore deemed the work a U.S. work. Because the plaintiff had not registered the work prior to initiating the suit, the court dismissed the complaint and, even though the plaintiff during the pendency of the action ultimately obtained a Copyright Office registration, denied leave to amend, holding the motion untimely, on the ground that once non registration was raised as a defense the plaintiff should not have waited to seek registration.

The court distinguished *Moberg*, stating that the decision had not resolved the question whether posting a work on an internationally-accessible website constituted publication. The court determined that a work was "published" over the Internet when it became available for download, not merely for listening or viewing; *Moberg*'s disclosure of the photographs was limited to viewing, according to the court. By contrast, because the composer's work could be downloaded from the Australian site, this availability meant that the composer was "distributing or offering to distribute his work to the public" within the meaning of the U.S. Copyright Act's definition of "publication." The court then examined the statutory definition of "United States

work" in sec. 101(1)(C) as one that is first published "simultaneously in the United States and a foreign nation that is not a treaty party." (The court noted that the sec. 101(1)(B) criterion of simultaneous publication in the U.S. and in a country whose copyright term is the same as or longer than the U.S. term did not apply because at the time of the posting to the Australian website, Australia's copyright term was shorter than the U.S.') Because posting a work on a website for download anywhere in the world results in its "publication" everywhere, including in (those few) countries with which the U.S. has no treaty relations, the definition applies, held the court. The court observed that Congress in 1998 had altered other aspects of the definition of United States work in 1998, as part of a variety of amendments introduced in connection with the digital exploitation of copyrighted works. Given Congress' awareness of the Internet, had Congress not intended for works published over the Internet to be "published" or be deemed U.S. works, it could have modified the definition accordingly.

In addition to drawing questionable conclusions from Congress' non-enactment of further amendments to the definition of U.S. works, the court's decision is troublesome for all the policy reasons rehearsed in *Moberg* [see my prior column] - and rejected by the *Kernal* court. Moreover, under *Kernal*'s interpretation of section 101(1)(C), so long as there remains even one country in the world without copyright treaty relations with the US, but whose residents have Internet access, every work published to a general audience over the Internet becomes a U.S. work, and thereby freighted with the U.S. pre-suit registration formality. The court might have paused before attributing to Congress such imperialism, and its attendant tension with the Berne Convention. Indeed, section 101(1)'s specification that "for purposes of section 411, a work is a 'United States work' *only if*"(emphasis supplied), suggests that, with respect to the pre-suit registration obligation, Congress' intent to impose U.S. nationality on works with foreign points of attachment was far more modest.

With respect to the Berne Convention, the court also might have paid more attention to the interplay of sections 101(1)(B) and (C). These provisions mirror article 5(4)(a) and (b) of the Berne Convention:

> (4) The country of origin shall be considered to be:
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> (a) . . . 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;
>
> (b) in the case of works published simultaneously in a country outside the Union and in a country of the Union, the latter country

Under article 5(4)(a), the country of origin would have been Australia, whose copyright term at the time of posting was 20 years shorter than the U.S. term. Article 5(4)(b), whose equivalent U.S. provision *Kernal* applied, would not change the identification of the country of origin because simultaneous publication would have been made in a multiplicity of Berne Union (as well as non Union) countries; among these the country of the shortest (Berne-compatible) term would be designated the country of origin. If the court had interpreted the U.S. provisions consistently with the international treaty whose terms the U.S. legislation is supposed to implement, it could have avoided the extraordinary extrusion of U.S. copyright law that the court appeared to have considered the natural and proper consequence of choosing to make a work available for download over the Internet (the Norwegian composer "elected to publish [his work] on the Internet and the legal consequences of that decision must apply").

Of course, designating as the country of origin of an Internet-published work the country of the shortest Berne-compatible term (i.e. life of the author plus 50 years) will not significantly narrow the field if many countries share this term. Moreover, such an approach may designate a country with which the work has few points of contact other than a potential audience. These anomalies suggest that the notion of Internet "publication" for purposes of determining the country of origin should be limited to a single Berne Union country: but which one? One might designate as the country of first publication the country from which the author communicated the work to the server, but this characterization has some disadvantages. First, that country may have little relationship to the work, as the author may upload the work from an appropriately equipped computer anywhere in the world (including from countries through which the author is merely traveling). Second, if the public accesses the work from a website, the work is not yet available to the public until the work arrives at its place of residence on that website. This in turn suggests that the country of first publication is the one from which the work first becomes available to the public; that is, the country in which it is possible to localize the website through which members of the public (wherever located) access the work.

This choice, however, is not problem-free, either. If the author operates her own website, the website may be localized at the author's habitual residence. But if the author is making the work available through a third-party site, as was the case in *Kernal*, localization may prove more uncertain. Unlike countries of traditional, physical first publication, in which authors or publishers consciously organize the locus of economic center of the exploitation of their work, the country in which the server that hosts the website is located may be completely indifferent, or even unknown, to the author. Similarly, the location of the effective business establishment of the website operator may be insignificant to an author's selection of that site to disseminate the work. For example, if the conditions of publication are the same whatever the geographic location of the website operator's business establishment, then that country's relationship to the publication would seem purely fortuitous. Moreover, the downloading web-user may not even be aware of the location of the website operator or its host server. In these circumstances, it becomes clear that there are significant difficulties with making "publication" a criterion for determining the "country of origin."

When there is a surplusage of places of publication, perhaps the simplest solution would be to link the country of origin to that of the author's nationality or residence, at least where that country's domestic law conforms to Berne minima.[i] That solution, however, is not one for which the U.S. definition of U.S. work provides. Neither, however, does U.S. law mandate imposing U.S. formalities on works whose foreign authors choose to make available by download to an international public.

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[i] See Sam Ricketson and Jane C. Ginsburg, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND, para. 6.57 (2006).