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Country of Origin and Internet Publication: Applying the Berne Convention in the Digital Age[†]

Professor Brian Fitzgerald, Dr Samsung Xiaoxiang Shi, Cheryl Foong and Kylie Pappalardo*

I. INTRODUCTION

It is increasingly common for copyright works to be made available to the public for the first time via the Internet. Online publication allows a work to be published simultaneously throughout the world to every country with Internet access. While this is certainly advantageous for the dissemination and impact of information and creative works, it creates potential complications under the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”), an international intellectual property agreement to which most countries in the world now subscribe. The Berne Convention contains national treatment provisions, which require member countries to extend baseline rights and protections to foreign copyright works.¹ Rights accorded under the national treatment provisions may not be subject to any formality, such as registration requirements.² Member countries are free to and some do impose formalities on the exercise of rights in relation to domestic copyright works. In the United States, for example, the *Copyright Act 1976* establishes a requirement that copyright owners register their work with the Copyright Office before they can commence a civil action for infringement of their work.³ Additionally, the U.S. law limits the availability of certain remedies depending on when the work was registered.⁴

The Berne Convention contains “country of origin” provisions, which amongst other things seek to assist member countries in determining whether copyright works are domestic or foreign. Under the Convention, determining the country of origin of a published work is simply a matter of ascertaining where that work was first published or simultaneously published.⁵ The rules provide that for works first published in a country of the Union, the country of origin will be that country.⁶ For works published simultaneously in several countries of the Union which grant different terms of protection, the country of origin will be the country with the shortest term of protection, and for works published simultaneously in a country of the Union and a country outside of the Union, the country of origin will be the Union country.⁷ Historically, determining the country of origin of a published work

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¹ Article 5(1). Discussed in more detail below.

² Article 5(2). Discussed in more detail below.

³ *Copyright Act: 17 U.S.C. § 411(a)*.

⁴ *Copyright Act: 17 U.S.C. § 412*.

⁵ “Simultaneous publication” is defined as within 30 days of first publication: Article 3(4). For unpublished works, the country of origin is the country of the Union of which the author is a national: Article 5(4)(c).

⁶ Article 5(4)(a).

⁷ Article 5(4)(a) and (b).

presented few challenges, because works were generally published physically – whether in print or otherwise – in a distinct location or few locations. However, publishing opportunities presented by new technologies mean that we now live in a world of simultaneous publication – works that are first published online are published simultaneously to every country in world in which there is Internet connectivity. These new opportunities present unique challenges and bring to the fore the apparent gaps in the Berne Convention’s country of origin provisions. For example, as discussed further in part 2.3 of this article, the Berne Convention fails to point to a distinct country of origin where a work is published simultaneously in multiple Union countries with the same term of protection.⁸ This is exactly the kind of scenario that is likely to arise more frequently as Member countries seek consistency in the term of copyright protection accorded to copyright works⁹ and as more and more works are first published online. In this situation, the Berne Convention offers little guidance. This creates legal uncertainties for Member countries such as the United States in determining whether a work first published over the Internet is a domestic or foreign work for the purpose of applying national copyright formalities.

Two cases recently decided in the United States deal directly with this issue. In *Kernel Records Oy v. Timothy Mosley p/k/a Timbaland, et al.* (“*Kernel v Mosley*”),¹⁰ the Florida Southern District Court of the United States ruled that first publication of a work on the Internet via an Australian website constituted “simultaneous publication all over the world,” and therefore rendered the work a “United States work” under the definition in section 101 of the U.S. Copyright Act,¹¹ subjecting the work to registration formality under section 411. This ruling is in sharp contrast with an earlier decision delivered by the Delaware District Court in *Håkan Moberg v. 33T LLC, et al.* (“*Moberg v. 33T*”).¹² The Delaware court held that the publication of a work via a German website did not render the work a “United States work” within the meaning of section 411 of the Copyright Act, and thus need not be registered in the U.S. in order for the copyright owner to bring suit for infringement. The conflicting rulings of the U.S. courts reveal the problems posed by new forms of publishing online and demonstrate a compelling need for further harmonization between the Berne Convention, domestic laws and the practical realities of digital publishing.

In this article, we argue that even if a work first published online can be considered to be simultaneously published all over the world it does not follow that any country can assert itself as the “country of origin” of the work for the purpose of imposing domestic copyright formalities. More specifically, we argue that the meaning of “United States work” under the U.S. Copyright Act should be interpreted in line with the presumption against extraterritorial application of domestic law to limit its application to only those works with a real and substantial connection to the United States. To be clear, we argue that the extraterritorial application of U.S. law at issue here is not the imposition of formalities at the point of enforcing copyright in courts within the United States (the “enforcement stage”), but the designation, via U.S. copyright legislation and the judicial interpretation of such, of all works first published online as “United States works” within the ambit of section 411 of the U.S. Copyright Act (the “designation stage”). We propose a number of factors that may be considered in assessing whether there is a “real and substantial connection” to the United States and assert that in

⁸ The language of Article 5 indicates that there should be only one country of origin of a work, though this is not entirely clear.

⁹ The European Union recently extended its term of copyright protection from life of the author plus 50 years to life of the author plus 70 years, bringing it in line with the term granted in the United States of America, Australia, and a number of other countries around the world.

¹⁰ 2011 U.S. Dist. LEXIS 60666 (S.D. Fla. June 7, 2011).

¹¹ The definition states that a work which is published simultaneously in the United States and another country is a “United States work” for the purposes of §411 of the Copyright Act. See further below.

¹² 666 F. Supp. 2d 415 (D. Del. Oct. 6, 2009).

most cases, the nationality, domicile or habitual residence of the author of the work should be the determinative factor in ascertaining the country of origin of the work. As discussed above, there are gaps in the Berne Convention’s articulation of “country of origin” which provide scope for judicial interpretation, at a national level, of the most pragmatic way forward in reconciling the goals of the Berne Convention with the practical requirements of domestic law. We believe that the uncertainties arising under the Berne Convention created by new forms of online publishing can be resolved at a national level by the sensible application of principles of statutory interpretation by the courts. While at the international level we may need a clearer consensus on what amounts to “simultaneous publication” in the digital age, state practice may mean that we do not yet need to explore textual changes to the Berne Convention.

II. COUNTRY OF ORIGIN UNDER THE BERNE CONVENTION

2.1 Essentials of the Berne Convention

One of the aims of the Berne Convention is “to help nationals of its member States obtain international protection of their right to control, and receive payment for, the use of their creative works”.¹³ For example, Article 5(1), under the title ‘Rights Guaranteed’, states that “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 which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention”.

In addition, the 1908 Berlin revision of the Berne Convention established a prohibition on the imposition of any governmental formalities by a Member country as a precondition for “the enjoyment and the exercise” of copyright in foreign works in that country. Today, this rule reads as follows in Article 5(2) of the Convention: “The enjoyment and the exercise of these rights shall not be subject to any formality”. The Convention therefore purports to secure minimum rights for authors, which automatically arise without the need to obey formalities, in countries of the Union other than the country of origin of the work. Protection of works in their country of origin is governed by domestic law and may, in fact, be subject to formalities (as they are in the U.S. for enforcement of rights).¹⁴ Therefore, a central object of the Convention is to guarantee that a foreign work will be protected in a Union country other than its country of origin without formality requirements.

2.2 The Notion and Place of Publication

The definition of “published works” set forth in Article 3(3) of the Convention is as follows:

The expression “published works” means works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work.

¹³ See World Intellectual Property Organization (WIPO), *WIPO Treaties – General Information*, <http://www.wipo.int/treaties/en/general/>, (last visited Sept. 15, 2011). Note that in addition to protection in accordance with the principles of national treatment, the Berne Convention also sets out minimum standards of protection in relation to the works and rights to be protected, and the duration of the protection. See WIPO, *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, http://www.wipo.int/treaties/en/ip/berne/summary_berne.html (last visited Sept. 15, 2011).

¹⁴ Berne Convention, Article 5(3).

The performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication.

In addition, “simultaneous publication” is defined under Article 3(4): “A work shall be considered as having been published simultaneously in several countries if it has been published in two or more countries within thirty days of its first publication.”

The definition of “published works” and the corresponding determination of the country of origin of a work are significant to the application of certain important clauses of the Convention. As highlighted by the Committees of Experts on a Possible Protocol to the Berne Convention, these clauses include “[the] application of the protection of the Convention to authors who are not nationals of one of the countries of the Union but whose works have been first published in one of those countries (Article 3(1)(b)); the comparison of terms of protection (Article 7(8)); and application of the Convention to works already in existence when their country of origin first joins the Convention (Article 18(1)).”¹⁵ In addition, the protection of foreign works under Articles 5(1) and (2) and foreign nationals under Art 5 (3) require determination of what is the “country of origin”. A modern enquiry, contemplated in both the *Kernel v Mosley* and *Moberg v 3TT* cases discussed below, is what happens under our assessments of “published” and “country of origin” where a work is first made available to the public online. Is the act of posting a work to the Internet enough to make the work a “published work” under the Berne Convention? And if so, given that the Internet is a globally distributed platform, how do we determine the country or countries of first (or simultaneous first) publication for the purpose of establishing the country of origin?

The general consensus appears to be that Internet dissemination is enough to render a work “published”. A WIPO Committee of Experts has acknowledged as much, stating, “As far as the public is concerned, these new forms of publishing are functionally no different than the traditional forms: the works are available”.¹⁶ Under the abovementioned Article 3(3) of the Berne Convention, the dispositive factor in determining whether a work is published is “[that] the availability of such copies has been such as to satisfy the reasonable requirements of the public”. We agree with the proposition that posting a work over the Internet may “easily satisfy this requirement”.¹⁷ Therefore, we contend that once a work is made available over the Internet the work will be published in every country with adequate access to the Internet. Nevertheless, it does not follow that the work will become a “work of every country”; or put differently, it does not mean that the country of origin of the work will be every country in the world.¹⁸

¹⁵ WIPO, *Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to be Considered by the Diplomatic Conference* (CRNR/DC/4) at 16 (August 30, 1996), http://www.wipo.int/edocs/mdocs/diplconf/en/crn/dc/crn_dc_4.pdf.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ In December 1996, the WIPO Committee of Experts raised concerns about the potential impact of new technologies on the provisions of Article 3(3) and Article 5(4) of the Berne Convention. The Committee proposed the following solution:

Article 3 Notion and Place of Publication

- (1) When literary or artistic works are made available to the public by wire or wireless means in such a way that members of the public may access these works from a place and at a time individually chosen by them, so that copies of these works are available, Contracting Parties shall, under the conditions specified in Article 3(3) of the Berne Convention, consider such works to be published works.
- (2) When applying Article 5(4) of the Berne Convention, Contracting Parties shall consider works referred to in paragraph (1) of the present Article to be published in the Contracting Party **where**

2.3 Identifying the Country of Origin

What then is the country of origin of a work first published online? Article 5(4) of the Convention sets out the rules for determining the country of origin as:

- (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;
- (b) in the case of works published simultaneously in a country outside the Union and in a country of the Union, the latter country;
- (c) in the case of unpublished works or of works first published in a country outside the Union, without simultaneous publication in a country of the Union, the country of the Union of which the author is a national, provided that:
 - (i) when these are cinematographic works the maker of which has his headquarters or his habitual residence in a country of the Union, the country of origin shall be that country, and
 - (ii) when these are works of architecture erected in a country of the Union or other artistic works incorporated in a building or other structure located in a country of the Union, the country of origin shall be that country.

While these rules look comprehensive at first glance, they fail to address a number of probable scenarios. As a result, legal uncertainties may arise, particularly in the case of Internet publication. As Ricketson and Ginsburg have observed, certain situations are not directly covered by the rules in Article 5(4). These situations include where: (i) The case of Union authors where the country of origin of their published works is a different country from that of which they are a national; (ii) a work is published simultaneously in several countries of the Union that have the same period of protection; and (iii) a work is unpublished or first published in a country outside the Union and the work has several co-authors from different Union countries.¹⁹

In the digital era, it has become even more apparent that the rules in Article 5(4) fail to cover the field. If a work is initially posted and made available to the public over the Internet, such publication “may be truly simultaneous, within seconds” to every corner of the world.²⁰ It is arguable that a work first made available online could be considered by any country in the world to be “first published” within that country and thus subject to domestic law (including any applicable formalities) as a “domestic work”. Indeed, this was the position reached in relation to U.S. law in the *Kernel v Mosley* decision. As Professor Ginsburg noted,

A Union member meets its Berne obligations if it accords protection consonant with Convention minima to *foreign* Berne-Union works. Arguably, with simultaneous universal publication via the

the necessary arrangements have been made for availability of these works to members of the public. [Emphasis in bold added.]

The Committee explained that “[t]he expression ‘necessary arrangements’ is intended to mean such steps as are an absolute *condition sine qua non* for the availability of the work. Mere linking or routing arrangements are not sufficient.” While not perfectly clear, this approach suggests that the place of publication of a work would likely be the country where the work is first uploaded and made available online, or the country where the publication of the work is specifically targeted. However, the Committee’s proposal was not adopted in the final text of the WIPO Copyright Treaty (“WCT”).

See WIPO, *supra* note 15, 18-21.

¹⁹ This will happen where an author who is a national of a Union country first publishes his work in another country of the Union. See Sam Ricketson and Jane C Ginsburg, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND* 283-86 (Oxford University Press, New York, 2nd ed, 2006). See also, Sam Ricketson, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986* 214-15 (The Eastern Press Ltd, 1987).

²⁰ Ricketson and Ginsburg, *supra* note 19, at 285.

Internet, every work of authorship could be considered a domestic work in each country of the Berne Union. In that event, ironically, Berne Convention minimum standards of protection might never apply, because there will be no foreign works.²¹

Alternatively, it is also arguable that under Article 5(4)(a) of the Convention, the work could be considered to be “published simultaneously in several countries” and the country of origin of the work should be “the country whose legislation grants the shortest term of protection”. Then all works first published over the Internet will have whichever is the shortest term of protection in the world under the copyright laws in effect at that time.²² “These anomalies”, as Ginsburg points out, “suggest that the notion of Internet ‘publication’ should be limited to a single Berne Union country: but which one?”²³

These uncertainties in the application of the Berne Convention become particularly relevant in suits for infringement of foreign works brought in the United States. The U.S. imposes a registration requirement before infringement actions can be brought with respect to U.S. works.²⁴ If a work first published online in any country in the world can be deemed a “U.S. work”, then potentially all authors of the world, wherever they reside, must register their copyright with the U.S. Copyright Office before they can assert their copyright interests in U.S. courts. The difficulty in determining country of origin has been brought to light in two U.S. District Court cases involving works first made available online, *Kernel v Mosley*²⁵ and *Moberg v 33T*.²⁶ The courts had divergent views on what constituted a “United States work”, which in turn led to two very different results.

III. “UNITED STATES WORKS” IN THE U.S. COPYRIGHT ACT

3.1 Defining “United States Works” for the Purpose of Section 411

Section 411(a) of the *Copyright Act 1976* of the United States provides that “no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made”. This means that in the U.S., domestic copyright owners must complete copyright registration or preregistration in order to bring a suit for infringement in federal court. This registration requirement only applies to “U.S. works”, not foreign

²¹ Jane Ginsburg, *Private International Law Aspects of the Protection of Works and Objects of Related Rights Transmitted through Digital Networks* (WIPO, GCPIC/2) (30 November, 1998) 7, http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=926. See also, Jane Ginsburg, *Borderless Publications, the Berne Convention, and U.S. Copyright Formalities*, THE MEDIA INSTITUTE, October 20, 2009, http://www.mediainstitute.org/new_site/IPI/2009/102009_BorderlessPublications.php.

²² See further Article 7(8) of the Convention, which provides as follows: “In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work.”

²³ Ginsburg, *supra* note 21, at 8.

²⁴ *Copyright Act: 17 U.S.C. §411*. Note that in limited circumstances, it may be possible to commence proceedings and subsequently obtain copyright registration. The plaintiff would have to amend the complaint and add the allegation that registration has been obtained, but good cause under the Federal Rules of Civil Procedure (Fed. R. Civ. P. 16) must be shown before a court will consider whether the amendment is proper under Fed. R. Civ. P. 15(a). To show good cause for an untimely amendment, the plaintiff must demonstrate diligence (see e.g. *Oravec v Sunny Isles Luxury Ventures, L.C.*, 527 F. 3d 1218, 1232 (11th Cir. 2008)). In *Kernel v Mosley* however, Justice Torres held that this was not satisfied because registration was sought and obtained *after* the Court had ruled for the Defendants.

²⁵ 2011 U.S. Dist. LEXIS 60666 (S.D. Fla. June 7, 2011).

²⁶ 666 F. Supp. 2d 415 (D. Del. Oct. 6, 2009).

works. But copyright owners of non-U.S. works still must comply with registration requirements if they wish to seek statutory damages in court.²⁷ The removal of registration as a precondition to filing an infringement claim for non-U.S. works was one of the results of the *Berne Convention Implementation Act of 1988*²⁸ and the *WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998*.²⁹ Furthermore, the U.S. Supreme Court has recently clarified in *Reed Elsevier, Inc. v. Muchnick* that section 411(a) merely contains “claim-processing rules” rather than “jurisdictional conditions”. Thus, the Court ruled that “[s]ection 411(a)’s registration requirement is a precondition to filing a claim that does not restrict a federal court’s subject-matter jurisdiction.”³⁰

For the purposes of section 411, a full definition of “United States work” is set out in section 101. This definition provides:

For purposes of section 411, a work is a “United States work” only if —

- (1) in the case of a published work, the work is first published—
 - (A) in the United States;
 - (B) simultaneously in the United States and another treaty party or parties, whose law grants a term of copyright protection that is the same as or longer than the term provided in the United States;
 - (C) simultaneously in the United States and a foreign nation that is not a treaty party; or
 - (D) in a foreign nation that is not a treaty party, and all of the authors of the work are nationals, domiciliaries, or habitual residents of, or in the case of an audiovisual work legal entities with headquarters in, the United States;
- (2) in the case of an unpublished work, all the authors of the work are nationals, domiciliaries, or habitual residents of the United States, or, in the case of an unpublished audiovisual work, all the authors are legal entities with headquarters in the United States; or
- (3) in the case of a pictorial, graphic, or sculptural work incorporated in a building or structure, the building or structure is located in the United States.

The legislative history of section 411 suggests a fairly strong correlation between the definition of “United States work” in the Copyright Act and the definition of “country of origin” in the Berne Convention.³¹ The apparent intention of the U.S. Congress was to parallel the relevant definitions in section 101 with those terms contained in Article 5(4) of the Berne Convention.³²

²⁷ § 412 sets forth registration as prerequisite to certain remedies for infringement. Unlike § 411, the application of § 412 is not limited to “U.S. works”. However, in a suit under § 411(c), the copyright owner of a foreign work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission may obtain statutory damages without registering the work under certain conditions. See *Football Ass’n Premier League v. YouTube*, 633 F. Supp. 2d 159 (2009).

²⁸ Pub. L. No. 100-568, 102 Stat. 2853, 2854.

²⁹ Pub. L. No. 105-304, 112 Stat. 2860, 2861.

³⁰ *Reed Elsevier, Inc., et al., Petitioners, v. Irvin Muchnick, et al.*, 130 S. Ct. 1237 (2010).

³¹ In *The Senate Statement on the Berne Convention Implementation Act of 1988* that appears on page S14544, Congressional Record (Daily Ed.), October 5, 1988 (Senate Legislative Day of Monday, September 26, 1988), it was stated:

...
With regard to the specifics of the amendment on registration, the two-tier system is established by making three amendments to the committee-reported bill. First, the repeal of existing section 411(a) is

Nevertheless, there are operative variations between the concepts of “U.S. works” and “country of origin”. The definition of “country of origin” in the Berne Convention has a narrowing or pinpointing function – it seeks to determine, of all the countries in the world, the country from which a published work can be considered to have originated. The definition of “United States work” need not be so comprehensive. It seeks to determine only whether a work originates (i.e. is firstly or simultaneously published) in the U.S. or not for the purpose of imposing registration requirements. If the work does not originate in the U.S., then it has little relevance to the operation of section 411. As being emphasized in *The Senate Statement on the Berne Convention Implementation Act of 1988*, it is “not necessary in all cases to determine the precise country of origin of the work in order to know whether or not the registration prerequisite to suit applies”.

Despite the relatively clear function of the section 101 definition of “United States work”, it is not always easy to determine whether a particular work falls within the language of this definition. For example, it is uncertain (and unsettled) whether works that are first published online can be considered U.S. works for the purposes of section 411. This is because a work first published online is arguably published in all countries in the world with internet access, including the United States, which may bring the work within paragraph (1)(B) or (C) of the definition of “United States work” even if the work was not created or uploaded in the United States and the author is not a U.S. national, domiciliary or resident. As we have alluded to earlier, the following two cases considered this very issue of online publication and reached vastly different conclusions about whether the work was a U.S. work under section 411.

3.2 *Moberg v 33T*

Håkan Moberg, a professional photographer from Sweden created a series of photographs entitled “Urban Gregorian I-IX”. These photos were first published in 2004 on a German website, blaugallery.com, which offered copies of the photos for sale as canvas prints. In late 2007, three websites began displaying the Moberg’s Urban Gregorian images.

In September 2008, Moberg brought a complaint in the United States federal district court against the website proprietors for copyright infringement under the U.S. Copyright Act. The defendants argued that the court lacked subject matter jurisdiction because the work was a ‘United States work’, which had not been registered in accordance with s 411(a) of the Copyright Act.

eliminated, in favor of an introductory phrase to the existing provision which makes it inapplicable to "actions for infringement of copyright in Berne Convention works whose country of origin is not the United States." Secondly, in section 411(b), dealing with works such as live broadcasts that are first fixed simultaneously with transmission, the amendment inserts after the reference to post-broadcast registration of the work the phrase "if required by subsection (a)." Finally, the amendment inserts in the definitional section of the Copyright Act , 17 USC 101 , a definition of "country of origin" of a Berne Convention work.

The definition of country of origin, while a new feature of U.S. copyright law, is a familiar principle to students of Berne. The definition contained in the amendment tracks the definition of this phrase contained in Article 5(4) of Berne. For the guidance of practitioners, and of the courts, the following observations may be in order.

...
³² The *Berne Convention Implementation Act of 1988*, Pub. L. No. 100-568, 102 Stat. 2853, 2857, amended § 101 by adding the definition of “country of origin” of a Berne Convention work, for purposes of § 411. The *WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998* Pub. L. No. 105-304, 112 Stat. 2860, 2861 amended that definition by changing it to a definition for “United States work,” for purposes of § 411. See U.S. Copyright Office, *Copyright Law – Chapter 1* (‘Chapter 1 Endnotes’), <http://www.copyright.gov/title17/92chap1.html> (last visited Sept. 15, 2011).

Hillman J considered that the question of whether Moberg's photographs were 'United States works' involved two issues: (i) whether the posting of plaintiff's photographs on the Internet is considered "publishing," and, (ii) if so, whether "publishing" on the Internet causes the photographs to be published only in the country where the Internet site is located, or in every country around the world simultaneously.³³

In reaching its decision, the court focused on the broader purpose and policy rationale behind the Berne Convention. Regarding the issue (i), the court found that it need not "delve into yet another unsettled issue, because even assuming that the German website 'published' the plaintiff's photographs, [...] as a matter of U.S. statutory law the photographs were not published simultaneously in the United States". This reasoning was based on part of section 408(a) of the Copyright Act, which states that "registration is not a condition of copyright protection",³⁴ and the proposition in *Kuklachev v. Gelfman*³⁵ and *Muchnick v. Thomson Corp.*,³⁶ that "[u]nder the clear language of the statute, which refers only to 'any United States work,' foreign works originating in countries party to the Berne Convention need not comply with section 411."³⁷ The court concluded that the work was not a "United States work" for the purposes of section 411.

The court held that the acceptance of the defendant's contention that "publishing" on the internet would cause the work in question to become a United States work "would overextend and pervert the United States copyright laws".³⁸ To subject the copyright owner to the formalities of the copyright laws of every country would be "contrary to the purpose of the Berne Convention ... [which] is to provide protection to authors whose works will be published in many countries".³⁹ The court continued:

[T]he United States copyright laws, in accord with the Berne Convention, provide for protection of foreign works in the United States without requiring the artists to undertake any formalities in the United States. ...

To require plaintiff to register his photographs in the United States prior to initiating suit against a United States company and the registrants of U.S.-based websites for their violation of United States law, which protects plaintiff's copyrights, would flout United States law and the international union the U.S. has joined voluntarily. Therefore, the Court finds that plaintiff's photographs are not "United States works," and, accordingly, his copyright infringement claims may stand without registration of the photographs.⁴⁰

³³ 666 F. Supp. 2d 415, 421 (D. Del. Oct. 6, 2009).

³⁴ Note that § 408(a) only relates to "protection" of the work, and does not refer to a precondition to instituting a civil infringement action.

³⁵ 600 F. Supp. 2d 437, 473 (E.D.N.Y. 2009).

³⁶ 509 F.3d 116, 133 (2d Cir. 2007).

³⁷ 666 F. Supp. 2d 415, 423 (D. Del. Oct. 6, 2009).

³⁸ 666 F. Supp. 2d 415, 410 (D. Del. Oct. 6, 2009).

³⁹ 666 F. Supp. 2d 415, 422-23 (D. Del. Oct. 6, 2009): "if the publishing of plaintiff's photographs on the German website simultaneously caused them to be published in the United States, and such publication transformed the work into a United States work, plaintiff would be subjected to the very formalities that the Berne Convention eschews. To hold otherwise would require an artist to survey all the copyright laws throughout the world, determine what requirements exist as preconditions to suits in those countries should one of its citizens infringe on the artist's rights, and comply with those formalities, all prior to posting any copyrighted image on the Internet. The Berne Convention was formed, in part, to prevent exactly this result."

⁴⁰ 666 F. Supp. 2d 415, 423-24 (D. Del. Oct. 6, 2009).

3.3 *Kernel v Mosley*

The dispute in *Kernel v Mosley*⁴¹ arose from a sound recording of a composition entitled “AcidJazzed Evening” (“AJE”) created by Glenn Rune Gallefoss. In 2007, Gallefoss transferred “all transferrable rights” to Kernel Records, a company registered in Finland. In 2009, Kernel alleged that the sound recording and musical arrangement of AJE had been copied into Nelly Furtado’s song “Do It”. It brought a claim for copyright infringement in the Florida Southern District Court against Timbaland (who wrote the composition and produced the recording), EMI Music and a few other recording and distribution companies. This dispute was initially tried and lost in Finland.⁴² While the Finnish ruling remained pending on appeal in Finland, Kernel commenced the second duplicative action in Florida.

3.3.1 Online publication

In Florida, Kernel alleged that Gallefoss first published AJE on a disk magazine (i.e. a computer disk containing a magazine) in Australia in August 2002. It argued that music file was only later made available online on 21 December 2002. Kernel also claimed that at least three whole months separated the first publication on the disk magazine and the online appearance of the music file. Further, Kernel argued that Gallefoss had not chosen the internet as the means to first publish his work.⁴³

However, these submissions were not accepted by Justice Torress of the South Florida District Court. His Honour found that AJE was first published online via the so-called “disk magazine”, which was held to be an online magazine. This finding of fact was largely due to Gellefoss’s ambiguous oral testimony and Kernel’s lack of evidence as to the nature of the alleged disk magazine.⁴⁴ Therefore, online publication had occurred.

The court further concluded that posting AJE on the internet was publication under section 101 of the Copyright Act. Although Justice Hillman in *Moberg v 33T* had deemed it unnecessary to delve into the issue of internet publication, Justice Torress in *Kernel v Mosely* stated, “We must address the issue”.⁴⁵ His Honour reasoned that once a work is available for downloading and copying (as opposed to being merely viewable as was the case in *Moberg*), members of the public are able to obtain a possessory interest in the work. Hence, once the author has lost the physical ability to control the dissemination and enjoyment of the work and the work has been “acquired by the public”, publication under section 101 of the Copyright Act has occurred.⁴⁶

3.3.2 Simultaneous publication

As to whether publishing on the Internet lead to simultaneous publication in the United States, the court expressly declined to follow the reasoning in the earlier persuasive (but not binding) Delaware District Court decision of *Moberg v 33T*.

⁴¹ 2011 U.S. Dist. LEXIS 60666 (S.D. Fla. June 7, 2011).

⁴² See *Kernel Records Oy v. Mosley*, 2010 U.S. Dist. LEXIS 69424, 49 (S.D. Fla., July 5, 2010).

⁴³ See Response in Opposition re Defendant’s Motion for Summary Judgment Statement of Undisputed Facts filed by Kernel Records Oy, 2009 U.S. Dist. Ct. Motions 337943; 2010 U.S. Dist. Ct. Motions LEXIS 52741, 2-3 (S.D. Fla., June 21, 2010).

⁴⁴ 2011 U.S. Dist. LEXIS 60666, 11-13 (S.D. Fla. June 7, 2011).

⁴⁵ 2011 U.S. Dist. LEXIS 60666, 19 (S.D. Fla. June 7, 2011).

⁴⁶ 2011 U.S. Dist. LEXIS 60666, 22-24 (S.D. Fla. June 7, 2011). The court cites 1 *Nimmer on Copyright* S 4.07[A] at 4-43 and *Getaped.com v Cangemi*, 188 F. Supp. 2d 398 (S.D.N.Y. 2002) for this proposition.

The court held that the “Plaintiff’s first publication of AJE on the Internet, an act tantamount to global and simultaneous dissemination of the work in question, constituted “publication” in the United States and around the world”. Court accepted that *Moberg v 33T* is “the only other published opinion that has addressed this particular issue”, but rebutted Justice Hillman’s reasoning in *Moberg v 33T*:

There can be little dispute that posting material on the Internet makes it available at the same time – simultaneously – to anyone with access to the Internet. There is nothing in the text of the statute to suggest that Congress intended to except works published on the Internet from the phrase “first published . . . simultaneously” or that certain works should be excluded from the definition of “United States work” based solely on the manner in which they are published.⁴⁷

The court continued:

Judge Hillman’s objections to the proposition that publication on the Internet constitutes simultaneous global publication for copyright purposes are policy-driven. They reflect a deference to certain goals of the Berne Convention at the expense of clear statutory language.⁴⁸

The court found no need to “spend much time examining the interrelationship between U.S. copyright law and the Berne Convention because a simpler approach is available and dispositive”. In conclusion on this point, it stated:

We respectfully decline to follow the reasoning of *Moberg*. As indicated in our prior Order, Judge Hillman’s contextual and policy-driven analysis is reasonable and sound but is, in our opinion, wholly untethered to the actual statutory and treaty language that governs this dispute.⁴⁹

IV. IDENTIFYING “UNITED STATES WORKS” IN A GLOBAL DIGITAL PUBLISHING MARKET

The court’s conclusion in *Kernel v Moseley* that a work created outside of the United States, uploaded in Australia and owned by a company registered in Finland was nonetheless a “United States work” by virtue of its being published online is somewhat concerning. Taken to its logical conclusion, this reasoning would hold every work first published online to be a “United States work” requiring registration before an action for infringement can be commenced in the United States. Arguably, this stretches the application of U.S. copyright law too far – to works with only tenuous connections to the United States – and draws into question the United State’s compliance with Article 5(2) of the Berne Convention which prevents countries from imposing formalities on the exercise of rights with respect to foreign works.

In this part, we propose a limiting principle for reading the section 101 definition of “United States work”. We argue that a broad interpretation of “United States work” results in the extraterritorial application of U.S. copyright law at the designation stage – i.e. at the point of deciding whether or not a work should be bound by U.S. copyright formalities. We believe that a narrower reading of “United States work” accords with U.S. jurisprudence supporting a principle of territoriality in legislative

⁴⁷ 2011 U.S. Dist. LEXIS 60666, 28 (S.D. Fla. June 7, 2011).

⁴⁸ 2011 U.S. Dist. LEXIS 60666, 31 (S.D. Fla. June 7, 2011).

⁴⁹ 2011 U.S. Dist. LEXIS 60666, 25 (S.D. Fla. June 7, 2011).

interpretation and ensures that the United States complies with its international obligations under the Berne Convention.

4.1 *The Presumption against Extraterritoriality*

It is a “longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’”⁵⁰ This principle was famously applied in the *EEOC v Arabian Oil Co (Aramco)* case, and was recently cited with approval and applied by the United States Supreme Court in *Morrison v National Australia Bank* 130 S. Ct. 2869 (2010). The *Morrison* court stated:

This principle represents a canon of construction, or a presumption about a statute’s meaning, rather than a limit upon Congress’s power to legislate, see *Blackmer v. United States*, 284 U. S. 421, 437 (1932). It rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters. *Smith v. United States*, 507 U. S. 197, n. 5 (1993). Thus, “unless there is the affirmative intention of the Congress clearly expressed” to give a statute extraterritorial effect, “we must presume it is primarily concerned with domestic conditions.” *Aramco, supra*, at 248 (internal quotation marks omitted). The canon or presumption applies regardless of whether there is a risk of conflict between the American statute and a foreign law, see *Sale v. Haitian Centers Council, Inc.*, 509 U. S. 155, 173–174 (1993). When a statute gives no clear indication of an extraterritorial application, it has none.⁵¹

Similarly, the Court in *Aramco* stated:

Our conclusion today is buttressed by the fact that ‘when it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute.’ *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989). Congress’ awareness of the need to make a clear statement that a statute applies overseas is amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute.⁵²

As a matter of policy, extraterritorial application of domestic law is contrary to the principle of democratic rule that has its basis in the idea of the consent of the governed.⁵³

There is nothing in the section 101 definition of “United States work” that evinces a clear intention on the part of Congress that section 411 will have extraterritorial effect. Each of the paragraphs of subsection (1) (relating to published works) has a clear and explicit connection to the United States – (A) applies to publication *in* the United States, (D) requires, for works published outside of the United States, that *all* of the authors be nationals, domiciliaries or habitual residents of the United States, and (B) and (C) require that the work has been published in the United States simultaneously with its publication elsewhere.

⁵⁰ *EEOC v. Arabian American Oil Co.*, 499 U. S. 244, 248 (1991) (*Aramco*) (quoting *Foley Bros., Inc. v. Filardo* , 336 U. S. 281, 285 (1949)).

⁵¹ *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), 2878.

⁵² *EEOC v. Arabian American Oil Co.*, 499 U. S. 244, 258 (1991).

⁵³ See further, Mark P. Gibney, *The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles*, 19 B.C. INT’L & COMP. L. REV. 297, 305 (1996).

It is paragraphs (B) and (C) (the “simultaneous publication” provisions) that were at issue in the *Moberg* and *Kernel* cases. We argue that from a common-sense approach to and plain reading of the Act, it is not apparent that the intention of these provisions was to bring into the definition of “United States work” a huge expanse of foreign produced and owned works, thus subjecting them to registration requirements. Rather, it seems to us that the intention was to ensure that works with a sufficient connection to the United States were not excluded from the definition of “United States works” simply by virtue of them also being published (simultaneously) in foreign countries. Further, in the remaining subsections of the definition, relating to unpublished works and visual works incorporated into a building or structure, there is a clear requirement that all authors must be nationals, domiciliaries, or habitual residents of the United States (for unpublished works) or that the building or structure in which the work is incorporated be located in the United States. There is nothing in the language of any of the provisions of this definition that indicates an intent that the definition, or section 411, would have an extraterritorial effect.

Nor is there anything in the circumstances surrounding the inclusion of this definition in the Copyright Act to suggest an intention that section 411 would apply extraterritorially. The definition of “United States work” was inserted into the Copyright Act by the *Berne Convention Implementation Act* to give effect to the terms of the Berne Convention relating to country of origin.⁵⁴ Article 5 of the Berne Convention is clear that copyright in foreign works is to be recognised in all Member countries without being subject to formality requirements. A situation in which all works published online, regardless of where they are created or the nationality, domicile or habitual residence of the author, are subject to formalities under United States law does not sensibly accord with Article 5 of the Berne Convention, nor the purpose of implementing the Berne Convention within U.S. domestic law.

4.2 Interpreting “United States Works” Based on a Presumption against Extraterritoriality: A Proposal

We propose that the country of origin of a work, including whether a work is or is not a “United States work” under the U.S. Copyright Act, should be determined (and confined) by reference to a “real and substantial connection” test. This test would ask: which is the jurisdiction with which the work has the most substantial connection, so as to reasonably conclude that the work originated from that jurisdiction?

This test has parallels to the choice of law principles in United States law. The Restatement of the Law, Second, Conflict of Laws, §6, sets out the choice of law principles as:

- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
- (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
 - (a) the needs of the interstate and international systems,
 - (b) the relevant policies of the forum,
 - (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
 - (d) the protection of justified expectations,

⁵⁴ In fact, as explained above, the original definition inserted into the U.S. Copyright Act was for “country of origin”; this was later changed to “United States work” by the *WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998*, Pub. L. No. 105-304, 112 Stat. 2860.

- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

By analogy, the determination of the country of origin of a work can be assisted by reference to factors such as the needs of international systems, protection of justified expectations and certainty, predictability and uniformity of results. However, we argue that the one dominating factor in this analysis should be the nationality, domicile or habitual residence of the author of the work. This is the obvious factor in which to ground the origin of a work. In nearly all cases it will point to a clear and sensible point-of-origin for a work and in most cases it will effectively limit the extraterritorial application of domestic copyright law.

We can envisage some scenarios in which this factor would not conclusively indicate a country of origin for a work. One is where there are multiple co-authors of a work and each co-author resides in or is a national of a different country. These situations will not be the norm, however, and in these situations additional factors can be taken into account in ascertaining the country with the most substantial connection to the work, including where the work was created, where the work was uploaded, and the expectations of the affected parties.

We submit that this test would have helped to resolve the *Moberg v 33T* and *Kernel v Mosley* cases in a more sensible and legally foreseeable way. In *Moberg v 33T*, the country of origin of the work would be Sweden, the country of nationality and residence of the photographer of the work (Moberg). In *Kernel v Mosley*, the country of origin of the work would be Norway, the country of nationality and residence of the author of the work. The *Kernel* case is potentially more complicated in that the author claimed that the work was first published in an Australian disk magazine. If supported by sufficient evidence, it is arguable that the country of origin of the work should be Australia.

The critical point is that in neither of these cases is the United States logically or sensibly the country of origin of these works.

4.3 *Nationality as a More Preferred Criterion in Networked Information Age*

Our proposal for a nationality criterion is not a radical one.

As early as 1987, Samuel Ricketson argued that the country of origin of a work should, in most cases, be the country of the author's nationality. Referring to the Berne Convention, Ricketson wrote, "[this] concept of 'country of origin' is only really necessary in the case of non-Union authors, and there is little justification for its use in other cases, particularly when the application of the above rules often means that the country of origin of a published work will be different from the country of which the author is a national."⁵⁵ "In such cases," he suggested, "it is more logical that the [country of origin] of a work should be the country of which the author is a national."⁵⁶ As Ricketson highlighted, "[the country of origin] of a work is a concept which is linked directly to the criterion of territoriality ('the place of first publication') as the criterion for entitlement to protection under the [Berne]

⁵⁵ Sam Ricketson, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986* 211 (The Eastern Press Ltd, 1987).

⁵⁶ *Id.* See also, Ricketson and Ginsburg, *supra* note 19, 280, which refers to "the country of which the author is a national or resident".

Convention”.⁵⁷ However, the history at the time of making the Berne Convention indicates that there was a debate over the choice of “nationality” or “territoriality” as criterion for the protection of published works.⁵⁸ It was not until the ALAI Conference for the drafting of the Berne Convention in September 1883 that the territoriality approach triumphed.⁵⁹ It is likely that a key reason for selecting territoriality over nationality was that this criteria would maximize the chances of non-Union authors obtaining copyright protection for their works in different countries (particularly within Union nations) in later 19th century and earlier 20th century. At the time of drafting, the Convention had a very small number of Member countries and limited geographic coverage. Today there are 164 signatory nations of the Berne Convention out of about 192 countries and regions in the world.⁶⁰ However, only 10 countries (Belgium, France, Germany, Great Britain, Haiti, Italy, Spain, Switzerland, and Tunisia) signed the Convention in 1886, and the number of member nations gradually expanded to 58 in 1970, 70 in 1980, 83 in 1990 and 147 in 2000.⁶¹ The “territoriality” approach ensured that authors who were nationals of a non-Union countries could obtain copyright protection for their work in countries of the Union if their work was first published in a country of the Union or was published simultaneously in a Union country and non-Union country.

In December 1998, Professor Ginsburg prepared a document for WIPO in which she stated: “In effect, to determine the country of origin, we are seeking the country that has the most significant relationship to the act of making the work available to the public.”⁶² She suggested, therefore, that the country of the website’s business establishment, the country where the author resides, or a country with significant contacts with the author should be considered as the country of origin, depending on the particular circumstances.⁶³ However, she also noted that this criterion “is not currently present in the Berne Convention”.⁶⁴ Most recently, in 2006, Professors Ricketson and Ginsburg joined together to argue that where simultaneous publication is effected by means of digital communications such as the Internet, it made sense to designate the country of the author’s nationality as the “country of origin” of the work.⁶⁵

4.4 How Our Proposal Fits With the Language of the U.S. Copyright Act

Before our proposed text can be adopted, it is necessary to determine whether, as a matter of statutory interpretation, our test can be read into the determination of “United States work” under section 101 of the U.S. Copyright Act. We believe that it can. Justice Torres in *Kernel v Mosley* held:

⁵⁷ Ricketson, *supra* note 55.

⁵⁸ Ricketson and Ginsburg, *supra* note 19, 244-46.

⁵⁹ *Id.*, 245. For a history of the drafting of the Berne Convention, please see Michael Blakeney, *The International Protection of Industrial Property: From the Paris Convention to the TRIPS Agreement* (WIPO/IP/CAI/1/03/2), prepared at the WIPO National Seminar on Intellectual Property (Cairo, February 17 to 19, 2003).

⁶⁰ A full list of contracting parties of the Convention can be found at WIPO’s website – see WIPO, *Contracting Parties*, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15 (last visited Sept. 6, 2011).

⁶¹ WIPO, *Treaties Statistics*, http://www.wipo.int/treaties/en/statistics/StatsResults.jsp?treaty_id=15&lang=en (last visited Sept. 6, 2011). For a history of the signatory of the Convention, see United Nations, *YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1968* (vol. 2) (A/CN.4/SER.A/Add.1) (United Nations, New York, 1970) available at http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC_1968_v2_e.pdf.

⁶² Ginsburg, *supra* note 21, 8-9.

⁶³ *Id.*, 8.

⁶⁴ *Id.*, 9.

⁶⁵ Ricketson and Ginsburg, *supra* note 19, 285. The authors also presented an alternative: that the country of origin might be deemed the country with the most author-favourable domestic legislation.

‘[T]he starting point for interpreting a statute is the language of the statute itself.’ *Consumer Product Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). ‘As a basic rule of statutory interpretation, we read the statute using the normal meaning of its words.’ *Consolidated Bank, N.A. v Office of Comptroller of Currency*, 118 F.3d 1461, 1463 (11th Cir. 1997)...We look beyond the plain language of a statute only when it is unclear or ambiguous, when Congress has clearly expressed a legislative intent to the contrary, or when an absurd result would ensue from adopting the plain language interpretation. *Id.* at 1463-64.⁶⁶

His Honour went on to determine that “[a]bsent evidence of Congressional intent to the contrary, the term ‘simultaneously’ should be given its ordinary and plain meaning”, that a work published online was published simultaneously in all countries with internet access, including the United States, and that this made the work a “United States work” for the purposes of section 411 of the Copyright Act.

We do not believe that “United States work” can be so easily read to apply so broadly. The purpose of defining “United States works” is to determine which works will be subject to registration requirements under U.S. law – it therefore has a limiting function, not an expansive function. We do not believe that Congress intended that all works published online, wherever created and whether owned by foreign nationals or residents, would be considered U.S. works, and that the U.S. copyright law would, as a result, have such a broad, extraterritorial application. We believe that it is more sensible to read “first published... simultaneously in the United States and another treaty party or parties” and “first published...simultaneously in the United States and a foreign nation that is not a treaty party” to import a requirement that there be a proper (under our proposal: real and substantial) connection with the United States sufficient to reasonably render the work a “United States work” under U.S. law.

It is also worth noting that our proposal does not preclude foreign nationals from bringing their works within the definition of “United States work” under the U.S. Copyright Act. Foreign nationals who intend that their work be designated a United States work under section 411 can clearly exhibit this intention by first publishing their work in the United States, bringing it squarely within paragraph (1)(A) of the definition of “United States work”.

4.5 How Our Proposal Fits With the Language of the Berne Convention

We also do not believe that our proposal has any negative impact on a reading of Article 5 of the Berne Convention. Our proposal is designed to assist a country in determining whether a particular work should be found to come within the scope of domestic copyright law, such that an exercise of the associated rights (including bringing an action for infringement) can be held to be dependent on certain formalities prescribed in domestic law. As argued above, adherence to the Berne Convention depends on a sensible interpretation of the requirements of the Convention at a national level. The Berne Convention provides little guidance as to country of origin in situations where a work is published simultaneously in multiple member countries with the same term of protection.⁶⁷ Such a situation will be increasingly common as more countries enact the same minimum term provisions (usually, life of the author plus 70 years) and more and more works are published online. In such situations, we need a means of determining the country of origin of a work that is logical, reasonable,

⁶⁶ 2011 U.S. Dist. LEXIS 60666, 26-27 (S.D. Fla. June 7, 2011).

⁶⁷ See further, Ricketson and Ginsburg, *supra* note 19.

and which respects the purpose behind Article 5(2) of the Berne Convention in limiting the imposition of formality requirements for foreign works. We believe our proposal achieves this end.

V. CONCLUSION

Justice Torres's interpretation of the "plain language" of the statute failed to appreciate the limiting function of the term "United States work", contrary to the intention of Congress. This interpretation was not in line with the presumption against extraterritorial application of U.S. law, and if applied widely, would mean that all works first published online would be subject to the U.S. registration requirement before an action for infringement could be commenced.

Many works are still physically published in select jurisdictions, and in those instances, the territoriality approach to determine whether a work is a "United States work" (or to determine if the United States is the Country of Origin) is still logical and relevant. However, the fact that many works are simultaneously published and made available online necessitates a sensible reading of the definition of "United States work" in section 411. This sensible reading calls for an enquiry into whether the work has a "real and substantial connection" with the United States – the dominating factor in this analysis being the nationality, domicile or habitual residence of the author. As we have discussed, this approach is consistent with both the U.S. Copyright Act and the Berne Convention, and reflects the changing pace of technology.