Notes from Speaker James Lorin Silverberg, Esq. Regarding January 17, 2019 Presentation Related to Copyright Registration

17 USC SECTION 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.

To perform or display a work “publicly” means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

“Copies” are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “copies” includes the material object, other than a phonorecord, in which the work is first fixed.
"Although publication would no longer play the central role assigned to it under present law, the concept would still have substantial significance under provisions throughout the bill, including on Federal preemption and duration. Under the definition in Section 101, a work is published" if one or more copies or phonorecords embodying it are distributed to the public -- that is generally to persons under no explicit or implicit restrictions with respect to disclosure of its contents-- without regard to the manner in which the copies or phonorecords changed hands. The definition clears up the question of whether the sale of phonorecords constitutes publication, and it also makes plain that any form of dissemination in which a material object does not change hands (performances and displays on television for example -- is not a publication no matter how many people are exposed to the work. On the other hand, the definition also makes clear that, when copies or phonorecords are offered to a group of wholesalers, broadcaster, motion pictures, etc., publication takes place if the purpose is "further distribution, public performance, or public display."

**Authority of Copyright Holder is Required.**

The Archbishop directs us to nothing more than his own unsubstantiated contentions that certain Works were “passed around” in the public sphere for decades without notice. Even accepting this statement as true, we face the reality that not just any publication of the Works without notice will insert them into the public realm; instead, any such injection must be authorized by the copyright holder, *i.e.*, the one effectively relinquishing its
copyright. *Harris Custom Builders, Inc. v. Hoffmeyer*, 92 F.3d 517, 521 (7th Cir.1996) (“A finding of forfeiture of copyright protection cannot be based on an unauthorized distribution of the work without notice because the notice requirement applies only to copies of works published ‘by authority of the copyright owner,’ pursuant to § 401(a).”); see also Copyright Act of 1976, Pub.L. No. 94–553, § 401(a), 90 Stat. 2541, 2577 (amended 1988) (“Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section shall be placed on all publicly distributed copies....” (emphasis added)); *Cipes v. Mikasa, Inc.*, 346 F.Supp.2d 371, 374–75 (D.Mass.2004); *Zito v. Steeplechase Films, Inc.*, 267 F.Supp.2d 1022, 1026 (N.D.Cal.2003) (citing 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright *46 § 4:04 at 4–22 to 4–23 (2002)) (hereinafter 1 Nimmer). Here, the only copyright holder that could have authorized such publication without notice is the Monastery. We find no evidence of such authorization in the record, nor does the Archbishop direct us to any material showing to the contrary.


**Transfer of a Digital Copy Under a License is Publication**

Archie case. Transfer of one digital copy can suffice, (case being decided on distribution theory, not offering theory) was accompanied by a license. Giving work to a publisher for further constitutes publication.

The transfer of a digital copy of a work may amount to distribution and therefore publication. *See id.* at 402 (concluding that the display of a website online amounts to publication.
because doing so allows a user to view and copy the code used to create it, and, “[c]onsequently, when a website goes live, the creator loses the ability to control either duplication or further distribution of his or her work.”). Here, Archie provided Elsevier with a copy of Work along with “a worldwide ... license to use, reproduce, publish, transmit, and distribute the [Work] ... in any format or medium, in whole or in part, in and in connection with [Elsevier's] Publications and otherwise.” Munkittrick Decl. Ex. 17 ¶ 1.1. While Elsevier had not yet undertaken further distribution of the Work at the time Archie sought registration, the initial transfer of a copy in anticipation of further distribution may nonetheless amount to publication. See M. Nimmer and D. Nimmer, 1 Nimmer on Copyright § 4.13 (2017) [hereinafter “Nimmer”] (noting that “the general principle that a distribution preparatory to ultimate distribution to the public constitutes general publication” was a part of the pre–1978 doctrine).


**Transfer of Illustration for further reproduction (Manequin illustration so that recipient could make mannequins) was publication**

Plaintiff Chesley McLaren, a well known commercial illustrator and designer, brings this action against Chico's FAS, Inc. (“Chico's”), a retailer of women's clothes, alleging that Chico's displayed mannequins that infringed certain of Ms. McLaren's copyrighted designs that she had licensed to a manufacturer named Pucci International, Inc. (“Pucci”) in order for Pucci to make mannequins and sell them to high-end retailers.


According to the complaint, the mannequin illustration from the Collection that Chico's allegedly infringed was previously licensed to Pucci pursuant to the December 1998 agreement. See Compl. Exs. A & Ex. C. By licensing the mannequin illustration to Pucci so that Pucci could produce and sell mannequin illustration to Pucci so that Pucci could produce and sell mannequins based on that drawing, McLaren “published” the drawing within the meaning of the Copyright Act. See 17 U.S.C. § 101 (defining “publication” to mean “the distribution of copies ... of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending,” and providing that “[t]he offering to distribute copies ... to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication”); see also Shoptaik, Ltd. v. Concorde–New Horizons Corp., 168 F.3d 586, 591 (2d Cir.1999) (“the publication of the derivative work, to the extent that it discloses the original work, also constitutes publication of that underlying work”).


BUT SEE

"Defendants have provided no support for their position that the transfer of the Subject Design from Lin Design to Hyup Sung,
without any sale to the public, constitutes publication.\(^3\) Texkhan, Inc. v. One Step Up, Ltd, 2017 WL 8231368, at *3 (C.D. Cal., 2017)

(This case involves transfer of fabric design to parent company, along with work for hire registration, and might be distinguished from other cases on the related party, restricted group, or work for hire principles).

**Selling a copy of the work is generally a publication**

A sale of a work, as opposed to merely a dissemination, however, puts the matter in a different light. Professor Nimmer asserts that a sale to any member of the general public is a publication, citing two cases, *Ross Prods., Inc. v. New York Mdse. Co.*, 233 F.Supp. 260 (S.D.N.Y.1964) and *Gottsberger v. Aldine Book Pub.*, 33 F. 381 (Mass.C.C.1887). In *Ross*, a toy was sold in a department store. The court relied upon *White v. Kimmell*, supra for the proposition that “[i]t cannot be disputed that putting the article on sale to the general public constituted a general publication.” 233 F.Supp. at 261. In *Gottsberger*, the plaintiff sent a number of copies of a work to booksellers and private individuals, for examination, and in one instance accepted money for one copy of the work. The court held that the one sale of the work constituted publication of the work and because the sale occurred before the plaintiff procured a statutory copyright, he lost all rights. Though the cases contain much talk of publication occurring upon the sale of a “single copy,” e.g., *Bobbs–Merrill Co. v. Straus*, 147 F. 15, 19 (2d Cir.1906), aff’d, 210 U.S. 339, 28 S.Ct. 722, 52 L.Ed. 1086 (1908), “such statements express the thought that the availability for public sale constitutes publication even if sales are minimal.” *Roy Export*, 672 F.2d at 1102 n. 14. We observe that these “sale” cases, however, usually implicate the placing of a work in a commercial posture which exposes the text to the scrutiny of the
general public.

**putting book in a library is publication**

*Jewelers' Mercantile Agency, Ltd. v. Jewelers' Weekly Pub. Co., 155 N.Y. 241, 49 N.E. 872 (1889)* is interesting, primarily for its dicta regarding the placement of a work in a public library. In that case, the New York Court of Appeals rejected the notion that there is any difference between selling and leasing a work to the general public. *49 N.E. at 874–875.* (The plaintiff had subscribers who “leased” the works instead of buying them.) In so doing, the court stated that “to give [a work] to the public libraries where all the public may have access to it is to publish it.” *Id., 49 N.E. at 874.* The court further stated that presenting a work to public libraries (gratuitously *550 or otherwise) will constitute publication because “the author or publisher, by the act, puts it in such a place that all the public may see it if they so choose.” *Id., 49 N.E. at 875.* The court, however, undertook to distinguish between a private circulation and a general publication, concluding that private circulation to friends or acquaintances or even to a class is not a general publication.

**Lending a book with restrictions that nevertheless permitted unlimited access to the copies was publication**

In *Ladd v. Oxnard, 75 F. 703 (Mass.C.C.1896)*, 179 subscribers of certain books were issued the books as a “loan” for money, with the restriction that if any copy was found in any other hands the publisher would repossess the books. The court held that while the nature of the use of a particular book was sought to be limited there was no limit placed by the authors on the extent or the number of persons to whom the book had been distributed, and that therefore a general publication occurred. This case hold[s]
that “the mere fact that the delivery of copies of a book was under special limitations would not prevent the delivery from constituting a publication, provided the delivery insured that the public, or an indefinite portion of it, should, without further action on the part of the author, have access to it.” Id. at 730–31 (emphasis added).

**Giving photos to publicist to put in magazines**

**Milton H. Greene Archives, Inc. v. BPI Communications, Inc**
United States District Court, C.D. California, Southern Division, June 7, 2005378 F.Supp.2d 11892005 Copr.L.Dec. P 29, 035

Joshua Greene testified Milton Greene permitted the publicists to use the *1196 photographs to promote the motion pictures and to place the photographs in newspapers, magazines, and campaign books. Here, the photographs were published on three occasions. First, Milton Greene provided the photographs to a publicist, Warner Brothers, and Fox for dissemination to publicize the motion pictures. (See, e.g., Thomas Decl. Exs. A–G, H at 80, 82, 84–88.) Second, the photographs were published when the publicists and motion *1198 picture studios, with Milton Greene's permission, provided the photographs to the press and to theaters in campaign books. (Def.'s Mot. Summ. J. at 16 (citing evidence).) Third, at least six of the seven photographs appeared in the press, either accompanying an article or in an advertisement, and none of the photographs carried a copyright notice. (See, e.g., Def.'s Mot. Summ. J. at 16; Thomas Decl. Exs. B–C, E.)

16 This would amount to a general publication, forfeiting any copyright Plaintiff had in the photographs. However, if the
distributions can be shown to constitute a limited publication, validity may be shown and the photographs will not fall into the public domain.

**Distribution in magazines is publication**

In *Roy Export Co. v. Columbia Broadcasting System, Inc.*, for example, the Second Circuit stated publication of a novel in a magazine, involving “nationwide distribution,” was a general publication and “unquestionably terminated the author's common-law rights.” 672 F.2d 1095, 1104 (2d Cir.1982).

**Distribution of publicity materials to the public is publication**

12 Given the undisputed evidence regarding handouts, flyers, giveaway and sale items, and movie posters for telephone poles distributed under the National Screen Agreement (in apparent contravention of its “return or destroy” provisions), as well as the widespread distribution of many publicity images to newspapers and magazines, the only possible “implications of [Loew's] outward actions to the reasonable outsider” is that Loew's intended to abandon the right to control reproduction, distribution, and sale of the images in the publicity materials. See *Nucor Corp.*, 476 F.2d at 390 n. 7. In terms of the Ninth Circuit test, the publicity materials simply were not distributed to a definitely selected class of persons without the right of reproduction, distribution, or sale. See *White*, 193 F.2d at 746–47. To the contrary, the purpose of the distribution of all of these publicity materials was to reach as much of the public as possible. The studio itself happily estimated at the time that over 90 million people would see the advertising campaign for *The Wizard of Oz*. In practical terms, “courts have hesitated to find general publication if to do so would divest the common law right to
profit from one's own work,” Burke, 598 F.2d at 691, but here it appears Loew's viewed the publicity materials as a tool to maximize profit from the copyrighted films, not as an independent source of revenue. Therefore, we conclude that the publicity materials for The Wizard of Oz and Gone with the Wind, as well as for the Tom & Jerry short films, are in the public domain.\textsuperscript{7} Warner Bros. Entertainment, Inc. v. X One X Productions, 644 F.3d 584, 595 (C.A.8 (Mo.), 2011)

\textbf{Sale of Fabric Samples to Reps for further production}

“Publication occurs when fabric, carpet, or wallpaper samples are offered to sales representatives for the purpose of selling those works to wholesalers and retailers.” U.S. Copyright Office, Compendium of U.S. Copyright Practices § 1906.01 (3d ed. 2014) [hereinafter, Compendium III].\textsuperscript{4}


These actions constitute publication as a matter of law because Plaintiff sold fabric with the 1461 Design to its customers. The purpose of selling these samples was to “secur[e] full production contracts for hundreds or thousands of yards of fabric.” Ajnassian Decl., Dkt. 60–1 ¶ 5.


\textbf{Selling toys to public is publication}

As Mr. Koster's April 12, 1992 affidavit makes clear, however, Phoenix Toys was marketing the dinosaurs to wholesalers,
retailers, and toy distributors before May 20, 1991. In other words, the dinosaurs were published before their effective date of registration as an unpublished collection. 17 U.S.C. § 101 (“The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication.”); Determined Productions, Inc. v. Koster, 1993 WL 120463, at *1 (N.D.Cal., 1993)

**Displaying work on Internet with permission to download it**

See Getaped.com Inc. v. Cangemi, 188 F.Supp.2d 398, 401 (S.D.N.Y. 2002) (noting that the key factor bearing on whether a work is published through its being posted online is the ability of a user to “gain a proprietary or possessory interest” in the work, but never suggesting that that interest need be exclusive).³

**Limited Publication Doctrine**

A limited publication “communicates the contents of a (work) ... to a definitely selected group and for a limited purpose, and without the right of diffusion, reproduction, distribution, or sale ... (and) does not result in the loss of the author's common law copyright to his (work).... [T]he circulation must be restricted both as to persons and purpose, or it cannot be called a private or a limited publication.” White v. Kimmell, 193 F.2d 744, 747–48 (9th Cir.1952), cert. denied, 343 U.S. 957, 72 S.Ct. 1052, 96 L.Ed. 1357 (1952). It has been held that the restrictions may be express or implied. American Vitagraph, Inc. v. Levy, 659 F.2d at 1027 (citing Burke v. National Broadcasting Co., Inc., 598 F.2d 688, 692 (1st Cir.1979)); Werckmeister v. American Lithographic Co., 134 F. 321, 324 (2d Cir.1904)).
Greene Case:

"Definitely Selected Group"

The evidence establishes the photographs were provided to a wide group, not a definitely selected group. (See, e.g., Thomas Decl. Exs. A–C.) In Brown v. Tabb, the Eleventh Circuit held, “Even if the persons receiving copies in fact constitute only a select group, the publication is nevertheless general if copies were available to persons not included in the group.” 714 F.2d 1088, 1092 (11th Cir.1983). Also, the general public does not constitute a definitely selected group. See Rexnord, Inc. v. Modern Handling Sys., Inc., 379 F.Supp. 1190, 1197 (D.Del.1974) (stating brochures “were freely available to customers and prospective customers” and, therefore, “the audience to which they were disseminated can hardly be regarded as restricted”).

Monastery publication "reviewers" are a select group

The Monastery does not contest this latter proposition. In fact, it concedes it authorized St. Nectarios Press to distribute booklets—composed of in-progress translations of certain of the Works at issue on appeal expressly attributing copyright ownership to the Monastery—to certain parishes for their use and editorial critiques. Any such promulgation though, according to the Monastery, was restricted and should be deemed a limited publication not requiring such notice.

We agree. Delivery of these booklets to selected religious congregations for the circumscribed purpose of literary feedback rings more of a limited publication (distribution “to a limited class of persons and for a limited purpose”)—than of a general publication (distribution to “the public at large without regard to
who they are or what they propose to do with [the work]). *Burke,* 598 F.2d at 691; see also *Warner Bros. Entm’t, Inc. v. X One X Prods.,” 644 F.3d 584, 593 (8th Cir.2011) (distinguishing between a general publication and a limited publication).

*Society of Holy Transfiguration Monastery, Inc. v. Gregory,* 689 F.3d 29, 45 (C.A.1 (Mass.),2012)

limited purpose

*For a Limited Purpose [Greene Case]*

*publicizing motion picture was found to be limited purpose* (but publication was general considering other factors).

23 Plaintiff argues the seven photographs were distributed to publicize the motion pictures, which constitutes a limited purpose. *Hirshon v. United Artists Corp.,* 243 F.2d 640, 645 (D.C.Cir.1957).

**Limited purpose includes copies given for "critical review:"

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no further distribution [Greene case]

3.) Without the Right of Further Reproduction, Distribution, or Sale


**Warner Bros Case -- Three Elements for Limited Publication.**

We have held that a publication is general, rather than limited, if the rights-holder demonstrated an express or implied intent to abandon his right to control distribution and reproduction of his work, as determined objectively from “the implications of his outward actions to the reasonable outsider.” Nucor Corp. v. Tenn. Forging Steel Serv., Inc., 476 F.2d 386, 390 n. 7 (8th Cir.1973) (quoting Edgar H. Wood Assocs., Inc. v. Skene, 347 Mass. 351, 197 N.E.2d 886, 892 (1964)). There is a dearth of Eighth Circuit case law applying this test, and the parties argue this issue under a framework developed by the Ninth Circuit and adopted by several other circuits defining a limited publication as a distribution (1) to a definitely selected class of persons, (2) for a limited purpose, (3) without the right of reproduction, distribution, or sale. See White
v. Kimmell, 193 F.2d 744, 746–47 (9th Cir.1952); see also Brown, 714 F.2d at 1091; Data Cash Sys., 628 F.2d at 1042; Burke, 598 F.2d at 692; Am. Visuals Corp. v. Holland, 239 F.2d 740, 744 (2d Cir.1956); 1–4 Melville B. & David Nimmer, Nimmer on Copyright § 4.13 (hereinafter “Nimmer on Copyright ”). We agree that this test may help to focus the analysis. Warner Bros. Entertainment, Inc. v. X One X Productions, 644 F.3d 584, 593 (C.A.8 (Mo.),2011)

**Gold Value repeats three elements for Limited Publication and cites Greene**

A publication is deemed limited where the work was distributed “(1) to a ‘definitely selected group,’ and (2) for a limited purpose, [ (3) ] without the right of further reproduction, distribution or sale.” *Id.* “All three of the enumerated elements must exist or else the distribution may not be deemed limited and the copyright will not be valid.” Milton H. Greene Archives, Inc. v. BPI Commc'ns, Inc., 378 F. Supp. 2d 1189, 1198 (C.D. Cal. 2005) (citation and alteration omitted).


**Copies include electronic messages posted on Internet message board.**

Act of sending message to Usenet newsgroup which caused reproduction of portions of copyrighted works on computer bulletin board service (BBS) operator's and Internet access provider's storage devices created “copies” for purposes of Copyright Act; even though messages remained on operator's and access provider's systems for at most 11 days, they were sufficiently “fixed” to constitute recognizable copies under the

American Tobacco Co. v. Werckmeister
Supreme Court of the United States
December 2, 1907
207 U.S. 284
28 S.Ct. 725
2 L.Ed. 208
12 Am.Ann.Cas. 595

The rule is thus stated in Slater on the Law of Copyright and Trade Marks p. 92):
‘It is a fundamental rule that to constitute publication there must be such a dissemination of the work of art itself among the public as to justify the belief that it took place with the intention of rendering such work common property.’ And that author instances as one of the occasions that does not amount to a general publication the exhibition of a work of art at a public exhibition where there are bylaws against copies, or where it is tacitly understood that no copying shall take place, and the public are admitted to view the painting on the implied understanding that no improper advantage will be taken of the privilege.
We think this doctrine is sound and the result of the best-considered cases. In this case it appears that paintings are expressly entered at the gallery with copyrights reserved. There is no permission to copy; on the other hand, officers are present who rigidly enforce the requirements of the society that no copying shall take place.

Mere display on Internet is not publication

(but consider whether copy needed to be transferred to cause display, and consider if transfer was unrestricted publication).

"Moreover, even if the factual aspect of this allegation were credited, this claim that images composing the Collection were
posted on her website would not in any event suffice to plead “publication.” See, e.g., Einhorn v. Mergatroyd Prods., 426 F.Supp.2d 189, 197 n. 5 (S.D.N.Y.2006) ( “merely posting a digital file” on the Internet does not amount to “publication” under the Copyright Act).


**Mere Performance on Internet is not publication.**

"Further, defendants allegedly posted a full-length performance of the show on their web site and placed metatags containing Einhorn's name on their web sites, a practice called “metastuffing” which results in Internet search engines directing web surfers who entered Einhorn's name in search requests to defendants' web sites.

The same definition dooms Einhorn's claim that the posting of performances of the show on the Internet constituted publication, even assuming *arguendo* that Einhorn may rely upon defendants' actions, some of which are said to have infringed his alleged rights, to establish publication. Making the work available in that way, even assuming it constituted “distribution,” did not involve “sale or other transfer of ownership, or by rental, lease or lending.” Indeed, this result follows directly from the principle that “the projection or exhibition of a motion picture in theaters or elsewhere does not in itself constitute a publication.”

### Compendium of Copyright Office Practices

**PUBLICATION** Contents

<table>
<thead>
<tr>
<th>1</th>
<th>1901</th>
<th>What This Chapter Covers</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>1902</td>
<td>What Constitutes Publication?</td>
</tr>
<tr>
<td>3</td>
<td>1903</td>
<td>The Significance of Publication</td>
</tr>
<tr>
<td>4</td>
<td>1904</td>
<td>General Policies Concerning Publication</td>
</tr>
<tr>
<td></td>
<td>1904.1</td>
<td>Applicant Makes the Determination</td>
</tr>
<tr>
<td></td>
<td>1904.2</td>
<td>Facts Stated in the Application</td>
</tr>
<tr>
<td></td>
<td>1904.3</td>
<td>Claim in a Published or Unpublished Work Contradicted by Information Provided Elsewhere, such as in the Registration Materials</td>
</tr>
<tr>
<td>4</td>
<td>1905</td>
<td>Distribution of Copies or Phonorecords of a Work</td>
</tr>
<tr>
<td></td>
<td>1905.1</td>
<td>Distribution to the Public</td>
</tr>
<tr>
<td></td>
<td>1905.2</td>
<td>The Means of Distribution</td>
</tr>
<tr>
<td></td>
<td>1905.3</td>
<td>Deposit for Registration in the U.S. Copyright Office</td>
</tr>
<tr>
<td>6</td>
<td>1906</td>
<td>Offering to Distribute Copies or Phonorecords of a Work</td>
</tr>
<tr>
<td></td>
<td>1906.1</td>
<td>Offering to Distribute Copies or Phonorecords to a Group of Persons</td>
</tr>
<tr>
<td></td>
<td>1906.2</td>
<td>Offering to Distribute Copies or Phonorecords for the Purpose of Further Distribution, Public Performance, or Public Display</td>
</tr>
<tr>
<td></td>
<td>1906.3</td>
<td>The Copies or Phonorecords Must Be in Existence</td>
</tr>
<tr>
<td>8</td>
<td>1907</td>
<td>Distributing the Work vs. An Offer to Distribute the Work</td>
</tr>
<tr>
<td>8</td>
<td>1908</td>
<td>A Public Performance or Public Display Does Not Constitute Publication</td>
</tr>
<tr>
<td></td>
<td>1908.1</td>
<td>Performing a Work of Authorship</td>
</tr>
<tr>
<td></td>
<td>1908.2</td>
<td>Displaying a Work of Authorship</td>
</tr>
<tr>
<td></td>
<td>1908.3</td>
<td>Public Performances and Public Displays</td>
</tr>
<tr>
<td></td>
<td>1908.4</td>
<td>Private Performances and Private Displays</td>
</tr>
</tbody>
</table>

### 10 Specific Forms of Publication

| 10 | 1909  | Unpublished Work Embodied in a Published Work |
|    | 1909.1 | Publishing a Portion of a Work |
|    | 1909.2 | Publishing Separate Parts or Installments of a Work |
|    | 1909.3 | Works First Published Outside the United States |

*revised 09/29/2017*
compendium: chapter 1900 PUBLICATION

1901 What This Chapter Covers This Chapter provides a definition and discussion of publication for works created or first published on or after January 1, 1978. note: This Chapter does not discuss works first published before January 1, 1978. For information concerning these types of works, see Chapter 2100. Additionally, this Chapter does not discuss publication issues that are unique to online works. For publication issues relating to online works, see Chapter 1000, Section 1007.3. For a discussion of the specific practices and procedures for registering a claim to copyright in a published or unpublished work, see the following Chapters:

• For a general overview of the registration process, see Chapter 200.
• For guidance in determining who may file an application and who may be named as the copyright claimant, see Chapter 400.
• For a general overview of the applications that may be used to register a copyright claim, see Chapter 1400.
• For information on how to complete an application, see Chapter 600. For guidance in providing a date of first publication and identifying the nation of first publication in the application, see Chapter 600, Section 612.
• For information concerning the notice requirements for U.S. works published in copies or phonorecords between January 1, 1978 and February 28, 1989, see Chapter 2200.

1902 What Constitutes Publication? Section 101 of the Copyright Act defines publication as “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.” 17 U.S.C. § 101. It states that “offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication.” Id. It also explains that “[a] public performance or display of a work does not of itself constitute publication.” Id. The legislative history explains that “a work is ‘published’ if one or more copies or phonorecords embodying [the work] are distributed to the public” with “no explicit or implicit restrictions with respect to [the] disclosure of [the] contents [of that work].” H.R. Rep. No. 94-1476, at 138 (1976), reprinted in 1976
U.S.C.C.A.N. at 5754. It also explains that publication occurs “when

1903

compendium: Publication copies or phonorecords are offered to a group of wholesalers, broadcasters, motion picture theatres, etc.” for the purpose of “further distribution, public performance, or public display.” Id.

Although it is not expressly stated in the statutory definition, the legislative history indicates that publication occurs only (i) when copies or phonorecords are distributed by or with the authority of the copyright owner, or (ii) when an offer to distribute copies or phonorecords to a group of persons for further distribution, public performance, or public display is made by or with the authority of the copyright owner. For a definition and discussion of the terms “copies” and “phonorecords,” see Chapter 300, Section 305.

Offering to distribute copies or phonorecords to a group of persons for further distribution, public performance, or public display without authorization does not constitute publication. Like-wise, an unauthorized distribution of copies or phonorecords does not constitute publication. Instead it generally constitutes copyright infringement. See H.R. Rep. No. 94-1476, at 62 (1976), reprinted in 1976 U.S.C.C.A.N. at 5675-76 (explaining that Section 106(3) of the Copyright Act gives copyright owners “the right to control the first public distribution of an authorized copy or phonorecord of [the] work, whether by sale, gift, loan, or some rental or lease arrangement”).

The Significance of Publication

Publication is an important concept for works created or first published after January 1, 1978 for a number of reasons:

- If the work has been published, the date and nation of first publication should be provided in the application to register that work with the U.S. Copyright Office. See 17 U.S.C. § 409(8). For guidance in completing this portion of the application, see Chapter 600, Sections 612 and 617.

The deposit requirements for registering a published work differ from the requirements for registering an unpublished work. For information concerning these requirements, see Chapter 1500, Sections 1503 and 1505.

Works first published in the United States may be subject to mandatory deposit with the Library of Congress. For information concerning the mandatory deposit requirements, see Chapter 1500, Section 1511.

The year of publication may determine the length of the copyright term for a work made for hire. For a definition and discussion of works made for hire, see
Chapter 500, Section 506.
The year of publication may determine the length of the copyright term for an anonymous work or a pseudonymous work, unless the author’s identity is revealed in records maintained by the U.S. Copyright Office. For a definition and discussion of anonymous works and pseudonymous works, see Chapter 600, Sections 615.1 and 615.2.
The year of publication may determine the length of the copyright term if the work was created before January 1, 1978, and was first published between January 1, 1978 and January 1, 2003. See 17 U.S.C. § 303(a).
A certificate of registration constitutes prima facie evidence of the validity of the copyright and the facts stated in the certificate of registration, provided that the work is registered before or within five years after the work is first published. 17 U.S.C. § 410(c).

Chapter 1900
| 2
revised 09/29/2017
compendium: Publication

- The copyright owner may be entitled to claim statutory damages and attorney’s fees in an infringement lawsuit, provided that the work was registered before the infringement began or within three months after the first publication of the work. See 17 U.S.C. §§ 412, 504(c), 505.
- Many of the exceptions and limitations set forth in Sections 107 through 122 of the Copyright Act may be impacted depending on whether the work is published or unpublished. See, e.g., 17 U.S.C. §§ 107, 108, 115, 118, and 121.
- As a general rule, U.S. works first published in the United States before March 1, 1989 must be published with a valid copyright notice. Failing to include a valid notice on a U.S. work published during this period may invalidate the copyright in that work. For a detailed discussion of these notice requirements, see Chapter 2200, Sections 2203 through 2207.

1904 General Policies Concerning Publication
This Section discusses the U.S. Copyright Office’s general practices and procedures for examining published and unpublished works.

1904.1 Applicant Makes the Determination The applicant—not the U.S. Copyright Office—must determine whether a work is published or unpublished. The U.S. Copyright Act is the exclusive source of copyright protection in the United States, and all applicants—both foreign and domestic—must demonstrate that a work satisfies the requirements of U.S. copyright law to register a work with the Office. Determining whether a work is published or unpublished should be based
on U.S. copyright law under Title 17, and it should be based on the facts that exist at the time the application is filed with the Office, even if the work was created in a foreign country, first published in a foreign country, or created by a citizen, domiciliary, or habitual resident of a foreign country. Upon request, the Office will provide the applicant with general information about the provisions of the Copyright Act, including the statutory definition of publication, and will explain the relevant practices and procedures for registering a published or unpublished work with the Office. The Office will not give specific legal advice on whether a particular work has or has not been published. However, if an assertion is clearly contrary to facts known by the Office, a claim may be questioned, or in certain situations, refused.

1904.2 Facts Stated in the Application As a general rule, the U.S. Copyright Office will not conduct its own factual investigation to determine whether a work is published or unpublished or to confirm the truth of the statements made in the application concerning publication.

Ordinarily, the Office will accept the facts stated in the application, unless they are implausible or conflict with information provided elsewhere in the registration materials, the Office’s records, or other sources of information that are known by the Office.

Chapter 1900
3
revised 09/29/2017
compendium: Publication 1904.3 Claim in a Published or Unpublished Work Contradicted by Information Provided Elsewhere, such as in the Registration Materials

As a general rule, if the applicant affirmatively states that the work is unpublished or fails to provide a date of first publication in the application, the Office will register the work as an unpublished work, unless the information provided in the deposit copy or in other sources of information known by the Office clearly indicate that the work has been published.

Likewise, if the applicant affirmatively states that the work has been published and provides a date of first publication in the application, the Office generally will register the work as a published work, unless information provided in the deposit copies or in other sources of information known by the Office clearly suggest that the work is unpublished.

If the deposit copy(ies) or other information known by the Office clearly suggest that the work is published or unpublished and if it appears that the applicant provided or failed to provide a date of publication by mistake, the registration specialist may communicate with the applicant. For examples of situations that may prompt a communication concerning publication, see Chapter 600, Sections
1905 Distribution of Copies or Phonorecords of a Work

As discussed in Section 1902, publication occurs when copies or phonorecords of a work are distributed to the public by or with the authority of the copyright owner. These issues are discussed in Sections 1905.1 through 1905.3 below.

1905.1 Distribution to the Public

Section 101 of the Copyright Act states a work is published when copies or phonorecords of that work are distributed “to the public.” 17 U.S.C. § 101. Specifically, publication occurs when one or more copies or phonorecords are distributed to a member of the public who is not subject to any express or implied restrictions concerning the disclosure of the content of that work. If a work exists only in one copy – such as a painting embodied solely in a canvas – the work may be considered published if that copy is distributed to the public with the authorization of the copyright owner. H.R. Rep. No. 941476, at 138 (1976), reprinted in 1976 U.S.C.C.A.N. at 5754.

Examples:

• Selling copies of a textbook to a local school board constitutes publication of that work.
• Selling a product with copyrightable artwork on the packaging and label constitutes publication of that artwork.
• Mailing copies of a catalog to potential customers constitutes publication of that catalog and any unpublished works revealed in that work.
• Distributing copies of a leaflet on a street corner constitutes publication of that work.

• Giving away copies of a photograph without further restriction constitutes publication of that work.
• Lending, renting, or leasing copies of a work constitutes publication of that work.
• Distributing copies of a motion picture through a retail service constitutes publication of that work.
• Selling the original copy of a painting at an auction. If an actual distribution has not occurred, the work is considered unpublished. Likewise, a work is considered unpublished if the copies or phonorecords were not distributed to a member of the public, but instead were much more restricted, including
an exchange between family members or social acquaintances. The courts created the doctrine of “limited publication” to distinguish certain distributions from a “general publication” and to avoid the divestive consequences of publication without notice when it was clear the author (or copyright proprietor) restricted both the purpose and the recipients of the distribution. Generally, a limited publication is the distribution of copies of a work to a definitely selected group with a limited purpose and without the right of diffusion, reproduction, distribution, or sale. A limited publication is not considered a distribution to the public and, therefore, is not publication. See White v. Kimmell, 193 F.2d 744, 746-47 (9th Cir. 1952) (explaining that a publication is limited if it “communicates the contents of a [work] to a definitely selected group and for a limited purpose, and without the right of diffusion, reproduction, distribution or sale ... [and is] restricted both as to persons and purpose.”). Examples:

- Sending copies of a manuscript to prospective publishers in an effort to secure a book contract does not constitute publication (regardless of whether the copies are returned).
- Distributing copies of a research paper that are intended solely for the use of the participants at a seminar generally does not constitute publication if there was no right of further diffusion, reproduction, distribution, or sale by the participants.
- Distributing copies of a speech that are intended solely to assist the press in covering that event has been deemed a limited publication under the Copy-right Act of 1909 (i.e., not a publication). However, under the current statutory definition, offering to distribute copies to different news outlets for the purpose of further distribution, public performance, or public display could constitute publication.

Moreover, a work may be considered unpublished if, in addition to communicating a work to a definitely selected group and for a limited purpose, the copyright owner imposed any express or implied restrictions concerning the disclosure of the content of that work, such as placing a statement on the copies or phonorecords indicating that distribution of the work is limited or restricted in some way, such as “Confidential—these specifications are for internal office use only.”

1905.2 The Means of Distribution

As discussed in Section
1902, publication occurs when copies or phonorecords are distributed to the public by means of a sale or other transfer of ownership, such as giving copies away. Like-wise, publication occurs when copies or phonorecords are distributed by means of rental, lease, or lending (i.e., where the copies or phonorecords change hands, but there is no change in the ownership of those copies or phonorecords). Distributing copies or phonorecords by any other means does not constitute publication. In particular, the legislative history states that “any form or dissemination in which a material object does not change hands... is not a publication no matter how many people are exposed to the work.” H.R. Rep. No. 94-1476, at 138 (1976), reprinted in 1976 U.S.C.C.A.N. at 5754.

1905.3 Deposit for Registration in the U.S. Copyright Office

Depositing unpublished copies or phonorecords with the U.S. Copyright Office for the purpose of registering a claim to copyright does not constitute publication.

1906 Offering to Distribute Copies or Phonorecords of a Work

As discussed in Section 1902, offering to distribute copies or phonorecords to a group of persons for the purpose of further distribution, public performance, or public display constitutes publication, provided that the offer is made by or with the authority of the copyright owner. These issues are discussed in Sections 1906.1 through 1906.3 below.

1906.1 Offering to Distribute Copies or Phonorecords to a Group of Persons

Section 101 of the Copyright Act states that “offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display constitutes publication.” 17 U.S.C. § 101. Specifically, publication occurs when one or more copies or phonorecords are offered to a wholesaler, a retailer, a broadcaster, an aggregator, or similar intermediaries for the purpose of distributing the work to the public or for the purpose of publicly performing or publicly displaying the work. If a work exists only in one copy, the work may be considered published if that copy is offered to a group of persons with the authorization of the copyright owner. H.R. Rep. No. 94-1476, at 138 (1976), reprinted in 1976 U.S.C.C.A.N. at 5754.

Examples:

• Publication occurs when a motion picture is offered to a group of movie theaters or television networks for the purpose of exhibiting or broadcasting that work.

• Publication occurs when copies of a greeting card are offered to retailers for the purpose of selling those copies to the public.

• Publication occurs when copies of a photograph are offered to stock photography agencies for the purpose of licensing those copies to newspapers, magazines, and websites.
Publication occurs when phonorecords are offered to radio stations for the purpose of broadcasting the songs and sound recordings embodied therein. Publication occurs when copies of a song are offered to a group of band directors for the purpose of performing that work at athletic events. Publication occurs when fabric, carpet, or wallpaper samples are offered to sales representatives for the purpose of selling those works to wholesalers and retailers. Publication occurs when the original copy of a statue is offered to a group of museums for the purpose of publicly displaying the work. By contrast, offering a work directly to the public does not constitute publication unless copies or phonorecords of that work are actually distributed. Examples:

- An online advertisement offering to sell an app directly to the public does not constitute publication of that work.
- An advertisement containing pictures of a jewelry design constitutes publication of that work, but an advertisement that merely contains a textual description of that design does not.

Offering to Distribute Copies or Phonorecords for the Purpose of Further Distribution, Public Performance, or Public Display

Section 101 of the Copyright Act states that “offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication.” 17 U.S.C. § 101. In other words, the copies or phonorecords must be offered to a group of persons for one or more of the purposes listed in the statute. Publication does not occur when copies or phonorecords are offered for any other purpose, such as offering them to a group of persons for private use, private performance, or private display. The copies or phonorecords must be in existence

Offers and phonorecords constitute publication, provided that the copies or phonorecords exist when the offer is made. Offering to distribute copies or phonorecords before they exist or before they are ready for further distribution, public performance, or public display does not constitute publication. Examples:

- Offering a new line of toys to a group of retailers constitutes publication, provided that the toys are available for distribution when the offer is made.
Offering prints of a **motion picture** to a group of theater owners constitutes publication, provided that the prints are available for public performance when the offer is made.

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**1907**

- Offering a cartoon to a group of syndicators constitutes publication, provided that the work is available for distribution when the offer is made.
- Offering to distribute a motion picture that is currently in production does not constitute publication.
- Offering to distribute a **sound recording** that has not been **fixed** in its final form does not constitute publication.

### Distributing the Work vs. An Offer to Distribute the Work

The statute states that a work is published when copies or phonorecords are distributed to the public. It also states that offering to distribute copies or phonorecords to a group of persons for the purpose of further distribution, public performance, or public display constitutes publication. See 17 U.S.C. § 101 (definition of “publication”). In other words, publication occurs when either of these conditions has been met. **Examples:**

- Distributing copies of a photograph to the public constitutes publication (even if the copies were offered solely for private display).
- Offering to distribute copies of a lithograph to a number of galleries for the purpose of public display constitutes publication, but offering the same copies to a group of individuals solely for private display does not.

### Public Performance or Public Display Does Not Constitute Publication

As discussed in Section **1902**, a public performance or a public display of a work “does not of itself constitute publication.” 17 U.S.C. § 101 (definition of “publication”). Therefore, if the **applicant** provides a date of publication in the application and indicates that the work was performed, televised, broadcast, displayed, or exhibited on that date, the **registration specialist** may communicate with the applicant and explain that merely performing or displaying a work in public does not constitute publication under U.S. copyright law, “no matter how many people are exposed to the work.” H.R. Rep. No. 94-1476, at 138 (1976), reprinted in 1976 U.S.C.C.A.N. at 5754. **Examples of performances and displays that do not in themselves constitute publication include the following:**

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**1908**

**compendium:** Publication
Performing a song at a concert or on television or radio, regardless of the size of the audience.

Showing a motion picture in a theater or on television. Performing a play, a pantomime, or a choreographic work in a theater. Delivering a speech, lecture, or sermon at a public event.

compendium: Publication

- Displaying a painting in a museum, a gallery, or the lobby of a building (regardless of whether the copyright owner prohibited others from taking photographs or other reproductions of that work).
- Displaying a fabric design, wallpaper design, or textile design in a store front.

1908.1 Performing a Work of Authorship

Section 101 of the Copyright Act states that performing a work of authorship means “to recite, render, play, dance, or act [the work], either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.” 17 U.S.C. § 101. Reading a literary work aloud, singing or playing music, dancing a ballet or other choreographic work, or acting out a dramatic work or pantomime clearly falls within the scope of this definition. Likewise, showing portions of a motion picture, filmstrip, or slide presentation in sequential order or playing a motion picture sound track clearly qualifies as a performance of that work. See H.R. Rep. No. 94-1476, at 63-64 (1976), reprinted in 1976 U.S.C.C.A.N. at 5677.

1908.2 Displaying a Work of Authorship

Section 101 of the Copyright Act states that displaying a work of authorship means “to show a copy of [the work], either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.” 17 U.S.C. § 101. For example, displaying a painting in a gallery, posting a photograph on a billboard, placing an advertisement in a store front, or projecting a drawing onto a screen or other surface falls within the scope of this definition. See H.R. Rep. No. 94-1476, at 64 (1976), reprinted in 1976 U.S.C.C.A.N. at 5677.
Section 101 of the Copyright Act states that performing or displaying a work “publicly” means:

- “[T]o perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or”
- “[T]o transmit or otherwise communicate a performance or display of the work to a place specified [in the preceding paragraph] or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.”

Although the statute does not define the term “public,” it “suggests that ‘the public’ consists of a large group of people outside of a family and friends,” such as “a large number of people who are unrelated and unknown to each other.”