

PUBLICATION

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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For a discussion of the specific practices and procedures for registering a **claim** to copyright in a published or **unpublished** work, see the following Chapters: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

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. Likewise, 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”).

1903 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\(c\)](#).

- 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.

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 612.7(A) and 612.7(B).

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 Copyright 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. Likewise, 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.

1906.2 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.

1906.3 The Copies or Phonorecords Must Be in Existence

The statutory definition indicates that offering to distribute **copies** or **phonorecords** constitutes 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.

- 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.

1907 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.

1908 A 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:

- 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.

- 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.

1908.3 Public Performances and Public Displays

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.”

17 U.S.C. § 101.

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.” *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2509-10 (U.S. 2014).

The legislative history explains that a performance or display constitutes a public performance or a public display if it occurs “in a public place.” It also explains that a performance or display that occurs in a “semipublic” place, such as a club, lodge, factory, summer camp, or school, is considered a public performance or display. **H.R. Rep. No. 94-1476, at 64 (1976)**, *reprinted in* 1976 U.S.C.C.A.N. at 5677-78.

By contrast, a performance or display that occurs at “a gathering confined to [an] individual’s social acquaintances would normally be regarded as private.” *Id.* A performance or display that occurs during “[r]outine meetings of businesses and governmental personnel” would be normally considered private “because they do not represent the gathering of a ‘substantial number of persons.’” *Id.*, *reprinted in* 1976 U.S.C.C.A.N. at 5678. Likewise, “an entity does not transmit [a work] to the public if it does not transmit to a substantial number of people outside of a family and its social circle.” *American Broadcasting Companies*, 134 S. Ct. at 2511.

The legislative history further explains that a public performance or a display includes “the initial rendition or showing” of a work, as well as “any further act by which that rendition or showing is transmitted or communicated to the public.” **H.R. Rep. No. 94-1476, at 63**, *reprinted in* 1976 U.S.C.C.A.N. at 5676. “[F]or example, a sing[er] is performing when he or she sings a song; a broadcasting network is performing when it transmits [that] performance (whether simultaneously or from records); a local broadcaster is performing when it transmits the network broadcast; a cable television system is performing when it retransmits the broadcast to its subscribers; and any individual is performing whenever he or she plays a phonorecord embodying the performance or communicates the performance by turning on a receiving set.” *Id.*, *reprinted in* 1976 U.S.C.C.A.N. at 5676-77.

A performance or display that is transmitted to the public is considered a public performance or a public display “even though the recipients are not gathered in a single place, and even if there is no proof that any of the potential recipients was operating his receiving apparatus at the time of the transmission.” *Id.* at 64-65, *reprinted in* 1976 U.S.C.C.A.N. at 5678. “In other words, ‘the public’ need not be situated together, spatially or temporally” for a public performance or public display to occur. *American Broadcasting Companies*, 134 S. Ct. at 2510.

Moreover, “when an entity communicates the same contemporaneously perceptible images and sounds to multiple people, it transmits a performance to them regardless of the number of discrete communications it makes.” *Id.* at 2509. For instance, when an entity “streams the same television program to multiple subscribers, it ‘transmit[s]... a performance’ to all of them,” regardless of whether the entity makes the transmission “from the same or separate copies” or from “user-specific copies.” *Id.* (quoting **17 U.S.C. § 101** (definition of “perform or display a work ‘publicly’”)).

1908.4 Private Performances and Private Displays

Section 101 of the Copyright Act expressly states that a public performance or a public display “does not of itself constitute publication.” **17 U.S.C. § 101** (definition of “publication”). Therefore, a private performance or a private display in and of itself does not constitute publication.

1909 Specific Forms of Publication

1909.1 Unpublished Work Embodied in a Published Work

An unpublished work is considered published when it is embodied in another work of authorship that has been published, but only to the extent that the unpublished work is disclosed in the published work.

Examples:

- When an unpublished screenplay is used in the creation of a **motion picture**, the elements of that screenplay that appear in the motion picture are published when (i) copies of the motion picture are distributed to the public, or (ii) when copies of the motion picture are offered to a group of persons for further distribution, public performance, or public display.
- When an unpublished musical work is incorporated in a distributed **sound recording**, the elements of that work that are incorporated into the sound recording are published when (i) copies of the sound recording are distributed to the public, or (ii) when copies of the sound recording are offered to a group of persons for further distribution, public performance, or public display.
- When an unpublished painting is reproduced in a book, the elements of the painting that appear in the book are published when (i) copies of the book are distributed to the public, or (ii) when copies of the book are offered to a group of persons for further distribution, public performance, or public display.
- When an unpublished sculpture is featured in a motion picture, the publication of the motion picture may publish the sculpture if the motion picture discloses a sufficient amount of three-dimensional authorship to effectuate a publication of a sculptural work.

1909.2 Publishing a Portion of a Work

Publishing a portion of a work does not necessarily mean that the work as a whole has been published. As a general rule, publication applies only to the specific portions of the work that have been distributed to the public or offered for distribution to a group of persons for the purpose of further distribution, public performance, or public display.

Examples:

- Publishing a detailed summary of a novel does not publish the novel as a whole.
- Publishing a treatment or synopsis of a **motion picture** does not publish the motion picture as a whole.
- Publishing a motion picture that is based on an unpublished manuscript publishes the elements of the manuscript that are embodied in the motion picture, but it does not publish the manuscript as a whole.

1909.3 Publishing Separate Parts or Installments of a Work

When various parts or installments of a work are published separately, each part or installment is considered a separate work. As a general rule, an **applicant** should prepare a separate application, **filing fee**, and **deposit** for each part or installment of a work if those parts or installments were published separately. If the various parts or installments were published on different dates, the applicant should provide a separate date of publication for each part or installment.

NOTE: To avoid the need for filing multiple applications, applicants are encouraged to register an unpublished work as a whole before the various parts or installments of that work are published.

For a general discussion of the practices and procedures for registering multiple versions of the same work, see **Chapter 500**, Section 512.

1909.4 Works First Published Outside the United States

When a work is published in a foreign country and then subsequently published in the United States, the publication in the foreign country is considered the first publication of that work. When submitting an application to register the work the **applicant** should provide the date that the work was first published in the foreign country and should submit a copy or phonorecord of the foreign edition. Registering a **claim** in the U.S. edition may be permissible, provided that the work contains a sufficient amount of new material that did not appear in the work when it was published abroad.