The Problem of Literary Property in Archival Depositories

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THIS paper attempts to lay a ghost that is reported to be haunting the archival house but that like many ghosts may be more imaginary than real. A vexing problem involving literary property in archival material seems to be inherent in present doctrine about literary property rights, but like a ghost that emerges only from evidence of things not seen, the problem emerges only from extrapolation from the current situation. "The absence of a clear test case, in the Federal Courts, concerned with the subject matter of this paper is highly significant. It would indicate that at least at the Federal level the problem is not a real one either on a theoretical or practical level." [2]

Be it real or imaginary, many archivists report that they have been haunted, and that is the reason for this paper. A word of explanation, and to some extent a warning, seems in order. The author neither is nor pretends to be an expert in this field. The question of literary property is one that must ultimately be settled, if it is at all, by courts and lawyers. This paper simply represents one man's somewhat untutored interpretation of the available information.

Literary property is intangible. The phrase expresses a concept that has reality only within the framework of common law, statutes, and court decisions. This concept has been many times, and differently, defined, but all definitions focus mainly on the same aspects of it; that is, that literary property is an intangible right, separate and distinct from physical matter, and that it is chiefly the right of exclusion. It is the right to exclude others from the use, enjoyment, or profit of an author's own creation. It exists not in any material

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[2] E. Ernest Goldstein, professor of law, University of Texas, to Seymour V. Connor, Oct. 23, 1957. I should like to acknowledge my gratitude to Professor Goldstein, who has specialized in copyright law, and to Dean Thomas J. Gibson, who kindly helped me assemble materials for this paper.

medium, nor yet in ideas, but only in words and phrases. Actually, the concept itself is not so difficult to understand as it is to define.

Literary property exists in novels, of course, and in short stories, in drama and dramatic writings, in scenarios and movie scripts, in music and songs, in speeches, in lectures, and even in academic monographs. It exists wherever garrulous mankind has strung words together. It exists in private correspondence, in manuscript journals and diaries, and in most things that get collected in an archives.

Its recognition under law implies that it is protected by law, and two general types of legal protection are afforded. One is under the common law; the other under statutory law. Common law reserves forever the right of *first* publication to the creator of the literary property or his heirs. It is the absolute and unquestioned right, under the common law, of the owner of a piece of literary property to determine whether, when, under what circumstances, and so on, his property may be first published. After publication, common law protection ends. Statutory law, which is usually referred to as copyright law, is designed to give protection against unauthorized use after publication. In this country the basis of statutory law is the Constitution and the copyright code. Copyright law is an involved and complicated subject, into which it is not necessary to delve deeply for the purposes of this paper. Most archivists are at least vaguely familiar with the basic protection afforded by copyright statutes.

There are, however, several fundamental principles connected with statutory copyright that should be reviewed, particularly in their relation to the common law right. The first of these is that literary property loses the protection of common law when it is placed under the protection of statutory law. The courts have, with a fairly high degree of consistency, held that the two forms of protection cannot coexist for the same piece of literary property. The second basic principle is that the protection under statute is for a limited time, a monopoly granted for a fixed term of years. Although copyright is renewable, it eventually expires; and with its expiration all legal protection ends for the literary property involved. Thus, after the expiration of a copyright, literary property does not revert to the protection of the common law; instead, the property becomes a part of the public domain, and all rights of private ownership disappear. The inevitable result of statutory copyright is the dissipation of the common law right. A third principle of statutory copyright is that it is primarily designed to protect the rights of authors after their work has been published. In this,

it is greatly different from the common law, which affords protection against first publication itself.

The philosophical reason for copyright statutes is to encourage authors to publish their works by reserving to them the fruits of their labors. As stated in the Constitution, "The Congress shall have Power . . . To promote the Progress of Science and the useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . ." Growing out of this philosophy is the doctrine of "fair use," which is so important to science and scholarship. It makes it reasonably possible for others to utilize work that has previously been done and so to enlarge the general body of knowledge without infringing on an author's copyright. Most scholars are familiar with the doctrine of "fair use."

There are some principles of literary property that are common to both statutory copyright and common law. This is especially true in the area of uncopyrightable material. Neither common law nor statute protects facts, ideas, intellectual theories, plot structures, or anything of that nature. For example the general plot of a short story cannot be protected, but its development and the words and phrases used to spin out the tale are protected under common law and copyrightable under statute. The theory of relativity is not copyrightable, but any physicist's particular explanation of the theory is his literary property. Facts cannot become literary property, but an interpretation of facts can be. The facts of history or biography are not the private possession of anyone, but an interpretation of them may be. Furthermore, the journalistic, straightforward reporting of facts that occasionally appears in newspapers is not literary property subject to legal protection; but editorials are. Immorality in any form, including pornographic literature, has been held to be uncopyrightable, and the interesting question has occasionally arisen in court whether a given piece of literary property, presumably protected by copyright, was not too *risqué* to be protected.

Another feature of both common and statutory law is the right of the owner of literary property to transfer his title to the property. This feature, too, has many complicated phases; but in general it implies that the possessor of a literary property can legally assign, sell, or convey that property to another. Literary property is also subject to inheritance and the laws of descent and distribution.

An even more complex notion relating to literary property is the author's debatable "moral right" to prevent the perversion of

his creation by another — the right, for instance, of a novelist to object to a Hollywood treatment of one of his characters. This "moral right" is so vague, so nebulous, and so involved that it seems at times to be an element of the literary property concept and at times to be an altogether separate and distinct kind of property. According to some interpretations, particularly in Europe, an author would seem to retain his moral right to his property even after he has assigned his literary rights.

The "right of privacy" is a doctrine connected with literary property that has been developed in relatively recent times, apparently on the basis of a law review article published in 1890. This doctrine holds that it is the right of any person to keep all aspects of his life, including his intellectual creations, to himself. It is almost analogous to the right of an author to make first publication.

The principles and doctrines that have thus far been discussed did not spring full armed from the brow of one person. Like the common law itself, the idea of literary property evolved with the development of a civilization geared to printing. It is not fixed and immutable but continues to evolve. The invention of printing caused its first major mutation. Recently the phonograph, radio, cinema, and television have added new dimensions to the idea. A growing body of court decisions is constantly changing the perspective. New statutes, publishers' agreements, and international conventions contribute further developments. Archivists may also contribute something to the shape of the idea in the future.

Why should archivists be concerned? Simply because the principles of literary property as they are understood today are a fantastic contradiction of the basic philosophy of archival practice. Indeed, if the ridiculous extremes already present in the literary property concept were consistently pursued, it would be almost impossible to maintain an archival depository as anything but a morgue for useless documents.

Why may this be so?

Literary property rights exist forever, and they are always the property of the author or his heirs or assignees unless they have been dedicated to the public or placed in the public domain. The general process by which literary property can pass from private to public ownership is simple although its ramifications are many and complex. Literary property becomes a part of the public domain upon general publication unprotected by statutory copyright or upon the expiration of statutory copyright following publication. For example, many academic articles have been published in scholar-

ly journals without statutory copyright. The literary property in these articles was the private possession of their authors until their publication in an uncopyrighted vehicle. Upon publication, the literary property passed into the public domain. These writings were thus dedicated to the public. It makes no difference whether or not the writer intended to surrender any rights; the fact that the articles appeared in print for general consumption makes them a part of the public domain.

Once in the public domain, literary property can never again belong to a private party. On the other hand, an item privately printed for distribution to a few friends does not pass into the public domain, unless it is copyrighted, because its publication is not "general" in the legal sense. An author may make any number of limited or restricted printings without forfeiting his right to his literary property.

It is obvious that the whole question of literary property rights hinges on a definition of the term "general publication." This unfortunately is a matter of speculation because the courts have not always held consistently. Archivists may have a problem because general publication is usually defined as the placing of material before the public in any unrestricted way; that is, in a way which anyone in the general public may have access to it. Thus, if an author tacks his beloved theses to the door of a church in Nuremberg, where any passerby may view them, he has made a general publication. If he prints them and offers them for sale where anyone may acquire them, he makes a general publication. If his heirs permit and authorize their sale at public auction where anyone may buy, they make a general publication. These little examples could be carried on almost indefinitely. The idea is that if the author or his heirs or assignees in any manner offer a piece of literary property to the public in an unrestricted way, a general publication is made. Such an interpretation clearly implies that deposit in a public institution constitutes general publication. It has been so held by the courts in cases not applying directly to the archival problem.[3]

So far there is no real problem for archivists. An author deposits a manuscript in a public archives where anyone may use it and thus makes a general publication. The only problem for the archivist is an ethical one. Perhaps he should inform the author making the deposit that such action forever places the material in the public domain.

[3] Ralph R. Shaw, *Literary Property in the United States*, p. 136 ff. (Washington, 1950).

We faced this aspect of the problem very recently at Texas Tech in the Southwest Collection. An elderly lady had prepared a long manuscript on the history of her home community. Her story contained anecdotes and factual material about the region not to be found anywhere else. The manuscript was worth preserving for this reason if for no other. After offering it to several publishers, who declined it because of its limited scope and probable limited sale, she offered it to us to hold in our files. Although our proper course may seem clear, we agonized for some time before reaching a decision. As historians, we knew that the material this lady had collected should be preserved. We found it hard to swallow the thought that because of a technicality a rather rich source might be lost to historical research. On the other hand, of course, we felt it was necessary to inform the lady that if she gave it to us, she could never possess it again or copyright it. For, even if in the future we returned the manuscript to her, the literary property in it would have passed into the public domain. As a result, by being precise in our ethics, we defeated the purpose for which our collection exists — to preserve materials relating to the history of the Southwest.

But a niceness of ethics is not the major problem that faces today's archivist. The major problem is the legal technicality that is compounded many times over when a manuscript is deposited by someone who does not own the literary property in it.

Before continuing, I should again emphasize one point. Literary property is separate and distinct from physical property. One person may own the physical manuscript while another owns the literary property in it. An unusual circumstance? No, indeed. Every letter that was ever delivered fits the case. Written by one person and sent to another, the literary property belongs to the sender, while the letter itself — the ink and the paper — belongs to the recipient. Hence, a letter may be 200 years old and may, in the passage of time and the succession of generations, have changed hands a score of times; but the literary property in the letter resides in the heirs of the man who wrote it. This entails specifically the right of first publication, or the *right to deposit it in a public institution.* Legally, it cannot be deposited by the owner of the physical letter. Does it not follow, then, that a public institution cannot legally accept the deposit of any manuscript without the consent of the owner of the literary property?

And there are yet unsolved questions relating to the ownership of literary property created by employees for their employers. This is one instance in which the status of public servants is simple. Where

there are no altering circumstances, the literary work of a government employee belongs to the public if it was done in connection with his employment. Archival depositories handling this kind of material happily have no problem. But who owns the creative writing, including even the ubiquitous desk memo, penned by an employee of a private company? Opinions are not consistent on this point. Although the concensus holds that the literary property in such records belongs to the company or the employer, there seems still to be a question whether it might remain the property of the employee unless there is a specific agreement to the contrary. This is a matter of vital concern to the depository collecting business records. By implication, a business firm might not have the right to make a general publication of the work of its employees. Thus, it could be illegal for a company to offer or an archives to receive the records of that company for preservation for historical research purposes. This may be the most troublesome specific problem arising in this whole maze.

In what a ridiculous quandary this places archival institutions! Under the existing interpretations concerning literary property in common law, an archives seems not to have the legal right to own or to make available to scholars any manuscripts that were not deposited by an author or his heirs or assignees. Hence, perhaps most archives have no legal right to over half their holdings.

Specifically, it may be illegal for archival depositories to possess diaries, journals, record books, notes, letters, or manuscripts of any kind that were not deposited by the owner of the literary property. Another example may serve to focus on the major obstacles in the situation. Several months ago the Southwest Collection received a group of family papers ranging in date from 1668 to 1952. There was a trunkful of these papers. Most of them were manuscript letters received by various members of the family over a period of almost three centuries. It would be an impossibility to get in contact with the heirs of each letter writer represented in this group and ask their permission to accept the collection. So, with complete disregard for the technicality of the law, the deposit was accepted.

What other answer to this problem could have been found? There are several possible solutions, but all lead back directly or indirectly to this same answer.

The first possible solution lies in common sense. Despite the technicalities of common law, what court would gainsay an institution attempting to preserve for posterity historical records of value?

It is against the law in Texas to carry a pair of pliers in one's car or on one's person, but no court would find against a person for doing so. There are hundreds, perhaps thousands, of outmoded or idiotic laws and ordinances on various statute books across the nation. They have become so meaningless that they have atrophied from their own incongruity without the necessity of repeal. The absurd extension of common law protection of literary property may be analogous.

Another consideration in the common-sense solution is that of prosecution. Who would prosecute, under the literary property right, an institution holding manuscripts for historical research purposes? Suppose someone to be an heir-at-law of one of the writers of letters now deposited in the Southwest Collection. Would he be likely to bring an action against us for possessing and preserving a letter his ancestor wrote? What would it avail him if he did object? In the first place, acting out of common sense, we should probably give him the letter rather than go to court. In the second place, since we should not have profited financially from holding the letter, it seems doubtful whether any damages could be claimed.

A further point in the common-sense approach is the fact that there has not been a clear test case directly bearing on literary property in archival depositories. This might indicate that for all practical purposes there is no real problem, despite the alarming extension of interpretations that seem related to the question.

It might be added that the common-sense solution requires some discretion on the part of the archivist. Circumstances surrounding some particular document may make it desirable to obtain permission of the owners of the literary property to deposit it.

A second solution to the problem, and regrettably one that is practiced in some institutions, seems to me completely invalid. It is a bogus and perverted notion that an institution may dodge the issue of general publication by placing certain restrictions on material in its depository. If anything at all is clear about the meaning of the literary property concept, it is the fact that the author solely and alone possesses the right to restrict the use of his material. Any institution having on deposit or accepting for deposit material to which it does not have a clear title is violating the law as well as common sense by attempting to restrict the use of the material. Yet, who has not tried to do research in institutions where the custodian has set up his own rules about who may and who may not see, use, or copy material on deposit, or for what purposes the material may

be used? Such self-anointed hypocrisy, of course, is as unsuited to the archival profession as it is immoral and illegal.

There are types of restrictions that are legal. These are restrictions that have been imposed on literary property by its owners. Perhaps the most common is sealing material from public use for a given period of time on the request of the rightful owner of the literary property. It is doubtful, however, if a restriction regarding permission to publish has any validity in law, whether placed on the material by the author or by another, since the fact of its deposit in a public institution constitutes a dedication to the public.

A third solution to the problem confronting archival institutions may develop out of the vague doctrine of abandonment. It may be presumed, for example, that if a general publication becomes a *fait accompli* by deposit in a public institution and if the rightful owners of the literary property involved do not protest within a reasonable time, they may be considered to have abandoned their rights. This expansion of the doctrine of abandonment is largely my own notion and not one that has any wide acceptance. The whole question of abandonment is in a state of flux. It seems far more sensible, however, to accept the abandonment idea than to accept without restrictions the perpetual rights view. Abandonment is sometimes referred to in law as laches — the long and continued neglect by a person to file and prosecute a suit to sustain his rights. The doctrine of laches has been applied a number of times by courts in suits involving statutory copyright. But I have not found any application of it to the common law rights.

Assuming abandonment in regard to a given piece of literary property is easy; proving it may be difficult. Horace G. Ball in his definitive work on copyright law states that four factors must be necessary before abandonment can be proved under statutory copyright: (1) the copyright owner possesses knowledge of the infringement over an unreasonably long period of time, (2) he has had opportunity to establish his own rights, (3) his failure to do so leads to the conclusion of abandonment, and (4) the enforcement of the owner's claim would result in prejudice, extreme hardship, or injustice to the defendant.[4]

A fourth solution has been frequently suggested by persons well acquainted with the various aspects of the problem. Since the chief element of the problem is the fact that the literary property right is perpetual, the solution may well lie in destroying the aspect of

[4] Horace G. Ball, *The Law of Copyright and Literary Property*, p. 711-715 (Albany, 1944).

perpetuity. This has been done in other countries, notably Germany. For instance, suppose an author's rights were protected during his lifetime and for, say, 10 years after his death. Would his right of privacy or his right to enjoy the fruits of his labor be restricted? Probably not, in the majority of cases. Hence, it has been suggested that some action be taken to end an author's rights at some specified time after his death. Perhaps 28 years would be a better figure than 10.

One writer suggests:

> Common law literary property rights should be defined, and a termination date for these rights must be set if scholars and scholarly institutions are not to be permanently restrained from advancing learning by use of records of past eras or are not continually to violate common law literary property rights. . . .
>
> The most sensible approach appears to be to limit the duration of the common law right. If this were done, then any public institution which acquires an unpublished manuscript from someone other than the owner of the literary property would automatically store it and not use it for any purpose until the common law right expires. Other approaches appear possible, but they are more complex and no more satisfactory.[5]

The goal suggested might be achieved by the passage of an act of Congress limiting the duration of the common-law right or abolishing it completely and substituting for it an equivalent statutory right. Indeed, the archival profession might request such a law from the Government. One wonders, however, if this remedy might not be worse than the disease, since, no matter how laudable its purpose, a law of that nature would be confiscatory.

[5] Shaw, *Literary Property*, p. 142, 154.