Private Letters and the Public Domain

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THOUGH the law on publication rights in literary manuscripts derives from the first major cases in the 18th century,[1] there has been since that time relatively little authority that adds to an understanding of literary rights in historical manuscripts. It is well known that literary property vests in the authors of letters, diaries, and similar personal papers. The addressee, subsequent recipient, and *bona fide* purchaser can take title only to the physical property: the ink, paper, postage stamp, envelope, and the like. According to the preponderance of decisions in the United States and foreign countries, unless the addressee obtains permission from the author of a letter or similar document to publish its contents, he may not do so upon the author's death but must obtain such right from the heirs of the decedent.[2] Here is the nub of the problem insofar as the historical publisher is concerned. Heirs are quite frequently difficult to locate; and finding all living relatives, especially of an individual who has been dead for many years, is manifestly impossible.

Several recent articles in law reviews have pinpointed a woeful inadequacy in the present statement of the law,[3] and in almost all cases they have argued that the most valid reason for obtaining

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[1] *Pope* v. *Curl*, 2 Atk. 342, 26 Eng. Rep. 608 (Ch. 1741); *Thompson* v. *Stanhope*, 2 Ambler 737 (Ch. 1774).

[2] Right to publish does not inhere originally in the recipients of letters, nor does it obtain in subsequent purchasers. See Harry Ransom, "The Personal Letter as Literary Property," in *Studies in English*, 30:116–131 (Austin, University of Texas Press, 1951).

[3] "Personal Letters in Need of a Law of Their Own," 44 *Iowa Law Review* 705–715 (1959). This takes cognizance of the historian's plight, especially with regard to recent material. See Wittenberg, *The Law of Literary property*, p. 76 (1957), which underscores the problem of the biographer and historian; J. L. Wilson, "The Scholar and the Copyright Law," in *ASCAP Copyright Symposium No. 10*, p. 104 (1959); and L. R. Yankewich, "What Is Fair Use?" 22 *University of Chicago Law Review* 203 (1954). Wilson's treatment is particularly significant in the area of manuscripts, at p. 113–121.

specific statutory regulation in the field of personal letters is their potential meaning to humanity. Historical value—new light where before no knowledge has shone—would seem to justify publication over the sender's or his descendants' objections.[4] But the sad fact for the historian is that in many cases the law does not recognize this possibility. The letters of James McNeill Whistler were lost to historians and a reading public because his niece would not allow certain chosen biographers to publish them.[5]

This writer, after studying the work of case-note authors and other authorities, would like to raise several questions in the area of concern for publication of the historical document and thus to attempt a synthesis of certain modern thinking where it has been expressed. It must be emphasized, however, that instances of views concerning the merits of historical publication are almost invariably discussed last in law review articles when they are mentioned at all. Consequently, development of the precise subject has been vague and relatively brief.

What rights, if any, does the historian have to seek facts for publication in the interest of research? Can the public's right to know in certain cases outweigh the private feelings of individuals? Is there a test that has been and can be successfully applied in the courts? The law gives no present answer, nor is one likely to be given unless the public is made aware of the historian's need for manuscripts in even greater quantities than ever before. Such mammoth and painstaking tasks as multivolume editions of the private and public papers of historical personages have, in the meaning of the Federal Records Act of 1950, significant bearing upon our national development. Law dealing with publication of manuscripts must be made more suitable to research needs.

[4] Ralph R. Shaw, *Literary Property in the United States,* p. 17 (Washington, 1950).

[5] *Philip* v. *Pennell* (1907), 2 Ch. 577; Pennell, *Life of James McNeill Whistler,* p. xxiv (1908). There are a few exceptions, however, to the general caveat that publication rights are vested solely in the writer of the manuscript. The style of a letter may imply it is the addressee's property. See *Mayor of New York* v. *Lent,* where a George Washington letter to the city aldermen was held to be absolute property of the addressee: 51 Barbour (N.Y.) 19 (1868). Also, if publication would aid in the vindication of the recipient's reputation against a public charge of misconduct by the writer: Drone, *Law of Property in Intellectual Productions,* p. 138 (1879). For a recent example of the majority rule, holding heirs' rights inviolate, see "Harding Love Letters To Matron Found," in *Washington Evening Star,* July 10, 1964, p. A-1. The letters, as soon as found, were the subject of an effort to suppress them for 50 years. The circumstance of discovery or purchase by an individual not a member of the family would not alter common-law protection. The family can still restrain publication or research into the group indefinitely under present law. It is a moot point, however, whether suppression or publication of this particular collection would be the more damaging to individual reputations.

The historian has or should have as much right to delve into the past for its value to the present as any investigator. His purposes are honorable. But he seeks to publish and is thus often an unwelcome guest. The physician, lawyer, broker, and private investigator all pry, but do so more quietly and in a confidential relation to their employers. Historians are, by definition, chroniclers; and so they must make both coworkers and the world beyond their fraternity aware of their discoveries. Such educated snooping is ill-calculated to win the warm approbation of those to whom it is an intrusion. Nonetheless, it continues to exist in the interest of scholarship, and it must persist, within the bounds of reasonable good taste, in order to advance the knowledge of our entire society. Though by far the majority of heirs evidence a real spirit of cooperation with historical projects and are to be commended for their personal generosity and sense of community enterprise, researchers with an honest interest in the truth as only primary sources can provide it will continue to investigate, in their belief that the public has a right to know. Such an opening of privately held documentary materials to the scholar is entirely consonant with Thomas Jefferson's statement of 1791 that records should be preserved "not by vaults and locks which fence them from the public eye and use, in consigning them to the waste of time, but by such a multiplication of copies, as shall place them beyond the reach of accident."[6]

It is recognized at the outset that the common-law literary property right in unpublished manuscripts is a protection against the invasion of privacy. The precise issue here is not simply privacy versus intrusion, but a more complex question involving the degree of control proper for an heir of an ancestor-writer to exercise over unpublished material that probably he has never even seen. An heir of historic manuscript letters has an undisputed right to privacy regarding the manuscripts within his immediate ownership and control; it is unconscionable, however, that he should expect to govern the use of private letters whose recipients have either given or sold the documents to third parties.

Legal writing today begins to inquire why writers' descendants should have right in perpetuity to publish or not to publish personal letters.[7] When no terminal date for restriction is specified but the interest to be protected is not deserving of perpetual restriction,

[6] *Report to the President Containing a Proposal by the National Historical Publications Commission*, p. 8, 29 (Washington, 1963).

[7] Note: "Personal Letters: In Need of a Law of Their Own," 44 *Iowa Law Review* 705–715 (1959).

publication should be permitted. The further removed subject matter is in point of time from its creation, the less weight should be given to heirs' interests if the motives of publication are not malicious or intended for personal exploitation.

"The unauthorized publication of letters is a piracy of a portion of the sender's personality rather than of his intellectual creation."[8] Hence, a test of literary quality is neither required nor desirable, since it needs a standard that few justices would be competent to administer. The raising of a proper standard would demand evaluation of manuscripts as information, whether they are documents of business affairs or personal letters or literary creations such as poems and stories, since all can be revealing of character and purpose and therefore can be useful as research material for the historian. Segregation by justices of classes of documents into "literary" and "nonliterary" property in the old cases, making so-called literary manuscripts subject to protection after a writer's death (but not making common receipts, bills, and personal letters so subject), has created a fundamental problem in that quite frequently the seemingly less important ephemera are more revealing of private affairs. Yet no one knows how many years must elapse before even these become part of the public domain.

In February 1965 a new bill for general revision of the U.S. Copyright Law (S. 1006, H.R. 4347) was introduced in the 89th Congress. In most respects, it resembles general revision bills brought before the 88th Congress on July 20, 1964, by Senator John McClellan and Representative Emanuel Celler (S. 3008, H.R. 11947). A number of changes seem to clarify the bill's language and add to its substance; it is a mixed blessing to historians, however, in that it makes the law concerning printed works more precise but perpetuates the manuscript dilemma. Under the proposed copyright measure, "any tangible medium of expression" may be copyrighted. Since letters are certainly tangible media of expression, passage of this rule would cause concern among historians as affecting their right to publish manuscripts.

The Committee on the Historian and the Federal Government of the American Historical Association endorses the principle of limiting the life of copyright in unpublished materials. In its meeting of September 26, 1964, the committee approved the copyright rule as embodied in §20 of the earlier bill. Under this section works that are published after January 1, 1967, would be protected for a term including the life and 50 years after the decease of the

[8] *Ibid.*

author. This wording is retained as §302 of the 1965 bill. More relevant for the purpose of this discussion is §303 in the new bill providing that in the case of works created but not published before January 1, 1967, and not in the public domain, the copyright would run for the term specified in §302. This is a life-plus-50-year term with a maximum limit of 100 years from creation of the work, and it would apply to unpublished works, now protected under common law without a time limit. Does the expression "unpublished works" include manuscript letters? It may or may not, for this is not specified in the bill. Usually a deceased author's unpublished works are thought to be not letters but writings in prose or poetry not printed as of the time of his death. It is true that a letter might be a literary production of such competence as to justify comparison with any effort going under the name of a "work." So, is a letter an unpublished work? If it is, then the problem of privacy and the public domain would fall under the duration of the term defined in §302. If it is not, then the historian would hope for further definition and perhaps a briefer time limit on general availability.

Prof. Julian P. Boyd's statement of June 17, 1965, before the House Committee on the Judiciary concerning the proposed revision of the U.S. Copyright Law rightly includes an expression of gratitude on behalf of historians generally that §301 of the law preempts statutory literary property rights under common law on the statutes of any State. That section, however, applies to rights as included under several categories enumerated in §102. Among those items listed for which State or common-law protection would no longer apply are "literary works." This is the same ambiguous phrase under which earlier confusions have existed. It would be useful if "manuscript letters" could be distinguished from "literary works" and included as part of the subject matter of copyright no longer under a perpetual restraint.

What is the public domain? This, for manuscripts at least, is not explicit. It has been innocently assumed by the historical practitioner that if manuscripts are in a public repository, they are in the public domain unless a restrictive notice is given. If, however, the donor of certain materials is not an heir of the original writer, his gift under existing law may not give unrestricted permission for copying or publication; and so the specter of an heir's final veto in a matter prejudicial to the interest of scholarship is still very evident.

It is the express desire of the historical profession to have definition from the Register of Copyrights of provisions in the law

interesting to historians. What, for instance, is the meaning of "fair use"? The new bill would recognize the doctrine of "fair use," but it makes no attempt to define or apply the scope of the doctrine. To what extent is "fair use" applicable to manuscripts or any unpublished material? Printing of a collection of 10 or of 1,000 letters is perhaps legally permissible, but would the use of either quantity of documents be considered "fair use"?[9]

The only valid criterion in a decision to allow publication should be one of sincerity or intent. Rights of publication should be admitted or allowed if, in the court's discretion, the profit motive is counterbalanced by the educational or informative content of the subject matter.[10] This test could be applied impartially to both so-called "literary" and "historical" manuscripts, and would be a useful guide as to intent in the motive for publication.

Some recent authorities believe that no statute is required.[11] But common law is unsatisfactory, for this is the present system under which so much uncertainty exists. Other nations have found statutes helpful. Executors can restrain publication in Colombia and Panama for 80 years, 30 years in Rumania, 20 in Argentina and Paraguay, and 10 in Poland and Turkey. In the United States various statutes exist—in North Dakota, California, Montana, South Dakota, Guam, and the Canal Zone—but they add little to the common law.[12]

The purpose of statutory regulation in the area of personal letters would be to protect authors, editors, or publishers of *bona fide* historical works from injunction or suit should they possess and plan to print such manuscripts. Under the protection

[9] L. R. Yankewich, "What Is Fair Use? "(note 3 *supra*) deals with copyrighted, printed works. The inference one would naturally draw is that there is, strictly speaking, no fair use of unpublished works under the current perpetual protection of common law, whereas scholarly use of printed matter for purposes of review or criticism is apparently unlimited in quantity permissible. What the court is trying to prevent is the pirating of one man's work for another's commercial or professional gain.

[10] Louis Nizer, "The Right of Privacy: A Half Century's Developments," in 39 *Michigan Law Review* 526 ff. (1941). This is also recognized as a valid test in §6 of the 1964 McClellan-Celler proposal.

[11] Frederick M. Lavin, "Copyrights—Common Law Protection of Letters," in *Villanova Law Review*, vol. 7, no. 1: 105–116.

[12] The Lavin article (note 11 *supra*) is *contra* my view but presents an interesting argument. Though he offers nothing on historical letters, Lavin suggests that, in general, manuscript material should be protected without regard to time if the contents are such that the family has reasonable need for restraint on publication. Such restraint is not defined in terms of a time limit, nor are the needs for protection specified, though presumably these would be a defense against scurrilous, libelous remarks toward those still living, or against other embarrassments. See J. L. Wilson's article (note 3 *supra*) for an argument directly *contra* on the question of perpetual restraint.

of a statute, researchers could publish after a certain waiting period without obtaining permission. A statutory restriction of modest duration figured from the time of the death of the writer, presuming a reasonable search has produced no claimants of the literary rights, would tend to protect the immediate interests and reputations of those addressed in the manuscript.[13] Persons interested in publishing the information contained in historic letters could and would be able to do so after that time without fear of prosecution for infringement. Should a recalcitrant descendant appear at any time after the elapse of the statutory period and before publication, the burden would shift to the heir to demonstrate why such publication should not be allowed.[14]

A reasonable person upon reflection will admit that the historian's need for manuscripts—perhaps his most useful primary tool—demands at least as clear a statement about their availability for publication as is presently the case with documents and books. Some might say that a statutory regulation is inconsistent with the idea of increased availability. Any time requirement seems an apparent contradiction of former arguments against it, and a definite limitation would be subject to almost constant dispute both until and after it is enacted into law. Yet even though restriction militates against absolute freedom to publish manuscripts, it must be repeated that the law does not allow untrammeled freedom to publish or reprint copyrighted works or those protected by common law, and a definition of the law would seem to speed clarification of a murky area. It would at least be a step in the right direction to attempt precision. Twenty-five years might be meaningful in the sense that this amount of time or more is quite frequently necessary for a superior job of collection, collation, editing, and presentation.[15]

The question of whether prosecution would follow publication of

[13] The new British Copyright Act of 1956 states that if copyright proprietors cannot be ascertained a work may be published 50 years after the author's death, providing 100 years have elapsed since completion of the work (4 & 5 Eliz. II, C. 74). Most American historians and archivists, however, object to such a length of time as unreasonable.

[14] See Note: 46 *Yale Law Journal* 493; 504–505 (1937).

[15] Or the brilliant suggestion of J. L. Wilson, "The Scholar and the Copyright Law" (note 3 *supra*), could be considered by Congress. This is to employ the classic common-law rule against perpetuities so that a public interest would be created in an unpublished manuscript after a life plus 21 years. The measuring life would be that of the document's author. By such means Mr. Wilson feels that the original language of the Constitution, Art. I, §8, which specifies that authors may "for limited Times" secure protection from unauthorized use of "their respective writings," can be upheld in a modern restatement emphasizing reasonable limitation.

historical manuscripts without permission is largely one of the intent and actual use of the material. A few writers make so bold as to suggest that the scholar should go ahead and take the risk of publishing. Yet the fact that a preponderance of legal opinion continues to favor the heirs of writers makes prosecution possible. If it could happen, a wary person who hopes to publish will note carefully his position and act accordingly. The few facts here unearthed could be some protection for the honest researcher, as well as a plea for the enactment of a clear rule such as we have in the case of printed documents and books. The statute, of course, would protect the historian only in the absence of stated family, library, or defense restrictions. It would allow publication if no special caveat existed. Specifically, it would be the historian's responsibility to determine if for some reason the publication of a special collection or of individually owned letters had been forbidden. Once his notice of intent to publish had been filed with a central authority, he would act under the protection of the statute. He is not asking, therefore, to be admitted where he is not at present allowed, though he may hope to have that privilege eventually in the interest of scholarship. What the historian wants to secure in terms of protection is freedom from unreasonable restraint upon publication, should he find or acquire manuscripts whose interest and importance may have a distinct bearing upon history's interpretation.

"THE COPYRIGHT LAW AND PROPOSED REVISION"
A Session of the Joint SAA-AREA Meeting
New York City, October 6–8, 1965
See p. 463–464 for details.