The Recent American Past v. *H.R. 4347*: Historians' Dilemma

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ALTHOUGH the implications of the proposed copyright bill (H.R. 4347, S. 1006) touch virtually every phase of writing and publishing, we shall be concerned exclusively with that portion of the bill dealing with copyright in unpublished works. As a background for the proposed law, we need to have a look at the present copyright statute.

The governing copyright law, passed in 1909 (U.S.C., Title 17), provides two kinds of protection for unpublished works, that of common-law literary property and statutory copyright. The Library of Congress Copyright Office has said, regarding the former: "This type of protection is a matter of state law, and arises automatically when the work is created; it requires no action in the Copyright Office. It may last as long as the work is unpublished, but it ends when the work is published or copyright is secured." The Office defines an unpublished work as one "of which copies have not been made available to the public . . ."[1] Since we are concerned solely with unpublished manuscripts of an archival or historical nature, we shall deal only with common-law literary property, and not with statutory copyright as prescribed by the 1909 law. The latter pertains to unpublished musical compositions, dramas, works of art, photographs, motion pictures, and the like.

The common law is presently interpreted in such a way that anyone writing anything—a letter, diary, account book, memorandum, instruction note, endorsement, or such—holds in his writing a property right, which belongs to him for life and to his heirs in perpetuity, irrespective of their proliferation. Under the common law, the owner of literary rights may sell or give away the physical property—the actual document—and still retain the literary prop-

The author, formerly of the American Historical Association's staff, has recently joined the staff of the National Historical Publications Commission. This paper is his statement on the pending Copyright Bill (H.R. 4347), read at a session on the bill, Oct. 7, 1965, at the annual meeting of the Society of American Archivists, in New York City.

[1] Library of Congress, "General Information on Copyright," p. 4 (Washington, D.C., Aug. 1963).

erty inherent in the document, for literary property is separate from physical property. Ownership of this literary property includes the exclusive right to publish the verbatim content of the manuscript in any way—by print, photocopy, television, radio, or other means.

The revision in the existing copyright law, as prescribed by H.R. 4347 and S. 1006, seeks to broaden copyright coverage in several respects. It provides copyright protection for "original works of authorship fixed in any tangible medium of expression, now known or later developed."[2] Additionally, unpublished works, including manuscripts, are to be subject to copyright protection without regard to the nationality or domicile of the author.[3] Under the proposed bill, the owner of the copyright has exclusive rights to do certain things or authorize them to be done. These rights include (1) the reproduction of the copyrighted work, which for our purposes would consist largely of photocopying manuscript documents, and (2) the preparation of derivative works based on the copyrighted material.[4] The meaning of the first right is manifest: the copyright owner may reproduce in any way the copyrighted document or may have a second party do it. This second party would act as the owner's agent in reproducing the document. It could be an individual or an institution, such as a library, historical society, or archives. Incidentally, according to Ralph R. Shaw, no library has been sued "for making copies for a scholar in lieu of his copying the material himself."[5] What is not so clear is the meaning of the second right. As long as we are considering the copyright owner's right to prepare derivative works based on the copyrighted material, there is no question. But when we come to the matter of the owner's authorizing another party to prepare a derivative work, we face what might be a genuine dilemma. The key to the question lies in the definition of "derivative." Unhappily, the bill does not define the term. If "derivative" is interpreted to mean secondary—as it easily could be, since secondary works, such as monographs and biographies, are based on or derived from primary sources—then historical research might well be emasculated. This interpretation would mean that we would have only authorized or official historical research and writing. Those so authorized could

[2] H.R. 4347, § 102, 11.32–34, p. 4. All further reference is to H.R. 4347.

[3] § 104, 11.21–22, p. 5.

[4] § 106, 11.16–21, p. 6.

[5] "Copyright in Relationship to Copying for Scholarly Materials," in Lowell H. Hattery and George P. Bush, eds., *Reprography and Copyright Law*, p. 95 (Washington, American Institute of Biological Sciences, 1965).

never escape the suspicion of being court historians or, in less complimentary terms, "kept" historians. Surely the spirit of free scholarly inquiry is not compatible with this interpretation. The framers of this copyright legislation have a bounden duty to specify their meaning so that historial research will not be limited to authorized or official projects.

Another area in which the bill would in effect give broader copyright coverage to manuscripts is in the provision that copyright protection would exist for the life of the author, plus 50 years after his death.[6] When the time of a writer's death is unknown, protection would exist for 100 years from the date of writing.[7] Ostensibly this provision would limit copyright protection in manuscripts, for under the common law literary property rights continue into perpetuity. But in practice manuscripts are now available to scholars when the collections are placed in public repositories, subject of course to any conditions the donor may have placed on them. And the manuscripts are usually available both for photocopying and research. Consequently the access to manuscripts is at present much more liberal than that provided by the proposed bill. The situation is reminiscent of Parliament's liberalizing colonial taxation by substituting the Sugar Act of 1764 for the Molasses Act of 1733. Perhaps this is the type of paradox that Reinhold Niebuhr assures us lies at the heart of history.

The framers of the bill, possibly thinking that the above conditions might limit the access of scholars to their primary sources, have provided what might prove to be a loophole. This is the "fair use" section. It says that notwithstanding the enumerated exclusive rights in copyrighted works, "the fair use of a copyrighted work is not an infringement of copyright."[8] The bill makes no attempt to prescribe what it means by "fair use" or how the concept might be interpreted. As the bill would pertain to manuscript librarians and archivists, does this mean that each could assume the role of Humpty Dumpty and interpret the concept exactly as he wishes? Or will the brethren choose to play it safe and avoid any possible violation of the copyrights inhering in the materials in their custody by denying scholars access to the records?

The framers of the proposed law apparently had the following motives:

(1) A desire to bring the American copyright law into line with

[6] § 302, 11.8–9, p. 17.
[7] § 302 (e), p. 17–18.
[8] § 107, 11.8–9, p. 7.

the copyright laws of other nations. If this were accomplished, the administration of copyright matters in international law would obviously be simpler. Much is to be said, however, for the more liberal policy the United States has followed consistently. Indeed, it is fitting that this democracy place a minimum of restriction on historical research. If England, France, and the U.S.S.R. wish to continue their Old World ways in this respect, the United States should *not* try to get in step. Rather it should continue to set the pace for free access to the records of the past.

(2) A desire to bring all copyright matters under uniform statute, regardless of the fact that the disparate materials requiring copyright protection do not need the same *kind* of protection.

(3) A desire to protect the monetary interests of those who have prospects of making substantial profits from the materials they copyright. These parties would include literary creators and prominent statesmen and also publishers, movie producers, phonograph-record manufacturers, and the like.

(4) A desire to give some protection to the individual's right of privacy in anything he writes.

The protection sought for all those parties covered by the bill, while entirely understandable from the viewpoint of commercial interests, would do great harm to historians. It would constitute a serious handicap to biographical and historical study of the recent past. The proposed duration of this restrictive copyright will in fact never be less than 50 years and often will be as long as 100 years. It will apply automatically to all writings of all authors, even though their writings represent no monetary value and no threat to anyone's privacy. Such a restriction would seem particularly anomalous today, since never previously have historians devoted so much attention to the recent past.

In practice this law would mean that biographers, historians (in any field of specialization), learned editors, and publishers would be legally unable to photocopy or quote from great parts of the correspondence received and contained in the papers of such recent notables as Generals John J. Pershing, George C. Marshall, William Mitchell, and Harold Arnold; Admirals George Dewey and William Halsey; Presidents Theodore Roosevelt, Woodrow Wilson, Herbert Hoover, and Franklin D. Roosevelt; scientists Albert Einstein and Robert H. Goddard; inventors Henry Ford, Thomas A. Edison, and Wilbur and Orville Wright; composers George and Ira Gershwin, Victor Herbert, John Philip Sousa, and Charles Ives; authors F. Scott Fitzgerald, William Dean Howells, Eugene

O'Neill, and Vachel Lindsay; and legislators Robert A. Taft, Robert M. La Follette, Uncle Joe Cannon, and Sam Rayburn.

A few revisions in the bill could very easily make it one to which the historical profession could raise no legitimate objection. These revisions could be made, moreover, without injuring in any respect commercial interests, which apparently inspired the bill and which stand to gain most from its passage. The fact of the matter is that the framers of the bill did not take into account the differing stakes Tin Pan Alley composers and most other citizens have in their writings. The violation of the copyright of the former could manifestly result in financial gain, whereas the monetary gain to be had from the use of the papers of George Norris, for instance, is likely to be nil. Consequently, historical scholarship should not be penalized and jeopardized by a bill that is designed to meet the needs of entirely different groups. Happily the concessions that would make the bill acceptable to the historical profession can be made without the slightest danger to the commercial interests that need copyright protection.

I think we can proceed safely from the presumptions (1) that, in the great majority of cases, historical scholarship based on manuscript research does not produce significant amounts of royalty and (2) that those who hold common-law literary rights in the manuscripts used by historians are not denied any income by historians' use of the manuscripts. The fact that Richard Lowitt has researched the George Norris papers extensively does not mean that the Norris estate is going to lose money it would otherwise have had when Lowitt publishes his biography of Norris. The heirs of Franklin D. Roosevelt have suffered no monetary loss from Frank Freidel's use of the Roosevelt papers, irrespective of how much or little money Freidel may have made from his publications.

Proceeding from these presumptions, then, here are some specific recommendations for improvements in the proposed legislation.

(1) Manuscripts and archival material should be explicitly exempted from the life-of-the-author-plus-50-years rule. The framers of the bill are to be commended for attempting to reduce the life of literary property from the infinite to the finite. But life plus 50 is too long. As I have contended, this rule would make research in recent American history impossible. A far more practical and helpful limitation would be the life of the author plus 25 years. When it cannot be established that an author is alive or dead, or, if dead, when he died, the limitation should be 50 years from the date of writing.

(2) As for fair use, we have three alternatives:

(a) The bill should specify what fair use means in the area of manuscripts and archival material, if these are to be governed by the concept. It should mean that documents may be photocopied for research purposes and that they may be used as the bases for secondary or derivative works of historical scholarship.

(b) If we follow the logic of Ralph Shaw's persuasive argument on fair use, we should not even consider the concept in connection with manuscript materials. His contention is that the scholar's use of research material is a private use, and thus completely outside the realm of fair use. As long as a scholar is occupied in research, he has full right to examine and reproduce pertinent sources—and this private use of the sources is beyond the concept of fair use. Only when the scholar publishes the work based on these original sources does his use of them pass from private to public. Then may the judgment be made on whether he has made fair use of the materials. But so long as his scholarly activity has not been presented for public evaluation, it is outside the scope of fair use.[9]

(c) In case copyright lawyers and experts are habituated to thinking of fair use in relation to published works exclusively, it might be well to avoid any possible problem by *not* trying to specify what fair use means in terms of manuscripts, but rather to introduce such a provision as this: "Notwithstanding any other provisions of this law, documents may be photocopied for research purposes and they may be used as the bases for secondary works of historical scholarship."

(3) The bill should state that, when a collection of manuscripts is placed in a depository, those documents in which copyright ownership does not reside with the donor should be treated on the same basis as that portion of which the donor *is* the copyright owner. (These documents would usually consist of incoming letters in any collection of correspondence.) Then the present common-law literary property concept should prevail; that is, the records would be open to qualified researchers, and a putative injured party would have to prove damages. If it proves unfeasible to incorporate this common-law concept in the legislation, then the fair use section, if amplified as recommended in (2) above, would cover a researcher's use of the documents. Manuscript librarians and archivists should request donors of manuscript collections at the time of donation to authorize the reproduction of manuscripts and the

[9] Shaw, *loc. cit.*

preparation of secondary or derivative works on the basis of the manuscripts, insofar as the donors own the copyright.

(4) The bill should provide some means whereby those who wish to protect a monetary or other interest in any part of their writings may, by taking action such as registering a claim with the Copyright Office, double the duration of protection given to all unpublished writings by statute. This would make possible the added protection some would desire, but would not give unnecessary and unwanted protection to all writings of everyone. Such a provision would facilitate historical research and thereby enhance the right of the American people to know as much as possible as soon as possible about their past.

What's New?

The Batman Archive.

—Credit line under a cut of a caricature of Gustav Mahler in the *Washington Post*, p. G1, Mar. 13, 1966.