The Impact of the Proposed Copyright Law Upon Scholars and Custodians

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WHEN the Federal Constitution of the United States was adopted, it became for the first time in history a matter of national policy for a government to support the intrinsic right of a writer to profit from the results of his mind and pen. Article I, section 8, paragraph 8 of the Constitution gave Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Throughout the span of nearly two centuries it has been the intent of this principle to protect an author's private property in his works and the emolument that may result from their public sale. Far from being an obstacle to original thought, this principle has permitted scholars the latitude to work in many fields, even those previously investigated, secure in the knowledge that the only thing copyrighted is the manner in which an idea is expressed, and not the idea itself.

Note, however, the use of this right in the original statement as given in the Constitution. Authors shall secure "for limited Times" the exclusive rights to their discoveries. The framers recognized that valuable inventions or writings should not be owned by their originators in perpetuity. Like William Penn, they believed that "Hardly a thing is given us for ourselves, but the Publick may claim a share with us . . . . In this we are but Stewards, and to Hord up all to ourselves is great injustice as well as Ingratitude." The implication was, naturally, that there should be a time, set by common agreement in the form of a statute, after which the writings and inventions concerned should belong to the public. The tangible benefits secured by these exclusive rights could someday belong to all.

Printed documents such as articles and magazines and published works such as books have long since enjoyed a clear definition of

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their availability to scholars. Students know that after the lapse of a certain time they may use freely the printed or published work of others without fear of infringement. Since the major 18th-century legal cases on the subject, however, there have been few clarifying points in the law relating to copyright in historical manuscripts and documents. According to the present law, as is well established, literary property and legal capacity to reproduce letters, diaries, and similar personal papers vest in the author of such manuscripts and his descendants, who take the rights in fee simple. They may give or sell their right, title, and interest to others, since an addressee of manuscript letters may not publish the contents of the correspondence to him without permission from either the author or his heirs. Here is the nub of the problem insofar as the historian-author-publisher is concerned. Discovering heirs in order to obtain their permission is frequently an impossible task. Julian P. Boyd stated in his report to the House Committee on the Judiciary on June 17, 1965, that his staff believed the courts would permit the technical invasion of literary property rights posed by publishing the letters to and from Thomas Jefferson. To find all living heirs of both authors and recipients in this case would have been impossible. Believing that appropriate sanction for their publication would be found in the fair use doctrine, the staff of The Papers of Thomas Jefferson has produced 17 peerless volumes whose quality has long since justified their decision to publish. There have been projects not so fortunate, however, such as the effort made in 1907 to print the correspondence of James McNeill Whistler. In that sad instance, the type had been set and the presses readied, only to be stilled under the impact of an injunction by the artist's family.

Until fairly recently law review articles have mentioned only briefly the subject of publishing historical letters and the rights under copyright law that scholars, archivists, and librarians may have in their own kind of "research and development." What does the new copyright proposal do to meet the need of the archivist and historian? The broad, general answer made in the rest of this report is the belief that the custodian and scholar are far better served under the implications of this new proposal than they have been under common law. Though certainly some improvements may be contemplated—aiming toward perfection from our point of view—workers in the field of manuscripts may now know, with a good deal of precision, just how the law affects their endeavors. There are a number of changes in the law regarding printed matter

as well; so I have thought it best to consider in general how the statute will affect scholarship and will make our rights in the attempt to produce creative work more secure.

I would suggest that historians and archivists get copies of the House Committee on the Judiciary's *Supplementary Report* [part 6] *of the Register of Copyrights on the General Revision of the U.S. Copyright Law.* They should familiarize themselves with its provisions at length, since this paper can at best only indicate the trend of thinking on the subject.

There is now a greater need for original documentation for historical work than at any point in the evolution of American historiography. Such mammoth and painstaking tasks as multivolume editions of the private and public papers of historic figures have, in the meaning of the Federal Records Act of 1950, significant bearing upon our national development. Legal research and writing today have inquired into the present stumbling blocks that exist in common law, and their conclusions tend to support the claim of the historian to a greater latitude in the pursuit of his craft. Educated snooping with honest intent is still intrusion to some; and it is recognized at the outset that the common-law literary property right in unpublished manucripts is a protection against the invasion of privacy.

The precise issue here is not simply piracy versus intrusion but a more complex question involving the degree of control proper for the 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 be able to govern in perpetuity the use of private letters whose recipients have either given or sold the documents to third parties. The proposed statute will not limit the right of the author to property in a letter or manuscript, despite failure to claim his rights in the transfer at the time of a sale. Quite the contrary, the statute in § 202 would require a purchaser to produce a statement in writing from the author saying that such rights had been transferred as well (*Report*, p. 70–71). What the statute would assure to the prospective publisher or scholar is that, after the lapse of a fixed time limit, letters sold or transferred to third parties would enter the public domain. Letters quite definitely fall under the general definition of "literary works," of which this proposal takes cognizance. The intent of the statute is broad, and the definition of "literary works" is meant "to

avoid any qualitative limitations implied by the word 'literary.' " Thus, the principle is established that for limited times authors of manuscript material have property in their works. Just so, interested scholars, collectors, and custodians who find useful documents on the market have a right to public dissemination of these documents in the form of publication. Insofar as possible, a balance is struck between the interests of personal retention and public dissemination.

In a majority of cases evaluated by the Register of Copyrights it appears that the writing of a proper bill has required as delicate a balance as possible between the monetary incentive to authors and publishers of protection and the interest of scholars and others in dissemination. Each of these interests is quite important to learning in general. The authors of the bill feel that the needs of education would be ill served, however, if educators, by copying materials they need, cut off revenue to the authors and publishers who create and financially produce these classroom materials. The statute would recognize the doctrine of fair use to the extent of permitting short quotations without permission and making other arrangements for lengthier use. It is silent, however, on the question of fair use so far as manuscripts are concerned. "Fair use" somehow is cloaked under the phrase "It is a question of law." Where is the case law that states that my publishing 10 or 1,000 letters, from perhaps tens of thousands of letters written by my biographee, is or is not fair use? The statute shrinks from a definition. So do I. Perhaps no one can define it adequately in the eyes of all interests concerned. Yet it would surely seem that the implication of situations that have arisen under the fair use doctrine point to a general sort of permission being understood among writers that only so much of another's property may be used as is necessary to illustrate a point or convey an idea. Strictly speaking, there is 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. Rather than being able concretely to say what is fair, courts are only able to say what is not fair in given situations, as in the case of manuscripts; and their aim is to prevent the pirating of one man's work for another's professional or personal gain. It is thus the express desire on the part of the historical profession to have an opinion from the Register of Copyrights on the meaning of "fair use" with regard to manuscripts whose author has not been dead for 50 years or whose date of origin is less than 100 years ago.

In many cases the author of a historical or literary work has, or should have, a scholarly interest. Literary and scholarly interests should not necessarily be antithetical, for the author is often a member of a university faculty or an institution of a custodial nature. Sometimes, to the deep regret of fellow scholars, the advanced student or researcher uses to the full the benefits of the new accessibility he campaigns to achieve, and he extols its liberality to the skies, only—once his route of access is secure—to turn on others wishing the same privileges in the interest of scholarship. Such deeply abhorrent dog-in-the-manger tactics as indefinite reserves on rare materials that prevent others from seeing or using them, or urgent pleas to use unpublished documents under copyright only to condemn, discourage, and perhaps even prosecute others who may quote from the resulting anthology are practices that would not be the aim of an increased liberality of definition of what can be published and when. The framers of the proposal certainly do not have such an *un*fair use in mind. Consequently librarians and archivists will continue to see to it that records are administered fairly under the new law and that repeated offenders against such an obvious canon of good taste will be refused access to the collections.

Section 301 of the statute protects unpublished works for the full run of the statutory period. Manuscripts are protected, says the Register of Copyrights, long enough for rights of privacy to be respected. A 50-year term was chosen partly for the very important reason that it conforms to the more-or-less uniform standard of international copyright. The almost universal question among historians is: will not the 50-year period prove to be too restrictive? It is usually considered as contrary to public interest to have recent records available for all to see, especially when the officials concerned are still alive. Witness the recent stir of dismay over the Schlesinger revelation that President Kennedy was planning to replace Dean Rusk. The argument is made that there should be a measure of privacy allowed to public officials in their respective offices; otherwise, the recordmakers might become self-conscious or overly destructive when leaving office. Jean Preston of the Huntington Library makes the point in her useful article in the July 1965 issue of the *American Archivist* (p. 371), ". . . a wise man takes the long-term view: privacy for 50 years may vex the scholar today, but at least the papers may be preserved rather than destroyed and the scholar of tomorrow can use them."

This is true insofar as the bulk of papers in the possession of the

author is concerned—but many other manuscripts outside his physical control will undoubtedly exist. In most cases, letters tending fully to reveal the character and attitude of an individual, especially if they should cast him in an unfavorable light, will be destroyed before the incumbent leaves office. Fear of archival entry into personal papers would be taken care of long before these manuscripts reach an institution, provided that the individual cares about his public image. The problem most writers are concerned about is the printing of the letters they may have written to *others*, not necessarily the papers they have retained. A rule providing for quicker entry—25 years from the date of the author's death or 50 years from the date of creation of the manuscript—would not significantly affect the destruction of records by their writer. It is the letters sent, not drafts retained, which historians find time and again are more revealing of character and purpose, and even perhaps malevolence. A briefer rule would also permit custodians earlier access so as to preserve and protect documents now treated as ephemera but perhaps a century from now to be regarded with awe as prime artifacts of the early space age. Publication would not necessarily come immediately; indeed, the amount of time for preparation embodying the latest and most thorough techniques of publication might well take another decade past the time requirement. But the right to publish would be there. Further to illustrate the contention that it is the letters sent, not the manuscripts retained, that an author might wish to destroy, let us examine the wording of the relevant paragraph in Willa Cather's perpetual restriction by will. She interdicted publication, "in any form whatsoever of the whole or any part of any letter or letters by me." How would a 50-year restriction protect her according to her view? This stern injunction would imply that the author would like to revoke every remark she may have ever made in a letter; a ban of even 500 years might be too brief for her. Reasonable and fairminded individuals do not share this view.

Some libraries urge donors to dedicate literary property rights when they accession manuscripts. Others would be well advised to do so, according to the author of a recent article in *Manuscripts*, the quarterly journal of the Manuscript Society of America. Most libraries requesting surrender of literary property rights in manuscripts began to do so after World War II. The Chicago Historical Society and Louisiana State University have been asking for such rights for about 15 years; the Kentucky Historical Society, 13

years; the State Historical Society of Wisconsin, 10 years; and the Buffalo Historical Society, the Ohio Historical Society, the Illinois State Historical Library, and the Utah State Historical Society, all 5 years. The Virginia Historical Society has been asking its donors to surrender literary property rights for over a century.

The fact that library restrictions do have teeth was illustrated in the celebrated Peter Kavendish case of New York's Supreme Court in 1960, in which a pirated edition of John Quinn's letters was ordered destroyed, and in the instance of the John Addington Symonds memoirs to which the London Library permitted Phyllis Grosskurth access but no right to quotation. These are two recent examples of extreme reluctance on the part of libraries to permit publication in violation of the spirit of gift.

Yet another interesting case shows the reliance of a court upon the publication of original documentation. It presents the ironic situation of the court's permitting and even demanding exhibit—and thus publication—of manuscript letters and documents bearing upon the character of an individual. This is the case of Helen Clay Frick versus Sylvester Stevens. Dr. Stevens, of the Pennsylvania Historical and Museum Commission, has written a work which describes Henry Clay Frick as "brusque and autocratic," a judgment which many historians concede is a generous one. Miss Frick sought an injunction against further distribution of the book. According to the text of the *New York Times* article reporting the progress of the case at Carlisle, Pa., "Judge Weidner ruled . . . that the defendant would have to produce original source materials as evidence to support his contention that the book's account of Mr. Frick was truthful" (*Times*, July 23, 1965, p. 40). Of course, the production of this evidence certainly involves publication to the extent of being included in the court record; and this publication is mandatory, without the approval of Frick's daughter.

Speaking briefly to the question of the impact of the proposal upon historical agencies and museums, there may be an effect so far as the institution may conduct publication or audiovisual programs. Would display of manuscript materials be considered publication? The public is certainly exposed in small quantities to documents on exhibit. If the statutory requirements would not be met on printing—for instance, if the documents are displayed less than 50 years after the author's death—is the historical agency guilty of breach of copyright? One may profitably consult the section (in the *Report*) on educational dissemination, which leads the reader to believe that the intent of the statute is to promote and

not to hinder proper and legitimate historical purpose [*Report*, p. 29–30; Stat. § 108 (b)]. It would still be a problem, however, to prevent such piracy as occurred in the Kavendish case, should the viewer at an exhibit wish simply to memorize parts of a letter and then reproduce them. Perhaps further interpretation from the Register of Copyrights is needed on this point.

If your institution has an education department with audio-visual equipment and a program designed for public broadcast information, a careful review of § 109 will be worth while. The content and purpose of the program are all-important. If the performance is made an adjunct to the classwork of educational institutions, it will not be considered an infringement. There are certain cases, however, in which such broadcasting may not be done without permission. Care should be taken that the educational institution under whose sponsorship the program is transmitted be "non-profit"—that it not be an "association" or "foundation." Permission then, must be obtained for so-called educational programs aimed at the general public; that is, for adult education programs.

Scholars will be interested to find in the clear language of § 201 (c) that "each separate contribution to a collective work (such as a periodical issue or encyclopedia) is to be regarded as a separate work in which copyright ownership 'vests initially in the author.'" The author remains copyright owner in his contribution, and the publisher acquires only certain publishing rights. Section 403 provides that "a single notice applicable to the collective work as a whole is sufficient to satisfy the requirements . . . with respect to the separate contributions it contains."

There is a portion on compilations and derivative works (*Report*, p. 6) that editors will find interesting. There is nothing to prevent an independent contractor from securing copyright in works prepared by him under Government contract or grant so long as the contract or grant permits it (*Report*, p. 9). Collaborating scholars will note that their protection will run on their published works a full 50 years from the death of the second of a group of joint authors. Query: could not an older man induce a younger one to collaborate with him so as to prolong the copyright? Yes, but the thinking is that this chance must be taken. It would work as a greater hardship on the younger to have the copyright run from the date of the first one's death.

No reason exists to deprive the copyright owner from the full term of his protection. The present "manufacture in U.S.A." re-

quirement does so deprive the author to some extent, in that works of American authors must be made here or else be thrown into the public domain, in some cases as a result of failure to comply with the law's strict requirements. The proposed law offends book manufacturers in its refusal to require nondramatic literary material in English to be published in the United States or lose its protection. If the work has illustrations manufactured abroad, its status is not affected. Should one or more authors be foreign, the rule of domestic manufacture does not apply. Since, however, it costs more to import over 3,500 copies of a work than to manufacture the same number here, at least that many copies could be brought in under foreign copyright protection—unless certain portions were manufactured in the United States.

Turning once again to custodial situations, consider for a moment the crucial problem of the Library of Congress in providing space for copyrighted works. The accumulation there is so great that some disposition is necessary. The dilemma is that certain of today's ephemera are tomorrow's collectors' items of social history. The statute should provide for retention of original unpublished works or published items as long as possible; but if this is inconvenient, the Report of the Register of Copyrights recommends a provision "to dispose of them ultimately under proper safeguards" (*Report*, p. 154). These might include transfer to other libraries.

Those archivists and librarians accustomed to consulting publications of catalogs of copyright registration will find the present catalog of copyright entries continued under § 707 (a), but the Register of Copyrights will have a more flexible authorization to determine the form and frequency of publication of each part of the catalog. The catalog entries would be divided into parts in accordance with the various classes of works. Here the Register of Copyrights acknowledges the great value of the catalog to public users, and he is certainly making an effort to accommodate scholars and custodians.

Along with the question of scholarly accessibility under a 50-year rule, would not the collecting policy of a custodial agency naturally tend to favor manuscript items of greater age and farther distance behind the cutoff date, knowing that these would be of immediate use and not subject to restriction? The nature of more recent correspondence is ephemeral, since the telephone handles a vast percentage of communications today. This situation demands more of the archivist's skill in handling and preserving items of future value, yet modern material might be slighted in favor of

older papers because the custodial agency would prefer that which is legally usable. From a financial standpoint, however, the more recent manuscript or autograph material is generally easier to acquire. Acting now to collect, despite inability as yet to use and publish, may be a wise decision.

One class of custodian, in a very real sense, has yet to be mentioned. This is the private collector of autograph letters and documents. The rule preventing publication of letters in private possession is just as emphatic as that applying to collections in public institutions. The collector who does not make his autographs available to scholarly enterprise, or who makes no plan to publish or exhibit them himself, does just as great disservice to research as the recalcitrant heir who steadfastly refuses to allow inspection of his ancestor's documents. At best, the owner of these valuable portions of world history is a temporary custodian, and his death will make for another disposition of the manuscripts under his care. It must be said that most private collectors cooperate magnanimously with the scholar; I refer only to the inevitable few.

No Federal legislation yet conceived can require a collector to surrender his property rights in manuscripts; nor can it be foreseen how this could be done without just compensation. Part of the reluctant collector's objection to use of the original documents in his possession is the belief, nurtured by dealers and other collectors, that the freshness and originality of his manuscript will suffer from publication and that, after printing, values will tumble. A vehement controversy exists over this point. Arthur Link, editor in chief of The Papers of Woodrow Wilson, once wrote me his view, that publication is only scholarly confirmation of the intrinsic merit of a letter; and, to use an extreme example, the publication of literally millions of copies of the Declaration of Independence has not lessened one whit the supposed monetary value of this priceless archive. Precious letters and documents may lose immediate fascination for some by publication, but to the genuine scholar and archivist the temporary slump in market value of an autograph, if indeed there is a dip, has little or no bearing upon the cultural importance of its release to the world.

In the same area of discussion, it seems logical to mention the usefulness of putting a clear statutory end to the maze of confusion in such literary "trust" arrangements as the Mark Twain Company. This corporation controls permission to publish any and all unpublished letters and manuscripts of any kind written by Mark Twain. Is it proper for such a clearinghouse to have the absolute

power of life and death over any future work on the subject? It is argued that the corporation merely steps into the shoes of Samuel L. Clemens just as if he or his heirs were determining permission. Yet, there is a formidable permanency in an institution such as the Mark Twain Company. It is conceivable that such an organization would last much longer than any effective interest the Clemens family may have or may have had in suppression of Mark Twain materials. As such, it could be a rigorous obstacle to constructive scholarship. As Jean Preston indicates, the Mark Twain Company did successfully interrupt first publication of the manuscript of an unpublished Mark Twain story when it came up for sale in 1945. Apparently such organizations are prepared to defend their rights as understood under common law. The impact of the statute, however, would allow undiscovered material to be published after the statutory period. A purchaser would not have to obtain permission from such an entity as the Mark Twain Company when the prescribed number of years had elapsed.

Material already in repositories and under a perpetual restriction by will can also be published after the statutory period. No restriction after that time would be valid, any more than an author could prevent the passing of his printed work into the public domain after expiration of a certain statutory period. Eventually, therefore, the letters of Willa Cather, mentioned earlier, may be released to publication.

Barriers are falling, and the honest researcher may someday have fuller access to the writings of the past. The aim of H.R. 4347 is clarification; and in the main it is of real assistance to historians. When it is complete, we hope, with amendments to the section of fair use and when perhaps it includes a revision of the duration of statutory protection in manuscripts, the bill will become a law that indeed preserves a good balance between the twin important interests of privacy on the one hand and dissemination on the other.

The National Archives: A Short Guide

GSA is responsible for an immense body of documentary material, ranging from the Declaration of Independence and the Constitution to individual income tax returns.

—*Annual Report of the Administrator of General Services 1965*, p. 29 (Washington, 1966).