Common Law Copyright and the Archivist

KARYL WINN

COMMON LAW LITERARY PROPERTY RIGHT is the right of an author under the common law to the exclusive use and control of his literary creation before publication. As such, this concept also is called the right of first publication or common law copyright. A written expression need not possess literary merit to warrant such protection. Furthermore, literary property, an intangible quality which is distinct from physical possession, does not end with the death of the author, but it exists in perpetuity until the unpublished writing is published or otherwise placed in the public domain. Common law copyright differs radically from statutory copyright, which governs published works protected under the Copyright Act.

Difficult to grasp as a concept, common law copyright is complicated by legal interpretations of publication, photocopying policy, donor relations, and the privacy issue. Archivists necessarily must deal with common law copyright problems in administering unpublished writings, and they may wait years more for the salutary effect on these problems of the proposed revision of the copyright law. Letters or other writings of a donor's correspondents pose a particularly vexing problem. While a donor (or his heirs or assigns) holds literary property rights in his own writings, he has no control over literary property in a correspondent's writings even though these writings may constitute a substantial part of his papers. This discussion recognizes problems inherent in this situation, but it does not attempt to resolve them.

When a donor gives his papers to a repository, he parts with physical possession of them. He retains literary property in his unpublished writings, however, unless he expressly transfers it.

The author is Curator of Manuscripts at the University of Washington Library. This is a revision of a paper read September 1973 in St. Louis at the annual meeting of the Society of American Archivists.

The terms of the gift could specify whether he transfers it to the repository or keeps it for a specified time or indefinitely. If the transaction is a sale rather than a gift or if the author is a literary author, these conditions are likely to be spelled out clearly. More often than not in cases of gifts, no mention of this issue is made. The gift may represent several years of persuasive effort, and the field representative, at the conclusion of negotiations, may be reluctant to suggest the assignment of literary rights to the repository, a subject that might cause the donor to change his mind. At such tense moments, physical custody seems the only real goal.

Presumably the donor has given his papers to a repository so that they may be used by researchers. Unless he has specified restrictions on access, the papers may be consulted by the repository's clientele. There seems to be no problem until a researcher requests a photocopy or until he wishes to quote from the papers. Must he then seek permission from the author of the item in question or from the author's heirs? Who holds the common law copyright or the exclusive right to first publication? Authorities on this subject disagree to some extent, so let us look at the concept more closely.

If the donor of papers places them in a repository, does he retain literary property rights in them? The answer depends on what constitutes general publication. Some authorities, notably Seymour Connor and Ralph Shaw, feel that "deposit in a public institution constitutes general publication."[1] The donor's writings are, according to this interpretation, freely available to be read, copied, and quoted for publication. If his heirs or assigns donated them or offered them for sale where the public might purchase them, the materials likewise are available without restriction. These authorities believe that a repository's attempts to regulate use of such writings are not based on solid legal foundation. Their interpretation holds that access is synonymous with general publication.

Even if this theory is accepted, the donor's correspondents most likely did not consent to the transfer of their papers. They or their heirs or assigns retain literary property in their unpublished writings. If general publication includes merely the reading of these correspondents' writings in a repository, it is violating the law by allowing them to be used at all. The repository, this theory suggests, is actually administering them illegally. An

[1] Seymour V. Connor, "The Problem of Literary Property in Archival Depositories," *American Archivist* 21 (April 1958):147; Ralph Shaw, *Literary Property in the United States* (Metuchen, N.J.: Scarecrow Press, 1950), pp. 136–37.

archivist occasionally encounters potential donors who worry about donating letters from their correspondents, and the archivist probably tries to reassure them that their correspondents' writings may be used but cannot be quoted without permission from the correspondents or their heirs. This is probably a false assurance, however, if one accepts the interpretation described above, that access itself constitutes publication.

Another theory holds that donation of papers to most repositories may be interpreted as limited rather than general publication. One legal expert states that the only court cases discussing "the question of what constitutes publication have indicated that this requires printing or multiplication of copies."[2] Repositories surely are not involved in printing or multiplication of copies by allowing records to be read and single photocopies to be made for scholars' private research.

The noted copyright authority, Melville Nimmer, defines limited publication as that "which communicates the contents of a manuscript to a definitely selected group for a limited purpose, without the right of diffusion, reproduction, distribution or sale."[3] An author's distribution of his writings to his close friends, with the implicit or expressed understanding that they will not copy or distribute them further, constitutes limited publication. So does distribution in advance of publication for purposes of review, criticism, or performance. Similar limiting conditions on use generally apply to papers in a manuscripts collection.

What is the situation if the repository does not administer manuscripts for a select group or for a limited purpose? Another authority asks, "Just what is the position of the library in relation to the author and those who use that material? Is it a private use or does the use amount to a publication? Perhaps the answer depends upon the type of library and who of the public are invited to use its facilities. If the library is private and the patronage from a select group, then probably no publication would result even after an extended showing or use. On the other hand, a public library, which anyone may use, showing a manuscript to only a very few persons would amount to a publication . . . as it would be in the public domain."[4] How helpful this distinction is seems to depend on the type of institu-

[2] "Personal Letters in Need of a Law of Their Own," *Iowa Law Review* 44(1959):706.

[3] Melville B. Nimmer, *Nimmer on Copyright* (New York: Matthew Bender & Co., 1973), Sec. 58, pp. 224–25.

[4] Kenneth E. Walden, "Common Law Right in Literary Property," *Journal of the Patent Office Society* 37 (September 1955):655.

tion represented. The Huntington, Clements, and Folger Libraries clearly fall into the first category. Many historical societies fit the other description. Still other repositories are public institutions, but they are exclusive in practice to some extent by being devoted primarily to a select clientele.

Although this question of who holds literary rights is not clear-cut, the matter of whether or not general publication has occurred poses legal implications for the repository in the assurances it can furnish to the donor and to researchers. The donor of papers to a repository that makes no distinctions about who can use its holdings or for what purpose would seem to have abandoned his literary rights to them. He probably also could not establish restrictions on the use of his papers. They would be freely available for use, copying, and publication. General publication might have occurred also for the writings of those who corresponded with the donor, although his transferring their literary property without their consent might be an action that they could protest. On the other hand, the donor of papers to a repository serving a select group retains literary rights unless he expressly parts with them. His correspondents similarly retain literary property in their writings. A user who wishes to quote extensively for publication must seek permission from the author or his heirs. The donor may establish special restrictions on the use of his papers.

This latter situation, where limited publication occurs, prevails in many if not most repositories. It is a rationale consistent with court decisions and with the writings of authorities on common law copyright. It is preferable to the first theory, in which access is equated with general publication.

The second interpretation, which contends for limited publication, offers more advantages to the donor than to the researcher. The researcher who wishes to quote for publication must seek permission from the author of unpublished writings, his heirs, or assigns. If the manuscripts are several decades old, a search for heirs poses a difficult problem.

Since a repository must balance interests of both donors and researchers, it is desirable to consider practices that might safeguard donors' interests and at the same time minimize scholars' frustrations. A number of institutions seek literary rights at the time of the gift, and probably more repositories should. Many do not for the reason mentioned previously, fear of hampering the negotiations. A carefully designed deed of gift form, introduced at the conclusion of negotiations, can provide for transfer of literary rights without making an issue of the matter. The

archivist can explain the assignment of literary rights to the repository as a convenience to future scholars. If a donor wishes to retain his literary rights, the form can be altered to reflect this. Even a wary donor, however, might consent to transfer his literary rights to the repository upon his death. Such terms could be written into the deed of gift form.

Another recommended practice is that of encouraging a donor to consider the kinds of materials in his papers that need protection from quotation—and for how long—and to define a specific restriction to cover the problem. If an author expressly restricts the "diffusion, reproduction, or distribution" of his work, according to one authority the courts can more easily decide that he has effectively limited publication and thus protected his rights.[5] Having established appropriate restrictions, the donor might then transfer to the repository literary rights in the rest of his papers.

If the repository does not hold literary property rights, it faces the bothersome problem of advising scholars to seek permission of authors or their heirs for quotation. Heirs may be impossible to trace, but repositories normally assist to the extent that their records furnish clues. Almost universally, repositories oblige the researcher to assume responsibility for potential violation of copyright and common law literary rights. They alert him to this policy through instructions for use of the collection, registration forms, photocopy request forms, various permission forms, and at the beginning of each reel of microfilm prepared for him. Also they caution him against the use of libelous statements or those that might be construed as invasion of privacy.

Some doubt exists whether or not the repository is absolved of responsibility by shifting or trying to shift this burden to the researcher. If the researcher and possibly his publisher risk publishing without permission of the literary right proprietor, they can be held liable for damages and possibly so can the repository.

In the case of a literary executor preparing unpublished writings for publication, a repository is well advised to request written proof of the editor's trusteeship of literary property. A legal document or a letter from the author's heir authorizing literary trusteeship is more reassuring to a repository than a mere letterhead.

Policing a researcher's use of material, however, is impossible in most cases, particularly if papers have been photocopied.

[5] David Hodges, "Divestitive Publication of Speeches and Lectures," *Baylor Law Review* 25 (1973):492–93.

This fear, along with the careful view that photocopying may constitute a violation of common law copyright, induces repositories like the Library of Congress to refuse to reproduce material written in the last fifty years without the express permission of the author, his heirs, or assigns. Many repositories are not as strict and extend the concept of fair use, which originated with copyrighted materials, as rationale for photocopying unpublished manuscripts.

While fair use is probably not legally applicable to manuscripts, the Gentleman's Agreement of 1935 and the Keyes-Metcalf statement adopted by the American Library Association in 1940 extended it to manuscripts. These statements make clear that a *single* photocopy of an item is supplied in lieu of the scholar's manual copying and that it is done as a convenience for the scholar's private study.[6] The various photocopy forms referred to previously usually state these bases for copying, and they forbid further reproduction or publication without permission of the holder of common law copyright. Repositories adopting such a photocopying policy may take comfort in Ralph Shaw's remark that no library has been sued "for making copies for a scholar in lieu of his copying the material himself."[7] The organizations, however, which concluded the Gentleman's Agreement are no longer in existence. Moreover, the agreement could not bind persons or organizations that were not parties to it.

A subsequent policy, the Single Copy Policy, was prepared by the Joint Libraries Committee of Fair Use in Photocopying in 1961 and later approved by the parent library associations.[8] It does not, however, specifically mention manuscripts. Furthermore, the fair use doctrine has been tested but not yet fully resolved in the *Williams and Wilkins* case.

I am not suggesting that repositories cease all photocopying of manuscript materials without permission of the holder of common law copyright. Awareness of the potential liability they assume should be reflected in their policies. As noted previously, they should try to educate researchers about their responsibilities with regard to literary property rights. If repositories seek literary rights at the time of gift, their statement of transfer

[6] Louis C. Smith, "The Copying of Literary Property in Library Collections," *Law Library Journal* 47 (1954):204, 206.

[7] Quoted in Walter Rundell, Jr., "*The Recent American Past* v. *H. R. 4347:* Historians' Dilemma," *American Archivist* 29 (April 1966):210.

[8] Verner Clapp, *Copyright—A Librarian's View,* Copyright Committee, Association of Research Libraries (Washington, D.C., 1968), pp. 22–23.

should include a permission to make single photocopies for a researcher's private use.

Besides warning the researcher of his responsibilities with regard to literary property rights, repositories may attempt to regulate his use of photocopies. Photocopies may have to be returned at the conclusion of research. Microfilm may be lent through interlibrary loan rather than sold. Deposit of photocopies in another repository may be forbidden or forbidden without consent of the repository holding the originals. These policies require policing efforts that are bothersome and often applied haphazardly. Reasons other than fear of violation of literary property rights may explain them (fear of "loss of control"—resulting in unknown parallel research; loss of prestige). Thus, such policies are advised only in cases where donor restrictions or extreme sensitivity of the material seem to demand it. Repositories should not employ them as if common law considerations necessitated them.

We have considered fair use as a justification for photocopying manuscripts. Fair use also has been generally extended to cover limited quotation of an unpublished item. The term, however, has never been precisely defined, even in its application to copyrighted works. Use of material is regarded as "fair" when it is "reasonable." This definition suggests a small amount of material; and when questioned by researchers, archivists usually advise a few lines or various other strict but imprecise limits. The doctrine of fair use to justify quotation for publication without the author's permission seems to be well recognized. Nimmer states that, particularly in cases of complicated searches for the inheritor of common law copyright, the courts would possibly "give greater scope to the defense of fair use where the letter in question is very old and of historical significance."[9]

A researcher may seek advice on various other questions of literary property. He may be advised that an author's intent in his writing may place it in the public domain. For example, a letter to an editor of a newspaper, a speech intended for public presentation, or a report prepared for general distribution seem to imply consent to their publication. Speeches may present difficult problems, however. In the case of *King* v. *Mister Maestro, Inc.*, an action against a record company that released records of Martin Luther King's "I Have a Dream" speech, the court held that delivery of a speech does not constitute publica-

[9] Nimmer, *Nimmer on Copyright*, Sec. 64, p. 249.

tion, despite the presence of an enormous audience. Furthermore, King's advance distribution of the text to the press constituted limited rather than general publication.[10]

A later case involved oral works. In *Estate of Hemingway* v. *Random House,* Ernest Hemingway's widow sought first to suppress publication and then to recover damages for publication of A. E. Hotchner's *Papa Hemingway,* based on conversations and oral interviews with the novelist. This case may offer more implications for oral history than it does for unpublished textual materials, for the "analogy of oral conversations to common law copyright protection given to personal letters was rejected by the court."[11]

To return to further questions of literary property, one authority suggests that letters written to the government may be published by the government, but he suspects that this does not have firm foundation. Archivists may wonder about the status of letters written to public officials on public business, but they would probably not encourage a researcher to quote from or publish them without taking customary precautions. The courts have generally held, however, that literary property in materials written in the course of the author's employment rests with the employer, unless an employment contract specifies otherwise. This view has obvious implications for business records and for public records or archives. In the case of the latter, the test of who holds literary property may be expressed as whether persons "in public office are writing in official capacity."[12] Although exceptions exist for such elected officials as the President and members of Congress, whose papers are regarded as personal, the preponderance of government records may be thought of as being in the public domain.

Common law copyright considerations definitely pose difficult problems for repositories. Legal liabilities exist inasmuch as the repository must balance the needs of scholarship against literary property rights, which exist in perpetuity for unpublished writings. What are the risks, however? Some risks probably must be taken by the repository if scholarship is to be served.

If unauthorized publication occurs, authorities agree that the

[10] K. Dunlop, "Copyright Protection for Oral Works," *Bulletin of the Copyright Society of the USA* 20 (June 1973):288.

[11] Paul M. Morley, "Common Law Copyright in Spontaneous Oral Conversation," *William and Mary Law Review* 11 (Fall 1969):254–55.

[12] Margaret Nicholson, *Manual of Copyright Practice,* 2d ed. (New York: Oxford University Press, 1964), p. 166, quoted in Robert W. Lovett, "Property Rights and Business Records," *American Archivist* 21 (July 1958):264.

literary right proprietor can generally suppress publication or recover damages.[13] In the case of historical letters, however, one authority stated in 1961 that "not one case has been uncovered where the writer sought damages."[14] Thus the risks in such cases may be small if reasonable caution and good judgment are exercised.

Recent writings seem to call for more careful use than older ones, since the author, his correspondents, or their heirs or assigns are more likely to protest against invasion of privacy. We have not yet considered the issue of privacy, but, like common law copyright, it has a strong bearing on the use of unpublished writings. In an 1890 article, Samuel D. Warren and Louis D. Brandeis stated that "the principle which protects personal writings and any other production of the intellect or the emotions is the right to privacy."[15] They proposed that although the right to prevent publication may be considered a property right, "the principle which protects personal writings and all other personal productions . . . against publication in any form, is in reality not the principle of private property, but that of an inviolate personality."[16]

This article has had a profound influence on the doctrine of privacy, although courts have had difficulty articulating a well-defined body of law on the subject. Court cases in recent years, particularly those concerned with the news media, have held that the privacy issue is "virtually swallowed by the privilege of disseminating matters of public interest."[17] With the concern for privacy gaining momentum as a public issue, it is difficult to imagine how a court might balance the interests of scholarship against the right of a public figure and his heirs to privacy. Should a case involve a risk taken by a scholar in quoting from unpublished writings without permission (and perhaps by a repository in providing facsimile copies), the case might be decided quickly on grounds of common law copyright infringe-

[13] Many cases might be cited, most of them involving literary works. The efforts of a publisher, George Doran, before he learned about common law copyright, to publish letters of Woodrow Wilson to his intimate friend Mrs. Peck is the most pertinent example for this discussion. See George H. Doran, *Chronicles of Barabbas, 1884–1934* (New York: Harcourt, Brace, 1935), pp. 219–23.

[14] Frederick M. Lavin, "Copyright—Common Law Protection of Letters," *Villanova Law Review* 7 (1964):110.

[15] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (1890):193, reprinted in *Copyright and Related Topics* (Berkeley: University of California Press, 1964), p. 68.

[16] Ibid., p. 60.

[17] J. Skelly Wright, "Defamation, Privacy, and the Public's Right to Know," *Texas Law Review* 46 (1968):637.

ment. It would be instructive, however, to see how the court might respond to the charge of invasion of privacy.

Archivists may recall that several years ago a superb test case was not pursued. Francis Russell had discovered love letters of Warren G. Harding to his mistress and confidante, Carrie Phillips, and had helped to place them in the Ohio Historical Society. Subsequently, he was forbidden, along with his publishers and an archivist, from "publishing, producing, copying, exhibiting or making any use whatsoever" of the letters by court order. Apparently this temporary pretrial restraining order inhibited the author and his publishers sufficiently, for when *The Shadow of Blooming Grove,* Russell's biography of Harding, appeared, there were blank spaces instead of the quotations Russell had intended to use. If the case had continued, the effect might easily have been the same—suppression of publication. Of greater interest would have been the judge's or a higher court's response to issues such as libel and invasion of privacy that the plaintiffs might have raised. The Harding heirs had sought to impound the letters and to recover a million dollars in damages, claiming that they had been "irreparably damaged" by publication of extracts.[18] It seems dubious that they could have established their claim to such extensive damages forty years after Teapot Dome. Furthermore, if they had based their suit to some extent on invasion of privacy, such a charge might not have impressed the court. Right of privacy does not seem to descend to one's heirs, except possibly to one's spouse where letters or other expressions are personal in nature.[19]

In another case the daughter of Henry Clay Frick, the Pittsburgh steelmaster, alleged libel as the basis of her suit to restrain the sale and distribution of a scholarly history of Pennsylvania that mentioned her father in unflattering terms. Libel usually does not apply to dead persons, and this case seems to have been no exception. The Cumberland County (Pennsylvania) court dismissed Miss Frick's suit in 1967, buttressing its decision with a doctrine first developed in the *New York Times Company* v. *Sullivan* case, which held that published statements

[18] Francis Russell, *The Shadow of Blooming Grove* (New York: McGraw-Hill, 1968), p. 658. For an account of the discovery of the letters and a history of the Harding Papers see Kenneth W. Duckett and Francis Russell, "The Harding Papers: How Some Were Burned and Some Were Saved," *American Heritage* 62 (February 1965):24–31, 102–110.

[19] Samuel H. Hofstadter and George Horowitz, *The Right of Privacy* (New York: Central Book Co., 1964), pp. 158, 177.

about a public figure are not libelous unless made maliciously or in reckless disregard of whether or not they are false.[20]

Distinctions between common law copyright and the libel and privacy issues might be helpful for the archivist to consider. A distinction is made in current libel and right-of-privacy cases between a public figure and an average citizen. The public figure, particularly a public official, has surrendered his right of privacy in achieving prominence. He generally cannot recover damages for publications of public interest about him or by him unless proven to be maliciously false. This distinction between a public figure and an average citizen does not prevail in common law copyright. Also, common law copyright exists in perpetuity, while "most actions for injuries to personality are ended with the death of the author."[21]

Nimmer not only supports this latter distinction but questions the need for the perpetual protection provided by common law copyright. Privacy as a rationale for common law copyright "largely loses its meaning when the author who sought such privacy has been dead for a considerable period of time."[22] Nimmer emphasizes more heavily than Warren and Brandeis the economic rationale for protection of literary rights. "Economic encouragement of creativity," according to Nimmer, does not seem to require the perpetual protection of common law copyright.[23] An author is likely to write whether or not his heirs are assured of benefiting from any of the fruits of his labors.

Many others have agreed and have decided that the uncertainties of the copyright act and of common law copyright should be resolved. Copyright revision legislation was passed in 1967 by the House, and a current revision bill, S. 1361, has been introduced in the Senate. This bill would protect unpublished writings under statute more specifically than presently is the case at common law. Protection of literary property in manuscripts would no longer be perpetual, but it would terminate at the end of the copyright term, which is defined as the author's life plus fifty years. This period would agree with that established by most other countries of the world. Provisions are made also for

[20] "The Role of the Joint Committee in the Frick Case," *AHA Newsletter* 6 (June 1958):26–30.

[21] Dunlop, "Copyright Protection," p. 312.

[22] Melville B. Nimmer, "Copyright vs. The First Amendment," *Bulletin of the Copyright Society of the USA* 17 (1969):268.

[23] Ibid.

presuming the death of an author who is difficult to locate and for terminating copyright protection for both published and unpublished works created before passage of the law. A special section permits reproductions to be made for a user's private study, scholarship, or research. Under carefully defined provisions, it also permits non-profit libraries and archival institutions to make facsimile reproductions of unpublished works in their collections when needed for preservation and security reasons and for deposit in similar repositories for research use.

This proposed legislation would greatly benefit repositories by eliminating many of the uncertainties concerning literary property rights. While scholars would still bear the onus of seeking publication permission from potentially elusive authors, repositories would have a solid basis for advising scholars of their obligations and for making photocopies of manuscripts for them. Early passage of this law does not appear favorable, however. It has long been delayed over provisions concerning cable television. Only two days of hearings were held in the summer of 1973 on the revision bill by Senator John L. McClellan's Sub-committee on Patents, Trademarks, and Copyrights. Representative Robert W. Kastenmeier, who guided copyright revision through the House, is determined not to act until the Senate passes a bill.[24]

Until Congress acts, the archivist must work under the liabilities thrust upon him by the common law copyright situation and the needs of researchers. To lessen those liabilities he is urged to adopt such practices as seeking literary rights and photocopy permission at the time of gift, helping the donor define reasonable, specific restrictions, and requesting researchers to sign photocopy permission forms before he provides facsimile copies. Although some troublesome problems of literary property rights will remain, the repository's agents will feel more comfortable in administering papers and records. They will be less likely to be troubled about protecting a remote descendant's interest in inherited literary property and more concerned with facilitating serious research.

[24] *American Libraries* 5 (January 1974):19.