Copyright, Unpublished Manuscript Records, and the Archivist

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Abstract: Two questions relating to copyright in unpublished records are considered: archivists' obligations and privileges under United States copyright law, and archivists' responsibilities beyond merely legal ones. The 1976 Copyright Act clarified archivists' obligations by terminating perpetual copyright and by granting archives authority to reproduce copyrighted works under certain conditions. The ambiguous applicability of this authority and of "fair use" to unpublished records continues to complicate archivists' work. Archivists serve scholarship by accepting transfer of copyright in acquired records, by including information on copyright status in inventories, and by understanding copyright well enough to explain it to both researchers and copyright owners.

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The author is not a lawyer, and this article is not intended as legal advice.

YOU ARE THE ARCHIVIST / MANUSCRIPT CURATOR of the Pooduck County Historical Society, a private, not-for-profit, membership-supported organization. What should you do, or what would you recommend to your director, in the following situations?

Scenario 1: A commercial publishing house, which reprints scholarly articles for use in college history courses, wishes to expand its service by publishing, in pamphlet form, previously unpublished historical manuscripts. The company asks you for copies of, and permission to publish, the letters of John J. Jones, in which Jones recounts his experience as an American volunteer in the Spanish Civil War. The company offers to pay an attractive fee.

Scenario 2: The papers of Freelove Johnson, a nineteenth-century, Pooduck County utopian-communitarian reformer, are being published under the sponsorship of Pooduck State University and the National Historical Publications and Records Commission. The editor, Alice A. Adams, writes for copies of, and permission to publish in full, all letters to and from Johnson in your collections.

Scenario 3: Your board of directors decides to begin publishing a quarterly journal that will include both secondary articles dealing with life in Pooduck County and primary documents from the society's collections. The new editor asks you to suggest several documents, representative of all time periods in your collections, for use in the first issue.

Scenario 4: Professor Samuel S. Smith teaches an American history survey course at Pooduck Junior College. Each time he offers the course he asks every student to write a "grandparent essay," an account of the life of one of the student's older relatives, to be based principally upon family records and oral interviews with family members. By retaining a copy of each essay, he builds up a file rich in information on the people of Pooduck County, including accounts of immigration, farm life, and labor union struggles. Realizing the value of this file, he decides to make it readily available by donating it to your archives, with the condition that the society agree freely to grant to any and all legitimate researchers permission to quote at length from the essays.

The archivist could become liable for infringement of copyright by complying with the request made of him in each of these scenarios. Questions pertaining to copyright continually confront archivists in the fulfillment of their responsibilities to collect, preserve, and promote the use of historical documentation.

What policies should an archivist or curator of a research repository adopt in regard to copyright in the unpublished manuscripts in his repository's holdings? Several possibilities come immediately to mind. The archivist could simply post notices to the researcher that the responsibility to discover the status of copyright in the records he uses is his alone, and that he is liable for any copyright infringement in his use of them. This solution would relieve the archivist of the difficulties involved in keeping track of copyright ownership and shift the burden of liability to the researcher. Another possibility would be to refuse to photocopy, or to permit publication of, any manuscripts whose copyright the archival institution does

not itself own or which are not manifestly in the public domain. This solution would effectively guard the archivist from committing copyright infringement. A third solution would be to comply strictly with the copyright law, making copies or giving permission to publish where the law allows and refusing to do so where the law forbids. This solution places the burden of a full comprehension of the law on the archivist and forces him to apply the law on a case by case basis, but it gives him the satisfaction of knowing he is serving scholarship to the extent the law permits.

A close examination of the question discloses that none of these solutions is appropriate. The first denies the researcher guidance on provenance that he has a right to expect from the archivist. The second involves the archivist in unreasonable denial of access and reference service. The third is not so simple as it seems, since the law itself is full of ambiguities. In order to balance his obligations as guardian of the records of the past with his obligations to the law, the archivist needs to concern himself actively with issues of copyright. He must understand the law and its ambiguities, and he ought to have a set of definite policies regarding copyright.

In this paper I shall consider copyright only in relation to unpublished materials; and I shall consider only written materials, not sound recordings, still or moving photographs, art works, or machine-readable records. The discussion will concern repositories within the jurisdiction of the United States. The term "archivist" will be used broadly to include the manuscript curator, and the term "archives" to include manuscript libraries.

Rationale

In its common usage, copyright means "the exclusive legal right to reproduce, publish, and sell the matter and form of a literary, musical or artistic work." The U.S. Copyright Law, Public Law 94-553, Title 17, U.S. Code, Copyrights, was adopted 19 October 1976, and most provisions went into effect 1 January 1978. It defines both the extent of those exclusive rights that are to be protected by law and the limitations on those rights, that is to say, the rights of others to reproduce, publish, and sell the protected matter and form. The archivist ought to concern himself with the rights of the copyright holders whose records are in his custody, as well as with the rights of researchers, for several reasons: in order to act in an ethical manner; to enhance his ability to collect, retain, and preserve records; to improve his service to researchers; to conform with the law; and to avoid the penalties of the law. The set of policies he adopts should be suitable to his repository, allow him to conform as closely as is reasonably possible to the letter of the law, enable him to protect the rights of both copyright owner and researcher, and serve the interests of preserving his collections and of promoting scholarship.

Copyright in Unpublished Records

Until the Copyright Act of 1976 went into effect, protection of copyright in unpublished works in the United States was by common law; was perpetual, provided the works remained unpublished; and was administered by state governments. The new law has changed all this. The protection is now statutory, has a definite duration, and is administered by the federal government. The new law has removed certain ambiguities in the protection, but it has left others. The Copyright Office explains the new duration of copyright protection for either published or unpublished works in this manner. For those

created on or after January 1, 1978, the new law provides a term lasting for the author's life, plus an additional 50 years after the author's death. For works made for hire, and for anonymous and pseudonymous works (unless the author's identity is revealed in the Copyright Office records), the new term will be 75 years from publication or 100 years from creation, whichever is shorter.

For unpublished works that are already in existence on January 1, 1978, but that are not protected by statutory copyright and have not yet gone into the public domain, the new Act will generally provide automatic Federal copyright protection for the same life-plus-50 or 75/100 year terms provided for new works.

However, all works in this category are guaranteed at least 25 years of statutory protection; the law specifies that in no case will copyright in a work of this sort expire before December 31, 2002, and if the work is published before that date the term is extended by another 25 years, through the end of 2027.[1]

In effect, nearly all manuscripts in repository collections will be under copyright protection until A.D. 2003. The major exceptions would be most public records and other works already in the public domain. On 1 January 2003 a great mass of unpublished records will pass into the public domain, including nearly all those whose authors died before the year 1953.

Limitations on Exclusive Rights

The Copyright Act defines five specific rights belonging to the creator of a work, his heirs, or assigns: reproduction, preparation of derivative works, public distribution, performance, and display. Each of these rights can be owned separately. Copyright protection extends to unpublished works of citizens and non-citizens of the United States regardless of their domicile.

The Copyright Act gives legal recognition to the doctrine of "fair use," the concept that copyright protection does not extend to quotations of relative brevity "for purposes such as criticism, comment, news reporting, teaching . . ., scholarship, or research" (section 107). The law provides general guidelines to be used in deciding what constitutes fair use, but the actual determination is the courts' to make and will only become more certain as a body of case law develops. There is some doubt whether the doctrine of fair use extends to unpublished works. Writing in 1974 on common law copyright, Karyl Winn, curator of manuscripts at the University of Washington Library, doubted that fair use was legally applicable to unpublished manuscripts; but she observed that in 1940 the American Library Association had endorsed the extension of the doctrine to a single copy made in lieu of notes taken manually for a scholar's private study.[2] In his standard reference work on copyright, Melville Nimmer states his opinion that in cases in which identification of the heirs of common law copyright is unfeasible the courts might "give greater scope to the defense of fair use where the letter in question is very old and of historical significance."[3] Carolyn Wallace, Director of the Southern Historical Collection of the University of North Carolina at Chapel Hill, asserts unequivocally that, because of section 107, "the fair use of manuscripts is now clearly legal."[4] How-

[1]Library of Congress, Copyright Office, *Duration of Copyright Under the New Law,* Circular R15a (Washington, D.C., 1976), pp. 2-3.

[2]Karyl Winn, "Common Law Copyright and the Archivist," *American Archivist* 37 (1974): 380.

[3]Melville Nimmer, *Nimmer on Copyright* (New York, 1981), sec. 5.04, pp. 5-32-5-34.1.

[4]Carolyn A. Wallace, "Archivists and the New Copyright Law," *Georgia Archive* 6 (1978): 8.

ever, the Senate Committee on the Judiciary's report on *Copyright Law Revision* states that "the applicability of the fair use doctrine to unpublished works is narrowly limited. . . . Under ordinary circumstances the copyright owner's 'right of first publication' would outweigh any needs of reproduction for classroom purposes."[5] An official in the Copyright Office says "there really is no decisive law on the point."[6]

The doctrine of fair use is not the only defense archivists can use for providing copies of unpublished materials to researchers. Section 108 of the new law provides specific exemption from liability for copyright violation to archives and libraries when they make and distribute copies of protected materials, provided certain requirements are met. I shall examine those exemptions shortly, after I have described the rights conferred by ownership of a manuscript.

Ownership of the Physical Manuscript

Before passage of the 1976 law, authorities disagreed on whether or not deposit, without restrictions on access, of an unpublished work in an institution whose collections were open to the public, constituted publication.[7] If it did constitute publication, then the manuscript passed into the public domain and lost common law copyright protection. In such a case, an archivist could be liable for copyright infringement for accepting records for deposit, with unrestricted access, without the permission of the creators of those records. Conversely, if deposit in itself did not constitute publication, then an archivist could be liable for copyright infringement if he provided access to, that is, "published," manuscripts without the creators' permission. Some archivists assumed that their repositories acquired rights to publish if they acquired a collection without explicit retention of copyright by the donor. The new law has removed cause for this confusion. First, the provisions of section 108 clearly imply that copyright adheres to unpublished writings in archives open to the public; and, second, section 202 of the law provides that transfer of the physical copy in which the work is embodied does not automatically transfer copyright.[8] Ownership of the copy and ownership of the copyright are completely separable. Transfer of copyright must be in writing (section 204).[9]

The new law provides that the legal owner of a manuscript, even though he does not own the copyright, may, without infringing the copyright, sell or dispose of it, and display it or a single projected image at the place where the copy is located (section 109). Assuming that there is nothing contrary in the

[5]U.S. Congress, Senate, Committee on the Judiciary, *Copyright Law Revision,* 94th Cong., 1st sess., 1976, S. Rept. 473, p. 64.

[6]Lewis I. Flacks to Sue E. Holbert, May 16, 1977, quoted in Holbert, *Archives and Manuscripts: Reference & Access,* Basic Manual Series (Chicago: Society of American Archivists, 1977), p. 18.

[7]For the argument that deposit did constitute publication, see Ralph R. Shaw, *Literary Property in the United States* (Washington, 1950), pp. 136-37; and Seymour V. Connor, "The Problems of Literary Property in Archival Depositories," *American Archivist* 21 (1958): 143-52.

[8]Some ambiguities remain for documents deposited in archives before 1978, since the new law does not alter the copyright status of works already in the public domain. It might be argued that, before implementation of the new law, deposit of manuscripts in archives open to the public did constitute publication; hence, these works, having already passed into the public domain, would stay there. (James Ernest Thorpe, *The Use of Manuscripts in Literary Research: Problems of Access and Literary Rights,* 2d ed. [New York, 1979], pp. 34-36).

[9]For the history of the debate over the relationship between deposit and publication, see Thorpe, *Use of Manuscripts,* pp. 34-37; Wallace, "Archivists and the New Copyright Law," pp. 5-6; and Winn, "Common Law Copyright," pp. 376-77.

transfer agreements, an archivist is free to cull his collections for unwanted manuscripts and sell or otherwise dispose of them, place manuscripts or single images of them on dislay, and allow researchers to read them.

Special Privileges for Libraries and Archives: Section 108

Section 108 of the new copyright law grants libraries and archives special privileges relating to works in their collections. An archivist or librarian of an institution, whose collections are open to the public or to persons unaffiliated with the institution who are doing specialized research, may reproduce or distribute a single copy of a work in his collections provided that it is done without purpose of profit and the reproduction or distribution of the work includes a copyright notice. The archivist of such an institution may duplicate, in facsimile form, unpublished works for preservation and security. He may make copies for deposit in another research institution open to the public or to persons doing specialized research, provided the two provisions above are met and the work is currently in the archives' collections. The copy must be facsimile: the archives may not, for example, convert a manuscript into machine-readable language.

Whether those provisions of section 108 which grant archives and libraries the right to make copies for researchers apply to all works, or only to previously published works, is unclear and awaits interpretation by the courts. Aside from paragraphs (b) and (c), which relate to reproduction for preservation, security, deposit in another repository, and replacement, no paragraph in section 108 explicitly restricts its provisions to published or to unpublished works. The difficulty arises with paragraphs (d) and (e). Paragraph (d) limits the copying to "no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work." Paragraph (e) reads, in part, as follows: "The rights of reproduction and distribution under this section apply to the entire work, or to a substantial part of it, made from the collection of a library or archives where the user makes his or her request or from another library or archives, if the library or archives has determined, on the basis of a reasonable investigation, that a copy or phonorecord of the copyrighted work cannot be obtained at a fair price . . . ." Whether these paragraphs apply only to previously published works depends upon the meaning of the term "copyrighted work." The courts, recognizing Congress' explicit concern to protect the author's right of first publication, may determine that the term "copyrighted work" in this context applies only to published works. Conversely, since the new law extends statutory copyright protection to unpublished works, and since elsewhere in the act Congress was careful to state explicitly if a provision applied only to published or only to unpublished materials, it could be argued plausibly that unpublished works are subsumed under the term "copyrighted work." Furthermore, the paragraph does apply to "the collection of an . . . archives," which consists in most cases of unpublished materials.

In 1980 the Society of American Archivists' Task Force on Copyright urged that section 108, paragraphs (d) and (e), be clarified and that their applicability to unpublished materials be confirmed. In his report to Congress of 5 January 1983, the Register of Copyrights rejects the SAA's position and recommends an amendment to make it clear that unpublished works are not within the scope of those paragraphs: "The Copyright

Office does not believe that Congress intended to permit libraries or archives to publish works when the copyright owners had chosen not to do so. . . . This choice should be honored, and no distribution to users . . . should be permitted." The Register argues that "the critical needs of users for access to unpublished materials are provided for adequately" by the provisions which allow for libraries and archives to duplicate unpublished works for deposit in other libraries and archives (section 108, paragraph b), and which preempt common law by placing a statutory limit to the duration of copyright in unpublished works (section 301).[10]

Were archivists to adhere strictly to the views of the Copyright Office, the relationships between archivists and researchers would change substantially, at least until A.D. 2003. Archivists would not make photocopies of manuscripts for researchers who visited the archives. The researchers would have to copy the manuscripts manually unless they themselves were permitted to use the photocopying machines unsupervised. Nor would archivists send photocopies of manuscripts directly to researchers in distant parts. Researchers who could not travel to the archives which held the required manuscripts would have to persuade a local library or archives to request copies for deposit. The impediments such arrangements would put upon scholarship are imponderable. A few examples will suffice for illustration. How would a private citizen tracing his genealogy, or an author of historical works, either of whom was unaffiliated with a university, persuade a library or archives to request copies of manuscript materials for his particular use? Project offices collecting copies of manuscript materials for edited works of historical and literary figures would be forced to collect through an affiliated library or archives, or to constitute their files a library open to use by others. Considering the imprecision of the law, until Congress or the courts act, archivists should be inclined to err, if to err it would be, on the side of service to scholarship. The possibility of heavy penalties is remote, and the benefits to scholarship clearly outweigh the dangers. Despite her agreement with the interpretation of the law by the current Register of Copyrights, Barbara Ringer, former Register of Copyrights, believed that archivists should be allowed to continue practices standard before passage of the new law.[11]

When single copies are made for the use of a researcher, the following conditions must adhere: the archivist has had no notice that the copy is to be used for any purpose other than private study, scholarship, or research; the copy becomes the property of the researcher; and the archives displays prominently in the place the orders are taken and on the order form the copyright warning prescribed by the Register of Copyrights, which reads as follows:

NOTICE
WARNING CONCERNING COPYRIGHT RESTRICTIONS

The copyright law of the United States (Title 17, United States

[10]David Ladd, *Report of the Register of the Copyrights: Library Reproduction of Copyrighted Works (17 U.S.C., 108)* (Library of Congress: Washington, D.C., 1983), pp. 105, 121–24, 328–30, 361, quotations from 121 and 329–30; "Statement by Copyright Task Force, Society of American Archivists For Copyright Review Hearing, June 20, 1980, Washington, D.C." *ibid., Appendix IV,* Part 2, pp. 90–96; see also "Statement of Dr. Carolyn Wallace, Society of American Archivists," *ibid., Appendix IV,* Part I, 2 Washington Hearing, pp. 66–83.

[11]For a discussion of Barbara Ringer's interpretation, and further arguments for an inclusive interpretation of paragraphs (d) and (e) of section 108, see Wallace, "Archivists and the New Copyright Law," pp. 8–11.

> Code) governs the making of photocopies or other reproductions of copyrighted material. Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specified conditions is that the photocopy or reproduction is not to be "used for any purpose other than private study, scholarship, or research." If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement. This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.[12]

The right to make copies for a researcher does not apply to musical, pictorial, graphic, or sculptural works, with the exception of pictorial and graphic works which are illustrations or diagrams in other works being duplicated in accordance with the law (section 108, h). The copies themselves should have a warning that the material may be protected by copyright law. In any event, the law does not nullify express contractual prohibitions against reproduction (section 108, f, 4). The House of Representatives Committee on the Judiciary reported that this regulation "is intended to encompass the situation where an individual makes papers, manuscripts or other works available to a library with the understanding that they will not be reproduced."[13]

Assuming that the archives is open either to the public or to persons unaffiliated with the archives who are doing specialized research, what procedures might the archivist follow in accepting copying requests from users? First, he must display prominently the copyright warning. The archives ought to have a photoduplication request form on which a user is asked to state his name, address, institutional affiliation, the material to be copied, and the purposes for which the copies are to be used.[14] Furthermore, the form should contain the copyright warning prescribed by the Register of Copyrights; an agreement by the user that the copy is for private study, scholarship, or research; and an agreement that the user will not duplicate the copy without securing permission of the copyright owner. The user must be required to sign the form. It would be good to maintain these completed forms in a file for at least three years. Congressional guidelines on library copying advise libraries to maintain records on copies they request from other repositories for three years.[15] A similar record of copies requested by others is an extra precaution, for an archivist is not permitted to make copies if he is "aware or has substantial reason to believe" that he is engaging in the systematic duplication of multiple copies of the same work (section 108, g). A broad interpretation of section 108, paragraph (e), would imply that any number of pages may be copied from unique records without violating copy-

[12]For the regulation concerning use of this notice, see Library of Congress, Copyright Office, "Final Regulation: Warning of Copyright for Use by Libraries and Archives," *Announcement* (Washington, 1977).

[13]U.S. Congress, House of Representatives, Committee on the Judiciary, *Copyright Law Revision.* 94th Cong., 2d sess., 1976, H. Rept. 1476, p. 77.

[14]The law does not require archives to find out the purposes for which copies are requested. It forbids archives to provide copies if they have had positive notice that the purposes are other than private study, scholarship, or research (section 108, d, 1). Nevertheless, having such information will help the archivist protect the rights of copyright holders and may help the archivist defend his actions.

[15]U.S. Congress, House of Representatives, Committee of Conference, *General Revision of the Copyright Law, Title 17 of the United States Code.* 94th Cong., 2d sess., 1976, H. Rept. 1733, p. 73.

right law, provided that the purpose of the copy is private study, scholarship, or research. Before complying with the copying request, the archivist should ascertain that the form has been properly and fully completed and that the purpose is not for profit. He should also check that there are no copying restrictions on the collection from which copies are requested. The copy must have the following warning: "This material may be protected by copyright law. (Title 17, U.S. Code)."[16] The copies must become the property of the user. Some repositories will not reproduce records less than fifty years old without written permission of the records' creators.[17]

Public Domain

Works pass into the public domain when they are published without notice of copyright or when the copyright expires. Some works, such as most public records, are automatically in the public domain. Copyright warnings need not be placed on works in the public domain. Materials in the public domain may be quoted freely, except in cases of invasion of privacy and libel. An archivist must allow publication of records in the public domain; but he may regulate the physical use of the records, including by what means, by whom, and where the copying is done.[18]

Beyond Complying With the Law

Once the archivist has complied with the law by posting the required copyright warnings, refusing improper copying requests, and avoiding improper copying or publishing by his own institution, he has not yet discharged his professional obligations in regard to copyright. He has further services to perform, particularly for the researcher. There are procedures he can adopt that will smooth the way in the use of his collections.

The ultimate responsibility to determine whether an unpublished work has passed into the public domain, to whom the copyright belongs, or to procure permission to quote beyond the limits of fair use lies with the researcher who plans to publish the work or a substantial portion of it. Nevertheless, the archivist ought to provide any information he has that will help the researcher make these determinations. The American Library Association and the Society of American Archivists' "Joint Statement on Access to Original Research Materials in Libraries, Archives, and Manuscript Repositories" states that "whenever possible a repository should inform a researcher about known copyrighted material, the owner or owners of the copyrights, and the researcher's obligations with regard to such material."[19]

One way the archivist can help is to attempt to have copyright ownership transferred to the archives with the manuscripts. The Copyright Act provides that "a transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent" (section 204, a). In her discussion of the deed of gift, Trudy Huskamp Peterson suggests that the agreement include a

[16]The Copyright Office believes that the text of the full warning, reproduced above, is required. Ladd, *Report of the Register of Copyrights,* pp. 361–62.

[17]Winn, "Common Law Copyright," p. 380.

[18]Holbert, *Reference & Access,* pp. 21, 24.

[19]*American Archivist* 42 (1979): 537. See also the SAA "Statement on the Reproduction of Manuscripts and Archives for Reference Use," *American Archivist* 39 (1976): 411.

transfer of the copyright: "It is desirable to write into the deed the transfer of the copyright from the donor to the archives; failing that, the deed should clearly specify who holds the copyright and for how long."[20] Because a certificate of acknowledgement can be prima facie evidence of a transfer (section 204, b), Sue E. Holbert recommends that repositories also "issue notarized certificates of acknowledgement when they are given written notice of transfer of copyright."[21] Of course, the person donating or selling the manuscripts can only transfer ownership of those copyrights he possesses. Even if the collection consists of the donor's own papers, he does not own the copyrights to incoming letters or other records he did not create.

Before accepting a transfer of copyright, the archivist should be sure to inform the donor of the nature of the rights he is giving up.[22] The archivist should also be aware that the law allows for a revocation of the transfer beginning thirty-five years and ending forty years following the transfer (section 203). At the time of the transfer, the archivist ought to find out as much as he reasonably can about the identity of the current copyright owners. To be sure, what can be learned with a reasonable amount of effort will be little when a collection contains incoming letters from numerous correspondents, or when descent of ownership is obscure or has passed through several generations.

The archivist should keep in his collection file the deed of gift or other document that transfers copyright to the archives and any other correspondence or notes concerning the copyright owners, or probable owners, if doubtful. Here, too, should be found any agreements limiting copying and permission to publish. The introduction of any inventory or other finding aid prepared for a collection should include a brief description of the state of the copyright of the records, a summary of any restrictions on copying and publishing, and a reference to further information in the collection file. If the information in the inventory is not sufficient for the researcher's purposes, then the archivist should willingly consult the collection file with or for him.

The archivist should be willing to advise the researcher on the best ways to approach the copyright owner for permission to publish. He should also be willing to give advice to the copyright owner who seeks it. In any particular case, however, he should not urge the copyright owner to grant permission.[23]

For collections that originate within the archives' home institution, a general policy should be worked out with that institution regarding the kinds and amounts of material for which permission to quote can be given by the archivist. Requests that exceed those limits could then be passed on to officers of the home institution. Similarly, the repository may want to place limits on the kinds and amounts of material they will allow to be quoted from accessioned material to which they own the copyright, particularly if the archives is involved in publishing those documents itself.

[20]Trudy Huskamp Peterson, "The Gift and the Deed," *American Archivist* 42 (1979): 61–66.

[21]Holbert, *Reference & Access,* p. 25.

[22]For further discussion of the relationship between the archivist and the donor in relation to copyright, see Wallace, "Archivists and the New Copyright Law," pp. 6–7, and Mary Ann Bamberger, "Copyright and the University Archivist," *Midwestern Archivist* 6 (1981): 26–28.

[23]For elaboration of this view, see Wallace, "Archivists and the New Copyright Law," pp. 14–15.

Archival Publication of Previously Unpublished Records

When a manuscript repository decides to publish previously unpublished materials in its collections, then the total responsibility for determining the copyright status of those materials rests with the repository itself. This is a problem shared by the dozens of documentary editing projects now under way in the United States. The problem becomes more pressing the more recently the records were created, for it is less likely that they have passed into the public domain and more likely that the author or his heirs will object to their publication or sue for infringement of their copyright. The problem still applies to records regardless of their age, for copyright protection extends at least until A.D. 2003 in most cases. For instance, the heirs of William Bradford, governor of Plymouth Colony, in theory, would have the sole right to publish a newly discovered "Secret History of Plymouth Plantation."

If the archivist can identify and locate the copyright owners and get their written permission, then he may go ahead and publish a manuscript; but if the copyright owners refuse permission, he may not publish. Once permission has been sought, fair use is probably no longer a defense.[24] What if the archivist cannot identify or locate the copyright owner? How does he determine whether records have passed into the public domain? How many generations after the creation of a work is it reasonable to assume that ownership of copyright in it has become so diffuse among the heirs that it is unreasonable to seek permission to publish and safe to publish without fear of a lawsuit?

The dangers of an archivist being sued and of being sued successfully for distributing, or permitting the publication of, a historical letter from his collections appear to be small, if he exercises caution and judgment.[25] One authority, writing in 1964, could find no case in which the writer of a historical letter sought damages; and another, writing in 1979, says one must search to find cases "in which infringement of literary property is at issue."[26] Karyl Winn argues that "some risks probably must be taken by the repository if scholarship is to be served."[27]

James Thorpe, director of the Huntington Library, literary editor and textual critic, offers this advice:

> It is not possible to offer a safe rule of thumb as to a date before which scholars need not bother about the question of literary rights. In my experience, however, there is essentially no problem for materials earlier than the nineteenth century. For nineteenth-century writers, there are some—relatively few, actually—whose literary rights are still under control. For twentieth-century writers, the scholar should always make very careful inquiries.[28]

Conclusion and Summary

We can now consider solutions to the problems in the scenarios posed at the start of this paper.

In scenario one, unless John J. Jones or his heirs have already transferred to the society their right to publish, or can

[24] Jerome K. Miller, *Applying the New Copyright Law: A Guide for Educators and Librarians* (Chicago, 1979), p. 31.

[25] Thorpe, *Use of Manuscripts,* p. 37; Winn, "Common Law Copyright," p. 383.

[26] Frederick M. Laven, "Copyright—Common Law Protection of Letters," *Villanova Law Review* 7 (1961): 110; Thorpe, *Use of Manuscripts,* p. 37.

[27] Winn, "Common Law Copyright," p. 382.

[28] Thorpe, *Use of Manuscripts,* p. 34.

be located and persuaded to grant permission, publication of Jones's letters should be postponed until A.D. 2003 or fifty years after Jones's death, whichever is later. Jones retains the right of first publication. In addition, archives' special privileges to make or distribute copies apply only to not-for-profit purposes.

Scenario two is more difficult to resolve. Even if Freelove Johnson or her heirs transferred to the society copyright in her letters, she or they could not transfer copyright in the letters from her correspondents. If there are no restrictions on the collection, there would be some small risk in providing copies to the project, with the explicit understanding that Adams will be liable for any copyright infringement resulting from their use; but the service to scholarship would presumably outweigh the risk.

In scenario three, you might choose rather freely among pre-Civil War and more carefully among late nineteenth-century documents; but, for the twentieth century, it would be wise to choose only from collections to which the historical society owns the copyright or for which permission to publish can be obtained from the holders of the copyright. In the case of more recent letters, care must also be taken to avoid invasion of privacy.

The society should not accede to Professor Smith's conditions in scenario four. The professor cannot transfer the copyrights in the essays since they belong to the students. Furthermore, publication may result in suits for invasion of privacy and libel, especially since oral interviews are a major source for the essays. As archivist, you might persuade the professor to modify his conditions after you have explained the law to him. Even better, you might help him design a form that students in future classes could use, if they wished, to transfer to the historical society their copyrights in the essays.

To handle issues of copyright in unpublished materials wisely is a constant and difficult responsibility for the archivist. With study, however, he can understand the law and establish a workable set of policies in regard to it. The archivist must be a tightrope artist, balancing his obligations to the law, to scholarship, to researchers, and to authors and their heirs as equitably as possible.[29]

In order to assist archivists in formulating policies on photocopying and publishing original materials, I suggest that consideration be given to the following guidelines:

1. Seek to have copyright transferred in writing at the time manuscripts are transferred.
2. When copyright is not transferred, make a written note on the identity of copyright holders.
3. Clarify restrictions on copying and quoting from records transferred to or deposited with the archives.
4. Freely share your information about the identity of copyright owners with interested researchers.
5. Include in the introduction to the collection's inventory information on copyright ownership, restrictions on copying and quoting, and any special procedures for acquiring permissions.
6. In the printed regulations and rules for use of the archives, explain that it is primarily the researcher's responsibility to inform himself

[29]Any study of copyright should begin with the 1976 act itself. The most useful works that specifically address the problems associated with copyright in unpublished records are: Bamberger, "Copyright and the University Archivist"; Thorpe, *Use of Manuscripts;* Wallace, "Archivists and the New Copyright Law"; and Winn, "Common Law Copyright."

regarding the copyright status of records he uses; and that, beyond the limits of fair use, he may be liable for copyright violations.

7. Display the required copyright warnings and notices in the search room, on copy request forms, and on the copies themselves.
8. Have researchers who request copies state their purpose on the form and sign it.
9. Establish a consistent copying and publishing policy for records whose copyright the archives controls.
10. Refuse to make copies or to give permission to quote copyright-protected items to commercial ventures without written permission of copyright owners.
11. Refuse to copy or to give permission to quote records that the archives has agreed not to reproduce.
12. Ask a literary executor preparing unpublished writings for publication for documentary evidence of his trusteeship of literary rights.[30]
13. Transfer to the researcher ownership of copies made at the request of the researcher.
14. Maintain a three-year record of copying done for researchers and refer to this record when a systematic copying endeavor appears to be under way.
15. Do not prohibit publication of a document in your holdings if the owner of the copyright gives his permission.[31]

[30]Winn, "Common Law Copyright," p. 379.

[31]Holbert, *Reference & Access,* p. 21.