Unpublished materials, new technologies, and copyright: facilitating scholarly use

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INTRODUCTION

Within the community of professional archivists, I am known as an archivist with a special interest in copyright. My colleagues therefore frequently share with me copyright stories. One recent story gave me pause. A colleague in an archives with extensive Civil War holdings told me about a researcher who had been working with the collections to prepare an article comparing the perceptions and sentiments of western soldiers with their eastern counterparts. Those of you with an appreciation of history will, I believe, realize that this is an interesting topic and well worth exploring. The researcher submitted the completed paper to the historical magazine of a Midwestern state, which accepted it, but then told the researcher that he had to get signed copyright permissions from the families of every one of the soldiers whose letters and diaries he quoted in the course of the article.

The journal's stipulation was defensible. Technically all unpublished manuscript material is copyright until at least 1 January 2003, regardless of the date of the original letter. Furthermore, the last Union veteran died in 1956 and the last Confederate veteran in 1959. That means letters from the Civil War, if they had been written by these veterans, could be copyrighted until 2037 or 2039. The only way to ensure that the letters to be used in the book would enter the public domain on 1 January 2003 would be to determine if the authors of the letters had died before 1932.

As any archivist knows, however, it is impossible to determine with certainty the copyright status of items in a repository. Every archives is filled with items of mixed parentage and provenance. In some cases the soldier's family may have donated the letters and diaries to the repository. In other cases, people who found the items in old houses, furniture, or suitcases - in other words people with no direct connection to the soldier's family - may have donated the unpublished items to the repository. Still other items may have been purchased, with no direct means of tracing the family that owned them.

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Even if all the items in the repository could be traced to a specific family, the copyright problem might still not be solved. A recipient of a letter receives title to the physical letter, but no transfer of copyright takes place. The descendants of the recipients of the Civil War letters may have inherited title to the physical property of the letters, but the copyright in the letters would have remained with the author and been inherited by the author's heirs. Many of the soldiers would have died during the course of the war, leaving no direct descendant to inherit the copyright and requiring extensive genealogical investigation, as well as investigation of probate practices in several states, in order to identify the current copyright owners. In short, the amount of research needed to meet the requirement to clear all copyrights in the article would easily dwarf the amount of effort put into researching the piece in the first place. And even with the best possible effort, it is likely that the current copyright owners of some items would never be identified, and hence the copyright on these items could never be cleared.

I wish I had a happy ending to this story. At last report, the author of the article had withdrawn the article from the journal that had accepted it but required copyright clearances and had begun to look for a different journal in which to publish the article. Almost two years after I was first told this story, the article has not appeared. It may never see the light of day.

What saddens me the most about the story I just told is the perverse role copyright plays in it. Copyright, as we all know, is a limited monopoly right granted by the public to the author of a work in order to encourage creativity. The public is willing to grant a limited monopoly in order to encourage authors to create original material that otherwise would not be available to the public. In the story I just told, however, copyright is being used not as an incentive to create new scholarship, but rather as an impediment to its creation.

This paper is divided into three parts. The first part explores why, at least with regard to the use of unpublished materials, current interpretations of copyright law have become an impediment to creative endeavors rather than an encouragement to them. I will argue that two factors are at work. The first factor that is making it harder for archivists to copy unpublished materials and for scholars to use them is that we are imposing on unpublished materials a set of rules and viewpoints meant to govern published material. As is becoming painfully apparent, the fit does not work very well. The second factor that has made the use of unpublished material more problematic is the rise of the Internet and the ease with which people can uncover potential infringing acts. Technology has not changed the law, but it has affected how people interpret the law – with potentially disastrous results as far as unpublished material is concerned.

It is not enough to just explore why the current system is not working well; we should also propose solutions. In the second part of the paper, I consider one possible solution advanced by the Copyright Office to address the problem of what they call "orphan works" – works whose copyright owner cannot be located. The Office has suggested that a compulsory license could be granted to permit the use of orphaned copyrighted works.

An important component or the Registrar's plan is a requirement to engage in a reasonable effort to locate copyright owners. The last part of the paper considers what might constitute reasonable investigation of the copyright ownership of unpublished works. It may be that the standard for reasonable investigation would be enough to establish a fair use defense of the material, obviating the need for compulsory payments.

I. The Use of Unpublished Material

Problems in using unpublished materials arising from uncertainty over copyright ownership are not new. Prior to 1978 the situation was in theory worse. Until the passage of the 1976 Copyright Act unpublished material was not protected by federal copyright law, but rather by common law. Unlike federal protection, which according the Constitution must be limited, the protection afforded by common law was perpetual; copyright in an unpublished work lasted forever. Any English professor who quoted from an unpublished novel or any historian who prepared a scholarly edition of unpublished manuscripts, diaries, or letters, was a potential infringer, no matter how old the material in question. Furthermore, the normal copyright escape valve – fair use – was not available for use by scholars. The courts established a companion principle of first publication. In the few court cases concerning unpublished materials, the courts found that the author's right to determine if and when an unpublished work would see the light of day was almost inviolate. Publishing unpublished materials, or even quoting from them, was considered to be a violation of the author's right of first publication. As Michael Les Benedict has noted, under a rigorous interpretation of the copyright law then in existence, the authors and publishers of almost every American work of history or biography published in the twentieth century that quoted unpublished material was open to legal suit for infringement.[1]

Nor was it enough to rely on the separation between expression and idea. For scholars in the humanities, expression frequently is the idea; the exact wording of a section is needed in order to make a point, and a paraphrase will not do. Libraries and archives as well have wanted to publish facsimiles of their holdings in order to assist scholars in their work. More recently, they have experimented with making digital copies of source materials available to supplement more traditional microfilm copies. Only a copy of the original document, and not a paraphrase of the ideas found in the original documents, would meet the needs of those who must work from primary resources.

The historians, humanists, political scientists, sociologists, biographers, archivists, and librarians interested in quoting from or publishing unpublished materials could have sought the permission of the copyright owners, be they the authors themselves, their heirs, or a third party. But for many historical documents, identifying the current copyright owner is impossible. Who, for example, knows who owns the copyright in George Washington's unpublished works, or in Thomas Jefferson's, or in Abraham Lincoln's? And these are prominent individuals, whose unpublished writings seemingly would be of some financial interest. What of the thousands of common citizens who

[1] Michael Les Benedict, Historians and the Continuing Controversy over Fair Use of Unpublished Manuscript Materials, AM. HIST. REV., 859-88 (1986).

wrote the bulk of the unpublished material found in the nation's libraries and archives? Who could justify the genealogical, legal, and contractual investigations needed to identify the current copyright owners of these materials?

In sum, in all but the rarest of cases, it was prohibitively expensive and time consuming for a scholar to identify the current copyright owner. Because he or she could not gain permission, and because copyright in unpublished material was perpetual, and because the courts did not by and large recognize a right of fair use in unpublished materials, any scholarly publication of unpublished material, no matter how old, was an infringement of copyright.

Of course, scholars continuously quoted from and published without permission unpublished material in spite of the law. Federal agencies such as the National Historical Publications and Records Commission and the National Endowment for the Humanities funded projects to publish in letterpress and on microfilm the unpublished papers of the famous and the obscure in spite of the fact that others owned the copyright in the material.

In general, this laissez-faire approach to the presumed interests of copyright owners worked very well. Scholarship using unpublished material flourished , with only the rare court case to challenge the equanimity of scholars. The public benefited from the work of scholars and only occasionally did a copyright owner complain, and then usually for reasons other than a desire to protect their right to first publication.[2] In perhaps the most famous case of its time, the heirs of Warren G. Harding sued to stop publication of quotes from love letters Harding had written to his mistress. Francis Russell, Harding's biographer, had discovered the letters and arranged for their deposit in a repository in Columbus, Ohio, but Harding's heirs sued to stop their use. In this case copyright law was used to protect rights of privacy otherwise unavailable to Harding's descendants. After settling out of court, Russell's biography was published with blank paragraphs where the quotes from the letters would have been.

The Copyright Act of 1976 of course radically changed this environment. In the place of common law copyright protection for unpublished material, the act implemented federal statutory protection. In the place of perpetual copyright for unpublished material, the act instituted a limited copyright term of life of the author plus fifty years (now increased to seventy), but with no unpublished work entering the public domain until 1 January 2003 at the earliest. An amendment in 1992 in theory confirmed the right of fair use of unpublished materials

Has the Copyright Act of 1976 aided scholarship? In one significant way, it has. On 1 January 2003 tremendous amounts of unpublished material will enter the public domain. Scholarly resources that might otherwise have gone to investigating the copyright status of unpublished material can now be spent on interpreting and disseminating those

[2] Kenneth D. Crews has discussed the importance of privacy interests in many ostensibly copyright cases. See Kenneth D. Crews, *Fair Use of Unpublished Works: Burdens of Proof and the Integrity of Copyright*, ARIZ. ST. L.J. (1999).

resources. Most of the Civil War letters that were at the heart of the dispute will presumably enter the public domain, and the scholar then will be free to publish them with impunity, subject only to any publication restrictions the repository or the donors may have placed on the material.[3] This flowering of the public domain is potentially so important that Kenneth Crews has argued that scholars and archivists should refrain from publishing anything until 2003 in order not to jeopardize this transfer.[4]

In a fundamentally important way, however, the 1976 Act has been harmful to scholarship that relies on the use of unpublished materials. It has made unpublished materials subject to the same rules and procedures as material created for commercial exploitation. Most unpublished material, however, differs greatly from for-profit material in both its origin and in the expectation for commercial exploitation. The reasons why people write letters, or take family photographs, or prepare an oral history, are fundamentally different from those of an author or corporation that is interested in creating a best-selling novel or movie. The vast majority of the items in the nation's archives were created without any expectation of financial reward. The limited monopoly rights granted by copyright are irrelevant to the creation of most unpublished material – even though unpublished material then lives under a copyright regime that assumes that limited monopoly rights were an essential component in the creation of the material.

Because of the 1976 Act, the rules that have been created to protect those few published items of enduring economic value now also apply to the great mass of unpublished materials. Most notable is the impact of copyright term extension. It is hard to justify extending the term of copyright for published materials in the absence of any evidence that such an extension will encourage additional creativity on the part of authors. Copyright extension only matters for the very small number of copyrighted items that continue to have significant economic value long after they have been created. Because the rules for the copyright of unpublished materials are now the equivalent of published materials, a letter from my mother to me is treated the same as if it were Disney's Fantasia, even though they have nothing in common in authorship, motive, or distribution.

The potential impact of copyright extension on scholarship will be significant. Take, for example, the case of Charles Townsend Copeland (1860-1952), the great Harvard English professor whose students included Heywood Broun, T. S. Eliot, and Walter Lippman. Under the 1976 law, letters and early writings authored by Copeland during his formative period of intellectual development starting in the late 1870s were scheduled to enter the public domain on January 1, 2003. Under the new legislation, these documents will remain under control of Copeland's literary heirs until 2023. If the heirs choose to publish the documents, control over them could extend to December 31, 2047. Scholars would thus be denied the full use of these materials for over 160 years from the

[3] The last surviving Civil War veteran died in 1956; any letters he may have written home during the war will only enter the public domain on 1 January 2027. So even in 2003, 143 years after the end of the Civil War, the researcher must be careful.

[4] Kenneth D. Crews, *Do your manuscripts have a Y2K+3 problem?* LIBR. J. June 15 2000, at 38-40.

time of their creation. A similar situation exists with the papers of Clark Clifford. As a young man, Clifford was an assistant to the Naval Aide to the President during World War II. In the immediate postwar years, he served as Special Counsel to the President. Since he only died in 1998, his letters, diaries, and unpublished memoirs from this period will not be freely available for scholars to use until 2069, or 124 years after the end of World War II. This is comparable to having source material for the Civil War still protected by copyright until 1990. Do any of us really believe that the public interest is served if it takes more than a century for the source materials for the study of the Second World War to enter the public domain?

II. COPYRIGHT AND NEW TECHNOLOGIES

An apologist for our current copyright system might point out that the problem with my analysis so far is not with copyright law per se. The university press in my opening story, for example, could have followed the practice of at least a century of scholarship and published the letters without the author clearing permission. The risk of the press being sued for copyright infringement is, I think we would agree, small, though the resulting damages, including impoundment of published volumes, could be substantial. Is the problem not with the copyright regime, but with the courage of publishers? Why is a publisher that exists to serve scholarship so skittish about publishing scholarly work?

Part of the answer lies in the role new technologies play in making known the availability of unpublished works. Thanks to the Internet, it has become much easier to discover whether an unpublished, copyrighted, work has been published. Prior to the development of the Internet, an unpublished letter in a manuscript collection might have been published as part of a microfilm set. Many microfilm sets sell only in the double digits, and some sets sell less than ten copies. The likelihood that any individual copyright owner would discover that a letter had been published was small. Scholarly monographs in history and English often sell only in the hundreds of copies. Again, it is likely that heirs might not learn of the existence of a relative's letters even after publication.

If that same letter, however, is published as part of an archival web site or on a faculty member's pre-print server, the possibility of discovery – and subsequent legal action – go up dramatically. In an era of easy network publication, it is not surprising that archives and publishers have become more careful about following the explicit rules.

Take, for example, the case of the Calvin Coolidge papers at the Library of Congress. Twenty years ago the Library prepared and published a microfilm edition of the papers in the collection. The edition shared the same copyright difficulties that other presidential papers projects have faced: it was often hard to identify who was the current owner of the copyright in the different materials comprising the collections; even when the author was prominent, it was often hard to locate the current owner of the copyright; in many cases it was impossible to tell if the intellectual property rights in the works to be included in the collection belonged to the author, or if they were a work done for hire, and hence belonged to an employer. Unable to successfully solve this problem, the project did what

the other presidential projects have done: publish without securing permissions for every item in the collection.

Fast forward twenty years. As part of the very successful American Memory site, the Library of Congress decided to mount a digital collection relating to the Coolidge administration. Many of the items included in the collection were from the Coolidge papers that had earlier been microfilmed. For a digital publication, the Library could no longer rely on its earlier copyright assessment. Instead, the Library (in their own words) "exhaustively researched the contents of this collection to ascertain any possible legal rights embodied in the materials." [5] Lawyers from the National Digital Library Program within the Library worked with other library staff, including the staff of the Manuscript Division where the original items are held, in order to establish the copyright status of the items included on the web site. As we might expect, in spite of this effort, the library was unable to identify all of the possible rights holders in the materials in the collection. It therefore makes some of the material available under an assertion of fair use.

No significant change in the legal status of the unpublished material occurred between the publication of the microfilm edition and the publication of the digital version. It was instead a change in technology - the greater public accessibility of the digital version – that encouraged the Library of Congress to follow different procedures.

III. POSSIBLE SOLUTIONS

The National Digital Library Program at the Library of Congress is a multi-year, multi-million dollar initiative. It has its own staff of lawyers, ready access to the files of the Copyright Office, and can call on the Copyright Office for advice. No other library or archives program is in such a favorable position, and few scholars are interested in hiring intellectual property lawyers every time they wish to follow the scholarly norms of their profession by citing from unpublished works. "Exhaustively researching" the copyright status of an unpublished work is an unacceptable tax on the scholarly research process. Yet how else can researchers and archives use unpublished material with unknown copyright ownership to support education and scholarship prior to the eventual entrance of the material into the public domain without incurring massive copyright investigation expenses?

One possible solution would be to amend the copyright law to create rules for the reproduction, dissemination, and use of unpublished material that differ from the law governing materials created for commercial exploitation. An example of this already exists in the law. Normally a library would not be allowed to digitize and mount on the web for the use of the public a digitized copy of a work. To do so would interfere with the copyright owner's exclusive rights to copy and distribute a work. Section 108(h), however, allows libraries and archives to do precisely this (digitize and distribute copyrighted works) during the last twenty years of a work's copyright term. The work must be published and must not be subject to "normal commercial exploitation."

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[5] http://memory.loc.gov/ammem/coolhtml/ccres.html.

Amending this law to include unpublished material would go far towards reversing one of the unfortunate effects of copyright extension.

IV. COMPULSORY LICENSING OF "ORPHAN" WORKS

The Copyright Office has proposed a slightly different legislative solution. In testimony before Congress on the Copyright Term Extension Act, the Registrar of Copyrights noted that a longer copyright term might make it harder to identify copyright owners. At that time, she proposed that the use of a compulsory license permitting the use of copyrighted material without the consent of an undiscoverable copyright owner be investigated.[6]

The problem of copyrighted works of unknown ownership resurfaced in the Copyright Office's report on **Report on Copyright and Digital Distance Education,** prepared in response to a directive in the Digital Millennium Copyright Act. In the report, the Registrar of Copyright recognized a problem with the exploitation of what she termed "orphan works." In general the report takes the position that the exploitation of copyrighted works in distance education is best handled through negotiation between the copyright owner and the user. The report notes, however, that when:

> the owner of the work simply cannot be located, there is no opportunity to negotiate. Particularly because the problem of such "orphan works" may become more acute due to longer copyright terms and the expanded audience for older works made possible by digital technology, we believe that the time may be ripe for Congressional attention to this issue generally.[7]

As a solution to the problem of orphan works in distance education, the Registrar again proposed that the United States investigate the use of a compulsory license, in spite of the Copyright Office's long-standing opposition to the creation of new compulsory licenses. The model that intrigues them is that of Canada.[8] Canadian law stipulates that if the Copyright Board (a governmental body) is satisfied that an applicant has made reasonable efforts to locate the owner of the copyright and that the owner cannot be located, the Board may issue to the applicant a non-exclusive license upon terms and conditions that it deems appropriate. It also determines the amount of royalties, if any, that must be paid to use the work. The royalties are normally made directly to the copyright collective society that would represent the unlocatable copyright owner. The copyright owner may, not later than five years after the expiration of the license, collect the royalties or commence an action to recover them.[9]

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[6] *Copyright Term Extension: Continued Hearing on H.R. 989 before the Subcommittee on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104 Cong. (1995). (statement of Marybeth Peters, Register of Copyrights).

[7] U.S. COPYRIGHT OFFICE, REPORT ON COPYRIGHT AND DIGITAL DISTANCE EDUCATION: A REPORT OF THE REGISTRAR OF COPYR.GHT, 165 (1999), *available at* http://www.loc.gov/copyright/docs/de_rprt.pdf>

[8] *Id.* at 165-66.

[9] COPYRIGHT BOARD CANADA. UNLOCATABLE COPYRIGHT OWNERS: LICENCES ISSUED BY THE COPYRIGHT BOARD OF CANADA UNDER SECTION 77 OF THE COPYRIGHT ACT, *available at* http://www.cb-cda.gc.ca/owners/brochurecov-e.html.

The Registrar is to be applauded for noting that both copyright term extension and the use of new technologies exacerbates an existing problem, namely the scholarly exploitation of material of uncertain copyright ownership. Are compulsory licenses a possible solution? I see several potential problems with this approach

First, the Canadian law addresses only published material of uncertain copyright ownership; attempts to add unpublished material for consideration have failed. The Registrar in the report on distance education follows the Canadian model in addressing only published material whose copyright owner cannot be located. It is unclear whether the Registrar feels that a different set of rules should apply to unpublished material or if the concept of compulsory copyright licenses could be extended to unpublished material as well.

Second, the Canadian model provides as yet scant evidence for how such a system would work in the United States. Few items to date have received a compulsory license.

Third, the Canadian law requires that the person who wishes to use copyrighted published material must have made "reasonable efforts to locate the owner of the copyright," but does not specify what constitutes reasonable efforts.[10] The Canadian Copyright Board believes that a "reasonable effort" involves a "thorough search." They suggest several steps someone who wants to use a published item must take in order to determine that a copyright owner is unlocatable. They include: contacting the copyright collective societies that deal with the type of material in question; using the Internet to locate authors; contacting publishing houses, libraries, universities, museums and provincial departments of Education; and investigating inheritance records if the author is deceased. Only after this investigation has been made would the Copyright Board issue a non-exclusive license.

The Canadian Copyright Board's equation of "reasonable effort" with a "thorough search" imposes a real cost on researchers and libraries that may wish to use the published material. Some sense of the cost can be gained by examining the findings of the few projects that have undertaken extensive (if not thorough) copyright investigation. Duke University, for example, has a project to mount on the web for research purposes advertisements found in its J. Walter Thompson Company Competitive Advertisements Collection. The project, Ad*Access, gives researchers around the world online access to images and information for more than 7,000 advertisements printed primarily in U.S. newspapers and magazines between 1911 and 1955.[11] As part of the project, librarians at Duke University sought to secure permission from the firms represented in the ads, in the hope that they owned the copyright in the advertisements. Duke estimates that their costs for copyright investigation at $1.43 per ad for the 7,307 ads. At the same time, they

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[10] Copyright Act (R.S. 1985, c. C-42), sec. 77, http://canada.justice.gc.ca/en/laws/C-42/index.html.
[11] *See* http://scriptorium.lib.duke.edu/adaccess/.

actually only identified and contacted fewer than half of the firms represented in the ads; locating these harder-to-find companies would have greatly increased the per ad cost.[12]

The Refugee Studies Centre at the University of Oxford's International Development Centre has also found copyright clearance to be an expensive project. They are seeking to digitize and make available for researchers on the web their library of grey literature - material of an unpublished or semi-published nature – on forced migration. Most of the material dates from the 1980's, and copyright clearance has been a major problem. According to the directors of the project, "In the original estimates of timescales, costs, and deliverables for the project, it was never assumed that the copyright clearance process would take so long or cost us so much even though we don't actually pay anything to obtain rights to digitize." They estimate that copyright investigations cost £5-6 per document the first year, and have dropped to £2-3 per document subsequently. In only a few rare cases did they actually pay any fees to the copyright owner; the costs were just for investigating the copyright status of material that the authors, once contacted, were happy to let them use. While they do not specify how much it costs to digitize and make available each document, my experience would suggest that copyright investigation costs may represent 50% to 100% of the costs of making material available.[13]

Clearly a thorough search for a hard-to-locate copyright owner adds substantially to the research costs of a project. And in both the Duke and Oxford cases, the investigation was in some ways unnecessary: the copyright owners, when located, did not by and large object to their material being included and did not charge permission fees. This does not mean that an investigation into the copyright status of the works was not justified. It is important that historians, archives, and libraries, when they wish to use the actual expression in an unpublished copyrighted work, do not blindly impinge on the exclusive rights of the copyright owner. At the same time, however, the extent of investigation must be reasonable. The remainder of this paper is an effort to develop guidelines on establishing what constitutes reasonable investigation of the copyright ownership of an unpublished work.

V. BEST PRACTICES FOR COPYRIGHT INVESTIGATION

Any attempt to develop guidelines for the investigation of the copyright ownership of unpublished materials, with a goal of making those unpublished materials generally available to the public, must first recognize that not all unpublished material is the same. Some material, such as the Civil War letters cited at the beginning of this paper, were not written with publication or commercial interest in mind. The protections copyrights afford are in many ways incidental to their existence. A different situation arises with respect to material written by someone for whom literary endeavor is a source of income. Two recent cases make this distinction clear.

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[12] Lynn Pritcher, *Ad*Access: Seeking Copyright Permissions for a Digital Age*, D-LIB MAGAZINE (Feb. 2000), http://www.dlib.org/dlib/february00/pritcher/02pritcher.html.

[13] Mike Cave et al., *Copyright Clearance in the Refugee Studies Centre Digital Library Project*, RLG DIGINEWS (October 15, 2000).

This summer an unpublished Mark Twain story will appear in the *Atlantic Monthly*. First written in 1876 and offered to the *Atlantic Monthly* at that time, it appears now after a bidding war between the *New Yorker* and the *Atlantic*. The Foundation that owns the rights to Twain's works had sued in the 1940s to stop publication of the short story, but has agreed to this most recent initiative. The price was described as "nothing like six figures, but well above the high three figures."[14] The story would have entered the public domain on 1 January 2003, since Twain died in 1910, but now, with its publication, it will remain in copyright until 1 January 2048.

It seems entirely appropriate that Twain's copyright in the unpublished manuscript should be respected. Twain lived by his writing; his will created a trust that owned his copyrights for the benefit of his sole surviving child, Clara Clemens Samossoud; upon her death The Mark Twain Foundation was established to enable, among other things, mankind to appreciate and enjoy the works of Mark Twain; and his work, as we have seen, has continuing value.[15] While it is unfortunate that copyright in this manuscript will last for almost 140 years past Twain's death, it may be appropriate: Twain, after all, was a firm believer in perpetual copyright.

A more recent example of the continuing financial importance of unpublished works to authors whose livelihood depended on their creativity concerns the case of old-time radio shows. According to a recent article in the Los Angeles *Times*, the copyright in these shows has become a source of conflict. For years, private collectors recorded, saved, and traded programs that were recorded by radio stations but then discarded. Most of the scripts for shows were not registered for copyright, and so exist as unpublished works – meaning they are copyrighted by either the scriptwriter who wrote them or by their employer until well into the next century. One businessman has made a practice of licensing the radio shows from the copyright owners and then selling the shows on tape or in radio syndication. Finding out who owns the copyright in the shows, the article notes, can require costly legal research because there is no central record of ownership.[16] Nevertheless, it seems fair. The authors of the works lived by their creative skills; it seems fitting they should be able to exploit the product of their labor.

In the case of Mark Twain, radio dramas, and other literary creations, therefore, extensive copyright investigation seems appropriate and fair. A reasonableness test might include the following:

- Search *WATCH: Writers, Artists, and Their Copyright Holders*, an online file created by the Harry Ransom Humanities Research Center at The University of Texas at Austin and the University of Reading Library, Reading, England, for

[14] Steve Grant, *To Twain Literary Edifice, Add A Story Newly Uncovered Mystery, Written In 1876, Will Be Published This Summer*, HARTFORD COURANT, 23 January 2001.

[15] http://www.buffalolib.org/twain.twain.foundation.html.

[16] Erik Smith, *Web Battle is Latest Episode in Old-Time Radio Serials*, LOS ANGELES TIMES, Feb. 16, 2001, at 16.

possible authors.[17] The WATCH file contains the names and addresses of copyright holders or contact persons for authors and artists whose archives are housed, in whole or in part, in libraries and archives in North America and the United Kingdom.

- Follow the procedures outlined in the Copyright Office's "Circular R22, "How to Investigate the Copyright Status of a Work." Because copyright in unpublished material is not normally registered, this is likely to be a dry hole for most authors. If the author in question has published, however, investigation of the copyright status of his or her published works may lead to the identification of the current copyright holder. In the case of a published author, it may be appropriate to search this file.
- Follow the relevant procedures outlined in the pamphlet "Locating US Copyright Holders" published by the Literary Rights Committee of the Rare Books and Manuscripts Section of the American Library Association.[18] Among the recommended paths include contacting publishers, asking other scholars, searching reference sources, and, in the case of artists, checking with the appropriate artist rights society.

The same rules for copyright investigation need not apply to the ostensibly private unpublished papers of public officials. They are unlikely to appear in the WATCH file, and records for their unpublished work are not likely to be found in the records of the Copyright Office, again for the reasons I have already outlined. Yet the public would seem to have an even greater interest in having access to the papers of public officials. Even Judge Story in the famous case of Folsom v. Marsh seemed to indicate that at times public interest might supercede private concern. He wrote that based on "the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers."[19]

A modern manuscript collection for a public official can consist of hundreds, if not thousands, of correspondents. Often there is more material created by people writing to the official then there is material from the official himself or herself. Before any project to publish papers of the public figure can proceed, some preliminary investigation of the current copyright ownership of at least the documents authored by the official should be undertaken. The best place to start is in the papers and files that accompanied the transfer of the records. Attention should be paid to the bulk dates of the material as well. Older material is likely to present fewer problems. Joseph L. Sax in his recent book on public interest in private property, ***Playing Darts with a Rembrandt***, suggests that for deed-imposed prohibitions on access, a time limit is in order. He suggests that for letters "one might choose the later date of the joint lives of the writer and the recipient, but setting a

[17] http://www.watch-file.com.
[18] http://www.hrc.utexas.edu/watch/locating.html.
[19] Folsom v. Marsh, 9 F.Cas. 342 (C.C.D.. Mass. 1841) (No. 4,901).

minimum of twenty-five years and a maximum of fifty years from the date of the letter in question."[20]

Sax's notion could as easily be applied to the publication of materials when it is not possible to identify easily the current copyright owner. The Public Record Office automatically declassifies everything after thirty years; a similar executive order issued by the White House established automatic declassification for most government documents twenty-five years after they are created. We need a similar time frame in the copyright law that would allow historians, librarians and archivists to distribute unpublished material twenty-five or fifty years after creation, unless the material is subject to normal commercial exploitation.

The papers of purely private individuals present the greatest challenge for copyright investigation, but also the least risk. It can be almost impossible to determine who might own the copyright in a letter with a chili recipe that a used car dealer sent to General Eisenhower in 1946, and yet the Papers of Dwight David Eisenhower project at Johns Hopkins University might wish to include that letter in the printed volume. It may be enough to check some standard reference books to see if the individual is still alive. The phone book for the local city (unless the person has a very common name) and a check in a standard reference tool such as *Biography and Genealogy Master Index* may be enough to establish the relative anonymity of the individual. New services, such as ArrangeOnline.com, a national obituary index endorsed by the National Funeral Directors Association, may make it ever easier to determine whether and when an obscure individual died.

Again, care should be taken whenever private papers are to be published, either in a scholarly monograph or on the web, before they have entered the public domain, and without the explicit permission of the copyright holder. As Joseph Sax notes, "No facile claims of history's right to know should conceal the real costs that unmitigated probing of private matters can engender."[21] With time, however, the scandals of an early age dim in importance, and it may be possible to publish items that would be risky now.

Privacy is not the only consideration at work with purely private correspondence. Take, for example, the case of Robert Sneden. Individual civil war letters may have little economic value, but Sneden's memoir from the same period recently became a publishing sensation. Simon & Schuster's Free Press paid $355,000 two years ago for the publishing rights to *Eye of the Storm*, an abridged version of this Civil War soldier and artist's unpublished memoir. The Virginia Historical Society had purchased the material from a private collector and from the grandson of Sneden's sister for $200,000.[22] While newspaper accounts make no mention of the copyrights in the material, one assumes that the Virginia Historical Society (VHS) obtained them as well from all relevant heirs.

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[20] Joseph L. Sax, PLAYING DARTS WITH A REMBRANDT 128 (1999). Ann Arbor, Michigan: The University of Michigan Press, 1999: p. 128.

[21] *Id.* at 142.

[22] Ken Ringle, *A Brush With History; Robert Sneden's Civil War Memoir Was as Unknown As Its Author. But Now It's a Different Story*, WASH. POST, December 20, 2000, at C01.

Consider for a moment if rather than purchasing this material, the Virginia Historical Society had instead just found it in its collections and wished to mount it on display on a web page. The effort to locate Sneden's heirs was difficult and in the end required a good bit of luck. Would the VHS have been justified in giving up after a time and mounting the material on its own, without the copyright owner's permission? Sneden was not a public figure, and his memoirs and drawings were not intended to be a source of support for his children and grandchildren; they are purely private. Could they have been made available?

I would hope the VHS could have made the Sneden material available as a service to teaching, scholarship, and research even if the material was still technically copyrighted and they did not have permission to do so. A requirement would be that they did this for purely non-profit reasons. Furthermore, a disclaimer similar to the one used by the Library of Congress on its web site should be included with any materials when they have been made available without the explicit permission of the copyright holder. The Library says:

> Despite extensive research, the Library has been unable to identify all possible rights holders in the materials in this collection. Thus, some of the materials provided here online are made available under an assertion of fair use (17 U.S.C. 107). Therefore, we stress that this collection and the materials contained therein are provided strictly for noncommercial educational and research purposes. Again, responsibility for making an independent legal assessment and independently securing any necessary permissions ultimately rests with persons desiring to use particular items in the context of the intended use.
>
> The Library of Congress would like to learn more about these materials and would like to hear from individuals or institutions that have any additional information.

In the Sneden case, the VHS has chosen not to make the materials available strictly for noncommercial educational and research use, but instead are trying to exploit financially the Sneden documents. A commercial web site separate from the museum has been established.[23] The site includes a Sneden store with Sneden note cards, Sneden prints, and a Sneden day planner. Clearly the commercialization of the material requires more thorough investigation of the copyright status of the material than would merely making it available for research use.

VI. IS A LICENSE FEE NECESSARY?

In the preceding section of the paper, I have tried to suggest some of the elements that would comprise a response to the Canadian Copyright Board's requirement that a reasonable search for unlocatable copyright owners be conducted. I have tried to suggest that the definition of "reasonable" depends in part on the nature of the material (whether

[23] *The Sneden Civil War Collection,* http://www.sneden.com

it was created by someone who made his living as an author, or by a public figure, or by a private citizen) and the purpose to which it is put (commercial or non-commercial). Part of the solution may lie in the creation of a period after which libraries and historians could distribute unpublished material for non-commercial use. Further discussion needs to take place between scholars, librarians, and copyright experts as to what constitutes reasonable guidelines on the use of unpublished material,

If guidelines on the use of unpublished material for scholarly purposes can be reached, I question whether a compulsory license should also be sought. Perhaps it would be useful for the individual who wants to exploit an unpublished work commercially, and makes a good faith effort to locate a copyright owner, but to no avail. For non-commercial use, however, fairness can only be assured by establishing guidelines on an appropriate level of effort to locate unknown copyright owners.