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COPYRIGHT IN LETTERS UNPUBLISHED AT WRITER'S DEATH

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In *The American Archivist* for July 1965[1] Mr H. B. Cox, a former archivist, outlines the American law on the above subject; he indicates how inconvenient it is from the point of view of archivists and historical scholars, and discusses the numerous proposals for changing that law which have been put before the Congress of the U.S.A. In Australia, as in the U.S.A., copyright is a subject of federal power and is governed by federal statutes; the Australian law, as indicated later, is also under review and likely to be changed within the next year or so, but since the date of the change is still uncertain and since this particular subject may not be affected at all, a note on the Australian situation as it now exists may be useful.

The present Australian law is contained in the Commonwealth *Copyright Act* 1912-1950, which adopts (and sets out in a schedule) the U.K. *Copyright Act* 1911.[2] This sets up a code on the subject which replaces the earlier common law of copyright and displaces any earlier State legislation on the subject. The position with respect to letters is not explicitly mentioned but judicial decisions and accepted commentaries put beyond doubt the following propositions.[3]

A letter, however trivial, is a "literary work" for the purpose of the Act.

The writer of the letter is the author of that work and accordingly *prima facie* the owner of the copyright.

The sending of the letter to its addressee does not, *prima facie,* transfer the copyright to the latter.

The sending of the letter does not in itself constitute publication. Even if the letter is sent to a newspaper for publication, copyright remains with the writer; if the letter is actually published by the newspaper, then it becomes a published work whose copyright duration is life of the author and 50 years thereafter.

If a letter is not published in a newspaper, or in some other way by the writer or someone on his assignment or licence during the

writer's life, then at his death it will become a posthumous unpublished work, and copyright will then exist in the ownership of the writer's personal representatives and successors in title until the letter is published by them, or with their consent, and for a period of 50 years thereafter.

Hence copyright in posthumous unpublished letters is potentially capable of lasting to infinity. It will so last if the person legally entitled to publish never does so.

This position is substantially the same as that in the U.S.A. and it is obviously very inconvenient for historical scholars if, as frequently happens, the personal representatives and legatees or next of kin of a person of historical importance refuse to publish or allow publication of posthumous unpublished letters or other use of them for historical research.

It is also a galling situation for the recipients of such letters who may have taken the trouble to preserve them. Such addressees undoubtedly have property in the actual document of letters and are entitled to keep them. The copyright law prevents addressees from publishing such letters and it also prevents them and anybody to whom they show the letter from publishing substantial extracts or a paraphrase so close as to be "colourable imitation" of a letter. The copyright law does not of itself prevent addressees from using a letter for research purposes, or from showing it to other persons for similar purposes. Nor would an account of what was said in a letter, in a work by the addressee or anyone he allows to read the letter, amount to a breach of copyright so long as it was in a substantially different form of words from the letter itself.

But there is an old doctrine independent of copyright law, which probably still exists, under which the writer of a letter and after his death his personal representatives can restrain a use of the letter which amounts to "breach of confidence". Whether this would be applied in favour of the personal representatives of a deceased person some years after the death of that person, or whether it would apply in favour of legatees or next of kin as well, has never been decided. There are arguments favouring a view that the "confidentiality" of letters should in most cases evaporate with the passage of time. However, since the addressees of letters are not usually anxious to buy into litigation with the representatives of deceased celebrities concerning such questions, this aspect of the matter is quite likely to remain without authority; having regard to the danger, a careful lawyer could only advise an addressee to refrain from using posthumous unpublished letters or allowing others to use them, even in a way which does not infringe copyright, unless the persons legally entitled to the property in the document consent.

The Commonwealth *Copyright Act* is likely to be repealed soon and replaced with a new Act. The main single reason for doing this is to enable Australia to ratify the Universal Copyright Convention of 1952; this will give Australian copyright owners much better international protection, and in particular adequate protection in the U.S.A., where at present Australian authors are at a great disadvantage. Many other incidental questions will be dealt with; indeed, it is unfortunate that so many pressure groups have leaped in to try to better their particular situation, since the inability of the Commonwealth government to make policy decisions on these miscellaneous questions and the difficulties which the draftsmen have found in giving effect to the policy decisions have been a main cause for the shameful delay in completing this legislation. It had been hoped that the draft Bill would be tabled in 1966, but it now seems unlikely that this will happen until 1967.

In any event, so far as this writer knows, there is no intention of enacting any new provision on the matter now under consideration. No recommendation to this effect was made by the Attorney-General's Committee on the Copyright Law of the Commonwealth which reported on 22 December 1959. It is believed that no organization has made representations concerning this particular matter; and indeed, as Mr Cox's article shows, it would not be at all easy to decide on a new policy. What is involved is a fundamental clash between the right of privacy in which even celebrated persons have a limited share, and the interests of historians and their allies, the archivists. One difficulty is that probably it would be impossible to have a provision for the benefit solely of "reputable historians"; the daily press, the Sunday press, the sensational press, and "disreputable historians", would necessarily share in the benefits of a new law designed to procure the disclosure of unpublished letters. Some compromise would be essential and it is very difficult to know where to draw the line.

Yet the possibility of a copyright continuing forever was probably never contemplated by the draftsman of the *Copyright Act*, and there is much to be said for the view that at some time after the death of a letter writer, copyright in the letter (whether then published or unpublished) should cease. My own suggestion is that the only substantial interest to be protected after a letter writer's death is the legitimate feelings of close relatives then living. Hence I would support a provision which terminated the copyright in unpublished letters at the death of any surviving parent, widower or widow and any child, which ever event occurs last. Perhaps the views not only of children but grandchildren should be considered? Or at least grandchildren living at the letter writer's death. What about brothers and sisters? But I would very much dislike to see the present proposed Bill further delayed while matters of this sort are argued and decided at Ministerial level.

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1. Vol. 28, p. 381.
2. Repealed as to the U.K. by the U.K. *Copyright Act* 1956, but kept in force so far as it operates in Australia.
3. See *Law of Copyright*, Copinger and James, 8th ed., pp. 31, 85-6. Later editions deal with the U.K. Act of 1956 and so are not relevant to present Australian law.

LETTER TO THE EDITOR

The Editor,

Archives & Manuscripts.

Dear Sir,

I read with considerable interest in the last issue of *Archives and Manuscripts* an article by Mr Strahan on Melbourne University Archives; having visited the repository and met Mr Strahan I am appreciative of the notable contribution which he and his staff have made in collecting and preserving business archives in Australia.

There are, however, several points in the article which by implication, particularly in the case of those who are unfamiliar with the Australian scene, may give readers an incorrect picture of our archival institutions; unfortunately, also, Mr Strahan has made a number of generalisations which indicate that he is not aware of what is being done in other parts of Australia.

There is the statement that University archivists have realised that it is unsatisfactory to sit back and wait for material to come to the repository. No archivist worth his salt would do this, and from the back files of *Archives*