

COPYRIGHT IN LETTERS NOT PUBLISHED AT THE AUTHOR'S DEATH

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In *Archives and Manuscripts* vol. 3, p. 27 (November 1966), the present writer published a note on the above topic in which the opinion was ventured that the projected new Commonwealth copyright legislation, if duly enacted, would probably not contain any provisions directly relevant to this topic.

The *Copyright Act* then in force in the Commonwealth was the U.K. Act of 1911 adopted for Australia by the Commonwealth Copyright Act, 1912-1963. In 1968, the Commonwealth enacted a new *Copyright Act* (No 63 of 1968) which repealed all the previous Commonwealth Acts on this subject and eliminated for Australian purposes both the U.K. Act of 1911 and (so far as relevant) the U.K. Act of 1956 (which completely restated the law in relation to the U.K. and colonies).

The forecast about letters turned out to be correct; the new Commonwealth Act, which constitutes an almost complete code of law in copyright matters, and for the first time provides this law with an exclusively Australian basis of operation, has no provisions dealing directly and explicitly with copyright in letters. (Neither does the U.K. Act of 1956). The general principles of the new code are substantially the same as those operating under the previous law. In particular a letter is clearly a "literary work" under the definitions of s. 10, copyright in a letter vests in the writer of a letter as he writes it under s. 32 (1) and s. 35 (2), and that copyright has indefinite duration as long as the letter is unpublished: s. 33. The Act, like the previous law, makes provision in s. 35 for original ownership of copyright by employers of an author. This section will rarely apply to the case of private letters; its main importance is in relation to business and official letters, copyright in which will vest in the employing firm, corporation, government etc. However, this possible shift in the original ownership of copyright from author to employer does not affect the principle that so long as the letter is unpublished the copyright has indefinite duration; the transmission of a letter from writer to addressee is not "publication".

Similarly, there is nothing in the new Act to affect the principle that the ownership of the *document* containing a letter belongs to the recipient, who can use the letter for any personal purposes such as research and study and (subject to a rather uncertain principle about breach of confidence) can make it available to other persons for similar purposes. The recipient, however, cannot himself publish nor authorise others to publish the contents of the letter, either verbatim or in substance. Thus the general position as to letters and in particular the position of letters unpublished at the death of their writer remains unchanged. The only new provisions in the Act having some bearing on problems raised in the previous note are ss. 49, 50, 51 and 52.

S. 49 allows libraries not established or conducted for profit (i.e. generally

public libraries) to copy various kinds of copyright “works” and supply the copy to persons who *themselves* wish to use the material for “research or private study” and for no other purpose; only one copy may be supplied and (except where a Member of Parliament is concerned) at least the cost of making the copy must be charged. S. 50 authorises the making of copies by any librarian for the purposes of supplying those copies to another library. The chief difficulty about s. 49 is that except in the case of articles contained in “a periodical publication”, the section permits copying only of a “reasonable portion of the work” – not the whole of the work. It is unlikely that the draftsmen devoted any consideration to the special problem of letters, but it is quite clear that generally speaking a letter will not be an article or part of an article in a periodical publication under s. 49 (1.), and so can only be a “literary work” coming under sub-section (2.) and subject to the limitation under sub-section (5.) as to the amount which can be copied. That is, the whole letter may not be copied. Under s. 50, a copy of the *whole or more than a reasonable part* of a non-periodical work can be supplied from library to library only if the librarian doing the copying does *not* know the name and address of the copyright owner and cannot reasonably ascertain it; the implication is that otherwise consent of the copyright owner must be obtained.

S. 51 authorises the copying of unpublished works which are kept in libraries and open to public inspection, where the work was written at least 75 years previously and the author has been dead at least 50 years. S. 52 permits *publication* under certain circumstances of works coming under s. 51. These two sections will eventually facilitate the use and publication of letters unpublished at death of writer, but only where they find their way into the possession of libraries. Otherwise the impasse pointed out in the previous note will continue to exist in the case of unpublished posthumous letters. Copyright will be controlled, generally speaking, by the legal representatives of the writer, but property in the actual document will be controlled by the legal representatives of the recipient; the cooperation of both is likely to be needed in order to obtain publication of the letters. However, only the “document owner” needs to consent to the use of the letter for purposes of study and research; if the writer kept a copy of the letter, now controlled by his legal representatives, then they can give all the necessary consents in relation to the use of that copy – for study and research, or for publication in full, whatever the views of the recipient or his legal representatives.

The Editor was kind enough to mention to me the facts of a recent exchange between two Australian libraries, and I have to some extent embroidered and to some extent simplified these in order to produce the following illustrative case. In 1940, X, a former Australian State Premier, died and left all his property to his son Y; included in this was a quantity of papers relating to his official career, and Y deposited these with the A library in Sydney. The B public library in Perth asked for a microfilm of the papers. The A library decided, correctly, that since there was no question of a periodical and the request was for the whole of the papers, the case came under s. 50 and some investigation had to be made into the question of copyright ownership and consent obtained from the owner. Since Y was still alive, the A library suggested to the B library that the latter should obtain the consent of Y. Now, this course was quite appropriate in relation to one and only one class of document in the papers – namely copies of private letters written by the late X to other people. It was probable that as to a good many other papers, copyright was now vested in the government of the State of which X had been Premier; this would include copies of official letters, interoffice memoranda con-

cerning his official activities and even personal memoranda which he had written in relation to his position as Premier. Probably the papers also contained letters written to X or to the government by other persons; some were probably written in the course of the employment of the writer by other business or government bodies, in which case the latter would own the copyright in the letters so written, while others might be personal letters in which case it was necessary to inquire as to the writers – were they alive or dead, and if dead who was now entitled to their copyrights? In cases of this sort, it is unfortunately not possible to treat a collection of papers as if they were a single “work” controlled by the person who collected them or his legal representative. Each document has to be considered separately, and if copying of the whole or the greater part of a particular document is required, then the copyright ownership of that particular document has to be investigated; in such cases, if reasonable investigation cannot discover the name and address of the copyright owner it is safe to proceed under s. 50, but the search can lead in many directions.