



# Ownership of Local Historical Materials

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THE LEGAL OWNERSHIP of historical documents is elusive. My discussion will be reminiscent of the Irish constable on point duty (we say "traffic cop") whom I asked how to get to a certain village. He said, "Ye go ahead four miles. Ye'll see a church. Take no note of it. Go ahead three miles. Ye'll see a castle. Take no note of it."

Old letters are the raw material of history. Most of the attics in America have gone unfishd for them. Local libraries should collect them. I am envious of the piscatorial delights that await all of you and the incalculable contributions you can make to American history. But when you have caught your fish, who owns it? I can give you the answer, but take no note of it. Legal title to the piece of paper was originally in the recipient, but legal title to the literary content of the letter was in the writer. And this even though the writer of the letter was illiterate. The writer could have prevented the recipient from publishing it. The recipient could have destroyed it. He could have sold it, but the buyer would have had no right to publish it without the consent of the writer.

However, except in the rarest case, all this is changed with the lapse of time. If you caught your fish 100 years after the death of both the writer and the recipient, their respective titles are scattered into infinity. Let us say that the writer died leaving four children. If he had a will, title may have passed to his residuary legatee. In the absence of a will, title passed to his four children. If none of them left a will, their titles passed to their respective heirs and so on ad infinitum. Except in an unusual case, no one now alive can prevent you from publishing this ancient letter nor hold you accountable in any way, if you do. Of course, the writer, in his lifetime or by his will, may have transferred all of his literary properties to an assignee who has preserved

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the title for the 100 years that have elapsed. It is reported that title to Mark Twain's letters has been preserved in this way. What I have said with respect to the title of the writer of the letter applies also to the recipient's title. In practically every instance no one can prevent the possessor of such a letter from giving it to you, and no one can prevent you from publishing it. Furthermore, the public interest is emphatically in favor of throwing all possible light on our history.

Of course, contemporary letters from persons now living or who have recently died stand in a different situation. Until a letter is at least twenty-five years old, it is rarely regarded as historical material. You may accept a recent letter from the recipient or the possessor, but you should not publish it without the consent of the writer or his heirs, and letters in an estate of a deceased person require the consent of the proper heirs for complete legal transfer to you.

Do I hear someone ask, "What about the right of privacy? Suppose the letters disclose private affairs of someone other than the writer?" In 1890, Louis D. Brandeis and Samuel D. Warren, brilliant young lawyers, moved by the agony of a friend threatened with a scandal, published in the *Harvard Law Review* an article suggesting the existence of a right not to have one's private affairs publicized.<sup>1</sup> They based it largely on the ancient right of an individual not to have his letters or pictures published without his consent. A few states adopted this view by court decision or by statute, but nearly fifty years later an eminent authority in this field publicly regretted that the campaign to have such a right recognized had "almost completely failed."<sup>2</sup> It had come into conflict with the constitutional liberty-of-the-press and the press had prevailed. In 1952 an Appellate Court decision in Illinois asserted the existence of such a right,<sup>3</sup> but a few years later the same court had to limit the decision to the rule that a private person could prevent the publication of his picture in commercial advertising<sup>4</sup>—a rule recognized long before anyone had used the term "right of privacy." Again I must advise you, "Take no note of it."

But suppose the big fish that you hook in someone's attic is a letter written by a public official in the course of his duty. Do not the public authorities have a paramount right to that letter? On that subject recent litigation throws revealing light.

In 1953 a granddaughter of General John Henry Hammond went to St. Paul to dispose of the contents of a house long occupied by his daughter who had recently died. An old desk in the attic appeared

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to contain ancient papers, and the granddaughter called the Minnesota Historical Society whose curator of manuscripts came to look at them. The General's granddaughter told the curator to select anything of historical interest that the Society might want. General Hammond had been an officer in the Civil War, and the curator returned to the Society with some 11,000 papers. Two days later the curator found among them 67 papers which proved to be original records of the Lewis and Clark expedition made some 150 years before. Most of these were in the handwriting of Captain William Clark, though a few contained notations by Meriwether Lewis. The executor of General Hammond's widow then brought a suit to quiet title to these papers. The United States secured leave to intervene and claimed a paramount title to the Lewis and Clark papers as documents made in the course of duty by an officer of the United States. A three-day trial ensued in which several experts testified. President Jefferson in his written instructions to Meriwether Lewis had explicitly ordered him to keep records such as these. But these were rough notes or work sheets from which the official record, made in pursuance of Jefferson's directions, had been compiled. These notes also contained some personal notations of Captain Clark not included in the official record.

How did General Hammond get possession of them? The government offered a plausible speculation. General Hammond in 1878, on government orders, had closed up the office of the General Superintendent of Indian Affairs at Lawrence, Kansas. As directed, he shipped the books and other property there to the Commissioner of Indian Affairs, describing them as material accumulated in St. Louis, Atchison, etc. These included a map which Lewis and Clark had with them on their expedition. Clark had been Superintendent of Indian Affairs in St. Louis and Governor of Missouri Territory.

The court rejected the government's claim. These papers had been for seventy-five years in the possession of the Hammond family and possession raises a presumption of ownership. Other notes of Clark, more official than these, had been in possession of Clark's heirs for fifty years, had been published, and the government had made no claim to them. Jefferson's instructions did not embrace papers such as these rough notes. If General Clark wilfully abandoned these papers, or forgot them, or turned them over to others, this would not enhance the government's claim to title if no such title existed when they were in Clark's hands. The litigation terminated five years later when the Court of Appeals affirmed the District Court.<sup>5</sup> By this time all of the

Hammond descendants had assigned their interest to one of their number and the historical society had withdrawn its claim of a gift, reserving only its lien for expenses incurred in organizing and preserving them.

Another recent litigation throws more light on the ownership of literary productions by government officers. Vice Admiral Hyman G. Rickover had delivered twenty-three speeches on such subjects as atomic submarines and the American system of education. A publisher asked leave to quote from them. The Admiral denied permission since another publisher was about to publish them. The first publisher then filed suit contending that since the speeches were an outgrowth of Rickover's governmental activities and were in part prepared on government time with the aid of government facilities, the Admiral had no literary property in them and might not secure a copyright on them. Both the trial court and the Court of Appeals held that a government officer did have private literary property in such speeches as these.<sup>6</sup> The trial court cited as precedents Gideon Welles' diary, Harold L. Ickes' diary, and Admiral Mahan's famous book, *The Influence of Sea Power Upon History*. Admiral Rickover had mimeographed the speeches and distributed them to the press and to the organizations sponsoring his speeches, and it was argued that by this publication he had lost any literary property that he might have had, even though he had marked some of the mimeographed copies as copyrighted. The trial court held that the Admiral had not lost his literary property by this limited publication, but the Court of Appeals held that by such publication he might have destroyed his literary property in the speeches, and reversed the case for further evidence on this point. The Supreme Court, after granting an appeal, held that the record was insufficient for a determination and sent the case back to the trial court.<sup>7</sup> Again I advise, "take no note of it."

A question that frequently arises for librarians is the extent to which copyrighted books may be quoted without infringing the copyright. The usual rule of thumb of leading publishers is that a quotation of fifty words or more of prose requires the consent of the copyright owner. Even then, however, publishers usually suggest to an author that his book will be more readable if he will paraphrase the quoted portion, perhaps quoting only the three or four crucial words.

With the recently discovered methods of reproducing books in great numbers from old books without resetting the type, it may be anticipated that librarians will be asked to furnish rare old local his-

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tories for this purpose. Usually in such a case either the twenty-eight years of the copyright's original life or the additional twenty-eight years of its extended life will have expired, and a librarian will render a service to students of history by permitting its reproduction. But if a copyright still exists, a librarian might incur liability for loaning the book, knowing that a borrower intended to reproduce it in this way. It has been held that the owner of a plate from which a picture could be reproduced incurred such a liability.<sup>8</sup>

### *References*

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