

## Recent Changes to the Copyright Law: Copyright Term Extension

Peter B. Hirtle<sup>1</sup>  
Member, SAA Council

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In the closing days of this past legislative session, the 105<sup>th</sup> Congress passed and the President signed a number of bills that have greatly altered the copyright landscape. The most important of these bills for archivists is the Sonny Bono Copyright Term Extension Act, signed into law on 27 October 1998 as Public Law No. 105-298. This report addresses the important changes embodied in PL 105-298; future reports will address other recent copyright actions.

There are a number of reasons why archivists should be interested in understanding the current structure of the copyright law. For one, the ability to understand and explain copyright is one of our professional obligations. The “ALA-SAA Joint Statement on Access: Guidelines for Access to Original Research Materials” <http://www.archivists.org/governance/resolutions/alasaa.html> notes that it is the researcher’s (not the repository’s) responsibility to satisfy any copyright regulations when copying or using materials found in collections, but adds: “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.” In order to be able to meet this obligation, it is important that archivists understand copyright law. Furthermore, violation of copyright can result in financial or even criminal penalties. It is incumbent that we understand those risks in order to help protect our institutions and ourselves. Finally, in the past most reproductions in archives were made at the request of and for researchers. Today, however, many archives are interested in publishing archival materials directly on the Web. In effect, archives have themselves become users of materials, and must meet the same obligation to satisfy copyright regulations that formerly were the responsibility of researchers.

PL 105-298 affects directly the copyright status of unpublished material. The law consists of two titles. The second title exempts some food service and drinking establishments from music licensing requirements. Archives that have established cafes or restaurants in their facilities may be interested in the ramifications of this title, but here I want to focus on the first title in PL 105-298. It addresses how long copyright endures, and adds a new exemption for libraries and archives. To understand how the term of

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<sup>1</sup> The author is not a lawyer, and the information in this report should not be taken as legal advice. While the author has sought to ensure that the information in this report is accurate, copyright law is complicated, and a brief overview such as this cannot reflect the deep and technical details of the law.

copyright has changed, however, it is necessary to first review the copyright terms in effect until October.

### **Copyright Term Prior to 1998**

Prior to the passage of the Copyright Act of 1976, copyright in unpublished materials was governed by common, not Federal, law, and the term of copyright was perpetual. In most cases as soon as a work was fixed (in writing, or as a photograph, for example), it was copyrighted. One important exception to this principle are works authored by Federal government employees. They are, by law, part of the public domain. For most other unpublished works, however, the only sure way to enter the public domain was to be published. With publication, Federal statutory copyright protection began and would eventually expire.

The copyright law passed in 1976 (and which became effective in 1978) ended perpetual common-law copyrights and replaced them with Federal statutory copyrights. At the same time the 1976 law set for most works a copyright term of life of the author<sup>2</sup> plus 50 years or until 31 December 2002, whichever was longer. The term for anonymous, pseudonymous, and corporate works was set at 75 years. This meant that the unpublished personal papers of George Washington or Abraham Lincoln (which were protected by common law copyright when written and which gained statutory protection under the 1976 law) would become part of the public domain on 1 January 2003 (since each author had died more than 50 years before this date).

Why is the copyright status of unpublished works important? The law reserves to the copyright owner certain rights, including the right to reproduce, distribute, or prepare derivatives of the work. By providing to authors a limited monopoly over the use of their works, the copyright law seeks to encourage creativity. Federal law provides for stiff penalties for infringement of the rights reserved to the copyright owner. At the same time, copyright law recognizes that the public has an interest in using, learning from, and building on the work of others, and so provides several limitations on the rights of copyright owners. These include provisions for limited copying by libraries and archives, and for “fair use” of copyrighted material. Thus while the law provides copyright owners the exclusive monopoly to reproduce copyrighted material, this monopoly right can be put aside if it is in the best interests of the public.

For archivists and researchers, the biggest challenge has been to identify the copyright owner of a work in the archives. Who among the many descendants George Washington or Abraham Lincoln, for example, have a share in their respective copyrights? And for the myriad of lesser-known figures, how could archivists ever determine who actually owned the rights in the materials (or even when they died)? The bulk of the records in archives are “orphan” works. Their copyright is owned by someone, but identifying that

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<sup>2</sup> While the copyright law speaks of “authors,” the term applies to the creators of non-textual material as well, such as a photographer or sculptor.

someone is an almost impossible task. The one consolation for archivists was that at least a large portion of the material in archives - specifically the material from authors who died before 1953 - was going to enter the public domain on 1 January 2003. Many archivists have been anticipating the “public domain party” in four years that would remove any ambiguity about the copyright status of much archival material.

### **1998 Changes to Copyright Term**

The Sonny Bono Copyright Term Extension Act modifies the 1976 law in two important ways: by changing the dates when copyrights expire, and by introducing a new limitation limited to library and archives on the rights of copyright owners. Let’s consider each of these in turn.

First, the good news. Archivists can still have a public domain party on New Years Eve in 2002; 1 January 2003 is still the date when many unpublished works will enter the public domain.<sup>3</sup>

What has changed is the length of the term of copyright. Ostensibly to bring American copyright into uniformity with the term originally implemented in Germany and subsequently adopted by the rest of the European Union, the length of the basic copyright term has been increased by twenty years.<sup>4</sup> The term of most copyrights is now life of the author plus 70 years rather than life of the author plus 50 years. That means the unpublished personal works of authors who died in 1932 or earlier, including Washington, Lincoln, and many of the less-prominent Americans that fill our archives, will lose their copyright and become part of the public domain on 1 January 2003. On 1 January 2004 the unpublished works of authors who died in 1933 will enter the public domain; on 1 January 2005 the unpublished works of authors who died in 1934 will lose their limited monopoly, and so on.

Note that the above dates apply to **unpublished** works. A different set of rules applies to **published** works. The date when published works enter the public domain is

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<sup>3</sup> This is an important change from the original copyright term extension bill introduced in 1995 but never passed that would have moved the date when works enter the public domain to 2013.

<sup>4</sup> In spite of the stated intention to bring American copyright law in line with European practice, the two still differ in significant ways, to the benefit of American corporate interests. It is well to recall the words of Stephen Breyer (now a Supreme Court Justice) on an earlier attempt to extend the copyright term:

This continual expansion [of copyright term] is not surprising. Holders of copyrights about to expire have a financial interest in urging extension. Authors and publishers can lead a legislature to focus on the production and ‘moral’ arguments for protection, while no single interest group is sufficiently affected to focus legislative attention upon the problems of dissemination. An examination of the question, however, suggests that, even if the moral argument is given its due, which is little, extension is not justified.

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complicated, and depends on when the work was created, whether it was published with notice, and other factors (see box). All that can be said with certainty is that works published before 1923 are in the public domain, whereas works published in or after 1923 but before 1978 may have a copyright term of up to 95 years from date of publication (a change from the 75 years prior to passage of the bill). Works published in or after 1978 will enter the public domain seventy years after the death of the author (unless Congress elects to extend copyright once more).

**Anonymous and Pseudonymous works** are treated slightly differently. Since it is impossible to determine the life span of the author of anonymous or pseudonymous works, these are protected for 95 years from date of publication or, if unpublished, 120 years from date of creation, whichever expires first. Again no work will enter the public domain until 1 January 2003. On that date anonymous unpublished works written in 1882 or earlier will no longer be copyrighted.

A third class of works of special interest to archivists are works of corporate authorship (referred to in the law as **Works Made for Hire**). In the case of works made for hire, an employer and not the employee owns the copyright in works created by the employee as part of his or her employment. Copyright in works made for hire endures for a period of 95 years from the date of publication or, if unpublished, 120 years from the date of creation, whichever expires first. For example, copyright in an unpublished manuscript by Jacob Riis, who died in 1914, would normally expire after 31 December 2002 (1914 + 70 years is less than this date). If he wrote the unpublished manuscript in 1899 as a police reporter for the *Evening Sun*, however, the piece might then be a work made for hire. The paper would own the copyright, and it would only expire after 2009 (1899 + 120 years).

### Termination of Copyright Assignments

The 1976 Copyright Act includes a provision for termination of any grant of copyright during a five year window. For unpublished material that remains unpublished, the five year window begins forty years after the initial grant. All grants of copyright must be in writing. Under the 1976 law the people who might be able to revoke a grant of copyright included the author, his or her surviving spouse, their children, and their grandchildren. PL 105-298 has expanded this to include the author's executor, administrator, personal representative, or trustee.

### Exemptions for Libraries and Archives

PL 105-298 includes a new reproduction right for libraries and archives. During the last 20 years of any term of copyright of a published work, "a library or archives, including a nonprofit educational institution that functions as such, may reproduce, distribute, display, or perform in facsimile or digital form a copy or phonorecord of such work, or portions thereof, for purposes of preservation, scholarship, or research." This may mean, for example, that a library or archive could digitize and make available on its web site a published work 75 years after publication (instead of waiting another twenty years until

the work entered the public domain). Some limitations on this new right to reproduce are set forth in the legislation.

What this new exemption means for archives is unclear. There are at least four issues that may limit for archives the utility of this exemption:

- The right to reproduce an item in digital form extends only to **published** works. Archives that wish to reproduce or distribute **unpublished** works before they enter the public domain will have to find a copyright defense elsewhere.
- By permitting libraries and archives to make digital copies of published works during the last twenty years of copyright term, the law may by implication forbid them from doing this any earlier.
- The law stipulates that the exception for libraries and archives does not apply if “the work is subject to normal commercial exploitation.” It does not explain what this means, and some would argue that *all* copyrighted works are subject to possible commercial exploitation.
- The rights under this section apply only to a library or archives. Researchers who wanted to use the material found on a web site would still be liable for clearing all copyrights.

It will be interesting to see how the library community elects to implement this new exemption granted to them.

### **Implications for Archivists**

What do the changes in copyright law described above mean for archives? In the short term, the answer is: nothing. Unpublished works that were copyrighted the day before the bill was signed are still copyrighted, and will be to at least 1 January 2003. On that date, some works will enter the public domain (though not as many as archivists would have liked). Additional material will enter the public domain in each following year.

Nevertheless, the long-term implications for archives are not promising. In an important article on the right of fair use in unpublished materials, Kenneth D. Crews has argued that collections should be open to researchers to the fullest extent allowed under law and under agreement with donors. He therefore proposed four strategies intended to help archivists and researchers overcome the barriers to the use of copyrighted work, and thus restore the balance between private and public interests. One of these strategies was to “confirm the public domain status of material.” As Crews noted, when works enter the public domain, “the limits of fair use no longer apply, and the writings may be quoted and even reprinted in full without copyright restrictions.” And he added: “The year 2003 is not far away. A thorough biography or history in process today may not be published until then.”<sup>5</sup>

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<sup>5</sup> Kenneth D. Crews, “Unpublished Manuscripts and the Right of Fair Use: Copyright Law and the Strategic Management of Information Resources,” *Rare Books and Manuscript Librarianship* 5:2 (1990): 61-70.

Because of PL 105-298 on 1 January 2003 there will be twenty fewer years of material in the public domain than would have occurred prior to the passage of this bill. That means there will be that much more material of uncertain copyright status in the archives, and the archivist who reproduces that material will continue to be at risk. For the users of archives, the situation is even more grim. Each user (including an archives that wishes to publish its holdings on the Web) will need to weigh the potential risk of a suit for copyright infringement before proceeding.

Furthermore, while we can be confident that some material will enter the public domain in four years, there is a real danger that the passage of copyright term extension this year is the first step to a system of perpetual copyright. Twenty years ago copyright was extended for a period of 25 years; this year we have seen it extended for the period of another 20 years; and some of the supporters of the extension have called for the end of all copyright term limits.<sup>6</sup>

For material that will because of the new copyright law remain under copyright protection, alternative strategies must be found in order to make it as freely available as possible. Archivists can still rely on the exemptions found in Sections 108 (“Reproduction by Libraries and Archives”) and 107 (“Fair Use”) of the Copyright Law in order to make copies of documents for our patrons, and possibly to make documents available electronically. We can also follow the strategies outlined in Crew’s useful article. For example, archivists should, in conjunction with legal counsel at their own institutions, develop policies that will ensure that the full right of fair use is permitted. We should as well document as much as possible the copyright status of the materials in our collections. While most unpublished materials are copyrighted, works of the Federal government are not, and hence are in the public domain. Furthermore, photographs and documents that have been published under the authority of the copyright owner but without proper notice may have entered the public domain.

Just as the copyright law strives to strike a balance between the interests of copyright owners and the public, so too must archivists strive to strike a balance in our approach to copyright. We have a duty to avoid copyright infringement and liabilities, both out of respect for authors and to protect our institutions. At the same time, we have a duty to make our collections as useful as possible. All archivists should seek to develop policies that optimize the potential for use while respecting the limited rights of copyright owners.

<Chart: When Unpublished Works Pass Into the Public Domain>

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<sup>6</sup> Congresswoman Mary Bono, in her remarks in support of the bill, noted: “Sonny wanted the term of copyright protection to last forever. I am informed by staff that such a change would violate the Constitution. I invite all of you to work with me to strengthen our copyright laws in all of the ways available to us. As you know, there is also Jack Valenti’s proposal for term to last forever less one day. Perhaps the Committee may look at that next Congress.” *Congressional Record*, 7 October 1998, page H9951.

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Boxes of quotes to include in the text:

1. “Sonny wanted the term of copyright protection to last forever.... Perhaps the Committee may look at that next Congress.” Hon. Mary Bono
2. "Holders of copyrights about to expire have a financial interest in urging extension. Authors and publishers can lead a legislature to focus on the production and 'moral' arguments for protection, while no single interest group is sufficiently affected to focus legislative attention upon the problems of dissemination. An examination of the question, however, suggests that, even if the moral argument is given its due, which is little, extension is not justified." Justice Steven Breyer

<b>UNPUBLISHED WORKS</b>		
<i>Type of Work</i>	<i>Copyright Term</i>	<i>What will become public domain on 1 January 2003</i>
Unpublished works	Life of the author + 70 years	Works from authors who died before 1933.
Unpublished anonymous and pseudonymous works, and works made for hire (corporate authorship)	120 years from date of creation	Works created before 1883.
Unpublished works created before 1978 that are published before 1 January 2003	Life of the author + 70 years or 31 December 2047, whichever is greater	Nothing. The soonest the publications can enter the public domain is 1 January 2048.
Unpublished works created before 1978 that are published after 31 December 2002	Life of the author + 70 years	Works of authors who died before 1933.
Unpublished works when the death date of the author is not known <sup>2</sup>	120 years from date of creation <sup>3</sup>	Works created before 1883. <sup>3</sup>

<b>PUBLISHED WORKS</b>		
<i>Time of Publication in the U.S.</i>	<i>Conditions</i>	<i>Public Domain Status</i>
Before 1923	None	In public domain
Between 1923 and 1978	Published without a copyright notice	In public domain
Between 1978 and 1 March 1989	Published without notice, and without subsequent registration	In public domain
Between 1978 and 1 March 1989	Published without notice, but with subsequent registration	70 years after death of author, or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation
Between 1923 and 1963	Published with notice but copyright was not renewed <sup>4</sup>	In public domain
Between 1923 and 1963	Published with notice and the copyright was renewed <sup>5</sup>	95 years after publication date
Between 1964 and 1978	Published with notice	95 years after publication date
After 1 March 1989	None	70 years after death of author, or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation

<sup>1</sup> These two charts are based in part on Laura N. Gasaway's chart, "WHEN WORKS PASS INTO THE PUBLIC DOMAIN," at <<http://www.unc.edu/~uncclng/public-d.htm>>, and similar charts found in Marie C. Malaro, *A Legal Primer On Managing Museum Collections* (Washington, D.C.: Smithsonian Institution Press, 1998): 155-156.

<sup>2</sup> These works may still be copyrighted, but certification from the Copyright Office is a complete defense to any action for infringement.

<sup>3</sup> Presumption as to the author's death requires a certified report from the Copyright Office that its records disclose nothing to indicate that the author of the work is living or died less than seventy years before.

<sup>4</sup> A 1961 Copyright Office study found that fewer than 15% of all registered copyrights were renewed. For textual material (including books), the figure was even lower: 7%.

<sup>5</sup> A good guide to investigating the copyright and renewal status of published work is Samuel Demas and Jennie L. Brogdon, "Determining Copyright Status for Preservation and Access: Defining Reasonable Effort," *Library Resources and Technical Services* 41:4 (October, 1997): 323-334.