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The Archival Briar Patch

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Like an untrained bird dog, I shall run a few legal rabbits through the archival briar patch. Thus my remarks shall be at random, pointed and barbed perhaps as we go. If we scare up a few rabbits, that's almost as good as catching one.

I shall mention copyright, but not really talk about it. Copyright is that protection which the Congress of the United States extends to those people who publish their creative efforts. The law is designed to prevent literary piracy, a kind of theft that once flourished when one publisher would print for his own profit the works of another publisher. Under copyright law, within certain limitations, this can be done only by the payment of royalties. The invention of the photo-duplicating machine has made every kid on the block a potential publisher and pirate, but we won't go into that mess except to say for the past ten years Congress has been trying unsuccessfully to revise the 1909 Copyright Law. One of the main problems is that of fitting the business of photocopying into the doctrine of fair use of copyrighted materials. Under court interpretation, fair use is the little bit you get free, without violating the copyright law. Anyhow, instead of copyright law, I will be talking about manuscripts and some problems relating to these unpublished materials.

A manuscript is a chattel or an item of personal property, if you will, and the first question I raise of chattels is who owns them. Except for some specialized chattels, like negotiable instruments in limited situations, you cannot own an item that has been stolen from someone else. You might possess it, but you do not own it, no matter how innocently you came by it nor how much

*Mr. Broadfoot, an attorney and the Director of the Flowers Collection at Duke University, delivered this talk at the Society's Workshop on Archives and Records in Atlanta on November 17, 1973.
you paid, nor how long ago the theft occurred. The rightful owner has only to prove his claim in order to recover the chattel without any reimbursement whatever to you. The law here is the same whether we speak of manuscripts, washing machines, rare books, jewelry, or junk.

Real property, as opposed to personal property, consists of various estates in land. Historically real property is transferred from one owner to another by an instrument describing the property. The instrument, known as a deed, is then recorded as a public record. The execution of the instrument in the form required by law is entirely sufficient to effect the transfer of the property. The purpose of the recording is to give public notice of ownership, thereby making ineffective any subsequent recording by another party purporting to claim the same property. From these requirements, both as to the deed and the recording, you can readily see that one does not steal land as readily as one steals a refrigerator. However, to complicate this issue just a little bit for your benefit, there is such a thing as adverse possession whereby a stranger to your title may own your property after a number of years of active possession that is openly hostile to your interests. So we see that there can be a kind of theft of real estate which, though it takes several years to bring off, is ultimately sanctioned under the concept of adverse possession.

To this law of theft as it applies to personal property and real property, I now add the caveat that I am talking only about ordinary mortals. Kings were once above the law, even as now and then a president tries to be. The rule was that adverse possession never ran against the Crown. This doctrine still applies to real property owned by any government or sub-division thereof. For example, you can fence off a piece of federal or state park and build a house on it and live there forever, claiming the land however you will, and you will never own that land.

Of course practical problems arise as to a theft of chattels that has been committed in the distant past. When people who originally owned the property have died, a difficulty exists in establishing that the theft occurred and in locating the lawful heir to the property. Particularly you can see this is true when we are talking about ordinary personal property with no special identifying
marks. Even when we are talking about letters where the author and the original recipient are certain, the fact that such manuscripts are later in someone else's possession is not any evidence of theft. Witness today's thriving manuscript market which is in no way a thieves' market.

An individual owner can sell, give away, or discard whatever manuscripts he possesses. Such transfers are common and they make a particular transfer by theft hard to spot. For all that, let me say again that the manuscript thief gains no title nor does any person in the chain of possession from the thief have title.

Do the same rules apply to manuscripts belonging to the State as to the manuscripts of an individual? This is what is called an interesting question, but first a footnote: Manuscripts of presidents of the United States are today considered their personal property. Presidents have raised money and established libraries in places of their choosing, thereafter obtaining public funds to support these personal monuments. Yet the typewriters, the secretarial time, the materials, the office overhead, and all costs whatever in the production of these documents come from the public purse. I see no way these materials can be considered private property, unless we revert to the concept of the royal privilege, which is a cut above executive privilege.

Mr. Nixon donated his vice-presidential papers to the National Archives and received approximately one-half million dollars of tax benefit. That tax loophole has now been closed but a question remains: If a vice-president's papers are his to donate, albeit now without a tax benefit, might he not sell the papers? Better yet, does a president have the right to destroy his papers? End of footnote.

Most problems of ownership are less complicated when one considers state documents. The dispersal of state documents happens less often than that of private papers. Recent state archives laws make ordinary disposal illegal. This leaves us with problems arising from earlier days. What about abandonment—for example, a court house was renovated and in the process public records were dumped in the trash. Have not these papers been abandoned and therefore do they not legally belong to whomever rescues
them from the trash? Certainly this would be the case with private papers. Many states, take the position that there can be no abandonment of public property. As the State Archivist of Virginia wrote to me in 1960:

Insofar as public records of Virginia are concerned, it has been the policy of the Virginia State Library to deny that title to such public records can ever be alienated, and hence they cannot be sold by an individual or dealer with any guarantee of title.

This view raises legal questions which, as far as I know, have not been answered. For example, how do you make a legal distinction between the state not being able to abandon manuscripts yet being able to abandon, or sell, or otherwise dispose of most any other form of chattel that it owns? Does not the attitude that there never can be an alienation of state manuscripts partake of royal prerogative? How do you make a modern viewpoint retroactive?

Considerable cloudiness exists as to what constitutes public archival property in the first place. Part of the problem has to do with manuscripts that were never in the possession of a government but which might, nevertheless, be claimed by it. The attempt of the federal government to assert ownership of certain memorabilia from the Lewis and Clark expedition, which was financed by the government, comes to mind. In that case, the claim of the government for documents which had never been in the possession of the government, was defeated. I am also thinking of an example out of my own recent experience. We bought some manuscripts from a person in North Carolina whose ancestor had been an adjutant general in the Confederate Army. A nationally known manuscript expert had appraised the collection and rendered his opinion as to the Confederate manuscripts as follows: "Since these are official records, this volume is legally the property of the Federal Government, to whom it should be returned, and no evaluation is assigned." That opinion is all the more remarkable because these papers had been in the house from which we got them since 1865. The state of Georgia has had its own experience with this phenomenon. Some few years ago your legislature authorized the Secretary of State to spend as much as $20,000 to obtain from the federal government the records of Confederate soldiers from Georgia. These materials were probably a part of the so-
called "Rebel Archives," spoils of war brought to Washington at the close of the Civil War and thereafter, miraculously, federal property.

Somewhat similarly, the federal government in the First and Second World Wars took control of a variety of alien property in this country. At one time the Alien Property Custodian had well over 50,000 cubic feet of manuscripts. The disposition, still incomplete, went in every possible direction from destruction, to retention, to return to the former owners. There is still no understood policy in determining the custody and disposition of enemy records. Most of that answer probably needs to come from international treaties.

Having said this much on the question of ownership of public and private records, let us turn now to the problem of use. Hopefully the law relating to the use of manuscripts can be explained without all the exceptions which I was required to make in talking about ownership.

Public records, with small exceptions most involving confidentiality, may be quoted and published. Private records, where they are donated to or bought by an institution, similarly may be used but only to the extent that the donor or seller could himself have used them. By this I mean that the scholar may publish in full those writings of the donor or seller because, obviously, any author may publish that which he wrote. But the typical manuscript collection will consist heavily of letters written to the donor or seller. It is with these materials that we hit a snag, called the common law of literary property rights which is still preventative, or pre-publication if you like, in its operation.

In 1890 in the Harvard Law Review, a remarkably foresighted article entitled "The Right to Privacy," by Samuel Warren and Louis Brandeis examined the nature of this incorporeal right and concluded that it rested more on the right to privacy than on property rights:

The same protection is accorded to a casual letter or an entry in a diary as to the most valuable poem or essay, to a botch or daub or to a masterpiece. In every case the individual is entitled to decide whether that which is his shall be given to the public. No other
has the right to publish his productions in any form, without his consent.

This personal property right, unless alienated, abandoned, or breached, exists in the heirs of the author unto perpetuity.

This common law of literary property rights is more flagrantly violated by scholars and by governments than any other law that I can think of. And it is violated knowingly with a "don't give a damn" attitude in the sacred name of scholarship. Under federal auspices the National Historical Publications Commission proposes to film "virtually all documentary sources of national significance for all but the most recent period (material dated after 1920), regardless of where this material is located in the United States." That statement was made by Dr. Wayne Grover, former Archivist of the United States, in an article in the March 1966 issue of the Journal of American History. From what I have seen, the program makes no distinction between what can legally be filmed and what cannot legally be filmed. Nor have I seen any recognition by the National Historical Publications Commission that a problem exists, let alone any expression of concern. It would be nice if the Commission would request a ruling from the Attorney General, but my impression is that the gentlemen involved with the program really don't want to know if they are in error.

The individual scholar also violates literary property rights when he quotes and publishes manuscripts which, at best, should only be summarized. Bear in mind the scholar has the right to read the protected letter and to tell all about it. He can publish the fact that this author wrote the specific person on the particular date a two page typewritten letter in which the writer admitted taking the money, how much, from whom, in what denominations, and what he did with it. All the scholar can't do is directly quote the letter in broadcasting these details.

That's enough. I think scholars cry too much when they say the law of literary property rights cripples research. I also see the scholar's transgressions as less significant than those of the federal government, not because the scholar is necessarily more ignorant, but because his total activity lacks the scope and purpose to
violate the rights of others that so obviously exists in
the federal program. Filming can't summarize or pick
significant facts; it can only totally and mindlessly
ignore the law.

Parenthetically let me say that today the federal
government is the defendant in a suit brought by the
scientific publisher, Williams and Wilkins Company, for
copyright violations. The Court of Claims has ruled for
the plaintiff and the case is on appeal. At issue is
the publication of some 80,000 copyrighted items per year
by the National Library of Medicine and its affiliated
agencies without a nickel of royalty being paid. The
publisher doesn't want to prevent the copying but he does
want royalty payments for it.

Thus we see an important difference between
copyright and literary property rights. Copyright pro-
vides a means of payment in an understood and accepted
commercial situation. Redress against the violator of
the copyright law lies simply in forcing him to make
adequate payment. On the other hand the author of the
unpublished manuscript has had his privacy breached by
unauthorized publication and money does not make amends
in the same way. The privacy is gone forever, with
whatever unwanted results that might have accompanied
it. I have no doubt that the law of literary property
rights should be limited in duration by statute. No
personal right should exist in perpetuity. But it
should remain clearly a right of privacy, not to be con-
fused with copyright in any way. Meantime we should
cease our arrogant and willful violation of both laws.
As a librarian I must throw our name into this pot. Not
a day goes by that we don't aid and abet these violations
by furnishing our personal services and our institutional
equipment for copying that invades privacy as to manu-
scripts and goes beyond any possible concept of fair use
for copyrighted material.

To all the lousy reasons that we hear these
days for breaking the law, let us not add the excuse
that we too, in the name of enlightenment, are above it
all.