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## The 1976 Copyright Act and Preemption of Private Letters, 13 J. Marshall L. Rev. 205 (1979)

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## COMMENT

### THE 1976 COPYRIGHT ACT AND PREEMPTION OF PRIVATE LETTERS

#### INTRODUCTION

The Constitution vested Congress with the power to enact legislation promoting the progress of science and the useful arts, by securing for a limited time to the author the exclusive right to his writings.<sup>1</sup> Congress responded to the constitutional mandate by enacting the first Copyright Act in 1790.<sup>2</sup> The 1790 Act provided protection for authors of maps, charts, and books at the time of publication.<sup>3</sup> Subsequent amendments and judicial decisions expanded the concept of what constituted a writing and the type of works eligible for copyright protection, such as photographs and musical compositions.<sup>4</sup>

These categories of writings were termed literary property.<sup>5</sup> There was no requirement that writings have literary value to qualify for copyright protection.<sup>6</sup> Nor were copyrights subject to

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1. U.S. CONST. art. I, § 8, cl. 8. See Kalodner & Vance, *The Relation Between Federal and State Protection of Literary and Artistic Property*, 72 HARV. L. REV. 1079 (1959) [hereinafter cited as Kalodner & Vance]. "The clause expresses three separate policies: (1) a policy against granting protection to anything other than writings; (2) a policy against granting protection for more than limited times; (3) a policy against granting protection to a nonauthor." *Id.* at 1086.

2. Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1831).

3. Section 1 of the 1790 Act granted the author the right to print, reprint, publish, and vend. However, that Act and later enactments failed to expressly define "publication." The act of publication was generally recognized as the dividing line between common law and statutory copyright. See *G. Ricordi & Co. v. Haendler*, 194 F.2d 914 (2d Cir. 1952).

4. The scope of copyright protection was extended as follows: Act of April 29, 1802, ch. 36, § 2, 2 Stat. 171 (historical prints); Act of Feb. 3, 1831, ch. 16, § 5, 4 Stat. 436 (musical compositions); Act of March 3, 1865, ch. 126, 13 Stat. 540 (photographs); Act of July 8, 1870, ch. 230, § 86, 16 Stat. 212 (paintings and fine arts). See Note, *Study of the Term "Writings" in the Copyright Clause of the Constitution*, 31 N.Y.U. L. REV. 1263 (1956).

5. The definition of a "writing" has been construed broadly and includes works far removed from literary productions. See *Mazer v. Stein*, 347 U.S. 201 (1954) (copyright upheld on statuettes used as lamp bases).

6. See A. LATMAN, *HOWELL'S COPYRIGHT LAW* (1962). "On the question as to whether a work must promote progress in order to merit copyright protection, a literal application of this test would require an extremely subjective determination, and might exclude from protection a good deal of material presently under copyright." *Id.* at 12.

"The courts have not undertaken to assume the functions of critics, or

the stringent novelty requirements characteristic of patents.<sup>7</sup> The purpose of a copyright was to protect the expression of an idea as embodied in a writing.<sup>8</sup>

Inasmuch as statutory copyright commenced on publication with notice, a dual system of protection existed in the United States.<sup>9</sup> Unpublished works were protected at common law, while the federal statute governed the rights in published works.<sup>10</sup>

Though the original Copyright Act did not refer to the dual system of protection, section 2 of the 1909 Act specifically exempted unpublished works from the statute.<sup>11</sup> The act of publication divested an author of common law rights and invested the author with statutory rights, provided that the author complied with certain formalities.<sup>12</sup> The published author received a limited term of protection prescribed by the statute, whereas, the unpublished author received perpetual protection.<sup>13</sup> No state had enacted legislation limiting state copyright protection to the comparable federal term.<sup>14</sup>

Inasmuch as the dual system of protection ensured that unpublished works would never be available for historical or research purposes, and because perpetual protection was contrary to the constitutional provision of limited times, a major objective of the Revision Committee was elimination of the dual system.<sup>15</sup>

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to measure carefully the degree of originality, or literary skill or training involved." *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951).

7. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951). "The applicant for a patent was obliged to file a specification 'so particular' as to distinguish the invention or discovery from other things before known and used." *Id.* at 101.

8. Chafee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 513 (1945) [hereinafter cited as Chafee].

9. *Id.* at 521.

10. Section 10 of the 1909 Act provided that a copyright could be secured by publication with notice of copyright affixed to each copy published or offered for sale.

11. Section 2 of the Copyright Act of 1909 provided that "Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor."

12. *G. Ricordi & Co. v. Haendler*, 194 F.2d 914 (2d Cir. 1952).

13. Prior to 1978, a copyright lasted for 28 years and was renewable for 28 additional years.

14. Judge Learned Hand urged that states should not extend perpetual protection to works that qualified as writings under the Constitution and were susceptible to federal protection. See Goldstein, *Federal System Ordering of the Copyright Interest*, 69 COLUM. L. REV. 49, 51 (1969).

15. S. REP. NO. 473, 94th Cong., 2d Sess. 129 (1976) [hereinafter cited as SENATE REPORT]:

This was achieved in the Copyright Revision Act of 1976.<sup>16</sup>

Unification—the merger of federal statutory law with rights at common law—is set forth in section 301, the preemption provision.<sup>17</sup> Although Congress manifested an intent to preempt common law rights that are equivalent to the exclusive rights

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One of the fundamental purposes behind the Copyright Clause of the Constitution, as shown in Madison's comments in *The Federalist*, was to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various States.

*See also Brown, Unification: A Cheerful Requiem for Common Law Copyright*, 24 U.C.L.A. L. Rev. 1070, 1077 (1977) [hereinafter referred to as Brown]:

There was at least one issue of principle that disturbed the constitutional integrity of the dual system. The Constitution confines federal protection to "limited times." Common law rights were generally assumed to be perpetual. Although nothing barred a state from limiting duration of such rights, no state in modern times has done so. If the constitutional policy that in the end propelled all copyrights into the public domain was a sound one, it did not seem right that some kinds of producers could exploit some kinds of works in perpetuity.

16. Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-810 (1977)). "Instead of a dual system of 'common law copyright' for unpublished works, which has been in effect in the United States since the first copyright statute in 1790, the bill adopts a single system of Federal statutory copyright from creation." SENATE REPORT, *supra* note 15, at 129.

17. 17 U.S.C. § 301 (1977):

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978; or

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2047. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2047. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2047.

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

within the scope of copyright, it is unclear whether an unpublished author will have a satisfactory remedy outside the statute.<sup>18</sup> This comment will examine the law of private letters and the preemptive provisions of the 1976 Act which bring them under the domain of federal protection.

#### BACKGROUND

Private letters are included within the category of literary property.<sup>19</sup> Though at one time letters required literary value to qualify as protectable literary property, the courts have abandoned this subjective distinction and refused to engage in discussions of literary merit.<sup>20</sup> The property right rested on the principle that letters, even common, friendly, business letters, were the product of intellectual labor, and the effort expended in creating them entitled the author to protection.<sup>21</sup>

Because most letters were unpublished, they were protected at common law.<sup>22</sup> Perpetual protection enabled the writer and later a legal representative to enjoin any efforts at

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18. See Brown, *supra* note 15, at 1070; Goldstein, *Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright*, 24 U.C.L.A. L. REV. 1107 (1977) [hereinafter cited as Goldstein]; Comment, *Copyright and Privacy Protection of Unpublished Works—The Author's Dilemma*, 13 COLUM. J.L. & SOC. PROB. 351 (1977) [hereinafter cited as *Author's Dilemma*].

19. M. NIMMER, NIMMER ON COPYRIGHT § 5.04 (1979) [hereinafter cited as NIMMER].

20. The first two important cases in the field involved letters of literary value written by famous men and thus did not reach the question of whether protection should be limited to letters that were literary works. See *Pope v. Curl*, 26 Eng. Rep. 608 (Ch. 1741) (involving letters of Swift and Pope); *Thompson v. Stanhope*, 27 Eng. Rep. 476 (Ch. 1744). In *Wetmore v. Scovell*, 3 Edw. Ch. (N.Y.) 515 (1842) and *Perceval v. Phipps*, 35 Eng. Rep. 225 (Ch. 1813), the courts required that a letter possess literary value before publication would be enjoined. This test of value could be met by showing that the letter was of literary value in itself or that the author was a famed literary figure. All subsequent cases in the United States and England, however, have definitely overruled these cases and the proposition is now well established that all letters, regardless of literary quality, will be protected. The New York cases were overruled by *Woolsey v. Judd*, 11 How. Pr. 49, 4 Duer 379 (N.Y. 1855). For a further discussion of when courts ceased to make literary judgments concerning private letters, see Comment, *Property Rights in Letters*, 46 YALE L.J. 493, 500 (1937) [hereinafter cited as YALE].

21. *Carpenter Foundation v. Oakes*, 26 Cal. App. 3d 784, 103 Cal. Rptr. 368, 175 U.S.P.Q. 309 (1972); *Baker v. Libbie*, 210 Mass. 599, 97 N.E. 109 (1912); see Note, *Personal Letters: In Need of a Law Of Their Own*, 44 IOWA L. REV. 705, 711 (1959) [hereinafter cited as IOWA]. This commentator felt that the application of literary property law to letters of no literary value was an escape from the inadequacies of the existing law. This approach used by the courts has been called "strained," but may have been justified conceptually for the purpose of reaching justifiable results.

22. NIMMER, *supra* note 19, at § 5.04.

publication.<sup>23</sup> The source of the author's right to control publication of his letters was said to derive from either a property right in the letters, a fiduciary relationship between the writer and recipient, or a right of privacy.<sup>24</sup>

The legal status of letters has a peculiar dichotomy.<sup>25</sup> Unlike manuscripts or other literary properties, the nature of the object is such that physical possession of the letter will usually be transferred to another. The writer's basic right results from intellectual labor, whereas the recipient's rights are based on the common law of personal property.<sup>26</sup>

For the writer, the fruit of his labor is a literary property interest in the particular form of expression in the letter.<sup>27</sup> This incorporeal property right is transferable and empowers the copyright owner to authorize copying or publication.<sup>28</sup>

The more tangible property interest, that of physical possession of the letter, is in the recipient.<sup>29</sup> The recipient may save the letter, destroy it, share its contents with a limited group of family or friends, or transfer possession to others without the consent of the copyright owner.<sup>30</sup> Although the recipient has a personal property interest in the letter itself, this interest is not taxable as personal property, and the letter does not become an asset of the recipient's estate upon the recipient's death.<sup>31</sup>

As a result of this dichotomy of rights, letters have been found in unusual places far removed from the writer or recipient.<sup>32</sup> Collectors purchasing unpublished manuscripts at auc-

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23. *Carpenter Foundation v. Oakes*, 26 Cal. App. 3d 784, 103 Cal. Rptr. 368, 175 U.S.P.Q. 309 (1972); *Baker v. Libbie*, 210 Mass. 599, 97 N.E. 109 (1912).

24. Comment, *Common Law Protection of Letters*, 7 VILL. L. REV. 105, 108-09 (1961) [hereinafter cited as VILLANOVA]; see Cohn, *Rights in Private Letters*, 8 BULL. COPYRIGHT SOC'Y 291, 296 (1961) [hereinafter cited as Cohn].

25. NIMMER, *supra* note 19, at § 5.04.

26. *Id.*

27. *Folsom v. Marsh*, 9 Fed. Cas. 342 (C.C. Mass. 1841).

28. VILLANOVA, *supra* note 24, at 108; IOWA, *supra* note 21, at 712; YALE, *supra* note 20, at 498.

29. NIMMER, *supra* note 19, at § 5.04.

30. *Id.* See *Grigsby v. Breckinridge*, 65 Ky. (2 Bush) 480, 489 (1867) (legal representative who also authored some of the letters could not compel surrender of them after death of the recipient); cf. *Johnson v. Johnson*, 34 Ill. App. 3d 356, 340 N.E.2d 68 (1975) (author of letter could compel its production in judicial proceeding).

31. IOWA, *supra* note 21, at 707.

32. Boswell papers were found at Malahide Castle after being lost for two centuries. A lost manuscript of Mark Twain was purchased at auction by Feldman more than 40 years after it was written. Letters written by President Warren G. Harding to Mrs. James Phillips, wife of an Ohio merchant, were found in 1964 in an old shoe box in a locked closet of her home. Letters written by Sir Robert Hart, Inspector General of the Imperial Chinese Maritime Customs Service (1854-1908) were found in the Univer-

tions have found that purchase of the physical object does not carry with it the literary property interest therein.<sup>33</sup> Legatees in possession of papers of historical significance have had to contend with claimants asserting a literary property interest without color of title.<sup>34</sup> Third parties have come into possession of writings such as poems, for which there was no apparent copyright claimant, because the poem was disseminated without attribution or reservation of rights.<sup>35</sup> What these owners had in common was possession of a writing without claim to the literary property interest contained therein.<sup>36</sup>

Thus, as letters and private papers increased in historical significance, the burden of perpetual protection foreclosed their use by historians and researchers.<sup>37</sup> Groups of historians, researchers, and archivists pressed for a unified copyright system on the ground that the public had a right to private papers for historical purposes.<sup>38</sup> Perpetual protection of unpublished papers thwarted the efforts of historians as well as the limited times provision of the Constitution.

The public's right to know, a countervailing interest, is dia-

sity of London's library for the school of Oriental and African Studies. The letters were donated after the death of the recipients. See, e.g., Comment, *Historical Writings: The Independent Value of Possession*, 67 YALE L.J. 151 (1957).

33. *Chamberlain v. Feldman*, 300 N.Y. 135, 89 N.E.2d 863, 84 U.S.P.Q. 148 (1949) (Mark Twain manuscript).

34. *United States v. First Trust Co. of St. Paul*, 251 F.2d 686, 116 U.S.P.Q. 172 (8th Cir. 1958) (papers from Lewis and Clark expedition).

35. *Bell v. Combined Registry Co.*, 397 F. Supp. 1241 (N.D. Ill. 1975), *aff'd*, 536 F.2d 164 (7th Cir.), *cert. denied*, 429 U.S. 1001 (1976). The poem "Desiderata" by Max Ehrman was circulated for many years without a copyright notice and often without attribution. The court stated that a copyright owner has the duty to police all distributions of his work if he desires to retain his legal monopoly. When the court found that the poem had been circulated without a copyright notice, it held that a forfeiture had occurred. As a result, the poem had entered the public domain and no valid copyright could be asserted. 397 F. Supp. at 1241.

36. Comment, *Historical Writings: The Independent Value of Possession*, 67 YALE L.J. 151 (1957).

37. Chafee, *supra* note 8, at 726. Chafee lamented that the letters of James McNeil Whistler were lost to the world because his "crabbed" niece would not allow his chosen biographers to print them. See *Phillip v. Pennell* [1907] 2 Ch. 577.

38. See Lacy, *Copyright Revision and the Scholar*, 6 SCHOLARLY BOOKS IN AMERICA 8 (1965); *Copyright Law Revision: Hearings Before Subcomm. No. 3 of the Comm. on the Judiciary on H.R. 4347, H.R. 5680, H.R. 6831, and H.R. 6835*, pt. 3, 89th Cong., 1st Sess. 1867 (1965) (statement of the Register of Copyrights indicating approval of arguments advanced by the Deputy Archivist of the United States and by Professor Julian Boyd on behalf of archivists and historians); Treece, *Library Photocopying*, 24 U.C.L.A. L. REV. 1025, 1044 (1977) [hereinafter cited as Treece].

metrically opposed to the law of private letters.<sup>39</sup> In the 1961 draft of the Revision Bill, the Register of Copyrights cited the right of privacy as a paramount consideration for protection of private papers against unauthorized disclosure and suggested that copyright attach on dissemination.<sup>40</sup> However, the Register's recommendation met with resistance from user groups represented on the Revision Committee.<sup>41</sup> This proposal created the barrier of dissemination and ran counter to the thrust for a unified term of protection.<sup>42</sup> In later reports, the Register indicated that privacy considerations were alleviated by the longer copyright term and the exemption from preemption of certain state actions such as privacy.<sup>43</sup> The fulcrum on which the opposing interests of copyright and the personal interests of the writer are balanced is the preemption provision of section 301.<sup>44</sup>

#### PREEMPTION OF RIGHTS WITHIN THE SCOPE OF COPYRIGHT

Our system of federalism requires that when Congress intends to "preempt the field," the preemption should be stated unequivocally.<sup>45</sup> Such was the intent of Congress in enacting

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39. See *United States v. Biley*, 406 F. Supp. 726, 118 U.S.P.Q. 344 (E.D. Pa. 1975):

Civil copyright law is a compromise between competing social policies—one favoring the widest possible dissemination of new ideas and new forms of expression, and the other giving writers and artists enough of a monopoly over their works to ensure their receipt of fair material rewards for their efforts. The first policy predominates, which means that the system of rewards is to be no more extensive than is necessary in the long run to elicit a socially optimal amount of creative activity.

*Id.* at 730, 188 U.S.P.Q. at 347.

40. REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, COPYRIGHT LAW REVISION 41-43 (1961).

41. *Brown*, *supra* note 15, at 1078 n.50.

42. *Id.*

43. See *Copyright Law Revision: Hearings Before Subcomm. No. 3 of the Comm. on the Judiciary on H.R. 4347, H.R. 5680, H.R. 6831, and H.R. 6835*, pt. 3, 89th Cong., 1st Sess. 1866-67 (1965) (statement of the Register of Copyrights to the closing session of the hearings). The Register stated that the single federal system of copyright and a term of the life of the author plus fifty years were the most important sections in the bill. He offered several reasons for his endorsement of these sections: (1) an author's works would not enter the public domain during the author's lifetime, thus reserving all benefits to the author while he is alive; (2) decreased reliance on the obscure concept of "publication"; (3) a uniform term of the life of the author plus fifty years is prevalent throughout the world; and (4) elimination of the complex renewal system.

44. See generally Goldstein, *supra* note 18, at 1108, 1110, 1113-14.

45. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-25 (1978), *citing*, *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963); *cf.* *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) (where the Court held that the use of a state's law of unfair competition was incompatible with the federal patent law after a patent was held invalid). In *Sears*, the Court stated that



section 301(a).<sup>46</sup> The Senate Report indicated an intent to implement the limited times provision of the Constitution, as well as to completely preempt rights at state law, even though the rights granted under the Act were narrower in scope than those at common law.<sup>47</sup>

Section 301(a) is applicable to the rights set out in section 106, including the rights of reproduction, preparation of derivative works, distribution, performance, and public display.<sup>48</sup> Though these rights are the exclusive rights of the copyright owner, they are limited by sections 107-118.<sup>49</sup>

Whether or not a right asserted is "equivalent" to any of the rights included within the scope of the federal copyright statute determines the applicability of the preemption provisions.<sup>50</sup> Because of the need to define equivalent rights, commentators have termed this provision as potentially the most trouble-

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"[t]he purpose of Congress to have national uniformity in patent and copyright laws can be *inferred . . .*" *Id.* at 231 n.7 (emphasis added).

46. 17 U.S.C. § 301(a) (1977).

47. SENATE REPORT, *supra* note 15, at 130:

The intention of section 301 is to preempt and abolish any rights under the common law or statutes of a State that are equivalent to copyright and that extend to works coming within the scope of the Federal copyright law. The declaration of this principle in section 301 is intended to be stated in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection.

48. 17 U.S.C. § 106 (1977):

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

49. SENATE REPORT, *supra* note 15, at 61:

The approach of the bill is to set forth the copyright owner's exclusive rights in broad terms in section 106, and then to provide various limitations, qualifications, or exemptions in the 12 sections that follow. Thus, everything in section 106 is made 'subject to sections 107 through 118,' and must be read in conjunction with those provisions.

50. See Brown, *supra* note 15, at 1091; Diamond, *Preemption of State Law*, 25 BULL. COPYRIGHT SOC'Y 204, 206-08 (1978); Goldstein, *supra* note 18, at 1113.

some.<sup>51</sup>

Though earlier drafts of section 301 included examples of state rights different in nature from the rights comprising copyright, those examples were deleted from the final version of the Act.<sup>52</sup> The House Report stated that as long as a cause of action contained elements such as an invasion of personal rights or a breach of trust or confidentiality, these rights would remain unaffected by preemption.<sup>53</sup> The complementary statute, section 301(b), reserves to the states rights that are not equivalent to any of the exclusive rights of copyright.<sup>54</sup>

Thus, the specter of the common law, with its delicate balancing of economic and personal rights, appears to hover over the preemption provision when considering the law of private letters. In attempting to determine what state rights are equivalent to copyright, one must look at the purpose or effect of the state right.<sup>55</sup> It appears that private letters fall into a vague borderline area that Goldstein termed a hybrid state doctrine, an area that Congress attempted to avoid in the preemption section.<sup>56</sup>

51. See note 50 *supra*.

52. Brown, *supra* note 15, at 1091, 1099-100.

53. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 132, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659 [hereinafter cited as HOUSE REPORT].

54. 17 U.S.C. § 301(b) (1977):

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

(1) subject matter that does come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978; or

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

55. Goldstein, *supra* note 18, at 1113:

If Congress' intent was to preempt state doctrines whose *purpose* is equivalent to the purpose behind federal copyright, the section cuts too narrowly, for it is an easy matter to find an independent, non-copyright purpose for any state law. If, however, the intent of Congress was to preempt state doctrines whose *effects* are equivalent to copyright, the section cuts too broadly into state doctrines that Congress surely would have wanted to survive.

56. SENATE REPORT, *supra* note 15, at 130:

The intention of section 301 is to preempt and abolish any rights under the common law or statutes of a State that are equivalent to copyright and that extend to works coming within the scope of the Federal copyright law. The declaration of this principle in section 301 is intended to be stated in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection.

*The Right of Privacy*

Many of the articles which have discussed the preemption section have used private letters, diaries, and family memorabilia as illustrations of an inherent ambiguity in the provision.<sup>57</sup> At common law, when protection was afforded these works, there were often overlapping economic and personal interests, and courts did not specify which interest was being protected.<sup>58</sup>

Warren and Brandeis used the principles of common law literary property to launch a greater right of privacy.<sup>59</sup> Their premise was that the common law secured to each individual the right to determine to what extent thoughts, sentiments, and emotions embodied in a writing would be communicated to others. The existence of this right did not depend on the nature or value of the thought nor upon the excellence of the means of expression. The same protection was accorded a casual letter, an entry in a diary, or the most valuable poem or essay. The individual had the right to determine whether the work would be given to the public. The basis of this right to prevent publication was a right of property. When the relief afforded gives the peace of mind of preventing publication at all, however, it is difficult to regard the right as one of property in the common acceptance of the term. The protection afforded in preventing publication is merely an instance of the enforcement of the more general right of the individual to be let alone. Thus, the existing law affords a principle which may be invoked to protect the privacy of the individual.<sup>60</sup>

This principle of common law literary property and privacy is illustrated in *Birnbaum v. United States*,<sup>61</sup> an action in which the Central Intelligence Agency had intercepted, read, copied, and circulated copies of private letters written by the plaintiffs

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Goldstein used the following as an example of his hybrid state doctrine:

P's personal diaries are photocopied by D, an intruder in P's home; D subsequently publishes the diaries. Under the law of some states, P's right of privacy has been invaded and he will be entitled to damages and an injunction against further publication. P has a cause of action as well under § 106(a)(1) for violation of his exclusive right to reproduce copies. Again, D's acts have violated two rights, one state, one federal, while P's remedy—injunction—is single.

Goldstein, *Federal System Ordering of the Copyright Interest*, 69 COLUM. L. REV. 49, 75 (1969).

57. Goldstein, *supra* note 18, at 1114.

58. *Id.*

59. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890).

60. *Id.* at 198-201, 205-06.

61. 436 F. Supp. 967, 198 U.S.P.Q. 487 (E.D.N.Y. 1977).

to other agencies. There was no doubt that the plaintiffs' literary property right had been infringed. The case, however, also presented elements of an unconstitutional search and a violation of common law privacy rights. Though the court found that the act of reading and copying the letters effected a publication within the meaning of that term,<sup>62</sup> plaintiffs were not allowed recovery on a theory of infringement of common law copyright because their economic interests had not been injured by the publication.<sup>63</sup> Plaintiffs were, however, allowed to recover for invasion of privacy.

*Birnbaum* was decided six months before the effective date of the Copyright Act.<sup>64</sup> However, the court referred to the preemption provisions of section 301 and the House Report to ascertain what common law rights were unaffected by the codification of common law copyright.<sup>65</sup> The court's action is in accord with Nimmer, who explains that if the state right involves elements in addition to or instead of the rights in section 106 of the Act, then the state right is not preempted.<sup>66</sup>

There are limitations, however, to the protection afforded to authors under the right to privacy doctrine. A right of privacy is personal and will not survive the death of the author or recipient.<sup>67</sup> In ruling on cases involving private letters, courts have expressed concern for the personal feelings of the parties.<sup>68</sup> However, if the writer is deceased, little consideration is given to the privacy claims of the representative.<sup>69</sup>

An author or claimant may find a privacy action barred on the grounds that the author is a public figure.<sup>70</sup> The public

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62. *Id.* at 981, 198 U.S.P.Q. at 496.

63. *Id.* at 987, 198 U.S.P.Q. at 501.

64. The new Act became effective on January 1, 1978.

65. 436 F. Supp. at 979, 198 U.S.P.Q. at 495.

66. NIMMER, *supra* note 20, at § 101.

67. *Maritote v. Desilu Prods., Inc.*, 345 F.2d 418 (7th Cir.), *cert. denied*, 382 U.S. 883 (1965) (there is no right of privacy as to a deceased person).

68. *Baker v. Libbie*, 210 Mass. 599, 97 N.E. 109 (1912).

69. *Meeropol v. Nizer*, 560 F.2d 1061, 195 U.S.P.Q. 273 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); *Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771 (1968). One aspect of the right of privacy that can survive the death of an author or celebrity is the right in the publicity value of one's name or likeness, often called the right of publicity. See *Factors, Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978) (right in the publicity value of one's likeness is a valid property right which is transferable and capable of surviving the death of the owner, but only if it is found that the owner exploited the right during his or her lifetime); cf. *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978) (right of publicity does not attach where an evidently fictionalized account of an event in the life of a public figure is depicted in a novel or a movie).

70. *Leopold v. Levin*, 45 Ill. 2d 434, 259 N.E.2d 250 (1970); *Marek v. Zanol Prods. Co.*, 298 Mass. 1, 9 N.E.2d 393 (1937).

figure doctrine may also bar a claimant who, while not the author of the documents, was in legal possession at the time the documents were appropriated.<sup>71</sup> In addition, a representative may find that the documents and letters are a matter of public interest<sup>72</sup> or subject to fair comment.<sup>73</sup>

An author or claimant may find a privacy action barred on public interest grounds. When President Nixon's papers were seized, the Supreme Court held that the privacy interest of the President had to yield to the public interest in preserving materials touching on the President's performance of his official duties.<sup>74</sup> The intrusion into the confidential areas of the presidency was minimal.<sup>75</sup> Thus, the right of privacy may offer some protection to the letter writer's personal interest, but only if the author is alive and not a public figure.<sup>76</sup>

#### LIMITATIONS ON RIGHTS

The effectiveness of a privacy action may be further eroded by the limitations on exclusive rights set forth in sections 107-118. Of particular concern to the writer of letters are the provisions on fair use<sup>77</sup> and library reproduction.<sup>78</sup>

The Fair Use section<sup>79</sup> is a codification of a judicially recog-

71. *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969).

72. *Meeropol v. Nizer*, 560 F.2d 1061, 198 U.S.P.Q. 487 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

73. *Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771 (1968). In *Meeropol v. Nizer*, 417 F. Supp. 1201 (S.D.N.Y. 1976), *aff'd in part, rev'd in part*, 560 F.2d 1061, 198 U.S.P.Q. 487 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978), the court held that:

[T]he relevant test for a fair use of historical letters should be (1) whether the taking is limited in scope, and (2) whether in the context of the entire work it appears that the purpose of using the letters is to illustrate historical facts with which the work deals rather than to capitalize on the unique intellectual product of the person who wrote them. *Id.* at 1213.

74. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977).

75. *Id.* at 451.

76. It has been suggested that the right of privacy be recognized even though the remedy will be suppression of the work, thus rendering any copyright valueless. This contention is justified by the fact that the plaintiff's claim is predicated not on a right to compete commercially, but on a right to be left alone. *See Kalodner & Vance, supra* note 1, at 1101.

77. 17 U.S.C. § 107 (1977).

78. 17 U.S.C. § 108 (1977).

79. 17 U.S.C. § 107 (1977):

Notwithstanding the provision of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an in-

nized standard allowing reasonable use of copyrighted material.<sup>80</sup> While it was not recognized at common law as a limitation on the literary property rights of unpublished authors,<sup>81</sup> the privilege has been recognized as to usage of published material.<sup>82</sup> Now that rights in private letters have been preempted, it is submitted that the defense of fair use will be available for unpublished private letters.

Application of this principle may be seen in *Estate of Hemingway v. Random House, Inc.*,<sup>83</sup> where a biographer was allowed to use the biographee's letters so long as they were not copied verbatim. The court, without specifically labelling the use "fair use," ruled that to prohibit all quotation of a subject's prior writings would render creation of an effective biography impossible.<sup>84</sup>

Where letters have been published, as in *Meeropol v. Nizer*,<sup>85</sup> the defense of fair use has been available for verbatim copying of letters. In both the *Meeropol* and *Hemingway* cases, however, the plaintiffs were constrained in that they were not the writers of the letters and thus could not maintain successful privacy actions.

Private letters have often been collected and donated to libraries,<sup>86</sup> but without a transfer of the literary property interest,

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fringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

80. See, e.g., *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 150 U.S.P.Q. 715 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967).

81. It has been stated that the defense of fair use is not available in actions for common law copyright infringement. See *Stanley v. Columbia Broadcasting Sys., Inc.*, 35 Cal. 2d 653, 221 P.2d 73 (1950).

82. *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 150 U.S.P.Q. 715 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967).

83. 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771 (1968). This case, however, did not arise under the 1976 Act.

84. 53 Misc. 2d 462, 468, 297 N.Y.S.2d 51, 57 (Sup. Ct.), aff'd, 29 A.D.2d 633, 285 N.Y.S.2d 568 (1967), aff'd, 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771 (1968).

85. 560 F.2d 1061, 195 U.S.P.Q. 273 (2d Cir. 1977), cert. denied, 434 U.S. 1013 (1978).

86. Comment, *Historical Writings: The Independent Value of Possession*, 67 YALE L.J. 151 (1957).

libraries could only serve as repositories.<sup>87</sup> Historians and researchers thus had to journey to the library in order to examine documents, but could not freely quote from, paraphrase, or copy the documents for research purposes.<sup>88</sup>

Section 108 grants libraries, serving as repositories of unpublished works, the right to copy documents for archival or research purposes without the consent of the copyright proprietor.<sup>89</sup> Libraries are also privileged to send copies of the unpublished documents to other libraries and archives so as to ensure preservation of the original. It has been suggested that the recipient of a letter may permit a library to display the letter under the provisions of section 109<sup>90</sup> which provide for transfer of a copy without the consent of the copyright owner.<sup>91</sup>

Whether or not the writer of a letter may bring an action for invasion of privacy to enjoin library reproduction may turn on considerations of public policy. President Nixon could not preclude the archival storage of his papers, and as a consequence, duplication will be possible under section 108.<sup>92</sup> In addition, pol-

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87. *United States v. First Trust Co. of St. Paul*, 251 F.2d 686 (8th Cir. 1958) (the Minnesota Historical Society was custodian of documents identified as notes from the Lewis and Clark expedition).

88. Treece, *supra* note 38, at 1046.

89. Section 108(b) authorizes "reproduction and distribution . . . of an unpublished work duplicated in facsimile form solely for purposes of preservation and security or for deposit for research use in another library or archives." 17 U.S.C. § 108(b) (1977). See also SENATE REPORT, *supra* note 15, at 75.

90. 17 U.S.C. § 109 (1977):

(1) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

(b) Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

(c) The privileges prescribed by subsections (a) and (b) do not, unless authorized by the copyright owner, extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it.

91. "The answer turns on whether such disposition constitutes either a public 'distribution' or 'display' of the work such as to infringe either of those rights under the Copyright Act." NIMMER, *supra* note 19, at § 5.04. The Senate Committee stated that "Section 109(b) adopts the general principle that the lawful owner of a copy of a work should be able to put his copy on public display without the consent of the copyright owner." SENATE REPORT, *supra* note 15, at 79.

92. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977).

icy considerations may bar restraints on the recipient's right to freely transfer physical possession of a letter.<sup>93</sup> However, existence of a fiduciary relationship may serve to check the recipient's right of transfer if the copyright claimant can prove that confidentiality was intended.<sup>94</sup> Nevertheless, it is possible that a writer of some reknown may find his letters on display in a library without his consent. Unless the author alleges elements of a state right not equivalent to copyright, the author will not have a remedy.<sup>95</sup>

#### THE BEGINNING AND DURATION OF THE COPYRIGHT TERM

Although the thrust of preemption is to bring all works previously protected at common law within the federal ambit, the scope of preemption is limited by the Constitution. The Constitution uses the term "writings," which implies materials of permanent nature that are capable of being perceived. Section 102(a)<sup>96</sup> perpetuates the existing requirement that a work be fixed in a tangible medium of expression and adds that this medium may be one now known or later developed.<sup>97</sup> Under the Act, copyright will attach on fixation—when the original work and tangible object merge—rather than at the time of publica-

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93. Cohn, *supra* note 24, at 292-93.

94. *Id.* at 296-98.

95. See 17 U.S.C. § 301(a) (1977).

96. 17 U.S.C. § 102 (1977):

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works; and
- (7) sound recordings.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

97. SENATE REPORT, *supra* note 15, at 52:

Under the bill it makes no difference what the form, manner, or medium of fixation may be —whether it is in words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia, whether embodied in a physical object in written, printed, photographic, sculptural, punched, magnetic, or any other stable form, and whether it is capable of perception directly or by means of any machine or device "now known or later developed."



tion with notice.<sup>98</sup> Hence, copyright attaches to a letter simultaneously with the writing of the letter, as soon as the pen is lifted from the page.

Whether or not the writer chooses to exercise the grant of rights under section 106 of the Act,<sup>99</sup> rights will subsist for a term of life of the author plus fifty years, rather than the previous term of twenty-eight years from the date of publication.<sup>100</sup> This term of protection was a prime objective of author and user groups<sup>101</sup> and was also influential in persuading the Register of Copyrights to abandon earlier recommendations for copyright attaching upon dissemination.<sup>102</sup>

Another facet of preemption concerned the termination of perpetual copyright on unpublished materials and the question of what was to happen to the vast store of materials (letters, diaries, photographs) that were losing perpetual protection.<sup>103</sup> Some groups pointed out that the statutory term of life plus fifty years, if strictly applied, would result in older works entering the public domain on the effective date of the Act.<sup>104</sup> In response, Congress afforded a degree of statutory protection in exchange for the perpetual protection that these works were losing.<sup>105</sup> The result was section 103, which provided a copyright term of twenty-five years and an additional twenty-five year

98. "A work is 'fixed' in a tangible medium of expression when its embodiment in a copy . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101 (1977).

99. See note 48 and accompanying text *supra*.

100. 17 U.S.C. § 302(a) (1977).

101. SENATE REPORT, *supra* note 15, at 133:

With certain exceptions, there appears to be strong support for the principle, as embodied in the bill, of a copyright term consisting of the life of the author and 50 years after his death. In particular, the authors and their representatives stressed that the adoption of a life-plus-50 term was by far their most important legislative goal in copyright law revision.

See also Bricker, *Duration of Copyright*, 25 BULL. COPYRIGHT SOC'Y 213 (1978).

102. See note 43 and accompanying text *supra*.

103. "Under the preemption provisions of section 301 and the single Federal system they would establish, authors will be giving up perpetual, unlimited exclusive common law rights in their unpublished works, including works that have been widely disseminated by means other than publication." SENATE REPORT, *supra* note 15, at 134-35.

104. Brown, *supra* note 15, at 1081. However, Brown felt that:

With historical manuscripts, the problem has been not to preserve copyright, but to get rid of it. . . . The perpetual nature of common-law rights, and the fact that literary property in the content of a manuscript could be claimed by others than the possessors of the paper itself, made scholarly publication of documents often uncomfortable.

*Id.*

105. SENATE REPORT, *supra* note 15, at 139:

term if the works are published within the initial term.<sup>106</sup> This durational provision reflects Congressional implementation of the constitutional mandate that copyright be secured for "limited times."<sup>107</sup> It also brings American copyright protection into conformity with the durational protection afforded by a great majority of other nations.<sup>108</sup>

#### FORMALITIES OF NOTICE AND REGISTRATION

Just as the writer of letters need not exercise his or her rights under the Act,<sup>109</sup> so long as the letters remain unpublished the author need not comply with the requirements of registration and deposit.<sup>110</sup> Registration of a claim to copyright is

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A special problem under this provision is what to do with works whose ordinary statutory terms will have expired or will be nearing expiration on the effective date. The committee believes that a provision taking any subsisting common law rights and substituting statutory rights for a reasonable period is fully in harmony with the constitutional requirements of due process, but it is necessary to fix a "reasonable period" for this purpose.

This statement responds to the constitutional question raised in Sargoy, *An Exclusive Federal Statutory System for Literature and Artistic Works: The Confusion in the Diversity of Our Present Federal and State Systems*, 8 BULL. COPYRIGHT SOC'Y 6 (1960):

To the extent that Congress may choose to bring what are presently common law rights in unpublished works into the exclusive orbit of the Federal domain, would it be a deprivation of vested property rights to bring into the limited copyright statute any such unpublished works as were in existence on the day the statute takes effect? Or must such a copyright statute be limited only to works created in the future? If the substituted statutory term were sufficiently long, and the scope of statutory rights sufficiently similar, the question of an arbitrary or unreasonable deprivation would appear to be avoided.

*Id.* at 20.

106. 17 U.S.C. § 303 (1977):

Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the term provided by section 302. In no case, however, shall the term of copyright in such a work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2027.

107. NIMMER, *supra* note 19, at § 105. The Senate recognized this aspect of the problem concerning the expiration of copyright on an unpublished work. The Senate concluded that "both the Constitution and the underlying purposes of the bill require the establishment of an alternative term for unpublished work and the only practicable basis for this alternative is 'creation.'" SENATE REPORT, *supra* note 15, at 137.

108. SENATE REPORT, *supra* note 15, at 135.

109. 17 U.S.C. § 106 (1977).

110. 17 U.S.C. § 401 (1977):

(a) General Requirement.—Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section shall be placed on all publicly distributed copies from which the work

permissive,<sup>111</sup> but the certificate is a prerequisite to an action for copyright infringement.<sup>112</sup> In addition, the remedies of section 412 would not be available if the infringement was of an unpublished work and occurred prior to registration.<sup>113</sup>

Commentators have termed the registration requirements procedural obstacles and predicted that the author of unpublished materials may forego federal protection to seek a state remedy for a right not equivalent to copyright.<sup>114</sup> For the author of private letters, the registration and deposit requirements would be a burden in that the copyright claimant does not have physical possession of his letters. In *dicta*, the court in *Baker v. Libbie*<sup>115</sup> suggested that the copyright claimant be allowed to make copies of his letters in order to preserve his rights of publication. Such a privilege extended to the writer to preserve the letter in order to ensure his rights of publication, however, would impose an unreasonable burden on the recipient.<sup>116</sup> It may be noted that in *Birnbaum v. United States*,<sup>117</sup> the infringement occurred while the letters were in transit. Being unaware of the infringement, as well as lacking possession of a copy, the plaintiffs could not have complied with the registration and de-

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can be visually perceived, either directly or with the aid of a machine or device.

Notice requirements apply only to those copies which have been published, and only if such publication occurs under the authority of the copyright owner. See NIMMER, *supra* note 19, at § 7.12.

111. 17 U.S.C. § 408 (1977):

(a) Registration Permissive.—At any time during the subsistence of copyright in any published or unpublished work, the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 409 and 708. Subject to the provisions of section 405(a), such registration is not a condition of copyright protection.

112. NIMMER, *supra* note 19, at § 7.16. See Levine & Squires, *Notice, Deposit and Registration: The Importance of Being Formal*, 24 U.C.L.A. L. REV. 1232, 1244 (1977).

113. 17 U.S.C. § 412 (1977):

In any action under this title, other than an action instituted under section 411(b), no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for—

(1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or

(2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

114. Mentlik, *End to Common Law Copyright*, 23 ASCAP COPYRIGHT L. SYMP. 137 (1977); *Author's Dilemma*, *supra* note 18, at 381.

115. 210 Mass. 599, 97 N.E. 109 (1912).

116. YALE, *supra* note 20, at 495-96.

117. 436 F. Supp. 967, 198 U.S.P.Q. 487 (E.D.N.Y. 1977).

posit requirements before bringing an action for copyright infringement.

### CONCLUSION

The 1976 Copyright Act has been hailed as an "authors' law"<sup>118</sup> as well as a "law of compromises."<sup>119</sup> It reflects the striking of a tenuous balance between author and user groups.<sup>120</sup> Caught within the sweep of those author groups are the writers of private letters who would not view themselves as "authors." The works they create are, however, literary property according to the decisional law.<sup>121</sup> Consequently, to assure effective preemption, all materials such as letters, which are capable of being protected as literary property, had to be included in the preemption provisions.<sup>122</sup>

One might question the advisability of giving the public the ultimate right to publish writings which an author does not wish to reveal.<sup>123</sup> Conversely, however, this ultimate right gives the public access to materials which was denied by perpetual common law copyright.<sup>124</sup> Chafee commented that the burdens of copyright on the public should be no greater than the benefits to the author.<sup>125</sup> Actually, it is the value to the author of perpetual protection that is questionable.<sup>126</sup>

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118. C. LIEB, AN OVERVIEW OF THE NEW COPYRIGHT LAW 1 (1976) (pamphlet published by the Association of American Publishers, Inc.).

119. *Id.*

120. The Register of Copyrights, Barbara Ringer, speaking on the revision bill, made the following comment:

Except for the most prescriptive and technical of its provisions, practically everything in the bill is the product of at least one compromise, and many provisions have evolved from a long series of compromises reflecting constantly changing technology, commercial and financial interests, political and social conditions, judicial and administrative developments and—not least by any means—individual personalities. The bill as a whole bespeaks concern for literally hundreds of contending and overlapping special interests from every conceivable segment of our pluralistic society. It was not enough to reach compromise on a particular point; all of the compromises had to be kept in equilibrium so that one agreement did not tip another over.

UNITED STATES COPYRIGHT OFFICE, GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976 1:3 (Sept. 1977).

121. See note 20 and accompanying text *supra*.

122. Chafee, *supra* note 8, at 510; Cohn, *supra* note 24, at 300.

123. Waldheim, *A Single Federal Copyright System*, 12 BULL. COPYRIGHT SOC'Y 2 (1965).

124. NIMMER, *supra* note 19, at § 1.10.

125. Chafee, *supra* note 8, at 506.

126. Cohn, *supra* note 24, at 300-01:

As to the *duration* of copyright protection, this writer believes that forever is too long in the case of any unpublished works, including letters. One of the two primary purposes of copyright (other than the en-

Chafee formulated six ideals which should be served by a copyright law. These goals are complete coverage (the subject matter of copyright); a single monopoly (the scope of protection); international protection (to facilitate the free flow of ideas and imaginative creations); limited protection (not substantially exceeding the purposes of protection); protection that will not stifle independent creation by others; and legal rules which are convenient to handle.<sup>127</sup> Despite the ambiguity of the preemption section, the 1976 Copyright Act comes very close to fulfilling these ideals.

*Geraldine C. Simmons*

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couragement of intellectual creativity) is to provide rewards to the author and benefits to his family. It is elemental that monopoly in perpetuity is not necessary to assist such persons. It is the unusual man who is concerned about his descendants in centuries to come. Perpetual common law copyright cannot help an author to make a better deal for his work since any disposition made by him would undoubtedly contemplate publications which would destroy the perpetual monopoly.

127. Chafee, *supra* note 8, at 506-14.