

JANUARY 1, 2003: THE BIRTH OF THE UNPUBLISHED  
PUBLIC DOMAIN AND ITS INTERNATIONAL IMPLICATIONS

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January 1, 2003, marked a historic transformation in copyright law, and by extension, in scholarship, documentary films, and culture at large. For the first time, unpublished works automatically began entering the public domain in the United States, and will now continue to do so, just as published works have for centuries, once their statutory term of copyright expires.<sup>1</sup> Section 303(a) of the Copyright Act brings a newfound freedom never before experienced by those researchers, artists, and others whose work depends upon unpublished works. For the first time, users of unpublished works eventually will not have to seek copyright approval for the use of a particular letter or diary. This change may in itself seem innocuous, but it means the freedom to write, comment, criticize, and create new works without censorship from disapproving literary executors or copyright holders.<sup>2</sup> It also means that once the copyright term has expired, users of unpublished works need not depend on the unreliable concept of fair use. Instead, the user may work with the text in confidence, knowing that because the unpublished work is now part of the public domain, the user is free to use the work as she wishes. Section 303(a) opens up whole new worlds, strengthening scholarship, art, documentary filmmaking, storytelling (novels, films, television), and all of the other parts of our culture that utilize sources of our past to create new works for our future.<sup>3</sup>

Section 303(a) creates the possibility of a potential flourishing of comment and criticism on materials that previously were only accessible if the use of the unpublished work was "authorized."<sup>4</sup> If an artist wants to use an unpublished Gustav Klimt sketch as the basis for a new artistic work, that is now possible without seeking approval from the copyright holder.<sup>5</sup> If a documentary filmmaker wants to have an actor recite one of Thomas Edison's unpublished letters in its entirety, he need not worry about prohibitively high copyright fees.<sup>6</sup> In some instances, such fees have become so high that they are altering the content of what gets included in anthologies.<sup>7</sup> The *permissions* costs, rather

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<sup>1</sup> 17 U.S.C. § 303(a) (2006).

<sup>2</sup> See IAN HAMILTON, *KEEPERS OF THE FLAME* (1992).

<sup>3</sup> For problems documentary filmmakers currently face, see the Center for Social Media, [www.centerforsocialmedia.org/](http://www.centerforsocialmedia.org/) (last visited Sept. 10, 2006).

<sup>4</sup> In contrast, see Richard Byrne, *Silent Treatment: A Copyright Battle Kills an Anthology of Essays About the Composer Rebecca Clarke*, *CHRONICLE OF HIGHER EDUC.*, July 16, 2004, at A14.

<sup>5</sup> Gustav Klimt lived from 1862 until 1918. See Gustav Klimt, [http://en.wikipedia.org/wiki/Gustav\\_Klimt](http://en.wikipedia.org/wiki/Gustav_Klimt) (last visited Sept. 7, 2006).

<sup>6</sup> Thomas Edison lived from 1847 until 1931. See Thomas Edison, [http://en.wikipedia.org/wiki/Thomas\\_Edison](http://en.wikipedia.org/wiki/Thomas_Edison) (last visited Sept. 7, 2006).

<sup>7</sup> Kevin J.H. Dettmar, *Writers Who Price Themselves Out of the Canon*, *CHRONICLE OF HIGHER EDUC.*, Aug. 4, 2006, at B6.

than literary or cultural taste, are guiding the decision of what our children are taught, and what is included in the building blocks of our culture.<sup>8</sup> If a scholar wants to write a biography of T.E. Lawrence, his unpublished works are now part of the public domain in the United States.<sup>9</sup> Previously, that same scholar would have had to get permission from the copyright holder. Often, this meant the copyright holder was not only approving the use of primary materials, but also evaluating the argument itself. A copyright holder could easily prevent unflattering portraits by withholding the documents necessary to support the assertions. This, in fact, is what is at the heart of the *Shloss v. Joyce* copyright fair use and misuse case, now in the early stages of litigation.<sup>10</sup> This monumental legal change of unpublished works coming into the public domain is the subject of this article.

The 1976 Copyright Act brought unpublished works under the federal statutory system, giving them a limited term of protection, just as published works have had for centuries. Before the 1976 Act, unpublished works were protected by state common law copyright perpetually until publication, upon which they would then enter the federal system.<sup>11</sup> The 1976 Copyright Act completely changed the nature and duration of protection for unpublished works. Section 302 of the 1976 Copyright Act created a unified system of duration whereby unpublished and published works alike carry copyright protection for the term of the life of the author plus seventy years.<sup>12</sup> In order to aid the transition from a state common law perpetual system to a “limited Times” federal statutory system, the 1976 Copyright Act created two mechanisms for change.<sup>13</sup> First, section 303(a) guaranteed that no work would enter the public domain until December 31, 2002, regardless of how long the author had been deceased.<sup>14</sup> Second, that section provided an incentive for publication of unpublished works created before 1978.<sup>15</sup> If the unpublished work was published for the first time between January 1, 1978 and

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<sup>8</sup> *Id.*

<sup>9</sup> T.E. Lawrence lived from 1888 until 1935. See T.E. Lawrence, [http://en.wikipedia.org/wiki/T.\\_E.\\_Lawrence](http://en.wikipedia.org/wiki/T._E._Lawrence) (last visited Sept. 7, 2006).

<sup>10</sup> See Complaint, *Shloss v. Sweeney*, No. 06-3718 (N.D. Cal. June 12, 2006). Shloss needed primary materials to support her thesis that Joyce’s daughter, Lucia, was sane and misunderstood, rather than insane. Shloss had to delete material, however, in the final published version because of threats from the Joyce estate. Now, Shloss seeks to place that material on a website as supporting evidence of her thesis. See also Lisa M. Krieger, *Copyright Suit Challenges What’s Public vs. Private*, MERCURY NEWS, Aug. 4, 2006.

<sup>11</sup> See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 4.01[B] (2006).

<sup>12</sup> 17 U.S.C. § 302 (2006).

<sup>13</sup> *Id.* § 303(a).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

December 31, 2002, the new published work would be granted further protection until December 31, 2047.<sup>16</sup> This means that as of January 1, 2003, all unpublished works by authors who had been deceased longer than seventy years (deceased before January 1, 1933), became part of the public domain.<sup>17</sup> Therefore, January 1, 2003, can be seen as marking the birth of the unpublished public domain. Each year, additional unpublished materials are added to the public domain. For example, as of 2007, the public domain includes unpublished works from authors deceased before 1937. However, any works that were published for the first time between January 1, 1978 and December 31, 2002 will remain under copyright until December 31, 2047.

Unpublished works come in all forms. We naturally think of diaries, unpublished letters, sketches for paintings, and unpublished manuscripts. A newly discovered Hemingway short story, a manuscript version of a lost Beethoven piano piece, and a grocery list from the 1900s are all examples of unpublished works. Letters sent to presidents and fan mail sent to movie stars are additional examples that come to mind. But unpublished works also include films, both home movies and those produced by Hollywood studios, unpublished photographs, unpublished comics, and scrapbooks filled with family photos. In a forthcoming work, Anthony Reese has organized unpublished works into three categories: 1) private works such as letters, diaries and manuscripts; 2) preparatory works including early drafts of manuscripts and extra film footage; and 3) works performed and displayed works like radio and television, but not technically published.<sup>18</sup> There is no question that January 1, 2003, brought the largest influx of materials into the public domain at one time, and yet few seem to be at all aware of this new category.

Moreover, little legal attention has been paid to this new development, leaving even the most basic statutory requirements as well as the larger potential cultural implications of this change yet to be explored.<sup>19</sup> This article seeks to sort out some of the legal

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> R. Anthony Reese, *Public but Private: Copyright's New Unpublished Public Domain*, 85 TEX. L. REV. (forthcoming 2007).

<sup>19</sup> To date, little has been published on this change in the copyright law treatment of unpublished works. The only other article specifically focused on this topic is by Tony Reese, forthcoming 2007. *Id.* Others that discuss section 303(a) include: Kenneth Crews, *Fair Use of Unpublished Works: Burdens of Proof and the Integrity of Copyright*, 31 ARIZONA STATE LAW JOURNAL 1 (1999); Scott J. Burnham, *Copyright in Library-Held Materials: A Decision Tree for Librarians*, 96 LAW LIBR. J. 425, 427-28 (2004). A few articles discuss the impending deadline of December 31, 2002, including: Bryan M. Carson, *Legally Speaking—The Copyright Status of Unpublished Works*, 14 AGAINST THE GRAIN 54, 54-58 (Apr. 2002); Robert Clarida, *Publish or Perish: Clock Is Ticking for Unpublished Works*, LEGAL LANGUAGE SERVS.,

elements that determine when unpublished works enter the public domain by exploring: 1) the legal language and issues surrounding unpublished works entering into the public domain in the United States; and 2) the international implications of section 303(a). Part I explores the case of works that had been set to expire on December 31, 2002, and the legal elements needed to meet the requirements under section 303(a) of the Copyright Act, in order to receive additional protection until December 31, 2047. Part I additionally examines the definition of “publication” in myriad contexts. Part II turns to the international dimensions of unpublished works in the public domain. In a time when copyright harmonization is being touted as a global goal, the case of unpublished works presents an interesting example of dissonance, or what this article refers to as disharmonization. Part III provides examples of determining the copyright status of unpublished works in an international context. Finally, the conclusion looks more broadly at the international stage and explores whether other countries are transitioning their unpublished works from a perpetual system of protection to a limited times copyright system. The path towards harmonization of duration is long when it comes to unpublished works. But, in a time when there is great concern about the shrinking of the public domain—from copyright extensions for published works to copyright retroactivity of foreign works previously in the public domain—unpublished works present an unimaginable expansion of the public domain.<sup>20</sup>

### I. LEGAL COMPONENT

Duration of copyright: Works created but not published or copyrighted before January 1, 1978: (a) 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, 2047.<sup>21</sup>

Section 303(a) of the Copyright Act looks deceptively simple: an unpublished work created before 1978 that is published for the

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(Dec. 2000), <http://www.legallanguage.com/lawarticles/Clarida010.html>; Franklin B. Molin & Jesse E. Busch, *Publish or Perish: Copyright Term for Some Unpublished Works Will Expire at the End of 2002*, 24 NAT'L L.J., Dec. 24, 2001, at C1.

<sup>20</sup> See Pamela Samuelson, *The Public Domain: Mapping the Digital Public Domain: Threats and Opportunities*, 66 LAW & CONTEMP. PROBS. 147, 169 (2003).

<sup>21</sup> 17 U.S.C. § 303(a).

first time between January 1, 1978, and December 31, 2002, will receive additional protection until December 31, 2047.<sup>22</sup> Works that remain unpublished as of 2002 receive the same protection as published works created after January 1, 1978, that is, for the life of the author plus seventy years.<sup>23</sup> In no case, however, would any unpublished materials come into the public domain under this new scheme before December 31, 2002, even if the author had been deceased more than seventy years.<sup>24</sup> If the work was a work for hire, then the term is 120 years from creation. Section 303(a) also includes all corporate works created before 1886.<sup>25</sup>

For example, a diary created in 1920 that remained unpublished as of January 1, 1978 will be protected by copyright at least until December 31, 2002, regardless of when the author died. If the author died in 1921 (and therefore more than seventy years ago as of December 31, 2002), the work would enter the public domain on January 1, 2003. However, if the copyright holder published the diary between 1978 and 2002, then the new published version of the unpublished work is protected until December 31, 2047. What quickly becomes clear is the need to parse the language in section 303(a). More specifically, we must determine which works qualify as “unpublished” as of January 1, 1978 and which works qualify as “published” between January 1, 1978 and December 31, 2047. To determine which works qualify as “unpublished” as of January 1, 1978, we must look to the 1909 Copyright Act. To determine what has, is, and will be considered published between January 1, 1978 and December 31, 2047, we must look to the 1976 Copyright Act.

#### A. “Unpublished” Under the 1909 Act

To qualify for additional protection under section 303(a), from December 31, 2002 through December 31, 2047, a work must have been unpublished as of January 1, 1978.<sup>26</sup> The definition of “unpublished” or “publication,” therefore, is governed by the 1909 Act. However, the 1909 Act did not define “publication.” This is further complicated by the fact that the 1909 Act had stiff penalties for improper execution of the copyright formalities required upon publication.<sup>27</sup> The 1909 Act

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* § 304. See Peter Hirtle, *Copyright Term and the Public Domain in the United States* (Jan. 1, 2006), <http://www.copyright.cornell.edu/training/copyrightterm.pdf>.

<sup>26</sup> *Id.*

<sup>27</sup> 17 U.S.C. § 10 (1909). See generally Edward Samuels, *The Public Domain in Copyright Law*, 41 J. OF THE COPYRIGHT SOC'Y 137 n.83 (1993). See *King v. Mister Maestro, Inc.*, 224 F. Supp. 101, 105 (S.D.N.Y. 1963).

required that when a work was published, an accompanying © symbol be attached to the work, along with the name of the copyright holder and the date, and that the work be properly deposited and registered with the Copyright Office. If any of these elements was missing, the newly published work immediately became part of the public domain.<sup>28</sup> Courts mitigated this harsh penalty by creating the concept of “limited” versus “general” publication, whereby if a work was published in a limited context, it technically remained unpublished, and therefore was not subject to the formal requirements for federal copyright protection.<sup>29</sup> Consequently, we must include in the category of “unpublished works” not only those works that were never distributed, but also those works that received limited publication under the 1909 Act and therefore also qualify as unpublished for the purpose of section 303(a) of the 1976 Copyright Act.<sup>30</sup>

### 1. Limited vs. General Publication

The concept of “limited versus general publication” was developed by the courts, partly in reliance on pre-1909 case law, with the goal of mitigating the harsh penalty for a work bearing improper or no notice.<sup>31</sup> A “limited” publication was technically considered unpublished, and was not required to meet deposit, registration, or other formalities required of published works under the 1909 Act. For instance, an early Supreme Court case, *American Tobacco Co. v. Werckmeister*, determined that the display of a painting in a gallery did not constitute general publication.<sup>32</sup> General publication occurred only when the work was sold, distributed, or loaned to the general public, without restrictions, qualifications, or limitations.<sup>33</sup> An example of this is the sale of a book in a bookstore. In contrast, only “limited” publication occurred if circulation satisfied a three-part test. First, the work was only communicated to a select group; second, the work was

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<sup>28</sup> For an overview of the requirements of the 1909 Act, see JOHN W. HAZARD, JR., COPYRIGHT LAW IN BUSINESS AND PRACTICE § 2:65 (1998). It is important to note that defective or improper general publications would not qualify for additional protection under section 303(a) because these works were, upon original publication, part of the public domain. Section 303(a) is not a “second chance” for works that had not initially met the formalities required under the 1909 Act. However, formality requirements for published works changed in 1989. See Peter Hirtle, *Copyright Term and the Public Domain in the United States* (Jan. 1, 2006), <http://www.copyright.cornell.edu/training/copyrightterm.pdf>.

<sup>29</sup> Estate of Martin Luther King, Jr., Inc. v. CBS, Inc., 194 F.3d 1211, 1214 (11th Cir. 1999).

<sup>30</sup> Nutt v. Nat’l Inst. Inc. for the Improvement of Memory, 31 F.2d 236, 238 (2d Cir. 1929); *Mister Maestro*, 224 F. Supp. at 106.

<sup>31</sup> 17 U.S.C. § 10. See Samuels, *supra* note 27, at 137 n.83.

<sup>32</sup> 207 U.S. 284 (1907).

<sup>33</sup> 1 NIMMER, *supra* note 11, § 4.04.

communicated to the select group for limited purposes; and third, those to whom the work had been communicated had no additional distribution rights to the work.<sup>34</sup> A restricted archival collection that permits scholars access only for personal use and requires them to sign an agreement that the copies will not be further distributed is a classic example of limited publication.

The question arose, however, of whether the performance or display of a work would ever constitute general publication. The courts developed the concept that if a work was displayed or performed “in such a manner as to permit unrestricted copying by the general public,” then a general publication had occurred.<sup>35</sup> However, merely being disseminated to the public, as in the announcement by CBS news of the assassination of President Kennedy, did not constitute general publication because of its newsworthiness.<sup>36</sup>

One important example of how courts used the limited versus general publication doctrine to avoid inadvertent injection of a work into the public domain concerned Martin Luther King, Jr.’s “I Have a Dream” speech.<sup>37</sup> The question was whether the fact that the speech was delivered before a wide audience and that copies of it were distributed to the news media without formal copyright notice and registration with the Copyright Office caused the “I Have a Dream” speech to come into the public domain.<sup>38</sup> In 1963, a Southern District of New York Court determined that oral delivery of a speech does not constitute general publication and that the distribution of printed versions of the speech to the media constituted a limited publication.<sup>39</sup> Relying on precedent, the court found that the public performance of a work did not constitute publication.<sup>40</sup> Regarding the distribution of the speech

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<sup>34</sup> *Brown v. Tabb*, 714 F.2d 1088, 1091 (11th Cir. 1983); *White v. Kimmell* 193 F.2d 744, 746-47 (9th Cir. 1954). See *Aerospace Servs. Int’l v. LPA Group, Inc.*, 57 F.3d 1002 (11th Cir. 1995).

<sup>35</sup> *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211, 1216 (11th Cir. 1999).

<sup>36</sup> *Columbia Broad. Sys., Inc. v. Documentaries Unlimited, Inc.*, 248 N.Y.S.2d 809, (N.Y. Sup. Ct. 1964).

<sup>37</sup> *Estate of Martin Luther King, Jr.*, 194 F.3d at 1211.

<sup>38</sup> For the video version of the speech, delivered August 28, 1963, see *American Rhetoric*, <http://www.americanrhetoric.com/speeches/Ihaveadream.htm> (last visited Sept. 11, 2006).

<sup>39</sup> *King v. Mister Maestro*, 224 F. Supp. 101, 106 (S.D.N.Y. 1963).

The copyright statute itself plainly shows that ‘oral delivery’ of an address is not a dedication to the public. Sections 5(c) and 12 (of Title 17 U.S.C.) taken together show that Congress intended copyright protection for ‘lectures, sermons, addresses (prepared for oral delivery)’ despite such ‘oral delivery. . .’

The ‘oral delivery’ of a speech by Dr. King, no matter how vast his audience, did not amount to a general publication of his literary work.

*Id.* at 107.

<sup>40</sup> *Estate of Martin Luther King, Jr.*, 194 F.3d at 1211.



to news media, the court concluded, “[t]here is nothing to suggest that copies of the speech were ever offered to the public; the fact is clear that the ‘advance text’ was given to the press only.”<sup>41</sup>

A second case addressing the same speech arose thirty years later, and the court reached the same conclusions.<sup>42</sup> Once again, in *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, the court decided that even though the speech was broadcast to a large, general audience, and copies of the speech were given out to the news media, this did not constitute general publication under the 1909 Copyright Act.<sup>43</sup> The court reiterated that:

[a] performance, no matter how broad the audience, is not a publication; to hold otherwise would be to upset a long line of precedent. This conclusion is not altered by the fact that the Speech was broadcast live to a broad radio and television audience and was the subject of extensive contemporaneous news coverage. We follow the above cited case law indicating that release to the news media for contemporary coverage of a newsworthy event is only a limited publication.<sup>44</sup>

The *King* rulings make sense because film, television, and radio shows were also considered unpublished in the “limited” publication sense.

“Limited” publication broadens the category of unpublished works to include not only traditional unpublished works like diaries, letters, and photographs, but also the nightly news, portraits displayed at museums, films, radio shows, and even Martin Luther King Jr.’s “I Have a Dream” speech. This means that many more unpublished works have potentially come into the public domain, as long as they remained unpublished through December 31, 2002, and their authors have been deceased for over seventy years, or in the case of a corporate work or a work for hire, 120 years from the creation have passed.

## 2. Unpublished Registered Works

One category of unpublished works *disqualified* from the additional protection afforded under section 303(a) is that of unpublished works registered under the 1909 Act.<sup>45</sup> Section 12 of the 1909 Copyright Act set out an enumerated list of works that

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<sup>41</sup> *Mister Maestro*, 224 F. Supp at 101.

<sup>42</sup> *Estate of Martin Luther King, Jr.*, 194 F.3d 1211.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 1217.

<sup>45</sup> 1 NIMMER, *supra* note 11, § 1.05[B].

could be registered under the federal system.<sup>46</sup> The category included lectures, dramatic or musical compositions, motion-picture photoplays, photographs, motion pictures, stills from motion pictures, and artistic works or drawings.<sup>47</sup> If the copyright holder registered these works, the common law perpetual copyright was replaced by the federal statutory limited term of twenty-eight years, with an optional renewal term of an additional twenty-eight years.<sup>48</sup> So, in working with potentially registered unpublished works, it must first be determined whether the work was registered, and then if it was renewed (otherwise it would be in the public domain after the initial twenty-eight term). If a work was registered after 1923 and *renewed*, the work now carries a term of ninety-five years from publication.<sup>49</sup> However, these works would not qualify for the additional term of protection under section 303(a), even if the registered unpublished work was published between 1978 and 2002, as their copyright term is determined under the 1909 Copyright Act for published works.<sup>50</sup>

### 3. Unpublished Works (specific categories)

To make matters more complicated, there are two categories of works that do not quite follow the rules set out above: art and sound recordings. Like unpublished works, sound recordings were protected by state common law copyright, with a perpetual

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<sup>46</sup> *Id.* § 2.04.

<sup>47</sup> Copyright Act of 1909, ch. 320, § 12, 61 Stat. 656 [hereinafter 1909 Act].

Copyright may also be had of the works of an author, of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic, musical, or dramatico-musical composition; of a title and description, with one print taken from each scene or act, if the work be a motion-picture photoplay; of a photographic print if the work be a photograph; of a title and description, with not less than two prints taken from different sections of a complete motion picture, if the work be a motion picture other than a photoplay; or of a photograph or other identifying reproduction thereof, if it be a work of art or a plastic work of drawing.

*Id.*

<sup>48</sup> *See id.* § 7.16(A)(2)(c). There are two points to note. The term for unpublished works was not included within the 1909 Act, as the law referred to the duration of statutory copyright beginning upon “first publication.” Reese, *supra* note 18. Courts eventually decided that the initial term of unpublished works registered for protection ran for twenty-eight years from the date of deposit. *Marx v. United States*, 96 F.2d 204, 206 (9th Cir. 1938); *Shilkret v. Musicraft Records, Inc.*, 131 F.2d 929, 932 (2d Cir. 1942).

<sup>49</sup> *See* Peter Hirtle, *Copyright Term and the Public Domain in the United States* (Jan. 1, 2006), <http://www.copyright.cornell.edu/training/copyrightterm.pdf>.

<sup>50</sup> The 1909 Act did not explicitly indicate a copyright term for unpublished registered works, but the Ninth Circuit determined that the term would be the same as published works, except that the term would start running on the date of registration, rather than the date of publication. *Marx*, 96 F.2d at 206. Other courts followed this interpretation. *See Shilkret*, 131 F.2d at 932; *Davis v. E. I. Du Pont De Nemours & Co.*, 240 F. Supp. 612 (S.D.N.Y. 1965); *Tobias v. Joy Music, Inc.*, 204 F. Supp. 556 (S.D.N.Y. 1965); *Rose v. Bourne, Inc.*, 176 F. Supp. 605 (S.D.N.Y. 1959); *Loew's Inc. v. Superior Court of Los Angeles County*, 18 Cal. 2d 419 (1941).

term of protection, but they are protected in a slightly different manner in terms of a transition period to a federal statutory term.<sup>51</sup> All sound recordings will remain under a state common law perpetual copyright system until February 15, 2067.<sup>52</sup> This means that sound recordings qualify for protection granted by section 114(b), which is longer than the additional transition time granted under section 303(a).<sup>53</sup>

Art works present an even more complicated matter. Under the 1909 Act, a piece of art work was considered unpublished prior to any sale. Under this Act, courts determined that if the work was sold, the work should be considered published.<sup>54</sup> Some courts also ruled that an art piece was published if the work was exhibited to the public without any copying restrictions.<sup>55</sup> This makes the category of whether an art work was unpublished as of January 1, 1978 a little narrower.

### B. “Published” Under the 1976 Copyright Act

Once it is determined that a work was considered “unpublished” under the 1909 Act, the next task is to determine whether the work was “published” between 1978 and 2002. The 1976 Copyright Act incorporated the case law developed under the 1909 Act with regard to publication and the distinction between limited and general publication.<sup>56</sup> But in general, publication is less complicated under the 1976 Act, especially since there are no longer formality requirements upon publication. Questions arise, however, in a number of instances. First, does posting an unpublished work on the internet count as a “publication” under the 1976 Copyright Act? Second, need the publication have been authorized by the copyright holder in order

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<sup>51</sup> 1 NIMMER, *supra* note 11, § 2.10.

<sup>52</sup> As Caz McChrystal notes: “[On February 15, 2067], every sound recording ever recorded prior to February 15, 1972 will pour simultaneously into the American public domain.” Caz McChrystal, *The Dissonant Tune of International Harmonization and the Domestic Duration of Phonorecord Protection*, 3 VAND. J. ENT. & TECH. L. 523, 523 (2006).

<sup>53</sup> 17 U.S.C. § 114(b) (2006).

<sup>54</sup> See *Pierce & Bushnel Mfg. Co. v. Werckmeister*, 72 F. 54, 57 (1st Cir. 1896) (“It is the published book, or the book which is made public by offering for sale or otherwise, which must contain the notice.”); *Morton v. Raphael*, 79 N.E.2d, 522 (Ill. App. Ct. 1948).

<sup>55</sup> See *Letter Edged in Black Press, Inc. v. Pub. Bldg. Comm’n of Chicago*, 320 F. Supp. 1303, 1309 (N.D. Ill. 1970) (deeming “The Chicago Picasso” a general publication when the general public was allowed to take pictures and pictures appeared in newspapers and magazines).

<sup>56</sup> Section 101 defines “publication” as the distribution of copies or phonorecords of a work *to the public by sale or other transfer of ownership, or by rental, lease, or lending*. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication. 17 U.S.C. § 101 (emphasis added).

to qualify for additional protection?

### 1. The Internet

The question of whether posting a work on the internet constitutes publication contains within it an important second question. If such posting does count as publication, how does one determine when the publication occurred?

To date, only one court has truly addressed the initial question. In *Getaped.com, Inc. v. Cangemi*, the Southern District of New York decided that posting on a website constitutes more than merely display because posting permits access to download the materials.<sup>57</sup> The court determined that viewing a website is not the same as viewing a painting displayed at a museum.<sup>58</sup> The court explained:

By accessing a webpage, the user not only views the page but can also view—and copy—the code used to create it. In other words, merely by accessing a webpage, an Internet user acquires the ability to make a copy of that webpage, a copy that is, in fact, indistinguishable in every part from the original. Consequently, when a website goes live, the creator loses the ability to control either duplication or further distribution of his or her work. A webpage in this respect is indistinguishable from photographs, music files or software posted on the web—all can be freely copied. Thus, when a webpage goes live on the Internet, it is distributed and “published” in the same way the music files in *Napster* or the photographs in the various *Playboy* decisions were distributed and “published.”<sup>59</sup>

As the *Getaped.com* court noted, some courts have determined that posting music files, software and photographs on the internet is considered publication.<sup>60</sup> Yet, it remains to be seen what other

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<sup>57</sup> 188 F. Supp. 2d 398, 401-02 (2002); JAMES E. HAWES & BERNARD C. DIETZ, COPYRIGHT REGISTRATION PRACTICE § 7:3 (2d ed. 1999).

<sup>58</sup> *Getaped.com, Inc. v. Cangemi*, 188 F. Supp. 2d 398, 401-02 (S.D.N.Y. 2002).

<sup>59</sup> *Id.* at 402.

<sup>60</sup> See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) (uploading music files to the internet for others to copy violates the copyright holder's exclusive publication right); *State v. Perry*, 83 Ohio St. 3d 41, 45 (Ohio 1998) (finding a state statute preempted by the Copyright Act, and noting that “[p]osting software on a bulletin board where others can access and download it is distribution,” i.e., publication); *Playboy Enter., Inc. v. Chuckleberry Publ'g, Inc.*, 939 F. Supp. 1032, 1039 (S.D.N.Y. 1996) (uploading content on internet and inviting users to download it violates exclusive publication right); *Playboy Enter., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 513 (N.D. Ohio 1997) (finding that defendants violated plaintiff's exclusive publication right by moving subscriber-uploaded photographs to common bulletin board service files); *Playboy Enter., Inc. v. Frena*, 839 F. Supp. 1552, 1556 (M.D. Fla. 1993) (holding that defendant's unauthorized uploading of copyrighted images with the knowledge that the images would be downloaded by other bulletin board subscribers constituted an infringement of plaintiff's exclusive publication right (citing *Getaped.com*, 188 F. Supp. 2d

courts determine about publication and posting or creating websites, and, if this is considered to be publication, whether it is a general publication.<sup>61</sup>

Following this reasoning, one could assume that posting an archival letter on the internet before the December 31, 2002 deadline would count as a publication because of the ability to “view-and-copy,” but this has not been decided.<sup>62</sup> A problem not addressed by the *Getaped.com* analysis is what happens when access controls and digital devices are put in place to prevent copying. Does the post merely become a display, and the work remain unpublished? The court argued that because the source code is viewable, the work can be copied, and, therefore, a publication has occurred. However, the determination of whether a publication was general or limited was not premised on whether a work could be copied, but rather whether the work was released to a general or limited audience with or without restrictions.<sup>63</sup>

The Copyright Office has taken the position that posting on the internet could be a publication, but has left the decision of whether to consider a work published or unpublished to the individual registering a particular online work.<sup>64</sup> In Circular 66, the Copyright Office provides some basic information about registering an online work: “The application for registration should exclude any material that has been previously registered or published or that is in the public domain. For published works, the registration should be limited to the content of the work asserted to be published on the date given on the application.”<sup>65</sup> This seems to leave it to the applicant to decide whether the work is published. In determining whether the work is published or unpublished, the Circular provides additional advice in filling out “Space 3” on the registration form.<sup>66</sup> It is worth quoting the

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at 398)).

Originally in *Getaped.com*, a magistrate judge distinguished the website from many of the cases above and came to the conclusion that *Getaped.com*'s website was not a publication because nothing was being downloaded, as was the case in *Napster*, *State and Playboy*. *Getaped.com, Inc. v. Cangemi*, 00 Civ. 7661, 2001 U.S. Dist. LEXIS 22591 (S.D.N.Y. 2001). Instead the magistrate saw the website as a mere display, which does not constitute publication. *Id.* The district court later reversed in *Getaped.com*, 188 F. Supp. 2d at 398.

<sup>61</sup> For another discussion, see Franklin B. Molin, *Posting a Web Site is Publication*, *U.S. Court Rules*, NAT'L L.J., May 13, 2002, at C16.

<sup>62</sup> *Getaped.com*, 188 F. Supp. 2d at 402. Publication was said to have taken place when the website “went live.” *Id.*

<sup>63</sup> See RayMing Chang, “*Publication*” Does Not Really Mean Publication: The Need to Amend the Definition of Publication in the Copyright Act, 33 AM. INTELL. PROP. L. ASS'N Q. J. 225 (2005).

<sup>64</sup> U.S. Copyright Office, Copyright Registration for Online Works, Information Circular 66, 2 (Sept. 2000), available at <http://www.copyright.gov/circs/circ66.pdf>.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

directions in their entirety:

The definition of “publication” in the U.S. copyright law does not specifically address online transmission. As has been the long-standing practice, the Copyright Office asks the applicant, who knows the facts surrounding distribution of copies of a work, to determine whether the work is published or not.

In the current copyright law, “**publication**” is defined as “. . . the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.” 17 U.S.C. sec. 101.

**Published works:** If you determine that your work is published, give the complete date and nation of first publication in Space 3b of the application. For a revised version, the publication date should be the date the revised version was first published, not the date the original version first appeared online. For registration purposes, give a single nation of first publication, which may be the nation from which the work is uploaded.

**NOTE:** If the same work is published both online and by the distribution of physical copies and these events occur on different dates, the publication date should refer to whichever occurred first. For what to deposit in this case, see the “Exception” below.

**Unpublished works:** If you determine that your work is unpublished, leave Space 3b blank. Do **NOT** write “Internet,” “homepage,” or any other term in this space.<sup>67</sup>

It is unclear whether an individual’s choice as to whether to have her website be considered published or unpublished will hold any weight in a court, or if courts will attempt only a *Getaped.com*-style analysis, and simply examine a user’s ability to “view-and-copy” the website. How courts choose to deal with this issue will potentially alter what works are in the public domain. This determination of whether a work is published when placed online could significantly affect which unpublished works have additional protection and which are now part of the public domain. The issue of “publication” in an online context is something to watch.

If an unpublished work was posted on a website and we assume that this qualifies as a publication, the question becomes how to determine whether the unpublished work was posted

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<sup>67</sup> *Id.*

before or after December 31, 2002. If the unpublished work was placed on the internet *after* the 2003 deadline, and meets the other criteria such that it was created before 1978 and the author has been deceased longer than seventy years, it is now part of the unpublished public domain.<sup>68</sup> Therefore, it becomes important to determine when a particular unpublished photograph, letter, film, or diary was posted to a website. The Internet Archive Wayback Machine may help with this determination:

The Internet Archive Wayback Machine is a service that allows people to visit archived versions of Web sites. Visitors to the Wayback Machine can type in a URL, select a date range, and then begin surfing on an archived version of the Web. Imagine surfing circa 1999 and looking at all the Y2K hype, or revisiting an older version of your favorite Web site.<sup>69</sup>

Without the Wayback Machine, it would be nearly impossible to determine what was published before the 2002 deadline, as many websites do not include when a particular unpublished work was posted to a particular site.<sup>70</sup>

## 2. By Whose Authority Did the Publication Take Place?

Another significant question that arises is whether a publication “counts” if it is not authorized by the copyright holder. Copyright law forbids the unauthorized copying, distribution, public display or performance of a copyrighted work, as well as the unauthorized creation of a derivative work. Circular 22 from the Copyright Office states that “[u]nauthorized publication without the copyright notice, or with a defective notice, does not affect the validity of the copyright in the work.”<sup>71</sup> So, even if someone benevolently publishes unpublished works to get the additional protection, unless he is authorized to do so by the copyright holder, these efforts do not count as a publication.<sup>72</sup>

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<sup>68</sup> Some sites, including the Mark Twain collection at Berkeley, have blocked the Wayback Machine. Many sites, however, still allow the Wayback Machine to function.

<sup>69</sup> The Wayback Machine, <http://www.waybackmachine.org> (last visited Aug. 20, 2006).

<sup>70</sup> This tool is very simple to use. Just input the URL, and a page comes up listing all of the previous versions of that web page. Click on the version closest to the December 31, 2002 cut-off date, and you can tell if the unpublished work was posted before the deadline. It is an amazing tool, particularly when many sites do not post the date of internet publication on a given image or text. It makes determining what is in the unpublished public domain much easier.

<sup>71</sup> U.S. Copyright Office, How to Investigate the Copyright Status of a Work, Information Circular 22 (July 2006), *available at* <http://www.copyright.gov/circs/circ22.pdf>.

<sup>72</sup> Franklin B. Molin & Jesse E. Busch, *Publish or Perish: Copyright Term for Some Unpublished Works will Expire at the End of 2002*, 24 NAT'L L.J., Dec. 24, 2001, at C1. See generally Paul J. Heald, *Payment Demands for Spurious Copyrights: Four Causes of Action*, 1 J. INTELL. PROP. L. 259, 260 (1994).

One area that is less clear is that which is related to the “*Pushman* presumption” and unpublished works. The *Pushman* case established for a short period of time that where a unique unpublished work is sold by an author with no restrictions, there is a presumption that copyright was transferred as well.<sup>73</sup> In *Pushman*, an artist delivered an “uncopyrighted” painting to an art gallery for sale.<sup>74</sup> The court found that the unpublished common law copyright passed to the gallery as part of the sale.<sup>75</sup> The *Pushman* presumption relies on the fact that the artist himself sold the painting with no conditions attached.<sup>76</sup> This went against the traditional notion that the copyright and the physical object were distinct.<sup>77</sup> This presumption was overturned in many states by statute, including New York in 1966.<sup>78</sup> The 1976 Copyright Act

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<sup>73</sup> *Pushman v. N.Y. Graphic Soc’y, Inc.*, 287 N.Y. 302 (1942).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 306. It is interesting to note that the *Pushman* court was not deciding the question of whether the art work was generally published upon the sale of the painting to the gallery, and therefore would lose the very common law copyright in question. *Id.* at 308. The *Pushman* court also noted a similar case, with a similar outcome:

*Parton v. Prang* . . . [is] very similar to this, [and] was decided on the pleadings. The artist plaintiff Parton who was seeking, like plaintiff here, to enjoin the reproduction of one of his paintings by a defendant who had bought the painting from a dealer, lost the suit. True, it was argued in that case that the artist had lost his rights to object because of certain negotiations with the defendant, but the court, leaving that question undecided, held positively that ‘if the sale was an absolute and unconditional one, and the article was absolutely and unconditionally delivered to the purchaser, the whole property in the manuscript or picture passes to the purchaser, including the right of publication, unless the same is protected by copyright, in which case the rule is different.’

*Id.* at 306.

*Parton v. Prang* cited *Turner v. Robertson*, 10 Irish Chancery Rep. 121, 143, which is considered to be the authoritative case on this issue. *Turner* states that “it would be a waste of time to add more than that the copyright is incident to the ownership and passes, at the common law, with a transfer of the work of art.” *Id.*

<sup>76</sup> *Pushman*, 287 N.Y. at 305.

<sup>77</sup> 3 NIMMER, *supra* note 11, § 10.03[A] [3].

<sup>78</sup> N.Y. ARTS & CULT. AFF. LAW § 14.01 (McKinney 2006).

Whenever a work of fine art is sold or otherwise transferred by or on behalf of the artist who created it . . . the right of reproduction thereof is reserved to the grantor . . . unless such right is sooner expressly transferred by an instrument, note or memorandum in writing signed by the owner of the rights conveyed or his duly authorized agent. Nothing herein contained, however, shall be construed to prohibit the fair use of such work of art.

*Id.*

The memorandum of the State Department of Law concerning this bill stated:

This bill is designed merely to overcome the effect *Pushman v. New York Graphic* . . . in which it was held that an artist who has given an absolute and unconditional bill of sale on an uncopyrighted painting retains no such common law copyright as to enable him to prevent commercial reproduction or exploitation by the purchaser . . .

This bill, therefore, gives a much needed measure of protection to the creator of fine art by creating a law of property independent of the copyright laws.

1966 N.Y. Sess. Laws 2915 (McKinney).



codified this change in section 202 which explicitly states that the copyright and the physical work are two separate forms of property.<sup>79</sup>

The question then, in relation to unpublished works, is whether *Pushman* applies in a narrow window of time; i.e., whether a work that was physically sold or donated by an author, without restrictions, transferred the copyright in that sale or donation. This becomes an issue when determining *who* can authorize a publication that would qualify for additional protection under section 303(a).

## II. INTERNATIONAL IMPLICATIONS

The transformation of the public domain with the addition of unpublished works presents a significant change in U.S. copyright law. This is coupled with the fact that the scope of unpublished materials in the United States is not bound by territory or nationality.<sup>80</sup> Traditionally, under the Berne Convention, the copyright status of unpublished works is governed by the nationality or place of domicile of the author, since there is no place of publication.<sup>81</sup> However, under section 104(a) of the 1976 Copyright Act, all unpublished works are protected under copyright in the United States regardless of the nationality or domicile of the author.<sup>82</sup> To understand the significance of section 104(a) read in conjunction with section 303(a), one must understand a few basic concepts in copyright, specifically: national treatment, territoriality, the rule of the shorter term, and country of origin. Additionally, to meet the requirements of section 303(a), the issue of which works count as “published” in an international context needs to be addressed.

### A. *Unpublished Works in an International Context*

Copyright law is generally constrained by national

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<sup>79</sup> 17 U.S.C. § 202 (2006).

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

*Id.*

<sup>80</sup> *Id.* § 104(a).

<sup>81</sup> Berne Convention for the Protection of Literary and Artistic Works art. 2(4), Sept. 9, 1886, as last revised Sept. 28, 1979, 828 U.N.T.S. 221 [hereinafter Berne Convention].

<sup>82</sup> 17 U.S.C. § 104(a). “UNPUBLISHED WORKS. — The works specified by sections 102 and 103, while unpublished, are subject to protection under this title without regard to the nationality or domicile of the author.” *Id.*

boundaries, that is, the territory of a particular country only governs the copyright activities within that country (including alleged infringement within that country's borders).<sup>83</sup> This is coupled with the idea of international agreements requiring national treatment.<sup>84</sup> The Berne Convention, TRIPS, and the WCT all operate on these principles.<sup>85</sup> A country is required to treat a foreign work or author in the same manner as a national work, a concept which is called national treatment.<sup>86</sup> The one exception to national treatment of a foreign work is the case of duration. Countries are allowed to discriminate against foreigners under a principle called the rule of the shorter term.<sup>87</sup> This principle allows countries to limit the term of protection to that of the term in the country of origin, if the term in the country of origin is shorter.<sup>88</sup> For example, if work A only carries a term of ten years in Country A, and Country B normally gives thirty years of protection, Country B can limit the term to ten years of protection to Work A in Country B. Many countries have adopted this rule to encourage other countries to lengthen their duration of copyright and also to give an advantage to their own nationals by making available the use of foreign otherwise copyrighted materials at an earlier date. Country of origin is a related concept to national treatment.<sup>89</sup> In order to receive protection in a particular country, a published work must be published in that country or by an IP treaty-signed country, and if the work is unpublished, the author must be a national or domiciled in that country.<sup>90</sup>

In the United States, section 104(a) does not adopt the rule of the shorter term, nor does it apply the country of origin concept.<sup>91</sup> All unpublished works in the United States fall under section 104(a).<sup>92</sup> This would seem to mean that, within the United States, the term of protection for all unpublished works is

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<sup>83</sup> See generally PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW AND PRACTICE § 3 (2001).

<sup>84</sup> *Id.* § 3.2.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Berne Convention, *supra* note 81, at art. 7(8). "In any case, the term shall be governed by the legislation of the country where protection is claimed: however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work." *Id.* The rule of the shorter term is also called comparison of terms. See GOLDSTEIN, *supra* note 83, § 5.3.2.1.

<sup>88</sup> The United Kingdom is one country that adopts the rule of the shorter term. Copyright, Designs and Patents Act, 1988, c. 48 (Eng.) [hereinafter CDPA].

<sup>89</sup> See generally GOLDSTEIN, *supra* note 83, § 5.3.2.1.B.

<sup>90</sup> Berne Convention, *supra* note 81, at art. 5(4)(c).

<sup>91</sup> 17 U.S.C. § 104(a) (2006).

<sup>92</sup> *Id.*

measured by the term set out by section 303(a).<sup>93</sup>

However, because copyright is territorial, if a U.S. author wants to distribute or publish a work abroad that relies on or reprints certain unpublished works that are in the public domain in the United States, that U.S.-based author must now look to the copyright laws of the particular country (secondary country) to make sure those relied-upon works are in the public domain there as well. The author must then determine whether an unpublished work has any particular country of origin connection to the secondary country. If the author is a national or is domiciled in that country, the unpublished works may still be under copyright in that country. One must be aware that other countries, like the United States, may not distinguish unpublished works by nationality, and so any unpublished work used may still be under copyright in that jurisdiction.

One additional complication occurs regarding European works, specifically with respect to the determination of the expiration date of a particular work. Under the E.C. Term Directive, the rule of the shorter term does not apply within the European Union, but it is to be applied to works published outside of the EU, or, in the case of unpublished works, to nationals and those domiciled outside of the EU.<sup>94</sup>

Currently, there exists a great variance of the copyright terms for unpublished works. Unlike the harmonization of “life of the author plus seventy” across the globe, through instruments like the Berne Convention (the minimum of life of the author plus fifty) and pressure from the European Union and the United States, unpublished works seem to be in great disharmony. Ironically, the disharmony stems from common law countries trying to harmonize the copyright treatment of unpublished works, which were often previously under common law perpetual copyright and not under the “life plus” system. From this author’s limited research, the transitional periods for unpublished works appear only to exist in common law countries.<sup>95</sup> Civil law countries appear to protect unpublished works for the same term as

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<sup>93</sup> *Id.*

<sup>94</sup> Council Directive 93/98, art. 7(1), 1993 O.J. (L 290) 9 (EC).

<sup>95</sup> For instance, Hungary and Italy have a term of life of the author plus seventy years for both unpublished and published works, without any indication of a transition period. Mihály Fiscor, Hungary, in 2 INTERNATIONAL COPYRIGHT LAW AND PRACTICE (2004) and Alberto Musso, Italy, in 2 INTERNATIONAL COPYRIGHT LAW AND PRACTICE (2004). These are just two examples, but it also seems to be the case of most of the EU countries, and other civil law countries. See Alain Strowel & Jan Corbet, Belgium, in 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 3 (2004); Moniteur belge (Official Journal), July 27, 1994, 19,297-314 (Copyright Act) and 19,311-17 (Software Act.), describing section 7 as granting the same term for both published and unpublished works.

published works.<sup>96</sup> Brazil is one example.<sup>97</sup> But once these transition periods are over (in about fifty years), a harmonized system will be in place in which unpublished works are incorporated into the “life plus” system on a global scale.

The United Kingdom, under the Copyright, Designs and Patent Act 1988 (CDPA), is also moving from a system of perpetual protection for unpublished works to a limited time regime.<sup>98</sup> The U.K. system has at least three categories for literary, dramatic, and musical works. The law in the United Kingdom seems to be as complicated as the law in the United States, but has different specific complications.<sup>99</sup> Generally, literary, dramatic, musical and artistic works carry a term of life of the author plus seventy years, just as in the United States.<sup>100</sup> However, the term varies depending on when a work was created, was published, or whether it remained unpublished. If the work was unpublished at the author’s death, but published between June 1, 1957, and August 1, 1989, the work carries a copyright term of fifty years from the year of publication, if longer than life of the life of the author plus seventy years.<sup>101</sup> If the work was unpublished as of August 1, 1989, then the term is either fifty years from the end of 1989, or, if longer, then life of the author plus seventy years.<sup>102</sup> If the work was created and unpublished after August 1, 1989, then the term is measured by life of the author plus seventy years. The term for artistic works, regardless of when they were created, published or unpublished is measured by life of the author plus seventy years.<sup>103</sup> Photographs of a known author are protected by

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<sup>96</sup> *Id.* Another example is Germany. As of July 1, 1995, the term is life of the author plus seventy years for both published and unpublished works. This eliminated the additional ten years given to a work published for the first time within the last ten years of the life plus seventy term. Adolf Dietz, *Germany*, in 2 INTERNATIONAL COPYRIGHT LAW AND PRACTICE (2004); section 64 of the 1965 Copyright Act.

<sup>97</sup> See, e.g., Manoel J. Pereira dos Santos & Otto B. Licks, *Brazil*, in 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 3 (2004). See also 1998 Copyright Act, no. 9,610; 1998 Software Act, no. 9,609.

<sup>98</sup> Duration of Copyright and Rights in Performances Regulations, 1995, S. 12(1), 1995/3297 [hereinafter DCPR]; CDPA, *supra* note 88. See John N. Adams, *The Duration of Copyright in the United Kingdom After the Regulations*, 1 ENT. L.R. 23 (1997). See also Lionel Bently & William Cornish, *United Kingdom*, in 2 INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 3[1][d][I] (2004).

<sup>99</sup> Adams, *supra* note 98, at 23. The paper begins: “The question of the term of protection enjoyed by any particular copyright work can be an exceptionally difficult one to answer.” *Id.* Note that their comment only applies to works created after April 27, 1912, which is “the commencement date of the Copyright Act 1911.” *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* (citing Copyright Act 1956, ch. 74, § 2(3); CDPA, *supra* note 88, at sched. 1, 12(2)(a), as amended by DCPR, *supra* note 98, § 15(1)).

<sup>102</sup> *Id.* (citing CDPA, *supra* note 88, at sched. 1, ¶¶ 12(2), 12(4)(a), as amended by DCRPR, *supra* note 98).

<sup>103</sup> *Id.* (citing CDPA, *supra* note 88, at art. 12(2), as amended by DCRPR, *supra* note 98).

a whole set of different terms:<sup>104</sup>

1. A photograph taken after August 1, 1989: protected for life of the author plus seventy years;<sup>105</sup>
2. A photograph taken after June 1, 1957 and unpublished on August 1, 1989: protected for the longer of fifty years from the end of 1989 or life of the author plus seventy years;<sup>106</sup>
3. A photograph *published* between June 1, 1957 and August 1, 1989: protected for the longer of fifty years from the year of publication or life of the author plus seventy years;<sup>107</sup>
4. A photograph taken before June 1, 1957: the longer of fifty years from the year the photograph was taken or life of the author plus seventy years protected for;<sup>108</sup>

Therefore, the term for works unpublished as of August 1, 1989, whose authors have been deceased at least seventy years, is until December 31, 2038.<sup>109</sup> If the author was still alive on August 1, 1989, then the unpublished work is protected, like published works, for the life of the author plus seventy years.<sup>110</sup> This means that a work could be in the public domain in the United States because it was created before and remained unpublished through 1978 and was not published between 1978 and 2002, but is protected in the United Kingdom because of the author's country of origin.<sup>111</sup>

Canada is another example of a country in transition. Canada's unpublished works (those works that have not been publicly displayed or communicated to the public) come into the public domain after life of the author plus fifty years.<sup>112</sup> Like the United States system, there is a transition period. If an author died before December 31, 1948, his unpublished works entered the public domain on January 1, 2004.<sup>113</sup> For those authors who died between 1948 and 1998, their unpublished works are automatically protected until January 1, 2049.<sup>114</sup>

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<sup>104</sup> Unknown authors are governed by different terms. See Adams, *supra* note 98, at 24.

<sup>105</sup> *Id.* (citing CDPA, *supra* note 88, at art. 12(2), as amended by DCRPR, *supra* note 98).

<sup>106</sup> *Id.* (citing CDPA, *supra* note 88, at sched. 1, ¶ 12(4)(c); CDPA at art. 12(2), as amended by DCRPR, *supra* note 98, § 15(1)).

<sup>107</sup> *Id.* (citing CDPA, *supra* note 88, at art. 74, § 3(4)(b); CDPA at sched. 1, ¶ 12(2); CDPA at art. 12(2), as amended by DCRPR, *supra* note 98, § 15(1)).

<sup>108</sup> *Id.* (citing CDPA, *supra* note 88, at art. 74, sched. 7, ¶ 2; CDPA at sched. 1, ¶ 12(2)(c); CDPA at art. 12(2), as amended by DCRPR, *supra* note 98, § 15(1)).

<sup>109</sup> CDPA, *supra* note 88, at sched. 1, ¶ 12(4).

<sup>110</sup> *Id.*

<sup>111</sup> See "Vera Brittain" example *infra* Part III.D.

<sup>112</sup> Canada Copyright Act, R.S.C., c. C-42, s. 23 (1985); ch. 47, s. 59 (1994); ch. 24, s. 14 (1997).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

Hong Kong is yet another example of copyright in transition. The transition period is based on the death date of the author (as in the United Kingdom), rather than on the date of creation of the work, and the additional copyright term granted is automatic, but the term itself looks more like the term granted in the United States.<sup>115</sup> If the author was deceased before June 27, 1997, the unpublished work receives protection until December 31, 2047.<sup>116</sup> This brings unpublished works into a limited term, whereas previously, publication started the copyright duration clock.<sup>117</sup> If the author was alive on or after June 27, 1997, the term is life of the author plus fifty years.<sup>118</sup>

During this transition period, the United States may see itself as having a distinct advantage by having unpublished works in the public domain ahead of other common law countries. Australia would be one such disadvantaged country. Australia's term for unpublished works continues to be perpetual, in the same way that the U.S. system had previously been.<sup>119</sup> Therefore, an Australian work created before 1978 and not published by 2002, is now in the public domain in the United States, but remains under copyright protection in Australia. This is a benefit to the United States because that same Australian unpublished work, under perpetual copyright until published in Australia, is now in the public domain in the U.S., free of copyright restrictions.

Some may ask whether the current location of the unpublished materials makes a difference in determining which country's law applies in terms of copyright duration. For instance, if a Canadian university owns the papers of a British national, does the fact that the unpublished papers are in Canada make any difference to the copyright duration? The answer is no for a number of reasons. Where the materials are housed is not a concern of the Copyright Act, and in the United States, section 104(a) does not distinguish between nationals and foreigners.<sup>120</sup> Second, the true inquiry is whether the unpublished work is still under copyright by the rules of the country in which the author *using* the unpublished works is located, or in other words, where the alleged or potential infringement occurs.

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<sup>115</sup> Jared R. Margolis, *Hong Kong*, in 2 INT'L COPYRIGHT LAW AND PRAC. (2004) based on Copyright Ordinance, (1997) Cap. 528 (H.K.).

<sup>116</sup> Copyright Ordinance, (1997) Cap. 528, sched. 2, ¶ 13 (H.K.), *cited in* MARGOLIS, *supra* note 115, at HK-16.

<sup>117</sup> Margolis, *supra* note 115, at HK-16.

<sup>118</sup> *Id.*

<sup>119</sup> *Compare* Australian Copyright Council, Duration of Copyright, Information Sheet G23 (Sept. 2005), <http://www.copyright.org.au/publications/G023.pdf>, *with* 17 U.S.C. § 104(a) (2006).

### B. *Publication*

A final issue is whether works published outside the United States can qualify for additional protection under section 303(a). Unlike unpublished works under 104(a), according to which nationality of the author or location of the papers does not matter, what qualifies as a publication within the territory of the United States has a slightly stricter standard. The determination of whether an unpublished work published outside of the United States qualifies as a publication between 1978 and 2002 invokes section 104(b), which looks at publications in an international context.<sup>121</sup> Section 104(b) includes both foreign publications in the United States and publications in countries who are signatories to U.S. intellectual property treaties. This means that an unpublished work, published for the first time in Canada during the 1978-2002 period, would qualify as published for the purpose of receiving additional protection through December 31, 2047.<sup>122</sup> To receive such protection, first publication must take place within the United States or within a foreign nation that is a treaty party. Alternatively, at least one of the authors must be a national or domiciliary of the United States or subject to the authority of a treaty party. The final possibility is the author's status as a stateless person, wherever that person may be domiciled.<sup>123</sup> Generally, this requirement should not be much of an impediment, as most countries are now a treaty party to TRIPS, the Berne Convention, the WCT or other international copyright treaties.

One question that might arise is which country's definition of "published" should be followed. While the United States is still unsure of what counts regarding internet postings, other countries, such as the United Kingdom and all of the other European Union countries, have written into their laws the right to communicate to the public as a specific right in regard to internet communication, and have defined published in a broader sense of making available to the public.<sup>124</sup> Other countries, like China, have made distinctions between traditional publications

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<sup>121</sup> 17 U.S.C. § 104(b).

<sup>122</sup> *Id.*

<sup>123</sup> The treaties included under section 101 of the 1976 Copyright Act are the Berne Convention, Universal Copyright Convention, WTO Agreement, Geneva Phonograms Convention, WIPO Copyright Treaty, WIPO Performances and Phonograms Treaty and "any other copyright treaty to which the United States is a party." *Id.* § 101. (Note that section 101 defines international agreements and then, for the definition of a treaty party, refers back to the international agreement definition as a treaty party being a signatory to one of the international agreements.)

<sup>124</sup> See TREVOR COOK & LORNA BRAZELL, THE COPYRIGHT DIRECTIVE: UK IMPLEMENTATION 15 (2004).

and making a work available to the public.<sup>125</sup>

### III. FOUR EXAMPLES

This Part examines a number of the preceding issues by way of examples with an international element. Each of the four examples poses an issue relating to unpublished works with either a U.K. or U.S. connection. This is meant to illustrate the complexities that arise with just two countries involved. Both the United Kingdom and United States are common law countries, and are engaged in a transition period that brings unpublished works under a limited time statutory scheme for the first time.

#### A. *From A.S. Byatt's Novel Possession: Unpublished Works that Remain Unpublished*

A.S. Byatt's novel *Possession* provides a good fictional example of the potential impact of the change in U.S. law in an international context.<sup>126</sup> The plot of the novel revolves around a set of previously unknown nineteenth century love letters by two well-known British poets. Several of these letters are found in a British library, while the rest are found at a private home. Central to the plot is a determination of the identity of one of the authors, and then the issue of who will control the physical ownership of the documents as well as the copyright in the letters. Who holds control will determine who, out of a half-dozen scholars, will have access to the new finds. Access means the ability to write, critique, and pursue a particular scholarly agenda, and there are many competing interests in this book.<sup>127</sup> If these fictional events had actually happened in England under the CDPA, these letters would be under copyright until December 31, 2038, because the authors had been deceased before August 1, 1989.<sup>128</sup> In the

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<sup>125</sup> China generally follows the term life of the author plus fifty years. For posthumous works:

If the author did not expressly object to making the work available to the public, the right of making the work available to the public may be exercised by the successor in interest of the author within 50 years after the death of the author; if the author has no successor in interest, the owner of the original copy of the work may exercise such a right.

Xue Hong, *China*, in 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE (2004) (the Decision on Revision of the Copyright Act of the People's Republic of China brought into effect the 2001 Copyright Act, at Chi-24 (Implementing Regulations, Article 17)).

There is also a moral right of divulgence, or "first publication," in the broad sense of making a work available to the public," which lasts the same as the copyright term, life of the author plus fifty years. The author could have made an express statement forbidding posthumous divulgence. *Id.*

<sup>126</sup> A.S. BYATT, *POSSESSION* (Random House 2001).

<sup>127</sup> This is what is at stake in the current controversy between Shloss and the Joyce estate. See *supra* note 10.

<sup>128</sup> CDPA, *supra* note 88, at sched. 1, ¶ 12(4).



United States, however, these same works would be in the public domain, free from copyright and for all to use.<sup>129</sup> One of the main problems, of course, is that even without copyright, the papers may still be governed by other conditional access controls, and those who hold the papers will yield a great deal of power, regardless of their legal rights.<sup>130</sup>

*B. Jane Austen's Early Unpublished Novel Online: Unpublished Works Published*

Another British example is an early, previously unpublished, Jane Austen (d. 1817) novel, which is now online at the British Library as part of the "Turning the Pages" project.<sup>131</sup> In order to know if this work is entitled to receive additional protection in the United States, the question one must ask is whether the novel was published between 1978 and 2002. In the case of this novel, we must also once again confront the question of whether posting the novel on the internet counts as publication.

Regarding foreign publication, because section 104(b) includes publications in treaty-party countries, the Jane Austen publication will count if published, and so the work would be protected *in the United States* through December 31, 2047, as long as the work was published before the December 31, 2002 deadline.<sup>132</sup> In terms of publication and the internet, the United Kingdom grants a specific right to communicate to the public, which is interpreted as related to the internet.<sup>133</sup> This does not necessarily solve the question of whether an internet publication counts for publication in the United States, of course. Assuming that the posting counts as a publication, we are left again with another question of timing. The British Library's website is not very helpful in determining when the work was placed on the internet or whether this was the first time the work was published. The British Library provides only a general copyright statement about the entire site: "The content (content being images, text, sound and video files, programs and scripts) of this website is copyright © The British Library Board. All rights expressly reserved."<sup>134</sup>

In the United Kingdom, the unpublished work will be

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<sup>129</sup> 17 U.S.C. § 303(a) (2006).

<sup>130</sup> See Reese, *supra* note 18.

<sup>131</sup> The British Library, Turning the Pages, <http://www.bl.uk/onlinegallery/ttp/tpbooks.html> (follow "Jane Austen's Early Work" hyperlink) (last visited Aug. 16, 2006).

<sup>132</sup> 17 U.S.C. § 104(b).

<sup>133</sup> CDPA, *supra* note 88, at art. 16(1).

<sup>134</sup> The British Library, Website Copyright Statement, <http://www.bl.uk/copyrightstatement.html> (last visited Aug. 16, 2006).

protected through December 31, 2038.<sup>135</sup> Interestingly, artistic works, whether created, published, or unpublished, are only protected for life of the author plus seventy years.<sup>136</sup> So, in the case of Jane Austen's work, only the unpublished text is protected; the small drawings and other art are in the public domain in the United Kingdom.<sup>137</sup> However, both the text and the small drawings are protected through December 31, 2047 in the United States.<sup>138</sup> This is another great example of the global disharmonization of unpublished works during the transitional period from perpetual common law copyright to a statutory system.

C. *Marion Cummings: U.S. Laws Abroad, or the Advantage of the Rule of the Shorter Term*

Marion Cummings (d. 1926) is a little-known writer with an unpublished diary housed at the Newberry Library in Chicago.<sup>139</sup> The finding aid does not indicate that the diary was published before December 31, 2002, and, therefore, if it was not indeed published, the work is in the public domain.<sup>140</sup> An interesting situation would arise if a U.K. scholar uses this work. Since the United Kingdom applies the rule of the shorter term, and since Marion Cummings appears to have no point of attachment (country of origin) with the United Kingdom, the work is also in the public domain in the United Kingdom, as compared to unpublished works of U.K. authors deceased during the same year, which would be under copyright. In this instance, a scholar studying early twentieth-century American authors publishing in the United Kingdom would have an advantage over his U.K. cohorts, as the U.S. materials of authors deceased before 1937 will be in the public domain long before the U.K. materials of the same period will be. In this case, U.S. law works to the advantage of countries with the rule of the shorter term for unpublished works whose terms are longer.

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<sup>135</sup> CDPA, *supra* note 88, at sched. 1, ¶ 12(4).

<sup>136</sup> Adams, *supra* note 97, at 23 (citing CDPA, *supra* note 88, at art. 12(2), *as amended* by DCRPR, *supra* note 98) (“[A]rtistic works (other than photographs and engravings) of known qualifying author only get 70 years p.m.a. whenever created, published or unpublished - 1956 Act, Sched 7, para.2; 1988 Act Sched 1, para.12(2)(c); Duration Regulations 15(1).”).

<sup>137</sup> Adams, *supra* note 98, at 23.

<sup>138</sup> 17 U.S.C. § 303(a) (2006).

<sup>139</sup> Marion Cummings Papers, Midwest Manuscript Collection, The Newberry Library, Chicago. Inventory of the Marion Cummings Papers 1900-1956, <http://www.newberry.org/collections/FindingAids/cummings/cummings.html> (last visited Jan. 28, 2006). This collection consists of three boxes, or 1.5 linear feet. The short description of the collection reads: “Papers of Marion Cummings (1876-1926), teacher, philosopher and poet, which include both her works and a collection of letters and works of American poet Sara Teasdale.”

<sup>140</sup> *Id.*

D. *Vera Brittain and Her Fiancé's Letters from the First World War:  
Unpublished Works Partially Published*

British writer Vera Brittain (1893-1970) wrote *Testament of Youth*, a memoir about her experiences in World War I. Her brother, fiancé, and two friends all died during the War, and she served as a nurse in Malta, London, and France. Her works were all created before 1978, as she died in 1970. If published before January 1, 2003, her unpublished works would receive protection through December 31, 2047. This is seven years longer than the copyright term would be without the additional protection received by calculating the life of the author plus seventy years, or through 2040. Three edited collections of her diaries and some of her wartime letters were all published for the first time between 1981 and 1999, long before the deadline, and so receive additional protection through December 31, 2047.<sup>141</sup>

The collection of letters also included letters from her brother, friends, and fiancé. Had they not been published, the boys' letters would have gone into the public domain in the United States on December 31, 2002, because they were all killed in the War, now much past the life plus seventy years.<sup>142</sup> But with the publication, the *published* portions of the letters receive additional protection through December 31, 2047.

For the letters written by the boys, only those parts of the work published between 1978 and 2002 receive the additional term of protection; any portions of the unpublished work that remained *unpublished* would now part of the public domain. In the case of the unpublished portions of the diaries and letters written by Vera Brittain, these remain under copyright in the United States through 2040, the life of the author plus seventy years.

There is an international dimension to this situation. If the scholar using the unpublished public domain works wants to distribute her scholarship outside of the United States, then the scholar must look to the laws of the particular country where distribution will take place to make sure the same unpublished works are in the public domain there as well. In the case of Vera Brittain, the letters of the boys who died during World War I would be in the Canadian public domain as of January 1, 2004.

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<sup>141</sup> VERA BRITAIN, *CHRONICLE OF YOUTH: THE WAR DIARY, 1913-1917* (Alan Bishop ed., Morrow 1981); *LETTERS FROM A LOST GENERATION: THE FIRST WORLD WAR LETTERS OF VERA BRITAIN AND FOUR FRIENDS* (Alan Bishop & Mark Bostridge eds., Northeastern Univ. Press 1998).

<sup>142</sup> Vera Brittain's brother, Edward Brittain died in 1918. Vera's fiancé, Roland Leighton, died in 1915, and Vera's two friends, Victor Richardson and Geoffrey Thurlow, died in 1917.

But, in Australia, one country that still retains perpetual copyright on unpublished works, the same letters would be still protected.<sup>143</sup> The unpublished portions of the boys' letters came into the public domain in the United States on January 1, 2003. The published portions of the same letters, as discussed above, are protected in the United States through December 31, 2047. However, if the scholarly work using the unpublished portions of the letters is to be distributed in the United Kingdom, the scholar must check to see if these same unpublished letters are in the public domain or under copyright *in the United Kingdom*. In this case, because the boys were all British, their unpublished letters are governed by U.K. law.<sup>144</sup> Thus, the letters are still under copyright through December 31, 2039, because all four died before August 1, 1989.<sup>145</sup> Here, the rule of the shorter term does not apply to the unpublished works, because as U.K. citizens, their works are protected by U.K. copyright laws.

#### IV. CONCLUSION

In the United States, all unpublished works eventually come into the public domain either: 1) seventy years after the death of the author, 2) 120 years from creation for an unknown author or a work for hire, 3) on January 1, 2003 for those authors deceased longer than seventy years, or 4) January 1, 2048, when the additional term of protection expires for works created before January 1, 1978, and published for the first time between January 1, 1978 and December 31, 2002, which represents a statutory transition period from the common law perpetual system to the "limited Times" federal statutory system of protection.<sup>146</sup> For the moment, copyright is in a transition period, both in the United States and abroad, particularly within common law countries. It is this transition period upon which this article has attempted to shed light.

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<sup>143</sup> See Australian Copyright Council, Duration of Copyright, Information Sheet G23 (Sept. 2005), <http://www.copyright.org.au/publications/G023.pdf>.

<sup>144</sup> CDPA, *supra* note 88, at art. 15A(5).

<sup>145</sup> See GRAHAM P. CORNISH, COPYRIGHT: INTERPRETING THE LAW FOR LIBRARIES, ARCHIVES AND INFORMATION SERVICES (Library Ass'n Pub. 2d ed. 1997).

The situation may sound complicated [in the case of unpublished works.] If the author died before 1 August 1988, was a national of an EEA state and the work was unpublished at the time, copyright expires on 31 December 2039. If the author died on or after 1 August 1989, the work is protected for 70 years from the end of the year in which the author died.

*Id.* at 38.

There is also a posthumous publication right, where if the unpublished work is published for the first time after the author's death but before August 1, 1989, the new work gains an addition fifty years of protection. CDPA, *supra* note 88, at sched. 1, ¶ 12(2).

<sup>146</sup> 17 U.S.C. § 303(a) (2006).

This article has identified some of the legal issues involved with determining what works are now part of the unpublished public domain, both in a domestic as well as international context. The title of this piece begins with the date, January 1, 2003, a date which marks the entry into the public domain in the United States of unpublished works of all those authors in human history who had been deceased longer than seventy years as of December 31, 2002, as set out in section 303(a).<sup>147</sup> Section 303(a) offers whole new sets of materials and possibilities for scholars, students, artists, documentary filmmakers, Hollywood filmmakers, hobbyists, and all others who use the unpublished stuff of our culture. We live in exciting times indeed.

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<sup>147</sup> *Id.*