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## **PRIVATE BUT EVENTUALLY PUBLIC: WHY COPYRIGHT IN UNPUBLISHED WORKS MATTERS IN THE DIGITAL AGE**

*Damien McCallig* \*

### **Abstract**

Digital life is no longer only concerned with online communication between living individuals; it now encompasses post-death phenomena of inheritance, legacy, mourning and further uses of our *digital remains*. Scholars and practitioners seeking an appropriate legal theory to claim, control and recover the *digital remains* of the dead and protect *post-mortem* privacy interests have identified copyright as a possible surrogate.

This article explores the links between copyright and privacy in unpublished works. It charts the historical development of perpetual copyright protection in unpublished works, reviews the reasons why perpetual protection for unpublished works has been abolished and analyses some of the privacy impacts of these changes. It argues that without perpetual copyright protection and the surrogate privacy protections in unpublished works, the fear that one's *digital remains* will eventually be opened to societal scrutiny may lead to the fettering of personal and private communication, while alive, and may promote the deletion of one's *digital remains* in contemplation of death.

This could have perverse consequences, denying family and friends mementos, including access to shared memories of those who have died, and may also deny future historians and generations access to the materials of history. Therefore, it is argued that any regulation of *digital remains* must recognise the privacy interests of

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\* Ph.D. Candidate, School of Law, National University of Ireland Galway, Irish Research Council scholar. His research entitled *The Law of Digital Remains: Reconciling the dignity and interests of the deceased with those of the living* is funded by the Irish Research Council. A version of this article was delivered at the Amsterdam Privacy Conference 2012 panel on *Death and Post-Mortem Privacy in the Digital which Age*, a panel, which the author co-organised. The author would like to acknowledge the helpful comments and feedback received at the conference. Special thanks also goes to Marie McGonagle, School of Law, NUI, Galway for her assistance and thoughtful insights relating to this article.

decedents and reconcile them with the interests of surviving family, heirs, friends and wider society.

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It is certain every man has a right to keep his own sentiments, if he pleases: he has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends. In that state, the manuscript is, in every sense, his peculiar property; and no man can take it from him, or make any use of it which he has not authorized, ...<sup>1</sup>

## 1. Introduction

Digital technology is detaching private communication and expression from the physical plane, where property law of various sorts had found definition. Letters now take the form of e-mails and, instead of scrapbooks with pictures or news clippings of old friends and memories, social network connections detail daily interactions and events. There is no longer a physical artefact or manuscript to possess or in which to claim ownership.

The principles and norms associated with the digital transmission and storage of private communications have seen the transfer of custody of these private communications and expressions to digital and online service providers. Following death one's "digital remains", including private communications and expressions, are often locked behind passwords; therefore, without access to and control of these remains, their economic and sentimental value are lost to the loved ones of the deceased.<sup>2</sup> In other extreme cases "public profiles" may be exploited out of context by others in an insensitive or inappropriate manner.<sup>3</sup> This phenomenon of the digital age has led to novel problems for online service providers. Social network services are gradually being turned into digital memorial sites.<sup>4</sup> Heirs and family members of the deceased increasingly seek access to or control over Internet-based accounts. Some service providers deny access, citing concerns for the privacy of the deceased; others hand over the digital remains upon request.<sup>5</sup>

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<sup>1</sup> *Millar v Taylor* (1769) 98 English Reports 201, at 242; Yates J, (dissenting), the majority agreed with this principle for unpublished works.

<sup>2</sup> "Digital Remains" is the collective term used to describe the expressions, possessions and impressions that a decedent leaves behind in digital media.

<sup>3</sup> See for example the issue of cyber trolling of decedents and their families, S Morris, "Internet troll jailed after mocking deaths of teenagers" *guardian.co.uk*, 13 September 2011, available at <http://www.guardian.co.uk/uk/2011/sep/13/internet-troll-jailed-mocking-teenagers> (accessed 29 October 2012). Further examples of *trolling* the dead, including the arrest of a man for creating an offensive page set up after the murder of two police officers in Manchester, England are described in D Sabbagh, "Can Facebook and Twitter do more to tackle trolling?" *Guardian* (20 September 2012), available at <http://www.guardian.co.uk/media/2012/sep/20/facebook-twitter-trolling> (accessed 29 October 2012).

<sup>4</sup> N Chan, "Postmortem Life On-Line", *Probate and Property* (July/August 2011) 36-39, at 36 quotes a report by Entrustet (an online digital estate planning service provider) who claim that 408,000 Facebook users will die in 2011.

<sup>5</sup> Yahoo! originally refused access to the e-mail account of a deceased US Marine killed in Iraq, citing privacy concerns. They were later ordered to release copies of the e-mails to the decedents father, *In re Ellsworth*, No. 2005-296,651 DE (Oakland Co. Michigan Probate Court, 2005); Facebook are reported

The challenges posed by human interactions with digital technology and the emerging post-death phenomena of digital legacy, inheritance, and the repurposing or further uses of digital remains have led legal scholars and practitioners to actively seek appropriate legal theories to claim, control and recover the digital remains of the dead and ultimately protect various *post-mortem* interests of the deceased.<sup>6</sup>

Copyright has been identified by many of these writers as a substantive area of law with the potential to effectively regulate, in part, this emerging phenomenon. A substantial portion of our digital remains are digital communications and expressions which fall to be copyright protected upon creation. Of particular relevance is that once copyright subsists in a work certain *post-mortem* rights then become available offering legal protections to both the creator (author) and to the work. While copyright is viewed by many as a set of economic rights, it also protects what are termed *moral rights*, including the reputation of the author and the integrity of the work.<sup>7</sup>

There is no need to register or publish a work in order to obtain copyright protection. The establishment of the causal link between the creator and the work (expression) often termed “authorship” together with the attainment of an “originality” threshold and the “fixation” requirements will in most jurisdictions trigger the protections and rights afforded by copyright.<sup>8</sup> Therefore, private communications and expressions,

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to be denying a family access to their deceased son’s Facebook account citing privacy concerns; while Google released account information to the same family upon receipt of a court order, see report on MSNBC, J Hopper, “Digital Afterlife: What happens to your online accounts when you die?”, available at <http://rockcenter.msnbc.msn.com/news/2012/06/01/11995859-digital-afterlife-what-happens-to-your-online-accounts-when-you-die?lite> (accessed 29 October 2012). The more recent case of *In RE request for order requiring Facebook Inc. to produce documents and things*, California ND, Case No.: C 12-80171 LHK (PSG) has confirmed that service providers can not be compelled through the civil courts to provide the contents of a decedent’s online account. As otherwise service providers would violate the Federal Stored Communications Act 18 U.S.C. § 2701.

<sup>6</sup> For example from a practitioners’ perspective see, Thomas Eggar LLP, “Digital Legacy: Future proofing a virtual life in the Digital World”, (26 January 2010); G Beyer and K Griffin, “Estate planning for digital assets”, *Estate Planning Studies and Briefs*, (July 2011), published by The Merrill Anderson Company and N Chan, see note 4 above. From the legal/academic realm see, J Atwater, “Who Owns E-Mail? Do You Have the Right to Decide the Disposition of Your Private Digital Life?”, 2006 *Utah Law Review* 397-418; J Darrow and G Ferrera, “Who owns a decedent’s e-mails: Inheritable Probate or Property of the Network?”, (2006-2007) 10 *New York University Journal of Legislation and Public Policy* 281-320; D Desai, “Property, Persona, and Preservation”, (2008) 81 *Temple Law Review* 67-122; and N Kutler, “Protecting Your Online You: A New Approach to Handling Your Online Persona After Death”, (2011) 26 *Berkeley Technology Law Journal* 1641-1670.

<sup>7</sup> For an Irish perspective on moral rights see, R Clark, S Smyth and N Hall *Intellectual Property Law in Ireland* 3rd ed (Dublin: Bloomsbury Professional, 2010), at 463-481; for an international comparative analysis of moral rights see, E Adeney, *The Moral Rights of Authors and Performers: An International Comparative Analysis* (Oxford: OUP, 2008) and MT Sundara Rajan, *Moral Rights: Principles, Practice and New Technology*, (Oxford: OUP, 2011).

<sup>8</sup> In Irish copyright law an “author” is defined as the person who creates the work; see Copyright and Related Rights Act 2000 (CRRRA) (as amended) at s 21. This is further defined to include various categories of creator as an “author”, including the producer of a film or sound recording, photographer in the case of a photograph, compilers of a database, the person who makes the necessary arrangements to create a computer generated work; see also S Ricketson and J Ginsburg, *International Copyright and*

which are digitally recorded and which have never been published and in many cases were never intended for publication, are also protected. Copyright law can be invoked in order to protect or control dissemination, publication and reuse of such unpublished works, thereby protecting the creator's privacy in what has been described as a surrogacy approach.<sup>9</sup>

Traditionally, copyright protection and, by extension, the surrogate privacy protections in unpublished works were perpetual. The development of the law, most especially the modern changes flowing from the internationalisation of copyright law as an integral part of trade agreements, has seen the perpetual protection of unpublished works abolished and the bifurcation of traditional copyright protections between economic and moral rights leading to inconsistent protection of *post-mortem* privacy through the use of copyright across jurisdictions.

Although this article originated from a desire to address the emerging phenomenon of modern digital technology and how it impacts on *post-mortem* privacy, the article primarily looks back in time and explores the historical links between copyright and privacy in unpublished works. It charts the reasons why the perpetual protection for unpublished works has been abolished and analyses some of the privacy impacts of these changes. It further highlights the potential importance of this issue for the management of *digital remains* and questions whether copyright is a suitable host (that is, a principles based legal framework) upon which to build a regulatory model to reconcile the rights and interests of the deceased with those of the living.

## 2. Copyright and Privacy in Unpublished Works

### 2.1 Definitional Parameters and Scope: Public v Private Domains

Before delving further into the history and development of the law relating to unpublished works and its links to privacy protection, it is important to set some definitional parameters. For the purposes of this article the published/unpublished dichotomy will be delineated by the concept that published works are those lawfully made available to the public with the consent of the author.<sup>10</sup> This can incorporate digital or Internet publication, provided members of the public may access the work from a place and time chosen by them.<sup>11</sup>

With respect to the precise threshold requirements for digital publication, Ricketson and Ginsburg suggest that Internet and digital communications, where the author makes the work available by offering it as a download from a publically accessible website, would be publication but sending a communication by e-mail to one person

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*Neighbouring Rights: The Berne Convention and Beyond* 2nd ed (Volume I) (Oxford: OUP, 2006), at 358-376; *Originality* is not a test of intellectual or cultural merit. It revolves around the central issue of "whether the person claiming copyright has independently created the work" see R Clark *et al*, see note 7 above, at 253-283; *Fixation* in Irish law copyright does not subsist in a work until it is "recorded in writing or otherwise"; CRRA s 18(1).

<sup>9</sup> E Barendt, *Freedom of Speech* 2nd ed (Oxford: OUP, 2005), at 262.

<sup>10</sup> s 24(1) of the Copyright and Related Rights Act 2000 (as amended), which is modelled on art 1(1) of Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights [1993] OJ L290/9.

<sup>11</sup> s 40(1) of the Copyright and Related Rights Act 2000 (as amended).

would not result in publication.<sup>12</sup> This common sense approach will be applied in this article and the personal and private communications and expressions in the digital realm will be considered unpublished. Furthermore, rather than deal with numerous types of work and varying copyright terms, this article will focus on literary works. For the purposes of comparison the primary forms of private communications and expressions employed throughout the article will be letters and e-mails; therefore, depending on the time in history being addressed, when unpublished works are referenced this generally means private letters or e-mails.

A further important concept is that of a *posthumous work*. This is best described as a work which is unpublished at the time of death but lawfully published after the death of the author. A decedent may believe that his private digital communications and expressions will be destroyed or deleted upon his death or that they will be maintained with dignity and care by his heirs, as these works also have an emotional and sentimental value from the personal perspective of his family and friends.

However, modern copyright is designed to promote publication and to ensure that all works eventually fall into the *public domain*. This is achieved by setting a period beyond which copyright protection expires. This now applies to both published and unpublished literary works, with the term expiring seventy years following the death of the author.<sup>13</sup>

The European Union has created a further incentive, designed to ensure that works are published and are therefore accessible to the public, by creating a quasi-copyright for any person who, after the expiry of copyright protection, for the first time lawfully publishes or communicates to the public a previously unpublished work. The quasi-copyright is limited to economic rights only and endures for twenty-five years from the first lawful publication.<sup>14</sup>

Therefore, all copyright protected digital expressions and communications, private or otherwise, which have not been deleted fall into the public domain at some stage. In general this means that private communications and expressions will be unencumbered, in a copyright sense, and available for reuse without the permission of the author seventy years following death. In the digital world one's e-mails, private journals or blogs, and private and direct messages on social media will be copyright free and in the possession of service providers such as Google, Yahoo!, Twitter and Facebook should these corporate entities endure.

## ***2.2. Historical Development of Perpetual Protection in Unpublished Works***

Taking the starting point as the Statute of Anne 1709, which is widely accepted as the first copyright Act, copyright protection, including *post-mortem* protection, was

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<sup>12</sup> S Ricketson and J Ginsburg, see note 8 above, at 278; see also N Snow, "A Copyright Conundrum: Protecting Email Privacy", (2007) 55 *Kansas Law Review* 501-574, who argues that private e-mails would be considered unpublished works at both common and Federal law in the United States.

<sup>13</sup> art 1 of Directive 2006/116/EC of the European Parliament and the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version) [2006] OJ L372/12.

<sup>14</sup> *Ibid*, at art 4; transposed into Irish law by s 34 of the Copyright and Related Rights Act 2000 (as amended).

limited in terms of years for published works, and the issue of copyright subsisting in unpublished works and its duration had not been expressly addressed by Statute.<sup>15</sup>

However, one of the primary concerns of the Statute was the practice of printers, booksellers and other persons causing the publication of books and other writings without the consent of the author.<sup>16</sup> The earliest unpublished works cases, such as *Webb v Rose*,<sup>17</sup> were really about the plaintiff seeking the return of the physical manuscript rather than copyright *per se*. In fact the majority of early litigation which arose under the Statute of Anne involved booksellers against other booksellers rather than authors defending their rights.<sup>18</sup>

The first case taken by an author regarding his unpublished works, which sought to rely on the Statute of Anne, was that of *Forrester v Waller*,<sup>19</sup> where Forrester claimed to be the sole proprietor of legal texts he prepared from the Court of Chancery. He further claimed that “no person ought to print or publish [them] without licence or consent.”<sup>20</sup> Despite the originals being in his possession, they were reproduced in another work published by Waller. The Court granted an interlocutory injunction until a response was entered by the defendant but none was forthcoming and the relief sought was therefore uncontested.<sup>21</sup>

One of the most significant early cases was that of *Pope v Curl* and this differed from *Webb v Rose* in that Pope was not seeking the return of the original physical manuscripts but he sought to regulate their reproduction and subsequent publication.<sup>22</sup> Alexander Pope was “an exceptional figure” who wished to make his private letters public in order “to erect a monument to himself and the gifted writers he had known.”<sup>23</sup> This would have been viewed as extremely vain in the early 18<sup>th</sup> century so, in 1735, he tricked Edmund Curl into publishing some of his private correspondence, so that he could protest against the “indignity of being exposed in

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<sup>15</sup> R Deazley, *On the Origin of the Right to Copy* (Oxford: Hart Publishing, 2004), at 69; under the Statute of Anne copyright (the sole right of printing) vested in the author and endured from publication for fourteen years with a second term of fourteen years if the author was still alive at the end of the first term. A twenty-one year term endured for works already in print.

<sup>16</sup> Statute of Anne (1709); 8 Anne c. 19.

<sup>17</sup> *Webb v Rose* (1732) 4 Burr 2330.

<sup>18</sup> M Rose, “The Author in Court: Pope v Curll (1741)”, (1991-1992) 10 *Cardozo Arts and Entertainment Law Journal* 475-494, at 480. Both *Curl* and *Curll* appear in the literature. In the text of this article the spelling *Curl* will be used as that is the spelling of the name that appears in the case note.

<sup>19</sup> *Forrester v Waller* (1741) 4 Burr 2331.

<sup>20</sup> R Deazley, see note 15 above, at 70. Details of how Waller obtained a copy of the originals was initially contested but when pressed Waller could not or would not reveal how he obtained them.

<sup>21</sup> *Ibid*; as pointed out by Deazley the appropriateness of relying on the Statute of Anne was not explored.

<sup>22</sup> *Pope v Curl* (1741) 2 Atk. 342; 26 ER 608.

<sup>23</sup> M Rose, see note 18 above, at 480.

print”, while at the same time prepare the way for an authorised version of his correspondence to be published in order to set the record straight.<sup>24</sup>

Pope also hoped that the “incident” with Curl would help further strengthen rights in unpublished works, including private correspondence and letters.<sup>25</sup> Pope appears to have seen the issue regarding the surreptitious publishing of private letters as one of a *personal* rather than an *economic right* which he succinctly defined as *betraying conversation* and further detailed as damaging the social fabric:

To open Letters is esteem'd the greatest breach of honour; even to look into them already open'd or accidentally dropt, is held an ungenerous, if not an immoral act. What then can be thought of the procuring them merely by Fraud, and printing them merely for Lucre? We cannot but conclude every honest man will wish, that if the Laws have as yet provided no adequate remedy, one at least may be found, to prevent so great and growing an evil.<sup>26</sup>

Although the terminology we associate with modern privacy discourse is not present, it is clear that Pope understood that letters, the associated system of delivery and potential uses that could be made of letters after they are received, presented opportunities for invasions and intrusions of privacy. Limited protection of privacy was available in other laws of the time. The statutory protections, in the Post Office Acts, provided some protection to personal communications while in transit.<sup>27</sup> Pope was in effect highlighting the potential privacy gap in the correspondence chain and sought to close the gap through copyright. In the language of modern privacy scholarship, Pope sought to establish in the law privacy-enhancing “transmission principles” and norms to be attached to personal communication and expression by letter.<sup>28</sup> Through this legal action he helped shape the level of privacy a letter writer can expect in such communication and expression.

The basis of the 1741 court action was a series of twenty-nine letters between Alexander Pope and the Reverend Doctor Swift, Dean of Saint Patrick’s Cathedral, Dublin, which had subsequently come into Curl’s possession. Pope had arranged, again through an elaborate ruse, to have these letters published in Ireland, as this would make it possible for him to publish an authorised version in England. Curl, however, released his version of *Dean Swift’s Literary Correspondence for 24 years*

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<sup>24</sup> *Ibid.* at 481; see also M Rose, *Authors and Owners: The Invention of Copyright*, (London: Harvard University Press, 1993), at 60-61.

<sup>25</sup> *Ibid.*, at 481-482.

<sup>26</sup> *The Letters of Alexander Pope: and several of his friends* as cited in M Rose, see note 18 above, at 482.

<sup>27</sup> Post Office Act 1660 at s 6; Post Office (Revenues) Act 1710 at s 40; see also N Richards and D Solove, “Privacy’s Other Path: Recovering the Law of Confidentiality”, (2007) 96 *The Georgetown Law Journal* 123-182, at 140-144.

<sup>28</sup> H Nissenbaum, *Privacy in Context: Technology, Policy and Integrity of Social Life*, (Stanford: Stanford University Press, 2010), at 145-147. Transmission principles are identified by Nissenbaum as central to our expectations of privacy in context with respect to information flows.



from 1714-1738: *Letters from Swift, Pope and others*, which he claimed merely reprinted the letters already published in Ireland and were therefore “lawful prize.”<sup>29</sup>

The judgment is significant on a number of points. The court accepted that letters were protected by the Statute of Anne. Lord Chancellor Hardwicke skilfully dealt with this matter by stating that “it would be extremely mischievous, to make a distinction between a book of letters, which comes out into the world, ... and any other learned work.”<sup>30</sup> He further emphasised that:

[i]t is certain that no works have done more service to mankind, than those which have appeared in this shape, upon familiar subjects, and which perhaps were never intended to be published; ... .<sup>31</sup>

The court held that a letter writer, when sending his letters, is only parting with “a special property ... possibly the property of the paper ... ” and the court went on to hold that this does not give the receiver of such letters “a licence ... to publish them to the world ... .”<sup>32</sup> Control or possession of the physical manuscript does not infer that the holder has the copyright under the Statute of Anne. This meant that Curl could not publish Pope’s letters without his licence or consent.

Lord Hardwicke’s identification that letters and personal correspondence, although never intended for publication, have done service to mankind recognises the importance of a private sphere of communication for the personal development and learning of individuals and by extension the wider society they inhabit. This understanding by the court echoed one of the principal purposes of the Statute of Anne as set out in the long title: it was an “Act for the Encouragement of Learning ... .”<sup>33</sup> The social good of learning could be progressed by creating a private domain for the exchange of private correspondence safe in the knowledge that it would never be published to the world.

Lord Chancellor Hardwicke also indicated the possible scope such a right in unpublished works would have under the Statute:

The same objection would hold against sermons, which the author may never intend should be published, but are collected from loose papers, and brought out after his death.<sup>34</sup>

Such a right regarding the intention or permission of the author to publish his work extended beyond the life of the author and endured *post mortem*. This right was founded in the Statute of Anne, as no relief under common law was included in

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<sup>29</sup> M Rose, see note 24 above, at 63 and 151; although it is unclear whether Curl had copied from the Dublin book or an edition ready for print in England.

<sup>30</sup> *Pope v Curl* (1741) 2 Atk. 342; 26 ER 608.

<sup>31</sup> *Ibid*, at 343.

<sup>32</sup> *Ibid*, at 342.

<sup>33</sup> Statute of Anne (1709); 8 Anne c. 19.

<sup>34</sup> *Ibid*.

Pope's bill of complaint.<sup>35</sup> Neither did the court mention any other source for such a right in its judgment.

The high water mark for common law copyright and one of the most significant judicial pronouncements on early copyright came a number of years later in *Millar v Taylor*.<sup>36</sup> Although the case was in essence an attempt by the booksellers and publishers of the time to introduce perpetual copyright in published works, the judgment provides further insights into the rationales of protecting unpublished works and links directly to modern privacy law.

Scholars of privacy will immediately recognise this judgment of 1769, in particular the quote from Yates J., which is cited at the beginning of this article, from the seminal work of Warren and Brandeis some 121 years later.<sup>37</sup> They draw heavily on copyright to provide a conceptual basis for the recognition by the common law of the right to privacy.<sup>38</sup> Their article also bridges the perceived gap in the law by "advocating that privacy be embodied within a regime of *personal* as well as property rights."<sup>39</sup>

The concept of "inviolable personality" was extrapolated from the "right of property in the widest sense."<sup>40</sup> Warren and Brandeis recognised that their proposition of "inviolable personality" had borne "little resemblance to what is ordinarily comprehended" by the term property.<sup>41</sup> It is difficult almost 122 years later to infer the true meaning of their statement but it appears to be aimed at merging the seemingly divergent juridical underpinnings of the leading copyright cases dealing with unpublished works on both sides of the Atlantic rather than elaborating on the ordinary comprehension of property rights. In the United States *Folsom v Marsh* appears to be property and economically driven in order to ensure preservation and access to works of the deceased but *Millar v Taylor* was based on a moral and natural authorial right of disclosure, which was more in line with the concept of inviolable personality promoted by Warren and Brandeis.<sup>42</sup>

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<sup>35</sup> Pope's Bill of Complaint is transcribed in M Rose, see note 24 above, at 145-149.

<sup>36</sup> *Millar v Taylor* (1769) 98 English Reports 201.

<sup>37</sup> S Warren and L Brandeis, "The Right to Privacy", (1890) 4 *Harvard Law Review* 193-220, at 198; Yates J. is quoted in the footnote accompanying the following text: "The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others".

<sup>38</sup> *Ibid.*, at 205; "These considerations lead to the conclusion that the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone."

<sup>39</sup> R Post, "Rereading Warren and Brandeis: Privacy, Property, and Appropriation", (1991) 41 *Case Western Reserve Law Review* 647-680, at 663

<sup>40</sup> S Warren and L Brandeis, see note 37 above, at 211.

<sup>41</sup> *Ibid.*, at 205.

<sup>42</sup> *Folsom v Marsh*, 9 F Cas 342 (CCD Mass 1841); and *Millar v Taylor* (1769) 98 English Reports 201.

*Folsom v Marsh* dealt with the publication of the private letters of the deceased President George Washington.<sup>43</sup> Prior to his death the former President had expressly transferred physical possession and the copyright in his private letters.<sup>44</sup> The original physical letters were later sold to Congress for \$25,000 in order to be displayed in public. An authorised publication, *The Writings of George Washington* by Jared Sparks, was published over twelve volumes between 1834 and 1837 and contained many of the private letters of Washington. Sparks had spent considerable time and effort sorting through 40,000 manuscripts that were made available to him by Washington's heir.<sup>45</sup> However, another writer, Reverend Charles Upham, had his work the *Life of Washington* published by Marsh *et al.* in 1840; this work contained 353 pages which were copied directly from Sparks's work, 319 of these pages being in fact copies of Washington's letters.<sup>46</sup>

It was contended by the defendants that the letters were not in fact a proper subject for copyright as *inter alia* they were "manuscripts of a deceased person, not injured by publication of them," and because they were, "in their nature and character, either public or official letters, .... [or] designed by the author for public use."<sup>47</sup> Story J., in his judgment, immediately confirmed that the author of any letter has the copyright in them.<sup>48</sup> He then disposed of the argument that President Washington's letters were in the form of public documents, free for use, due to their sale to Congress.<sup>49</sup> The court then proceeded to rationalise the existence of *post-mortem* copyright and explained that without such protection for:

... private or familiar letters, written to friends, upon interesting political and other occasions, or containing details of facts and occurrences, passing before the writer, it would operate as a great discouragement upon the collection and preservation thereof; and the materials of history would become far more scanty, than they otherwise would be.<sup>50</sup>

The public interest in preserving such letters was then fused with an economic rationale to underpin the incentive for an heir to undertake the cost of making

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<sup>43</sup> *Folsom v Marsh*, 9 F Cas 342 (CCD Mass 1841).

<sup>44</sup> *Ibid.* at 347; as pointed out by Story J., this was affirmed in a bequest.

<sup>45</sup> O Bracha, "Commentary on *Folsom v. Marsh* (1841)" (2008), in L Bently and M Kretschmer, (eds) *Primary Sources on Copyright* (1450-1900) available at [www.copyrighthistory.org](http://www.copyrighthistory.org) (accessed 29 October 2012); the ownership of the copyright in Spark's work eventually made its way to Charles Folsom.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Folsom v Marsh*, 9 F Cas 342 (CCD Mass 1841) at 345.

<sup>48</sup> *Ibid.*, at 346; "I hold, that the author of any letter or letters, (and his representatives,) whether they are literary compositions, or familiar letters, or letters of business, possess the sole and exclusive copyright therein." It is interesting to note that Story J., also saw fit to fall back on the "intelligible and reasonable doctrine of Lord Hardwicke, in *Pope v. Curl* (1741) 2 Atk. 342" and other English precedents before confirming that "the sole right to print and publish" is provided for in the United States Copyright Act 1831; 4 Stat. 436, (1831), at §9.

<sup>49</sup> *Ibid.*, at 346 and 348; as "the government purchased the manuscripts, subject to the copyright already acquired by the plaintiffs."

<sup>50</sup> *Ibid.*, at 347.

available to the public the “materials of history”.<sup>51</sup> Without *post-mortem* copyright in unpublished works the heir might see his potential return on investment undermined by a rival bookseller.<sup>52</sup> The significance of access to manuscripts of importance “was thus met with the cold, calculating logic of market incentives,” in order to ensure their preservation.<sup>53</sup>

But this logic raises an interesting question. If the preservation of such documents was so important to society, and the purpose of copyright was to ensure such documents made it to the public through incentives, why did copyright law in the United States not promote the publication of all unpublished works of decedents? Why protect the unpublished works of deceased authors in perpetuity, unless specifically assigned *inter vivos*? As described below, in section 4, a quasi-copyright or publication right promoting the publication of unpublished works following expiry of copyright, similar to that recognised by the European Union, has not been enacted in United States copyright law.

The economic and property based rationale in *Folsom v Marsh* contrasts sharply with that of *Millar v Taylor* where the court confirmed the existence of perpetual common law copyright – later overturned for published works only in *Donaldson v Beckett*.<sup>54</sup> Perpetual copyright protection in unpublished works remained intact. Lord Mansfield in his judgment found that it is agreeable to moral and natural law principles to protect the unpublished works of an author. In doing so he posited the right of first publication as part of a broader rationale that would not be out of place in countries with distinct moral rights traditions.<sup>55</sup> With respect to an author, he states that:

It is just, that another should not use his name, without his consent. It is fit that he should judge when to publish, or whether he ever will publish. It is fit he should not only choose the time, but the manner of publication; how many; what volume; what print. It is fit, he should choose to whose care he will trust the accuracy and correctness of the impression; ...<sup>56</sup>

While, Yates J., dissented on the issue of perpetual copyright in published works his *dicta*, part of which is outlined at the start of this article, engages the following analogy to demonstrate the control an author enjoys over his unpublished works:

... while the author confines them to his study, they are like birds in a cage, which none but he can have a right to let fly: for, till he thinks proper to emancipate them, they are under his own dominion.<sup>57</sup>

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<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> O Bracha, see note 45 above, at section 5. See also *Folsom v Marsh*, 9 F Cas 342 (CCD Mass 1841), at 347; “It is the supposed exclusive copyright in such writings, which now encourages their publication thereof, from time to time, after the author has passed to the grave.”

<sup>54</sup> *Donaldson v Becket* (1774) 1 English Reports 837; common law copyright in published works was abolished by the Copyright Act 1911.

<sup>55</sup> MT Sundara Rajan, see note 7 above, at 96-99.

<sup>56</sup> *Millar v Taylor* (1769) 98 English Reports 201 at 252 (Lord Mansfield).

<sup>57</sup> *Ibid.* at 242. (Yates J.)

The underlying philosophy emerging from *Millar v Taylor* is the natural and moral right of an author to choose when and how to disclose his work to the public, if at all. This right of disclosure or first publication has been described as the most fundamental of authorial rights.<sup>58</sup> But disclosure was qualified to permit private disclosure backed by a remedy in copyright against the onward publication, to the wider public, of that expression or communication. The identification of copyright and in particular early English copyright law as a cornerstone for their right to privacy by Warren and Brandeis had provided the basis for relational expectations of privacy.<sup>59</sup> An author could share his personal expression in a limited way, for example with the recipient of a letter or his family, yet this was not seen as publication in a copyright sense. One's inviolate personality could be voluntarily opened to others, to promote personal development and relationships, safe in the knowledge that it would be protected from outside intrusion, reproduction or unauthorised use.

### 3. Posthumous Publication

Despite recognising the right of disclosure, as both a moral and economic right, at an early stage, English copyright law developed in a manner which began to dilute the moral aspects of protection in favour of the economic benefits of promoting publication. It was the Copyright Act 1842 that greatly freed the works of the dead for such public dissemination and consumption. This Act improved the chances of *posthumous* publication, by confirming that copyright was transmissible by will or intestacy.<sup>60</sup> Before the passage of the 1842 Act posthumous publication was only possible if the author, while alive, assigned copyright in his work.<sup>61</sup> Following the 1842 Act the beneficiaries of an author's will or intestate estate, once they had a physical copy, now also held the choice of whether to publish or not.<sup>62</sup>

The only option for an author to ensure that his works were not subject to posthumous publication was to destroy them prior to death. This transformed English copyright law by diminishing an author's right to control posthumous disclosure – a moral right – in favour of the economic rights of an author's heirs and the perceived social benefit in the publication of such works.

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<sup>58</sup> E Adeney, see note 7 above, at 44.

<sup>59</sup> Warren and Brandeis were focused upon securing a remedy for invasions of privacy against *strangers* and in their article did not build upon the nuances of copyright protecting private expression shared within a trusted circle or private correspondence. In this regard they also largely ignored the doctrine of confidentiality, see generally N Richards and D Solove, see note 27 above.

<sup>60</sup> Copyright Act 1842, at s 25; “all copyright shall be deemed personal property, and shall be transmissible by bequest, or, in the case of intestacy, shall be subject to the same law of distribution as other personal property.”

<sup>61</sup> Copyright Act 1710, at s 1 and Copyright Act 1814, at s 4 provided for copyright to be assigned by the author, with the assignment “first had and obtained in Writing.”; also *Pope v Curl* (1741) 2 Atk 342, had distinguished ownership of the physical manuscript from ownership of the right to copy the manuscript.

<sup>62</sup> Such posthumous publication was to benefit from the incentive of a forty-two year term; see Copyright Act 1842 at s 3, “Copyright in every Book which shall be published after the Death of its Author shall endure for the Term of Forty-two Years from the first Publication thereof.”

Interestingly, unlike the position taken in England in 1842, the United States Copyright Act 1831 did not provide a presumption in law that copyright transferred with the physical manuscript or personal property at death. Subsequent posthumous publication without the consent of the author or by assignment during his lifetime was prohibited.<sup>63</sup> Therefore, an author's surviving widow or children were not generally in the position to publish posthumously, although for published works renewal rights reverted to the author's "widow, child or children" if the author had died before the expiry of the initial copyright term.<sup>64</sup>

The English position did contain one anomaly which provided that copyright in a book published following the death of the author shall be "the property of the proprietor of the author's manuscript from which such book shall be first published."<sup>65</sup> Therefore control of the physical manuscript was important. In *Macmillan v Dent*, the publication in 1895 of letters of an author who died in 1834 by a publisher, who acquired the originals from the descendants of the recipients of the letters, vested copyright in the publisher.<sup>66</sup> The author's family could have opposed original publication under common law copyright but they did not take part in the case.<sup>67</sup>

Posthumous publication without an author's consent marked a considerable change in position for a deceased author. In general, his private expressions, including journals and diaries, would remain within the family circle, bound up in his personal possessions following death but his correspondence would be in the hands of the recipient and subsequently their heirs and surviving family. Therefore, the transmission of copyright at death could alter an author's freedom to express thoughts, sentiments and emotions in personal correspondence and expression.<sup>68</sup>

One of the risks arising from this change in the law was that an individual would temper his expression and recorded views based on the possibility that those expressions could, following his death, be published or made available outside of his private trusted circle. This risk of future publication goes beyond the obvious intrusion into the expectation that an individual may have held that expression or communication of this nature would not fall into the public domain. Privacy is much more than the Judge Cooley inspired *right to be let alone* that Warren and Brandeis promoted.<sup>69</sup> Modern justifications for the right to privacy, and the creation of a private

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<sup>63</sup> Copyright Act 1831, 4 Stat. 436, (1831), at §9.

<sup>64</sup> The United States legislature provided for a split term, initially twenty-eight years with a renewal period of a further fourteen years, see Copyright Act 1831, 4 Stat. 436, (1831), at §2.

<sup>65</sup> s 3 of the Copyright Act 1842.

<sup>66</sup> *Macmillan v Dent* [1907] 1 Ch. 107.

<sup>67</sup> *Ibid*, at 131; the case saw the original publisher prevent the letters from being included in another book by another publisher.

<sup>68</sup> For example Joseph Story noted that failing to protect confidentiality in letters would "compel every one, in self-defence, to write, even to his dearest friends, with the cold and formal severity with which he would write to his wariest opponents, or his most implacable enemies", as quoted by N Richards and D Solove, see note 27 above, at 143 from J Story, *Commentaries on equity jurisprudence as administered in England and America*, (3rd revision, Boston: Charles C. Little & James Brown, 1843).

<sup>69</sup> S Warren and L Brandeis, see note 37 above.

sphere of communication, also include the promotion of autonomy, dignity, intimacy and the free development of individual personality. Therefore, an author's fear that his private communication may be the subject of *post-mortem* social scrutiny might, while alive, limit his individual expression, hinder the development and growth of his individual personality, and inhibit his ability to freely and privately communicate with others in order to form and develop meaningful relationships.<sup>70</sup>

#### 4. Establishing Copyright's "Unpublished" Public Domain

##### 4.1 United States: Copyright Act 1976

The changes outlined in section 3 above, however, only altered the possibility of works unpublished at the time of an author's death being subsequently published or entering the public domain. More significant changes, which began in the final quarter of the last century, fundamentally altered the extent of the public domain by abolishing the perpetual duration of copyright in unpublished works.

The United States, through the Federal Copyright Act 1976, was the pioneer in abolishing perpetual state copyright in unpublished works (also known as common law copyright).<sup>71</sup> The first tentative steps towards the 1976 revision of copyright law saw the Register of Copyrights initially recommending that copyright in unpublished works be retained because the privacy interests of the authors and their heirs were paramount and deserved protection against unauthorised disclosure without any time limit.<sup>72</sup> The Register of Copyrights made this recommendation in recognition that most of the material concerned would be "manuscripts of a private nature, such as letters, memoranda, personal diaries, journals, and family photographs."<sup>73</sup> However, the report further recognised that "after some period of time, the need for privacy diminishes and private papers may become valuable sources of information for historians and other scholars."<sup>74</sup>

In assessing the Register's recommendations, very strong objections were raised against the maintenance of a dual system of common law copyright for unpublished

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<sup>70</sup> See for example discussion in F Schoeman, (ed) *Philosophical Dimensions of Privacy: An Anthology*, (Cambridge: CUP, 1984), at 415 and for the perceived impact of the panopticon on the watched, see M Bozovic, (ed), and J Bentham, *The Panoptic Writings* (London: Verso, 1995). Of course a modern author could utilise a feature of digital legacy service providers such as SecureSafe in order to delete digital content upon notification of death, thus negating the fear that the service provider who holds the content, or an heir, or other third party could read or publish such private digital content. See <http://www.securesafe.com/en/faq/> describing that content and data "which you do not allocate to anyone will be securely deleted in the event of your demise."

<sup>71</sup> A Reese, "Public but Private: Copyright's New Unpublished Public Domain", (2006-2007) 85 *Texas Law Review* 585-664, at 592-593.

<sup>72</sup> Copyright Office (US), *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* (10 July 1961), at 48; the report was actually printed and published by the House Judiciary Committee of the 87th Congress, 1st Session, (1961).

<sup>73</sup> *Ibid*, at 41.

<sup>74</sup> *Ibid*; bearing this in mind the report advised that the right of privacy and the interests of scholarship can be balanced by a special provision providing that an unpublished work made accessible to the public in an archive or library would enter the public domain when it is "50 years old and has been in the library [or archive] for more than 10 years", at 41-43.

works and Federal protection for published works.<sup>75</sup> A unified system of copyright, it was argued, had many advantages: it would help eliminate the confusion that existed in the United States around the concept of *publication*; it would be true to the limited times principle included in the Copyright Clause in the Constitution; and it would aid scholarship and further the public's right to know by making unpublished works available.<sup>76</sup>

When the proposals for the Copyright Act 1976 came before the Committee on the Judiciary, a further element entered the rationale for eliminating perpetual copyright in unpublished works. The copyright term and the basis of calculation of the term were to be radically altered to a system of life plus fifty years. This was a major increase in the copyright term for many authors from the then existing fixed fifty-six year term calculated from first publication. Part of the published works term extension was justified "as fair recompense for the loss of ... perpetual rights" in unpublished works.<sup>77</sup> Arising from the enactment in the United States of the Copyright Act 1976, the duration of copyright in unpublished works of an author would endure for his life plus fifty years, which was later extended to life plus seventy years.<sup>78</sup>

#### **4.2 European Union: Copyright Term Directive 1993**

As part of a general law harmonising the term of protection for copyright works across Member States, the European Union followed the lead of the United States by unifying the copyright term for published and unpublished works. The transposition of the Directive into national laws would force the end of perpetual copyright in Member States where it had previously existed.

The primary focus of the Directive was the harmonisation of the term, at a high level, of life of the author plus seventy years; copyright in all published and unpublished works expires in line with this term.<sup>79</sup> The driving principle for the Directive was the removal of restrictions to the free movement of copyright works and their trade across the Union. In reality, the term of protection in unpublished works was not focused upon in the drafting process. As pointed out by Von Lewinski, the unification of the terms for published and unpublished works was intended as an incentive for publication of works as quickly as possible.<sup>80</sup> The European Union identified a public good in promoting the publication of works and legislated accordingly.

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<sup>75</sup> A Reese, see note 71 above, at 592-593.

<sup>76</sup> *Ibid.*

<sup>77</sup> House of Representatives (US), Report No. 94-1476, 94th Congress 2d Session, *Report and Additional View from the Committee on the Judiciary on Copyright Law Revision*, (3 September 1976), at 134-5.

<sup>78</sup> Copyright Term Extension Act 1998 (Pub. L. 105-298, §§ 102(b) and (d), 112 Stat. 2827-2828).

<sup>79</sup> Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights [1993] OJ L290/9; see also M Walter and S Von Lewinski, (eds), *European Copyright Law: A Commentary*, (Oxford: OUP, 2010), at 508-509.

<sup>80</sup> S Von Lewinski, "EC Proposal for a Council Directive Harmonizing the Term of Protection of Copyright and Certain Related Rights", (1992) 6 *IIC International Review of Intellectual Property and Competition Law* 781-806, at 801.



The aim of promoting publication was supplemented by the introduction of a publication right for any person who lawfully publishes or communicates to the public a previously unpublished work.<sup>81</sup> These special regulations for posthumous publication are incentivised with the benefit of a twenty-five year related right equivalent to the economic rights of an author.<sup>82</sup> The Directive remains almost silent on moral rights; the European Union's general abstinence from this area is maintained.<sup>83</sup> The Directive explicitly states that it "shall be without prejudice to the provisions of the Member States regarding moral rights". This raises the issue of whether harmonisation has truly been achieved by providing Member States with the possibility of maintaining laws which conflict with the expiry of economic rights.<sup>84</sup>

The impact of the expiry of copyright in unpublished works now means that an author or his heirs are no longer the gatekeepers between the private and public domain. This has altered copyright's public domain, where once the public domain contained works, published – made public - with an author's consent, in which copyright had expired. The modern public domain includes the private expressions and communications of a deceased author, irrespective of his consent and regardless of his privacy interests in them. This situation is exacerbated in the European Union where a bounty – economic rights lasting twenty five years from publication – is provided for the exposure of a decedent's personal expression and communication.

## 5. Conclusion

When we die we leave behind various traces and artefacts based on our interactions with others and our environment. Copyright law has a long history and tradition of protecting our personal expression and communication and this protection extended *post mortem*. In the pre-digital world, access to the physical manuscript bearing personal writings normally remained in the hands of a family member or the recipient of a letter. This fact coupled with perpetual copyright limited the potential for exposure of these items. Today, most expression and communication is digitally transmitted and stored by third party service providers. Following death and the expiry of copyright, the reuse, including publication, of these private digital expressions is enabled and in current European copyright law such publication is promoted.

The privacy protections afforded to decedents available in the early copyright era have all but disappeared. The changing nature and digital mode of personal expression and communication have not been factored into the development of the law. Copyright's protection of *post-mortem* privacy has been lessened in the rush to promote publications of valuable works and subsequent international trade. One's digital remains are exposed to further uses, which may impact on and alter how the living communicate and record their private thoughts, sentiments and emotions.

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<sup>81</sup> art 4 of Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights [1993] OJ L290/9.

<sup>82</sup> *Ibid.*

<sup>83</sup> M Walter and S Von Lewinski, see note 79 above, at 609-612.

<sup>84</sup> art 9 of Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights [1993] OJ L290/9

Our digital remains also have sentimental and emotional value, often linked to a particular person or memory. Many of these remains are unlikely to have any great or lasting economic value but may in the future be of great value to historians, biographers or to cultural and heritage institutions and donation to such institutions should be encouraged. The fear that one's digital remains will eventually be opened to societal scrutiny, through the promotion of publication in copyright law, may lead to the deletion of digital remains in contemplation of death. This could have perverse consequences, denying family and friends mementos, including access to shared memories of those who have died. It could also deny future historians and generations access to records of personal history with valuable insights into our society.

The fear of future social scrutiny may also lead to a fettering of one's recording of true sentiments and emotions, thus limiting personal development while alive and indirectly limiting the quality and accuracy of these digital remains to inform future generations of life in the digital age. Any regulation of digital remains must recognise the privacy interests of decedents and the potential impact the publication *post mortem* of personal expression and communication can have.

The development of copyright and many of its core principles while providing a reasonable host for the surrogate regulation of digital remains leave a number of important issues unresolved. The interaction of copyright with *post-mortem* privacy clearly points to the fact that the transposition of these surrogate legal protections from their living subjects to the deceased does not always occur in full. Copyright's *post-mortem* privacy protections matter in the digital age but they must be balanced with other rights and interests.

A single temporal cut-off point between the private and public domain, reinforced with incentives to publish previously unpublished digital remains, does little to persuade a creator of the long-term public good access to such private expression could provide to society in the future. Privacy interests and the innate human desire to control and limit disclosure of personal communication and expression even to heirs, family members or the historians of the future demand a more nuanced and granular approach to provide for the possibility of varying degrees of access by different categories of beneficiary.

Defining new access limits to promote long-term preservation and access to digital remains needs to be balanced with a recognition of the complexity of privacy interests of the deceased. Therefore, further research is required to fully understand the importance of digital remains to the deceased, surviving family, heirs, friends and wider society in order to establish a regulatory regime which reconciles the rights and interests of the deceased (including privacy) with those of the living – present and future.