# Copyright Assignment - Hilary Henkin

*For each item, discuss whether or not the item(s) can be digitized and why. Cite appropriate copyright laws, rulings, or guidelines you use in making your decision. In the event that a definitive answer cannot be determined, discuss the ambiguities, why you believe the intellectual property rights to be unclear, and the decision you would advise your institution to make on whether or not to proceed with digitizing the item. Discuss possible implications of digitizing the item and making it available anyway.*

### Collection #1: Some personal letters written by Mr. Walter Packard to Mrs. Carrie Stevens dated during the year 1900. The personal letter described an outing that they had taken with a group of friends. Both parties are deceased.

Copyright holder: Walter Packard

Year of creation: 1900

These letters should not be digitized at this time.

The 1870 Copyright law, in effect at the time these letters were written in 1900, provided for an initial copyright term of 28 years, with a non-automatic renewal option of an additional 14 years, for maximum protection of 42 years. However, copyright at that time was applied only to materials specifically registered with the copyright office, and only to maps, charts, and books. It did not apply to unpublished material such as personal letters. Mr. Packard would’ve had to both publish the letters (retrieving them from Ms. Stevens first!) and to register them with the copyright Office, to establish those protections. Accordingly, when created and for many years after, these letters would’ve been unprotected from copying and distribution.

In 1976, the Copyright law was amended, extending the scope of the law to include unpublished materials such as personal letters. According to Title 17, chapter 3, section 303(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](http://www.law.cornell.edu/uscode/html/uscode17/usc_sec_17_00000302----000-.html).” (Cornell, 2010). It also extended the term of copyright to generally “the life of the author plus fifty years.” In 1998, the law was amended by the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.), to extend the term from fifty to seventy years (Reese, 2007, p. 590 footnote). With these two changes to the law, these letters then received copyright protection.

While we are made aware that both the writer and recipient of these letters are deceased, we are not told when they died.

The 1976 Copyright law, in extending the scope of the law to include unpublished works, provided that these works would receive a minimum of twenty-five years protection from the implementation date of Jan 1, 1978, or the life of the author plus fifty years, whichever was greater (1976 law, 17 U.S.C. § 303.). This would protect long-dead authors whose works might newly fall under protection, only to immediately expire. In use, this meant that works by authors who died before 1932 would convert to public domain after December 31, 2002. (Reese, 2007, pg 591). When the 1998 Bono amendment was passed, it did not change this provision. According to Reese (2007, p. 591),

“…works entered the public domain in the United States on January 1, 2003, if (1) as of January 1, 1978, they were unpublished and had never been registered for copyright protection, (2) they remained unpublished through December 31, 2002,26 and (3) the author died on or before December 31, 1932. Because all copyright terms run until the end of the year in which they expire, works that meet the first two conditions are today in the public domain if the author died on or before December 31, 1936.”

Had Mr. Packard died before 1936, his letters would now be public domain. However, since we do not know when he died, we cannot proceed under that assumption.

It is possible that Mr. Packard died before 1936, and his letters are now public domain. But if he lived beyond that time, they would be under copyright protection for seventy years after his death. Without further research, these letters should not be digitized.

However, the statute, in 17 U.S.C. § 302(e) also provides that after 120 years after creation of a work, it may be presumed that the author is dead, and that the material is in the public domain. This means, in this particular case, that even if death cannot be confirmed through research and the letters are still under copyright protection, those protections would end in 2020 (future statute amendments not withstanding). If these letters are important and deemed valuable, revisiting this collection after this date would be recommended.

Further research into Mr. Packard would also be warranted. Determining his date of death might be a relatively simple search; if he died before 1940, the letters would now be in the public domain, and available for digitization.

A decision to move forward with digitization and release of these letters without confirming clearance may depend on whether the individuals mentioned are known individuals, and the content of the letters. These factors will contribute to the “visibility” of the letters, and whether their existence and availability draws publicity and attention. If the outings are noteworthy, or individuals in the “group of friends” include well-known individuals, the letters may draw more attention than otherwise. This increased attention, if clearance is not solid, may cause problems for the institution.

### Collection #2: A book with the following citation: Hall, F. (1871). The history of San José and surroundings: with biographical sketches of early settlers. (L. Goodrich [role]), San Francisco: Printing house of A.L. Bancroft and Company no. 721 Market Street

Copyright holder: F. Hall

Date of creation: 1871

This work can be digitized.

This is a published book, which is a category covered by even the earliest copyright statutes. The first Act of 1790 established the term of protection as 14 years, with an optional renewal period of an additional 14 years (not automatic). The 1870 Copyright Act amended the 1790 Act by increasing the term of protection to 28 years. It did not, however, change the optional renewal period, and thus provided a maximum of 42 years’ protection.

While a later Act in 1909 added a requirement that works be “deposited and promptly registered with the Copyright Office” to establish protection, this was not in effect in 1871 when this work was published.

Regardless of any other provisions which may have been in effect at its creation, this book was published 140 years ago. Accordingly, it falls under 17 U.S.C. § 302(e), which provides that

“After a period of 95 years from the year of first publication of a work, or a period of 120 years from the year of its creation, whichever expires first, any person who obtains from the Copyright Office a certified report that the records provided by subsection (d) disclose nothing to indicate that the author of the work is living, or died less than 70 years before, is entitled to the benefits of a presumption that the author has been dead for at least 70 years. Reliance in good faith upon this presumption shall be a complete defense, retrieved from (Cornell, 2010) to any action for infringement under this title.”)

With this information, this book can be digitized. It is in the public domain and has been so for at least twenty years.

### Collection #3: Some photographs of J.J Owen (1827-1884?) that contain no dates and no information on who took the photographs.

Copyright holder: unknown photographer or photographers

Date of creation: no later than 1884 (estimate)

These works can be digitized.

These photographs are of the subject J.J. Owen. The identity of the photographer or photographers is not known.

Although precise dates for the photographs are unknown, we are given an approximate date of death for Mr. Owen. From this information, we can assign “no later than” creation dates for the photographs.

Since we know nothing about the photographer(s), we also know nothing about whether these photographs were taken as works for hire, and whether the photographer(s) retained ownership. Photographs were not covered by the first 1790 Copyright law, so such distinctions would’ve been irrelevant to the individuals involved. In that time period, it is likely that the photographer retained the negatives, if indeed negatives were even created (the photos could’ve been daguerreotypes, tintypes. or other types which did not create negatives as we know them.)

We are told that Mr. Owen died around 1884, so we can assume that the photos were all taken prior to that date, allowing perhaps a few years for estimate variation.

While we don’t know if there was one photographer or several, and we have no idea when *those* individuals died, 17 U.S.C. § 302(e) provides that if 120 years has elapsed from the creation of a work, published or unpublished, the death of the creator can be assumed, filed with the Copyright Office, and the work(s) converted to public domain.

Since that time period would’ve ended around the year 2004, even if we allow a few additional years for variation in estimation, the 120-year protection has ended, and copyright has expired. These photos can be digitized, since they are now in the public domain.

References:

Cornell University Law School, (2010). Title 17, Chapter 3, section 303. *U.S. Code*. Retrieved from <http://www.law.cornell.edu/uscode/html/uscode17/usc_sec_17_00000303----000-.html>

Reese, R.A. (2007). Public but private: Copyright’s new unpublished public domain , *Texas Law Review* 85(585) Retrieved from <http://www.google.com/url?sa=t&source=web&cd=1&ved=0CBgQFjAA&url=http%3A%2F%2Fwww.utexas.edu%2Flaw%2Ffaculty%2Ftreese%2Fpublicbutprivate.pdf&ei=3wNxTdnOGZG6sAOlnajSCw&usg=AFQjCNGKDGYVE12VpdWZPU8HAso9hSTMbw>)