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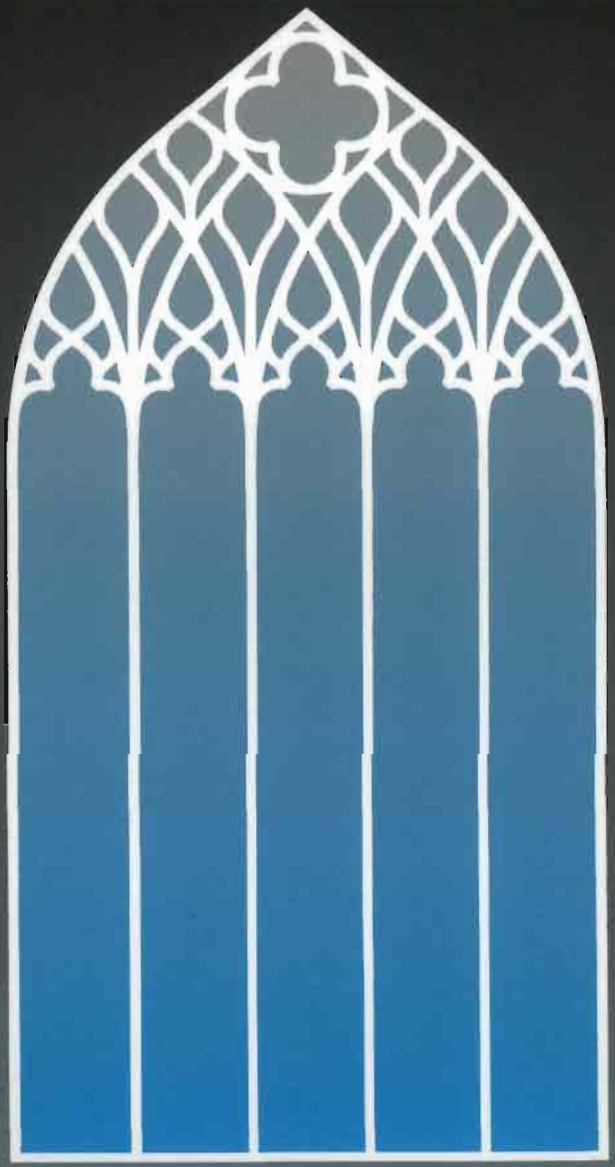

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A Bundle of Rights

Morris A. Thurston

ALTHOUGH GARY BERGERA is not a lawyer, he does a commendable job of explaining the rather technical and sometimes counter-intuitive United States copyright laws, particularly as they relate to Mormon historians and unpublished manuscripts. Other rights, however, also play important roles in archival policies and are likely to impact the LDS researcher. These include ownership rights, contract rights, and privacy rights. My purpose is to explore how they interface with copyrights.

COPYRIGHTS

In simplest terms, the owner of a copyright can prevent others from copying or publishing the copyrighted work, except as permitted under the doctrine of "fair use."[1] A copyright subsists in a work

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[1]17 United States Code 106. As Bergera explains in his piece, for a time following the J. D. Salinger case it appeared that almost no copying of unpublished works would be considered "fair use." More recent cases, however, as well as a 1990 amendment to the federal copyright law, have

from the moment it is put down in tangible form, whether or not the work is registered or published.[2] Therefore, when my great-grandfather William Griffiths Reese made handwritten entries in his journal while serving a mission in Wales in 1882, he was creating a work protected by copyright laws. Likewise, when he wrote letters to his future wife, Mary Maria Rees, he was also creating copyrighted works. In each case, the owner of the copyright was the creator of the work—William G. Reese.

When William passed away, he probably never considered who might inherit his copyrights.[3] Assuming that he did not assign the copyrights to someone during his lifetime, they would have passed through the residual clause in William's will. If he did not leave a will, they would have passed to his heirs, pursuant to the laws of intestacy.[4] Therefore, it is possible that William's children jointly inherited the copyright to his works. As most of them are deceased, their descendants, numbering in the hundreds, likely share ownership of the copyrights.

A basic principle of copyright law is that any joint owner of a copyright may "exploit" the right (that is, may copy or publish or license others to publish the work), subject only to the duty of accounting for any profits to all the other joint copyright holders.[5]

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made it clear that "the fact that a work is unpublished shall not itself bar a finding of fair use . . . ." 17 U.S.C. 107.

[2]"Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression. . . ." 17 United States Code 102(a).

[3]Although William G. Reese was a literate schoolteacher, with a penchant for poetry, who both kept journals and wrote letters, I do not know what thought he gave to copyright issues, although I suspect, like most of us, it was very little. I offer his case study for illustration only.

[4]17 United States Code 201. "The ownership of a copyright . . . may be bequeathed by will or pass as personal property by the applicable laws of intestate succession." See also *Forster Music Publishers, Inc. v. Jerry Vogel Music Co.* (1944, Southern District New York) 62 United States Patent Quarterly ("USPQ") 142; affirmed (1945, CA2 NY) 147 Federal Reporter (2d) 614, 64 USPQ 417, certiori denied (1945) 325 United States Reporter 880, 89 L Ed 1996, 65 S Ct 1573, 65 USPQ 588.

[5]Joint owners of a copyright are tenants in common; thus, one co-owner may use or license use of a work without other's consent, being

Since inheritance laws vary from state to state, the problem of tracing and determining the relative interests of all the potential joint owners of an ancient copyrighted work is daunting. Fortunately, perhaps, there is not big money to be made in most unpublished documents, so these issues rarely lead to litigation among heirs. Also, most of the problems associated with determining the joint rights of descendants to a long-deceased ancestor's copyright will fade away at the end of 2002, when unpublished documents created by individuals who have been dead for at least seventy years will enter the public domain.[6]

OWNERSHIP RIGHTS

Since William G. Reese presumably kept his journal in his possession, he was also the owner of tangible, personal property—consisting of the journal booklet, with its hard cover and its writing paper covered with words written in ink. As owner of both the copyright and the personal property, William could do what he wished with both rights. He could, for example, assign the copyright to another person who could then publish the journal in printed form. He could also transfer ownership of the journal booklet itself to a third person. But merely selling or giving the journal booklet to another person would not result in transfer of the copyright.

William's letters present different issues. Since he sent the letters to Mary, presumably intending her to keep them, she became their owner. However, unless William specifically transferred the copyright—and such transfers are required to be in writing and will not be presumed by mere transfer of the physical documents—he retained the copyright.[7]

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liable only to account for profits. *Noble v. D. Van Nostrand Co.* (1960) 63 New Jersey Superior Court, 534; 164 A2d 834; 128 United States Patent Quarterly ("USPQ") 100 (1960).

[6]"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 [seventy years after the author's death]. 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." 17 United States Code 303(a).

[7]"A transfer of copyright ownership, other than by operation of law,

Could Mary publish the letters without William's permission? Not without infringing on William's copyright. Could William require Mary to return the letters so that he could publish them? No. The letters were hers to do with as she wished. She could keep them for herself, or even burn them, if the mood struck her.

What if Mary were to give the letters to an archival library? Does it follow that the library could grant to a researcher the right to copy and publish the letters? Not unless the archive had received permission to do so from William. As holder of the copyright, William possesses one of the keys to the right to publish his letters. He could, of course, assign his copyright to the library; but in practice, such assignments are rare.

Contract Rights

Since William controls the copyright, could Mary exercise any control over the letters if she were to donate them to the library? For instance, could Mary require the library to place restrictions on access to the letters? The answer is, "Yes." As owner of the physical documents, Mary could enter into a contract with the library to place whatever conditions she wished on access to her property. For example, she could require that no access be given to researchers who failed to obtain her permission in advance. She also could specify what uses could be made of "her" letters. She could even stipulate that the library must not give anyone access to the letters until a certain number of years after her death. Of course, only if the library agreed to accept the letters on the conditions she set could someone compel the library to enforce these conditions—presumably by suing it if it violated them. If the library were unwilling to accept Mary's conditions, thereby entering into a contract with her, she would have the option of taking the letters to another library more willing to accommodate her wishes.

Though perhaps not the norm, it is not unheard of for an archive to receive contributions from persons who desire to place restrictions on them. Nor is it uncommon for an archive to agree to honor such restrictions—particularly if they are reasonable. Obviously, the more valuable the collection, the more clout the donor

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is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent." 17 United States Code 204(a).

can wield. Many archives have policies that require researchers to seek permission of the archive before publishing any of its documents, whether or not the archive holds the copyright. One reason for such a policy is to permit the archive to make certain that there are no donor restrictions on the document.[8]

Let us return to William's letters to Mary. If Mary were to make an unrestricted grant of these letters to a library, ownership of the letters would pass to the library. As the new owner of these materials, the library could, if it wished, place its own conditions on access. For instance, the library could permit note taking but refuse to allow photocopying. The library could also place limits on publishing information gleaned from the documents. Thus, the library could say to the researcher, "You can look at these letters, but only if you agree you will not publish any portion of the letter without first obtaining our approval." The researcher must then choose whether to agree to such a condition—thereby entering into a contract with the archive.

Note that, under this hypothetical situation, the doctrine of "fair use" does not automatically come into play. The owner of the letters themselves (Mary or the library, in our hypothetical example) can control access and thus has the power to place absolute limits on what can be copied from the letters.[9] Ironically, the owner of the copyright (William, in our hypothetical example) may have less control than the owner of the document, assuming he did not retain copies of this material, because he cannot prevent a person with access to his letters from quoting from them, so long as the quotations fall within the bounds of fair use.

In sum, therefore, an archive that owns the only copies of unpublished letters, diaries, minutes, and the like may control what

[8]Of course, not all conditions imposed by donors serve to restrict researchers. Some conditions are intended to protect access to donated materials. For example, the Anthon H. Lund diaries were contributed by his heirs to the LDS Church Archives on the condition that they would be available to researchers. This is a restriction of a different sort—a restriction on the right of an owner/archive to deny access.

[9]The owner of unpublished documents can exercise total control over what can be copied from them only if no one else has copies of them—in other words, only if the owner has monopoly power with respect to the documents.

is quoted from these materials, either by denying access or by conditioning access on an agreement to seek approval of the archive before quoting from them.[10] Whether an archive *ought* to exercise such control is another question.

Privacy Rights

An important concern of most archives, in addition to protecting copyrights and honoring the contracts it has made with donors, is protecting the privacy rights of living individuals who may be mentioned in its archival materials. Unlike copyrights, which are preempted in the United States by the federal copyright laws, privacy rights vary from state to state. In general, however, courts have held that an individual should be protected against public disclosure of offensive or intimate private facts if the information is not generally known and is not of legitimate concern to the public.[11] Privacy rights deserve especially strong protection when they are asserted by an ordinary individual—someone who has not thrust himself or herself into the public eye. Archives need to be wary of violating privacy rights, because unpublished materials, such as letters and diaries, are particularly susceptible of containing intimate (and potentially offensive) facts about ordinary individuals.

Most cases alleging inappropriate public disclosure of private facts arise in the context of newspaper reporting, television broadcasting, movie production, or book publication. The defendants are usually news organizations, reporters, production studios, publishing houses, or writers. I have not found any reported decisions in which a library or archive has been held liable for violation of privacy

[10]It is unclear whether an archive could obtain an injunction to stop publication or merely sue the researcher for damages. In either case, however, the archive could, if it wished, significantly inhibit the publication of material quoted from unpublished documents under its ownership and control.

[11]The case of *Shulman, et al. v. Group W. Productions, Inc., et al.*, 18 California Reporter (4th) 200, 214 (1998), contains a good summary of California law on the subject of public disclosure of private facts. Other states' laws are likely similar. The *Shulman* court explained that the elements of this tort are (1) public disclosure (2) of private facts (3) that would be offensive and objectionable to a reasonable person and (4) that are not of legitimate public concern.

rights by reason of having made private information available to researchers. This does not mean an archive is immune from being sued, but it does suggest there is no need for hypersensitivity.

Moreover, the burden on archives to protect privacy rights is tempered by the legal principle that such rights normally endure only for the life of the individual involved. Thus, for example, your Aunt Lizzie could sue you for invasion of her right of privacy if you were to publish in your memoirs the theretofore confidential fact that she embezzled money from the Relief Society centerpiece fund. Once she dies, however, you would be legally free to disclose her light-fingeredness without fear that her descendants would sue you. The legal right of privacy is a personal right. It does not survive death, nor does it pass on to heirs.[12]

What about facts concerning a dead person that may also reflect adversely on living individuals? For instance, suppose Aunt Lizzie had suffered from syphilis and passed the disease on to her children? Could the children argue that by making records available concerning Lizzie's condition—even if the records did not specifically mention the children—the archive enabled a tabloid to focus the spotlight of inquiry on the children's health? What if one of Lizzie's children was actually fathered by someone other than Lizzie's husband? Could an archive be sued for disclosing records after Lizzie's death, revealing that one of her living children was illegitimate? These are interesting legal questions that have not been answered definitively.[13] I doubt, however, that a court would find an

[12]One caveat should be noted: If a living person brings a lawsuit for invasion of privacy rights, then dies before the suit is resolved, it may be possible for the administrator of the plaintiff's estate to continue to prosecute the lawsuit.

[13]Recently a Florida judge denied the defendants' motion to dismiss the complaint in the case of *Tyne et al. v. Time Warner Entertainment Co., et al.* This lawsuit arose out of the motion picture *The Perfect Storm,* and its depictions of the crew of the swordfish boat, the *Andrea Gail.* Although all crewmembers lost their lives in the storm, their relatives sought damages on the ground that the alleged false presentation of facts in the movie was an "independent violation of their own personal privacy rights." See page 4 of "Plaintiffs' Opposition to Motion to Dismiss" in the files of the United States District Court, Middle District of Florida, Orlando Division, Case No. 6:00 CV-1115-ORL-C-22-JGG. Of course, a motion picture production

archive liable for such indirect disclosures unless, perhaps, it could be shown that the archive acted with intent or malice in the matter. But these questions point out the difficulties that can arise concerning privacy rights in archival materials.

Having in mind privacy issues, some archives place restrictions on materials that expire within a fixed number of years. One familiar example is the policy of the Church Family History Library not to make genealogical data (such as information concerning births or marriages, for example) available to the public unless it can be shown (or can be presumed) that the individual to whom it pertains is dead.

The National Archives and Records Administration (NARA) has a narrower view of privacy rights, as might be expected from a public agency, and recognizes such rights only in relation to events less than seventy-five years old.[14] There is a statutory seventy-two-year restriction on access to individual records contained in the U.S. Census.[15] In California, a sitting governor is authorized to restrict access to public records for a period not longer than fifty years or until the governor's death, whichever is later.[16] Harvard University routinely observes a fifty-year restriction on access to faculty papers,[17] while Yale University observes a thirty-five-year restriction on archival records, except for minutes of the Yale Corporation (fifty

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company that intentionally distorts facts (or at least allegedly does) is a far cry from a research archive that merely grants access to a researcher.

[14]National Archives and Records Administration, "Part 1256 Restrictions on the Use of Records," http://nara.gov/nara/cfr/cfr1256.html. This policy provides that access will be restricted with respect to: "Records containing information about a living individual which reveal details of a highly personal nature that the individual could reasonably assert a claim to withhold from the public to avoid a clearly unwarranted invasion of privacy . . . and that (1) contain personal information not known to have been previously made public, and (2) relate to events less than 75 years old."

[15]92 Statute 915; Public Law 95-416; 5 October 1978. Genealogists are eagerly awaiting 1 April 2002, when the 1930 U.S. Census becomes available to the public. http://www.nara.gov/genealogy/1930cen.html#date.

[16]California Government Code, 6268.

[17]Harvard University Archives "Access Information," http://lib.harvard.edu/ libraries/0023.html.

years) and student records (life plus five years, or seventy-five years, whichever is longer). The Yale archivist explains: "Placing restrictions on the research and use of records for specified lengths of time is a standard archival procedure which is part of the policy of most archival repositories. . . . Restrictions of reasonable length facilitate research by ensuring the survival and completeness of the historical record."[18]

Prudence, therefore, suggests that the Church should be cautious about archival material concerning living persons. This is particularly true about records having to do with financial information, patriarchal blessings, disciplinary courts, and the like. Policies that prevent public access to such records until after a person has died make good sense, legally and otherwise. Such records, however, need not be locked up forever. I have reviewed ward records from pioneer days showing contributions to and withdrawals from the bishop's storehouse, for example, and learned valuable background information on my ancestors—many of whom left no personal written record. Such information helps the historian fill in details that help enlighten individual stories as well as the history of an era.

And certainly, records that are not particularly sensitive could be made available to the public much more quickly. A fifty-year-after-creation rule would seem to provide adequate privacy protection for most types of archival records.[19]

A SAMPLING OF ARCHIVAL USE POLICIES

In writing this essay, I reviewed the policies of a number of libraries concerning access to and use of archival materials. As might be expected, the policies varied considerably from institution to institution. Most libraries provide some notice that patrons are responsible for respecting the copyrights of persons whose materials are housed in their collections. Most libraries also have restrictions on use—generally geared toward preserving the manuscripts, protecting privacy rights, and honoring contractual obligations. A number of archives demand that there be no publication of information

[18]Yale University Archives and Records Program, "Access Policies," http://www.library.yale,edu/archivese300/access_policies.html.

[19]I understand, for example, that the Community of Christ (formerly RLDS Church) grants historians access to the minutes of its leading bodies after fifty years.

in unpublished materials without obtaining permission from the archive.

The Huntington Library, which houses an extensive Mormon collection, has a policy that is, at least potentially, quite restrictive.[20] The Huntington will grant permission to reproduce images or texts of materials owned by the library only when use of the materials in publications "meets the standards of appropriateness established by the Huntington." Some examples of inappropriate use include "(a) [use in a] context that might be misleading or defamatory, (b) alteration of the original form, meaning or intent of the creator of the materials,[21] or (c) use that would compete with or detract from an existing or planned Huntington use." In addition, use of materials from the Huntington archives must "compl[y] with any donor agreements attached to the materials" and "compl[y] with all copyright restrictions."

The Pitts Theology Library of Emory University in Atlanta requires that "anyone who wishes to publish or use in facsimile reproduction material in the . . . Archives and Manuscripts Department must receive written permission from the Curator of Archives and Manuscripts."[22] Purdue University Calumet warns that "use of any material in the Archives is subject to the approval of the University Archivist" and "no archival document, nor any part of an archival document, may be published or reproduced except by permission of the University Archivist."[23]

Other libraries seem to be interested primarily in protecting the contract rights of contributors. For example, Boston University requires anyone photocopying unpublished manuscripts to obtain the written permission of the material's donor and/or creator.[24] The

[20]Huntington Library "Permission to Publish Policy," http://www.huntington.org/LibraryDiv/Permission.html.

[21]One is left to wonder how the Huntington determines the meaning or intent of the creator.

[22] Pitts Theology Library "Permission to Publish or Use Reproductions," http://www.pitts.emory.edu/Archives/ptl_publish.html. In addition, anyone using materials from the Pitts collection must agree to provide the library with a free copy of the final publication.

[23]Purdue University Calumet "Archives and Special Collections Office Rules and Policies," http://library.calumet.purdue.edu/Archhtmlfin/Info/Rules_and_Policies. htm.

University of Massachusetts Dartmouth Library reserves the right to deny requests for duplication if doing so "would violate restrictions placed by the donor, or would violate privacy statutes."[25] The UCLA Library explains: "Before reproduction of any unpublished records can be permitted, it will be necessary to check acquisition files, contracts, deed of gift, etc., to determine whether any special copying restrictions exist."[26]

THE CHURCH'S "RULES GOVERNING THE USE OF ARCHIVAL MATERIALS"

The "Rules Governing the Use of Archival Materials," used by the LDS Church History Archives, reads, in part, as follows:

> Any publication or reproduction . . . or other use of archival material that exceeds the bounds of fair use as defined in the United States copyright law, requires the prior written permission of the Church Copyrights and Permissions Office, as well as of any other individual or institution that may have rights to the material.[27]

The phrasing of this rule could cause some confusion as to the nature of the Church's claims, although I believe it is legally adequate. The Church, as owner of the physical materials in its archives, may put whatever conditions it wishes on researchers seeking permission to review those records. While the Church does not own the copyright to all of the documents in its archives, at the very least, it has ownership rights. By granting patrons permission to publish from materials in its collection "within the bounds of fair use," the Church is probably being more liberal in its grant of rights than is strictly necessary.[28]

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[24]Boston University "Rules Governing the Use of Manuscripts," http://www.bu.edu/speccol/rulesofuse.htm.

[25]University of Massachusetts Dartmouth Library "Copyright Policy for Archives & Special Collections," http://www.lib.umassd.edu/policies/copyright_archives.html.

[26]UCLA "Unpublished Materials" policy, http://www.library.ucla.edu/copyright/unpublis.htm.

[27]Rule 12, "Rules Governing the Use of Archival Materials," photocopy furnished to me by the LDS Church Historical Library Archives.

[28]As noted, the language of Rule 12 is not entirely clear in describing the Church's rights. While it may be presumptuous to suggest a change in "Rules Governing the Use of Archival Material" without consulting with the

In fact, the Church's restrictions are, on their face, less onerous than those imposed by the Huntington Library, the Pitts Theology Library, or the Purdue University Calumet Library mentioned earlier.[29] The requirement that the researcher consult both the Church's own Permissions Office, as well as any other person holding rights to the materials, when making use of unpublished materials that exceed the scope of fair use, is within its authority. It would also seem to be a reasonable compromise between requiring permission for any use of archival material and not requiring permission at all.

Notwithstanding the Church's legal rights in the archival materials it owns, I personally hope the Church will exercise those rights

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responsible Church authorities to determine their particular concerns, I might rephrase Rule 12 along these lines: "Except as set forth in the following paragraph, any publication or reproduction of archival material (including by electronic means) requires the prior written permission of the Church, as owner of the materials, and, where applicable, any other individual or institution that may have rights to the material, including copyrights. Permission of the Church is not required for 'fair use' of archival material. In determining the scope of fair use, the following factors should be considered: (1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work (use of unpublished works is generally more restricted than is use of published works); (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the work. Inquiries about the scope of fair use, and requests for permission, should be directed to the Church Copyrights and Permissions Office. The researcher bears sole responsibility for obtaining permissions from any other individual or institution having rights in the material to be used. In granting permission to use material in the archives, the Church does not necessarily claim copyright ownership, nor does the Church surrender any right it may have to use the material or to grant permission to others to use it."

[29]Of course, a policy that seems restrictive on its face, may be much less so in practice. Conversely, an archive whose written policy seems to be open can exercise a great deal of control simply by denying researchers access to certain documents. This can be done overtly, by refusing requests for access to catalogued materials, or covertly, by failing to catalog documents that the archive does not want examined.

as judiciously and narrowly as possible, and in a fair and noncapricious manner. When I lecture on life-story writing, I encourage my students to present a rounded portrayal of the person (usually an ancestor) about whom they are writing. Readers appreciate honesty and are more ready to accept the ancestor's virtues if the vices are dealt with in a forthright manner. The same holds true with respect to historical research. If folks feel that the Church is withholding material that might enlighten a subject, they are less likely to accept conclusions that are offered, even by "objective" historians.

The primary role of the Church History Library should be to facilitate legitimate historical research, while at the same time protecting the physical integrity of archival documents, the wishes of donors, and the privacy rights of living persons.[30] Therefore, while the Church may have sound legal grounds upon which to restrict access and publication of historical documents it finds troubling, I hope and trust it will instead continue to direct its efforts toward enabling a thorough examination of our past, thereby enriching us all.

[30]Interestingly, after I had been approached to write this piece, a brouhaha broke out between the Church and Utah State University over rights in certain unpublished documents received by the University from the estate of Leonard Arrington. The press published statements by a variety of persons asserting the importance of ownership rights, privacy rights, and copyrights. Eventually a committee of luminaries appointed by each side settled the matter out of court. It appears that the majority of the challenged documents remained with the university, while some of the more sensitive—perhaps those to which the claim of ownership was clearest—were returned to the Arrington family, who gave them to the Church. See Peggy Fletcher Stack and Kirsten Stewart, "USU Gives LDS Church Some of Historian's Papers," *Salt Lake Tribune,* 25 November 2001; Linda Thomson, "LDS and USU End Tiff Over Papers," *Deseret News,* 25 November 2001, on-line editions.