

Copyright Renewal, Copyright Restoration, and the Difficulty of Determining Copyright Status

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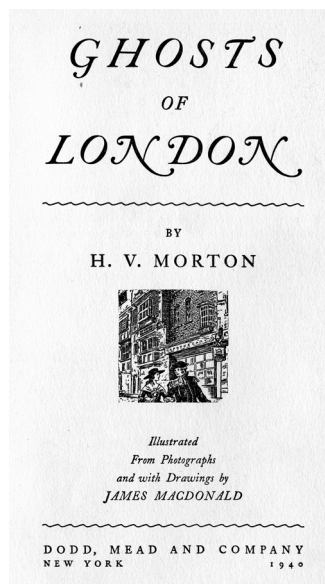
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Abstract

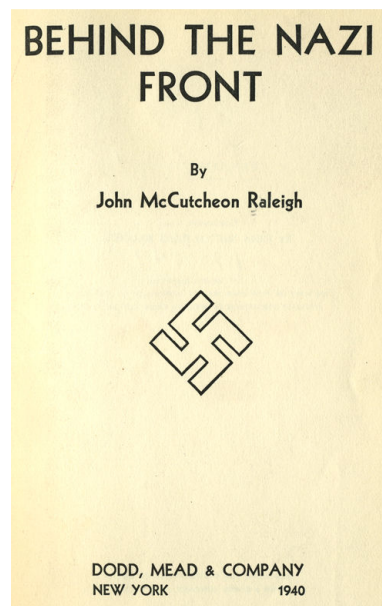
It has long been assumed that most of the works published from 1923 to 1964 in the US are currently in the public domain. Both non-profit and commercial digital libraries have dreamed of making this material available. Most programs have recognized as well that the restoration of US copyright in foreign works in 1996 has made it impossible for them to offer to the public the full text of most foreign works. What has been overlooked up to now is the difficulty that copyright restoration has created for anyone trying to determine if a work published in the United States is still protected by copyright. This article discusses the impact that copyright restoration of foreign works has had on US copyright status investigations, and offers some new steps that users must follow in order to investigate the copyright status in the US of any work. It argues that copyright restoration has made it almost impossible to determine with certainty whether a book published in the United States after 1922 and before 1964 is in the public domain. Digital libraries that wish to offer books from this period do so at some risk.

1. Introduction

Consider the following titles, published by the same publisher in the same year:

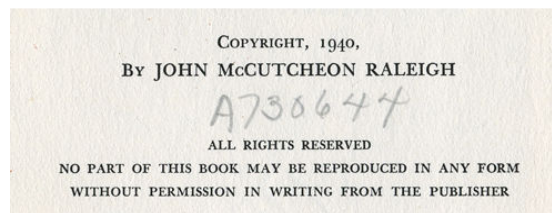
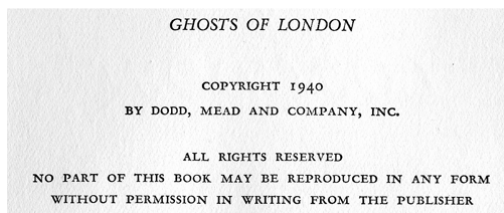


***The Ghosts of London*, by H. V. Morton,
published in New York by Dodd, Mead &
Co. in 1940**



***Behind the Nazi Front*, by John McCutcheon
Raleigh, published in New York by Dodd,
Mead & Co. in 1940**

Both titles were published with copyright notices, and both titles were registered for copyright with the US Copyright Office:



Copyright notices on the reverse of the Title Page

Morton, Henry V. Ghosts of London,
by H. V. Morton. Illustrated from
photographs and with drawings by
James MacDonald. © Feb. 7, 1940;
A 138081; Dodd, Mead & co., inc., New
York. 3733

Raleigh, John McCutcheon,* New
Canaan, Conn. Behind the Nazi
front. © Nov. 26, 1940; A 147577.
12188

Copyright registration information from the *Catalog of Copyright Entries*

A check in the online Copyright Renewal Database at Stanford University reveals that copyright in neither title was renewed.¹ One might reasonably conclude, therefore, that both titles are in the public domain in the United States. Yet the first title is still protected by copyright, whereas the second is not. The reason for the different copyright status is due to the restoration of copyright in foreign works.

In December 1994, President Bill Clinton signed the Uruguay Round Agreements Act (URAA). Included in the act were several amendments to the Copyright Act, Title 17, including the addition of section 104A to the Title. Section 104A provides for the automatic restoration of copyright in certain foreign works that have entered the public domain in the United States.²

Because of copyright restoration, it is clearly no longer possible for libraries and commercial entities to reproduce and distribute most foreign works published since 1922. What has been overlooked up to now is the difficulty that copyright restoration has created for anyone trying to determine if a work published in the United States is still protected by copyright. Because of copyright restoration, investigating the renewal status of works published in the US can now no longer establish *by itself* the copyright status of a volume. Rather than being the starting point of the copyright investigation process, as it has been in the past, investigating renewal status must now come near the end of copyright status investigations. More troubling, copyright restoration has made it almost impossible to determine with certainty whether a book published in the United States from 1923 to 1964 is, indeed, in the public domain.

The implications of copyright restoration for large-scale digitization projects by libraries, archives, and corporate entities such as Google and the Internet Archive are immense. Most projects will only make publicly available online the full text of works that are clearly in the public domain in the United States. Under current American law, both domestic and foreign publications published prior to 1923 are in the public domain.³ Almost all domestic and foreign works published after 1963 are still protected by copyright. And most works first published outside the US from 1923 through 1963 are likely to be protected by copyright, for reasons outlined below.

The copyright status of works published in the US from 1923 to 1964 – the period between almost certain public domain status and almost certain copyright protection – has been much harder to determine. Most of these works, however, are likely to be in the public domain. In order to receive the protections of copyright during this period, published works had to comply with certain straightforward formalities. Works had to be published with a copyright notice consisting of the word “copyright” or the symbol ©, followed by the name of the copyright owner and the date. Works published in English had to be manufactured in the United States. Registration of the copyright with the Copyright Office was not required, but it did secure extra protections for the copyright owner. The copyright owner was also required to arrange for the deposit of two copies of the work with the Copyright Office.

Most importantly for copyright status investigations, copyright had to be renewed in order to secure the longest possible term. The initial grant of copyright was for a term of 28 years. A second grant (called a renewal) was possible if requested in the last year of the copyright term. If secured, copyright was extended for another 28 years. With subsequent extensions of copyright term, the renewal term could last for as long as 67 years, or a total of 95 years when combined with the initial grant of 28 years of protection. A 1961 Copyright Office study, however, found that only 7% of registered copyrighted books had their copyright renewed.⁴ Failure to renew allowed the work to enter the public domain. *Behind the Nazi Front*, for example, is in the public domain in the US because the initial grant of copyright was never renewed; it became a public domain work on 1 January 1969.

There is, therefore, a potential mother lode of public domain works – works that were published from 1923 through 1963 – ready to be made freely available to anyone who wants to use them. Prior to copyright restoration, standardized protocols had been developed to investigate renewal status,⁵ and tools such as the Stanford Copyright Renewal Database and the Copyright Office's own records of renewals since 1978,⁶ which has recently been made available for bulk downloading,⁷ have made it possible to conceive of determining and recording renewal status in an automated fashion. The recently announced OCLC Registry of Copyright Evidence⁸ may become a place to store relevant information on copyright status gleaned from automated or manual searches of renewal records. Unfortunately, the restoration of copyright in foreign works has radically altered the procedures that must be followed when investigating the copyright status of domestic works as well. It has made automated determination of copyright status almost impossible, and greatly altered the types of data that need to be recorded in a registry of copyright evidence.

In order to understand why one unrenewed Dodd, Mead title from 1940 could be in the public domain while the other is still protected by copyright – and the implications this may have for copyright investigations – it is necessary to look more closely at the history of the copyright status of foreign works in the US.

2. Foreign-published works and US copyright protection

For most of the 19th century, the United States was a copyright pirate nation.⁹ Published works of foreigners were afforded no copyright protection, and many leading American publishing houses grew by publishing works of foreign authors, without paying any royalties. Beginning in 1891, however, the US began to afford protection to works first published abroad. Eligibility was sharply constrained, however. Only works from countries participating in certain copyright treaties or covered by presidential proclamations were eligible for protection, and the works by and large had to comply with American procedures (notice, American manufacture of foreign-origin books published in English, registration, deposit, and renewal).¹⁰ Works published abroad that failed to comply were generally considered to be in the public domain in the US.

All of this changed on 1 March 1989, when the United States joined the Berne Convention for the Protection of Literary and Artistic Works, the broadest international copyright agreement.¹¹

A requirement of the Berne Convention is that member countries must afford copyright protection to works that are still protected by copyright in their source country. At first the US sought to protect only Berne works created after the 1 March 1989 date, but in the face of stiff international criticism, the US eventually agreed to restore copyright protection in the US to works still protected in their home countries. Foreign works that had entered the public domain in the US because of their failure to comply with US formalities suddenly were given a full term of copyright: initially 75, and later extended to 95, years from publication.

Copyright restoration has had an obvious impact on the investigation of the copyright status of works published abroad. It is no longer necessary to check the copyright renewal records for works that were first published in Berne Convention member nations; almost all these works are now automatically protected for the full term of copyright.

What has been less well understood is the impact of restoration on copyright investigations of works published in the US. It is no longer enough to determine if copyright in an American edition was renewed. One must also determine whether there is a foreign edition of the work, and whether copyright in that foreign edition was restored. If it was, then digitizing and making available an American version of that foreign edition would infringe on that restored copyright – *even if a renewal investigation indicated that the American edition was in the public domain*. In addition, even if the American work was not a direct copy of the foreign work, but was rather derived from it – say a translation, or a play based on a foreign novel, or a later edition of a restored work – copying the American edition would be an infringement of the restored copyright in the underlying foreign original. Investigations of the copyright status of works published from 1923 through 1963 must therefore be guided by a new set of procedures.

3. Copyright status investigations, post copyright restoration

In order to determine the copyright status of a work published in the US from 1923 to 1964, it is first necessary to determine if the work also contains material for which copyright may have been restored. The following set of questions can guide that assessment. Unfortunately, many of these questions cannot be definitively answered.

3.1 Was the work *solely* published in the United States?

It is relatively easy to determine if a work was ever published in the US. The work itself, bibliographic utilities, publishing annuals, and Copyright Office records can all provide evidence of American publication. But titles published in the US are also frequently published overseas. Both *The Ghosts of London* and *Behind the Nazi Front* were published in London, for example, as well as being published in the US. If the other conditions discussed below apply, copyright in these titles could conceivably have been restored. If the work is *solely* an American work, however, then the investigation of renewal status can proceed as in the past to determine if the work has entered the public domain.

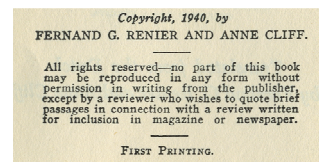
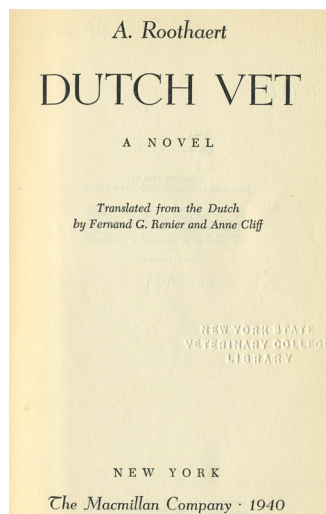
How does one prove conclusively that a work was only published in the US? Proving a negative – that a work was not published outside the US – is almost impossible. A search in a bibliographic utility, for example, may be suggestive, but it cannot be conclusive. In 2003, Peter Lyman and Hal Varian estimated that the total number of books that had been published up to that date ranged from 74 million to 175 million books.¹² WorldCat, the catalog from OCLC, currently reports that there are 105.5 million bibliographic records in its database, the largest bibliographic database in the world.¹³ If Lyman and Varian's upper estimate is correct, there could be tens of millions of titles that are not represented in WorldCat. Some of these could conceivably be foreign editions of works also published in the US.

Further complicating the issue is the quality of bibliographic records in WorldCat. WorldCat is notoriously poor when it comes to edition-specific information such as place of publication or publisher. (See note 14 for an example of the unsuitability of WorldCat for this sort of bibliographic investigation.) The absence of a record in WorldCat, therefore, is not a guarantee that a foreign edition has ever been published. In order to determine if the American edition is unique, it may be necessary to consult foreign catalogs directly, especially the catalogs associated with legal deposit libraries, if one suspects that a work may have first been published abroad.

Even if bibliographic records for the two works are present, it may be difficult or impossible to equate them. A work published in the US under one title could have been published months earlier in a foreign country under a different title. In the bibliographic database they may appear as two different works, when in reality copyright in the foreign publication was restored (thus protecting the American edition with the variant title).

3.2 Is the American work a translation or other derivative work based on a foreign work?

Consider the following volume:



Dutch Vet, a Novel by Antonius Roothaert, published in New York by Macmillan Co. in

1940

The work was registered for copyright with the Copyright Office in 1940, and there is no renewal record for the title in the Stanford Copyright Renewal database. Is the volume in the public domain in the US?

In this example, the answer would be no. As the title page of the work notes, it is a translation by Fernand G. Renier and Anne Cliff. A little research (but not the volume itself) reveals that the Dutch original, *Doctor Vlimmen*, was first published in Amsterdam in 1937. Copyright in that Dutch original was restored in 1996, and digitizing the English translation would infringe on the restored copyright of the Dutch original.

Although much harder to determine, digitization of the book would also infringe the copyright in the translation. While there is no indication of this in the American edition, Renier and Cliff were English authors and the translation was first published by Routledge in London in 1940. Copyright in the translation was therefore also restored.¹⁴

The same would hold true for adapted works derived from a foreign original. Imagine that the copyright in Rodgers and Hammerstein's musical *Carousel* had not been renewed and the musical had entered the public domain. One might still need the permission of the estate of Ferenc Molnár, the Hungarian author whose play *Liliom* served as the basis for the musical.¹⁵ The same would be true for a second American edition based on a foreign first edition. It is not enough, therefore, to know whether there is a foreign edition of an American work. It is also necessary to know something about the content of the American work in order to determine if it was derived from a foreign work.

There are frequently clues in bibliographic records that would indicate the existence of a foreign original. "Translated by" in a note, for example, or "Translation" in a subject heading suggest that the work is based on another work that may have been first published abroad. Similarly, "adapted from" or "based on" in a notes field in a record may indicate that the work in question is a derivative work. Sadly, the absence of such clues does not mean that the work is solely an American title.

3.3 Was the work first published outside the United States?

Copyright in works that were published solely in the United States and which were not derived from foreign works can be investigated according to the traditional methods (including investigating the renewal status). For all other works, copyright restoration is a possibility. For it to have occurred, two conditions must hold:

- The work must have first been published in an eligible country, and
- It could not have been published in the United States within 30 days of its publication abroad.¹⁶

The “eligible country” issue is discussed below; this section will focus on primacy of publication.

In order for copyright restoration to occur, first publication of a work must occur outside the United States. This is one of the reasons why *The Ghosts of London* is still protected by copyright in the US while *Behind the Nazi Front* is in the public domain. *The Ghosts of London* was first published in London by Methuen & Co. on 16 November 1939. It was subsequently published by Dodd, Mead & Co. in New York on 7 February 1940. More than 30 days had elapsed, and so the volume was eligible for copyright restoration.

It is a different story with *Behind the Nazi Front*. It was first published in the US on 26 November 1940. The first English edition appeared in 1941, published by G. G. Harrap. Because US publication preceded the English edition, the work was not eligible for copyright restoration.

When there are American and foreign editions of a title *and* the foreign edition clearly followed the American edition, it is probably safe to assume that copyright restoration did not occur. The copyright status of the work can be investigated as if there was only an American edition.

If the publication year of a foreign edition is at least two years prior to the publication year of an American edition, then it is likely that first publication occurred abroad. One should assume that copyright in the original edition has been restored.

The situation is slightly more complicated with works that carry a publication year immediately prior to the publication date of the American edition. A work first published in England on 20 December 1939 might have 1939 as a publication date. If an American version of the work was published in the United States on 10 January of the following year, it would have a publication date of 1940. From the publication dates, it would appear that the US publication occurred a year after the British publication, and copyright in the British text was restored. In reality, however, publication in the US occurred only 21 days after publication in England. American law would view the work as being simultaneously published in the US and Britain, and the work would be in the public domain in the US. The printed copyright records for the American edition should be consulted to see if the work was published in the US after January in the year following date of the foreign imprint.

Most problematic is when the two editions have the same publication year. How, for example, would one determine whether the 1940 New York Macmillan edition or the 1940 London Routledge edition of *Dutch Vet* came first, or if publication occurred within 30 days of each other? Further investigation as to the exact date of publication is needed. Unfortunately, it is almost impossible to determine with certainty the exact date of publication. Because the exact date of publication is unimportant in the Berne Convention, most countries have not tracked it. Furthermore, few countries have registries of copyrighted works even if they did wish to collect this data. In the case of *Dutch Vet*, however, we are in luck. The entry for the book in the

Catalog of Copyright Entries (CCE), the published compilation of copyright registrations and renewals, indicates that the American edition was published on 20 August 1940. The *English Catalogue of Books*, a British bibliographical compilation, reports that the British edition was published in April 1940.¹⁷ More than 30 days elapsed between English and American publication, and so copyright in the British version of the translation was restored.

3.4 *Ad interim* copyright

There is one resource that can be consulted for that subset of works that are likely to be the most problematic: works first published abroad in English. The 1909 Copyright Act required that these books be manufactured in the US to receive copyright protection. Congress recognized, however, that it might be difficult for foreign publishers to produce in the US, simultaneous with publication abroad, American editions of English works. Such publication abroad would throw the works into the public domain in the US. Without the protection of copyright, the foreign publisher might never produce an edition in the US, hurting both the printing industries and readers.

In response, copyright law included a system of *ad interim* copyright protection. *Ad interim* registration allowed foreign copyright owners to secure up to five years of interim copyright protection by depositing with the Copyright Office one copy of a work in English published outside of the US. Initially the law required deposit within 30 days of publication abroad. It was increased to 60 days in 1919, and to 6 months in 1949. If the work was subsequently manufactured in the US, the copyright owner could re-register the copyright in order to receive the full term of copyright; otherwise, at the end of a stipulated period, the work would enter the public domain.

Records for *ad interim* registrations were included in the *CCE*. For many works in English, therefore, there are two copyright records in the *CCE*. The first is for the *ad interim* registration of the work as published abroad. That record normally includes the date of publication abroad as well as the date of the *ad interim* registration. The second record is for the registration of the subsequently published American edition. Here is the *CCE* record for the Methuen edition of *The Ghosts of London*, published in London in 1939:

Morton, Henry V. *Ghosts of London*.
© 1 c. Jan. 9, 1940; A ad int. 25702;
pubd. Nov. 16, 1939; Dodd, Mead &
co., inc., New York. 1252

Translated, this means that *Ghosts of London* written by Henry V. Morton was copyrighted in the US on 9 January 1940. One copy of the work was deposited with the Copyright Office (as was required). The work was in Class A (for Books), and was an *ad interim* copyright with registration number 25702. The work was originally published on 16 November 1939. (Often

the record indicates the publisher and place of publication, but this record does not.) The copyright claimant is Dodd, Mead & Co. of New York.

Almost a month later, the American edition received its own copyright:

Morton, Henry V. Ghosts of London,
by H. V. Morton. Illustrated from
photographs and with drawings by
James MacDonald. © Feb. 7, 1940 ;
A 138081 ; Dodd, Mead & co., inc., New
York. 3733

Note that the publication date (the same as the © date) is more than 30 days after the original publication in London. The US and UK editions were not published within 30 days of each other, and so the work was eligible for copyright restoration. Duplicating the American edition, which appears to be in the public domain, would be a copyright infringement.

The utility of *ad interim* copyright searches to uncover works that may be in the public domain is limited, however. First, the registrations are only included in the printed *CCE volumes* of copyright registrations. No online version of these volumes exists, and so it is impossible to search for *ad interim* registrations in general. Nor is it possible to search for *ad interim* registrations that were subsequently converted to full registrations through publication in the US fewer than 30 days after the first publication abroad, and which therefore would be ineligible for copyright restoration.

Furthermore, and especially for titles published after 1949, the presence of an *ad interim* registration by itself is almost enough to prove that simultaneous publication did *not* take place. From 1919 to 1949, publishers had two months, and after 1949 six months, to file for *ad interim* protection. If the publisher knew that an American version would appear within 30 days (the time period of concern to us), it would be simpler just to file that registration and not bother with the *ad interim* registration.¹⁸ Almost by definition, therefore, an *ad interim* copyright means a restored copyright.¹⁹

3.5 Simultaneous publication

If most books with an *ad interim* copyright record are likely to be eligible for copyright restoration, a second group of works are likely to be excluded. These are works that were published simultaneously (that is to say within 30 days of each other) in the US and abroad. They are most often the product of American publishing houses and the place of publication is given as, for example, “New York and London.”

Simultaneous publication for American publishers has been described as a “back door to Berne protection.” By publishing works simultaneously in the US and in a Berne member country, the

American title received many of the protections offered by Berne – even though the US did not join the convention until 1989. There were, however, no particular advantages to a foreign publisher to rush publication in the US (beyond avoiding having to file an *ad interim* registration). It is possible, but not certain, that books from a US publisher and bearing both a US and a foreign place of publication were actually published simultaneously in both countries and can be treated as if they were American imprints, ineligible for copyright restoration.²⁰

3.6 Summary of publishing priority

To summarize, when considering a book that has both an American and a foreign imprint:

- If the American imprint is 1 year earlier than the foreign imprint, it is probably safe to assume that the American edition came first and the work is not eligible for copyright restoration.
- If the American imprint is one year older than the foreign imprint, there is a theoretical possibility that the American publication occurred within 30 days of the publication of the foreign edition. Check the copyright records to see if the American edition was registered in January. If it was not, then there is no possibility that simultaneous publication occurred and the work is most likely eligible for copyright restoration.
- If the publication dates of the American and foreign imprint are the same, the issue becomes much harder to determine. The *ad interim* copyright records may provide information on dates of publication for works first published abroad. The presence of an *ad interim* record most likely means that copyright in the title was restored. The absence of an *ad interim* record cannot be taken to mean that the work was first published in the US.
- Works that have American imprints and are listed as being published both in the US and abroad are most likely US imprints that were trying to use the Berne back-door to secure extra protection. They would not be eligible for copyright restoration.

4. Was the work first published in an eligible country?

To be eligible for copyright restoration, first publication must have occurred in an eligible country. An eligible country is a country, other than the United States, that is a member of the Berne Convention or the World Trade Organization (WTO), or is subject to a presidential proclamation on copyright. Eligible nations are listed in the Copyright Office's circular on international copyright relations, but for all practical purposes, the publications of almost any foreign nation can have their copyrights restored.²¹ Currently only Afghanistan, Eritrea, Ethiopia, Iran, Iraq, San Marino, and possibly São Tomé and Príncipe, and many of the island nations of Oceania, appear to be outside of the international copyright treaties. Works from Laos and Turkmenistan would also not be eligible for restoration, though some works published in those countries could be protected in the US under the terms of the Universal Copyright Convention.

It is likely, therefore, that if a work was first published abroad, it was published in an eligible country.

5. Was the work in the public domain in its source country on 1 January 1996 or the date of treaty adherence, whichever is later?

Since most countries in the world already belonged to either the Berne Convention or WTO when copyright restoration came into effect, the key date is 1 January 1996. One needs to consider the copyright status on that date for works from those countries.

For countries that joined either the Berne Convention or the WTO after 1 January 1996, the relevant date is the earliest date of adherence to either treaty. Yemen, for example, joined the Berne Convention on 14 April 2008.²² Works first published in Yemen that were not in the public domain as of that date are eligible for copyright restoration in the US.

After deciding on a date to use, one must determine whether copyright in the work had expired by that date in the source country. It is therefore necessary to know the copyright laws of the source country for the work. For example, let's say that you were interested in digitizing *To the Adventurous*, a book by Edith Nesbit, the author of *The Railway Children*, that was published in London by Hutchinson in 1923. There is no record for the volume in the Stanford Copyright Renewal database, but could copyright in the title have been restored in 1996? Investigation reveals that Edith Nesbit died in 1924, and copyright term in the United Kingdom on 1 January 1996 was (and is) 70 years after the death of the author. That means her English copyrights had expired by 1 January 1996, and copyright restoration could not have taken place. The work can be digitized.

6. Was the author a national or domiciliary of the source country?

For copyright restoration to take place, it is not enough that first publication took place in an eligible country and that the work was still protected by copyright on the appropriate date. At least one of the authors or rights holders must also have been either a citizen of an eligible country or be domiciled in an eligible country at the time the work was created.

In general, this is not a major issue. As was noted above, most countries in the world are now eligible countries, and most authors would be protected. A book by an Iranian citizen living in Iran that was first published in the United Kingdom, however, would not be eligible for copyright restoration (since Iran is not an eligible country).

Perhaps more problematic are American authors who live and work abroad. An example is the comic novel *Candy*, written by the American screenwriters Terry Southern and Mason Hoffenberg. It was first published in Paris by the Olympia Press in 1958, but not registered for copyright in the US. Subsequent versions appeared in the US starting in the mid-1960s. One would search in vain the Stanford Copyright Renewal Database for the work, and so might conclude that it is in the public domain in the US.

Candy was written, however, when Southern was living in Geneva, Switzerland. Because Southern was domiciled in an eligible country (Switzerland) and first publication occurred in an eligible country (France), the estates of Southern and Hoffenberg were able to secure in 2000 copyright protection for the novel using the provisions of copyright restoration.²³

For works that were first published abroad, therefore, it is not enough to know that they were published in an eligible country. One must also know the nationality of the authors and their residence at the time the book was written. The fact that an author is an American does not automatically exclude him or her from copyright restoration.²⁴

7. Risk management and copyright restoration

As the examples above indicate, what was a relatively simple process for determining public domain status of US and foreign works has been thrown on its head by copyright restoration. Prior to restoration, analysis could focus on whether a work's copyright had been renewed. Now a series of complex questions, many of which cannot be definitively answered, must be posed. Was the work published solely in the US? Is it based on or derived from a foreign work? If published both in the US and abroad, did first publication occur in the US? Was it published in an eligible country, by a citizen of an eligible country or by an American living abroad?

In the face of such complexities, one might well ask what a digital librarian should do. If you crave the certainty that was possible prior to copyright restoration, you could assume that all works, both foreign and domestic, had their copyright restored, and digitization can only proceed with the permission of the copyright owner.²⁵ This solution flies in the face of spirit of the law passed by Congress, but is the only absolutely safe solution when one looks at the implications of the letter of the law.

Alternatively, one could settle on strategies that would identify and manage risks. For example, as has been shown in this article, it is possible that a work published in America may have been first published abroad or was derived from a work first published abroad. In the absence of any concrete evidence of this, however, an institution might conclude that the likelihood that the work contains copyrights that were restored is small and be willing to accept the legal risk that it is wrong in its analysis.

On a practical level, it may be unlikely that digitized foreign works will be the subject of an infringement suit. For an action to be brought, the copyright owners (most likely the heirs of the author, given the age of the books) would have to know that they own a restored copyright, know that the book has been made available, and be willing to bring legal action in the US (an expensive undertaking). Settling such an unlikely suit might be less expensive than conducting the incredibly thorough analysis needed to establish copyright status with the highest degree of certainty. The experience of the Internet Archive in this regard may be instructive. It, and in particular the Universal Digital Library found in the Archive, contains some titles that may have had their copyrights restored. Yet to date there have been no reported actions against the Internet

Archive for copyright infringement of restored works, nor have there been any actions for contributory infringement reported against a library that provided the volumes. An institution might decide, therefore, that while the issues described in this paper are a theoretical possibility, they are unlikely to be an issue in practice. After careful analysis, the institution might conclude that digitization of some works can be risked even when it cannot be established with 100% certainty that the work is in the public domain.

Of course, while the likelihood of a suit is low, the possible damages that could accrue if one should be filed are high. The copyright restoration act stipulates that the full range of remedies found in Chapter 5 be available for infringements that start after restoration.²⁶ These can include statutory damages of up to \$30,000 per infringed work (and up to \$150,000, if willful), impoundment of the servers and other equipment used to deliver the text or images, and the costs and attorney's fees associated with bringing the suit.²⁷ Nevertheless, some institutions may conclude that the likelihood of a suit actually being brought is so low that digitization of material that is most likely in the public domain, but which theoretically could still be protected by copyright, is still worth the risk.

Possible legislative protection against unsuccessful copyright investigations may be on the horizon. There is currently under way a legislative effort to provide some immunity from damages for copyright infringement for so-called "orphan works."²⁸ It is possible that a diligent search that follows the recommendations in this paper yet still fails to uncover and identify a restored copyright would qualify for orphan work protection. As currently drafted, the inability to identify a copyright owner is one of the factors that makes a work an orphan. A search that understands that copyright in a work could have been restored but concludes that a work is in the public domain (and thus fails to identify a copyright owner) might qualify. The exact language of any legislation that passes will need to be examined closely.

8. Conclusion

This article has demonstrated that it is almost impossible to determine with certainty whether a work published from 1923 through 1963 in the US is in the public domain because of copyright restoration of foreign works. First you have to determine if the work was also published abroad or if it is based on or derived from a work published abroad. If a foreign edition is found, one then has to establish the order of publication, and whether the foreign publication occurred less than 30 days before the US publication. If foreign publication was more than 30 days before American publication, one next needs to determine if publication occurred in an eligible country and if at least one of the authors of the work was living in or a citizen of an eligible nation. Checking the copyright renewal database is still important, but only after one has determined that the work's foreign copyright was not restored or that it does not draw upon subsisting foreign copyrights.

Copyright restoration has been criticized for unnecessarily removing thousands of foreign-published works from the public domain in the United States. What has been little noticed up to now is its negative impact on the determination of the potential public domain status of works

published in the US. In many cases the impossibility of determining with certainty the absence of subsisting foreign copyrights in American publications that otherwise would be in the public domain means that American institutions will either have to keep these works inaccessible to the general public or risk the possibility of an infringement suit.

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1 Stanford University Library, "Copyright Renewal Database," <http://collections.stanford.edu/copyrightrenewals/>.

2 The provision has proven to be controversial on legal grounds. Never before in US history have works been removed from the public domain and placed back under copyright protection. The constitutionality of this action has been challenged in *Golan v. Gonzales*, No. 05-CV-1259 (10th Cir. Sep. 4, 2007). The decision upheld the general constitutionality of section 104A, though the court did remand the case back to the district court for further First Amendment review. See the Stanford Center for Internet and Society web page on *Golan v. Gonzales* at <http://cyberlaw.stanford.edu/case/golan-v-gonzales> for more information.

3 See Peter B. Hirtle, "Copyright Term and the Public Domain in the United States," Cornell Copyright Information Center, http://www.copyright.cornell.edu/public_domain/. Even the simple statement that works published prior to 1923 are in the public domain is not as absolute as it may sound. Foreign works published after 1908 may still be protected by copyright in the states of the Far West. See http://www.copyright.cornell.edu/public_domain/#Footnote_12. And the question of what constitutes publication is particularly difficult to answer. Many printed works that are found in libraries may only have undergone "limited publication." These printed works would be considered to be unpublished for copyright purposes.

4 Barbara Ringer, "Study No. 31: Renewal of Copyright" (1960), reprinted in Library of Congress Copyright Office, *Copyright law revision: Studies prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Eighty-sixth Congress, first [-second] session*. (Washington: U. S. Govt. Print. Off, 1961), p. 220.

5 See, for example, Samuel Demas and Jennie L. Brogdon, "Determining Copyright Status for Preservation and Access: Defining Reasonable Effort," *Library Resources and Technical Services* 41:4 (October, 1997): 323-334; Iris J. Wildman and Rhonda Carlson, *Researching Copyright Renewal: A Guide to Information and Procedure*. (Littleton, Colo: F.B. Rothman, 1989); and Library of Congress Copyright Office, *How to investigate the copyright status of a work. Circular 22*. (Washington, D.C.: Library of Congress, Copyright Office, 2004).

6 <http://www.copyright.gov/records/>.

7 <http://rss.resource.org/>. See also Jon Orwant, "U.S. copyright renewal records available for download." [Weblog entry.] Inside Google Book Search. 23 June 2008.

<<http://booksearch.blogspot.com/2008/06/us-copyright-renewal-records-available.html>>.

8 <<http://www.oclc.org/programs/ourwork/infrastructures/newservice/copyright.htm>>.

9 In reporting the bill in 1891 that would form the basis for the first recognition of foreign copyrights in American law, Senator Jonathan Chace noted “The committee believe it is time that the United States should cease to be the Barbary coast of literature, and that the people of the United States should cease to be the buccaneers of books.” S. Rep. No. 622, 50th Cong., 1st Sess. (1887).

10 The US's adherence to the Universal Copyright Convention in 1955 eased some of the more onerous requirements regarding notice and manufacture, but the requirement for renewal after 28 years remained.

11 <<http://www.wipo.int/treaties/en/ip/berne/>>.

12 Peter Lyman and Hal R. Varian, “Information Printed on Paper” *How Much Information* 2003. <<http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/print.htm>>.

13 OCLC. *WorldCat facts and statistics*.

<<http://www.oclc.org/worldcat/statistics/default.htm>>.

14 This example also illustrates the difficulty of using WorldCat to determine whether publication occurred abroad. The Routledge edition published in London in 1940 is not listed in WorldCat – only the Macmillan edition published in New York is given. Later English editions are listed in WorldCat, but anyone using just the WorldCat database to determine primacy of place of publication would erroneously conclude that the translation was first published in the US.

15 Copyright in *Carousel* was renewed, however, and *Liliom*, which was first presented in 1909, is in the public domain in the US. I would like to thank Elaine Engst for suggesting this example.

16 17 USC § 104A(h)(6)(D).

17 Library of Congress. *Catalog of Copyright Entries*. (Washington: U. S. Govt. Print. Off.) 37 (1940): 411; *The English Catalogue of Books*. (Sanderstead, Eng: Publishers' Circular) 14 (1936-1941): 1428. The April 1940 publication date is also provided in *Whitaker's Five-Year Cumulative Book List, 1939-1943*. (London: J. Whitaker, 1945). It is unclear how many other national bibliographies including publication date information.

¹⁸ It is interesting to note that *Dutch Vet* appeared in the US four months after publication in the UK, and with no *ad interim* registration within the required two months. The American registration issued to the work in 1940, therefore, was likely to be faulty and the work was in the public domain – at least until its copyright was restored in 1996.

19 Unfortunately, the absence of an *ad interim* registration is not proof of simultaneous publication. Until 1949, a regular registration for a work could have been filed from 30 to 60 days after foreign publication, assuming printing in the US had been arranged. No *ad interim* copyright was needed – but it also does not qualify as simultaneous publication. After 1949, the delay could even be longer. Again, *Dutch Vet* is a good example: a work with no *ad interim* registration, but whose copyright was restored.

20 It is not difficult to find examples in the Internet Archive database that contradict this general assumption. English author Edmund Vale's *Seas & Shores of England*, for example, published in 1936 and available for downloading at

<<http://www.archive.org/details/seasshoresofengl00valerich>>, lists as the publisher C. Scribner's Sons in New York and B.T. Batsford, Ltd., in London. There is no visible notice of copyright in the book, and it was printed in Great Britain. No copyright notice (regular or *ad interim*) was ever filed for the book. It was therefore in the public domain in the US immediately upon publication. There is, however, listed in WorldCat a purely English edition, also published in 1936. There is the strong possibility that the English edition appeared first. It is also likely that the copies of the book shipped from England arrived and went on sale in the US more than 30 days after publication in the UK. While one would need to examine the two different editions and also check publishing records in order to make a final determination, the odds are strong that this is an English title in spite of the dual imprint on the Internet Archive copy and that copyright in this volume was restored. The Internet Archive would therefore be infringing.

21 Library of Congress Copyright Office, *International Copyright Relations of the United States. Circular 38a*. (Washington, D.C.: Library of Congress, Copyright Office, 2004), <<http://www.copyright.gov/circs/circ38a.pdf>>. A more up to date listing is found in Wikipedia at <http://en.wikipedia.org/wiki/Wikipedia:Non-U.S._copyrights#Dates_of_restoration_and_terms_of_protection>.

22 World Intellectual Property Organization, "Berne Notification No. 254: Accession by the Republic of Yemen," 14 April 2008, <http://www.wipo.int/edocs/notdocs/en/berne/treaty_berne_254.html>.

23 The novel was registered with the Copyright Office on 4 Dec. 2000, #TX0005190349. On the convoluted history of the book, see Nile Southern, *The Candy Men: The Rollicking Life and Times of the Notorious Novel Candy* (New York: Arcade Pub, 2004).

²⁴ Even *Behind the Nazi Front*, which I have used as an example of a public domain work, may have copyright-restored content in it. While John McCutcheon Raleigh was an American, a note at the front gives thanks to the *London Daily Mail* for permitting him to republish some work that first appeared in the paper. McCutcheon was living in Germany at the time, as a war correspondent, and the Introduction was penned from Shanghai. It is possible that copyright in some of the text – as well as in the Foreword, written by an Englishman – was restored.

²⁵ Alternatively, one could digitize using the provisions of 17 USC § 108(h), which allows digitization of certain materials during its last 20 years of copyright.

²⁶ 17 USC § 104A(d)(1).

²⁷ 17 USC Chapter 5. A different section of the Act - 17 USC § 405(b) - allows for the waiver of damages if one innocently infringes based on the absence of a copyright notice. There may be situations in which digitizing a copy of a restored work could be viewed as an innocent infringement; this would require careful legal analysis.

²⁸ *Shawn Bentley Orphan Works Act of 2008*, S. 2913, 110 Cong., 2^d Session (24 April 2008); *Orphan Works Act of 2008*, H.R. 5889, 110 Cong., 2^d Session (24 April 2008).

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