

DRAFT

NOTE: This is a very early draft of this article.

Any suggestions or corrections are greatly appreciated.

7th Annual IP Scholars Conference 2007

The Center for Intellectual Property Law & Information Technology (CIPLIT®)

DePaul University College of Law

“Vera Brittain, Section 104(a) and Section 104A: A Case Study in Sorting out Duration of Foreign Works under the 1976 Copyright Act”

Elizabeth Townsend Gard¹

I. INTRODUCTION

This paper began as an exercise to answer a simple question: what works written by British author Vera Brittain (1893-1970) are in the public domain in the United States in 2007? As is often the case, a simple question turned out to be far more complex, but also strangely simple. This was in great part because of Section 104(a) and Section 104A.

What works are in the public domain is a fundamental question to the copyright system.² The fact that it has become increasingly complicated to determine is the subject of my inquiry.³ The present conference paper is the first of a series of case studies that will look at the current state of duration under the U.S. copyright system.⁴ This paper (and ultimately the larger study) seeks to provide a concrete example of the real-world complexities of what a scholar/filmmaker/artist, or any other user of copyrighted works would facing in trying to determine the copyright status of a work, or in this case a body of works.

¹ Associate Professor, Tulane Law School. Ph.D. European History, UCLA, J.D./LL.M. University of Arizona. This piece arose out of work done during a Leverhulme Trust Research Grant, held at the London School of Economics, 2005-06. An very early version of this paper were presented at the Queen Mary Intellectual Property Research Institute in the Spring 2006. Special thanks goes to Robert Wohl, my doctoral advisor at UCLA, who supported my crazy path that led me from graduate school to law school, all in many ways, in search of the answers this paper presents. Thank you to archivists at the William Ready Archive at McMaster University, Hamilton, Ontario, Canada, and in particular to Renu Barrett. Thanks to the research assistance of Michael Aisen, Jessica DeNisi and Matt Miller. Thank especially to Eric Wedig in Government Documents at Tulane Library and Tony Barnes at New Orleans Public Library for tracking down the Catalog of Copyright Entries.

² Citations to be added.

³ Citations to be added, including Crews and Spoo articles on duration.

⁴ Other case studies will include Gertrude Berg (1899-1966), an early radio and television pioneer, the Jazz Archive at Tulane University, and the Amistad Collection, also at Tulane. The goal of these studies is to gain a practical sense of the real-world practicalities of determining duration.

Two recent changes in U.S. copyright laws have dramatically altered the landscape of when both unpublished and published works come into the public domain.⁵ An additional layer of inquiry is added when a work is by a foreign author or originally a foreign publication. As of January 1, 1996, many foreign works in the U.S. were automatically “restored” from the public domain to full copyright status.⁶ Section 104A governs the requirements of such a restoration. The second change came about with the 1976 Copyright Act, but only came to fruition as of January 1, 2003.⁷ Under Section 303(a) of the 1976 Copyright Act, unpublished works, for the first time in U.S. history, automatically come into the public domain after the term of life of the author plus seventy years.⁸ Because of Section 104(a), Section 303(a) applies to all unpublished works, regardless of the nationality of the author.⁹ So, in one instance, hundreds of thousands of published foreign works were pulled out of the public domain in the US, an unprecedented move. In the other instance, a flood of unpublished works, both foreign and domestic, have come into the public domain for the first time. In both cases, this process happened automatically; in both cases it dramatically alters what is available for unfettered use in the U.S. public domain.

This paper explores the impact of these two laws through a case study of the British author, Vera Brittain (1893-1970). Determining the duration of foreign works actually turns out to be quite an easy task, thanks to Section 104(a) and Section 104A. That is, of course, if one knows the right questions to ask from the beginning. This paper will of course reveal the simple answers. The heart of it, though, will focus on the more complex route. For it is in the *why*, or in the duration history of a particular work that the story gets interesting.

This piece, in many ways, also becomes the culmination of a number of stories, one about the law, the other about the journey of a historian in search of legal answers. When I was finishing the second of a trilogy of articles on the “unpublished public domain,” an unsolicited email came in asking me about the copyright status of some of the poems by author Vera Brittain.¹⁰ It was not an unreasonable request. My doctoral dissertation had been in good part on Vera Brittain (1893-1970), and my field as a law professor is copyright, with an emphasis on duration.¹¹ The emailer wanted to write songs, using Brittain’s haunting poems for the lyric, and she wanted to know their copyright status.¹² It seemed a straightforward question. Why, then did I procrastinate in answering what should be a simple answer? (Did I even *ever* answer it?) The work in question was *The Poems of a War and After*, published in 1934 in the UK and the US. It should be simple to find out if the U.S. version had been renewed properly, and if not, then it would be in the public domain. Or was it that simple? It would turn out to be hardly that simple, at least in U.S. copyright law, or actually very simple. This is in part the effect of Section 104A on Vera Brittain’s works in the US, but also the status of an earlier publication, *Verses of a V.A.D.* (1918).

⁵ Citations to be added.

⁶ Pub. L. No. 103-465, Sec. 514, 104A, 108 Stat. 4809, 4976 (1994) codified as 17 U.S.C. §104A

⁷ 17 U.S.C. §303(a).

⁸ This, of course, is after a transition period that lasts through 2047. Under Section 303(a), unpublished works carry the term of life of the author plus seventy years, or until December 31, 2002, whichever is greater. If a work that was created and not published before January 1, 1978 was eligible for additional copyright protection, if the work was published for the first time between 1978 and 2002, where it received additional protection until December 31, 2047.

⁹ See R. Anthony Reese, Public but Not Private: Copyright’s New Unpublished Public Domain, 85 Texas LR 585 (Feb 2007), R. Anthony Reese, Is the Public Domain Permanent? Congress’s Power to Grant Exclusive Rights in Unpublished Public Domain Works, 30 Colum. J. L. & Arts, 531 (Spring 2007), Elizabeth Townsend Gard, January 1, 2003: The Birth of the Unpublished Public Domain and its International Implications, 24 Cardozo Arts & Ent. LJ 687 (2006), and Elizabeth Townsend Gard, Unpublished Works in the Public Domain: the Opening of a New Frontier, 54 J. Copyright Society of the USA 439 (Winter-Spring 2007).

¹⁰ See fn 7. The third prong of the trilogy will focus on a theoretical comparison of the development of the public domain (with particular emphasis on unpublished works) in a common law(s) versus civil law(s) context. I hope to have a draft completed by the Summer 2008. [Still to cite – original email]

¹¹ My doctoral thesis had been “Reconstructing Vera Brittain’s War Generation: A Comparative Biography.” (UMI, 1997) and I am currently revising the manuscript version entitled, The Making of the War Generation: A Biography.

¹² Put in reference from email.

The emailer had not asked about unpublished poems (if there are such a thing in the Papers of Vera Brittain), but I knew that the answer also had some complexity. It also gives me to opportunity to show the impact of the unpublished public domain on the possibility of sources never before accessible without permission. This section sets out the basic elements of Section 303(a) with particular attention paid to unpublished works of foreign authorship. It then turns to sorting the copyright status of unpublished works connected to Vera Brittain's life.

And of course, I started to think of the other 40 published books that Vera wrote and the 150 linear feet of archival materials—boxes overflowing with copyright questions—of various documents, scrapbooks of newspaper clippings, photographs, lectures, manuscripts, hundreds and hundreds of letters, all wondering if they were still under the chains of copyright, or now free in the public domain...¹³ The email had only asked about Brittain's World War I poems, but I knew my past had caught up with me. It was time to call on my legal scholar side to confront the deeply buried but not forgotten copyright duration questions of my historian side—the questions that in part had led me to law school in the first place. The email was the sign that it was time to turn to Vera Brittain again, and for some reason it seemed too hard a task. I felt like a teenager procrastinating on a term paper...And so here is that term paper, so to speak.

Part II introduces the reader to Vera Brittain, and suggests why she is a good candidate for this case study. Part II concentrates on the impact of Section 303(a) and 104(a) of the 1976 Copyright Act. on unpublished works surrounding Brittain's life, looking both at Vera Brittain's own writings as well as unpublished works of friends, family, and correspondence, including fan mail.¹⁴ Part IV grapples with the duration laws under the 1909 Copyright Act and 1976 Copyright Act, with particular attention paid to the impact of Section 104A on Brittain's published works. Part V turns to the case of Vera's poems, published in *Verses of a V.A.D.* (1918) and *The Poems of the War and After* (1934), the place where my inquiry began, as a demonstration of where the case study presents overlap of Section 303(a)/104A and Section 104A.¹⁵ Finally, Part VI will end with a modest call for a copyright calculator. The law has become far too complicated for the average scholar, student, artist, or documentary filmmaker to sort out on one's own.

II. INTRODUCING VERA BRITTAINE – A CASE STUDY FOR DURATION ANALYSIS

British writer Vera Brittain (1893-1970) was just twenty years old when the Great War broke out in 1914. Beginning in 1913, she kept a diary that she would diligently keep almost throughout the war. She also wrote and saved the correspondence with her brother, fiancé, and other wartime friends.¹⁶ When the war was over, only she survived—the boys in her life had all been killed, either in France or Italy. She went on to write *Testament of Youth* (1933), which became a best-selling memoir about the war generation.¹⁷ She wrote on many subjects, but she is best known as a voice of the war generation, and for a very long time, the only female voice connected with the war generation.¹⁸

¹³ In an expanded version of this paper, I will address these additional resources—newspaper articles, lectures, photographs—all common kinds of materials found with archival papers.

¹⁴ 17 USC 303(a), 104(a).

¹⁵ *Twin Books Corp. v. Walt Disney Co.*, 83 F.3d 1162, 1167 (9th Cir.1996), and *Societe Civile Succession Richard Guino v. Beseder*, 414 F.Supp.2d 944 (January 2006).

¹⁶ The unpublished letters of Vera Brittain, Edward Brittain, Roland Leighton and Geoffrey Thurlow are housed at the William Ready Archive at McMaster University, Hamilton, Ontario. An edited collection of the letters, *Letters of a Lost Generation: First World War Letters of Vera Brittain and Four Friends*, edited by Alan Bishop and Mark Bostridge in 1998, and was published by Northeastern University Press.

¹⁷ VERA BRITTAINE, *TESTAMENT OF YOUTH* (1933).

¹⁸ "The only female volume to have carved a niche in the British male canon of Great War literature is Vera Brittain's *Testament of Youth*. Although she became a lifelong pacifist, the experiences she recorded in her best-selling book were, like the men's gained by her participation in the war." JOYCE MARLOW, ED. THE VIRAGO BOOK OF WOMEN AND THE GREAT WAR, 1914-1918

I became fascinated with her story, as many have in the past, when I read the edited version of her diary as an undergraduate student at UCLA in the late-1980s.¹⁹ Here, a girl, about my age at the time, yearned to go to Somerville College at Oxford, just as her younger brother was planning to go. She studied and studied on her own, took the entrance exams, convinced her mother and father to allow her to go... and in the midst of all of this, met a really lovely and intriguing boy. Everything seemed perfect, except of course, that the war broke out just before they were all (including the interesting boy named Roland) were to head to Oxford in the Fall of 1914. Her wartime diary tells her story. Her 1933 memoir tells her story. She falls in love through correspondence during war. We see the love develop in letters between Vera and Roland, and in the few brief instances when they are together, Vera comes home to describe to her diary all of the details of their latest meeting, including when they kissed for the first, second and third time. One Christmas comes and goes, and then another is upon them. Roland finds out that he is being given leave. He will be home soon, and just in time for Vera's birthday too.²⁰ Her diary is filled with the preparations of his return. Perhaps they will marry on his leave home, as they had become secretly engaged on his previous trip. And then, she writes this in her diary on Monday, December 27th:

I had just finished dressing when a message came to say that there was a telephone message for me. I sprang up joyfully, thinking to hear in a moment the dear dreamed-of tones of the beloved voice. But the telephone was not from Roland, but from Claire [Roland's sixteen year-old sister]; it was not to say that Roland had arrived, but that instead had come this telegram:

T223. Regret to inform you that Lieut. R.A. Leighton 7th Worchesters died of wounds December 23rd. Lord Kitchner sends his sympathy.²¹

Four days later at 11.55 pm, New Years Eve, she returned to her diary. She writes of the New Years before, when she and Roland had been together "and I had just begun to realise that I loved Him."²² The next day, she wrote

This day last year was the first New Year's Day I had with Him in my life. To-day is the first New Year's Day I have had with my life empty through the loss of Him. I am immeasurably richer than I was this day two years ago; I am incomparably poorer than I was this day last year.²³

Years later, she would write about Roland, as well as her brother who would die in Italy in June of 1918, and also her own experiences during the war as a nurse, serving in London, Malta, and France. In 1935, twenty years after Roland's death, she explained in an article entitled "Youth and War,"

We who were growing up when (the Great) war broke out belonged to an unsophisticated generation... Our reactions (to the war) were mainly emotional. Partly, of course, we were influenced by the wish to be "in it" with our friends, and partly by a secret terror of being branded as cowards... We talked of the honour and glory of war, ...of faith that a nation which laid down the best of its youth would somehow achieve for them life everlasting. It seems strange that we

(1999), 7. For biographies on Vera Brittain, *see also* DEBORAH GORHAM, *VERA BRITTAINT: A FEMINIST LIFE* (1996), and Paul Berry and MARK BOSTRIDGE, *VERA BRITTAINT: A LIFE* (1995). For works that demonstrate Brittain as the only or most dominant female voice of the war generation, *see* ROBERT WOHL, *THE GENERATION OF 1914* (1979) and SAMUEL HYNES *A WAR IMAGINED* (1990).

¹⁹ ALAN BISHOP, ED. *CHRONICLE OF YOUTH: VERA BRITTAINT'S WAR DIARY 1913-1917* (1981). My undergraduate history honors thesis was titled, "When you have lost your all in a world's upheaval: A Biographical Essay on Vera Brittain," Spring 1991, co-directed by Robert Wohl and Ellen Dubois. (Spring 1991).

²⁰ Vera Brittain's birthday was December 29, 1893.

²¹ ALAN BISHOP, *VERA BRITTAINT'S CHRONICLE OF YOUTH*, 296.

²² *Id* at 296.

²³ *Id* at 301.

really made ourselves believe, all those years ago, that their dust would be more valuable to their countries...than their living presence.²⁴

My historical work on Vera Brittain looks at her expression of her experiences in war *during the war* as well as how she expresses those experiences *after the war*, to understand how individuals recover and convey catastrophe. Her words are very moving. For my work, the words themselves matter, as my focus as a historian is on how people *express* catastrophe, both during the events as well as part of the process of healing. It would not be the same story, had I not quoted from her edited diary and then the later article. It is that first quote – that hope to despair that makes the story so sad. And it is that second quote—that she never forgot and that her generation had been foolish to Believe—that makes her story so haunting. Her words, not mine. She would spend her career writing about her experiences of war, and so, in part the study of Vera Brittain, becomes a study of her transformation during the war and her struggle to make of her world as she coped with her loss and sorrow. It becomes much more about the language and expression she uses as the facts she reports.

In writing a scholarly work that depends on the expressive words of another, legal questions arise. The question becomes will I be able to use those snippets?²⁵ What if I want to use *lots* of snippets? . The facts that Vera Brittain reports Roland's death, for example, and that Claire called to tell her the sad news are not protected.²⁶ But copyright law protects expression—Vera's expression about those events, the very element a scholar like myself would find key in writing a major work about Vera Brittain, or in my case *The Making of the War Generation*.²⁷ So, how can a scholar include the expression like I did above? There are three possible paths: using small amounts that would potentially fall into a fair use defense, asking permission from the copyright holder, or using it freely without restriction.²⁸ The last path is contingent on whether the work is still under copyright or in the public domain.

Copyright is a statutory bargain between the author and the state, which lasts for only a limited time. Once the term of copyright has expired, the work is in the public domain. Once this occurs, a scholar or anyone else is free to use as much or in whatever manner they wish to use the public domain work as they see fit—no restrictions, no permissions. The question becomes—when does this occur? That is what the article is about, determining when a work is no longer under copyright and in the public domain.

[Note: In a longer paper, I would discuss the importance of the distinction between a work under copyright and that in the public domain; as well, the paper would discuss the issue of control and literary executors. I plan to use VB as an example, and am in the process of interviewing the literary executor and scholars that have asked for permission in the last thirty-five years, since Vera Brittain's death in 1970.]

And so why is Vera Brittain a good candidate for a case study on duration? Her body of works brings up many of the key struggles in duration today. She was a twentieth century figure, a particularly messy time for copyright. Most of her works were created under the 1909 Act, but she also has a number

²⁴ Vera Brittain, "Youth and War," *Women at Home and Abroad*, (The William Ready Division of Archives and Research Collections, McMaster University, Hamilton, Canada), F29, 1935.

²⁵ Fair use, of course, could potentially be used, but this is not the subject of the paper.

²⁶ 17 USC § 102(b).

²⁷ 17 USC § 102(a). This is the current title of the manuscript of my dissertation. It is a comparative biography that uses Vera Brittain's experiences as a starting place to compare to the men and women of her generation. The study includes other war and non-war figures including Erich Maria Remarque, Agatha Christie, and T.S. Eliot.

²⁸ There has been a great deal written on the topic of biography and fair use, as well as numerous cases on the topic. See, for instance, Kenneth Crews, Fair Use of Unpublished Works: Burdens of Proof and the Integrity of Copyright, 31 Ariz. St. L.J. 1 (1999)

of posthumously edited collections of both previously published as well as unpublished works.²⁹ Analyzing her works provides an opportunity to “test” how duration laws apply on not just one or two works, but forty works. Moreover, some of the works were published both in the U.S. and UK, and others were published only in the UK, giving a nice field of data on how the duration laws apply to one author’s body of works. In addition, she had a huge collection of unpublished works, which is also useful in understanding duration, as unpublished works are often not included as part of the discussion of the complexities of duration. And finally, there is the personal interest. I have worked intimately with both the published works and unpublished papers of Vera Brittain on and off for nearly two decades. I can come at this problem from two directions—both as a historian wanting to know the answers of what is in the public domain for practical purposes, and as a legal scholar, exploring the legal complexities of determining the copyright duration of one author’s body of works within an international context.

PART III: UNPUBLISHED WORKS AND SECTION 104(A)

Until 1978, unpublished works were perpetually protected under state law in the US. That meant that no matter how long an author had been deceased, any and all unpublished works would never enter the federal “limited Times” copyright system until “first publication.”³⁰ If they were never published, they remained protected and outside of the public domain. Someone, somewhere, even if one could not find that someone, would hold the golden key of permission in order to use that unpublished work (at least it was considered beyond a fair use). Section 303(a) dramatically altered the playing field, and with it changed the possibilities for scholars, artists, and others using unpublished works quite dramatically. Now, just as published works have a “limited Times,” so too do unpublished works; they were brought into the federal copyright system.

Section 303(a) of the 1976 Copyright Act states that a work that was created but not published before 1978 will have a term of life of the author plus seventy years, or until December 31, 2002, whichever is longer.³¹ In addition, if that unpublished work was published for the first time between January 1, 1978 and December 31, 2002, the work would receive additional protection through December 31, 2047. Works created after 1978, regardless of whether they were published or unpublished, carry the term of life of the author plus seventy years, or in the case of an unpublished work for hire, 120 years from creation.³²

Section 104(a) of the 1976 Copyright focuses on national origin requirements regarding unpublished works. It states: “UNPUBLISHED WORKS. — The works specified by sections 102 and 103, while unpublished, are subject to protection under this title without regard to the nationality or domicile of the author.”³³ The impact was that Section 303(a) applied to all works unpublished throughout the world, regardless of where the author lived or where the archival materials were housed. And so, when the copyright law in the U.S. changed to include unpublished works in the federal copyright system, all of the world’s unpublished works came under that system.

Now, of course, this event, this fundamental change in the law, thrills me as a scholar. Works that would have been perpetually protected by copyright are or will eventually be free from copyright restraints, even if other access and contract controls still exist. And if scholars were aware, I think this change in law could greatly impact the possibilities and approaches to scholarship.

²⁹ Again, in a longer paper, this statement would be expanded to explain why it is messy.

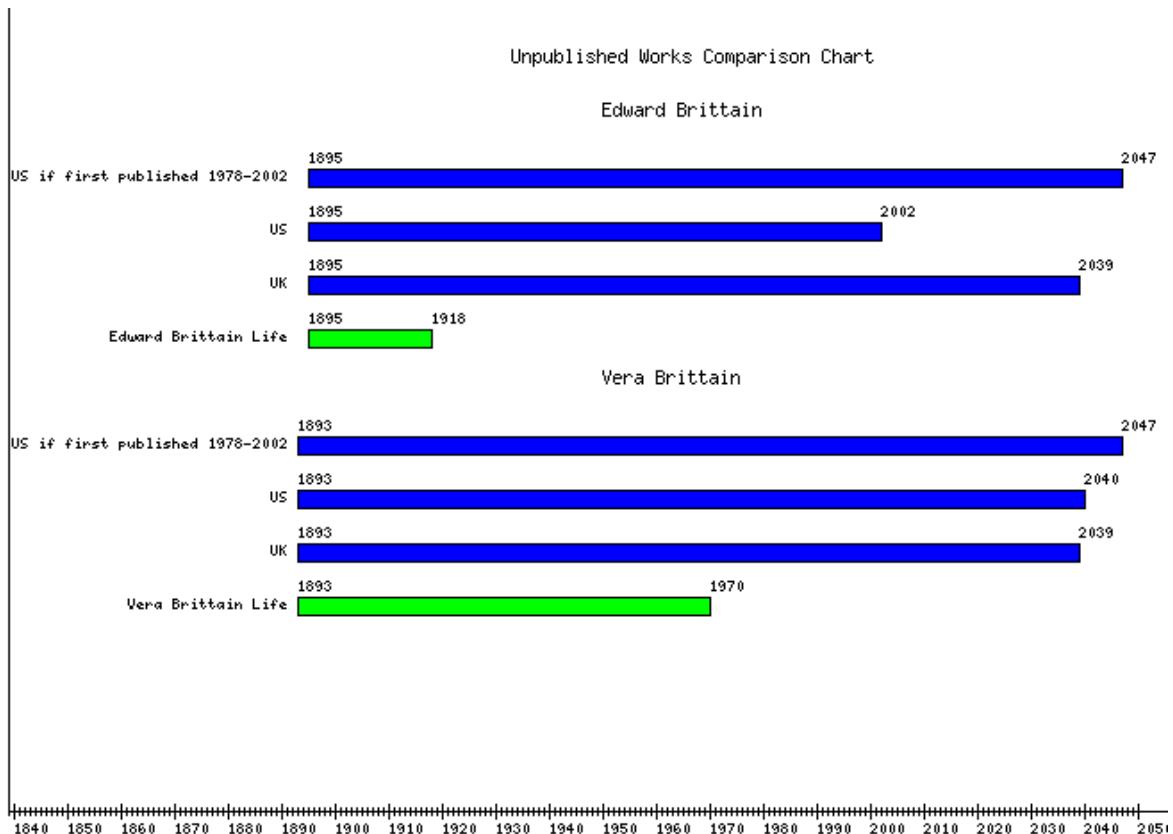
³⁰ In a longer piece, the right of first publication as a statutory dividing line will be discussed more in depth.

³¹ 17 USC 303(a).

³² 17 USC 302.

³³ 17 USC 104(a).

Figure 1 Duration of Unpublished Works for Vera and Edward Brittain



Key: Green – Life span Blue: Duration of Copyright

Vera Brittain is a useful example of how Section 303(a) combined with Section 104(a) alters the landscape for scholars and others using copyrighted works. Brittain died in 1970, and so her unpublished works (all created before 1978) will not be available as part of the public domain in the U.S. until 70 years p.m.a., or through 2040. Her brother's unpublished letters, as well as those of her fiancé, and her friends that died in the Great War, are now currently in the public domain in the U.S. if they remained unpublished through December 31, 2002. But, alas, an authorized edited collection of the letters came out in 1999, and so those parts that were edited and published are now protected through December 31, 2047. But many of the most interesting parts, depending on what you are studying, were not included in the edited collection. In my work, for instance, I am very interested in the relationship between Edward and his mother, in the form of carepackage requests and carepackage frustrations. (Edward loses his valise and has to rebuild his kit from scratch at one point; he also was very picky and very demanding on what his mother should send him, and these requests came at least twice, if not three times a week.) For my work, I can quote the portions that were not published in the edited collection without having to ask permission.

But there is more than just the scraps of the boy's letters not included in the edited collection. There are also the whole collection of unpublished papers of her closest friend, Winifred Holtby, who died in 1935, as well as any surviving papers by her father, who also died in 1935. Again, one might contemplate a research trip to the Hull Library in England to search through Holtby's papers with new vigor, knowing that a literary executor's permission was not needed to obtain permission for at least the unpublished works. Section 303(a) in combination with 104(a) incentivizes scholars to look at new works, to sift through the unpublished versions, to do what scholars do...uncover hidden treasures not previously known.

Another area that benefits greatly from this is correspondence and fan mail, as long as the death date of the author can be traced.³⁴ Vera Brittain kept all of her incoming correspondence, as well as copies of her outgoing responses. Even though Vera Brittain's unpublished letters will be protected through 2040, some of the correspondence, [give examples], will be available much sooner. Again, this is a tremendous way to add to the history of a subject, and now that all unpublished works come into the public domain, these letters will as well, making them an exciting and very usable source of history.

There are a couple of elements to note when determining whether a work was published between 1978 and 2002.³⁵ Microfilm may count as a publication, depending on when and by what authority the works have been microfilmed. Many times as well finding aids do not indicate the microfilm and so a scholar might unwittingly believe that a work was in the public domain, when in fact it was protected through 2047.³⁶ Many papers were microfilmed in this manner before the December 31, 2002 deadline. At one point, in fact, there had been talk of scanning Vera Brittain's papers and making them available online—another means that would have satisfied the publication requirement under Section 303(a).

[waiting to hear back whether they went forward with the project; not evident from the website]

What is interesting about microfilm relates back to correspondence. Very often an entire collection will be microfilmed. Depending on circumstances, this could give the unpublished papers protection through 2047. Incoming correspondence, however, is often left out of that microfilming process, because of the very problem of tracking down the copyright holder of the letter. Presidential libraries, in particular, are plagued by this problem. Section 303(a) alleviates this and presents the eventuality of many more documents becoming part of the public domain.

Second, there may be the little known publications off the beaten track that qualify for Section 303(a) protection. For instance, after working on Vera Brittain (I had to say for nearly twenty years), I came across a new publication while researching this paper. In 1981, Roland Leighton's nephew published, *Poems of love were written for Vera Brittain*. Except for those poems that Vera had asked permission to publish in *Testament of Youth* (1933), I would guess that this was the first time most of these works were published. It appears to have been with a small publisher, with the location listed as Snelsmore, Newbury. This publication, then, means that Roland Leighton's poems are now protected in the U.S., not through December 31, 2002, but through December 31, 2047. It takes a bit of investigation—knowing one's subject well—to uncover the different versions and forms eligible for copyright but it takes a copyright specialist to work out the details of what is still under copyright and what is now in the public domain.

³⁴ This, of course, is the orphan work problem. More will be discussed about this problem in a longer version (or perhaps an extended footnote.)

³⁵ Actually, this can be a highly complex question. See my articles and Tony Reese's articles on the unpublished public domain, *supra* note 7.

³⁶ In my law review article, "unpublished Works in the Public Domain: The Opening of New Frontier," 54 J. Copyright Society of the USA 439 (2007), I give the example of the papers of Jane Addams in Swarthmore College's Peace Collection, which were microfilmed before the deadline, even though the finding aid does not indicate this. *See* page 507. The other example I give are the papers of Oliver Wendell Holmes, Jr., whose papers were all published on seventy-two reels of microfilm for general purchase in 1985. *See* page 508.

Section 303(a) combined with Section 104(a) provides an enormous opportunity within the U.S. to use materials that might not otherwise be in the public domain in the author's home country. It also opens up new resources of unpublished works that before January 1, 2003, had been under copyright, and now are flowing into the public domain. The potential is enormous, again because of Section 104(a). All of Vera Brittain's friends and family, as well as herself, are British and very much under copyright in the UK, and yet under U.S. law, many of their works are now in the public domain.³⁷

A related note is determining the duration of the materials included within an edited volume of previously unpublished works. Under Section 303(a), works created but not published before January 1, 1978 gained additional protection through December 31, 2047, if that term is longer than life of the author plus seventy years. There have been a number of edited collections of her works. In addition, works created after January 1, 1978 carry the term of life of the author plus seventy years.

A number of edited collections of Brittain's work was published for the first time during the 1978 to 2002 period. What is the duration of the individual materials contained in the collections and the compilation, the edited collection itself? Who is the author upon which to determine the life of the author plus seventy years? Is the author the editor of the letters or the author of the letters themselves? The author of *Chronicle of Youth*, for instance, is listed as Vera Brittain, but what about the role of Alan Bishop, who painstakingly edited the collection, with both notes and an introduction?

Here is the copyright page from one of the editions of *Chronicle of Youth*:

³⁷ Expand on British copyright in a longer version or relate back to my earlier works on unpublished public domain in an international context.

A PHOENIX PRESS PAPERBACK

First published in Great Britain in 1981
by Victor Gollancz

This paperback edition published in 2000
by Phoenix Press,
an imprint of Orion Books Ltd,
Orion House, 5 Upper St Martin's Lane,
London WC2H 9EA

Phoenix Press
Sterling Publishing Co. Inc.
387 Park Avenue South
New York
NY 10016-8810
USA

Second impression
Reissued 2002

Vera Brittain's diaries copyright © Mark Bostridge and Rebecca Williams, the Literary Executors for the Vera Brittain Estate, 1970
This selection published under licence from McMaster University, Hamilton, Canada
Compilation and editorial matter copyright © Alan Bishop, 1980, 2000
Preface copyright © Clare Leighton, 1981

Figure 1 Copyright Page of *Chronicle of Youth*

38

This in itself is very telling. Vera Brittain's text will be protected in the U.S. through December 31, 2047. The edited comments and the compilation itself will be protected seventy years after the death of still very much living in Canada, Emeritus Professor of English Alan Bishop. The preface was written by Roland Leighton's sister (Roland, being the boy that Vera loved the most and died just before Christmas 1915). Claire passed away in 1989, and so the preface will be under U.S. copyright and UK copyright through 2059, or life of the author plus seventy years. Again, my point in all of this is not to contest the length of duration, but the difficulty for the average scholar wanting to know what is in copyright to figure out the duration. Would most scholars know how to read the above copyright page? There must be a helpful solution to sort out all of these questions.

Chronicle of Youth presents an easy example, as does her other edited diaries, *Chronicle of Friendship*, edited by Alan Bishop and *Wartime Chronicles* edited by Alan Bishop and Y. Aleksandra Bennett. The diary entries, like *Chronicle of Youth*, would be protected for the extended term provided by Section 303(a), until December 31, 2047. The edited materials, including the introduction and extensive footnotes, would be protected by the seventy years p.m.a. of the last surviving author. There are other edited collections of Vera Brittain's work, however, that are not as easy to figure. [The works will be

³⁸ Amazon.co.uk: Books: Chronicle of Youth: Great War Diary, 1913-17 (Women in History)
http://www.amazon.co.uk/gp/reader/1842125427/ref=sib_rdr_cr/202-7828726-3327828?ie=UTF8&p=S006&j=0#reader-page
Screen clipping taken: 4/3/2007, 12:43 AM

furtherh discussed in a longer version of the paper; it includes the strange question of when a work is considered published, in particular Brittain's wartime letters that she distributed to a mailing list of people during the war.]

PART IV: PUBLISHED WORKS AND SECTION 104A

Duration laws for published U.S. works are notoriously complicated, particularly for the period between 1923 and 1989.³⁹ What this section will show is that foreign works do not suffer a similar fate. I have studied duration for a number of years, but it was only in sorting out the calculations with legal twists and turns for this paper did I realize actually the simplicities thanks to Section 104A when it comes to foreign works. But this was not always so, as this section will explore. And in practical terms, sometimes determining duration for foreign works remains a bit complicated, both because of access to needed resources as well as awareness of the differences in duration between domestic and foreign works.

Before beginning, however, I want to briefly discuss the copyright status of Brittain's works in the UK. The 1988 CDPA brought the duration laws in the UK up to seventy years p.ma. for published text works.⁴⁰ Like the US, there are many twists and complexities with UK duration law, but for our purposes—texts—the law is relatively straightforward.⁴¹ So, with the case of Vera Brittain, all of her published works—beginning with her first set of poetry published in 1918—are protected through 2040, or seventy years after her death in 1970.

The U.S., in contrast, did not adopt a “life +” system until the 1976 Copyright Act, and so still measures duration based on the *publication* of a work for those works published before January 1, 1978, which makes determining duration sometimes complex, particularly with formality requirements.⁴² This is combined with the U.S.’s reluctant history of protecting foreign works, and the 100-year delay in joining the Berne Convention.⁴³ As Paul Goldstein explained in *International Copyright*, “The determination whether, and to what extent, a foreign work will be protected under U.S. Copyright law will turn in any case on the law in force in the United States at the time of the work’s first publication, as well as on the treaty relations, if any, that existed between the United States and the work’s country of origin at that time... [T]he 1909 Act...did not make first publication in the United States a point of attachment.”⁴⁴

WORKS PUBLISHED IN THE U.S. AND THE UK

Beginning with her smash hit, *Testament of Youth* (1933), a good number of Brittain’s works appeared as a U.S. publication as well as a UK publication. How does one proceed to determine duration? I have taken the approach of looking to the status of the work in the U.S. before Section 104A, and then looking at the impact of Section 104A on the copyright stauts of the work. In the case of Vera Brittain, I asked two questions. First, did the foreign work comply with the U.S. requirements for copyright law at the time of its publication? Second, if the work did not comply, did the work still have its copyright restored under Section 104A? We will follow this inquiry. What the case of Vera Brittain has demonstrated is that one needs not ask these questions, that the whole question of whether U.S. versions were either a) published with proper copyright formalities or b) renewed does not change the outcome of the current copyright status of Brittain’s works. All that matters is whether they were a) foreign and b) published simultaneous. But this is only the case of Vera Brittain. One must actually look

³⁹ Citation to be added

⁴⁰ Citation to be addeed

⁴¹ Put in Adams chart...

⁴² Citation to be added.

⁴³ Citation to be added

⁴⁴ PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT, 147-8.

to see if a work qualifies for restoration under Section 104A. It would be short-sided to view the case of Vera Brittain as defining the parameters of all of the questions.⁴⁵ Moreover, I would argue that beginning with the U.S. law and then looking to Section 104A may provide an easier and more thorough path in determining the current duration statuts.

This section begins determining U.S. duration and then turning to the impact of Section 104A. I think, also, the first set of questions is a natural path many would pursue. They would follow one of many flow charts, and then see that foreign works have “additional” requirements. Another reason for taking this path is that it mimics the historical progression of foreign works, and gives U.S. a better sense of when and why a work was protected in the United States. In some instances, particularly in the litigation setting, this type of analysis becomes important in sorting out when a work was protected (and again why) and when the work was in the public domain.

To analyze the impact of Section 104A on the duration of foreign works, then, I will first look at those works Vera intended to have an American audience, and then those, for whatever reason, were only published in her home country.

To begin, most of Vera Brittain’s works fall under the 1909 Copyright Act, because they were published before January 1, 1978. (Again, because Brittain died in 1970). In the US, works created between 1923 and 1978 fall under the 1909 Copyright Act, rather than the current copyright act, which means the basis of determining duration is based on the publication date of the work, rather than the current measure of the life of the author plus seventy years. There was a twenty-eight year initial term (as long as the required formalities and manufacturing requirements were met), and the need to renew the work for additional time in the 28th year.⁴⁶ If an author did not renew in the 28th year from publication, the work went into the public domain.⁴⁷ Many authors have found themselves with a work in the public domain in the U.S. because they did not meet the formality requirements. In fact, it was the notorious part of the 1909, which led to much of the change in the 1976 Copyright Act, and it was one of the key reasons that the U.S. long-delayed joining the Berne Convention, as the U.S. did not want to give up their formality requirements, which were prohibited by Berne.⁴⁸

Currently, for works published in the U.S. between 1964 and 1977, renewal was obtained automatically with registration, would receive the now full 95 year copyright term.⁴⁹ This applies to both domestic and foreign works. Amongst Vera Brittain’s writings, this includes *The Rebel Passion*, published in the U.S. in 1964,⁵⁰ *Envoy Extraordinary: A Study of Vijaya Lakshmi Pandit and Her Contribution to Modern India* published in the U.S. in 1965⁵¹, and *Radclyffe Hall - A Case of Obscenity?* published in the U.S. in 1969.⁵² These works will expire in 2059, 2061, and 2064, respectively. The same works will have been out of copyright in the UK since 2040, or seventy years after Vera Brittain’s death in 1970.

⁴⁵ Put in citations, including cases and articles on national ineligibility.

⁴⁶ Citation to be added

⁴⁷ Citation to be added

⁴⁸ citation to be added

⁴⁹ Citation to be added

⁵⁰ Vera Brittain, *The Rebel Passion*, New York: Fellowship Publications, 1964.

⁵¹ Vera Brittain, *Envoy Extraordinary: A Study of Vijaya Lakshmi Pandit and Her Contribution to Modern India*, New York: A. S. Barnes & Co., 1965.

⁵² Vera Brittain, *Radclyffe Hall - A Case of Obscenity?*, New York, 1969.

NAME OF WORK NAME OF WORK	DATE OF PUBLICATION	IN PUBLIC DOMAIN IN THE US
THE REBEL PASSION	1964	2059
ENVOY EXTRAORDINARY:	1965	2060
RADCLIFF HALL	1969	2064

Figure 2 Vera Brittain's Works Published in the U.S. 1964-1970

For works published between 1923 and 1963 in the U.S., we must first determine if they were renewed. If a work was properly renewed, then the work is protected for ninety-five years from publication. A new tool at Stanford University makes the task of looking up renewal records much, much easier.⁵³ As described on the website, “Building on the work done by [Project Gutenberg](#) to transcribe the 1950-1977 renewals, and on early conversion efforts by Michael Lesk, we have converted the published renewal announcements to machine-readable form, and combined them with the renewals for later years made available on the Copyright Office’s website.”⁵⁴ Renewal records are needed for works published before 1964, and so this applies to most of Vera Brittain’s published works, as she died in 1970.⁵⁵

For my first search, I put in “Vera Brittain,” and I got back eleven works: These works, since properly registered and renewed, have a copyright term of 95 years from the date of publication.

Honourable Estate, first published in 1936 and renewed by Vera Brittain in 1964 will come into the public domain in the U.S. after 2031.

Thrice a Stranger, first published in 1938 and renewed by Vera Brittain in 1966 will come into the public domain in the U.S. after 2033.

England’s Hour, first published in 1941, and renewed by Vera Brittain in 1968 will come into the public domain in the U.S. after 2036.

Account Rendered, first published in 1944, and renewed by Brittain’s husband in 1972 will come into the public domain in the U.S. after 2039

⁵³ Copyright Renewal Database, Stanford University Libraries and Academic Information Resources, <http://collections.stanford.edu/copyrightrenewals/bin/page?forward=home> (last visited April 2, 2007).

⁵⁴ *Id.*

⁵⁵ After 1964, renewal was automatic. From the Stanford renewal website, they explain: “This database makes searchable the copyright renewal records received by the U.S Copyright Office between 1950 and 1992 for books published in the U.S. between 1923 and 1963. Note that the database includes ONLY U.S. Class A (book) renewals.”

The period from 1923-1963 is of special interest for U.S. copyrights, as works published after January 1, 1964 had their copyrights automatically renewed by statute, and works published before 1923 have generally fallen into the public domain. Between those dates, a renewal registration was required to prevent the expiration of copyright, however determining whether a work’s registration has been renewed is a challenge. Renewals received by the Copyright Office after 1977 are searchable in an online database, but renewals received between 1950 and 1977 were announced and distributed only in a semi-annual print publication. The Copyright Office does not have a machine-searchable source for this renewal information, and the only public access is through the card catalog in their DC offices. “*Id.*

On Becoming a Writer, first published in 1947, and renewed by Brittain's husband and children in 1975, will come in the public domain in the U.S. after 2042

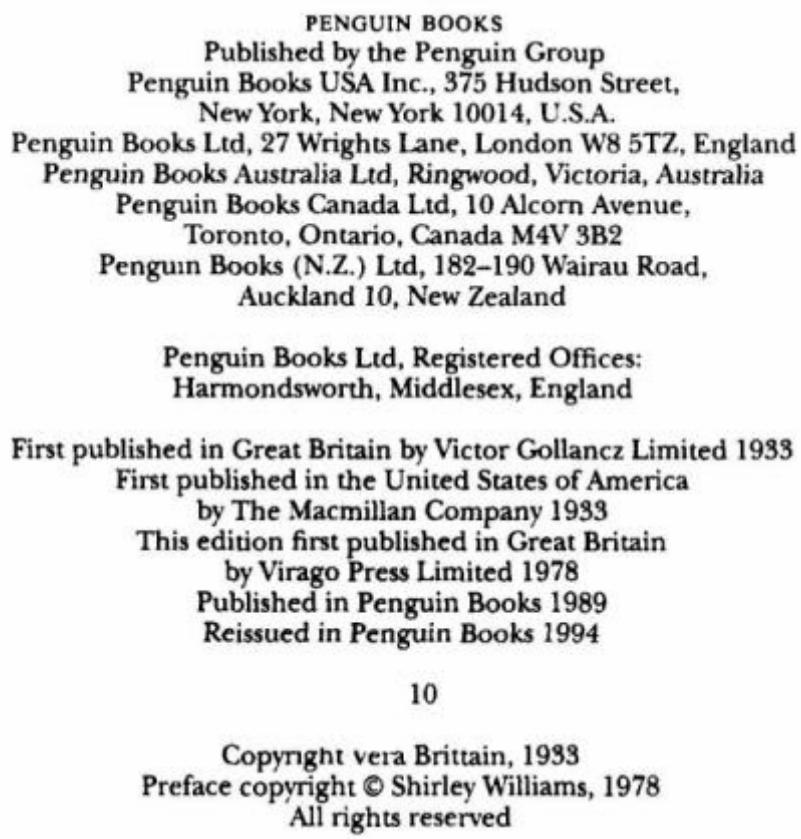
On Being an Author, first published in 1948 and renewed by Brittain's husband and children in 1975, will come into the public domain in the U.S. after 2043

Born 1925, first published in 1949, and renewed by Brittain's husband and children in 1976, will come into the public domain in the U.S. after 2044.

Testament of Experience, first published in 1957 and renewed by Shirley Williams in 1985 will come into the public domain in the U.S. after 2052.

What is interesting, however, are the works that were *not renewed*, namely *Testament of Youth*, *Testament of Friendship* and *The Poems of the War and After*—her three best-known works. Vera Brittain's most famous memoir—what made her a household name in England, does not seem to have been renewed in the United States. The copyright page on the Penguin classic version seems to confirm this as well:⁵⁶

Figure 3 Copyright Page from Penguin Classic edition of Vera Brittain's *Testament of Youth*



Does this mean that these three key works by Vera Brittain are in the public domain? If I had been lucky enough to find the Stanford site as a doctoral student, as I would have looked to see if the work was renewed, and would have found that it wasn't. This is what I would think was the answer, if I only had

⁵⁶ Vera Brittain, *Testament of Youth*, (Penguin Twentieth Century Classics, reprinted 1994).

my historian hat on. I would have been jumping for joy—imagine the key works all in the public domain. This changed the need for permission drastically—if I need not get permission for her autobiography about the war, for her poems about the war, and for her friendship with Winifred Holtby. My historian side would have believed it was the luckiest day ever. But of course, my law side obviously knew better that we should not rejoice so quickly, as we have the small matter of Section 104A. [Note: Presently there is nothing on the Stanford Renewal Records site that indicates that foreign works may still be protected, even if they were not renewed.]

SECTION 104A AND “SIMULTANEOUS PUBLICATION”

Section 104A is the delayed result of the U.S. becoming a member of the Berne Convention on March 1, 1989. Section 514 implemented the requirements of Article 18 of the Berne Convention, which “provides that a member country must apply the protections in the Convention to all works that have not yet fallen into the public domain through the expiration of the copyright’s term in its origin country.”⁵⁷ Section 104A was added to the 1976 Copyright Act, as part of the implementing legislation for GATT.⁵⁸ As part of our trading agreement, the U.S. agreed to restore foreign copyrights that had fallen into the public domain as a result of the formalities requirement, and thereby adopting Berne’s “rule of retroactivity” into the 1976 Copyright Act.⁵⁹ To be a “restored work,” the statute requires five elements.⁶⁰ First, the work must be an original work of authorship. This is a constitutional requirement for protection in the US, and requires only a modicum of creativity.⁶¹ Vera Brittain’s texts would have no problem qualifying, as they were independently created by an author.

Second, the work must still be in copyright in the source country as of 1 January 1996, in this case the United Kingdom.⁶² A work under the previous the 1911 Copyright Act in the UK had a term of life of the author + 50, which was then extended in 1988 to life of the author + 70 years.⁶³ So, in this case, as Vera Brittain died in 1970, and therefore would be protected under UK copyright through 2040. Brittain’s works, therefore, would have no problem meeting the second requirement.

The third requirement is that the work must have gone into the public domain in the United States prior to January 1, 1996, because of one of three of the following situations:

- (i) noncompliance with formalities imposed at any time by United States copyright law, including failure of renewal, lack of proper notice, or failure to comply with any manufacturing requirements;
- (ii) lack of subject matter protection in the case of sound recordings fixed before February 15, 1972; or

⁵⁷⁵⁷ Luck’s Music Library v. Ashcroft, 321 F.Supp.2d 107 (D.D.C. 2004).

⁵⁸ Uruguay Round Agreements Act, P.L. 103-465 (1994). *Restoration of Copyrights: Dueling Trolls and Other Oddities under Section 104A of the Copyright Act* 29 Colum. J.L. & Arts 181, (Winter2005). “The section 104A landscape is further complicated by the statute itself, which is highly technical, convoluted, oftentimes difficult to decipher and fraught with potential unintended consequences. The provision’s shaky beginnings are evidence of this; in its short existence, section 104A has already required several Congressional clarifying amendments to render it decipherable. Certain provisions of section 104A remain highly problematic and could benefit from additional clarification.” (187)

⁵⁹ For a concise explanation see, “GATT Restoration,” 5 No. 6 Intell. Prop. Strategist 6 (March 1999). The reasoning for adopting the “rule of retroactivity” in this fashion is that it is needed in order to comply to our U.S. commitments with Berne, particularly Article 18. *Dam Things From Den. v. Russ Berrie & Co. (Dam Things II)*, 290 F.3d 548, 554 (3d Cir. 2002). *See also* Nimmer on Copyright, Section 9A.01. Some believe this was not necessary in order to be in compliance with Berne. [Please expand on this...]

⁶⁰ 17 U.S.C. 104A(h)(6).

⁶¹ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

⁶² 17 U.S.C. § 104A(h)(8).

⁶³ *United Kingdom Copyright, Designs and Patent Act 1988 (as amended) s.12.*

(iii) lack of national eligibility⁶⁴

In the case of Vera Brittain, we are looking specifically at cases where we have not found a renewal record, that is for Brittain's *Testament of Youth* (1933), *Testament of Friendship* (1940), and *Poems of the War and After* (1934). Vera also published works both in the U.S. and the UK. Some of these works, as we have seen, she renewed on time. Some of them she did not. It looks like from the record that she was unaware that she needed to renew, as the first significant pieces – *Testament of Youth* and *Poems of the War and After* were the first to need renewing. After that, she and/or her family promptly renewed the works that had been published in the US. Had Vera Brittain known about the renewal requirement, there is no doubt in my mind that she would have renewed *Testament of Youth*. Section 104A was designed to restore works that suffered from just such a mistake., and allow the author to reap the benefit of the copyright for the term as if it had not fallen into the public domain.

The fourth requirement is that at least one of the author's of the work must be a national or a domiciliary of the source country. Vera Brittain was a citizen of the UK and resided in London during this particular period (and for most of her life).

Finally, the fifth requirement is that when the work was published, it must *first* have been published in the source country, and *not published in the United States* during the 30-day period following publication in such eligible country.⁶⁵ Here is where the possibilities get interesting. The 30-day period adopts the concept of “simultaneous publication” from the Berne Convention.⁶⁶ “Simultaneous publication,” had previously been used as a back-door method of gaining the protection of Berne in a non-Berne member country. So, if in 1980, an American author published a work simultaneously in the U.S. and Canada, that author got the Berne protection, as Canada is a member of Berne, and the U.S. was not, and regardless of the author's nationality of a U.S. citizen.⁶⁷ Now, simultaneous publication under Section 104A is being used a limitation on copyright restoration. The question, then was, whether the three Vera Brittain works that had not been renewed had been simultaneously published, in which case they were not eligible for copyright restoration.

So, I begin trying to figure out when *Testament of Youth* had been published in the UK and the US. First, I turned to the copyright page of the work itself—no help at all, as it just gave me the year, as did amazon.com for the earlier version. (For the reprint, it gave me the month and the year). Then I turned to the authorized biography of Vera Brittain. I found out that the UK version had been published on August 24, 1933, but Berry and Bostridge did not mention the date on which the American version was published, only by inference that it had been published before the end of year.⁶⁸ So, both my historian side and my legal scholar side suddenly have a little bit of hope—maybe, just maybe the American version was published within the thirty day period. If that was the case – that the British and the American

⁶⁴ 17 U.S.C. § 104A(h)(6)(C). The 2005 District Court of Appeal case Luck's Music Library v. Ashcroft concerned the national eligibility category, and the U.S. District Court of Columbia upheld the statute. 407 F.3d 1262 (2005)

⁶⁵ 17 USC § 104A(g)(6)(D).

⁶⁶ Berne Convention, Art. 3(1)(b): “A work shall be considered as having been published simultaneously in several countries if it has been published in two or more countries within thirty days of its first publication “ While there have been a number of law review articles that have focused on Section 104A, strangely many have not taken up an analysis of “simultaneous” publication.” For instance, see William Gable, *Restoration of Copyrights: Dueling Trolls and Other Oddities under Section 104A of the Copyright Act*, 29 Colum. J.L. & Arts 181 (Winter 2005). *Dam Things From Denmark v. Russ Berrie & Co* is the first case to look at the “first publication” requirement under Section 104A, but did not look at the issue of “simultaneous publication.” *Dam Things I*, 173 F. Supp. 2d 277, vacated, *Dam Things From Den. v. Russ Berrie & Co. (Dam Things II)*, 290 F.3d 548 (3d Cir. 2002)

⁶⁷ Jay Dratler, Jr. and Stephen M. McJohn, *Intellectual Property Law: Commercial Creative and Industrial Property* § 6.04, fn 137.

⁶⁸ Paul Berry and Mark Bostridge, *Vera Brittain: A Life* (London: Catto & Windus, 1995), 262. “”Back in London on 15 August, Vera's mounting excitement in the days before publication was palpable, as Gollancz's advertisements for the book started to appear. On 28 August, resplendent in bright mustard yellow, *Testament of Youth* was published.”

version were published within thirty days of each other, then the most important work by Vera Brittain would not qualify for restoration under Section 104A, and would be in the public domain. And so I unpacked my Vera Brittain books, and start to search. I find in the edited collection of her diaries from the 1930s an entry on October 10, 1933: “*T of Y.* pub. in the U.S.A.; cable from Latham saying 11,000 already sold.”⁶⁹ Was this the actual date of publication? My math was failing me...it seemed more than 30 days, however.⁷⁰ Oh, the stress of it all... I wanted to know for sure. I emailed the archivists at McMaster University, where the papers of Vera Brittain are held to see if they could find out whether this was the actual publication date, or maybe, just maybe, it was only the date that Latham had notified Brittain, and that it had been published earlier. But the likelihood that it had been in mid September, not later than September 23 was not looking very good.

While I waited to hear back, I also emailed Peter Hirtle, an archivist at Cornell with significant expertise in copyright law to see what answers he could find.⁷¹ I told him what I was trying to find out—whether *Testament of Youth* had been published in the U.S. within the thirty day period, beginning August 24. He was able to send me the information from the Catalog of Copyright Entries for the works in question.

The Catalog of Copyright Entries is the paper version of the original records of the Copyright Office. As already noted, renewal records that have been generated from scans of the CCE are now online for books, and records since 1978 are available at the Copyright Office.⁷² But for the pre-1978 original records, one must turn to either the card catalog at the Copyright Office or the CCE. In Peter’s email response, he began with record for the UK version of *Testament of Youth*:

The first registration (for the Gollancz edition) in the CCE, #33-301353, says the following:

(c) 1c. Sept. 13, 1933; A ad int. 18172; pubd. Aug. 28; Vera Brittain, London. (33-29806)

What does this tell us? 1 copy of the book was registered on 13 Sept. The "A" indicates a book, and the "ad int." means that it received *ad interim* copyright, giving it 1 year to be published in the U.S. and receive a full copyright term. That is why only 1 copy was received - you only needed to submit one copy for *ad interim* protection. The publication date is important because the copy had to be deposited within 30 days of foreign publication. (The 33- number is the LC card catalog number)⁷³

Ad interim copyright was a limited exemption for English language books first published abroad from the tough manufacturing clause in the U.S. under the 1909 Act that required all works to be printed and bound in the US.⁷⁴ So, according to the first entry, Vera Brittain obtained ad interim copyright protection, depositing the required one copy with the Copyright Office.⁷⁵ To qualify for ad interim protection, the deposit and request had to occur at the time that *Testament of Youth* was published within 60 days of the initial foreign publication.⁷⁶ In this case, Vera Brittain filed for ad interim protection

⁶⁹ Alan Bishop, ed., *Chronicle of Friendship, Vera Brittain’s Diary of the Thirties, 1932-1939* (Victor Gollancz, 1986), 158.

⁷⁰ There are 31 days in August – so that there were seven days left in August, plus thirty days in September, plus ten days in October – so far more than the thirty days needed to meet the 104A requirement.

⁷¹ For a short biography of Peter Hirtle, see <http://www.loc.gov/section108/hirtle.html>.

⁷² **The Online Books Page. Information about the Catalog of Copyright Entries,**
<http://digital.library.upenn.edu/books/cce/>

⁷³ Peter Hirtle, email to Elizabeth Townsend Gard, April 5, 2007 (on file with the author).

⁷⁴ Lee, Entertainment and Intellectual Property Law § 6:12.

⁷⁵ *Id.*

⁷⁶ Howard B. Abrams, 1 The Law of Copyright § 7:12 : “The original 1909 Act provided for a period of 30 days for the ad interim registration, Act of March 4, 1909, ch. 320, § 21, 35 Stat. 1075, 1080 (1909), and was subsequently amended in 1919 to a period of 60 days, Act of Dec. 18, 1919, ch. 11, 41 Stat. 368, 369 (1919), and in 1949 to six months.”

within the first month of the UK publication. The author then had five years in which to publish the work in the U.S. for full protection under U.S. copyright law.⁷⁷ "This registration was good for **five years** from the date of publication and the copyright expired unless a U.S. printing followed and a full term registration was made in the Copyright Office during that five year period."⁷⁸ Up to 1500 copies of the foreign work could be imported into the U.S. under ad interim protection.⁷⁹

Peter's email continued:

What about the Macmillan edition? Here is the data:

(c) Oct. 10, 1933; 2 c. Oct 11 : aff. Oct. 18 ; A 65790; V. Brittain, London. (33-30698)

So what does this mean? Copyright registration on the 10th, 2 copies received on the 11th. I don't know what the "aff." means, but I suspect it might be the required affidavit of American manufacture. I am a little surprised that they do not refer back to the ad interim registration. Regardless, the book got a full copyright term.⁸⁰

So, the first version was published on August 28 in London, and the U.S. version was published on October 10. The works were not simultaneously published, and therefore, the U.S. version was "restored" because of lack of proper renewal. It was a nice dream...

What of *The Poems of the War and After* and *Testament of Friendship*, also not renewed? Were they "simultaneously published"? Now it was my turn to delve into the CCE records, with *delve* being the operative *verb*.

Finding a copy of the CCE records tuned out to be a challenge in itself, in part because I am now living in New Orleans in a post-Katrina setting. Copies of the CCE are available around the country. The Tulane University version, in the government documents section of the main library, was flooded, but thanks to Eric Wedig, a government documents librarian, he was able to locate two versions, one in Baton Rouge, and the other at the New Orleans Public Library. This part of the story is a bit unusual. The second part, however, is more concerning. The NOPL librarians could not have been more welcoming. However, the CCE was in the basement of the library. I was graciously allowed access, and in no time I had the answers to my questions. However, I started to wonder about accessibility and usability. When was the last time someone had requested to view the CCE? Aren't others wondering which music, pamphlets, movies, plays, etc. are in the public domain? The CCE is critical in many cases in determining the copyright status of a work.⁸¹

And so, after a little adventure to the downtown main branch of the New Orleans Public Library, I was able to determine whether *The Poems of the War and After*, which had been registered but not renewed, had been simultaneously published, and if so, then it would be ineligible for Section 104A.

The index for the CCE for 1934 had two listings for *The Poems of the War and After*. The first, #6050, listed the work as published in London by V. Gollancz, Ltd., 1934. Like the record for *Testament of Youth*, this appeared to be an ad interim registration: © 1c. June 19, 1924 A. ad int. 19119. pub. Apr.

⁷⁷ 17 U.S.C.A. §§ 16 and 22 (1909) as cited in Lee, *supra* ____.

⁷⁸ Copyright Registration Prac. § 11:3

⁷⁹ Copyright Registration Prac. § 11:3

⁸⁰ Peter Hirtle, email to Elizabeth Townsend Gard, April 5, 2007 (on file with the author).

⁸¹ This topic of access, particularly with motion pictures and other non-book works will be explored at greater length in an expanded paper, which will look at the works of Gertrude Berg, an early pioneer in radio, television and film, and will use extensively the CCE to determine the status and ownership of her works.

30 1934. It appeared that the work had been published in London in April, and one copy was deposited at the Copyright Office in June.

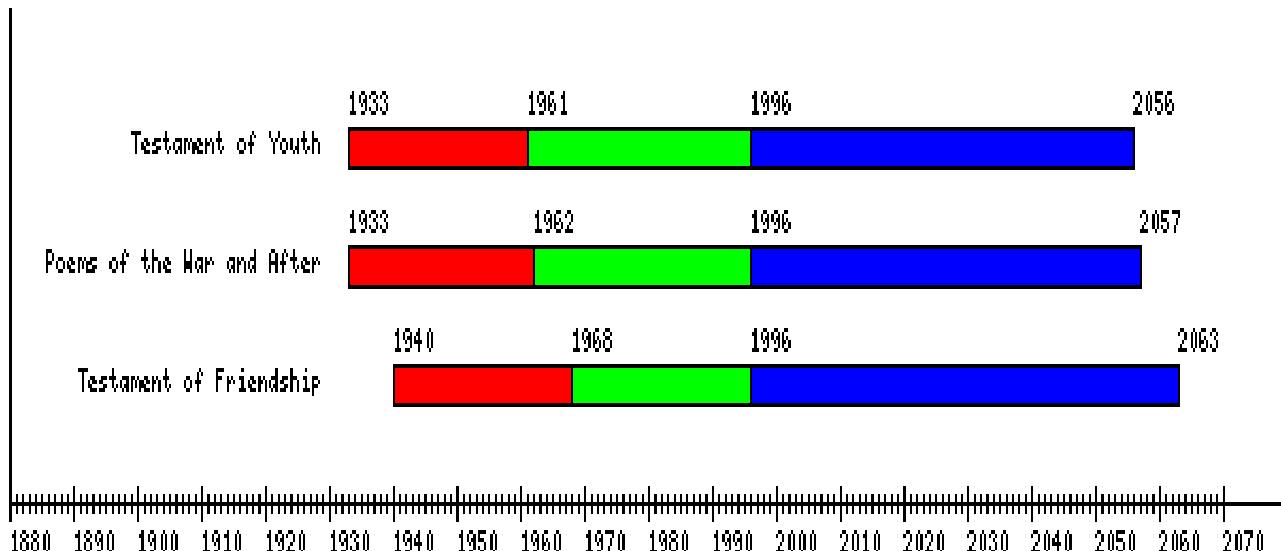
The second listing, #7394, followed the same pattern as the second listing for *Testament of Youth*. Again, the work had been published by Macmillan in New York in 1934. The listing read: © September 4, 1934. 2c. Sept 10; aff. Sept 5. A74792.

Like *Testament of Youth*, *The Poems of the War and After* did not qualify for simultaneous publication. The London version was published in April, and the New York version was published in September. And in many ways, this makes sense. Simultaneous publication benefited authors of non-Berne countries in order to gain Berne protection. There would have been no incentive for Vera Brittain, a member of a Berne country, to take advantage of this law. Her work was being protected in England and other Berne countries; her work was being protected in the US.

Testament of Friendship presented a different scenario. It appears there was only a U.S. version registered, and not an ad interim copy. The CCE record read: “© Jan 2, 1940 2 c. and aff. Jan 3.”⁸² According to the renewal records at Stanford, *Testament of Friendship* was not renewed.

So, both *Testament of Youth* and *The Poems of the War and After* qualify for Section 104A protection. *Testament of Friendship* also qualifies. All three works met all of the U.S. formalities at the time and were properly registered with the U.S. Copyright Office, but none of them were properly renewed. So, each of the works fell into the public domain at the end of their 28 year term, or 1961 for *Testament of Youth*, 1962 for *The Poems of the War and After*, and 1968 for *Testament of Friendship*. Their copyrights were then restored under Section 104A in 1996, and will now be under copyright, each for ninety-five years from publication.

Red: Under Copyright; Green: in the Public Domain; Blue – Under Copyright due to Section 104A



⁸² L.C. 3.6/1: 37/1-1 (1940) at entry #68.

Below is a list of Vera Brittain's works, both in a table, that lists the copyright information for all of her works published in the U.S. and UK.

Work	UK Publication Date and ad interim © in the US	US Publication Date	Renewal?	Date in the U.S. Public Domain	Date Under Copyright	Date in the U.S. Public Domain
<i>Testament of Youth</i>	Aug. 28, 1933 (London) Ad interim Sept 13, 1933	October 10, 1933	NO	1961	1996	2028
<i>The Poems of the War and After</i>	Apr. 1934 (London) Ad interim June 19, 1934	September 4, 1934	No	1962	1996	2057
<i>Honourable Estate</i>	(no ad interim)	Nov 2, 1936	Yes 1964	2031		
<i>Thrice a Stranger</i> (still to check)		1938	Yes 1966	2033		
<i>Testament of Friendship</i>	(no ad interim)	Jan 2, 1940	NO			
<i>England's Hour</i> (still to check)		1941	Yes 1968	2036		
<i>Account Rendered</i> (still to check)		1944	Yes 1972	2039		
<i>On Becoming a Writer</i> (still to check)		1947	Yes 1975	2042		

<i>On Being an Author</i> (still to check)		1948	<i>Yes</i> 1975	2043		
<i>Born 1925</i> (still to check)		1949	<i>Yes</i> 1976	2044		
<i>In the Steps of John Bunyan (Called in the U.S. Valiant Pilgrim)</i> (still to check)		1950	<i>No</i>	1978	1996	2052
<i>Testament of Experience</i>	(no ad interim)	1957 App. States previously published abroad	<i>Yes</i> 1985	2052		

Chart still to add

A. SECTION 104A AND UK-ONLY PUBLICATIONS

To summarize so far, the works that had been properly renewed are still under copyright in the U.S. for 95 years from publication. *Testament of Youth. The Poems of the War and After* and *Testament of Friendship* has a restored copyright, because they were not simultaneously published the works were registered in the U.S. but not renewed. They came into the U.S. public domain because of lack of formalities, while still under copyright in the UK. Therefore, they receive restored copyright protection through Section 104A.

However, there is another category of works. Some of Brittain's works were published only in the UK. These included her first novels in 1923 and 1924, but also works that were either specifically targeted to a UK audience like *Women's Work in Modern England*, or works later in her life that she had written to fulfill certain obligations, like *Pethick-Laurence*. We will call these works the UK-Only publications.

1. Vera Brittain's early publications: 1923 and 1924

Vera Brittain published two novels early in her career, *The Dark Tide* (1923) and *Not Without Honour* (1924). Both were only published in the UK, and never in the US. In the UK, the novels are protected seventy years p.m.a. or through 2040. In the US, the situation is again more complicated.

So are *The Dark Tide* and *Not Without Hour* in the public domain in the US? The works had been in the public domain in the U.S. because they had not met the formality requirements of the US. For a foreign work to be protected in the U.S. (at least before 1955), a work would have had to meet three requirements: proper copyright notice, deposit and registration in the US, and bound and printed in the

US. For the UK-only works, at least the last two would not be met. Vera Brittain did not register or have copies printed in the U.S. of these works, and so they would have gone into the public domain upon their publication in the UK.⁸³ But because they were published in 1923 and later, Section 104A comes into play. If the still in copyright in the UK, the original place of publication, then the term is 95 years from publication. So, *The Dark Tide* had been in the public domain from 1923-1996, and now will be under copyright through 2018 and *Not Without Honor* will be in the public domain in the U.S. after 2019.

NAME OF WORK	DATE OF PUBLICATION	IN PUBLIC DOMAIN IN THE US	OUT OF PUBLIC DOMAIN IN THE US	IN PUBLIC DOMAIN IN THE US
THE DARK TIDE	1923	1923	1996	2018
NOT WITHOUT HONOUR	1924	1924	1996	2019

For over seventy years, these works were in the public domain in the U.S. During that time, interestingly enough, no republished versions existed. It seems that no one took advantage of the freedom the public domain, and the U.S. law regarding foreign works allowed. Now, the works are under copyright for twenty-two and twenty-three years, respectively, beginning sixteen years after Vera Brittain's death in 1970. During this new phase of copyright, a paperback version of *The Dark Tide* was reissued by Virago in 1999 (in the UK, but is distributed in the U.S. with regularity), and a complete and unabridged audio cassette version was recorded, also in the UK, in 2000.⁸⁴

2. Vera Brittain's publication: 1925-1956

Vera Brittain published works both in the US/UK and UK-only during her most productive years. In 1928, for instance, she published in the UK-only *Women's Work in Modern England* and in 1929, *Halycon, or the Future of Monogamy*. Both of these works appeared before Vera Brittain really gain notoriety as an author. That came in 1933, with *Testament of Youth*, which has already been noted, was published in the U.S. as well as the UK. What followed were works that were also published in the US/UK, like *The Poems of the War and After* (1934), *Honourable Estate* (1936), *Thrice a Stranger* (1938), and *Testament of Friendship* (1940). During the 1930s, Vera Brittain was at the height of her career and popularity. That would soon end, when she took a pacifist stance during the Second World War. During the war she would continue to write works, both published in the U.S. and the UK, like *England's Hour* (1941), *Account Rendered* (1945), and *Born 1925* (1948), but she also began to publish specifically anti-war/pro-peace works that were just published in the UK. These included her *Wartime Letters to Peace-Lovers* (1940), *Humiliation with Honour* (1942), *One of these Little Ones...: A Plea to Parents and Others for Europe's Children* (1943), and *Seed of Chaos: What Mass Bombing Really Means* (1944). So, we see for the first time, Vera Brittain registering some of her works in the US, and during the same period of time, not registering others. Was this because no one was willing to publish them in the US?⁸⁵ Whatever the reason, some of her works were in the public domain, while others she diligently registered and renewed. Now, these works – all of these works—have a copyright term of 95 years from publication, either because Vera Brittain renewed them in a timely fashion, or because of Section 104A.

⁸³ Proper copyright notice will be discussed in the next section at length, particularly in light of the *Twin Books* case.

⁸⁴ VERA BRITTAINE, THE DARK TIDE, 1923, rept. Virago, 1999, audio version, Chivers Audio Books 2000.

⁸⁵ Check to see if she filed for ad interim copyright, which would have allowed 1500 copies in and given the works five years of protection before going into the public domain; also look at the 1960 proclamation, re copyright during World War II.

3. Vera Brittain's later publications: 1957 and Beyond

Did any of Vera Brittain's UK-Only works actually gain protection with the U.S. accession to the Universal Copyright Convention in 1955, and then UK in 1957? The Universal Copyright Convention was a multilateral treaty designed to bridge the gap between Berne and non-Berne countries, which included the US, several Latin American, African, and Asian countries, and the USSR.⁸⁶ The U.S. refused to join Berne because Berne required that there be no formalities, and the US, for a long time, was not willing to give up the elaborate formality system that made up both the 1909 and 1979 Copyright Act. Unlike Berne, the term of the work was measured by the date of publication (the U.S. system) and not life of the author (Berne).⁸⁷ No retroactive protection was allowed, meaning the UCC only applied to current and future works.⁸⁸ What the UCC did was allow foreign works to be protected under U.S. copyright law without registration or deposit.⁸⁹ What the UCC did require was the © symbol, the name of the copyright proprietor, and the year of the first publication.

What did this mean for foreign works covered under the UCC? Did this give them an initial term? A renewal term? Two cases illustrate typical scenarios under the Universal Copyright Convention. In *Hoepker v. Kruger*, 200 F.Supp. 2d 340 (SDNY 2002), a U.S. district court found that the photograph "Charlotte as Seen by Thomas" was considered published in Germany in 1960, and because Germany and the U.S. were both signatories to the UCC, "Hoepker's work published in Germany was given 'in [the United States] the same protection as [in the United States] accords to works of its nationals first published in its own territory.'"⁹⁰ The photograph in the U.S. had an initial term of 28 years from its publication in Germany, with the option of renewal in the 28th year. "Because Hoepker failed to renew protection as required by then-applicable United States law, his copyright terminated after this initial term."⁹¹ Barbara Kruger, the defendant, was then free to use the photograph after 1988, as it was in the public domain in the US. The copyright was then restored by Section 104A in 1996.⁹²

In the unreported case *Barris v. Hamilton* (SDNY 1999), the court faced similar questions as well, but explained in greater detail the reasoning. Here photographs of Marilyn Monroe were first published in a British newspaper *The Daily Mirror* in 1962. It would not be until 1986 that the plaintiff would register the photographs with the U.S. Copyright Office. The photographs had been incorporated into a collage in 1964 in the US. The question was whether the photographs were in the public domain in the US. Applying the 1909 Copyright Act and the Universal Copyright Convention, the court first noted that the Plaintiff's photographs carried proper copyright notice. Foreign published works were given protection under U.S. copyright law, if "the work is first published...in a foreign nation that, on the date of first publication, is party to the Universal Copyright Convention."⁹³ The U.S. joined the UCC in 1955, and the UK joined in 1957. The photographs, therefore were protected under U.S. law. They carried the term of twenty-eight years, as allowed by Section 24 of the 1909 Act, because it was published with proper

⁸⁶ PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT, 2.1.2.2

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Universal Copyright Convention [Genva Tex, 1952], Article III(1): "Any contracting State which, under its domestic law, requires as a condition of copyright, compliance with formalities such as deposit, registration, notice, notarial certificates, payment of fees or manufacture or publication in that Contracting State, shall regard these requirements as satisfied with respect to all works protected in accordance with this Convention and first published outside its territory and the author of which is not one of its nationals, if from the time of first publication all the copies of the work published with the authority of the author or other copyright proprietor bear the symbol © accompanied by the name of the copyright proprietor and the year of first publication placed in such manner and location as to give reasonable notice of claim of copyright."

⁹⁰ 200 F.Supp.2d 340, 343 citing U.C.C. Article III(1) and quoting the court's August 28 Order.

⁹¹ *Id* at 343.

⁹² Note, see below for more on this case, regarding enforcement of the new term of copyright.

⁹³ 17 USC Section 24 (repealed effected 1978); UCC, Article II(1), reprinted in 17 USCA Section 104, p 92 (1996) as cited in *Barris v. Hamilton*, 19999 WL 311813 (not reported), SDNY 1999, fn 8. *See also* International Film Exchange, 621 F. Supp at 635, n. 7 as cited in *Barris*.

notice.⁹⁴ A foreign work need not register the work to gain the initial 28-year term of protection. However, renewal was not automatic. The court quoted *Rose v. Bourne, Inc.* 176 F.Supp. 605, 610 (SDNY 1959) aff'd 279 F.2d 79 (2d Cir. 1960): "Unlike the original copyright, the renewal is created, not by publication with a claim to the copyright, but by registration of an application for renewal in the Copyright Office."⁹⁵ The court concluded that "By virtue of the 1909 Act and the Universal Copyright Convention, Plaintiff was able to enjoy copyright protection for twenty-eight years from the date of publication abroad."⁹⁶ Further, the Plaintiff could have renewed, for an additional term of protection. The renewal term is not automatic for publications abroad.

Applied to Vera Brittain's works, the UCC seems to mean that any of Vera Brittain's works that were first published in the UK after 1957 would automatically have received a copyright term of twenty-eight years. None of them were renewed, and therefore, after the first term, came into the public domain in the US. This works were then eligible for Section 104A, because they were in the public domain in the U.S. but not their source country, and they were in the public domain because they had not been renewed. So, these works first had a term of twenty-years, and then were in the public domain. Then, these works, then came out of the public domain on January 1, 1996, are protected 95 years from publication. This includes, then, her works *The Women at Oxford* (1960), *Pethick-Lawrence* (1963), *The Rebel Passion* (1964), *Envoy Extraordinary* (1965), and *Radclyffe Hall* (1968). All of these works automatically received twenty-eight years of protection, fell into the public domain, and had their copyright restored by Section 104A.

Figure 4 Table of Works created 1923-1968 and published in the UK only

Work	UK Date of Publication	Date In Public Domain in the US	Date In Copyright in the US	Date in the Public Domain in the US
THE DARK TIDE	1923	1923	1996	2018
Not Without Honour	1924	1924	1996	2019
Women's Work in Modern England	1928	1928	1996	2023
Halcyon, or the Future of Monogamy	1929	1929	1996	2024
Wartime Letters to Peace-Lovers	1940	1940	1996	2035

⁹⁴ *Id* citing 17 USC Section 24 (repealed effective 1978), 3.

⁹⁵ *Id* at 4.

⁹⁶ *Id* at 6.

Humiliation with Honour	1942	1942	1996	2037
One of these Little Ones...	1943	1943	1996	2038
Seed of Chaos	1944	1944	1996	2039
Above all Nations	1945	1945	1996	2039
The Story of St. Martins	1951	1951	1996	2046
Search After Sunrise	1951	1951	1996	2046
Lady into Woman	1953	1953	1996	2048
The Women at Oxford	1960	1986	1996	2055
Selected Letters	1960	1986	1996	2055
Pethick-Lawrence	1963	1991	1996	2058
The Rebel Passion	1964	2059		
Envoy Extraordinary	1965	2060		
Radclyffe Hall	1968	2063		

[Note: I plan to have a small section here on Section 104A, infringement claims and remedies. This will continue with the *Hoepker v. Kruger* case, 200 F. Supp. 2d 340, and analyze whether Vera Brittain's estate has taken any steps to enforce the new copyright terms, including a notice of intent. This section will also discuss the benefits of registering a restored work.]

PART IV: A TALE OF THE POTENTIAL LEGAL UNCERTAINTIES OF *VERSES OF A V.A.D.* (1918) AND *THE POEMS OF THE WAR AND AFTER* (1934)

I began this paper because of a question about Vera Brittain's poems. This section sets out to determine which of her poems, if any, are in the public domain, and which are under copyright (and why, by what mechanism, they are under copyright). The answer to that question serves as a nice intersection

between Section 104(a)/Section 303(a) and Section 104A, as well as recent (and controversial) case law on the relationship between the two.

[Note: this section needs to be reworked. *Twin Books* applies to foreign works, and I have been told that it only applies to works not published in English. But the case itself has no references to this and *Societe Civile Sucession Richard Guino v. Beseder* applies to sculpture (created in France.) So, this is where I have become stuck. This section was written with the assumption of a broad reading of *Twin Books* that would include all foreign works. Any suggestions or advice would be greatly appreciated.]

a. *Twin Books and Verses of a V.A.D.* (1918)

Vera's first published work, occurred in 1918, with the slim volume of poems entitled, *Verses of the V.A.D.*⁹⁷ The work was only published in the UK. Before this paper, I would have quickly answered that the work was in the public domain, as all works published before 1923 are in the public domain in the US. And so, in this case, Section 104A does not apply. But duration is never that simple. First, there the case of the work being of foreign origin, and second, once again there is the question of Section 104A with the 1934 version. And perhaps, depending on if one is in the 9th circuit, one may have to contend with a different result, thanks to the ten-year old *Twin Books* case, and more recent 2006 decision of *Societe Civile Succession Richard Guino v. Beseder*.⁹⁸ The question is whether *Twin Books* stands for the proposition that if a work was published in a foreign country without proper formalities then the work is unpublished, and how does that work with Section 104A? Would a VB work was published without notice in 1918 then qualify for protection under Section 303(a)?

Twin Books v. Disney and *Societe Civile Sucession Richard Guino v. Beseder*.

The line of cases looking at the publication status of foreign works with improper copyright notice has been plagued with one strange decision after the other. This line of cases actually began with the 1946 Second Circuit case, *Heim v. Universal Pictures*, 154 F.2d 460 (2d Cir. 1946).⁹⁹ But it is the Ninth Circuit's *Twin Books v. Disney* that provided the most controversy. The more recent case *Societe Civile Succession Richard Guino v. Beseder* sharply criticized but followed the *Twin Books* decision, but as we will see, that decision too has some problems.

Twin Books v. Disney was a 1996 Ninth Circuit case that involved the children's classic, *Bambi, a Life in the Woods*, where the original foreign version did not have a copyright notice. The court did not find that lack of formalities of a foreign work resulted in the work failing into the public domain in the US. In this case, the work was first published in Germany in 1923 without a copyright notice, or as the court wrote that the work "contained no notice to the world that Mr. Salten (the author) intended to protect the young German fawn. Therefore, *Bambi* was fair game to any deer hunter in the world outside

⁹⁷ Vera Brittain, *Verses of a V.A.D.* (London, Macdonald, 1918). A first edition (it was only a first edition) copy is currently (April 2007) selling for over \$1000 from Summerfield Books BA in the UK through www.abebooks.com. The descriptions reads: "46pp. Printed boards, with small 'nick' in spine. Owner's signature on ffep. The extremely scarce original issue of Vera Brittain's first published work, being poems on the theme of 1st world war loss and emotion. Bookseller Inventory # ABE-856280422." <http://www.abebooks.com/servlet/BookDetails?bi=856280422&AID=7169465&PID=555228> (last visited April 2, 2007).

⁹⁸ *Twin Books Corp. v. Walt Disney Co.*, 83 F.3d 1162, 1167 (9th Cir.1996), and *Societe Civile Succession Richard Guino v. Beseder*, 414 F.Supp.2d 944 (January 2006).

⁹⁹ *Heim v. Universal Pictures Co.*, 154 F.2d 480 (2d Cir. 1946) is now the first in a series of cases that look at the status of a foreign work published without proper copyright notice under the 1909 Act. These works are often works before the Universal Copyright Convention, although not always. The question is whether a work is considered improperly published and therefore in the public domain in the US, or whether it is considered *not* published (they never seem to use the phrase unpublished).

Germany.”¹⁰⁰ The court continues, “However, in 1926, Salten must have realized this potential danger, and therefore, he republished the German language *Bambi: A Life in the Woods* in Germany, this time with a notice of United States Copyright, in an attempt to afford *Bambi* some protection from the dangerous American hunters.”¹⁰¹ The 1926 version was timely registered in the U.S. in early 1927, which was then properly renewed in 1954.¹⁰² In 1993, Salten’s heirs assigned all of the rights in *Bambi* to Twin Books. Disagreements arose with Disney related to agreements made in 1958, and Twin Books initiated this law suit. Disney moved for summary judgment, and among the theories Disney put forth was that *Bambi* was in the public domain. Disney claimed that *Bambi* fell into the public domain in 1923 because there had not been proper copyright notice on the original German version, and so didn’t meet the strict formality requirements of the 1909 Act, of which the penalty was the published work fell into the public domain.¹⁰³

First, to gain copyright protection in the US, prior to joining Berne in 1989 or the UCC in 1955, a foreign work could gain copyright protection in the US, but required specific notice requirements, set out in Section 19 of the 1909 Act.¹⁰⁴ Without proper copyright notice, a work would fall into the public domain.¹⁰⁵ However, the court, continues, that would give the copyright law extraterritorial effect, and cited *Ferris v. Frohman*, 223 U.S. 424 (1912), determined under the 1909 Act, “that performance of a play in England did not alter that plays’ subsequent United States copyright status.”¹⁰⁶ The case then relied on *Heim v. Universal Pictures*.

The court explained that the 1923 edition did not meet the U.S. specific requirements for copyright notice, but the work did meet the requirements for protection in Germany. That is, it was not in the public domain in Germany in 1923.¹⁰⁷ Using *Heim* as a basis, the court found that the 1923 version had not placed *Bambi* in the public domain in Germany.¹⁰⁸ “Therefore, we find the 1923 publication did not preclude the author from subsequently obtaining copyright protection in the United States by complying with the 1909 Copyright Act.”¹⁰⁹ Using the doctrine of territoriality, the court reasoned that U.S. copyright was not secured until 1926, when” it was published with a United States copyright notice.”¹¹⁰

The court seems to say that the work is not published, but the court never says that the 1923 work is *unpublished*. Instead, here is what the court writes about the 1923 German publication: “During 1923, 1924, and 1925, anyone could have sold the *Bambi* book in the United States, or made some derivative movie of the *Bambi* book, and the author Salten would have had no recourse under United States copyright law.”¹¹¹ The court does not give reasoning. What about state common law copyright, which protected all but registered unpublished works before January 1, 1978? Was this route of protection not open to foreign authors? Strangely, the court never even uses the term *unpublished*, and yet the 1923 publication was not considered published in the U.S. until 1926, when it was republished the German language version of *Bambi* with a U.S. copyright notice, and registered the work in the United States in 1927.

In 2006, the U.S. District Court in Arizona returned applied the *Twin Books* decision in *Societe Civile Succession Richard Guino v. Beseder Inc.*, F.Supp.2d 2006 WL 2917349 (D. Ariz) (October 6,

¹⁰⁰ *Twin Books Corp v. Walt Disney Col.*, 83 F.3d 1162, 1164.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴¹⁰⁵ *Id* at 1165 referring to 17 U.S.C. 9, 10, 19 (superseded 1978).

¹⁰⁵ *Id* at 1166 citing *Nimmer on Copyright* § 7.02(C)(1).

¹⁰⁶ *Id* at 1166.

¹⁰⁷ *Id* at 1165-6.

¹⁰⁸ *Id* at 1167.

¹⁰⁹ *Id.*

¹¹⁰ *Id* at 1167.

¹¹¹ *Id* at 1167,

2006). At dispute were works of art created by Pierre-Auguste Renoir. Among the issues was the question of “determining the appropriate copyright term for the works.” The works in question were sculptures created between 1913 and 1917 by Renoir and Richard Guino. The sculptures were published in 1917 in France as works by Renoir, and then published as Renoir-Guino works in 1974, again in Paris. The court did not use the 1974 French publication because there had not been notice. The works were then published in 1983, and registered with the Copyright Office in 1984.

The question the court was faced with was whether the works were considered unpublished, and therefore gained protection in the U.S. through Section 303(a) or whether Section 104A applied. Here again was a foreign work that did not comply with the U.S. copyright formalities. Was it therefore an unpublished work? Was it considered improperly published, and therefore in the public domain? Was it considered under copyright in the source country, and qualified to be “restored” under Section 104A? The answer would make the duration of copyright quite different.

The court turned to *Twin Books*, controlling law in the Ninth Circuit: “The Ninth Circuit has held “that publication without a copyright notice in a foreign country [does] not put the work in the public domain in the United States.”¹¹² The court went to follow *Twin Books*, but not before criticizing it.¹¹³ First, the court found that the *Twin Books* court had misread *Heim*. *Heim* really stood for the “rule that foreign publication without a copyright notice can commence the term of an American copyright, not the rule that foreign publication cannot place a work in the public domain in the United States, which the Ninth Circuit adopted in *Twin Books*. ”¹¹⁴ The court explained that the proper reading means that formalities are waived for foreign works; the *Twin Books* reading means the copyright term does not begin for a foreign work until proper copyright notice is affixed.¹¹⁵ The court then followed the reasoning of *Twin Books* to its logical conclusion, namely that foreign works created before January 1, 1978 and published with improper or no copyright notice would be considered unpublished, and therefore would be protected by Section 303(a). These foreign works, because they were not considered published in the U.S. (and then in the public domain because, for instance, because of lack of formalities), would not be eligible for Section 104A. Thus, the court saw the *Twin Books* decision as limiting Section 104A with regard to foreign works. Not all foreign works would be eligible for 95 years from publication.

I would argue, however, that the court overlooked an important element. *Twin Books* actually makes what is included under copyright far more expansive. Under Section 104A, only foreign works published after 1922 are eligible. In contrast, *any* foreign work that was published without copyright notice or with improper copyright notice would be eligible for additional protection of life of the author, or until December 31, 2002, and if the work was published (1976 definition of published) for the first time between 1978 and 2002, then the work would be granted protection through December 31, 2047. But the court never took into account that the works had been first published as Renoir-Guino works in 1983 and registered in 1984, qualifying for additional protection through December 31, 2047.¹¹⁶ The court ended up applying Section 303(a) to determine the duration of the sculptures, because they were created between 1913 and 1917. The court did not get the law right on Section 303(a), only applying the “life of the author plus seventy years” to the last surviving author. Rather, the court should have determined whether the 1983 publication counted as “published” under the 1976 Act, and if so, then the sculptures would have received additional protection through December 31, 2047.

Application to *Verses of a V.A.D.*

¹¹² 414 F. Supp. 2d 944, 948 quoting *Twin Books* at 1167.

¹¹³ *Id.* at 949.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Copyright Records Search for SOCIETE CIVILE SUCCESSION RICHARD GUINO, <http://www.loc.gov/cgi-bin/formprocessor/copyright/locis.pl>

Verses of a V.A.D. were published in the UK in 1918. At the time, the Chase Act and a British/UK Treaty had been put in place not long before that, which allowed UK authors copyright protection of their work, as long as they met the formality and manufacturing requirements under the 1909 Act.¹¹⁷ So, the first question to ask was whether the slim volume of poems was every protected by U.S. copyright law? The answer appears to be no. In this case, the work was considered in the public domain *in the U.S.* from its time of publication in the UK, regardless of the 1923 date, because Brittain had not met the publication and formalities requirements needed for copyright protection in the US. The poems were in the public domain in the U.S. since 1918, or were they? Are they still?

The question then is whether Vera Brittain's collection of poems had enough formalities required under the 1909 Act to be considered a foreign publication, and if *Verses of a V.A.D.* did not, then it seems that according to *Twin Books*, the collection would be considered *unpublished*. As we saw with the Renior Guino sculptures, this potentially brings in Section 303(a). If *Verses of a V.A.D.* did not meet the formality requirements, then under *Twin Books*, the work would be unpublished, and therefore, eligible for an additional term of protection through December 31, 2047. So, as I write this, I wait for my interlibrary loan copy of *Verses of a V.A.D.* to arrive to see if it met the proper formalities of copyright notice, to see whether the small collection is actually considered a publication under U.S. copyright law or if it remained unpublished.

When the title and copyright pages come over the fax, I am surprised. The archivist at McMaster, where Vera Brittain's papers are housed, has sent me a copy of the title page Brittain had actually inscribed to her future husband. This was the famous book of verses that had started her relationship with George Catlin, a man who brought her into the future, after all of that devastation, a man she would have her children with, and a man who would always feel in the shadows of her first wartime love, Roland. But that was not the point of this exercise. What would the faxed pages reveal?

The work was published by Erskine MacDonald (listed on the title page), and on the following page, we find "All rights reserved. First published August 1918." Does this count for U.S. Copyright? The formalities in the U.S. required under 1909 was revised to consist of the word "Copyright," or the abbreviation "Copr.," accompanied by the name of the copyright proprietor. The date of first publication was required for printed literary, musical, or dramatic works.¹¹⁸ Paul Goldstein, however, notes "Judicial decisions under the 1909 Act and the text of the 1976 Copyright Act, had successively liberalized the copyright notice requirement by relaxing rules on the prescribed form, content, and position of copyright notice, and by providing more generous excuses for errors or omissions."¹¹⁹ Goldstein also notes, "Unlike the 1976 Copyright Act, which made the notice requirement apply whenever a work was published inside or outside the United States with the authority of the copyright owner, the 1909 Copyright Act left open the question whether notice had to be affixed to copies of works first published outside the United States."¹²⁰ Which, brings U.S. back to the *Twin Books* case. Would the above be considered sufficient, and therefore "published" under U.S. law, or insufficient, and therefore, *Twin Books* would apply?

If the work was considered published, then the work would have automatically fallen into the public domain in 1918, because the work did not meet the notice, deposit or manufacturing requirements under the 1909 Act. It would also mean that it would not meet the qualifications for Section 104A, because it was published before 1923. So, the work would have been in the public domain continuously since 1918.

¹¹⁷ International Copyright Act of 1891, 26 Stat. 1106.

¹¹⁸ "The formalities of notice, deposit, and registration, as well as requirements of American manufacture of English-language books, periodicals, photoengravings, lithographs, and most illustrations embodied in books, were retained and made even more onerous [under the 1909 Act]." 1 Patry on Copyright § 1:45.

¹¹⁹ PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT, 5.1.1.3.(B)(1)

¹²⁰ PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT, 5.1.1.3.(B)(1)

Why, you wonder, would this make a difference?

The Imperial War Museum reissued *Verses of a V.A.D.* in 1995 with a new introduction by Mark Bostridge and Paul Berry, the authors of her authorized biography.¹²¹ The new introduction is now under copyright in the US, and under the duration rules for joint authorship, protected seventy years after the death of Mark Bostridge, as Berry died in 1999, and Bostridge is still living. Before this article, I would have confidently written, “But the poems, even though they have been reissued, are not protected by the new copyright, giving me the opportunity to include one of my favorites right here, as long, of course, if this work is published in the US.” Now, was *Verses of a V.A.D.* considered published (and therefore in the public domain) or unpublished? If *Verses* was considered unpublished, the first publication would have been the IWM reissuing in 1995 and so still under copyright until 2048, at least in the Ninth Circuit.

So, I am not sure if the following poem is free to use because it is in the public domain or under copyright through December 31, 2047. In August 1915, Vera wrote the poem, ”Pancras Station, August 1915”

One long, sweet kiss pressed close upon my lips,
One moment’s rest on your swift-beating heart,
And all was over, for the hour had come
For us to part

A sudden forward motion of the train
The World grew dark although the sun still shone
One last blurred look through aching tear-dimmed eyes—
And you were gone¹²².

This would be their third and final kiss, as it would be the last time Vera would see Roland. Here was young love in war. If they had not kissed on that leave in August, would she have been so moved and connected by the war? Would she have gone on to be a dominant voice of the war generation? For it was this weekend that they had secretly become engaged, and in many ways, intensified their relationship to a new level. In telling the story of the making of the war generation (the current title of my manuscript), this poem, in some ways becomes a key identity point for Vera, and therefore, for the concept of the war generation, as her work so fundamentally shapes the memory of war with her memoir *Testament of Youth*. Could I use this poem without permission from Mark Bostridge, the current literary executor? I now wasn’t sure.

The diary entry of that day, however, remains under copyright in the U.S. through December 31, 2047.

Now Edward (her brother who also went the front) and Roland are gone. There seemed to be nothing left, for I felt that Roland was taking with him all my future, and Edward all my past.¹²³

Here was a typical copyright scenario a scholar faces. The diary entry for the day is under copyright; the poem written about that day may have always been in the public domain in the U.S. or it may now be protected through December 31, 2047.

B. *Twin Books and The Poems of the War and After* (1934)

¹²¹ Verses of a V.A.D and other war poems / by Vera Brittain ; with a new introduction by Paul Berry and Mark Bostridge, London : Imperial War Museum, Dept. of Printed Books, 1995.

¹²² Vera Brittain, *Verses of a V.A.D.*, London: Erskine MacDonald, LTD., 1918), 16.

¹²³ Alan Biship, ed. Vera Brittain’s *Chronicle of Youth*, August 23, 1915, 259.

Twin Books could change, not only the copyright status of the poems included in *Verses of a V.A.D.* (1918), but also the poems currently under copyright in *The Poems of the War and After* (1934). As already discussed, *The Poems of the War and After* (1934) was registered in the U.S. in 1934, but not renewed. It was then restored by Section 104A.

The registration record for both the ad interim registration for the UK version and the subsequent registration for the U.S. version both disclaimed poems previously published in *Verses of a V.A.D.*: “Includes poems from Author’s ‘Verses of a V.A.D.’”¹²⁴ Vera Brittain expected that the previous published poems were not covered by the 1934 copyright. In this case, they were in the public domain in the US. Only the new works would be covered by the U.S. copyright term. So, the previous poem about kissing at the train station would not be covered, but *Hospital Sanctuary*, would.

Vera would serve as a V.A.D. nurse in London, Malta, and France. Malta would turn to be her place of healing. We know this from her diary, but it is most elegantly described in her poem, *Hospital Sanctuary*, written September 1918.

When you have lost your all in a world’s upheaval,
Suffered and prayed, and found your prayers were in vain,
When love is dead and hope has no renewal—
These need you still; come back to them again.

When the sad days bring you the loss of all ambition
And pride is gone that gave you strength to bear
When dreams are shattered, and broken in all decision—
Turn you to those, dependent on your care

They too have fathomed the depths of human anguish,
Seen all that counted flung like chaff away;
The dim abodes of pain wherein they languish
Offer that peace for which at last you pray.

None of her other writings quite capture the place of nursing for her as personal healing in quite the same way. I quoted this poem (in my undergraduate honors thesis, no less, from 1991) and referenced Brittain’s *The Poems of the War and After*, not *Verses of a V.A.D.*.

As we have already recognized, this poem is still under copyright because of Section 104A. It had gone out of copyright in the U.S. after its first 28 year term, in 1962, and then it was pulled from the public domain and put back under copyright in 1996. It will not be under copyright until 2029.

The question *Twin Books* presents, however, concerns the first poem. If *Verses of a V.A.D.* does not count as a publication, *The Poems of the War and After* would. Therefore, even though Vera Brittain disclaimed *Verses of a V.A.D.* in the registration, if *Verses of a V.A.D.* was found to be unpublished because of improper copyright notice, then the first published edition of many of the poems, according to *Twin Books*, would be the 1934 edition.

What does this mean if *Twin Books* applied? First, all of the poems included in *The Poems of the War and After* would be under copyright until 2029, and this includes some poems from *Verses of a V.A.D.*. Second, the 1995 IWM reissue of *Verses of a V.A.D.* would only count for determining copyright duration with regard poems not included in *The Poems of the War and After* and the reprint of the preface

¹²⁴ #6050 and #7394, Catalog of Copyright Entries for 1934.

and introduction from the original 1918 version, which was not included in the 1934 collection. Therefore, Marie Conner Leighton's remarks about her son Roland and the young love with Vera would be protected through December 31, 2047. The collection also includes additional poems, which if considered published for the first time, would also be protected through December 31, 2047.

So, to recap, *Verses of a V.A.D.*, published in 1918, may be out of copyright in the U.S. (because it was published before 1923) if the work contained proper copyright notice. The question to investigate is whether "All rights reserved" on one page and the date on another sufficiently counts as notice. If there was no copyright notice, then the work may be considered unpublished. However, some of the poems were then first published as part of a collection in 1934. The remaining poems would have had the opportunity for additional term of protection, if it was first published between 1978 and 2002. It would then carry a copyright through 2047. The copyright was not restored in 1996 (because it is before 1923). The poems that were reprinted in the 1934 edition are either 1) in the public domain because there had been proper copyright notice on the original 1918 version; or 2) this was considered the first publication of the 1918 poems, and therefore is governed by the 1934 date.

And so the answer to whether *Verses of a V.A.D.* is in the public domain? I am just not yet sure. I knew it was going to be hard question, but I didn't realize it was going to be this complicated.

Figure 5 Poems from *Verses of a V.A.D.* – expiration date with and without application of *Twin Books*.

POEM TITLE	VERSES OF A V.A.D. (1918)	POEMS OF THE WAR AND AFTER (1934)	US DATE OF COPYRIGHT EXPIRATION TRADITIONAL DATE/ IF <i>TWIN BOOKS</i> APPLIES TO <i>VERSES</i>
AUGUST 1914	X	X	1918/2029
ST. PANCRAS STATIONS	X		1918/2047
TO A FALLEN IDOL	X		1918/2047
TO MONSEIGNEUR	X	X	1918/2029
THE ONLY SON	X		1918/2047
PERHAPS--	X	X	1918/2029
A MILITARY HOSPITAL	X	X	1918/2029
LOOKING WESTWARD	X	X	1918/2029
THEN AND NOW	X	X	1918/2029
MAY MORNING	X	X	1918/2029
THE TWO TRAVELLERS	X	X	1918/2029

ROUNDEL	X	X	1918/2029
THE SISTERS BURIED AT LEMNOS	X	X	1918/2029
IN MEMORIAM: G.R.Y.T.	X	X	1918/2029
A PARTING WORD	X	X	1918/2029
TO MY BROTHER	X	X	1918/2029
SIC TRANSIT--	X	X	1918/2029
TO THEM	X	X	1918/2029
OXFORD REVISITED	X		1918/2047
THAT WHICH REMAINETH	X		1918/2047
THE GERMAN WARD	X	X	1918/2029
THE TROOP-TRAIN	X	X	1918/2029
TO MY WARD-SISTER	X	X	1918/2029
“VENGEANCE IS MINE”	X		1918/2047
WAR	X	X	1918/2029
THE LAST POST	X		1918/2047
THE ASPIRANT	X	X	1918/2029
FORWARD BY MARIE CONNER LEIGHTON	X		1918/2047

PART V: CONCLUSION

Vera Brittain published over forty books, along with hundreds of journal articles. This exercise has been incredibly enlightening. Not only was it complex to determine when individual works come into the public domain, but at the end of the exercise, there are still uncertainties. Moreover, we have not discussed any of her journal articles, lectures, photographs, and other works housed at McMaster University as part of her Papers. We saw that for works only published in the UK and NOT in the US, with proper copyright notice at the time, these works are protected in the U.S. for 95 years from

publication.¹²⁵ For works published in the U.S. and not renewed, these works would have been in the public domain, but have now been restored, also for a period of 95 years from publication.¹²⁶ They may have enjoyed a brief period of time when they were in the public domain. For instance, for *Testament of Youth* (1933), the initial term expired at the end of 1961, and was in the public domain until January 1, 1996. *Testament of Friendship* (1940) was also in the public domain from 1969-1996 as was *The Poems of the War and After* (1934), from 1963 to 1996. But, they are once again under copyright in the US. We also saw that her UK works published with proper copyright notice after 1957 were automatically protected in the U.S. for twenty-eight years, then went into the public domain because of lack of registration/renewal, and then came back under copyright for a term of 95 years from publication. And for works that may not have had proper copyright notice, like *Verses of a V.A.D.*, these works might either be out of copyright (because it was published in the UK in 1918), or perhaps is considered unpublished (if *Twin Books* applies to foreign works, including published in English), and then would be under copyright through December 31, 2047 because it was “published” for the first time in 1995.

This is just too complicated. A copyright duration tool is needed that would help individuals sort out the complexities of duration, if this is even at all possible. Together with my research assistants, we are trying to design such a tool, and we hope to have a version of the program ready by the end of the summer. We hope to have it cover not only U.S. domestic law (including foreign works), but also have an international component as well. Perhaps, then, I will have a more simple way of answering the emailer’s question about Vera Brittain’s poems.

What a strange world we live in. Who would have thought that copyright duration would be a rollercoaster of thrills—of highs and lows, but it is. It is hard to believe that *Testament of Youth* was in the public domain from 1961 to 1996. The whole exercise, which I really thought would only take a few hours—maybe a few days—has left me exhausted after weeks or work, including tracking down a copy of the Catalog of Copyright Entries. And so, what does this careful analysis of duration tell us? Sometimes there are potentially really important and hidden gems that have come into the public domain—which seems to be the case with a number of Vera Brittain’s important works, at least if Section 104A had not “restored” their copyright. And Section 104(a) allows many unpublished gems to come into the U.S. public domain, long before they will be available in the UK. Moreover, before 1978, these works would never have come into the public domain, so this change brought about by Section 303(a) is a great boon to the public domain. This paper has also turned out to show the complexity of both determining copyright duration, as well as the great span of time one author’s published works can be under copyright. From some are in the public domain in the U.S. right now to others; be under copyright until 2064.

POSTSCRIPT

This piece was originally being written for the European Intellectual Property review, as a follow-up to a talk I gave at Queen Mary on comparisons between the U.S. and UK transition of unpublished works into a limited statutory scheme. But as I adopted the narrative of wanting to tell the story of Vera Brittain as a demonstration of the law in action, I realized that I would need to gain permission in the UK for many of the works, while I would not in the US, as that was what the piece was all about—making smart choices as a scholar. But in case that I did publish in the UK, or decided to use copyrighted materials in the US, I decided to contact the literary executor, who is now Mark Bostridge, (the co-editor of the IWM reprint of *Verses of a V.A.D.* and *Letters from a Lost Generation*, as well as one of the co-authors on her authorized biography.) I also thought he might be able to shed some light on the

¹²⁵ This includes *Women’s Work in Modern England* (1928), *Letters to a Friend* (1937), *Search After Sunrise* (1951), *Lady into Woman* (1953), *Pethick-Lawrence, A Portrait* (1963)

¹²⁶ [JANE: I’m not sure about *Seed of Chaos* (1944), *Long Shadows* (1958), *Selected Letters of Winifred Holtby and Vera Brittain* (1960)] This includes *Valliant Pilgrim* (1950), *The Women at Oxford* (1960)

publication and copyright history, particularly with *Testament of Youth*, which as discussed above went out of copyright in 1961 and then back into copyright in 1996, but only after numerous versions had come out, both in the U.S. and the UK. His response was polite, but that I would have to wait until late August to ask any questions. So, we will see what I learn, and of course, if permission will be granted if this piece is ultimately destined for a UK, or even now a U.S. publication. Otherwise, I will rely on a combination of works in the public domain and fair use.