

Robert Spoo
Doerner, Saunders, Daniel & Anderson, LLP
320 South Boston Avenue, Suite 500
Tulsa, Oklahoma 74103 USA
Phone: (918) 591-5328; email: rspoo@dnda.com
Published in Joyce Studies 2004 (The National Library of Ireland)

THREE MYTHS FOR AGING COPYRIGHTS: TITHONUS, DORIAN GRAY, ULYSSES

I ask'd thee, "Give me immortality."
Then didst thou grant mine asking with a smile,
Like wealthy men who care not how they give.
But thy strong Hours indignant work'd their wills,
And beat me down and marr'd and wasted me,
And tho' they could not end me, left me maim'd
To dwell in presence of immortal youth,
Immortal age beside immortal youth,
And all I was, in ashes.

Alfred Lord Tennyson, "Tithonus"¹

Not one blossom of his loveliness would ever fade. Not one pulse of his life would ever weaken. Like the gods of the Greeks, he would be strong, and fleet, and joyous. What did it matter what happened to the coloured image on the canvas? He would be safe. That was everything.

Oscar Wilde, *The Picture of Dorian Gray*²

Old age hath yet his honor and his toil;
Death closes all; but something ere the end,
Some work of noble note, may yet be done,
Not unbecoming men that strove with Gods.

Alfred Lord Tennyson, "Ulysses"³

Copyrights have the capacity to grow exceedingly old. Indeed, they have no other choice. Legislators in Europe and the United States, citing the imperatives of international harmonization and the needs of authors' children and grandchildren,⁴ have seen fit to pass laws that endow all copyrights with a spectacular longevity. Whereas a copyright under Great Britain's Statute of Anne of 1710,⁵ or under the first national copyright act in the United States in 1790,⁶ endured for a term of fourteen years from the date of first publication, with a possible further term of fourteen years, today a copyright

in the European Union⁷ and the United States⁸ lasts from the moment the work is created until seventy years after its author's death. This means that if a writer completes her first novel at the age of thirty and lives to be eighty, that novel will automatically enjoy a total copyright term of 120 years, with no requirement that the author or her heirs renew or otherwise maintain the copyright along the way. In the United States, different rules apply to certain categories of works. For example, corporate-owned works as well as older works published before 1978 have recently been granted an enhanced copyright term of 95 years from the date of first publication, again without any maintenance requirements.⁹

The result of all this legislative largess is compulsory old age for copyrights. The rallying cry for the past twenty-five years has been "More Rights for Copyright Owners!" Now that we have entered the digital millennium, and every computer-owner has the ability to reproduce and disseminate copies of works anywhere in the world at the stroke of a key, the rhetoric of "thick" rights for copyright owners seems scarcely to require justification.¹⁰ That copyrighted works are imperiled by a villainous user culture is now virtually unquestioned dogma, and lawmakers have responded with an unquestioning chivalry. Yet, despite all this hum and buzz of rights talk, no one has ever thought to ask an aging copyright if it wished to go on living as a copyright. (The distinction between a copyright and the work it protects will become clearer in a moment. Although this essay explores the effects of aging on copyrights, it is equally focused on the quality of life of the works protected by those copyrights.) I suspect that if such a question could be put to many octogenarian and nonagenarian copyrights, they would answer, in the manner of the decrepit Sybil when she was teased by the children at Cumae: "I wish to die."¹¹

If we really wanted to know the wishes of a copyright, we would have to consult the views of the public, for the purpose of copyrights lies in “the general benefits derived by the public from the labors of authors,” and copyright law “must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”¹² But the public is largely silent on this subject; the consequences of copyright legislation impinge so lightly on each individual member of society that only a comparatively few motivated persons ever take the trouble to voice a dissenting view. The fallout from extended copyrights settles upon each of us like a fine, invisible dust. As with a penny sales tax, a copyright has no weight on the scale of our daily needs and wants. It is society, not its individual members, that experiences the cumulative effects of long copyright terms, and “society” as such has neither voice nor vote. Political economists call this a problem of “public choice”: in contrast to organized special interests that clamor for thicker proprietary rights, the typical citizen knows little about the role of copyrights in society and perceives no immediate, personal benefit from any change that might be wrought in the laws of intellectual property.¹³

As an exercise in awareness, it would be interesting to think of copyrights as living creatures inhabiting time, keenly conscious of the long life dictated for them by forces beyond their control. By such a trick of personification, we might begin to understand the problem of aging copyrights, for copyrights indeed have an organic aspect that varies according to the length of protection they provide, the nature and qualities of the works they protect, and the behavior of copyright owners. Adding allegory to personification, I propose to imagine copyrights under three figures drawn from myth and literature: Tithonus, Dorian Gray, and Ulysses. Along the way, I will have occasion to

discuss the copyrights in the works of James Joyce—in particular, *Ulysses*—which offer a vivid illustration of the problem of aging copyrights in a changing culture.

The ancient myth of Tithonus presents the spectacle of immortality made subject to time. Eos, goddess of the dawn, carried off the mortal, Tithonus, and made him her lover. She then asked Zeus to give Tithonus immortality, but neglected to ask that he be made ageless as well. With the ruthless obligingness reserved for hasty petitioners, the gods granted Eos the letter of her wish, but no more. Tithonus remained with her in the realms of the east, but grew so old and feeble that, according to one version of the story, Eos had him shut up in a room behind heavy brazen doors, so that she would not have to hear his foolish chattering.¹⁴ Tennyson gives us a Tithonus in thoughtful, articulate despair over his predicament, longing to put off “cruel immortality” and to be restored to the condition of “happy men that have the power to die.”¹⁵ The poem is the immortal mortal’s frightened prayer for euthanasia to Eos, who, as Tithonus well knows, is helpless to alter what her own wish set in motion: ““The Gods themselves cannot recall their gifts.””¹⁶

Most modern copyrights face Tithonus’ predicament. Few works ever have more than a brief shelf life; it is only the rare work, such as *Ulysses* or *A Portrait of the Artist as a Young Man*, that achieves a lasting fame. The vast majority of intellectual creations are destined for unremarkable and unmarketable obscurity, remaining of interest, if at all, to a handful of scholars, antiquarians, or persons with special tastes. Yet under our present laws, all such homely works are protected indiscriminately by extravagantly long copyrights from the moment of their creation, or, in the jargon of copyright lawyers, when they are “‘fixed’ in a tangible medium of expression.”¹⁷ Forgotten by the public, of

no economic value to publishers or even to their authors or their authors' heirs, these aging works nevertheless remain tightly wrapped in the comparative immortality of copyright, "[a] white-hair'd shadow roaming like a dream / The ever silent spaces of the East."¹⁸

It is no ordinary death for which an enfeebled copyright wishes. Rather, it longs for the afterlife of the public domain, where, in contrast to the limited goals and perspectives of its owner, numberless users are free to rejuvenate the formerly copyrighted work by ferreting out the work's potential for new editions, adaptations, performances, and other transformative uses. When a work enters the public domain, its status as property vanishes, along with its aura of untouchability. It becomes available for unfettered exploitation by anyone who cares to take the trouble. Until that time, however, even a copyrighted work that has been out of print for sixty years will seem off-limits to potential users. And if an aspiring user does make an effort to seek permission for reprinting or adapting the old work, its copyright owner may be impossible to locate,¹⁹ or, if found, may prove difficult or uncomprehending.²⁰ Publishers typically will not proceed with a project until all rights are cleared and all rights-holders pacified.²¹ The result is copyright gridlock, a paralysis of creative energies. For the most part, aging copyrights serve little purpose other than to endow many ordinary creations, like *Tithonus*, with a cruel immortality that benefits neither copyright owners nor the public.

There was a time when copyright law, in the United States at least, had a wiser policy for caring for its elderly. Prior to 1978, publication was the significant event in a copyright's life. When a work was published in the United States with a proper copyright notice, federal protection began and continued for a modest term of twenty-eight years.²²

In the last year of that term, the author or copyright proprietor, if he or she desired a further twenty-eight years of protection, was required to “renew” the copyright by completing some paperwork and filing it with the Copyright Office in Washington, D.C.²³ If these formalities were not observed, the copyright would automatically terminate at the end of its first term, and the work would pass into the public domain at the youthful age of twenty-eight. This system had its flaws, of course. Sometimes, a copyright owner would bungle the paperwork or miss a deadline and be forced to pay the penalty of relinquishing the work to the public. When the United States joined the international Berne Convention in 1989, a condition of its membership was that it do away with or modify many U.S. copyright formalities. As a result, American copyright law, with a few exceptions, abolished the renewal requirement.²⁴ Henceforth, with respect to every kind of work, copyright protection would arise not upon publication, but at the moment of creation, and would last for a lengthy, unbroken term running from the death of the author into the far reaches of the future.

Abandoning the old bisected copyright term and the law’s renewal requirement was a bad idea, no matter how much it may have helped the United States become a more acceptable partner in international copyright relations. The act of renewing a copyright meant that its owner cared enough about the property right to go through the modest formalities required by the Copyright Act. It is surprising how few copyright owners ever took the trouble. Several decades ago, the U.S. Copyright Office conducted a study of original registrations of copyrights made during the fiscal year 1927, matching those registrations with their corresponding renewals filed twenty-seven years later, during the fiscal year 1954.²⁵ Original registrations for all classes of works totaled 180,864;

renewals totaled 17,304.²⁶ This means that owners of statutory copyrights acquired in the year that Charles Lindbergh flew the Atlantic in a one-motor airplane renewed a startling 9.5%²⁷ of those copyrights in the year that the long-range, heavy bomber B-52 Stratofortress had its first flight.

While some small percentage of those non-renewals no doubt resulted from inadvertent technical lapses, a very large number of copyright owners simply did not find it worth their while to renew copyright claims for works that held no economic or other significance for them. When it is added that the highest percentage of renewals in 1954 were in the categories of “published music” (45%) and “motion picture photoplays” (43.7%),²⁸ it becomes clear that the vast majority of traditional literary and dramatic works—books, stories, plays, and the like—were simply allowed to enter the public domain at the end of twenty-eight years, the same total term of protection that the earliest legislation in Britain and the United States had conferred upon creations of the intellect. The renewal requirement thus served as a valuable clearinghouse for unwanted copyrights, sweeping into the cultural commons vast quantities of works that no longer needed the protections of a legal monopoly. Essentially a mechanism for allocating resources to their highest and best use, the renewal formality permitted the diverse, undisciplined creativity of the public to go to work on previously neglected works whose transformative potential their owners had failed to recognize or exploit. And it allowed the public to do this decades in advance of what otherwise would have been the expiration of copyright protection.

Although the present scope of copyright law covers a much broader array of works than in the past, and digital technologies may have increased the shelf life of some

works,²⁹ there is no reason to believe that today's copyright owners would be much more diligent in renewing copyrights in unprofitable works than copyright owners were in 1954. What *has* changed since 1954 is that all these works which were formerly allowed to go betimes into the good night of the public domain, are now condemned to a lengthy term of mandatory protection from which there is no reprieve. Just as the immortal Tithonus, growing weaker and more useless with each dawn, longed to be restored to “the ground,” to the “grassy barrows of the happier dead,”³⁰ so these aging copyrights yearn for union with the good earth of the public domain, where at worst they will sink into a dignified obscurity and at best may attract the energies of individuals who perceive a potential for new, more vital uses—uses which may in turn generate new, more vital copyrights. What the Copyright Clause of the United States Constitution refers to as “the progress of Science”³¹ (that is, the spread of general learning) depends crucially on the smooth functioning of this cultural ecosystem. While it lasted, the renewal system played an important role in administering a kind of public-spirited hemlock to Tithonus-like copyrights.

Law professor and legal activist Lawrence Lessig, who has been a leading advocate for thinner intellectual-property rights and a correspondingly more robust cultural commons, has urged that U.S. copyright law return to a modified version of the copyright renewal system. His proposal, which last year was introduced in Congress as a bill entitled the “Public Domain Enhancement Act,” would require every copyright holder to pay a one-dollar “maintenance fee” fifty years after the first publication of a work, and every ten years thereafter until the end of the work's copyright term. As the draft of the Act explains:

the existing copyright system functions contrary to the intent of the Framers of the Constitution in adopting the copyright clause and the intent of Congress in enacting the Copyright Act. Neither is intended to deprive the public of works when there is no commercial or copyright purpose behind their continued protection. It is, therefore, necessary to establish a mechanism by which abandoned American copyrights can enter the public domain.³²

In effect, the Public Domain Enhancement Act proposes to solve the problem of Tithonus by reintroducing a user-friendly version of the renewal system, thus giving legislators what the gods themselves lacked: the power to recall their improvident gift of immortality.

There is something melancholy about this vast uncultivated field of abandoned copyrights, each one forgotten or neglected by the necessarily limited vision of its single owner when it might be turned over to the many-eyed resourcefulness of the public domain. We have only to think of the millions of feet of copyrighted celluloid that lie crumbling in public archives or private collections. “Of the tens or hundreds of thousands of movies made before 1950, fully fifty percent are irretrievably lost.”³³ The owners of many of the films that do survive have the expertise, interest, and funding to restore them, but, because copyrights in the films are held by others, the owners lack an economic incentive to restore what they know they would be prevented by law from exhibiting or selling to the public. And, conversely, “[e]ven if the copyright holder both knows and cares about the film, it cannot undertake restoration because it possesses no physical copy.”³⁴ This is a catch-22 of copyright law: a film owner without a copyright; a copyright holder without a film. As a Librarian of Congress Report put it, the consequence of all these multiple property interests and legal restrictions is that “[f]or

many of those seeking copies of films, archivists can look as if they are perversely saving films for a posterity that never quite arrives.”³⁵

It has been argued that longer copyrights are needed to provide the movie studios with incentives to restore the films they hold,³⁶ but the works in most urgent need of restoration are what are known as “orphan films”; numerically the majority of movies remaining in our film legacy, these neglected works include documentaries, newsreels, independent productions, sound films made by now defunct studios, and rare historic footage documenting daily life for ethnic minorities.³⁷ A compelling argument can be made for allowing these treasures to pass quickly into the cultural commons, where numberless potential researchers and investors would be free to search out the value—economic, historical, sentimental, hobbyist—of these deteriorating images of the early twentieth century. Who is to say that the public domain, with its great, heterogeneous complex of ideas and purposes, would not prove the better custodian of our cinematic legacy? If Tithonus has a direct counterpart in the world of intellectual property, it must be in the copyrighted silver-nitrate dust of these vanishing witnesses to a vanished culture.

Tithonus is one figure for conceptualizing the waste of overlong copyright protection. But not all copyrighted works are forgotten a few years after their birth. A few lucky works—a tiny fraction in comparison with the totality of cultural products—remain in print or available in some other medium for a few decades or more. In turn, a small subset of those works are the truly charmed creations—James Joyce’s writings, for example—which enjoy a celebrity commensurate with their copyright terms, or longer. For these happy few copyrights, a different allegory is needed, and it can be found in

Oscar Wilde's strange tale of youth miraculously preserved into middle age. *The Picture of Dorian Gray* offers a morbid variation on the fate of Tithonus. Where the handsome young man of the myth of the dawn received everlasting life without eternal youth, the naïve hero of Wilde's story prays for immortal youth but, under the influence of his aristocratic friend's decadent counsels, never thinks to ask for moral integrity to match.³⁸

Dorian Gray is the embodiment of fin-de-siècle art for art's sake: a beautiful design without ethical content. "They are the elect," wrote Wilde in the Preface to the novel, "to whom beautiful things mean only Beauty. There is no such thing as a moral or an immoral book. Books are well written, or badly written. That is all."³⁹ That it is a painted image of Dorian, instead of its flesh-and-blood subject, that undergoes the effects of aging and moral abandonment is a further Wildean twist on the notion of a perfectly amoral art. The portrait of the young Adonis, hidden away in an attic schoolroom, takes on all the outward and visible signs of Dorian's secret crimes and debaucheries. Yet all the while, London society sees only the perpetually youthful dandy with exquisite manners.

Whereas it is clear that copyright law confers on lesser, Tithonus-like works a wholly unnecessary and debilitating immortality, it might be thought that, conversely, the law is fully justified in bestowing such lavish protection on the comparatively few works that have proved their capacity for sustained popularity.⁴⁰ It has been argued that prolonging the copyright monopoly for works such as these is a good thing: the owner of a successful resource has incentives to maintain and cultivate that resource if there is an enforceable property right to justify investment.⁴¹ But the success of an aging copyright, like Dorian Gray's uncanny youth, is purchased at a dear price: a famous eighty-year-old

work might *appear* to have benefited from the youth-preserving effects of its copyright—one thinks, inevitably, of the ubiquitous merry demeanor of Mickey Mouse—but there are corruptions and deformations, carefully hidden away in the attic of our culture, that mar this perfect picture. The tale of Dorian Gray and his painted image captures this paradox of cultural monopoly perfectly. Like the handsome face of Dorian, the superficial triumphs of long copyrights tell only half the story. What is shielded from the public’s gaze, because withheld from the public domain, is the other side of copyright. As Wilde put it: “Beneath its purple pall, the face painted on the canvas could grow bestial, sodden, and unclean. What did it matter? No one could see it.”⁴²

The hidden corruption of a long-celebrated copyright manifests itself as an absence, a vacancy, an empty parenthesis of all the things that might have been, had that copyright not held them back from culture by permitting a sole monopolist to police for many decades the uses to which the work might be put. Stephen Dedalus in *Ulysses* imagines each event of history as having “ousted” an infinity of possibilities.⁴³ A century-long copyright is an ouster of historical possibilities, too; it mounts ghostly guard over a work and watches with satisfaction as hosts of phantom projects file by in sullen disappointment. As Dorian Gray wonders of the slowly decaying painted image of himself: “Was it to become a monstrous and loathsome thing, to be hidden away in a locked room, to be shut out from the sunlight that had so often touched to a brighter gold the waving wonder of its hair? The pity of it! The pity of it!”⁴⁴ Overlong copyrights inflict invisible losses; they put us mournfully in mind of the hidden might-have-beens of culture, the untested contenders, the possibilities surrendered by law so that an elderly copyright might retain superficial youth and beauty for a few more decades.

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Few holders of aging copyrights have been more publicly aggressive about policing their property than the Estate of James Joyce. Copyright in the Joyce Estate's hands has become more a sword than a shield, and the Estate appears now to be denying permissions almost upon principle and often on the ground of personal taste.⁴⁵ Not long ago, *The Irish Times* reported that the Estate had denied the request of a 23-year-old Irish composer, David Fennessy, to use eighteen words from *Finnegans Wake* in a short choral piece commissioned by Lyric FM for a Europe-wide broadcast. The *Times* quoted Mr. Stephen James Joyce, trustee of the Estate, as having written Fennessy that he and his wife simply did not like the composer's music. Fennessy was crushed and baffled: "I don't mind if they hate my music, but how can the personal taste of Stephen Joyce and his wife be thought the right criteria to use. . . . Now the whole thing is gone: it's not so much losing the commission fee, which I sorely needed, or the European broadcast. My piece can't ever exist because it can't be performed."⁴⁶

Around the same time, the news media reported that the Joyce Estate had demanded that the Edinburgh Festival's Fringe organizers cancel a cabaret show, *Molly Bloom, A Musical Dream*, in which a Molly figure, played by Anna Zapparoli, lay atop a grand piano serving as her bed and related her scandalous adventures. Zapparoli's adults-only reminiscences included the songs, "Rap of Spunk" and "Song of Sucking."⁴⁷ The Estate was quoted as objecting in particular to the treatment of Molly's soliloquy as if it were a circus act or a jazz improvisation.⁴⁸ The Fringe producers defended their right to use Joyce's text by invoking a U.K. copyright provision that grants a "license as of right" (or what is often called a "compulsory license") to anyone wishing to make use of a work

whose copyright was revived in 1996, as the Joyce copyrights were, by British legislation implementing the EU copyright-term Directive.⁴⁹ A spokesman stated that the Fringe “is one of the biggest platforms for free speech and it would be going against the spirit of it if we cancelled. We understand that the production is perfectly legal and the permission of the Joyce Estate is not needed so there is nothing we can, or would, do.”⁵⁰

The Estate evidently has no quarrel with the sexually explicit language that James Joyce incorporated into “Penelope,” the famous final episode of *Ulysses*; rather, it is various *adaptations* of the episode to which the Estate objects.⁵¹ According to *The Guardian/Observer*, Mr. Joyce contended that “Penelope” was not written for the stage or for performance, but rather is the final section of a “novel.”⁵² His remark suggests that the Estate seeks to protect Joyce’s works from being adulterated by the kinds of transformative insights that derivative works—as American copyright law calls them—can bring to even the greatest, most comprehensive masterpieces. The attempt by a copyright owner to use his exclusive derivative-work right (that is, the right to prepare adaptations of the copyrighted work) to enforce a kind of moral right is nothing new.⁵³ But the idea that *Ulysses* the “novel” (as Mr. Joyce called it) should remain faithfully confined to its own genre ignores the fact that *Ulysses* inhabits no such stable category in the first place, but instead owes much of its power as an avant-garde work to its refusal to become the product of anything except its own textual volatility. Tipsily based on Homer’s epic and Shakespeare’s tragedy, and incorporating catechisms, newspaper headlines, expressionist drama, literature anthologies, and a *fuga per canonem*, *Ulysses* is itself a derivative work *par excellence*, a full, unabashed confession that cultural borrowings, conscious and unconscious, make up the fabric of art and life.

As the boundary between scholarly and popular uses of Joyce's works becomes ever more hard to locate, the desire to celebrate *Ulysses* as part of shared, communal events increases. Each year, the Sixteenth of June, or "Bloomsday"—the day on which the fictional events of *Ulysses* take place—inspires extrovert acts of homage, imitation, and declamation. Friends gather in pubs to sing "Love's Old Sweet Song," "The Croppy Boy," and other melodies that Joyce wove into the larger symphony of *Ulysses*. Far and wide, people come together to read *Ulysses* or to hear it read, privately or in public; sometimes these readings are even broadcast over the radio or streamed over the Internet. It is hard to imagine anyone wanting to discourage such popular outpourings of love for a great book, but in recent years the Estate of James Joyce has opposed, among other events, a Bloomsday audio-webcast of an international reading of *Ulysses*, beginning in Melbourne and ending in Los Angeles. Encouraged by Irish government officials and sponsored by prominent Irish businesses, this global Internet reading was planned as a vehicle for promoting the nonprofit James Joyce Centre in Dublin. The Joyce Estate aggressively sought, and has in part accomplished, an embargo of these plans by brandishing the copyright it holds in *Ulysses*. The threat of copyright litigation can be formidable, and it has intimidated not a few Joyce scholars and enthusiasts.

In recent years, the Estate has gone beyond threats. In October 2000, the Irish High Court granted the Estate an interlocutory (preliminary) injunction preventing Cork University Press from publishing extracts of Danis Rose's Reader's Edition of *Ulysses* in an anthology entitled *Irish Writing in the Twentieth Century: A Reader* (2000). The publisher of this large and impressive volume had originally sought the Estate's permission to publish extracts from an earlier *Ulysses* edition, but when the Estate

insisted on a fee of £7000-7500 sterling for extracts from the 1922 Paris edition, the Press decided to go with the Rose edition instead, apparently believing that it could do so without the Estate's permission under Irish regulations protecting "third parties" who are affected by the revival of copyrights pursuant to the EU Directive.⁵⁴ The Irish High Court agreed with the Estate's contentions, however, and granted an injunction,⁵⁵ whereupon the Press decided to forgo further litigation and instead printed the anthology with the Joyce extracts neatly excised and a cardboard blank inserted bearing the notice: "Pages 323-346 have been removed due to a dispute in relation to copyright."

A similar mutilation mars the pages of *Fredson Bowers and the Irish Wolfhound*, a bibliographic study published in 2002 by the Irish scholar J.C.C. Mays. On page 71 of this monograph, Mays had planned to reproduce an elaborate diagram, hand-drawn by Joyce himself in a style evocative of the Book of Kells crossed with *Gray's Anatomy*, and intended by Joyce to elucidate the biological and evolutionary themes underlying the "Oxen of the Sun" episode of *Ulysses*.⁵⁶ But this was not to be. In place of Joyce's drawing, page 71 carries the following black-bordered notice:

The copyright-holder has refused permission to reproduce the chosen illustration and the reader must therefore consult either the original in London or a facsimile-transcription Meanwhile, visualize a sheet of paper containing nine enlarging ovals rising from the same base-point, drawn to represent the stages of foetal growth. Minutely-written gynaecological details are inserted at the apex of eight of the nine ovals. Surrounding the design, crowding in from each corner of the page, are words and phrases chosen to illustrate successive stages in the evolution of English prose.⁵⁷

The fact that copyright law does not prevent copyrighted works from being described offers little consolation to a reader deprived of Joyce's indispensable visual commentary on one of the most difficult episodes of *Ulysses*.

One reason why the Irish High Court was unwilling to let Cork University Press go forward with the extracts from the Danis Rose *Ulysses* was that separate litigation over the Rose edition had not yet concluded in Britain. In an independent lawsuit commenced in 1997, the Joyce Estate had sought an injunction to prevent publication by British Macmillan/Picador of Danis Rose's Reader's Edition of *Ulysses*, in part because of Mr. Joyce's well-publicized opposition to Rose's editorial methods and results. The Estate's allegations included copyright infringement, the unfair-competition tort of "passing off," and violation of James Joyce's moral rights, although the moral rights theory evidently dropped out at some later phase of the litigation.

After opening skirmishes in 1997, the Joyce Estate decided to pursue the matter directly at trial, whereupon publication of Rose's Reader's Edition went ahead as scheduled. In November 2001, after a full trial, Mr. Justice Lloyd of the English High Court, Chancery Division, ruled that the Reader's Edition had infringed the copyrights in certain manuscript materials published after Joyce's death—notably, what has become known as the Rosenbach manuscript.⁵⁸

Mr. Justice Lloyd's lengthy opinion addressed three principal issues: (1) Did the Reader's Edition infringe the copyright in any text of *Ulysses* published during Joyce's lifetime? (2) Did the Reader's Edition infringe the copyright in any work by Joyce published after his death? (3) Did the Reader's Edition constitute "passing off"—that is, was the Reader's Edition so different from the "class of goods" that is known to the reading and purchasing public as "*Ulysses* by James Joyce" that the Reader's Edition, as an instance of false labeling, substantially harmed the "goodwill" that the Joyce Estate had acquired in the "trade name" of "*Ulysses* by James Joyce"?

The court answered the first question in the negative. Pursuant to an EU copyright directive, lifetime editions of Joyce’s works enjoy “revived” copyright in the United Kingdom and the Republic of Ireland, and these resurrected rights are subject to statutory limitations that permit third parties to use or reproduce the works without permission in specified circumstances. Having begun the project of re-editing *Ulysses* prior to Britain’s target implementation date for EU-revived copyrights (1 July 1995), Rose and his publisher raised as a defense their position as “reliance parties,” that is, parties who had relied upon the then public-domain status of *Ulysses*, and who, therefore, under British law, cannot be held to have infringed.⁵⁹

But in an interpretation of the reliance-party exemptions that may have significant implications for U.K. copyright law, the High Court ruled that, because Rose had not actually *completed* his work on the Reader’s Edition prior to certain cutoff dates set by the British regulations (1 January or 1 July 1995, depending on the provision in question), and because he and Macmillan had not yet *concluded* a publishing contract by either of those dates, the reliance-party exemptions did not apply to the Reader’s Edition.⁶⁰

The court did rule, however, that *another* third-party exception—one that provides for a compulsory license for *any* use of a revived copyright in Britain—rescued Rose and Macmillan from being infringers of any lifetime edition of *Ulysses* (in particular, the 1922 text, which the court determined had been Rose’s primary source) and required only that Macmillan arrange for retroactive payment of a reasonable royalty to the Estate.

Mr. Justice Lloyd did find infringement, however. The third-party exceptions for use of revived copyrights do not apply to copyrights that were never revived because they

had never lapsed, such as those in the manuscript materials published in the *James Joyce Archive* in the 1970s. In an interpretive move that recalls the text-editing theory known as “versioning,” the court held that pre-publication versions of *Ulysses*, to the extent that they differ in some significant way from published versions of the text, constitute independent authorial “works” for purposes of copyright. The Court reasoned:

[I]f I am right in concluding that each successive stage of Joyce’s work on *Ulysses*, from the proto-drafts of particular sections, via the Rosenbach manuscript and the typescripts, to the various proofs, constituted a new copyright work, at any rate in all cases where there was any change beyond the purely minimal and insignificant, it follows that the only work that was published was the last-pre-publication version, namely the final approved page proofs including any amendments made by Joyce on them.

What U.S. federal Judge John M. Woolsey’s famous 1933 opinion in the *Ulysses* case was to the problem of obscenity law and avant-garde literary values, Mr. Justice Lloyd’s opinion is to the interplay of copyright and textual theory. Both jurists, with the assistance of counsel and expert testimony, sought to understand the bearing of complex *nonlegal* theories on the law and the literary phenomenon of *Ulysses*.⁶¹

According to Mr. Justice Lloyd, then, the Rosenbach manuscript, which the court used to test for infringement, enjoys its own U.K. copyright as a separate work of authorship. Concluding that Rose’s use of words and phrases drawn from the Rosenbach had been “substantial,” the court held that the Reader’s Edition infringed the copyright in the Rosenbach. Moreover, in a ruling that points up the some of the differences between British “fair dealing” and the generally more robust and elastic American doctrine of fair use, Mr. Justice Lloyd held that Rose’s emendations did not qualify as fair dealing, because they categorically had not been made for “the purposes of research, private study, criticism and review.” In short, Rose and Macmillan were infringers of the

copyright in that authorial “work” known as the Rosenbach manuscript—that heterogeneous assemblage of autograph pages which Joyce cobbled together over several years for sale to a collector, and which few scholars today would consider a “work” in any creative, organic sense. But copyright law has its own pragmatic needs and theoretical imperatives; and for legal purposes, the Rosenbach manuscript is a “work.”

Finally, Mr. Justice Lloyd held that sales of the Reader’s Edition did not constitute “passing off” of an inferior product under the trade name of “*Ulysses* by James Joyce.”⁶² To be subject to passing off, the court noted, *Ulysses* would have to constitute a “class of goods” sufficient to be identified in the public mind with certain characteristics conferring “goodwill,” or economic reputational value, on its present source, the Estate. When challenged to describe the characteristics defining this class of goods, counsel for the Estate tried to point to Joyce’s use of unconventional verbal forms, interior monologue, and other distinctive literary techniques. But how, persisted the court, can we know when a product such as the Reader’s Edition is or is not within the alleged class of goods? Counsel replied that any edition approved by James Joyce himself or subsequently by his Estate is within the class. The court dismissed out of hand this circular and self-serving definition, and rejected as well, for its “inherent uncertainty,” the suggestion that “the general body of academic opinion at any given time” could serve to define what is and what is not within the class of goods known as *Ulysses*.

Mr. Justice Lloyd noted that a conventional instance of passing off would be “selling lemon juice in a plastic lemon-shaped container which customers associate with a different manufacturer.” As one court commentator explained:

If someone went around selling copies of *Ulysses* that turned out to be John Grisham novels wrapped in the wrong dust-jacket, they might be liable. But while it could be argued (as many do) that Rose's isn't a good edition of *Ulysses*, you couldn't really say it wasn't *Ulysses* at all. And it is something, I suppose, to know that *Ulysses* doesn't fall into quite the same category as plastic lemons.⁶³

It is fortunate that the court denied this "passing off" claim. Such an elastic concept, if dignified by legal precedent, might strengthen the Estate's hand against any *Ulysses*-based project that it had not pre-approved, and, further, might be used by owners of revived copyrights to circumvent the various exemptions in favor of third-party users under British and Irish law. Courts are properly wary of attempts to add protections atop the already formidable copyright monopoly.

Recently, the United States Supreme Court articulated a similar discomfort with attempts to stretch what are essentially trademark concepts to fit the traditional subject matter of copyright law. In *Dastar v. Twentieth Century Fox Film Corp.*, a videotape producer, Dastar, released its own adapted version of an earlier television series about the Second World War which had fallen into the public domain when Fox, the owner of the copyright in the earlier series, failed to renew the copyright. Despite the public-domain status of Fox's series, Fox sued Dastar for marketing the series without crediting Fox as the creator of the copied public-domain footage, alleging that in doing so, Dastar had passed the footage off as its own, in violation of federal trademark law. The Supreme Court squarely held that federal trademark law's prohibition of passing off refers to unlawful uses of physical goods in commerce, not to expressive or communicative content, which is the province of copyright law.⁶⁴ The opinion of the Court, authored by Justice Scalia, reflects a healthy skepticism of efforts to use trademark as what he called "a species of mutant copyright law that limits the public's federal right to copy and to

use.”⁶⁵ Justice Scalia went on to envision a nightmarish regression of origins that such a legal theory would make possible:

A video of the MGM film *Carmen Jones*, after its copyright has expired, would presumably require attribution not just to MGM, but to Oscar Hammerstein II (who wrote the musical on which the film was based), to Georges Bizet (who wrote the opera on which the musical was based), and to Prosper Mérimée (who wrote the novel on which the opera was based). In many cases, figuring out who is in the line of “origin” would be no simple task.⁶⁶

The law, observed Justice Scalia, does not require a “search for the source of the Nile and all its tributaries.”⁶⁷ Imagine a requirement of that sort being applied to Joyce’s use of public-domain materials in *Ulysses*. The acknowledgments section alone would be practically as long as the text; and the Joyce Estate might years ago have found itself in trademark litigation with the Homer Estate (or Estates).⁶⁸

* * *

In remarks accompanying an interview with Medh Ruane over Irish radio, an intriguing justification was advanced for reprinting Joyce’s words without leave of the Joyce Estate: “James Joyce used the city of Dublin and Dublin people in his books, so the argument goes that the people should have a moral and cultural right to use James Joyce’s material in different ways.”⁶⁹ This is not the sort of argument that would carry much weight with a court, but it does point to some of the contradictions inherent in the private ownership of a public good like literature. *Ulysses* is a modern epic assembled from facts, personalities, and events in the Irish public domain; in that respect, it is not unreasonable for the Irish to view it as more immediately and intimately the property of the people than other works of the imagination might be, and to believe that they are entitled to continue the dialogue with Joyce that Joyce initiated with them. Joyce himself

conceded that he was a “scissors-and-paste” man, an adapter and arranger of what came freely to hand from the streets and pubs of Dublin.

In the ecology of copyright, a work like *Ulysses* has its creative origins in the raw materials of the public domain. With the sanction of law, the work comes under private control for a certain term, and, when the term has expired, the work returns to the public domain to enrich those raw materials and to spur the creation of new works. But excessively long copyright terms upset this ecological cycle. Today, more than sixty years after Joyce’s death and more than eighty years since its first publication, *Ulysses* has become part of the furniture of our cultural life; it has outgrown the state-supplied monopoly that technically allows private parties to restrict its dissemination and adaptation—just as James Joyce has outgrown the efforts of the Joyce Estate to shape his historical legacy according to the criteria of family privacy.

In its attempts to control Joyce’s image, the Estate has taken arms against the ungovernable sea of celebrity at precisely the moment when Joyce is truly becoming an icon of popular culture (as witness the explosion of dramatic and cinematic treatments of his life and works in recent years). With increasing frequency, Mr. Stephen James Joyce has appeared in the role of aggrieved plaintiff or outraged letter-writer seeking to contain history, to redirect the discourse of the public sphere, to re-fence the cultural commons. Armed with a few wasting copyrights and some sparse moral rights, and what personal authority he can command, Mr. Joyce tilts repeatedly at the academic and pop-culture windmills which, he feels, are rapidly making a commodity of a beloved family member.

Mr. Joyce’s efforts are not without a certain quixotic integrity, but their strangely antic and belated quality serves to remind us that, in the normal course of culture, the

protests of such an individual would not command much attention. But something has happened to the normal course of culture. Extremely long copyrights have given artificial voice and weight to the personal predilections of one who, in the absence of such rights, would be an ordinary participant in the life of art and letters like most of the rest of us. These protracted monopolies create, or permit, peculiar and unaccustomed distortions of the public sphere; they encourage attempts to re-privatize that space, to reclaim it in the interests of family privacy or personal taste. They allow a mere right-holder⁷⁰ to become a privileged and arbitrary custodian of culture. And all of this would be exactly as it should be were these monopolies confined to one generation or two. But to see this capricious veto power being exercised at a period so startlingly remote from the cultural and historical origins of the work in question is dispiriting. The phrase “the dead hand” comes irresistibly to mind, except that it is a living hand that is permitted to reach out to control the spontaneous choices of the public domain.

Normally, we do not think of a “classic” as something that can be owned; most of the masterworks we encounter have long resided in the public domain, either because their copyrights have expired or because they were produced before the advent of copyright statutes. But with copyrights now capable of enduring for more than a century, we can expect to see more works attain canonization in the public sphere while remaining subject to private control in the marketplace—unless such control handicaps the process of canonization in the first place. Therefore, it is a wholly understandable intuition that proclaims a “cultural right” to use *Ulysses* at this late date without permission, despite the fact that—fair use, fair dealing, and other exceptions aside—the law recognizes no “cultural” defense as such.

Because of the increasing length and scope of present-day copyrights, our cultural and historical relationship to *Ulysses* is quite different from Joyce's relationship to the works of his own literary heritage. The push for thicker proprietary rights tends to ignore, at the public's peril, the reality that all cultural production is to a large extent derivative, either in the specific copyright sense of adaptations or in the larger sense articulated by T.S. Eliot in his great essay, "Tradition and the Individual Talent," where he described the historical sense as compelling an author "to write not merely with his own generation in his bones, but with a feeling that the whole of the literature of Europe from Homer and within it the whole of the literature of his own country has a simultaneous existence and composes a simultaneous order."⁷¹ Nowadays, attempts to engage in either type of derivation can raise the specter of lawsuits and court injunctions; copyrights have grown so long that they play an unprecedented role in determining the availability of tradition to the individual talent. T.S. Eliot's relationship to the usable past of his own day is very different from the relationship of the present-day individual talent to Eliot; and much of that difference springs from the distortions introduced by overlong copyrights. It cannot be desirable that access to tradition is coming to resemble the operations of a tollbooth or the arbitrary admission policies of New York's Studio 54 during the 1970s.

And this is why aging copyrights for works like *Ulysses* can be likened to Dorian Gray, a superficial attractiveness hiding the disfigurements of creative stagnancy, monopoly pricing, absence of competition, and underproduction.⁷² Copyrights will continue to play a large role in our experience of *Ulysses* well into the twenty-first century in many parts of the world. In Britain and the Republic of Ireland, *Ulysses* will remain in copyright until the end of 2011. Nearly a century of legal protection can

scarcely be justified on any theory consistent with copyright's core pragmatic purpose of adding a dash of economic incentive to the other attractions of authorship.⁷³

Until the recent legislative changes, Anglo-American copyright law had the salutary effect of promoting the progress of culture—of which the public domain is an indispensable part—by granting authors exclusive rights, subject to *limited* times. A vibrant and growing public domain, which at the end of the day (or rather of the copyright) is entitled to recast Molly Bloom's monologue as tasteless cabaret entertainment or to edit Joyce's masterwork according to principles that some might find objectionable, promotes the robust health of culture, permitting individuals to be active, transformative users of authors' works, not mere passive consumers of products pre-approved by copyright owners. The public domain is the antithesis of an administered culture.

When *Ulysses* finally enters the public domain worldwide, we will witness, just as we did some years ago when copyrights in *Dubliners* and *A Portrait of the Artist as a Young Man* expired in the United States, an explosion of cheap reprints and new editions of Joyce's Irish epic.⁷⁴ We will also see uninhibited use of the work in streamed Internet performances, public readings, dramatic and cinematic adaptations, and multimedia digital presentations complete with period photographs, Dublin maps, sound clips of Irish songs, and hyperlinks to critical interpretations and manuscript sources.⁷⁵ On that red-letter day for the public domain, *Ulysses* will finally take its place with *The Odyssey* as raw myth-making material for some future national epic. Indeed, it can be argued that a work does not really become a "classic" until it is unqualifiedly available for cultural

exploitation. It would follow that overlong copyright protection is an inhibition on the full organic development of a classic.

* * *

A wise copyright law would resemble, not Tithonus or Dorian Gray, but Tennyson's Ulysses, that figure for the dynamic possibilities of old age. In Tennyson's conception of the man of many devices, Ulysses' return to Ithaca is only another brief stopover in a life of restless wanderings; already, the aging king of Ithaca has tired of his landlubberly responsibilities and is repelled by the unadventurous appetites of his subjects, who "hoard, and sleep, and feed, and know not me,"⁷⁶ in contrast to his hardy seagoing companions. Ulysses is the antithesis of stasis and stay-at-home comfort; he knows that he cannot know himself fully until he encounters his non-self in the transformative strangeness of new experiences and foreign customs. He has been altered by and become a part of all that he has met, in a restless exchange of self and other, original and adaptation, individual talent and tradition. In contrast to the intrepid, impulsive Ulysses, his son Telemachus has all the qualities that make for a competent ruler: he is just, capable, and blandly statesmanlike, but he is also unremarkable, better suited than his father to the tedious meting and doling of "[u]nequal laws unto a savage race."⁷⁷ It galls Ulysses that he himself has "become a name,"⁷⁸ a famous trademark rather than a creative force in action. "How dull it is to pause, to make an end, / To rust unburnished, not to shine in use!"⁷⁹

At its best, intellectual-property law can resemble Tennyson's Ulysses in its capacity to resist a comfortable commercialism that permits a handful of old copyrights to generate a steady, protected income for an even smaller number of copyright holders,

while myriads of forgotten works rust unburnished in the armory of unnecessary legal protection. Copyright law reveals its true genius when it challenges society to depart from the economically safe and the artistically predictable by using its older creations to discover new ones; to test the validity and staying power of popular works that have long enjoyed the comforts of monopoly; to subject famous sounds and images to the fires of irony, parody, and cultural vandalism; and to probe the transformative potential of forgotten works that have long lain under the deterrent pall of a useless copyright. Such a copyright law would protect the rights of creators for a just and reasonable time, yet not needlessly bar the way to “that untravell’d world, whose margin fades / For ever and for ever when [we] move.”⁸⁰ Such a copyright law would be worthy of a world equipped with more and better means of communicating imaginative products than ever before in history. We are entitled to a copyright law equal to our own brave possibilities, to our ambition, like that of the embarking Ulysses, “to strive, to seek, to find, and not to yield.”⁸¹

FURTHER READINGS

Paul K. Saint-Amour, *The Copywrights: Intellectual Property and the Literary Imagination* (Ithaca and London: Cornell University Press, 2003).

Robert Spoo, "Copyright Protectionism and Its Discontents: The Case of James Joyce's *Ulysses* in America." *The Yale Law Journal*, Vol. 108, No. 3 (1998): 633-67.

Robert Spoo, "Injuries, Remedies, Moral Rights, and the Public Domain." *James Joyce Quarterly*, Vol. 37 (2000), pp. 333-51.

Textual Monopolies: Literary Copyright and the Public Domain, eds. Patrick Parrinder and Warren Chernaik (Office for Humanities Communication Publication, No. 8, 1997).

ENDNOTES

¹ Alfred Lord Tennyson, “Tithonus” (first published in 1860), reprinted in *“Idylls of the King” and a Selection of Poems* (New York: New American Library, 1961), pp. 286-87, lines 15-23.

² *The Picture of Dorian Gray* (first published in book form in 1891), reprinted in *The Complete Works of Oscar Wilde: Stories, Plays, Poems & Essays* (New York: Harper & Row Publishers, 1989), p. 88.

³ Tennyson, “Ulysses” (first published in 1842), reprinted in *“Idylls of the King” and a Selection of Poems*, p. 285, lines 50-53.

⁴ See, for example, Senator Orrin G. Hatch’s defense of U.S. copyright term extensions in his article, “Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium,” *University of Pittsburgh Law Review*, Vol. 59 (1998), pp. 719-57. (Hereafter referred to as “Hatch.”) With respect to international harmonization, Hatch argues: “Copyrighted works move across national borders faster and more easily than virtually any other economic commodity, and with the techniques now in common use this movement has in many cases become instantaneous and effortless. The need to conform the duration of U.S. copyright to that prevalent throughout the rest of the world is increasingly pressing in order to provide certainty and simplicity in international business dealings.” Hatch, p. 729. As for the argument from grandchildren, Hatch contends: “In the United States, where works created before January 1, 1978 are still [as of 1998] afforded a 75-year fixed term of protection, the current term has proven increasingly inadequate to protect some works for even one generation of heirs as parents are living longer and having children later in life.” Hatch, p. 732.

⁵ 8 Anne ch. 19 (1710). Under the Statute of Anne, “for new works the right was to run for 14 years, and the author was granted the privilege of renewal for 14 years more.” Herbert A. Howell, *The Copyright Law: An Analysis of the Law of the United States Governing Registration and Protection of Copyright Works, Including Prints and Labels*, 2nd ed. (Washington, D.C.: Bureau of National Affairs, 1948), p. 2. (Hereafter referred to as “Howell.”) For excellent discussions of the Statute of Anne, see Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, Mass.: Harvard Univ. Press, 1993), *passim*.

⁶ Copyright Act of May 31, 1790, ch. 15, 1 Statutes at Large 124. “The Act of 1790 assured protection to the author or his assigns of any ‘book, map or chart’ for 14 years upon [completion of certain formalities involving recording the title with a court and publishing a copy of the record in a newspaper]. . . . The privilege of renewal of the copyright for 14 years more was granted to the author or his assigns on condition of again entering the title and publishing the record.” Howell, pp. 4-5.

⁷ In 1993, the Council of the European Communities issued a directive—Council Directive 93/98, 1993 O.J. (L 290) 9—which required that member countries implement by July 1, 1995, a term of protection equal to the life of the author plus 70 years.

⁸ 17 United States Code § 302(a) (1976 Act). Hereafter, the United States Code, which is the official compilation of federal statutory law in the United States, is referred to as “U.S.C.”

⁹ See 17 U.S.C. §§302(c), 304 (1976 Act). The Sonny Bono Copyright Term Extension Act of 1998 was responsible for increasing copyright terms for both existing and future works.

¹⁰ “[T]he digital environment and the Internet have presented new challenges to existing copyright law. The digital format allows perfect copies to be made virtually instantaneously. The Internet allows copies to be widely distributed in a short period of time.” Hatch, p. 725.

¹¹ The enfeebled Sybil at Cumae makes a famous appearance in an epigraph to T.S. Eliot’s “The Waste Land” (first published in 1922), reprinted in *Collected Poems 1909-1962* (New York: Harcourt Brace Jovanovich, 1970), p. 51.

¹² *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

¹³ Professor James Boyle has explained:

It is a matter of rudimentary political science analysis or public choice theory to say that democracy fails when the gains of a particular action can be captured by a relatively small and well-identified group while the losses—even if larger in the aggregate—are low-level effects spread over a larger, more inchoate group. . . . The heirs and assigns of authors whose copyright has expired would obviously benefit if Congress were to put the fence back up around this portion of the intellectual commons. There are obviously some costs—for example, to education and public debate—in not having multiple, competing low-cost editions of these works. But these costs are individually small and are not imposed on a well-defined group of stake-holders.

James Boyle, “A Politics of Intellectual Property: Environmentalism for the Net?,” *Duke Law Journal*, Vol. 47 (October 1997), pp. 110-11.

¹⁴ See Edward Tripp, *The Meridian Handbook of Classical Mythology* (New York: New American Library, 1970), p. 580.

¹⁵ Tennyson, “Tithonus,” reprinted in *“Idylls of the King” and a Selection of Poems*, pp. 286, 288, lines 5, 70.

¹⁶ *Id.*, p. 287, line 49.

¹⁷ 17 U.S.C. § 101 (1976 Act) (definition of “fixed”).

¹⁸ Tennyson, “Tithonus,” reprinted in *“Idylls of the King” and a Selection of Poems*, p. 286, lines 8-9.

¹⁹ Marybeth Peters, the current Register of Copyrights, has stated:

[I]t is exceedingly difficult to determine the copyright status of certain types of works, e.g., photographs, prints and labels. Moreover, finding the current owner can be almost impossible. Where the copyright registration records show that the author is the owner finding a current address or the appropriate heir is extremely difficult. Where the original owner was a corporation, the task is somewhat easier but here too there are many assignments and occasionally bankruptcies with no clear title to works.

The Copyright Term Extension Act of 1995, Hearing on S. 483 Before the Senate Committee on the Judiciary, 104th Cong. 42 (September 20, 1995), p. 18.

²⁰ For example, the authors of “Who Built America?” (an award-winning CD-ROM produced by the American Social History Project, in collaboration with the Center for History and New Media), which contains many primary sources from the Depression Era and is intended for high school and college students and teachers, “had immense difficulties tracking down copyright owners, who, when found, sometimes wanted large payments for older works whose only present value was historical.” The authors were forced to omit many works entirely, because “copyright owners insisted upon thousands of dollars for minor uses.” Brief of College Art Association, *et al.*, as Amici Curiae in Support of Petitioners, p. 7, *Eldred v. Ashcroft*, 123 S. Ct. 769 (U.S. 2003).

²¹ Richard J. Cox, a scholar of book preservation and other matters affecting libraries, has described the labyrinthine difficulties he encountered when his academic publisher, Greenwood, effectively waived his privilege of fair use and required him to seek permission for all the quotations from a book by Nicholson Baker that Cox had included in a scholarly monograph replying to Baker. Richard J. Cox, “Unfair Use:

Advice to Unwitting Authors, *Journal of Scholarly Publishing*, Vol. 34, No. 1 (October 2002), pp. 31-42.

²² 17 U.S.C. §§ 9, 23 (1909 Act).

²³ 17 U.S.C. §§ 23, 24 (1909 Act).

²⁴ Professor Marshall Leaffer has explained:

After enactment of the 1976 [U.S. Copyright] Act, the momentum has increased to eliminate all copyright formalities. The movement gathered steam with the United States' entry into the Berne Convention. One of the fundamental provisions of Berne is that the enjoyment and exercise of rights shall not be subject to any formality, and to many, the renewal requirement in United States law appeared inconsistent with Berne obligations. . . . Congress enacted the Copyright Renewal Act of 1992 to remedy the various difficulties of the preceding renewal system.

Marshall Leaffer, *Understanding Copyright Law*, 2nd ed. (New York: Matthew Bender, 1995), p. 187.

²⁵ James J. Guinan, Jr., "Duration of Copyright, Appendices A and B," Copyright Law Revision Study No. 30 (1957), reprinted in 1 *Studies on Copyright* (1963), p. 473.

The Guinan study is usefully summarized in Ralph S. Brown and Robert C. Denicola, *Cases on Copyright, Unfair Competition, and Other Topics Bearing on the Protection of Literary, Musical, and Artistic Works*, 5th ed. (Westbury, NY: The Foundation Press, Inc., 199), pp. 385-86. (Hereafter referred to as "Brown and Denicola").

²⁶ Brown and Denicola, *Cases on Copyright*, p. 385.

²⁷ *Id.*

²⁸ *Id.*

²⁹ "Since 1976, the likelihood that a work will remain highly profitable beyond the current term of copyright protection has increased significantly as the rate of

technological advancement in communications and electronic media has continued to accelerate, particularly with the advent of digital media and the explosive growth of the Internet.” Hatch, p. 734.

³⁰ Tennyson, “Tithonus,” reprinted in *“Idylls of the King” and a Selection of Poems*, p. 288, lines 71-72.

³¹ U.S. Constitution, article I, § 8, clause 8.

³² Section 2(5) of the Public Domain Enhancement Act, HR 2601, introduced by Representative Zoe Lofgren (D-Cal.) in the first session of the 108th Congress on June 25, 2003. As of this writing, the bill is in the House Committee on Judiciary. Along with colleagues from the Stanford Law School Center for Internet and Society, Professor Lessig has also brought a new lawsuit, *Kahle v. Ashcroft*, No. 3:04-CV-01127-BZ (filed N.D. Cal. Mar. 22, 2004), to challenge the present U.S. Copyright Act’s conferral of “unconditional” copyright upon creative works—that is, copyright without any requirements of registration, renewal, or affixation of copyright notice. The result of unconditional copyright is a vast accumulation of often commercially valueless but potentially useful works that remain locked in lengthy copyrights—what Professor Lessig refers to as “orphaned” works and this essay likens to the Greek figure, Tithonus.

³³ Brief of Hal Roach Studios and Michael Agee as Amici Curiae Supporting Petitioners, p. 11, *Eldred v. Ashcroft*, 123 S. Ct. 769 (U.S. 2003) (citing Report of the Librarian of Congress, “Film Preservation 1993: A Study of the Current State of American Film Preservation” (1993), p. 3).

³⁴ Brief of Hal Roach Studios and Michael Agee as Amici Curiae Supporting Petitioners, p. 14, *Eldred v. Ashcroft*, 123 S. Ct. 769 (U.S. 2003).

³⁵ Report of the Librarian of Congress, “Film Preservation 1993: A Study of the Current State of American Film Preservation” (1993), p. 47.

³⁶ See, for example, Hatch, pp. 736-37.

³⁷ Brief of Hal Roach Studios and Michael Agee as Amici Curiae Supporting Petitioners, p. 15, *Eldred v. Ashcroft*, 123 S. Ct. 769 (U.S. 2003) (citing Report of the Librarian of Congress, “Film Preservation 1993: A Study of the Current State of American Film Preservation” (1993), p. 5).

³⁸ Dorian strikes his Faustian bargain at the moment when, gazing enviously at his portrait, he murmurs: “If it were I who was to be always young, and the picture that was to grow old! For that—for that—I would give everything! Yes, there is nothing in the whole world I would not give! I would give my soul for that!” *The Picture of Dorian Gray*, reprinted in *The Complete Works of Oscar Wilde*, p. 34.

³⁹ *Id.*, p. 17.

⁴⁰ The United States Congress’s extension of copyright terms “promotes only the economic interests of the owners of copyright in the very few older works that remain valuable today.” Brief of College Art Association, *et al.*, as Amici Curiae in Support of Petitioners, p. 20, *Eldred v. Ashcroft*, 123 S. Ct. 769 (U.S. 2003)

⁴¹ The notion that granting and enforcing property interests will increase the care and efficiency with which resources are managed is a time-honored concept. “The economic utility theory justifies the protection of property interests as a means of creating incentives for the efficient use of resources.” Catherine M. Valerio Barrad, “Genetic Information and Property Theory,” *Northwestern University Law Review*, Vol. 87 (Spring 1993), p. 1079.

⁴² *The Picture of Dorian Gray*, reprinted in *The Complete Works of Oscar Wilde*, p. 99.

⁴³ See James Joyce, *Ulysses* (1922), ed. Jeri Johnson (Oxford: Oxford University Press, 1993), p. 25.

⁴⁴ *The Picture of Dorian Gray*, reprinted in *The Complete Works of Oscar Wilde*, p. 88.

⁴⁵ The following discussion of the actions of the Joyce Estate, as well as portions of the final section of this essay, are adapted from my remarks in “Injuries, Remedies, Moral Rights, and the Public Domain,” *James Joyce Quarterly*, Vol. 37 (2000), pp. 333-51.

⁴⁶ Medh Ruane, *The Irish Times* (June 10, 2000) (found on the Internet at www.ireland.com/newspaper/newsfeatures/2000/0610/newsfea10.htm) (last visited October 3, 2000).

⁴⁷ Iain S. Bruce, “Joyce Grandson Fury over Fringe Musical Filth,” *Sunday Herald* (online edition, July 30, 2000) (found on the Internet at www.sundayherald.com/news) (last visited October 10, 2000).

⁴⁸ These remarks were attributed to Seán Sweeney, trustee of the James Joyce Estate, in an article by Lucy Adams, “Joyce Grandson in Battle to Ban *Ulysses* Musical,” in *The Sunday Times* (Ireland) (July 30, 2000). They were attributed to Stephen James Joyce, however, in an article by Vanessa Thorpe, “A Joyce Bans Molly’s Musical Climax,” *The Guardian/Observer* (July 30, 2000) (found on the Internet at www.themodernword.com/joyce/article_molly_observer.html) (last visited March 16, 2004).

⁴⁹ The provision requires the user to give reasonable notice of the intended use and to offer a payment of reasonable royalties to the owner of a revived or restored copyright. If a reasonable amount cannot be agreed upon, the Copyright Tribunal will determine the license terms. Once the user has given reasonable notice, he or she is licensed, and the royalty may be determined later. Duration of Copyright and Rights in Performances Regulations, 1995 S.I. No. 3297, §§ 24, 25. Thus, the license is compulsory, or “as of right.” The copyright owner can haggle over royalties, but he or she cannot refuse the license.

⁵⁰ Quoted in an article by Kate Watson-Smyth, *The Independent* (London) (July 31, 2000). Despite these statements by the organizers, I am told that the Festival did discontinue Zapparoli’s show after she had performed it a few times.

⁵¹ But perhaps the Joyce Estate’s policy on sexy adaptations is flexible after all. In 2001, Tommy Boy Records released a CD single called *Yes* by the Dutch club singer, Amber. The CD has several tracks entitled “Yes,” each a throbbing disco mix with Amber’s erotic voice alternately shrilling and moaning Molly Bloom’s final words from “Penelope.” The CD card for at least one version of this single states that the lyrics are used with the permission of the Joyce Estate. Other CD singles by Amber include *Sexual*, *Do That to Me One More Time*, *This Is Your Night*, and *Need to be Naked*. It is hard to imagine a principled aesthetic distinction to be made between Amber’s adaptation and Zapparoli’s. If the Joyce Estate really did give permission for Amber’s techno-pop Molly, it would seem that some derivative works are more equal than others.

⁵² Vanessa Thorpe, “A Joyce Ban’s Molly’s Musical Climax.”

⁵³ In the litigation over Alice Randall’s revisionary novel *The Wind Done Gone*, the Margaret Mitchell Trust sued to prevent publication of what it argued was, among other things, a derivative work based without authorization on *Gone With the Wind* (1936). Over the years, the Mitchell Trust has been extremely selective in permitting sequels to *GWTW* and has demanded that any derivative work it does authorize avoid such subjects as homosexuality and miscegenation. *TWDG* confronts both. The Eleventh Circuit reversed the trial court’s grant of a preliminary injunction to the plaintiff Trust, holding that, as a “highly transformative” parody, Randall’s novel constitutes a fair use of otherwise protected elements of *GWTW*. The court’s strongly-worded opinion, which is unusual for the emphasis it places on First Amendment values in the copyright context, concludes that, in light of *TWDG*’s transformative purpose and the unlikelihood that so subversive a work would usurp the market for the sanitized sequels that the Trust typically permits, the district court erred in issuing a preliminary injunction. See *Suntrust Bank v. Houghton Mifflin Co.*, No. 01-12200, 2001 WL 1193890 (11th Cir. Oct. 10, 2001); see also Neil Weinstock Netanel, “Locating Copyright Within the First Amendment Skein,” *Stanford Law Review*, Vol. 54, (2001), pp. 1 *et seq.* Of course, *GWTW* is another work that has benefited from the Sonny Bono Act’s extension of older copyrights. And, like *Ulysses*, *GWTW* has contributed a historical mythos to culture that has outgrown the copyright that permits its legal owners to police the adaptations that the mythos inspires or provokes. With its extended term, *GWTW* will remain in copyright until 2031, 95 years after its first publication and 168 years after the Emancipation Proclamation.

⁵⁴ Specifically, Cork University Press argued that it could lawfully receive a sublicense to print extracts of the Danis Rose edition from Rose's current licensee, Macmillan Publishers Ltd., under § 14(2) of the European Communities (Term of Protection of Copyright) Regulations, 1995 S.I. No. 158, as adopted in the Irish Republic. This regulation insulates from liability any "person" that "has acquired (whether before or after commencement of these Regulations) rights" in a work "from a person exploiting that work or other matter [if] copyright in that work or other matter has been revived by virtue of these Regulations." This broadly drafted provision raises a number of knotty questions that the Irish High Court was unwilling to resolve on a motion for a preliminary injunction. Unfortunately, because the matter was not pursued at a trial for a permanent injunction, these questions were not addressed definitively in the context of the Rose edition in Ireland.

There is no doubt that under Britain's counterpart to the Irish regulations, an anthology issued in Northern Ireland or Britain could have printed extracts of the 1922 *Ulysses* under the compulsory license provision discussed elsewhere in this essay. The Irish regulations lack such a compulsory license, however. This divergence between Ireland's and Britain's EU implementation rules points up some of the obstacles facing "third parties" who hope for wide dissemination in Europe of works they have created on the basis of works whose copyrights were revived by the EU copyright-term Directive. "Differences in the nature of the transitional provisions adopted by each country are regrettable [and] produce further possible trade barriers within the European Economic Area." Brad Sherman & Lionel Bently, "Balance and harmony in the duration of copyright: the European Directive and its consequences," in *Textual Monopolies:*

Literary Copyright and the Public Domain, eds. Patrick Parrinder and Warren Chernaik (Office for Humanities Communication Publication, No. 8, 1997), p. 23. (Hereafter *Textual Monopolies*.) For a more detailed discussion of the Pierce anthology and the litigation surrounding it, as well as the Estate's lawsuit against Danis Rose and Macmillan Publishers, see my article, "A Rose Is a Rose Is a Roth," *James Joyce Literary Supplement*, Vol. 16, No. 1 (Spring 2002), pp. 3-4.

⁵⁵ See the court's opinion in this case: *Sweeney v. Nat'l Univ. of Ireland Cork, Trading as Cork University Press*, No. 10497P/2000 (Irish High Court, October 9, 2000).

⁵⁶ This diagram, which is found among Joyce's notesheets for "Oxen of the Sun," is familiar to students of Joyce from its reproduction in Phillip F. Herring's edition, *Joyce's "Ulysses" Notesheets in the British Museum* (Charlottesville: Univ. Press of Virginia, 1972), pp. 162-63 (interleaf).

⁵⁷ J.C.C. Mays, *Fredson Bowers and the Irish Wolfhound* (Ballybeg, Ireland: Coracle, 2002), p. 71.

⁵⁸ See *Sweeney v. Macmillan Publishers Ltd.*, Case No. CH 1997 S 3257, [2001] EWHC Ch B66 (Chancery, November 22, 2001).

⁵⁹ Duration of Copyright and Rights in Performances Regulations, 1995 S.I. No. 3297, § 23.

⁶⁰ To put this another way, it was no defense that Rose finished *most* of his work on his Reader's Edition while the 1922 *Ulysses* was out of copyright in Britain, or that he and Macmillan had engaged in *preliminary* contract discussions. Macmillan's defense would have been a good one only if Rose either had begun and finished RE within the public-domain window or had signed the contract with Macmillan during that interval.

⁶¹ I do not mean to imply that either judge was incapable of grasping complex nonlegal issues on his own. Certainly John M. Woolsey was a cultured and widely-read individual. But just as Judge Woolsey's sensitivity to the literary significance of *Ulysses* was aided by attorney Morris L. Ernst's learned arguments and the evidentiary submissions of opinions authored by literary critics, so Mr. Justice Lloyd received substantial assistance from the oral and written testimony of Joyceans and scholars of textual editing.

⁶² It will be recalled that what little legal relief James Joyce himself obtained against Samuel Roth's piracies of *Ulysses* in the United States came in the form of a state-court consent decree prohibiting Roth from engaging in further activities that Joyce's lawyers had argued was, among other things, an invasion of Joyce's privacy.

⁶³ Thomas Jones, "Short Cuts," *London Review of Books*, Vol. 23, No. 24 (December 13, 2001) (found on the Internet at www.lrb.co.uk/v23/n24/print/jone01.html) (last visited March 16, 2004).

⁶⁴ *Dastar v. Twentieth Century Fox Film Corp.*, 123 S. Ct. 2041, 2047 (U.S. 2003).

⁶⁵ *Id.* at 2048 (quotation marks and citation omitted).

⁶⁶ *Id.* at 2049.

⁶⁷ *Id.*

⁶⁸ Paul K. Saint-Amour's wonderful book, *The Copywrights: Intellectual Property and the Literary Imagination* (Ithaca and London: Cornell Univ. Press, 2003), contains an entertaining "thought experiment" on "how *Ulysses* and its reception would have differed if the book had first appeared under an early-twenty-first-century copyright

and publishing regime rather than under the interwar copyright conditions that marked its actual publication.” *Id.*, pp. 193-94. Among other things, Saint-Amour imagines “in minuscule type, *twenty-five pages* of ‘Acknowledgments’ of permission to reprint previously published material.” *Id.*, p. 196 (emphasis in original).

⁶⁹ “Interim Injunction Granted to Joyce Estate in Copyright Case,” interview with Medh Ruane, Morning Ireland, RTÉ News (September 12, 2000) (text and audio file found on the Internet at www.rte.ie/news/2000/0912/morningireland.html) (last visited March 16, 2004).

⁷⁰ Of course, one reply to this is to say that a grandson is no “mere rightholder.” My sympathies lie, however, with Mr. Fennessy, the banned composer: “[H]ow can the personal taste of Stephen Joyce and his wife be thought the right criteria to use?” But, for an intelligent and compassionate exposition of the other, familial perspective, see Michael Patrick Gillespie, “The Papers of James Joyce: Ethical Questions for Textually Ambivalent Critics,” *New Hibernia Review*, Vol. 2 (1998), pp. 99 ff., in which Professor Gillespie discusses family privacy and scholarly access in connection with archival materials relating to Joyce.

⁷¹ T.S. Eliot, “Tradition and the Individual Talent” (first published in 1919), reprinted in *Selected Prose of T.S. Eliot*, ed. Frank Kermode (New York: Harcourt Brace Jovanovich, 1975), p. 38.

⁷² “The absence of copyright eliminates monopoly pricing, and marginal cost decreases when a royalty no longer has to be paid. The fundamental premise of copyright as an incentive is that it allows the extraction of monopoly profits during its term.”

Dennis S. Karjala, “Judicial Review of Copyright Term Extension Legislation,” *Loyola of Los Angeles Law Review*, Vol. 36 (Fall 2002), p. 225-26.

⁷³ Some of the observations here and in a later paragraph are more fully developed in my short essay, “*Ulysses*, Bloomsday, and Copyright,” in *Yes I Said I Will Yes* (New York: Vintage Books, forthcoming 2004).

⁷⁴ Joyce’s *A Portrait of the Artist as a Young Man*, first published in the United States in 1916, entered the public domain there on January 1, 1992. See 17 U.S.C. § 304(b) (1994) (providing for a term of 75 years from the initial date of copyright for works in their renewal term before January 1, 1978). In 1991, three versions of *A Portrait* were in print in the United States: a Penguin paperback at \$4.95; a Penguin paperback with critical apparatus at \$9.95; and a reprint edition by Amereon Ltd. at \$17.95. See *Books in Print 1990-91* (1990), Vol. 6, p. 4924. In 1997, the same three versions were still in print, now retailing at \$7.00, \$14.95, and \$20.95, respectively; but the following versions were also available, most of them first published in 1991 or after: a Bantam paperback at \$3.95; a NAL-Dutton paperback at \$4.95; a Dover paperback reprint at \$2.00; a Holt student edition at \$10.00; a Knopf edition at \$17.00; a North Books large-type edition at \$24.00; a Buccaneer Books reprint edition at \$26.95; a Viking Penguin paper edition, with a new introduction and notes, at \$8.95; a St. Martin edition, with a revised text and critical essays, at \$35.00; a Garland hardcover, with a newly edited text and critical apparatus, at \$55.00; and a Random House paper edition of the same text at \$9.00. See *Books in Print 1996-97*, Vol. 7 (1996), pp. 6542. The last four titles give some idea of the scholarly creativity and industry that public-domain accessibility can unleash. See also Warwick Gould, “Predators and Editors: Yeats in the

Pre- and Post-Copyright Era,” in *Textual Monopolies*, pp. 74-80, which documents the vastly increased sales in the United Kingdom of inexpensive editions of W.B. Yeats’s poems following the temporary expiration of Yeats’s U.K. copyrights in 1990.

⁷⁵ Multimedia versions of *Ulysses* and other works by Joyce are in preparation as of this writing. For several years now, an exciting hypertext *Ulysses* project has been under way, conceived and headed by Professor Michael Groden of the University of Western Ontario. See Robert Spoo, “Preparatory to Anything Else,” 33 *James Joyce Quarterly*, Vol. 33 (1996), pp. 493-94. Recently, Professor Groden’s project was merged with a hypertext *Ulysses* manuscript project headed by Robert Bertholf at the Poetry/Rare Books Collection, University at Buffalo. But this collaboration had to be suspended in January 2004 when the Joyce Estate demanded a fee for rights to reproduce the text of *Ulysses* that was far beyond the project’s means.

⁷⁶ Tennyson, “Ulysses,” reprinted in “*Idylls of the King*” and a Selection of *Poems*, p. 284, line 5.

⁷⁷ *Id.*, p. 284, line 4.

⁷⁸ *Id.*, p. 285, line 11.

⁷⁹ *Id.*, p. 285, lines 22-23.

⁸⁰ *Id.*, p. 285, lines 20-21.

⁸¹ *Id.*, p. 286, line 70.