2000

Injuries, Remedies, Moral Rights, and the Public Domain

Robert Spoo

JJQ

Introduction

Injuries, Remedies, Moral Rights, and the Public Domain

To say that James Joyce was litigious is simply to recognize that he was as obsessed with the dialectic of injury and remedy in his practical affairs as he was in artistic matters. The pandying that Father Dolan inflicts upon Stephen Dedalus in *A Portrait*—although it would likely constitute a battery outside the walls of Clongowes (since Stephen's consent is coerced) and would implicate a student's due-process liberty interest if administered in a public school in the United States today[1]—is, within the Clongowes context, an injury for which there is no legal remedy. Instead, Stephen must seek a kind of gentlemen's injunction against further unwarranted pandyings by taking his case directly to the high court of the rector's office. Although Stephen appears to be granted his petition, his real victory is in the realm of the imagination: the dignitary wrong inflicted by Father Dolan is compensated by a series of self-fashioned symbolic remedies through which the beleaguered schoolboy identifies his plight with that of the "great men" of history (*P* 53), men like Charles Stewart Parnell, Christ, and Julius Caesar who suffered local injustice but triumphed in some larger moral and spiritual perspective.

Joyce's major works, particularly *A Portrait* and *Ulysses*, return repeatedly to this theme of injury and remedy—the fundamental rhythm of the law, civil and criminal. Indeed, Joyce's fictions themselves can be viewed as fabulous remedies for actual wrongs, real or imagined. The figure of Buck Mulligan, for example, was the culmination of a carefully orchestrated plan of authorial self-help, whereby wrongs committed by Oliver Gogarty against the young Joyce, although not actionable at law, could be redressed at the bar of fiction. In creating the character of Mulligan, Joyce fashioned for himself a remedy that embodied both a compensatory and a punitive dimension: while Joyce could take satisfaction in the myth-inflected verisimilitude of his fictional rendering of Gogarty—much as the young Stephen Dedalus savors symbolic triumphs at Clongowes—Gogarty himself would be forced to pay a kind of punitive or exem-

plary damages by serving, for all time, as the type of inconsequent, mercurial betrayal.[2]

It is no surprise, therefore, that the magisterial legalism of Joyce's fictions should have been echoed in the litigiousness he sometimes exhibited in everyday affairs. Quick to spot an action that would lie, to use J. J. O'Molloy's lawyerly jargon in "Cyclops" (*U* 12.1043), Joyce instituted lawsuits, or contemplated them, on a variety of causes of action over the years: debt, slander, assault, and threat of future harm in his 1918-1919 actions against Henry Carr; copyright infringement and unfair competition ("passing off") in his 1927-1928 litigation against Samuel Roth; and damages for misuse of his name in the 1931 *Frankfurter Zeitung* incident (*JJII* 639-40).[3] His efforts met with mixed success at best, and he paid an expatriate's price for pursuing legal remedies in jurisdictions where he could claim neither citizenship nor adequate familiarity with the law. In their contributions to this issue, Judge Conrad L. Rushing, Carol Shloss, and Paul Saint-Amour explore Joyce's various attempts to wring justice from alien legal systems. Mary Lowe-Evans and Fritz Senn show how responsive Joyce's texts are to the language and conceptual discourses of various legal regimes.

David Weir, Walter Kendrick, and Carmelo Medina Casado shed light on Joyce's encounters with obscenity law and government censorship. In the wake of the 1921 *Little Review* trial in New York, *Ulysses* was effectively placed under legal ban in the United States. The *Little Review*'s editors, Margaret Anderson and Jane Heap, were the actual defendants in that case. It was not until 1933 that the American ban could begin to lift as a consequence of the famous decision by federal judge John M. Woolsey, a decision affirmed by a 2-to-1 vote of the Second Circuit Court of Appeals. In that 1933 case, famously captioned *United States v. One Book Called "Ulysses,"* a single imported copy of *Ulysses* was the named defendant in a "libel" brought by the U.S. government,[4] and Random House entered as claimant to challenge the government's attempt to have the copy condemned as obscene and therefore forfeit under the law. In both of those trials, Joyce was the real party in interest, as it were, bearing most of the burdens and enjoying many of the benefits of the respective court rulings. The original typed opinion signed by Judge Woolsey—which is preserved along with the rest of the record of the federal *Ulysses* litigation in the Admiralty section of the National Archives for the Northeast Region in New York City—is reproduced photographically following this introduction (see Figure 1). We also include in this issue a short biographical account of Judge Woolsey by his son, John M. Woolsey Jr.

Where censorship and obscenity laws were once the dominant

legal forces shaping the sociocultural existence of *Ulysses*, today that role has been assumed by copyright and related intellectual property regimes, as I have argued, for example, in the *Yale Law Journal*.[5] That essay traces in considerable legal and historical detail the impact of American copyright law, obscenity laws, and customs seizures on the copyright status of *Ulysses* in America and concludes that, except for a brief period, the 1922 Paris edition of *Ulysses* has never enjoyed copyright protection in the United States, despite a kind of gentlemen's agreement among competitors in the publishing world to wink at Random House's claim of exclusive rights to publish *Ulysses*.[6] Indeed, I believe we can pinpoint the date of that edition's entry into the American public domain—and Joyce knew it as well—as 3 April 1922.

My efforts, as well as those of Saint-Amour and others, have been directed toward encouraging a broader recognition of the public domain and the role it plays in the production of culture—a role dramatically altered by recent legislation in the United States and the European Union that retroactively increases copyright terms for works published in the early twentieth century. Three years ago, partly in an effort to harmonize U.S. copyright terms with those in the European Union, Congress passed the Sonny Bono Copyright Term Extension Act,[7] which increased all future and *existing* American copyright terms by twenty years, thus preventing works first published in 1923 and after from entering the public domain until well into the next century. The fate of modernism and the shape of the literary canon may be affected by this foreshortening of the public domain—a development that, in my view, places works of the early twentieth century at a competitive disadvantage in the cultural and economic marketplace.

And that is not the only consequence. Think, for example, of how the specter of copyright loomed, without ever becoming fully manifest, behind all the sound and fury of *l'affaire Gabler-Kidd*. I am not particularly referring here to efforts in the 1980s—uncovered by Chuck Rossman[8]—to secure a "new copyright"[9] for *Ulysses* by means of a text freshly edited from manuscript materials. Whatever others may have wanted, Hans Gabler's constructing of the "continuous manuscript text" was motivated, I am convinced, by a theory of authorship and by his own temperament, not by the carrot of copyright or the blandishments of interested parties. And if the Joyce Estate did seek to maintain a market for *Ulysses*,[10] why should we be surprised? To fault a copyright owner for strategizing with publishers and editors is to deal in tautology.[11] A state-backed monopolist would scarcely seem rational if he or she did not seek to maximize profits and control. (As noted below, however, I feel that the Estate's more

recent efforts to assert control by means of aggressive lawsuits and frequent denials of permission to scholars and creative users have unnecessarily increased the public costs already imposed by long copyright terms. I therefore make a distinction between legitimately self-interested actions by a copyright owner and actions that are gratuitous or vexatious, particularly where the copyright has already generated extraordinary benefits for its owners and survives into the present only by grace of statutory revival or extension.[12])

No, I am not concerned here with what anyone *did* with his copyright but rather with something larger and harder to get hold of than any predictable, and in any case lawful, scheming. I am thinking of the mood and discourse, the episteme, that quietly pervaded those noisy years. It was a time of shrill dichotomies, of intimidating either/ors: "either the unrevised state of the Rosenbach MS or the imperfectly typed transcripts of the lost drafts";[13] "either the 1922 first edition or the 1961 Random House edition";[14] either authorially transmitted notation or verifiably historical names; Connolly or Conolly; street or Street—either American pragmatism or Teutonic abstraction. It was the perfect moment and mindset for the rise of that master dichotomist, John Kidd. And we Joyceans, who had ended one decade by congratulating ourselves on having conquered the illusion of definitiveness, found ourselves at the end of the next waiting helplessly—if we waited at all—for the one true text, the unforthcoming Norton edition.[15]

The common thread in all this was the assumption that one edition or editorial perspective must dominate, as of right. And this, I submit, was in large part the legacy of monopoly. The apocalyptic urgency of the choice between "Harry Thrift" and "Harry Shrift,"[16] the nearly hysterical hectoring that we all endured about such matters, would have seemed rank hyperbole in ordinary circumstances, but it appeared plausible to us at the time because no affordable textual alternative was likely to be permitted. In the absence of alternatives, every editorial decision made by Gabler had a surreally momentous quality, ousting all other possibilities; every emendation became, as a matter of law, "definitive."

And so the copyright monopoly informed the Joyce Wars in ways we still do not fully appreciate. Under nonmonopolistic conditions, of course, any "injury" that might have been caused by the Gabler text or the Rose edition could have been remedied quickly by versions of *Ulysses* drawn, re-edited or not, from the public domain. Fruitful competition among texts, rather than sterile innuendo and insult among interested parties, could have prevailed. But such a course was not even thinkable. (The reissue of the 1961 Random House text was a palliative, a lullaby.) The ten-years' war fought over accidentals

in *Ulysses* might have been better prosecuted as a united effort to liberate the 1922 edition from illusory copyright in the United States. The scandal of *Ulysses* is that the remedy for our collective injury has quietly resided in the public domain all along.

*

A taste for litigation seems to run in the Joyce family. As of this writing, Stephen James Joyce has instituted legal action, or threatened it, on several fronts. Copyright in Mr. Joyce's hands has become a sword as well as a shield, and the Estate now appears to be denying permissions routinely and often on the ground of personal taste. In *The Irish Times* for 10 June 2000, Medh Ruane reported that Mr. Joyce denied the request of a 23-year-old Irish composer, David Fenessy, to use eighteen words from *Finnegans Wake* in a short choral piece commissioned by Lyric FM for a Europe-wide broadcast. The brief quotation from the *Wake* was "[a]s we there are where are we are we there from tomtittot to teetootomtotalitarian. Tea tea too oo" (*FW* 260.01-03). Ruane quoted Mr. Joyce as having written Fennessy: "To put it politely, mildly[,] my wife and I don't like your music." The composer 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."

Similarly, in an article in *The Independent* (London) for 31 July 2000, Kate Watson-Smyth reported that Stephen James Joyce 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 "Song of the Big Hole," "Rap of Spunk," "Rap of Hip Bones," and "Song of Sucking." Mr. Joyce was quoted as objecting in particular to the treatment of Molly's soliloquy "as if it were a circus act or a jazz element in a jam session. This was clearly not the intention of the author."[17] The Fringe producers, however, 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, in the U.K., of a work whose copyright was revived in 1996 by British legislation implementing the EU copyright-term Directive.[18] A spokesperson 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 pro-

duction is perfectly legal and the permission of the Joyce Estate is not needed so there is nothing we can, or would, do."

Mr. Joyce evidently has no quarrel with the sexually explicit language that his grandfather incorporated into "Penelope"; rather, it is various *adaptations* of the episode to which he objects. As quoted by Vanessa Thorpe in *The Guardian/Observer*, Mr. Joyce explained: "This last chapter/episode was not written for the stage, or to be performed, but as the concluding part of a novel. I do not know who first authorised extracts from what has become known as the Molly Bloom monologue/soliloquy to be performed in theatres, even the radio, but looking back it was opening a Pandora's box."[19]

These remarks suggest that Mr. Joyce seeks to protect his grandfather's works from being adulterated by the kinds of transformative insights that derivative works—as copyright law calls them—can bring to even the greatest, most comprehensive masterpieces. The attempt by a copyright owner to use his derivative-work right (that is, the right to prepare adaptations of the copyrighted work) to enforce a kind of moral right is nothing new.[20] 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 generic 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 a derivative work *par excellence*, a full, unabashed confession that cultural borrowings make up the fabric of art and life.

In October 2000, the Irish High Court granted the Joyce Estate an interlocutory (preliminary) injunction preventing the Cork University Press from publishing extracts of Danis Rose's "Reader's Edition" of *Ulysses* ("RE") in an anthology entitled *Irish Writing in the Twentieth Century: A Reader*.[21] The publisher of this large and impressive volume, which is edited by David Pierce, 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.[22] The Irish High Court agreed with the Estate's position, however, and granted the injunction—see *Sweeney v. Nat'l Univ. of Ireland Cork, Trading as Cork University Press*, No. 10497P/2000 (Ir. H. Ct. 9 October 2000)—whereupon the Press decided to forgo further litigation and instead print the anthology with the Joyce extracts neat-

ly excised and a cardboard blank inserted bearing the notice: "Pages 323-346 have been removed due to a dispute in relation to copyright."

One reason why the Irish High Court was unwilling to let Cork University Press go forward with the Rose extracts 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 interlocutory injunction to prevent publication by British Macmillan/Picador of Danis Rose's "RE," at least in part because of Mr. Joyce's well-publicized opposition to Rose's editorial methods and results. The Estate's allegations included copyright infringement, "passing off," and violation of James Joyce's moral rights, although the moral rights theory evidently dropped out at some later stage of the litigation.

After opening skirmishes in 1997, the Joyce Estate decided to pursue the matter directly at trial, whereupon publication of "RE" went ahead as scheduled. In November 2001, after a full trial, Justice Lloyd of the English High Court, Chancery Division, ruled that "RE" had infringed the copyrights in certain genetic and archival materials published after Joyce's death—notably, the Rosenbach manuscript. See *Sweeney v. Macmillan Publishers Ltd.*, Case No. CH 1997 S 3257, [2001] EWHC Ch B66 (Ch. 22 November 2001). Thus, after a well-deserved retirement from the Joyce Wars, the Rosenbach manuscript has returned as a catalyst of controversy.

Justice Lloyd's lengthy and carefully reasoned opinion addresses three principal issues: (1) Does "RE" infringe the copyright in any text of *Ulysses* published during Joyce's lifetime? (2) Does "RE" infringe the copyright in any work by Joyce published after his death? (3) Does "RE" constitute "passing off"—that is, is "RE" so different from the "class of goods" that is known to the reading and purchasing public as "*Ulysses* by James Joyce" that "RE," as an instance of false labeling, has substantially harmed the "good will" that the Joyce Estate has acquired in the "trade name" of "*Ulysses* by James Joyce"?

The court answered the first question in the negative. As noted above, lifetime editions of Joyce's works enjoy "revived" copyright in Britain, 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 implementation date for EU-revived copyrights (1 January 1996), Rose and his publisher raised as a defense their position as "reliance parties," that is, parties who relied upon the then public-domain status of *Ulysses*, and who, therefore, under British law, cannot be held to have infringed.[23]

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 "RE" 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 or arrangement by either of those dates, the reliance-party exemptions do not apply to "RE."[24] The court did rule, however, that *another* third-party exception—the one discussed above 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.

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, constitute independent authorial "works" for purposes of copyright. The court's analysis of this issue reaches heights of complexity reminiscent of the Joyce wars:

> [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 Judge Woolsey's opinion was to the problem of obscenity law and avant-garde literary values, 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 *non*legal theories on the law and on the phenomenon of *Ulysses*.[25]

According to 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 was "substantial," the court held that "RE" 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 American doctrine of fair use, 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 are infringers of the copyright in that authorial "work" known as the Rosenbach manuscript—that heterogeneous assemblage of autograph pages which Joyce pragmatically 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 for legal purposes, the Rosenbach is a "work."

Finally, Justice Lloyd held that sales of "RE" did not constitute "passing off" of an inferior product under the trade name of "*Ulysses* by James Joyce."[26] 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 "good will" on its present source, the Estate. When challenged to describe the characteristics defining this class of goods, counsel for the Estate pointed 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 "RE" 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 subjective 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*. It is fortunate, in my view, that the court denied this "passing off" claim. The application of such an elastic concept to a work of literature, 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 third-party exemptions under British law. Courts are properly wary of attempts to add legal protections atop the copyright monopoly.

To sum up, the principal points of *Sweeney v. Macmillan* are three: (1) With respect to revived copyrights, the court gave a narrow interpretation to the U.K. reliance-party provisions but found that Rose and his publisher are permitted by a compulsory license to publish *most* of the text of "RE." (2) "RE" does infringe with respect to emendations taken from archival materials published after 1941. This holding may make it harder for British editors and publishers to draw upon the *James Joyce Archive* without fear of legal reprisal. (3) The sale of "RE" does not constitute "passing off."

On the basis of its holding, the High Court granted an injunction against further infringement by Macmillan. According to newspaper accounts, the court also ordered an inquiry into the extent of damages suffered by the Estate. Pending an appeal by Macmillan, the court granted a stay of its order. In an article in the *London Times* for 23 November 2001, Robin Young wrote that "[t]he judge made no order for costs, which he said were substantial given the amount of documentation and the expense of calling expert witnesses during the seven-day hearing. In the absence of an order, each side has to bear its own costs." This last point, if true, may significantly qualify the legal "victory" here.

*

In remarks made during a broadcast over Irish radio, Medh Ruane suggested a curious justification for reprinting Joyce's words without leave of the 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." 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. Joyce himself conceded that he was a "scissors-and-paste" man, an adapter and arranger of what came to hand.

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 then comes under private control for a certain term, and, when the term has expired, the work returns to the public domain to increase those raw materials and to spur the creation of new works—and, incidentally, new copyrights. But excessively long copyright terms upset this ecological cycle. Today, sixty years after Joyce's death and 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 Estate to shape his historical legacy according to criteria of family privacy.

In his attempts to control the image of his grandfather, Stephen James Joyce has taken arms against the ungovernable sea of celebrity at precisely the moment when James Joyce is truly becoming an icon

of popular culture (as witness the explosion of dramatic and cinematic treatments of his and Nora's lives in recent years). With increasing frequency, Mr. Joyce has appeared in the role of the 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, he tilts repeatedly at the academic and pop-culture windmills that rapidly (and, indeed, sometimes vulgarly) make a commodity of a beloved member of his family.

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 reprivatize that space, to reclaim it in the interests of the family circle or of personal taste. They allow a mere rightholder to become a privileged and arbitrary custodian of culture.[27] And all of this would be exactly as it should be (for I believe in copyrights and, as an attorney, help copyright owners to protect their rights), 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.

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 strikes me as a wholly understandable intuition that proclaims a "cultural right" to use *Ulysses* at this late date without permission, despite the fact that—fair use and other exceptions aside—the law recognizes no "cultural" defense as such. And I advocate no acts of infringement where copyright claims *are* genuine.

In each of the cases described above, Stephen James Joyce has sued,

or asserted legal rights, on a theory of copyright infringement, but it should be apparent that his grievance has as much to do with the *kinds* of uses being made of his grandfather's works as with the fact of use *per se*. Although newspaper accounts have reported exorbitant permission fees demanded by the Estate, Mr. Joyce's chief concern, I believe, is with the "moral rights" that his grandfather enjoyed in his writings and that Mr. Joyce, in some countries of the world, is permitted to enforce as the legal inheritor of those rights. As Carol Shloss explains in this issue, moral rights (such as rights of attribution and integrity) are legally distinct from economic rights (such as copyrights) and presuppose very different notions of authorial entitlement. Mr. Joyce's concern about alleged "passing off" shows that it is the kind, not just the fact, of copying that exercises him. Copyright law punishes for unauthorized *fidelity* to the source text. Theories of passing off and moral rights seek redress for unauthorized *deviations* from the source text.

Mr. Joyce's public attacks on Danis Rose's "RE" are filled with the language of moral rights, or *droit d'auteur*, as it is called in France. In a letter in the *Times Literary Supplement* for 27 June 1997, for example, Mr. Joyce alluded to his grandfather's attribution right (that is, his right to have his name associated with his own creations, not with "mutilations" of those creations or with the work of others): "To have had the audacity to put the name James Joyce on this outrageous misrepresentation of *Ulysses* . . . is demeaning to his creative, imaginative genius. . . . If this book is to continue to be sold, the name James Joyce must be eliminated, stricken from the dust-jacket, over and inside title-pages of this edition." In the same letter, Mr. Joyce referred to his grandfather's right of integrity as well: "The integrity, the essence of James Joyce's novative [*sic*] writing has been obliterated."

These legal concepts of integrity and attribution (or "paternity") derive from natural law and bear the impress of Romantic notions of organic expression and authorial uniqueness and sovereignty. They reflect a worldview that Shem's "pelagiarist pen" and "piously forged palimpsests" (in a chapter of *Finnegans Wake* that contains several allusions to the law of "copriright") hilariously draw into question (*FW* 182.03, 02, 185.30). Unfortunately for Mr. Joyce, the countries in which he would most like to enforce moral rights—the United States, the United Kingdom, the Irish Republic—either do not recognize such rights in authors' works or recognize them in attenuated or qualified forms.[28] In France, on the other hand, where Mr. Joyce resides, authors' moral rights are perpetual, inheritable, inalienable, and fully enforceable.

The result, for Mr. Joyce, is a significant and probably maddening gap between perceived injury and desired remedy. He would like to

pursue a remedy appropriate to moral rights, but often he must make do with approximate and ill-fitting legal machinery supplied by the copyright regimes of various countries.[29] This gap, or legal *differend*, is particularly frustrating for the moral-rights claimant in that copyright law confers a monopoly that is designedly "porous," permitting a number of exceptions that favor users of protected works (such as fair use for purposes of commentary and parody, the uncopyrightability of facts and ideas, limited durational terms, and compulsory licenses). Copyright is thus a rather imprecise instrument for redressing moral injury.

Another way of putting this is to say that a legal regime, such as copyright, which strives to balance private monopoly and public access—the rights of individual owners and the needs of the cultural commons—will not always afford relief to one who seeks to deny certain uses altogether, in the name of moral or personal rights. Anglo-American copyright law has 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 certain exceptions and for *limited* times (although in recent years legislatures have seen fit to erode that important limitation by extending future and existing copyright terms). The public domain, which at the end of the day (or rather of the copyright) is entitled to recast Molly's monologue as scabrous 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.

Stephen James Joyce suffers, as his grandfather did, from the imperfect fit between injury and legal remedy. We all do. That is why we make peace with noisy neighbors and learn to live with dents in our car-doors. It is partly why James Joyce chose to render the pain of his Dublin youth under the aspect of art and in a language of accusatory realism wrought for that purpose. Much of the social coherence that we experience in our lives is the product of "order without law" (to borrow a phrase from the legal scholar Robert C. Ellickson)[30]—the sane, informal folkways of compromise and restraint that we engage in every day, mostly unawares. Courts and lawsuits are a deviation from this norm of quiet, nonadversarial resolution of disputes.[31]

In the end, the public domain can be trusted to care for *Ulysses* properly. The slow, sifting process of culture can be relied upon to make the sorts of discriminations that ultimately preserve the integrity of works of artistic significance. Joyce, like Homer and

Shakespeare, will survive seemingly repugnant or disrespectful adaptations of his works. After all, Homer and Shakespeare have survived *Ulysses*.

Robert Spoo
Valhalla, New York

NOTES

[1] See *Ingraham v. Wright*, 430 U.S. 651 (1977) (holding that a student's due-process liberty interest under the Fourteenth Amendment is implicated when a school official, acting under color of state law, restrains and punishes the student for misconduct by inflicting pain, and concluding that due process is satisfied by an ex-post tort action brought under state law). Of course, Clongowes was not a "public" school in the American sense, and the United States Constitution has no legal relevance in the Irish context. I mention these unavailable remedies merely to highlight Stephen's legal helplessness at Clongowes.

[2] Older cases sometimes refer to exemplary or punitive damages as "vindictive damages," a formulation that seems suited to the occasionally grudge-bearing character of Joyce's "cruelfiction[s]" (*FW* 192.19). See, for instance, *The Palmyra*, 25 U.S. 1, 15 (1827) (Story, J.) (distinguishing between "remunerative" or compensatory damages and "vindictive" damages).

[3] Joyce himself was almost made a defendant in 1919 when the Society of Authors protested the production of George Bernard Shaw's play, *Mrs. Warren's Profession*, by the English Players—the troupe Joyce had formed in Zurich—without permission from or payment to Shaw. Joyce defended his actions by pointing to the difficulty in wartime of obtaining a foreign-based author's consent and further suggested that the production of an English-language play on the Continent was an exceptional case not governed by the Berne Convention on authors' rights. He also doubted that rights could exist for a play the performance of which had been declared illegal in England by the Lord Chamberlain (*JJII* 465-66). The irony of these justifications is that some of them mirror the legal rationalizations that Samuel Roth offered some years later for printing unauthorized installments of *Ulysses* in the United States. It is especially rich to see Joyce hinting at an "unclean hands" defense, whereby a copyright infringer asserts, as an affirmative defense, the immorality or obscenity of the work whose copyright he has allegedly violated.

[4] The term "libel" in this context does not denote a type of defamation but rather a complaint or bill (an initiatory pleading) brought in a civil action in admiralty. The government in the *Ulysses* case was the "libellant," and the book itself, as defendant, was "libeled"—that is, subjected to legal process.

[5] The essay first appeared under the title "Copyright Protectionism and Its Discontents: The Case of James Joyce's *Ulysses* in America," in the *Yale Law Journal*, 108 (December 1998), 633-67. A substantially longer version of the essay appeared under the title "Copyright and the Ends of Ownership: The Case for a Public-Domain *Ulysses* in America," in *Joyce Studies Annual 1999*, ed. Thomas F. Staley (Austin: Univ. of Texas Press, 1999), 5-62.

[6] My argument here focuses exclusively on the 1922 Paris edition of

Ulysses. Later editions, including Random House's 1934, 1961, and 1986 texts, present a different set of legal issues, as discussed in the version of this essay published in *Joyce Studies Annual 1999*.

[7] Act of 27 October 1998, Pub. L. No. 105-298, 112 Stat. 2827 (codified at 17 U.S.C. § 304[b]).

[8] Charles Rossman, "The New *Ulysses*: The Hidden Controversy," *New York Review of Books* (8 December 1988), 53.

[9] Letter from Peter du Sautoy to Philip Gaskell (5 May 1983), Richard Ellmann Papers, McFarlin Library, University of Tulsa.

[10] These copyright discussions have not been depicted fully or fairly in Joyce scholarship. The participants were not utterly unaware of the public interest or of the market limitations of a new, corrected *Ulysses*. On several occasions, for example, du Sautoy reminded his correspondents that the existence of a new copyright would not stop older editions from entering the public domain and returning under new imprints to vie with the Gabler edition at competitive prices. See, in this regard, the letter from du Sautoy to Stephen James Joyce (7 December 1982), Richard Ellmann Papers, McFarlin Library, University of Tulsa; see also the letter from du Sautoy to Ellmann, Gaskell, and Clive Hart (4 December 1981), noting that, despite any extension of copyright by means of the Gabler edition, "the larger sales will still go to the older uncorrected texts which will be out of copyright and cheaper."

The context of these letters suggests that the correspondents had the British *Ulysses* copyright chiefly in mind, though at times they alluded to the American copyright as well. When it is recalled that, at the time these letters were exchanged, the British copyright was scheduled to expire in ten years or so, the plan to secure a new derivative-work copyright in *Ulysses* seems much less momentous and overreaching than it might today in the wake of copyright revivals and extensions. At that time, prior to the twenty-year increase of United Kingdom copyright terms under the EU directive, public-domain versions of *Ulysses*, re-edited or merely reprinted, could be planned in Britain for the not-so-distant year of 1992.

[11] Rossman couched his criticisms in circumspect language, pointing to "the importance to the estate of establishing a new copyright" (p. 58). But the consensus back then, as Joyceans will recall, was that the Estate had been up to some pretty shady business in seeking to exploit the copyright in an edition that had received criticism from its own team of advisors.

[12] I should note that the opinions expressed in this introduction do not necessarily reflect the views of the *James Joyce Quarterly* or its editor, Sean Latham.

[13] John Kidd, "An Inquiry into *Ulysses: The Corrected Text*," *Papers of the Bibliographical Society of America*, 82 (December 1988), 411, 426 (enumerating an editor's options for a "base text" of *Ulysses*).

[14] See Rossman, who discusses an editor's options for a "copytext" of *Ulysses* (p. 53).

[15] And if this edition ever does come forth, does anyone suppose that it will not assert a fresh claim of copyright, just as the Gabler edition did? If Norton proceeds on the assumption that the 1922 edition is in the American public domain, Norton and/or Kidd will claim a new derivative-work copyright in

the re-edited text. If Norton arrives at an "arrangement" with the Estate that allows it to move ahead with the edition—see Warren St. John, "James Joyce and the Nutty Professor," *New York Observer* (29 December 1997), 1 ("'We've chosen to try to arrange things with the Joyce Estate,' said Victor Schmalzer, an executive vice president at Norton")—the Estate will claim a new derivative-work copyright in the re-edited text. Of one thing we can be certain: no one will offer to dedicate the new edition to the public domain. Copyright incentives just do not work that way.

[16] See, on this point, Bruce Arnold, "The *Ulysses* Scandal," *Independent* (17 June 1990), 14: "As a young student at Trinity College in the 1950s, I remember Thrift. . . . He was a revered Fellow of the college. *The Corrected Text* buries him for eternity, and Kidd is justifiably outraged." I should add that Arnold was the first, to my knowledge, publicly to raise questions about the validity of the American *Ulysses* copyright. See Arnold, "*Ulysses* Baffling Copyright," *Sunday Tribune* (15 March 1992), 28. Kidd later took up this issue—for example, in remarks quoted in St. John (p. 1).

[17] These remarks are attributed to Seán Sweeney, not Mr. Joyce, in an article by Lucy Adams, "Joyce Grandson in Battle to Ban *Ulysses* Musical," in *The Sunday Times* (Ireland) (30 July 2000).

[18] 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.

[19] Vanessa Thorpe, *The Guardian/Observer* (30 July 2000).

[20] In the recent litigation over Alice Randall's revisionary novel *The Wind Done Gone* (Boston: Houghton Mifflin, 2001), the Margaret Mitchell Trust sued to prevent publication of what it argued was, *inter alia*, a derivative work based without authorization on *Gone With the Wind* (New York: Macmillan Publishers, 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. 10 October 2001); see also Neil Weinstock Netanel, "Locating Copyright Within the First Amendment Skein," *Stanford Law Review*, 54 (2001), who discusses *Suntrust Bank*'s emphasis on free speech. Of course, *GWTW* is another work that has benefited from

the Sonny Bono Act's extension of older copyrights. Like *Ulysses*, moreover, *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, ninety-five years after its first publication and 168 years after the Emancipation Proclamation.

[21] David Pierce, ed., *Irish Writing in the Twentieth Century: A Reader* (Cork: Cork Univ. Press, 2000).

[22] Specifically, the 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 language 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 Press did not pursue the matter 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 introduction. 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. See Brad Sherman and Lionel Bently, "Balance and Harmony in the Duration of Copyright: The European Directive and Its Consequences," *Textual Monopolies: Literary Copyright and the Public Domain*, ed. Patrick Parrinder and Warren Chernaik (London: Centre for English Studies and the Office for Humanities Communication, 1997), p. 23: "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." 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" (forthcoming in the *James Joyce Literary Supplement*).

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

[24] To put this another way, it was no defense that Rose finished *most* of his work on "RE" 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 a publishing contract, or made more substantial arrangements with Macmillan, during that interval.

[25] I do not mean to imply that either judge was incapable of grasping complex nonlegal issues on his own. Certainly Judge 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 Justice Lloyd received substantial assistance from the oral and written testimony of Joyceans and scholars of textual editing.

[26] 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 finding of passing off or unfair competition.

[27] Of course, one reply to this is to say that a grandson is no "mere rightholder." I realize that there are two sides to the question. Unfortunately, in this case, I can occupy only one of them. I have more sympathy for the plight of 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*, 2 (Winter 1998), who examines family privacy and scholarly access in connection with archival materials relating to Joyce.

[28] The United Kingdom adopted statutory moral rights in 1988, pursuant to its obligations under the Berne Convention. See the Copyright, Designs and Patents Act of 1988. These rights include rights of attribution and integrity and are closely tied, in their duration and in other respects, to U.K. copyright law. Mr. Joyce's early attacks on the Rose edition suggested that he considered that text to have subjected *Ulysses* to "derogatory treatment" amounting to "distortion or mutilation of the work, or . . . otherwise prejudicial to the honor or reputation of the author"—C.D.P.A. § 80(1)-(2). Evidently, the Estate did not pursue its moral-rights claims in the later stages of *Sweeney v. Macmillan*. Perhaps this is because the theory had little chance of success in the first place. After all, can a serious effort at scholarly editing, however distasteful to an heir, constitute derogatory treatment? Are not moral rights in a work enjoying an EU-revived copyright statutorily limited just as that copyright is limited? The answer to this last question would appear to be yes: "It is not an infringement of any moral right to do anything that by virtue of this Regulation [governing third-party uses of revived copyrights] is not an infringement of copyright"—Duration of Copyright and Rights in Performances Regulations, 1995 S.I. No. 3297, § 23(6).

The statutory law of moral rights in the United States is limited to works of visual art. My understanding is that moral rights are virtually nonexistent in the Irish Republic.

[29] In this respect, Mr. Joyce has inherited his grandfather's disabilities as a foreign-domiciled plaintiff. As noted above, when James Joyce sought damages and an injunction in his 1927 suit against Samuel Roth, his New York attorneys had to resort to a rather unsatisfying theory of passing off or unfair competition, which later, in his 1937 address before the International P.E.N. Congress, Joyce strained to equate to a moral-rights remedy.

[30] See Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge: Harvard Univ. Press, 1991).

[31] Compare Abraham Lincoln's wry advice to lawyers: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the *nominal* winner is often a *real* loser—in fees, and expenses, and waste of time. As a peace-maker the lawyer has a superior opertunity [*sic*] of being a good man. There will still be business enough"—Lincoln, "Notes on the Practice of Law" (ca. 1850), in *The Portable Abraham Lincoln*, ed. Andrew Delbanco (New York: Viking Books, 1992), p. 34.

UNITED STATES DISTRICT COURT

Southern District of New York

United States of America, Libelant v. One Book called "Ulysses" Random House, Inc., Claimant	OPINION A. 110-59

On cross motions for a decree in a libel of confiscation, supplemented by a stipulation - hereinafter described - brought by the United States against the book "Ulysses" by James Joyce, under Section 305 of the Tariff Act of 1930, Title 19 United States Code, Section 1305, on the ground that the book is obscene within the meaning of that Section, and, hence, is not importable into the United States, but is subject to seizure, forfeiture and confiscation and destruction.

United States Attorney - by Samuel C. Coleman, Esq. and Nicholas Atlas, Esq., of counsel - for the United States, in support of motion for a decree of forfeiture, and in opposition to motion for a decree dismissing the libel

Messrs. Greenbaum, Wolff & Ernst, - by Morris L. Ernst, Esq., and Alexander Lindey, Esq., of counsel - attorneys for claimant Random House, Inc., in support of motion for a decree dismissing the libel, and in opposition to motion for a decree of forfeiture.

Figure 1. Original typescript of Federal District Court Judge John M. Woolsey's 1933 decision in *United States v One Book Called "Ulysses"*

WOOLSEY, J:

The motion for a decree dismissing the libel herein is granted, and, consequently, of course, the Government's motion for a decree of forfeiture and destruction is denied.

Accordingly a decree dismissing the libel without costs may be entered herein.

I. The practice followed in this case is in accordance with the suggestion made by me in the case of United States v. One Book Entitled "Contraception", 51 F. (2d) 525, and is as follows:

After issue was joined by the filing of the claimant's answer to the libel for forfeiture against "Ulysses", a stipulation was made between the United States Attorney's office and the attorneys for the claimant providing:

1. That the book "Ulysses" should be deemed to have been annexed to and to have become part of the libel just as if it had been incorporated in its entirety therein.

2. That the parties waived their right to a trial by jury.

3. That each party agreed to move for decree in its favor.

4. That on such cross motions the Court might decide all the questions of law and fact involved and render a general finding thereon.

5. That on the decision of such motions the decree of the Court might be entered as if it were a decree after trial.

It seems to me that a procedure of this kind is highly appropriate in libels for the confiscation of books such as this. It is an especially advantageous procedure in the instant case because on account of the length of "Ulysses" and the difficulty of reading it, a jury trial would have been an extremely unsatisfactory, if not an almost impossible, method of dealing with it.

II. I have read "Ulysses" once in its entirety and I have read those passages of which the Government particularly complains several times. In fact, for many weeks, my spare time has been devoted to the consideration of the decision which my duty would require me to make in this matter.

"Ulysses" is not an easy book to read or to understand. But there has been much written about it, and in order properly to approach the consideration of it it is advisable to read a number of other books which have now become its satellites. The study of "Ulysses" is, therefore, a heavy task.

III. The reputation of "Ulysses" in the literary world, however, warranted my taking such time as was necessary to enable me to satisfy myself as to the intent with which the book was written, for, of course, in any case where a book is claimed to be obscene it must first be determined, whether the intent with which it was written was what is called, according to the usual phrase, pornographic, - that is, written for the purpose of exploiting obscenity.

If the conclusion is that the book is pornographic that is the end of the inquiry and forfeiture must follow.

But in "Ulysses", in spite of its unusual frankness, I do not detect anywhere the leer of the sensualist. I hold, therefore, that it is not pornographic.

IV. In writing "Ulysses", Joyce sought to make a serious experiment in a new, if not wholly novel,

literary genre. He takes persons of the lower middle class living in Dublin in 1904 and seeks not only to describe what they did on a certain day early in June of that year as they went about the City bent on their usual occupations, but also to tell what many of them thought about the while.

Joyce has attempted - it seems to me, with astonishing success - to show how the screen of consciousness with its ever shifting kaleidoscopic impressions carries, as it were on a plastic palimpsest, not only what is in the focus of each man's observation of the actual things about him, but also in a penumbral zone residua of past impressions, some recent and some drawn up by association from the domain of the subconscious. He shows how each of these impressions affects the life and behavior of the character which he is describing.

What he seeks to get is not unlike the result of a double or, if that is possible, a multiple exposure on a cinema film which would give a clear foreground with a background visible but somewhat blurred and out of focus in varying degrees.

To convey by words an effect which obviously lends itself more appropriately to a graphic technique,

accounts, it seems to me, for much of the obscurity which meets a reader of "Ulysses". And it also explains another aspect of the book, which I have further to consider, namely, Joyce's sincerity and his honest effort to show exactly how the minds of his characters operate.

If Joyce did not attempt to be honest in developing the technique which he has adopted in "Ulysses" the result would be psychologically misleading and thus unfaithful to his chosen technique. Such an attitude would be artistically inexcusable.

It is because Joyce has been loyal to his technique and has not funked its necessary implications, but has honestly attempted to tell fully what his characters think about, that he has been the subject of so many attacks and that his purpose has been so often misunderstood and misrepresented. For his attempt sincerely and honestly to realize his objective has required him incidentally to use certain words which are generally considered dirty words and has led at times to what many think is a too poignant preoccupation with sex in the thoughts of his characters.

The words which are criticized as dirty are old Saxon words known to almost all men and, I venture, to many women, and are such words as would be naturally

and habitually used, I believe, by the types of folk whose life, physical and mental, Joyce is seeking to describe. In respect of the recurrent emergence of the theme of sex in the minds of his characters, it must always be remembered that his locale was Celtic and his season Spring.

Whether or not one enjoys such a technique as Joyce uses is a matter of taste on which disagreement or argument is futile, but to subject that technique to the standards of some other technique seems to me to be little short of absurd.

Accordingly, I hold that "Ulysses" is a sincere and honest book and I think that the criticisms of it are entirely disposed of by its rationale.

V. Furthermore, "Ulysses" is an amazing tour de force when one considers the success which has been in the main achieved with such a difficult objective as Joyce set for himself. As I have stated, "Ulysses" is not an easy book to read. It is brilliant and dull, intelligible and obscure by turns. In many places it seems to me to be disgusting, but although it contains, as I have mentioned above, many words usually considered dirty, I have not found anything that I consider to be dirt for dirt's sake. Each word of the book contributes

like a bit of mosaic to the detail of the picture which Joyce is seeking to construct for his readers.

If one does not wish to associate with such folk as Joyce describes, that is one's own choice. In order to avoid indirect contact with them one may not wish to read "Ulysses"; that is quite understandable. But when such a real artist in words, as Joyce undoubtedly is, seeks to draw a true picture of the lower middle class in a European city, ought it to be impossible for the American public legally to see that picture?

To answer this question it is not sufficient merely to find, as I have found above, that Joyce did not write "Ulysses" with what is commonly called pornographic intent, I must endeavor to apply a more objective standard to his book in order to determine its effect in the result, irrespective of the intent with which it was written.

VI. The statute under which the libel is filed only denounces, in so far as we are here concerned, the importation into the United States from any foreign country of "any obscene book". Section 305 of the Tariff Act of 1930, Title 19 United States Code, Section 1305. It does not marshal against books the spectrum of condemnatory adjectives found, commonly, in laws dealing

with matters of this kind. I am, therefore, only required to determine whether "Ulysses" is obscene within the legal definition of that word.

The meaning of the word "obscene" as legally defined by the Courts is: tending to stir the sex impulses or to lead to sexually impure and lustful thoughts. Dunlop v. United States, 165 U. S. 486, 501; United States v. One Book Entitled "Married Love", 48 F. (2d) 821, 824; United States v. One Book Entitled "Contraception", 51 F. (2d) 525, 528; and compare Bysart v. United States, 272 U. S. 655, 657; Swearingen v. United States, 161 U. S. 446, 450; United States v. Dennett, 39 F. (2d) 564, 568 (C.C.A.2); People v. Wendling, 258 N. Y. 451, 453.

Whether a particular book would tend to excite such impulses and thoughts must be tested by the Court's opinion as to its effect on a person with average sex instincts - what the French would call l'homme moyen sensuel - who plays, in this branch of legal inquiry, the same role of hypothetical reagent as does the "reasonable man" in the law of torts and "the man learned in the art" on questions of invention in patent law.

The risk involved in the use of such a reagent arises from the inherent tendency of the trier of facts,

however fair he may intend to be, to make his reagent too much subservient to his own idiosyncrasies. Here, I have attempted to avoid this, if possible, and to make my reagent herein more objective than he might otherwise be, by adopting the following course:

After I had made my decision in regard to the aspect of "Ulysses", now under consideration, I checked my impressions with two friends of mine who in my opinion answered to the above stated requirement for my reagent.

These literary assessors - as I might properly describe them - were called on separately, and neither knew that I was consulting the other. They are men whose opinion on literature and on life I value most highly. They had both read "Ulysses", and, of course, were wholly unconnected with this cause.

Without letting either of my assessors know what my decision was, I gave to each of them the legal definition of obscene and asked each whether in his opinion "Ulysses" was obscene within that definition.

I was interested to find that they both agreed with my opinion: that reading "Ulysses" in its entirety, as a book must be read on such a test as this, did not tend to excite sexual impulses or lustful thoughts but

that its net effect on them was only that of a somewhat tragic and very powerful commentary on the inner lives of men and women.

It is only with the normal person that the law is concerned. Such a test as I have described, therefore, is the only proper test of obscenity in the case of a book like "Ulysses" which is a sincere and serious attempt to devise a new literary method for the observation and description of mankind.

I am quite aware that owing to some of its scenes "Ulysses" is a rather strong draught to ask some sensitive, though normal, persons to take. But my considered opinion, after long reflection, is that whilst in many places the effect of "Ulysses" on the reader undoubtedly is somewhat emetic, no where does it tend to be an aphrodisiac.

"Ulysses" may, therefore, be admitted into the United States.

December 6, 1933

Woolsey

.....

United States District Judge

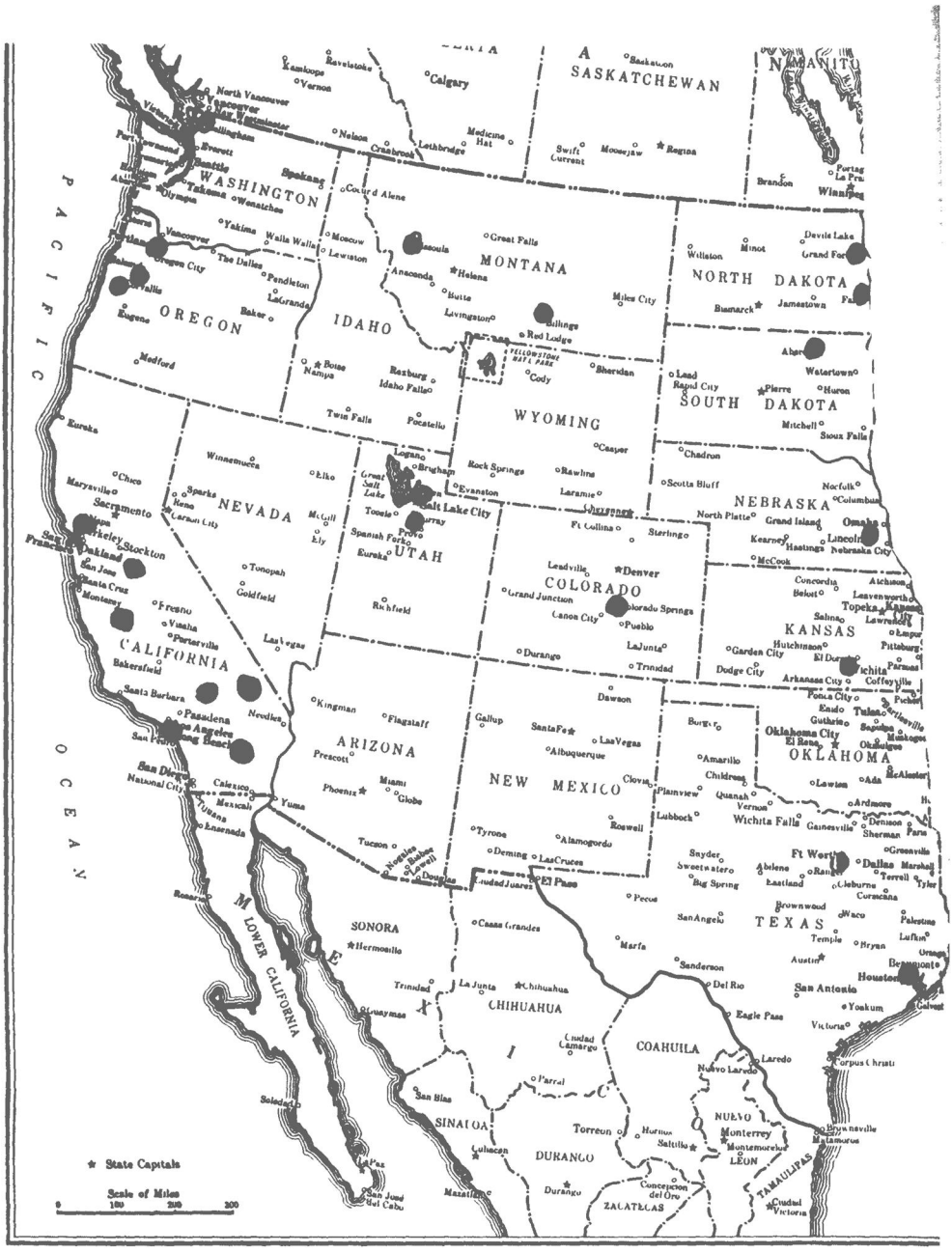
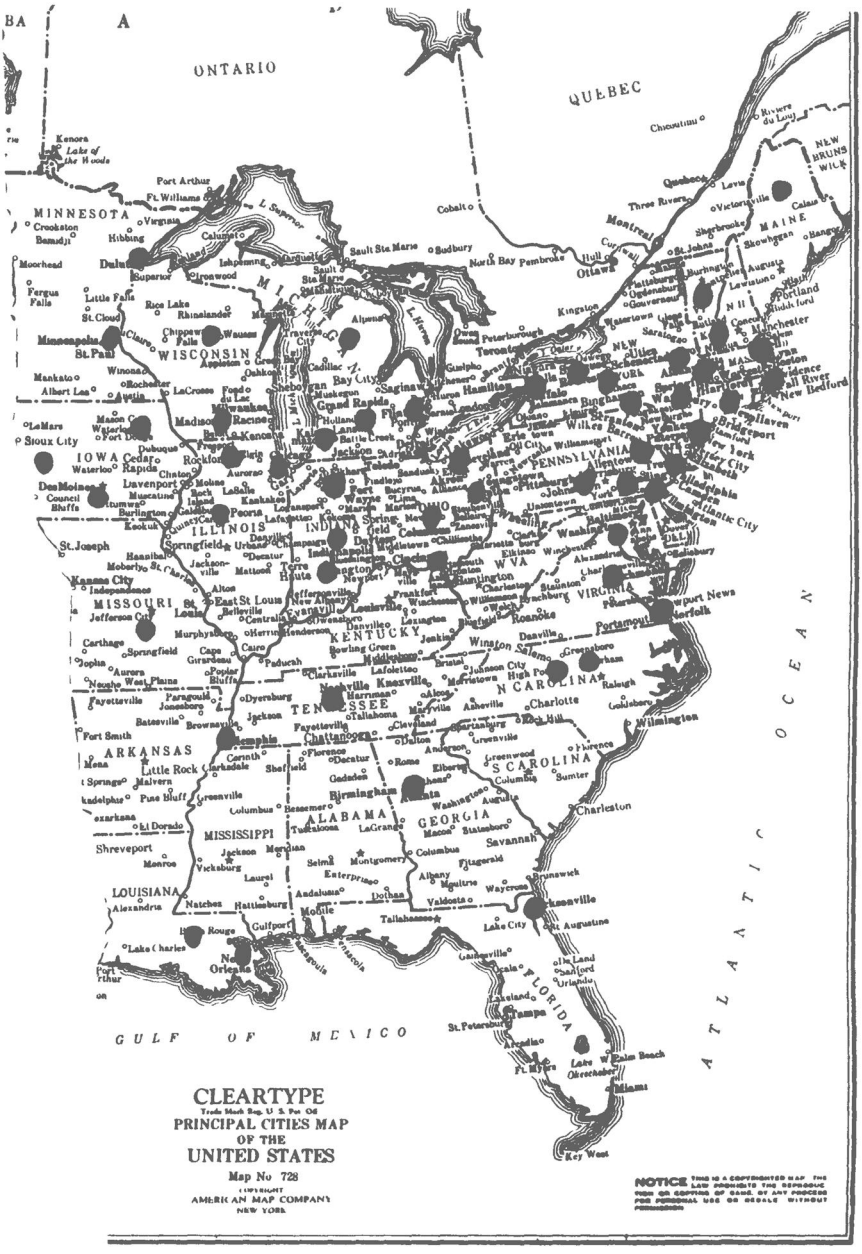


Figure 2. Map of the United States showing locations in 1932-1933 of libraries that either owned *Ulysses* or would add it to their collections if available.



The map was an exhibit attached to a preliminary memorandum submitted on behalf of Random House by attorney Morris L. Ernst.