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A Rose Is a Rose Is a Roth: New/Old Theories of Legal Liability in the Joyce World

By Robert Spoo

EDITOR'S INTRODUCTION: In late 2000 Cork University Press issued *Irish Writing in the Twentieth Century*, a 1400-page reader edited by David Pierce. This beautifully produced book is not confined wholly to fiction, poetry, and drama, but to critical, biographical, journalistic, and memoir writing as well; hence it should be the most complete single volume representation of Ireland's 20th century literary output—except for the fact that the section on James Joyce was removed in its entirety after the Irish High Court enjoined publication of the Joyce extracts under the copyright law. It is a Joycean irony that the gap—the very lack of Joyce in such a volume—speaks the loudest; hence instead of the conventional book review, we offer Robert Spoo's insight into the controversy. We at *JJLS* also suggest that you buy *Irish Writing in the Twentieth Century*, and glue the ensuing article in the gap between pages 323 to 346, where the Joyce section would have been.

What do Danis Rose and Samuel Roth have in common besides a knack for irritating members of the Joyce family? Each took advantage of technicalities of copyright law to produce an unauthorized version of *Ulysses* that deviated from the approved text and was advertised to appeal to a popular audience. Each was the target of long-distance litigation instigated by a man named Joyce residing in Paris who alleged copyright infringement and misuse of the name "James Joyce" (or "passing off," a tort that is often referred to by its more general term, unfair competition). Each had mixed success in the courts, beating some of the allegations but succumbing to others. And each conceived of *Ulysses* as a public good and masterpiece that should not be withheld from the reading public on mere legal grounds of private ownership or indecency.

Roth, whom James Joyce's American lawyers could not touch for copyright infringement, agreed to be bound by a consent decree issued by a New York court in 1928 that enjoined him from impermissibly exploiting Joyce's name in further acts of passing off. Rose, whom Stephen James Joyce's British attorneys could not nail for passing off, was found by an English court in 2001 to have infringed the copyright in certain published manuscript materials, and was enjoined from further distribution of the "Reader's Edition" of *Ulysses*. What is behind all these fearful symmetries? Several things, including the human impulse to make copies that are somehow unfaithful to the original; the blessed porosity of copyrights; the fury of litigants when aroused; and lawyers. In this article I explore the Rose-Roth parallels in some detail and offer a few observations on the Joyce Estate's recent lawsuits against Rose, Macmillan Publishers, and the Cork University Press.

In 1927, James Joyce engaged the New York law firm of Chadbourne, Stanchfield & Levy to put a stop to Samuel Roth's unauthorized serial publication of *Ulysses* in his magazine, *Two Worlds Monthly: Devoted to the Increase of the Gaiety of Nations*. Roth was the resourceful, virtually unsinkable pirate-pornographer of Manhattan, endowed with the soul, if not always the taste, of an aesthete-decadent out of the school of Beardsley. He was an intriguing mixture of incompatibles. On the one hand, he did not hesitate to exploit the popular association of avant-garde literature with plain-brown-wrapper lubricity. On the other, he genuinely believed that controversial books should have a wide circulation in an America hogtied by state and federal obscenity laws, aggressive customs and postal seizures, thuggish bookstore raids by the New York Society for the Suppression of Vice, and the parlor-prudish cultural attitudes fostered by the purity crusades of Anthony Comstock and his less flamboyant successor, John S. Sumner, the Society's grim enforcer. "What, in brief, made Sammy run?"[1]

It is hard for us to imagine today how luridly objectified "obscene" literature was in the era of Prohibition and Purity. Writing of federal judge John M. Woolsey's momentous ruling that *Ulysses* could be admitted into the United States, Morris L. Ernst, attorney for the banned, wrote that "the first week of December 1933 will go down in history for two repeals, that of the Prohibition and that of the legal compulsion for squeamishness in literature."[2] Ernst was not yoking heterogeneities by violence together. The famous newsreel images of feds and gumshoes smashing cases of bootleg hooch would be matched today, had photographers been present at the New York docks and post offices, by images of officials laying hold of books, magazines, and picture postcards. The original U.S. Customs Certificate identifying "one book 'Ulysses'" as "goods" seized, dated 8 June 1932 by the Acting Deputy Collector for the Tenth District of the Port of New York, may be viewed along with the rest of the record of the 1932-34 *Ulysses* litigation in the Admiralty section of the National Archives for the Northeast Region, located in New York City.

Turning the pages of the Admiralty case files, one can see why naughty books and bootleg occupied the same imaginative space in the Twenties and Thirties, a linkage that gave rise to the term "bookleggers" for enterprisers like Roth. In the same box that contains the files for *United States v. One Book Called "Ulysses,"* one may also peruse the record for *United States v. One Ford Truck*, a case dating from December 1932 that involved a vehicle caught transporting "intoxicating liquors" in violation of the Tariff Act of 1930 and the Prohibition Reorganization Act of 1930. Other case files include *United States v. Approximately 126 Assorted Glasses, a quantity of intoxicating liquors, etc. found at Club La Lune on West 52nd Street*, and *United States v. One Cash Register, Remington #A-334, 163840, a quantity of intoxicating liquors, etc. found at premises at 584 Lennox Ave., Manhattan*. Each of these cases was a forfeiture action, or "libel," brought against illicit articles by George Z. Medalie, the same U.S. Attorney who filed a libel against one book called *Ulysses*.[3] In the latter case, a single imported copy of *Ulysses* was the offending *res*, and Random House, which had imported the copy from Paris, entered the action as claimant to challenge the U.S. government's attempt to have the copy condemned by decree of forfeiture and destroyed according to the law.

The booklegger Roth was arrested on many occasions for violating obscenity statutes, as was his wife and publishing colleague, Pauline. He was convicted and sentenced to jail several times, including in 1927 (or 1928) when he was fined and given a suspended sentence for mailing an advertisement for *The Perfumed Garden* (the "Arabian classic of Muhammed al Nefzawi, a sixteenth-century Tunisian sheikh").[4] In 1928, he was arrested again, this time for having in his possession at a book auction allegedly obscene photographs and indecent books, and sentenced to three months in a workhouse where, he later claimed, he ghosted a play, *The Naked Woman*, for Mae West. Roth appears to have been in jail either during or not long after the civil litigation conducted against him by Joyce in 1927-28.[5]

Roth operated under several pseudonyms in his colorful career, edited racy magazines like *Beau* and *Casanova Jr.'s Tales*, and in the early Thirties published an expurgated version of *Lady Chatterley's Lover* as well as his own dramatization of the novel, along with the anonymous sequels, *Lady Chatterley's Husbands* and *Lady Chatterley's Friends*. During the Twenties and Thirties when he was publishing Joyce, Lawrence, and other controversial authors, Roth was pursued (for a nice Bloomian irony) by the Federation of Hungarian Jews in America as well as by the New York Society for the Suppression of Vice. Sumner, Secretary of the latter organization, boasted that in 1927 alone the Society had obtained the conviction of twenty-eight persons charged with violating obscenity statutes. Roth, who combined the huckstering of a snake-oil salesman with the moral passion of an apostle of free thought, declared late in life, "I've never published anything that wasn't good. I've put the classics into every American home."[6]

Joyce's New York lawyers went after Roth with all the weapons that American law could place at the disposal of a foreign author in Joyce's position. The most direct and effective means of exterminating the brute would have been an action for copyright infringement. Roth had been issuing episodes of *Ulysses* serially since 1926, and his only defense would have been that Ezra Pound, acting as Joyce's "agent," had authorized the installments some years earlier. This would not have been an entirely frivolous contention. Pound had been keen to find an American publisher to pick up with *Ulysses* where *The Little Review* had been forced by a criminal conviction to leave off; and there is evidence that Pound, always eager to gain influence with a new magazine, initially "approved" Roth's plan in 1921-22 for "publishing the *unpublished* remainder of the book," especially as Pound considered "the law under which *Ulysses* was suppressed, an outrage, [and] the people who tolerate such a law little better than apes."[7]

But if Pound had given encouragement to Roth in 1921-22, he changed his tune dramatically a few years later when he insisted to Joyce, "At no time did I give Roth any permission to use *Ulysses* ((I had no authority to give such permission and I never assumed such authority))."[8] Pound perceived no inconsistency here, for he had two sets of distinctions in mind: (1) the difference between moral "approval" and legal "permission"; and (2) the changes in the publishing history of *Ulysses* between 1921 and 1926. By 1926, four years after *Ulysses* had first appeared in book form, Pound could agree with Joyce that Roth's belated serialization was an act of "pirating and I believe mutilating, fragments of the already published book."[9] He evidently now felt that any approval he may have given in 1921-22—whatever its legal effectiveness then as a matter of agency law—could not justify Roth's actions in the altered circumstances of 1926-27. Now that getting *Ulysses* into print was a far less urgent matter than it had been in 1922 (despite the continuing legal ban on the book in America), Roth seemed to Pound less like a gallant swashbuckler than a thief in the night. Roth saw it differently, of course, testifying for Joyce's lawyers that "Pound had been empowered by Joyce to make any disposition he pleased of the manuscript," and denying that the magazine had realized any profit from the serialization: "The circulation of The Two Worlds Magazine has decreased very appreciably since the announcement of the articles by Mr. Joyce."[10]

But if Joyce's copyright claim was a sure-fire winner, why did his lawyers do a legal about-face just before trial and urge him "to withdraw the suit for damages as there was no copyright case and [instead] get an injunction against use of name" (*Letters I* 266)? The answer is as simple as the subsequent legal history of *Ulysses* has been complicated. James Joyce forfeited any American copyright that he might have enjoyed in the 1922 Paris edition by publishing the book first in Europe and then not reprinting it in the United States within six months. American copyright law in 1922 demanded that authors of English-language books first published abroad jump through certain statutory hoops before they could secure copyright protection in the United States. These authors were required, first, to deposit a copy of the book with the U.S. Copyright Office within sixty days of foreign publication, and, second, to reprint the text in the United States no later than four months after the deposit copy had been received. The latter provision was known as the "manufacturing clause" because it made American manufacture of English-language books first published abroad a condition of copyright protection here, and thus unabashedly protected American printers and bookbinders from having to compete against cheap foreign imports.[11]

The manufacturing clause also lent a helping hand, indirectly, to literary pirates, as Pound frequently complained: "Our copyright 'law' permits, and by permission, encourages such [piracy]."[12] This is because whenever a foreign-based author did not or could not get a deposit copy past American customs agents and through the mails to the Copyright Office, and then find an American printer to reset the book within the narrow four-month window, copyright protection would be unavailable in the United States. And when a book was not flying copyright colors, pirates were effectively invited to board and commandeer her. Joyce, the author of a famously unmailable and unprintable book, was in no position to comply with the manufacturing clause, and the 1927 international protest against Roth made this clear: "The appropriation and mutilation of Mr. Joyce's property is made under colour of legal protection in that the ULYSSES which is published in France and which has been excluded from the mails in the United States is not protected by copyright in the United States" (*Letters III* 151). Joyce was even more direct in his letter to Bennett Cerf, printed in earlier Random House editions of *Ulysses*: "I was unable to acquire the copyright in the United States since I could not comply with the requirements of the American copyright law which demands the republication in the United States of any English book published elsewhere within a period of six months after the date of such publication."[13]

Without an American copyright to enforce, Joyce's lawyers had to improvise a theory of liability. Unfortunately for researchers, most of the parties' pleadings and other legal papers have not come to light, so it is difficult to know exactly what the lawyers were arguing. But the laconic consent decree issued by Justice Mitchell of the New York Supreme Court, which enjoined Roth from "using the name of the plaintiff [Joyce] for advertising purposes or for purposes of trade," suggests that Roth had been accused of engaging in unfair competition of some kind. The central tort in unfair competition at common law is "passing off" or "palming off," whereby the defendant through false representation induces buyers to believe that the defendant's product is that of the plaintiff, sometimes "by using the plaintiff's name with literal accuracy in connection with the defendant's product but in a way that nevertheless suggests that the product is the plaintiff's or that he had some role in it."[14] When Justice Mitchell enjoined Roth from using Joyce's name "in connection with any magazine, periodical or other publication published by defendants, [or] any book, writing, manuscript or other work of the plaintiff" (*Letters III* 185-86), he was ordering Roth to stop palming off "*Ulysses* by James Joyce" in *Two Worlds Monthly* as if the product had been approved by

Joyce himself. The fact that Roth, in order to foil the censors, had been issuing bowdlerized—or as Joyce insisted, "mutilated"—texts of the episodes meant that he was passing off an inferior product under the valuable trade name of "James Joyce" (though Justice Mitchell's decree does not say this in terms, and the language of the injunction could also be read, quite consistently, as enforcing a kind of early common-law right of publicity or perhaps a right against false endorsement or misappropriation of Joyce's skill, expenditures, or labor.[15] New York also had a statutory right of privacy, dating from the turn of the century, that prohibited the use of a person's image or name in trade or advertising without the person's written consent).

So Roth got caught with his hand, or his palm, in the cookie jar, and a court enjoined him from future tortious conduct. Did that stop him? Apparently not, since American piracies of *Ulysses* continued, and some researchers believe that Roth was responsible.[16] Of course, if Roth chose to interpret Justice Mitchell's decree with a certain hawkeyed literalness and a rascally disregard for its clear import, he might have persuaded himself that the injunction prevented him only from using Joyce's name "in connection with" Roth's own publications and advertisements, not from issuing a bookleg version of the entire Blue Book of Eccles, which clearly lacked copyright protection in the United States. I suspect that some such wily logic underlay subsequent piracies of *Ulysses* as a book (if "piracies" is the right word, given the work's non-copyright status), whether or not Samuel Roth was the particular buccaneer responsible.

Joyce, at any rate, had his long-sought ruling by an American court, for all the good it did him. He entertained the fond notion, which some years later he announced to the P.E.N. Congress in Paris, that Justice Mitchell's decree stood for the legal principle "that a work, though not protected by copyright law and even if under legal ban, still belongs to its author by virtue of a natural right, and that a court may protect the author against mutilation and publication of the work just as he is protected against unlawful uses that might be made of his name" (*CW* 274-75; my translation).[17] Joyce fantasized that his little unfair competition case against Roth might one day be exalted, by some Circean jurisprudence, into an expansive moral right of authorship, or *droit d'auteur*, which European countries had long recognized.[18] But American law was, and in many ways still is, reluctant to grant authors moral rights in their writings,[19] and the modest decree issued by Justice Mitchell, which was never published in the law books and which no attorney of my acquaintance ever heard of, is not likely to spearhead a moral-rights movement in this country. (A consent decree reflects an agreement of the parties, made under sanction of the court, as to the just determination of their rights, and is binding only on the parties. It does not serve as precedent to bind the court.[20])

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For all his copying, Roth was no infringer of a *Ulysses* copyright. At most, he was an unfair competitor, offering inferior goods under the valuable trade name of "James Joyce." Now fast-forward seventy years, and lay the scene in Ireland and England. Hey, presto! Behold Roth Redux, or, by any other name, the War of the Rose. No sooner had British Macmillan-Picador issued Danis Rose's "Reader's Edition" of *Ulysses* ("RE") in 1997 than Stephen James Joyce was assailing the book on grounds of moral rights, or *droit d'auteur*.[21] In a letter in the *Times Literary Supplement* for 27 June 1997, Mr. Joyce alleged violations of his grandfather's moral right of attribution (that is, the right to have one's name associated with one's 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 moral right of integrity as well: "The integrity, the essence of James Joyce's novative [*sic*] writing has been obliterated."

The Joyce Estate brought suit against Macmillan in the English High Court, Chancery Division, initially seeking an interlocutory (preliminary) injunction to prevent publication of the book, but later choosing to pursue the matter directly at trial, whereupon publication of RE went ahead as scheduled. The Estate's allegations included copyright infringement, passing off, and violation of James Joyce's moral rights. Evidently, the moral rights theory dropped out at some later stage of the litigation, leaving Justice Lloyd of the High Court to grapple with copyright and passing-off claims. In November 2001, after a full trial, Justice Lloyd ruled that RE infringed the copyrights in certain *Ulysses* materials that had been published after Joyce's death—notably, the Rosenbach manuscript.[22]

Justice Lloyd's 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 representation, has substantially harmed the "good will" that the Joyce Estate has acquired in the "trade name" of "*Ulysses* by James Joyce"? If this last legal theory makes *Ulysses* sound less like a work of literature than a brand of toaster oven (or a Remington cash register or One Ford Truck), that is because the tort of passing off is usually invoked in more typical marketplace disputes. Justice Lloyd noted that the Estate's theory involved a rather ambitious application of the law.

The court answered the first question in the negative. Pursuant to a European Union directive, lifetime editions of Joyce's works, which had entered the public domain in Britain in 1992, were made the subject of "revived" copyrights there in 1996, and these resurrected rights were in turn limited by statutory exemptions that permit "third parties" to use or reproduce such works without permission in certain circumstances. One of these third-party exemptions grants a compulsory license (or "license as of right") to anyone wishing to make use of a work enjoying revived copyright.[23] This provision rescued Rose and Macmillan from being deemed infringers of any lifetime edition of *Ulysses* (in particular, the 1922 Paris text, which the court determined had been Rose's primary source) and requires only that Macmillan arrange for retroactive payment of a reasonable license fee to the Estate.

Justice Lloyd did find infringement, however. The third-party exemptions for use of revived copyrights do not apply to copyrights that were never revived because they had never expired, such as those in the genetic materials published in the 1970s in the *James Joyce Archive* and elsewhere. According to Justice Lloyd, the published text of 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. Furthermore, in a ruling that points up 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."

Turning to the Estate's alternative theory, 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." 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 should be considered 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*. (In the aftermath of the Joyce Wars, "inherent uncertainty" about the correct brand of *Ulysses* is an understatement. There is probably more consensus about toaster ovens.)

To sum up, Rose and Macmillan are not unfair competitors, and they did not infringe British copyright in the 1922 text or any other lifetime edition of *Ulysses*. But the English High Court did find that RE infringes a copyright in the published Rosenbach manuscript. On the basis of this holding, the court granted an injunction against further infringing distributions 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.

But the trials of the Reader's Edition do not end there. In October 2000, while litigation in the English High Court was still pending, the Irish High Court granted the Joyce Estate an interlocutory injunction preventing the Cork University Press from reproducing, in the Republic of Ireland, extracts from RE in an anthology entitled *Irish Writing in the Twentieth Century: A Reader* (2000). The publisher of this handsome and massive volume, which was edited by David Pierce, had originally sought the Estate's permission to print 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—comparable in many but not all respects to Britain's revived-copyright exemptions, discussed above—that protect third parties who are affected by the revival of copyrights pursuant to the EU directive.[24] The Irish High Court agreed with the Estate's position, however, and granted the injunction,[25] whereupon the Press decided to forgo the headache of further litigation and instead printed the anthology with the Joyce extracts neatly excised and a cardboard blank inserted bearing the melancholy notice: "Pages 323-346 have been removed due to a dispute in relation to copyright."

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What are we to make of all these Rose-Roth synchronicities? To begin with—and quite apart from the obvious differences between the brazen porno-buccaneer and the headstrong scholar-editor—each man did two unauthorized things: (1) he copied the text of *Ulysses*, and (2) he modified that text and placed Joyce's name on the product. Roth altered Joyce's words largely to escape the gaze of the censor and to ensure access to a ready market for titillation; Rose did so in order to correct what he believed to be certain "manifest" errors and in the hope of making a reputedly forbidding text more friendly to the common reader. The fury of Joyce *grand-père et petit-fils* fastened upon these two interrelated acts—unauthorized fidelity and unauthorized infidelity—and found expression, correspondingly, in two legal theories. The Paris-based litigants invoked copyright law to redress the copying, and passing off to remedy the deviations (though copyright law also may be used to seek relief for unauthorized adaptations).

Rose and Roth are kindred spirits in their passion for dissemination and their impatience with legal niceties that threaten to block the spread of their chosen message. (Pound, too, was a passionate disseminator; hence his early *entente* with Roth.) Yet the two men did not so much flout copyright law as seek to wriggle through its loopholes. Copyrights are riddled with exceptions that favor users of protected works (such as fair use, the idea/expression dichotomy, compulsory licenses, and limited durational terms), and the revived-copyright regulations in the United Kingdom and the Irish Republic expressly balance the benefits that EU harmonization confers on owners of revived rights with the legitimate expectations of the public in freely usable works. In Roth's case, the draconian consequences formerly visited upon foreign-based authors who could not comply with the U.S. manufacturing clause supplied the needed technicality.

Though their methods were risky and their motives sometimes unclear, Rose and Roth perceived a truth about works of the imagination: that in a profound sense such works are jointly owned, from birth, by the author and the public, and that copyright law merely steps in postpartum to grant the author sole legal ownership for a certain term—subject to fair use and other exceptions—after which the work returns to its equitable owners, the public. Copyright confers many benefits on an author, not the least of which is the ability to exercise temporary control over the reproduction and distribution of a work and thus to impose a kind of artificial scarcity on an otherwise inherently illimitable public good.[26] By such means, the law offers what some scholars call *ex ante* incentives to would-be creators. Put another way, copyrights are meant to lay the economic bait that will lure authors out of silence and inactivity, get them to exert themselves creatively and, ideally, to publish the results of their exertions.[27]

Notwithstanding all the private benefits conferred by copyright's limited monopoly, the copyrighted work never loses its native rapport with the public, its once and future owner. In an era of lengthening copyrights,[28] it is important to remember that works of art and literature are not ordinary private property. They are not chattel like a Remington cash register or a Ford truck, over which—absent legal forfeiture or illegal theft—an owner may exercise unqualified dominion. Rather, such works are privately-owned "public" goods, endowed with rich potential for benefiting large numbers of people and capable of transfer without the transferor's experiencing any loss.[29] "He who receives an idea from me," wrote Thomas Jefferson, "receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. . . . Inventions then cannot, in nature, be a subject of property."[30] Taking up a related theme, Justice Brandeis opined in a famous case about competitive misappropriation of news releases: "[W]ith the increasing complexity of society, the public interest tends to become omnipresent . . . . Then the creation or recognition by courts of a new private right may work serious injury to the general public, unless the boundaries of the right are definitely established and wisely guarded."[31]

Because in an age of digital reproduction a public good like literature may be distributed without a transfer of traditional physical copies (such as bound books, tape recordings, or CD-ROMs), the transferor experiences no loss of the good transferred, even though the copyright owner may incur economic loss if the good is downloaded or emailed without remuneration. Hence the heightened urgency of the invisible "No Trespass" sign that copyright law posts on "intellectual" property. Legislators and lawyers are currently grappling with the unsettling fact

that a large segment of the public sees little difference between a Napster download of the Beach Boys' track "God Only Knows" and a pre-digital loan of the *Pet Sounds* LP.

Copyrights are important, and we should respect them. They help light the flame that may be passed from taper to taper, and they provide authors and their families with just compensation. If copyrights are trespassed upon, their owners are within their rights to seek a legal remedy. Where copyrights do not exist or are being used consistently with fair use or other statutory exceptions, lawsuits and threats of lawsuits are a vexatious and unnecessary burden upon the public. But legal rights are sometimes in tension with practical realities, and the reality is that *Ulysses* is a public good *par excellence* whose precocious status as a world classic and as the talismanic symbol of the modern has given it a spectacular currency in high and popular culture. As an object of seemingly boundless cultural desire, it has begun to outgrow its own aging copyright. Of all the modernist authors, Joyce is probably the one least easily confined within the metes and bounds of a copyright, as witness the recent spate of stage and cinema adaptations and the Internet pages, discussion lists, and streamed performances inspired by Joyce's writings. After eighty years of controlled dissemination, which, in spite of piracies, has secured many benefits to the legal owners of *Ulysses*, the public appears to be increasingly asserting its equitable interest in this great work, whose subject was always the public domain. Samuel Roth and Danis Rose remind us in their very different ways of this other side of copyright, the side that is turned faithfully and expectantly toward the public.

—Valhalla, New York

1. Leo Hamalian, "Nobody Knows My Names: Samuel Roth and the Underside of Modern Letters," *Journal of Modern Literature,* vol. 3 (April 1974), 921. An earlier version of Hamalian's essay was published as "The Secret Careers of Samuel Roth," in *3 x 3* (Saratoga Springs, NY: Harian Press, 1969).

2. Foreword to James Joyce, *Ulysses* (New York: Random House, 1934), p. viii.

3. 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.

4. The dates and details of Roth's arrests and convictions are difficult to pin down. Of the incident involving *The Perfumed Garden*, Hamalian says that Roth was arrested in April 1927, fined $5,000, and given a suspended sentence of two years. Hamalian, "Nobody Knows My Names," 901. Paul K. Saint-Amour, citing another source, says the arrest was made in January 1928, and puts the fine at $500 and the suspended sentence at six months. Saint-Amour, "Soliloquy of Samuel Roth: A Paranormal Defense," *James Joyce Quarterly*, vol. 37 (Spring/Summer 2000), 475 n.29. Readers interested in a superb account of intellectual property as a constituent condition of and theme within modern literature should consult Saint-Amour's book, *The Copywrights: Intellectual Property and the Modern Literary Imagination*, forthcoming from Cornell University Press.

5. See Adelaide Kugel, "'Wroth Wrackt Joyce': Samuel Roth and the 'Not Quite Unauthorized' Edition of *Ulysses*," *Joyce Studies Annual 1992*, ed. Thomas F. Staley (Austin: Univ. of Texas Press, 1992), 247. See also Saint-Amour, "Soliloquy of Samuel Roth," 475 n.29.

6. Quoted in Hamalian, "Nobody Knows My Names," 889. Part of my description of Roth was previously published in Robert Spoo, "Unpublished Letters of Ezra Pound to James, Nora, and Stanislaus Joyce," *James Joyce Quarterly*, vol. 32 (Spring/Summer 1995), 547-48. I have taken information about Roth from contemporary newspaper accounts, as well as from Hamalian's essay and from Jay A. Gertzman, *A Descriptive Biography of "Lady Chatterley's Lover," with Essays Toward a Publishing History of the Novel* (New York: Greenwood Press, 1989), esp. pp. 11-34 and 237-43. Another essential source is Saint-Amour, "Soliloquy of Samuel Roth," 459-77.

7. "From Ezra Pound" (letter to the editor), *Chicago Tribune*, Paris ed. (26 May 1928), 4, reprinted in Lea Baechler et al., *Ezra Pound's Poetry and Prose: Contributions to Periodicals* (New York: Garland Publishing, 1991), p. 30.

8. Letter of Pound to Joyce, 30 March 1928, in Spoo, "Unpublished Letters," 546.

9. "From Ezra Pound," reprinted in Baechler et al., p. 30.

10. "Joyce Testimony on '*Ulysses*' Here," *New York Times* (20 May 1928), 12. Some years ago, Roth's daughter published an interesting rehabilitative essay about how her father had been misrepresented by Richard Ellmann and other Joyce scholars. See Kugel, "'Wroth Wrackt Joyce,'" 242-48. Kugel presents intriguing evidence that Roth was more honorable in his initial dealings with Joyce and "Work in Progress" than has been understood or acknowledged. But her claims regarding Roth's serialization of *Ulysses* and Pound's alleged support for it are less well documented. While her argument is deserving of attention and further research, many of her specific claims depend upon "lost" or "missing" letters or assertions drawn from Samuel Roth's own autobiographies. Importantly, Kugel does not distinguish between Pound's initial eagerness in 1921-22, following the *Little Review* criminal case, to find an American outlet for the unpublished balance of *Ulysses*, and his attitude in 1926-28 when the book version had been out for several years.

11. For a much fuller treatment of these issues, see Robert Spoo, "Copyright Protectionism and Its Discontents: The Case of James Joyce's *Ulysses* in America," *The Yale Law Journal*, vol. 108 (Dec. 1998), 633-67. A longer version of that 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.

12. "From Ezra Pound," reprinted in Baechler et al., p. 30.

13. "A Letter from Mr. Joyce to the Publisher, Reprinted in this Edition by Permission of the Author," in James Joyce, *Ulysses* (New York: Random House, 1934), p. xvi.

14. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* (5th ed. 1984), pp. 1015-16.

15. For concise discussions of publicity rights, passing off, and misappropriation, see David H. Berstein et al., "Trademark and Unfair Competition Issues," *Practising Law Institute: Protecting Your Intellectual Property Assets 2000*, PLI Order No. G0-00D2 (July 2000), 285-95, 300-02.

16. See, for example, Hamalian, "Nobody Knows My Names," 895, 897; R.F. Roberts, "Bibliographical Notes on James Joyce's *Ulysses*," *Colophon*, vol. 1 (1936), 573-74; and Saint-Amour, "Soliloquy of Samuel Roth," 460, 475-76 n.29.

17. Joyce was dreaming of a famous legal precedent even before *Joyce v. Roth* was concluded, writing that the New York lawyers should press for "a judgment . . . which, when recorded, would establish a precedent in case law in favour of unprotected European writers whose cause in this matter was the same as my own" (*Letters III* 267). The consent decree was never recorded, however—except in Joyce's collected letters.

18. See Carol Loeb Shloss, "Privacy and Piracy in the Joyce Trade: James Joyce and *Le Droit Moral*," *James Joyce Quarterly*, vol. 37 (Spring/Summer 2000), 447-57.

19. U.S. federal copyright law provides for moral rights only in works of visual art. See 17 U.S.C. § 106A.

20. See *Black's Law Dictionary* (6th ed.; St. Paul, MN: West Publishing Co., 1990), pp. 410-11. Justice Mitchell's decree refers to "the stipulation between the attorneys for the respective parties and consent of defendants thereto, both dated December 19, 1928" (*Letters III* 185).

21. The following account of the Joyce Estate's litigation against Danis Rose and the Cork University Press appears in somewhat different form and context in Robert Spoo, "Introduction: Injuries, Remedies, Moral Rights, and the Public Domain," *James Joyce Quarterly*, vol. 37 (Spring/Summer 2000), 338-42. This special issue of the *JJQ*, just out, is devoted to the topic of "Joyce and the Law." I am indebted to Sean Latham, Editor of *JJQ*, for the opportunity to serve, with Joseph Valente, as guest editor of that issue. The cover, which reproduces a beautiful watercolor of Judge John M. Woolsey, is alone worth the price of admission.

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

23. 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 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. U.K. Duration of Copyright and Rights in Performances Regulations, 1995 S.I. No. 3297, §§ 24, 25.

24. Specifically, the 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 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, as discussed above, an anthology issued in Northern Ireland or England could have printed extracts of the 1922 *Ulysses* under the compulsory license provision. 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."

25. See *Sweeney v. Nat'l Univ. of Ireland Cork, Trading as Cork Univ. Press*, No. 10497P/2000 (Ir. H. Ct. Oct. 9, 2000).

26. U.S. copyright law in fact permits copyright owners to control six distinct kinds of activity with respect to copyrighted works: reproduction, adaptation, public distribution, public performance, public display, and, in the case of sound recordings, public performance by means of digital audio transmission. See 17 U.S.C. § 106(1)-(6).

27. For a fuller discussion of the incentive theory of copyright and the difficulties in applying such a theory to the creative impulses of authors like Joyce, see Robert Spoo, "Copyright Law and Archival Research," *Journal of Modern Literature*, vol. 24 (Winter 2000/2001), 205-12.

28. More than three years ago, partly in an effort to harmonize U.S. copyright terms with those in the EU, Congress passed the Sonny Bono Copyright Term Extension Act, 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 U.S. Supreme Court has agreed to entertain a constitutional challenge to the Sonny Bono Act, in a case entitled *Eldred v. Ashcroft*.

29. For a classic discussion of public goods, see Harold Demsetz, "The Private Production of Public Goods," *Journal of Law and Economics*, vol. 13 (1970), 293-306.

30. Letter to Isaac McPherson, 13 August 1813, in *The Portable Thomas Jefferson*, ed. Merrill D. Peterson (New York: Penguin Books, 1977), p. 530.

31. *Int'l News Serv. v. Associated Press*, 28 U.S. 215, 262-63 (1918) (Brandeis, J., dissenting).