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Copyright and the Ends of Ownership: The Case for a Public-Domain Ulysses in America

Robert Spoo

in a language that much of the time is affecting, vibrantly concrete, and a surprising invitation to the imagination of the common reader.

During all the flap about the books of the century and *Ulysses*, I am sure it occurred to many of us with biting irony that the discussion of books and literature and literary criticism itself was once central to intellectual dialogue.

Thomas F. Staley

Copyright and the Ends of Ownership: the Case for a Public-domain *Ulysses* in America[1]

ROBERT SPOO

In 1927, Ezra Pound, then living in Italy, dispatched to the editor of *The Nation* a characteristically pugnacious letter containing what must have seemed an unusual declaration:

> For next President I want no man who is not lucidly and clearly and with no trace or shadow of ambiguity against the following abuses: (1) Bureaucratic encroachment on the individual, as [in] the asinine Eighteenth Amendment, passport and visa stupidities, arbitrary injustice from customs officials; (2) Article 211 of the Penal Code, and all such muddle-headedness in any laws whatsoever; (3) the thieving copyright law.[2]

[1] This essay is a revised and expanded version of a piece that appeared under the title "Copyright Protectionism and Its Discontents: The Case of James Joyce's *Ulysses* in America" in *The Yale Law Journal*, Volume 108, Number 3 (December 1998), 633–67. I would like to thank the editors of that journal and The Yale Law Journal Company, Inc., for permission to reprint. I have retained here the system of citation used in legal scholarship. At first glance, this system may seem alien to those familiar with humanities citation, but upon closer inspection it will reveal its efficiency and rationality.

[2] Ezra Pound, Letter to the Editor, THE NATION, Dec. 14, 1927, at 684, 685, *reprinted in* 4 EZRA POUND'S POETRY AND PROSE: CONTRIBUTIONS TO PERIODICALS 393 (Lea Baechler et al. eds., 1991) [hereinafter POETRY AND PROSE]. What Pound refers to as "Article 211 of the Penal Code" was a special provision codified among offenses against the Postal Service and enacted as part of a sweeping revision of the United States penal laws. *See* Act of Mar. 4, 1909, ch. 321, § 211, 35 Stat. 1088, 1129 (codified as amended at 18 U.S.C. § 1461 (1994)) (declaring "obscene" matter to be "nonmailable" on penalty of fine or imprisonment); *see also* Ezra Pound, *The Classics "Escape"*, LITTLE REV., Mar. 1918, at 32, 33, reprinted in 3 POETRY AND PROSE, *supra*, at 64 (referring to section 211 as "the amazing, grotesque, and unthinkable, ambiguous

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Three years later in a letter published in *The Hound & Horn*, Pound returned to this list of "abuses," now describing them as "[c]ertain laws and regulations [which] are contrary to the welfare of letters in America in 1930" and placing special emphasis on "our copyright law, originally designed to favour the printing trade at the expense of the mental life of the country."[3] During the 1920s and 1930s, Pound routinely expressed his exasperation, as an American author living abroad, with the trinity of legal forces that he believed was crippling the progress of literature and enlightenment in the United States: obscenity statutes, the discretionary powers of customs and postal officials, and the copyright law.[4]

Pound perceived clearly that literary modernism, if it was to thrive in the international context, required the freedom to cross borders. Quite simply, manuscripts and books by foreign-based authors had to pass through customs and the mails before they could come to rest in the hands of American publishers, printers, and readers. Less literally, modernist border-crossing involved the transgressing of moral and ideological boundaries: Authors like Radclyffe Hall, D. H. Lawrence, and Joyce sought to disturb social, sexual, and aesthetic complacencies.[5] Yet such transgressions could scarcely occur in the absence of the first kind of border-crossing. The artistic and ideological ambitions of authors were dependent upon the sociomaterial means of producing and disseminating texts. Transformation could not take place without transmission.

These prerequisites of the modernist project met their greatest challenge during the first half of the twentieth century, in the American legal forces that Pound so colorfully identified. While obscenity statutes sought to neutralize the transgressive power of modernist works, those same statutes—in concert with the discretionary acts

law of our country"). Pound's mention in *The Nation* of "the asinine Eighteenth Amendment" hints at the powers that U.S. customs officials had to enforce the prohibition upon intoxicating liquors by discretionary seizures of offending goods.

[3] Ezra Pound, Letter to the Editor, THE HOUND & HORN, July-Sept. 1930, at 574, 577, *reprinted in* 5 POETRY AND PROSE, *supra* note 2, at 228, 229.

[4] For further examples of Pound's ire on the subject of American copyright law, see *infra* notes 54–55 and accompanying text.

[5] *The Well of Loneliness*, the 1928 novel about lesbian experience by Radclyffe Hall, was the subject of obscenity prosecutions in Britain and the United States. *See* EDWARD DE GRAZIA, GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS 165–208 (1992). For a discussion of D. H. Lawrence's controversial novels in the context of obscenity and literary piracy, see *infra* note 111.

of customs officials and a copyright law that required works seeking protection to be printed and manufactured in the United States—prevented many foreign-produced works in English from crossing American borders and taking their place in the cultural scene. When controversial books did manage to reach readers in the United States, they often did so through underground channels of piracy, or "booklegging,"[6] a practice that deprived authors of financial rewards and of the power to control the quality and dissemination of texts.

This essay traces the history of the American copyright in *Ulysses* and argues that Pound's trio of legal "abuses" combined to destroy Joyce's chance of securing such a copyright within months of the book's initial publication in France in 1922. For students of modernism, the choice of *Ulysses* to illustrate a problem that confronted many foreign-based writers has several advantages. First, the importance of *Ulysses* as a literary achievement gives its less familiar identity as intellectual property an intrinsic interest. Second, the case of *Ulysses* provides unusually detailed insight into the protectionist features of our copyright law in the years prior to the advent of more cosmopolitan legislation regarding literary property. Finally, since it is often claimed that *Ulysses* is protected by copyright in the United States, and since these claims have a chilling effect on the activities of present-day publishers, scholars, and readers,[7] a clarification of the copyright status of *Ulysses* in America is badly needed. Now that Congress has passed legislation to extend existing copyright terms by twenty years,[8] it is particularly important to determine whether the American copyright in *Ulysses* is fact or fiction.

One purpose of this essay, then, is to illustrate how vulnerable foreign-based authors were to the parochial policies of the earlier American copyright law, particularly when copyright protection was sought for works deemed obscene. A second purpose is the more pragmatic one of showing that, since *Ulysses* has never, or almost never, enjoyed copyright protection in the United States—despite claims to the contrary—the novel should now be recognized for what in legal reality it is: one of the great treasures of the public domain.

[6] *See, e.g.*, R. F. Roberts, *Bibliographical Notes on James Joyce's "Ulysses"*, 1 COLOPHON (n.s.) 565, 574 (1936) (referring to the cost of a pirated edition of *Ulysses* as a "booklegger's price").

[7] *See infra* notes 128, 149–152, 157–159 and accompanying text.

[8] *See infra* notes 155–156 and accompanying text.

The equities that once favored Joyce and his heirs now favor the public domain.[9] Whereas the illusion of American copyright once helped to compensate Joyce for the privations he had suffered at the hands of protectionism and piracy, today that illusion serves only to sustain an extralegal monopoly that controls the availability of *Ulysses* and dictates the forms in which it may appear. Against the backdrop of international modernism and American publishing during the first half of the twentieth century, this essay examines a celebrated yet representative instance of the tension between literary monopoly and the public domain.

Part I of this essay adumbrates historical contexts for thinking about *Ulysses* as literature and as literary property. Part II sets forth the relevant portions of the 1909 Copyright Act—specifically, the manufacturing and ad interim provisions—and shows that, because it failed to satisfy these stringent requirements, *Ulysses* was injected into the public domain in America shortly after its publication in France. Part III discusses the phenomenon of trade courtesy that has endowed *Ulysses* with a kind of de facto "copyright" since its legalized publication in America in 1934. Part IV questions the wisdom of continuing to credit this courtesy copyright now that Congress has passed legislation to extend existing copyright terms. Part V argues that the cultural benefits of a public-domain *Ulysses* far outweigh any private interests in maintaining the illusion of a *Ulysses* protected by copyright in the United States. Finally, Part VI explores some of the implications of a public-domain 1922 *Ulysses* for the community of Joyce scholars and readers. In particular, this section addresses the copyright status of revised and corrected editions of *Ulysses*, the role of fair use in Joyce scholarship, and the relationship between American copyright law and its counterparts in Canada and the United Kingdom.

I. *ULYSSES* AS LITERATURE AND AS LITERARY PROPERTY

A. SERIAL PUBLICATION IN THE UNITED STATES: THE LITTLE REVIEW

The circumstances surrounding the publication and piracy of *Ulysses* are familiar to Joyceans, but the salient facts take on a special

[9] *See* discussion *infra* Parts IV and V.

significance in the context of copyright law that justifies their recapitulation here. Joyce first conceived *Ulysses* as a short story while residing in Rome in 1906,[10] but he did not begin serious composition for nearly a decade, by which time the work had grown in conception from a story to a novel-length book. By late 1917, Joyce had completed the first three episodes.[11] He mailed typescripts of these portions to the editors of *The Little Review*, who, with Pound's encouragement, had agreed to print episodes of the novel-in-progress as Joyce produced them.[12] When installments began to appear in *The Little Review* in March 1918,[13] *Ulysses* was launched on its American copyright adventure.

The present copyright law grants protection to a work from the moment the work is created.[14] Under the 1909 Copyright Act,[15] however, a work did not acquire protection until it had been published with a notice of copyright affixed to each copy.[16] While publication with notice was sufficient to secure copyright,[17] the 1909 Act also required that copies of the work be deposited in the United States Copyright Office and that a claim of copyright be registered there.[18] While issues of *The Little Review* containing installments of *Ulysses* were published regularly, each bearing a notice of copyright in the name of Margaret C. Anderson (the magazine's founder and coeditor), it is not certain that Anderson consistently complied with the deposit and registration requirements. The Copyright Office contains a record of registration for only the first four of twenty-three issues that serialized *Ulysses*.[19] Although failure to deposit and register the remaining issues would not have destroyed the copy-

[10] *See* Letters from James Joyce to Stanislaus Joyce (Sept. 30 and Nov. 13, 1906), *in* 2 LETTERS OF JAMES JOYCE 168 & n.4, 189, 190 (Richard Ellmann ed., 1966).

[11] *See* RICHARD ELLMANN, JAMES JOYCE 419–20 (rev. ed. 1982).

[12] *See id.* at 421–22.

[13] *See id.* at 421.

[14] The 1976 Act defines creation of a work as fixation in a "tangible medium of expression" and provides that copyright protection arises upon fixation. 17 U.S.C. § 102(a) (1994).

[15] Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075.

[16] *See id.* § 9, at 1077.

[17] *See* HERBERT A. HOWELL, THE COPYRIGHT LAW 75–76 (2d ed. 1948). Howell, who was Assistant Register of Copyrights earlier in this century, is a valuable authority on the 1909 Copyright Act.

[18] *See* Act of Mar. 4, 1909, ch. 320, §§ 10, 12–13, 35 Stat. 1075, 1078.

[19] Issues of *The Little Review* for March, April, May, and June 1918—containing the first four episodes of *Ulysses*—were assigned registration numbers B412274, B412276, B413421, and B414990, respectively, by the Copyright Office. Since separate copyrights were not taken out in Joyce's name for the individual episodes of *Ulysses*, those episodes

rights in those issues,[20] it might well have impaired their enforceability.[21] Anderson's seeming carelessness is therefore puzzling.

The anomaly may be explained by events that overtook *The Little Review* soon after *Ulysses* began to appear in its pages. Between January 1919 and January 1920, United States postal authorities suppressed three different issues, each containing a portion of Joyce's novel, by revoking the magazine's second-class postage privileges.[22] An issue of *The Little Review* had been declared nonmailable once before, in October 1917, when the Postmaster of the City of New York decided that a short story by the modernist author Wyndham Lewis was "obscene, lewd, or lascivious" within the meaning of the Federal Criminal Code.[23] The absence of copyright registration records for issues of *The Little Review* after mid-1918 may be the direct result of the Post Office's obscenity suppressions. Nonmailable issues could not readily have been deposited in the Copyright Office, of course. Once the magazine had acquired the stigma of obscenity, moreover, the Register of Copyrights had a ground for refusing to register claims of copyright in its issues.[24]

were protected by the general copyright of the issues in which they appeared. *See* HOWELL, *supra note* 17, at 80–81. The general copyrights were in Margaret Anderson's name, and there is no record of an assignment of copyright by Anderson to Joyce or his heirs. An amendment to the 1909 Act, effective March 15, 1940, however, permitted authors or their heirs to renew the copyright in a periodical contribution even though no separate copyright had ever been registered in that contribution and no assignment had occurred. *See id.* at 104–05. Accordingly, copyrights in the *Ulysses* episodes were properly renewed in the name of Joyce's widow on January 13, 1946 (renewal entries 751 to 755 in the Copyright Office), whereupon the original 28-year term of protection for those episodes was extended for another 28 years. *See* Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. 1075, 1080. I wish to thank Mary E. Aldridge for her generous assistance, evident here and elsewhere in this essay, in searching the Copyright Office onsite card catalogue and archives.

[20] *See* HOWELL, *supra* note 17, at 75–76.

[21] *See infra* notes 32–34 and accompanying text.

[22] The issues suppressed were those for January 1919, May 1919, and January 1920. See PAUL VANDERHAM, JAMES JOYCE AND CENSORSHIP 1–2 (1998).

[23] *See id.* at 18. The provision under which the October 1917 issue was declared nonmailable by the Postmaster was section 211 of the U.S. Criminal Code, the "Article 211" that Pound decried as one of the three American "abuses." *See supra* note 2 and accompanying text. The suppression of that issue was upheld by Judge Augustus Hand in *Anderson v. Patten*, 247 F. 382 (S.D.N.Y. 1917).

[24] The ground for refusal of copyright registration would have been that no copyright could exist in an immoral work. *See, e.g.*, Hoffman v. Le Traunik, 209 F. 375, 379 (N.D.N.Y. 1913) (stating that to be entitled to copyright, a work must be "free from illegality or immorality"); *cf.* HOWELL'S COPYRIGHT LAW 45 (Alan Latman ed., rev. ed. 1962) ("While the [1909] Copyright Act contains no . . . provision [precluding registration of copyright in immoral matter], protection has in some cases been denied to works deemed offensive to public policy."). *But see infra* note 80 (discussing the Copyright Office's "rule of doubt" as creating an administrative presumption in favor of works submitted for copyright registration).

Matters soon grew worse for *The Little Review* and for Joyce. In the autumn of 1920, the Secretary of the New York Society for the Suppression of Vice filed an official complaint against the magazine's two editors for publishing the July-August issue, which contained the section of the "Nausicaa" episode in which Leopold Bloom masturbates while observing Gerty MacDowell on the seashore.[25] The New York Court of Special Sessions found the editors guilty of publishing obscenity within the meaning of the state's penal code[26] and fined them fifty dollars each.[27] With this new setback, Joyce's still unfinished novel had gone from suffering the sporadic suppressions of postal officials to receiving the formal condemnation of a court of law.

Predictably, American publishers began to back away from the idea of publishing a book version of *Ulysses*. Shortly after *The Little Review* trial, the New York publisher B. W. Huebsch wrote John Quinn, the attorney who had defended the magazine's editors, that he would not risk defying the judgment of the Court of Special Sessions by publishing *Ulysses* "unless some changes are made in the manuscript."[28] He added: "In view of your statement that Joyce declines absolutely to make any alterations, I must decline to publish it."[29] Other publishers followed suit.[30]

Thus, after the appearance of thirteen of its episodes in *The Little Review*, *Ulysses* had run aground on the shoals of the obscenity law. With his masterpiece far from complete, Joyce found his hopes for further American publication dashed. The copyright protection for those portions of the novel that had appeared serially was unsatisfactory at best: Had Joyce wished to bring an action for copyright infringement, he would have been forced to make do with a general copyright in each issue of the magazine, as distinct from a separate copyright in his own contributions. The magazine's copyrights were

[25] *See* VANDERHAM, *supra* note 22, at 41–42; *see also* ELLMANN, *supra* note 11, at 502 (discussing the complaint filed against the editors).

[26] *See* N.Y. PENAL LAW § 1141 (Consol. 1909) (declaring "obscene prints and articles" to be illegal) (current version at N.Y. PENAL LAW § 235.05 (Consol. 1984)).

[27] *See* VANDERHAM, *supra* note 22, at 53; *see also* ELLMANN, *supra* note 11, at 502–04 (recounting the events of the trial of *The Little Review*'s editors).

[28] VANDERHAM, *supra* note 22, at 56 (quoting Huebsch).

[29] *Id.*

[30] *See id.*

not in Joyce's name, moreover, but in the name of its owner, Margaret Anderson. Finally, copyright registration seems to have been lacking for most of the issues in which Joyce's novel appeared.[31] Although not fatal to the copyrights themselves, these lacunae would have made an infringement action hard to pursue,[32] because a certificate of registration, being prima facie evidence of ownership of a valid copyright,[33] was a condition precedent to bringing suit.[34] As bleak as the situation seemed in early 1921, however, Joyce's American copyright troubles were only beginning.

B. FRENCH PUBLICATION AND AMERICAN PIRACY

Despairing of publication in the United States or in Britain, Joyce gratefully accepted the offer of Sylvia Beach to act as publisher of *Ulysses* in France. Joyce and Beach agreed on a Dijon printer and a first edition of 1000 copies,[35] whereupon Joyce set about finishing his book.[36] After several delays, *Ulysses* was published in France on February 2, 1922.[37] The copyright page bore the notice "Copyright by James Joyce."[38]

The book version of *Ulysses* differed substantially from the version that had appeared serially in *The Little Review*. No longer under pressure to meet magazine deadlines, Joyce had found time to add four

[31] *See supra* note 19 and accompanying text.

[32] *See* B. L. REID, THE MAN FROM NEW YORK: JOHN QUINN AND HIS FRIENDS 452 (1968) (reporting the Joyce Estate's concession that, given the American piracies of *Ulysses* in the 1920s, "[t]he *Little Review* copyright was not as helpful as [Ezra] Pound expected").

[33] *See* Act of Mar. 4, 1909, ch. 320, § 55, 35 Stat. 1075, 1086 ("[T]he said certificate shall be admitted in any court as prima facie evidence of the facts stated therein."). The language of section 55 of the 1909 Act is echoed in the present Act. *See* 17 U.S.C. § 410(c) (1994).

[34] *See* Act of Mar. 4, 1909, ch. 320, § 12, 35 Stat. 1075, 1078 ("No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with."); Lumiere v. Pathé Exchange, Inc., 275 F. 428, 430 (2d Cir. 1921) ("Deposit of copies and registration is each a condition precedent of the right to maintain an action for infringement."); HOWELL, *supra* note 17, at 82–84 (discussing deposit and registration as conditions precedent to maintaining a copyright infringement action). The present Act still makes registration a prerequisite to bringing suit in the case of United States authors. See 17 U.S.C. §§ 411- 412 (1994).

[35] *See* ELLMANN, *supra* note 11, at 504.

[36] *See id.* at 519.

[37] *See id.* at 524.

[38] JAMES JOYCE, ULYSSES (Shakespeare and Company ed. 1922).

lengthy episodes to his novel.[39] Of the published book's 732 pages, more than 300 had never appeared in any form in *The Little Review*. Other episodes Joyce amplified or recast to fit his changing conception of the work, sometimes altering them radically from their serial appearance. Only a handful of episodes remained relatively unchanged.[40] This new *Ulysses*, if it was to enjoy copyright protection in the United States, could expect only limited assistance from *The Little Review* copyrights, even if they were found to be enforceable.[41]

America dealt Joyce another blow by refusing to allow the book version of *Ulysses* to be imported. Five hundred copies were seized by customs authorities in New York in the latter part of 1922.[42] This destruction of a supply for which there was a clear demand set the stage for piracy, and in 1926 the New York publisher Samuel Roth began to print unauthorized episodes of *Ulysses*, brazenly expurgated to foil the censors, in his magazine *Two Worlds Monthly*.[43] In all, Roth printed fourteen episodes from Joyce's book and may also have been responsible for a forgery of the ninth printing of the Shakespeare and Company text.[44]

Joyce's response to these piracies, significantly, was not to bring an action for copyright infringement. Instead, his lawyers in America sought and won an injunction barring Roth and his publishing company "from using the name of the plaintiff [Joyce] for advertising purposes or for purposes of trade."[45] The ground of this decision by the Supreme Court of the State of New York is unstated in the

[39] The opening section of "Oxen of the Sun," the 14th episode, was the last of *Ulysses* to be published in *The Little Review*. It appeared in the September-December 1920 issue. In the following year, Joyce completed the 15th through 18th episodes. *See* ELLMANN, *supra* note 11, at 442.

[40] *See id.* at 519.

[41] *See supra* notes 31–34 and accompanying text.

[42] *See* Letter from James Joyce to Bennett Cerf (Apr. 2, 1932), *reprinted in* 3 LETTERS OF JAMES JOYCE, *supra* note 10, at 241, 243; VANDERHAM, *supra* note 22, at 4. The 500 confiscated copies were from the Egoist Press edition, an English edition that was printed in France because English printers refused to set *Ulysses*. *See* ELLMANN, *supra* note 11, at 490; Roberts, *supra* note 6, at 570.

[43] *See* Roberts, *supra* note 6, at 572.

[44] *See id.* at 574–75.

[45] Joyce v. Roth (N.Y. Sup. Ct. Dec. 27, 1928) (order granting injunction), *in* 3 LETTERS OF JAMES JOYCE, *supra* note 10, at 185, 185. This court order, issued by Justice Richard H. Mitchell, is unreported. Two earlier memorandum decisions—*Joyce v. Roth*, 223 N.Y.S. 878 (N.Y. App. Div. 1927) (mem.), and Joyce v. Roth, 225 N.Y.S. 842 (N.Y. App. Div. 1927) (mem.)—may be related to the 1928 decision, but they recite only procedural facts and do not indicate the cause of action.

laconic court order, though it must have been some form of unfair competition.[46] Joyce had told his lawyer in Paris prior to the decision that if there was "no case against [Roth] under copyright or property laws . . . I suggest at least that [the New York lawyers] press for some judgment . . . which, when recorded, may establish a precedent in case law in favour of unprotected European writers, whose cause in this instance is mine also."[47] Joyce had extracted a measure of protection from the American courts, but it was protection against the deceptive use of his name, not against the copying of his literary creation.[48]

Joyce also pursued an extralegal remedy against Roth. In the latter part of 1926, he hit upon the idea of an international protest and sent copies of a draft statement to notable authors around the world for their subscription.[49] More than 160 signatures were gathered, and the protest was issued to the press in February 1927.[50] The opening sentences show that Joyce was fully aware of his American copyright problems:

> It is a matter of common knowledge that the ULYSSES of Mr. James Joyce is being republished in the United States, in a magazine edited by Samuel Roth, and that this republication is being made without authorization by Mr. Joyce; without payment to Mr. Joyce and with alterations which seriously corrupt the text. This 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.[51]

[46] *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 130, at 1015–16 (5th ed. 1984) (stating that passing off, a form of unfair competition, "may be accomplished 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 a role in it").

[47] Letter from James Joyce to Benjamin Conner (Sept. 1, 1928), *in* 3 LETTERS OF JAMES JOYCE, *supra* note 10, at 181, 181.

[48] The injunction may have served only to drive Roth's operations underground. American piracies of *Ulysses* continued, and some scholars believe that Roth was responsible. *See, e.g.*, Leo Hamalian, *Nobody Knows My Names: Samuel Roth and the Underside of Modern Letters*, 3 J. MOD. LITERATURE 889, 895, 897 (1974); Roberts, *supra* note 6, at 573–74.

[49] *See* ELLMANN, *supra* note 11, at 585–86.

[50] *See id.* at 586.

[51] Statement to the Press Regarding the Piracy of *Ulysses*, *reprinted in* 3 LETTERS OF JAMES JOYCE, *supra* note 10, at 151, 151.

Whether, under American law, there could be an "appropriation" of an author's "property" when that property was "not protected by copyright" was a nice question that the protest did not address.[52] The statement confined itself to pointing to the equities of the situation and branding Roth as unscrupulous and buccaneering. Although Roth continued to print *Ulysses* for another eight months,[53] Joyce's resourceful self-help at least had the effect of bringing his plight to the attention of American readers and, more importantly, American publishers.

One writer who did not sign the protest was Ezra Pound. "I consider it misdirected," he wrote Joyce. The blame for Joyce's sufferings lay not with Roth, Pound explained,

> but with the infamous state of the American law which not only tolerates robbery but encourages unscrupulous adventurers to rob authors living outside the American borders, and with the whole American people which sanction the state of the laws. The minor peccadillo of Mr. Roth is dwarfed by the major infamy of the law.[54]

Pound was thinking again of his three legal "abuses"—obscenity statutes, customs/postal seizures, and the copyright law—but chiefly of the third member of the trinity. In a letter to the Paris Tribune, he rehearsed the facts of Roth's piracy but hastened to finger the real culprit: "Our copyright 'law' permits, and by permission, encourages such procedure."[55]

Pound was right. For foreign-based authors writing in English, especially those challenging conventional taste and morality, the American copyright law was often the enemy behind the enemy—the "major infamy," to use Pound's terminology, behind the "minor peccadillo" of piracy.

[52] *See infra* Section II.C and Part V (discussing the public domain); *cf.* JOHN FEATHER, PUBLISHING, PIRACY AND POLITICS: AN HISTORICAL STUDY OF COPYRIGHT IN BRITAIN 154 (1994) (discussing the unauthorized reprinting of British books by American publishers during the 19th century and noting that "the reprinters, despite the fact that British authors and publishers always referred to them as 'pirates,' were not acting illegally in their own country").

[53] *See* ELLMANN, *supra* note 11, at 587.

[54] Letter from Ezra Pound to James Joyce (Dec. 25, 1926), *in* POUND/JOYCE: THE LETTERS OF EZRA POUND TO JAMES JOYCE WITH POUND'S ESSAYS ON JOYCE 226, 226 (Forrest Read ed., 1967).

[55] Ezra Pound, Letter to the Editor, CHI. TRIB. (Eur. Ed.), May 26, 1928, at 4, *reprinted in* 5 POETRY AND PROSE, *supra* note 2, at 30.

II. COPYRIGHT PROTECTIONISM AND THE INDIVIDUAL TALENT

It is one measure of Joyce's anxiety to see *Ulysses* in print that he allowed it to be published first in France, knowing that this event might place the work's American copyright in jeopardy. In the fall of 1920, more than a year before the French edition appeared, the New York publisher B. W. Huebsch met with Joyce in Paris to urge him to bring the book out first in the United States. Because no legitimate American publisher could risk handling a book chargeable with obscenity, however, Joyce would have to delete or revise certain strong passages. Joyce flatly refused to discuss the question of alterations.[56]

Huebsch explained that publishing the book first in France, although it would spare Joyce the pain of expurgating his text, might well cost him his American copyright. Huebsch described the meeting for John Quinn:

> My conversation with Joyce related to the manner in which the book might be published without sacrificing his American rights and as these depend upon manufacturing the book in the U.S., I wanted him to understand that he was jeopardizing the thing that he holds most dear, namely, the publication of the book intact, by printing it in Paris, because that would leave the book free for a pirate after sixty days, and the pirate, in order to overcome the objections that now lie against it, would eliminate the offensive passages. Thus Joyce would lose not only his property but that which as an artist I presume he cherishes even more.[57]

[56] Huebsch and Joyce gave separate accounts of their meeting, which took place probably in September or October of 1920. *See* Letter from B. W. Huebsch to John Quinn (Dec. 22, 1920) (John Quinn Memorial Collection, New York Public Library); Letter from James Joyce to Ezra Pound (Nov. 5, 1920) (Ezra Pound Papers, Beinecke Library, Yale University); Letter from Joyce to John Quinn (Nov. 17, 1920), *in* REID, *supra* note 32, at 451–52. These letters show that Joyce was considering publishing *Ulysses* in France several months before Sylvia Beach is said to have offered to publish the book there. *See* ELLMANN, *supra* note 11, at 504 (discussing the Beach offer).

[57] Letter from B. W. Huebsch to John Quinn, *supra* note 56, at 1. (Huebsch's phrase, "the objections that now lie against [*Ulysses*]," referred to the criminal case then in progress against *The Little Review*'s editors.) Joyce's version of the meeting stressed Huebsch's flippancy, which the beleaguered Irish author took to be menacing. Upon hearing Joyce's plan to publish an edition of *Ulysses* in Paris for sale in Europe, Huebsch shot back, "Oh, in that case I could print it off in New York from that edition and pay you nothing." Letter from James Joyce to John Quinn, *in* REID, *supra* note 32, at 451 (quoting Huebsch). Joyce saw in Huebsch's instructive pleasantry a threat to "defraud" him. Letter from James Joyce to Ezra Pound, *supra* note 56, at 3.

With the canny prescience of a publisher who had to know the laws of obscenity and copyright in order to navigate their intricate courses,[58] Huebsch foresaw the activities of American pirates six years before Samuel Roth began appropriating and mutilating Joyce's work.

Huebsch's argument to Joyce was a flawless piece of legal prediction, lucid and arrestingly simple: Joyce could publish first in the United States, but, to avoid running afoul of the obscenity law, he would have to expurgate. Alternatively, Joyce could publish first in France and keep his work intact there; but in doing so he would risk never securing a copyright in the United States and inviting the depredations of pirates. And the pirates, to avoid running afoul of the obscenity law, would expurgate.[59]

Thus, whether Joyce published first in the United States or in France, he would have to live with a sanitized American *Ulysses*. The difference was that if he chose the former course, he could control the alterations to the text and his work would enjoy copyright protection in the United States. Joyce, with an obstinacy born of many encounters with the censor,[60] refused to compromise his creative integrity by changing a word.

Huebsch's account of the meeting left one point unclear, however: Why should publishing *Ulysses* initially in France threaten the American copyright? The publisher actually hinted at the answer, but so telegraphically as to be intelligible only to a lawyer acquainted, as Quinn was,[61] with the world of authors and literary rights. Huebsch's fleeting mention of "manufacturing the book in

[58] *See* B. W. Huebsch, *Footnotes to a Publisher's Life*, 2 COLOPHON (n.s.) 406, 407–09 (1937) (describing his encounters as a young publisher with obscenity laws and Post Office suppressions of books during World War I).

[59] Ironically, Roth's bowdlerizing of *Ulysses* did not keep him out of trouble with the obscenity law. In March 1927 he appeared in New York City's Jefferson Market Court to defend against a complaint filed by the Clean Books Committee of the Federation of Hungarian Jews in America, which alleged that Roth was "poisoning" the minds of readers by printing *Ulysses* in *Two Worlds Monthly*. *Roth's Magazine Accused*, N.Y. TIMES, Mar. 10, 1927, at 2.

[60] *See* Letter from James Joyce to the Press (Aug. 17, 1911), *reprinted in* 2 LETTERS OF JAMES JOYCE, *supra* note 10, at 291, 291–92 (describing the author's early encounters with publishers and censorship).

[61] *See generally* REID, *supra* note 32.

the U.S." and his cryptic prophecy about pirates getting to work "after sixty days" alluded to two statutory pitfalls that awaited authors like Joyce: the manufacturing and ad interim provisions of the 1909 Copyright Act.

A. CODIFIED PROTECTIONISM: THE MANUFACTURING CLAUSE

Section 15 of the 1909 Act, popularly known as the "manufacturing clause," provided that, in the case of printed books or periodicals,

> except the original text of a book of foreign origin in a language or languages other than English, the text of all copies accorded protection under this Act . . . shall be printed from type set within the limits of the United States, either by hand or by the aid of any kind of typesetting machine, or from plates made within the limits of the United States from type set therein, or, if the text be produced by lithographic process, or photo-engraving process, then by a process wholly performed within the limits of the United States, and the printing of the text and binding of the said book shall be performed within the limits of the United States. . . .[62]

The exception for foreign-language books of foreign origin was an innovation of the 1909 Act.[63] Under the previous law—the Chace International Copyright Act of 1891[64]—foreign works in any language could gain protection in the United States only if they were reprinted from type set within this country and if two copies of the reprint were deposited in the Copyright Office on or before the date of first publication anywhere else.[65]

This stringent requirement of the 1891 Act, demanding nothing less than first or simultaneous publication in the United States of foreign books in any language, was relaxed when the 1909 Act allowed foreign works in foreign languages to gain American copyright protection without being reprinted here.[66] Because foreign-language

[62] Act of Mar. 4, 1909, ch. 320, § 15, 35 Stat. 1075, 1078–79.

[63] *See* Dorothy M. Schrader, *Ad Interim Copyright and the Manufacturing Clause: Another View of the* Candy *Case*, 16 VILL. L. REV. 215, 241, 247–48 (1970) (discussing the legislative history of the 1909 Act's exemption of foreign-language works of foreign origin from the manufacturing requirement).

[64] Act of Mar. 3, 1891, ch. 565, 26 Stat. 1106.

[65] *See id.* § 4956, at 1107–08.

[66] *See* Act of Mar. 4, 1909, ch. 320, § 15, 35 Stat. 1075, 1079.

books would have only a limited readership in the United States, it was reasoned, American artisans would suffer no appreciable loss. Works with broad appeal would almost certainly be translated into English and "hence become subject to the manufacturing clause and thus give American labor its due."[67]

Clearly, the legislative purpose behind the manufacturing clause, in both its 1891 and its 1909 incarnations, was protection of American labor from the effects of foreign importation. The purpose "was avowedly not protection for authors," observes one noted authority, for the clause "exemplifies short-sighted and parochial tendencies that have proven destructive of the best interests of both copyright creators and users."[68] Since works that could not comply with the manufacturing clause enjoyed no copyright protection, the clause helped create the conditions necessary for book piracy—a fact that led Pound to complain of "the thieving copyright law."[69]

B. STRAIT IS THE GATE: AD INTERIM COPYRIGHT PROTECTION

The 1909 Act exempted from the manufacturing requirement foreign-language books of foreign origin, but not all books of foreign origin. Books first published abroad in the English language formed a separate category that required special treatment in light of the manufacturing clause: Such books would still have to be printed and manufactured within the limits of the United States. To mitigate the harshness of this requirement, the manufacturing provision carved

[67] HOWELL, *supra* note 17, at 85.

[68] MELVILLE B. NIMMER & DAVID NIMMER, 2 NIMMER ON COPYRIGHT § 7.22[D], at 7–218 to 7–219 (1998) [hereinafter NIMMER]; *see also* HOWELL, *supra* note 17, at 84 ("This requirement . . . has proved to be the real stumbling block to our joining the family of nations in what is commonly called the International Copyright Union."); Charles Rembar, *Xenophilia in Congress: Ad Interim Copyright and the Manufacturing Clause*, 69 COLUM. L. REV. 770, 790 (1969) ("Congress was seeking to preserve, and if possible to enlarge, the American market for American printers."); Schrader, *supra* note 63, at 282 ("The Copyright Office looks forward to the day when the supporters of the clause realize that its supposed benefits to them are illusory or, at least, not appropriate in a copyright statute . . . ."). Repeal of the manufacturing clause, originally set for July 1, 1982, as provided by the 1976 Act, *see* Act of Oct. 19, 1976, Pub. L. No. 94–553, § 601(a), 90 Stat. 2541, 2588, was postponed to July 1, 1986, by congressional amendment. *See* Act of July 13, 1982, Pub. L. No. 97–215, 96 Stat. 178, 178 (current version at 17 U.S.C. § 601(a) (1994)); *see also* 2 NIMMER, *supra*, § 7.22[A], at 7–213 ("[W]orks as to which all copies were manufactured on and after July 1, 1986, have full copyright protection regardless of the place and manner of such manufacture.").

[69] Ezra Pound, Letter to the Editor, THE NATION, Dec. 14, 1927, at 684, 685, *reprinted in* 4 POETRY AND PROSE, *supra* note 2, at 393.

out a further exception for "books published abroad in the English language seeking ad interim protection under this Act."[70]

Ad interim protection was defined in a separate section of the 1909 Act:

> [I]n the case of a book first published abroad in the English language, . . . the deposit in the copyright office, not later than sixty days after its publication abroad, of one complete copy of the foreign edition, with a request for the reservation of the copyright and a statement of the name and nationality of the author and of the copyright proprietor and of the date of publication of the said book, shall secure to the author or proprietor an ad interim copyright, which shall have all the force and effect given to copyright by this Act, and shall endure until the expiration of four months after such deposit in the copyright office.[71]

Once a copy of the foreign edition reached the Copyright Office for deposit within sixty days of publication abroad, ad interim protection began from the date of receipt[72] and endured for four months. Then, as further provided by section 22 of the 1909 Act:

> [W]henever within the period of such ad interim protection an authorized edition of such book shall be published within the United States,

[70] Act of Mar. 4, 1909, ch. 320, § 15, 35 Stat. 1075, 1079. Congress had earlier enacted two ad interim provisions that resembled the 1909 version in certain respects. *See* Act of Mar. 3, 1905, ch. 1432, 33 Stat. 1000 (providing for a one-year term of protection for foreign-language works deposited in the Library of Congress within 30 days of first publication abroad); Act of Jan. 7, 1904, ch. 2, 33 Stat. 4 (providing for a two-year term of "interim copyright" for works of foreign origin intended for exhibition at the Louisiana Purchase Exposition). Like their 1909 successor, these provisions attempted to strike a legislative balance between international comity and protection of domestic labor by providing a "grace period for compliance with the manufacturing requirement." Schrader, *supra* note 63, at 234; *cf.* Rembar, *supra* note 68, at 780 ("The original ad interim provisions were passed to help out foreign authors of foreign-language books, who found it difficult to comply with the requirements of the manufacturing clause . . . .").

[71] Act of Mar. 4, 1909, ch. 320, § 21, 35 Stat. 1075, 1080, *as amended by* Act of Dec. 18, 1919, ch. 11, § 21, 41 Stat. 368, 369. Under the original 1909 Act, applicants had only 30 days from publication abroad to secure ad interim protection, which lasted for 30 days from the date of deposit. Under the 1919 amendment, the time periods were extended to 60 days and four months, respectively. These changes were deemed necessary to alleviate hardships in the postwar period, particularly as these affected friendly and neutral nations. *See* Rembar, *supra* note 68, at 783. Under a later amendment, the time periods were extended further to six months and five years, respectively. *See* Act of June 3, 1949, ch. 171, § 2, 63 Stat. 153, 154.

[72] *See* HOWELL, *supra* note 17, at 90 ("[T]he ad interim copyright cannot begin until the copy is received in the Copyright Office.").

> in accordance with the manufacturing provisions . . . and whenever the provisions of this Act as to deposit of copies, registration, filing of affidavit, and the printing of the copyright notice shall have been duly complied with, the copyright shall be extended to endure in such book for the full term elsewhere provided in this Act.[73]

Thus, by satisfying the requirements of several linked provisions, the author of an English-language book published abroad could acquire statutory copyright protection in the United States for the full twenty-eight-year term, starting from the date of foreign publication.[74] Ad interim protection was, when it worked, a stepping-stone to full protection.

But it did not always work. A false step at any point along the twisty path leading from publication abroad to reprinting here might spell doom for the American copyright. Failure to mail the foreign edition for deposit in the Copyright office, or mailing it too late for receipt within the specified two-month window, would result in loss of the ad interim opportunity.[75] Even if ad interim protection were secured, failure to reprint in the United States in accordance with the manufacturing clause would result in termination of copyright protection once the narrow four-month gate slammed shut.

Even under ideal publishing conditions, compliance with these requirements was a test of a foreign-based author's legal knowledge, practical resourcefulness, and literary prestige.[76] A writer without an established reputation, or with a sullied one, might not be able to find an American publisher. James Joyce had everything a European writer needed to brave the complexities of our copyright law, except

[73] Act of Mar. 4, 1909, ch. 320, § 22, 35 Stat. 1075, 1080.

[74] *See* 2 STEPHEN P. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY § 352, at 769 (1938) ("Evidently . . . the copyright [in a work reprinted in the United States within the ad interim period] starts from the date of first publication abroad.").

[75] *See* HOWELL, *supra* note 17, at 90–91 (noting that delay or postal mishap would not excuse failure to comply with ad interim terms).

[76] *See* BRUCE ARNOLD, THE SCANDAL OF ULYSSES 81 (1991) (describing briefly the problems that the ad interim and manufacturing provisions created for Joyce and noting that "[i]t does not require a great effort of imagination to see how good the author's timing or that of his publishers in the United States had to be, in order to satisfy the strict timetable under the terms of the [1909] Act"); Warren St. John, *James Joyce and the Nutty Professor*, N.Y. OBSERVER, Dec. 29, 1997, at 1 (stating that *Ulysses* may not have been protected under "the protectionist Copyright Act of 1909").

a reputation for publishability. In 1922, no legitimate American publisher was willing to take a risk on his masterpiece.

C. FAILURE OF AMERICAN COPYRIGHT: ULYSSES AND CANDY

Ulysses was published in France on February 2, 1922, Joyce's fortieth birthday. On that day he received his first author's copy of the handsomely printed book.[77] Apart from typographical errors,[78] unavoidable in circumstances that required French printers to set a difficult, extensively-revised English text, the book had been spared mutilations of the kind introduced to appease the censor. Joyce had his unexpurgated text.

Within the American copyright arena, French publication of the book started the ad interim clock ticking. There is no record in the Copyright Office or elsewhere that Joyce or any representative sought to deposit a copy of the Paris edition with the Register of Copyrights.[79] Lacking such deposit, *Ulysses* lost any chance it might have had of gaining American copyright protection after April 2, 1922. Without ad interim protection, Joyce could not avail himself of the small four-month window for producing an American reprint and extending the temporary copyright to the full twenty-eight-year term. It seems reasonable to infer that in the wake of the 1921 obscenity trial, Joyce despaired of getting the requisite deposit copy of *Ulysses* past a vigilant United States customs check, through the mails, and into the hands of the Register of Copyrights, who might in any case refuse to allow deposit and registration on the ground of obscenity.[80] With no chance of a legitimate American reprint, efforts

[77] *See* ELLMANN, *supra* note 11, at 523–24.

[78] *See id.* at 526 (quoting Joyce's reference to numerous printing errors in the 1922 edition).

[79] In addition to this negative evidence of Joyce's noncompliance with the ad interim requirement, there is resoundingly positive evidence in unpublished court documents relating to Joyce's litigation against Samuel Roth. Question 23 in a list of written cross-interrogatories, prepared by Roth's New York attorney for administration to Joyce in Paris, asked: "Have you ever applied for a copyright of the book 'Ulysses' in the United States of America?" Defendant's Cross-Interrogatories on Commission at 4, Joyce v. Roth (N.Y. Sup. Ct. Dec. 27, 1928) (Ezra Pound Papers, Beinecke Library, Yale University). Joyce's response, given in a sworn deposition at the U.S. Consulate General in Paris, was "No." Plaintiff's Deposition at 6, *Joyce* (Ezra Pound Papers, Beinecke Library, Yale University). For the court order in *Joyce*, *see supra* note 45 and accompanying text (discussing the court's ruling).

[80] *See supra* note 24 and accompanying text. *But see* Schrader, *supra* note 63, at 218 n.10 (stating that, under the "rule of doubt," the Copyright Office "will register a claim if some reasonable doubt exists as to the ruling a court would make on validity of the copyright").

to secure an ad interim copyright in *Ulysses* would have been virtually meaningless anyway.

The practical consequence of Joyce's inability to acquire an American copyright was piracy and disfigurement of his work, as Huebsch had prophesied in the fall of 1920.[81] What precisely the legal consequence might have been is less easy to determine. Scholars have divided on the question of abortive ad interim copyright, many claiming that failure to comply with the provision injected a work into the public domain;[82] others, that the copyright in that work was merely unenforceable.[83]

The two positions stake out more than an academic distinction without a practical difference. When a work entered the public domain, as it did naturally upon expiration of its copyright term or unnaturally upon failure to satisfy certain statutory requirements,[84] it ceased to exist as intangible personal property. It was transformed from a private monopoly into a public resource, and the benefits once enjoyed by the creator passed to the user.[85] Except in very rare circumstances, a work cannot be resurrected from the public domain,

[81] *See supra* notes 56–59 and accompanying text. *See also* ARNOLD, *supra* note 76, at 83 (stating that "[t]he original edition of 1922 could not be deposited at Washington; and certainly, within four months [the ad interim period], no subsequent American edition could be brought out, since the book was banned").

[82] *See, e.g.*, RICHARD ROGERS BOWKER, COPYRIGHT: ITS HISTORY AND ITS LAW 147 (1912) (noting that failure to comply with the 1909 Act's ad interim provision injected a foreign work into the public domain); Schrader, *supra* note 63, at 281 (discussing the ad interim and manufacturing provisions and concluding that "the overwhelming weight" of decisional and secondary authorities supports the contention that "copyright [is] secured or lost depending upon compliance with the statute at the time of first publication, whether this occurred here or abroad").

[83] *See, e.g.*, 2 NIMMER, *supra* note 68, § 7.23[E][1], at 7–226 (suggesting that failure to comply with the ad interim requirement might cause a work's copyright to be not invalid, but merely "in suspension").

[84] *See, e.g.*, 1 PAUL GOLDSTEIN, COPYRIGHT § 3.18, at 3:150 (2d ed. 1996) ("If noncompliance forfeited copyright, any work published in violation of the manufacturing requirement before the effective date of the 1976 Act, January 1, 1978, would be in the public domain, and thus unprotectible, under the 1976 Act.").

[85] *See* American Code Co. v. Bensinger, 282 F. 829, 833 (2d Cir. 1922) ("Publication of an intellectual production without copyrighting it causes the work to fall into the public domain. It becomes by such publication dedicated to the public, and any person is thereafter entitled to publish it for his own benefit."); HOWELL'S COPYRIGHT LAW, *supra* note 24, at 48 ("If a work is in the 'public domain' it is of course free to anybody's use."); *see also* Edward Samuels, *The Public Domain in Copyright Law*, 41 J. COPYRIGHT SOC'Y 137, 138–50 (1993) (surveying definitions and theories of the public domain).

because "a temporary public domain [is] foreign to United States copyright concepts."[86]

If failure to comply with the ad interim provision, and hence with the manufacturing requirement, rendered a work's copyright merely unenforceable, however, that copyright would arguably be not invalid but only "in suspension,"[87] awaiting an event that would render it enforceable. One such triggering event might be the effective date of the 1976 Copyright Act, which, in light of that Act's attenuated manufacturing requirements, some scholars regard as sufficient to release the copyright from suspended enforceability.[88] The majority of commentators writing before the 1976 Act, however, believed that failure to obtain ad interim copyright cast a work irrevocably into the public domain.[89]

[86] HOWELL'S COPYRIGHT LAW, *supra* note 24, at 103. *But see* the discussion of recently restored copyrights *infra* Part IV.

[87] 2 NIMMER, *supra* note 68, § 7.23[E][1], at 7–226.

[88] *See id.* (speculating that suspended enforceability resulting from noncompliance with the 1909 Act's manufacturing clause might be removed by the termination of that Act "because the scope of the manufacturing clause under the current [1976] Act is much narrower than under the 1909 Act"); *see also* 1 GOLDSTEIN, *supra* note 84, § 3.18, at 3:150–51 ("If the copyright were only unenforceable, copyright would have subsisted in the work on the effective date of the 1976 Copyright Act and would thus be fully enforceable under the terms of the 1976 Act.").

[89] *See, e.g.*, BOWKER, *supra* note 82, at 147 (asserting that failure to comply with the 1909 Act's ad interim provision "will forfeit the right to obtain copyright protection and throw the foreign work into the public domain"); SAMUEL SPRING, RISKS & RIGHTS IN PUBLISHING, TELEVISION, RADIO, MOTION PICTURES, ADVERTISING, AND THE THEATER 105 (1952) (stating that, where no American reprint is produced within the period of ad interim protection, "the work is in the public domain in, and all rights are lost in, the United States"); PHILIP WITTENBERG, THE PROTECTION OF LITERARY PROPERTY 80 (1968) ("Should [an] ad interim application not be filed, then the work falls into the public domain and there is no valid copyright subsisting in the United States."); Schrader, *supra* note 63, at 280–82 (summarizing the consensus of primary and secondary authorities regarding compliance with the ad interim provision); Samuel W. Tannenbaum, *The U.S. Copyright Statute—An Analysis of Its Major Aspects and Shortcomings*, 10 N.Y.L.F. 12, 19 (1964) (noting that an author who fails to comply with the ad interim provision "loses his United States copyright"). *But see* HOWELL, *supra* note 17, at 92 (speculating that noncompliance with the ad interim provision might still leave the author with "a fighting chance" to publish in the United States and "to be protected at least from that time on"); 2 LADAS, *supra* note 74, at 766 (contending that noncompliance "does not invalidate the copyright" but only prevents the author from bringing an infringement action); *cf.* 2 NIMMER, *supra* note 68, § 7.23[E][1], at 7–226 ("If . . . the copyright was merely unenforceable under the 1909 Act—in suspension, as it were—then with the termination of the 1909 Act, the suspension will have been removed, and the copyright thus becomes enforceable."); Rembar, *supra* note 68, at 775 (contending that the ad interim provision is "merely an alternative" to securing copyright by the ordinary route of publication with notice).

Even more persuasively, the courts took this view. There is remarkably little published case law on the question of noncompliance with the ad interim provision, but that little has tended to vindicate the Copyright Office's position[90] that noncompliance would result in injection of the work into the public domain. Of the handful of pertinent court decisions, most address ad interim copyright only indirectly or by way of dictum. But all affirm the inescapable condition of American manufacture for works falling within the ad interim provision.[91]

Despite the paucity of decisional law, one well-documented case involving ad interim copyright and booklegging contains facts astonishingly similar to those of Joyce's predicament. In 1958, a novel by two Americans, Terry Southern and Mason Hoffenberg, appeared in France under the title of *Candy*. The pseudonymous book was published in English and bore a notice of French copyright. Like Joyce, Southern and Hoffenberg neither sought ad interim copyright in the United States nor attempted publication here within five years of the French publication.[92]

Candy was a mildly erotic satire and picaresque romp, loosely patterned after Voltaire's *Candide* and intended as a spoof of American female innocence. The wholesome heroine, Candy Christian, "Good Grief!"s her way through a series of bizarre adventures, repeatedly

[90] *See* Schrader, *supra* note 63, at 220, 280–82.

[91] *See* Olympia Press v. Lancer Books, 267 F. Supp. 920, 922–23, 925–26 (S.D.N.Y. 1967) (stating that under the 1909 Act an English translation, first manufactured and published in France, of a French work would be in the public domain because of failure to comply with the ad interim provision, unless the French publisher could prove that it was the "author" of the work as the translator's employer in a work made for hire); Grove Press v. Greenleaf Publ'g Co., 247 F. Supp. 518, 523 (E.D.N.Y. 1965) (assuming arguendo that an English translation, first manufactured and published in France, of a French work was in the public domain because of noncompliance with the ad interim provision); Encyclopedia Britannica Co. v. Werner Co., 135 F. 841, 846 (C.C.D.N.J. 1905) (holding that the Copyright Act of 1904, which granted two years of ad interim protection to foreign-produced works intended for the Louisiana Purchase Exposition, did not extend to an encyclopedia in English that had been published in the United States prior to the Act), *aff'd sub nom.* Encyclopedia Britannica Co. v. American Newspaper Assín, 142 F. 966 (3d Cir. 1906). *But see* Bentley v. Tibbals, 223 F. 247, 257 (2d Cir. 1915) (refusing to decide whether a British book in the American public domain, which contained some copyrighted matter but gave no notice of what was copyrighted and what was not, had lost all copyright).

[92] *See* G. P. Putnam's Sons v. Lancer Books, 239 F. Supp. 782, 783 (S.D.N.Y. 1965) (recounting the history of the French publication of *Candy*). Five years was then the ad interim period within which an author could acquire a standard American copyright by reprinting in accordance with the manufacturing clause. *See* discussion *supra* note 71.

encountering the importunate desires of men and tripping over her own unsuspected libido.[93] Sometime prior to 1964, copies of the book intended for importation into the United States were seized by customs authorities under the Tariff Act, "presumably on moral grounds."[94] Like *Ulysses* forty years before, *Candy* suffered the interdiction of two of Pound's American "abuses": the obscenity law and customs officials.[95]

Pound's third abuse entered the picture in 1964, when, following a determination by the Bureau of Customs that the book was admissible under the Tariff Act, Southern and Hoffenberg published a slightly revised version of *Candy* with G. P. Putnam's Sons ("Putnam") in the United States.[96] The authors deposited copies of the Putnam edition in the Copyright Office and, on the strength of evasive answers on their application, received a certificate of copyright registration for the revised book.[97] The copyright notice cited a string of dates that included the French copyrights along with the newly claimed American one: "Copyright © 1958, 1959, 1962, 1964. . . ."[98] Marketed in hardcover at five dollars per copy, the book quickly became a bestseller in the United States.[99]

In January 1965, Lancer Books, Inc. ("Lancer"), published an unauthorized paperback edition of *Candy* retailing at seventy-five cents per copy. This bookleg version, "copied word for word from the French edition," did not incorporate the revisions made to the American Putnam edition.[100] Putnam, together with Southern and Hoffenberg, sued Lancer for copyright infringement, seeking a preliminary injunction barring Lancer from publishing and distributing its pirated version of *Candy*. Unlike Joyce, who had contented himself with an action for unfair competition against Samuel

[93] *See, e.g.*, TERRY SOUTHERN & MASON HOFFENBERG, CANDY 29 (G. P. Putnam's Sons rev. ed. 1964) ("Oh, Daddy! Really! It's the greatest honor to be invited to Professor Mephesto's office, and have a drop! I've told you that a dozen times! Good Grief!"). An epigraph attributed to Voltaire hints that *Candide* is a source for this ribald pastiche. *See id.* at 11.

[94] *G. P. Putnam's Sons*, 239 F. Supp. at 783.

[95] In this case, the two "abuses" were combined in the same provision of the Tariff Act of 1930, which permitted seizure of imported goods deemed immoral or obscene. *See* Act of June 17, 1930, ch. 497, § 305, 46 Stat. 590, 688 (codified as amended at 19 U.S.C. § 1305 (1994)).

[96] *See G. P. Putnam's Sons*, 239 F. Supp. at 783.

[97] *See id.* at 783–84.

[98] *Id.* at 784.

[99] *See id.*

[100] *Id.*

Roth,[101] the authors of *Candy* decided to test the validity of their French copyright in the United States.[102]

The U.S. District Court for the Southern District of New York denied the plaintiffs' request for a preliminary injunction. Suspecting that the French edition of *Candy* was in the public domain, the court noted that the language of the 1909 Copyright Act "gives rise to a permissible inference that if the book is not published in the United States until after the five-year period has expired [even supposing that the work had obtained ad interim protection], no permanent copyright on it can be secured."[103] Confining itself, however, to the undisputed fact that "[p]laintiffs never applied for registration of copyright on the French edition and hence . . . never obtained one," the court held that "under Section 13 [the deposit and registration provision] they may not sue for infringement of something which they do not have."[104]

The plaintiffs took the hint and applied for registration of a claim to ad interim copyright in the French edition as well as for registration of an ordinary copyright in an American edition of substantially the same text.[105] The Copyright Office refused to register either claim, on the ground that the authors had not complied in a timely manner with the ad interim and manufacturing provisions.[106] When the action returned to the Southern District of New York for injunctive relief and damages, the court granted the defendants' motion to dismiss for want of jurisdiction on the same grounds as its earlier denial of a preliminary injunction.[107] The court specifically refused to consider the plaintiffs' constitutional challenge to the ad interim requirement and their argument that their early failure to comply with that provision had been unavoidable since "the novel [had been] banned by the Customs Bureau until after the time limitations of [ad interim protection] had expired."[108]

[101] *See supra* notes 45–48 and accompanying text.

[102] The authors of *Candy* also sought relief on a theory of unfair competition, but the court denied a preliminary injunction on the ground that case law had established "the principle that state law may not forbid, on a theory of unfair competition, the copying of an article which is not protected by federal patent or copyright." *G. P. Putnam's Sons*, 239 F. Supp. at 788.

[103] *Id.* at 787.

[104] *Id.*

[105] *See* Hoffenberg v. Kaminstein, 396 F.2d 684, 685 (D.C. Cir. 1968) (per curiam) (discussing the plaintiffs' efforts to register editions of *Candy* with the Copyright Office).

[106] *See id.*

[107] *See* G. P. Putnam's Sons v. Lancer Books, 251 F. Supp. 210, 214 (S.D.N.Y. 1966).

[108] *Id.*

The plaintiffs' sole remedy now lay in an action in the nature of mandamus seeking to compel the Register of Copyrights to register a copyright claim in the work he had lately rejected for failure to comply with the statutory provisions. In a brief per curiam opinion, the U.S. Court of Appeals for the District of Columbia ruled that "[s]ince the novel 'Candy' was first published and printed abroad in the English language and there is no ad interim registration of that edition, registration of the American edition was properly refused."[109] As for the plaintiffs' challenge to the validity of a Copyright Office regulation giving force to the ad interim provision, the court tersely remarked that the regulation "is not only not inconsistent with the pertinent sections of the Copyright Code, but in our judgment it accurately reflects the intention of Congress."[110]

The implications of the extended *Candy* litigation are unmistakable: The French edition of *Candy* was not protected by copyright in the United States. Equally unprotected was any version of the novel based on the French edition, with the exception of such revisions as had been printed in the United States in compliance with the manufacturing clause. The public domain had unceremoniously claimed *Candy*; for all practical purposes, the work was free for the pirating—though "piracy" can scarcely be ascribed with legal accuracy to the use of literary expression that has lost its status as private property.

Samuel Roth in 1926 had done no more and no less than Lancer Books did forty years later: He had taken advantage of an author's inability to comply with the strict protectionist requirements of the 1909 Copyright Act. As with *Candy*, so with *Ulysses*: The copyright code, the obscenity law, and customs officials—Pound's trinity of abuses—had combined to strip Joyce of his literary property rights in America. Like other works in English first published abroad,[111]

[109] *Hoffenburg*, 396 F.2d at 685.

[110] *Id.*

[111] It is impossible to know how many works were claimed by the public domain in the manner of *Ulysses* and *Candy*. Most authors in Joyce's position probably resigned themselves, as he did, to the loss of their copyrights in the United States. D. H. Lawrence, for example, was notoriously vulnerable to American pirates. "Lawrence's last novel [*Lady Chatterley's Lover*] was not protected by copyright, in England or the United States, and publishing pirates easily undersold the edition that Lawrence had privately printed in Italy with the help of the Florentine printer Pino Orioli." DE GRAZIA, *supra* note 5, at 56. For a rare instance in which a foreign-based publisher challenged its exploitation by an American publisher in circumstances similar to Joyce's, see *Olympia Press v. Lancer Books*, 267 F. Supp. 920, 926 (S.D.N.Y. 1967). In *Olympia Press*, the court expressed doubt, in light of the ad interim and manufacturing provisions, as to the validity of the American copyright in

Ulysses had entered the public domain—prematurely, but nonetheless surely.

III. *ULYSSES* LEGALIZED IN AMERICA: ILLUSORY COPYRIGHT

A. PUBLICATION IN THE UNITED STATES

The story of the fight to lift the obscenity ban on *Ulysses* in the United States has been told often.[112] Ten years after the publication of *Ulysses* in France, Bennett Cerf, the head of Random House in New York, and Morris L. Ernst, the noted lawyer and crusader against censorship, combined forces to deliver Joyce's novel from its prison house of official condemnation.[113] Their efforts resulted in the monumental decision handed down by federal district Judge John M. Woolsey declaring *Ulysses* to be "nowhere . . . an aphrodisiac" and therefore admissible into the United States.[114]

Within minutes of the announcement of the Woolsey decision, Cerf's typesetters were at work on a legitimate, and now legal, American edition of Joyce's novel.[115] The first copies of the Random House *Ulysses* reached Cerf in January 1934.[116] He deposited two copies with the Register of Copyrights and submitted an affidavit attesting to the edition's American manufacture. According to Copyright Office records, a claim of copyright was registered for the edition.[117]

an English translation made by an American and published in France. For a similar instance, see *Grove Press v. Greenleaf Publishing Co.*, 247 F. Supp. 518, 523 (E.D.N.Y. 1965), in which the court assumed arguendo that an English translation published in France and not securing ad interim copyright was cast into the public domain in the United States.

[112] *See, e.g.*, ELLMANN, *supra* note 11, at 666–67; JOSEPH KELLY, OUR JOYCE: FROM OUTCAST TO ICON 92–140 (1998); VANDERHAM, *supra* note 22, at 87–131.

[113] *See generally* THE UNITED STATES OF AMERICA v. ONE BOOK ENTITLED "ULYSSES" BY JAMES JOYCE (Michael Moscato & Leslie Le Blanc eds., 1984) [hereinafter ONE BOOK ENTITLED "ULYSSES"] (providing a detailed documentary account of the Cerf-Ernst collaboration).

[114] United States v. One Book Called 'Ulysses', 5 F. Supp. 182, 185 (S.D.N.Y. 1933), *aff'd sub nom.* United States v. One Book Entitled Ulysses by James Joyce, 72 F.2d 705 (2d Cir. 1934).

[115] *See* ELLMANN, *supra* note 11, at 667.

[116] *See id.*

[117] Copyright Office records show that two deposit copies of the Random House edition were received on January 27, 1934. The affidavit of American manufacture was received on February 23, 1934. The edition was assigned registration number A70193.

It is unclear from these records, however, precisely how much of the Random House *Ulysses* was claimed for copyright.[118] In the months before publication, Cerf had expressed great concern over the vulnerability of the forthcoming book: "I want to stress again," he wrote Joyce's secretary, "the importance of having as much copyrighted material in our edition as is humanly possible, in order to combat possible pirated editions which will undoubtedly come along to vex us all."[119] Cerf was referring to the unpublished chart of symbolic correspondences that Joyce had prepared for private circulation among select admirers of *Ulysses*.[120] Cerf wanted to include this explanatory chart in the Random House edition, partly as a way of enhancing the marketability of Joyce's famously difficult book, but chiefly to incorporate as much indisputably copyrightable matter "as is humanly possible." Joyce refused to allow the supplement on aesthetic grounds;[121] he was still willing to sacrifice legal protection to artistic pride.

Cerf did manage, however, to include an unpublished letter by Joyce in the book's front matter. Ironically, the letter, written to Cerf during the planning stage of the campaign to liberate *Ulysses* from the censor, complained of the very problem that its inclusion was meant to ameliorate:

> 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. . . .[122]

Joyce's summary shows that bitter experience had schooled him in the rigorous fine points of the Copyright Code's manufacturing and ad interim provisions.

[118] Neither the application for copyright registration in *Ulysses* nor a copy of the copyright registration certificate appears to be available in the records at the Copyright Office. A search by Mary E. Aldridge of the Office's onsite archives, February 23–25, 1998, followed by several later inquiries to Office personnel, turned up nothing.

[119] Letter from Bennett Cerf to Paul Léon (Oct. 30, 1933), *in* ONE BOOK ENTITLED "ULYSSES," *supra* note 113, at 278–79.

[120] The chart has since been published in various places. *See, e.g., id.* at 276–77.

[121] *See* Letter from Paul Léon to Bennett Cerf (Oct. 21, 1933), *in id.* 278 (asserting that *Ulysses*, as a "piece of belle lettres," should not contain "explanations").

[122] Letter from James Joyce to Bennett Cerf (Apr. 2, 1932), *in* JAMES JOYCE, ULYSSES at xvi (Random House ed. 1934).

The copyright notice in the 1934 Random House *Ulysses* confessed *sotto voce* to the same problem: "Copyright, 1918, 1919, 1920, by Margaret Caroline Anderson. Copyright, 1934, by the Modern Library, Inc."[123] The first string of dates referred to the serial installments of *Ulysses* in *The Little Review*,[124] and the final date indicated the Random House edition.[125] Delicately omitted was "1922," the date of the Paris edition—the only date relevant, in light of the ad interim and manufacturing provisions, to protection of the entire edition within the United States. The copyright notice in the 1934 edition was thus a kind of *in terrorem* red flag to would-be pirates, one that a determined competitor might confidently have ignored.[126]

B. THE "COURTESY COPYRIGHT" IN *ULYSSES*

If the copyright claimed by Random House in *Ulysses* was illusory and the work was actually in the public domain, why were Bennett

[123] *Id.* at v.

[124] Since issues of *The Little Review* published during 1919 and 1920 were apparently not registered for copyright, enforceability of the copyrights in those portions of *Ulysses* would have been problematic. *See supra* notes 19–21, 31–34 and accompanying text. Later Random House printings of *Ulysses* dropped "1919" and "1920" from the copyright notice; a typical notice from a later printing reads: "Copyright, 1914, 1918, by Margaret Caroline Anderson. Copyright, 1934, by the Modern Library, Inc. Copyright, 1942, 1946, by Nora Joseph Joyce." *See, e.g.*, JAMES JOYCE, ULYSSES at iv (Random House ed. 1961). The puzzling addition of "1914," a date irrelevant to any phase of the publishing history of *Ulysses*, is explained by the fact that Margaret Anderson sought and received registration of the copyrights for her first six issues of *The Little Review*, all published in 1914 (Copyright Office registration numbers B299661, B301407, B302631, B304723, B307749, B310978). For some reason, the Joyce Estate in March 1942 attempted to renew these copyrights in the name of Joyce's widow (renewal entries 107026 to 107030), even though these issues contained nothing by Joyce. The attempted renewals were therefore a nullity.

[125] Since the original application for registration of the copyright claim in the 1934 Random House *Ulysses* is not available in Copyright Office archives, it is impossible to know how much of the 1934 text Cerf claimed for copyright. *See supra* note 118. That the Copyright Office granted Cerf a certificate of registration and 27 years later permitted Joyce's children to renew the 1934 "copyright" for a second 28-year term (registration number R281082, dated August 30, 1961) would not have guaranteed the enforceability of the copyright claimed in the edition. For a discussion of the Copyright Office's "rule of doubt" in favor of registering works, see Schrader, *supra* note 63, at 218 n.10. The Random House edition was set, ironically, from the text of the pirated Paris edition of *Ulysses* in which Samuel Roth may have had a hand. *See* Roberts, *supra* note 6, at 576–78. Since the pirated text was based on the public-domain 1922 edition, it could hardly have provided a basis for protectible expression in the 1934 edition. *See infra Section* VI.A.

[126] For a brief discussion of the composite copyright notice in the 1934 *Ulysses*, see ARNOLD, *supra* note 76, at 84–85. Arnold also addresses the possible copyright implications of the various versions of *Ulysses*, offering tentative conclusions that resemble mine in certain respects. *See id.* at 85–86.

Cerf's fears of pirated editions never realized? Indeed, since 1934, there have been almost no challenges to Random House's exclusive right to publish *Ulysses* in the United States.[127] When the rare challenger has come along, it has promptly backed down in the face of protests by the Estate of James Joyce.[128] The possibility of legal entanglement has no doubt been the strongest deterrent in recent years to the appearance of competing versions of *Ulysses*. No publisher wishes to invest more money in defending a suit than it can reasonably expect to recover in book sales, and the American market for *Ulysses*, though substantial, may not be large enough to justify going to law to establish the work's public-domain status. But the question remains why Random House's hegemony was not challenged early on, when Joyce's American market was still forming and knowledge of his copyright predicament was widespread in the publishing industry.

The answer lies chiefly in the nineteenth-century tradition of "trade courtesy" among publishers, a tradition of which Joyce and Bennett Cerf availed themselves for the purpose of safeguarding the authorized American edition of *Ulysses*. Prior to the 1891 Copyright Act, the United States extended no copyright protection to works published abroad.[129] This legal vacuum inevitably gave rise to predatory activity on the part of American publishers. "There ensued the great Age of Piracy, in which books of several European countries, but particularly English novels, were appropriated and published

[127] During the early 1970s and perhaps before, a pirated version of *Ulysses* appeared under the imprint of Collectors Publications of Industry, California, containing, in addition to the text of the 1960 British Bodley Head edition of *Ulysses*, 43 pages of advertisements for adult paperbacks, nude photographs, and sex devices. The volume sold at five dollars per copy. *See* John W. Van Voorhis & Francis C. Bloodgood, Ulysses: *Another Pirated Edition?*, 9 JAMES JOYCE Q. 436, 436–40 (1972).

[128] In the early 1990s, the Oxford Text Archive planned to distribute Joyce's works in electronic-text formats via the Internet and diskettes, but when the Joyce Estate protested that *Ulysses* would remain in copyright in the United States "until at least 1997," the Oxford Text Archive ceased distributing the novel in electronic form. Message from Lou Burnard, Oxford Text Archive (posted on the Internet on February 1, 1993, to the Humanist Discussion Group) (hard copy on file with the author). The Humanist Discussion Group website has failed to archive several postings from February 1993, including Burnard's. *See Humanist Archives* (visited Nov. 7, 1998) <http://lists.village.virginia.edu/lists_archive/Humanist/v06>.

[129] *See* Schrader, *supra* note 63, at 225 ("One hundred years were to pass before the Chace International Copyright Act of 1891 extended copyright protection, under certain conditions, to non-resident foreigners.").

[in the United States] in such quantities as to flood the market for a time."[130]

To bring some measure of regulation and propriety to these practices, publishers began to observe "what they called a 'courtesy copyright,' in which the American reprinter [of a work first published abroad] had sole rights if he was the first to produce a book in this country . . . ."[131] According to the self-imposed code of trade courtesy, an American publisher would negotiate with a foreign author for the "right" to reprint a work or would simply announce its intention to publish as a way of putting competitors on notice.[132] Under this informal and wholly extralegal arrangement, a publisher's claim to the uncopyrighted work of a foreign author would be respected by other publishing houses, which could in turn expect such courtesy to be extended to their own titles.[133]

The practice of trade courtesy among nineteenth-century American publishers is a vivid example of what Robert C. Ellickson has called "order without law," a system of folkways peculiar to a group or community in which informal norms have come to take the place of formal legal rules.[134] Ellickson has argued that "[m]uch of the glue of a society comes not from law enforcement . . . but rather from the informal enforcement of social mores by acquaintances, bystanders, trading partners, and others."[135] In rewarding conformity and

[130] 1 JOHN TEBBEL, A HISTORY OF BOOK PUBLISHING IN THE UNITED STATES 208 (1972).

[131] *Id.*

[132] *See* 2 *id.* at 54–55 (quoting publisher Henry Holt's account of the distinction between "first announcement" and "arrangement with the author" as modes of establishing a rightful publishing claim in accordance with the rules of trade courtesy).

[133] *See id.* at 53–55; *see also* FEATHER, *supra* note 52, at 160 ("By what was known in the United States as the 'courtesy of the trade,' American publishers, or at least the respectable ones, did not pirate each other's British books once they had been acquired and published from British publishers.").

[134] *See generally* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991) (arguing that people in close-knit communities frequently resolve their disputes in a cooperative fashion without resort to the laws that apply to those disputes).

[135] Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 540 (1998). Having studied firsthand the modes of informal dispute resolution employed by rural landowners in Shasta County, California, Ellickson hypothesized that "members of a close-knit group develop and maintain norms whose content serves to maximize the aggregate welfare that members obtain in their workaday affairs with one another." ELLICKSON, *supra* note 134, at 167 (emphasis omitted). According to this hypothesis, members of such a group informally encourage cooperative behavior and discourage deviant

frowning upon deviancy, American publishers employed the "carrots and sticks" of Ellickson's taxonomy of remedial norms.[136] As "unofficial enforcers," they used "punishments such as negative gossip and ostracism to discipline malefactors and bounties such as esteem and enhanced trading opportunities to reward the worthy."[137]

Yet not all deviants from the norms of trade courtesy were responsive to the displeasure of their fellows. Novice publishers, for example, had strong incentives to engage in piracy as a way of establishing book lists, and trade courtesy failed to gain a foothold in the aggressive cheap book trade of the 1870s and 1880s.[138] Furthermore, with the expansion of American letters in the later nineteenth century, sales of British novels in the United States dropped off;[139] and the 1891 Copyright Act extended copyright protection, upon certain conditions, to works published abroad. As a consequence, trade courtesy began to decline in importance.

behavior, with the result that the welfare of the whole group tends to be maximized. *See id.* at 167–83. Ellickson is careful to point out that "welfare" must be understood to include high social status and close personal relationships as well as material benefits. *See id.* at 170.

It should be noted that the publishing world in the 19th century, while cohesive enough to evolve an extralegal code of conduct, was more heterogeneous and volatile than the close-knit rural community of Ellickson's study. Moreover, unlike his resourceful cattlemen who employ flexible social mores as an alternative to unwieldy or unfamiliar legal remedies, 19th-century publishers did not have the luxury of choosing between informal norms and legal entitlements, since the foreign-based authors whom they represented enjoyed no legal entitlements within the American copyright arena. These publishers were confronted instead with a starker choice between informal self-regulation and no regulation at all. The choice was not one between order with law and order without law, but, more fundamentally, between order and anarchy. The cost-efficiency incentives for adopting informal norms were therefore at a maximum.

[136] ELLICKSON, *supra* note 134, at 207–29.

[137] Ellickson, *supra* note 135, at 540. Practitioners of trade courtesy made liberal use of negative gossip and ostracism. In 1893, the publisher Henry Holt testified that "in the trade the words 'pirate' and 'thief' were freely applied to those who reprinted books already equitably in the hands of other publishers, and that the effect of such reprinting by Dr. Funk [an alleged transgressor] was 'not favorable' to his reputation in the trade." 2 TEBBEL, *supra* noté 130, at 54. Both the normativity and the complexity of trade courtesy are indicated in Holt's observations that "anybody is welcome who will behave himself," *id.*, and "[t]rade courtesy is as full of exceptions as the law itself. It has grown up as a mass of decisions in particular cases, just as the common law has." *Id.* at 55.

[138] *See* 2 TEBBEL, *supra* note 130, at 505 (discussing the sharply differing attitudes of new and established publishers towards trade courtesy and its proper role in the cheap book trade).

[139] *See id.* at 641 (noting the expansion of American writing and the decline in British creativity in the later 19th century).

Joyce's efforts to defend *Ulysses* from American piracy in the 1920s and 1930s gave new life to the practice. His campaign against Samuel Roth, widely discussed in the press,[140] had the effect of generating public outrage at the conduct of Roth and his ilk. Joyce's resort to international protest and American press coverage was a carefully orchestrated form of what Ellickson calls "truthful negative gossip," whereby all but the most incorrigible deviants are shamed into conformity by an appeal to the "general obsession with neighborliness" within the given group.[141] Joyce's negative gossip targeted Roth specifically, but its deterrent effect rippled out concentrically from that human bull's-eye to influence the conduct of publishers generally.

With the public ready to sympathize with Joyce, Cerf had less to fear from pirates than he thought. However attractive may have been the idea of competing with Random House for a share of the *Ulysses* market, the attempt was not worth the opprobrium that inevitably would follow from the Joyce publicity machine. No one in 1934 wanted to look like Samuel Roth.

If the rascality of Roth had begun to fade from the public's memory, Joyce's letter to Cerf, published in the opening pages of the Random House edition, was there to remind everyone of the particulars of that scandal. Placed strategically just after the text of Judge Woolsey's opinion lifting the obscenity ban on *Ulysses*, Joyce's letter recalled the Roth piracies, the international protest, and the injunction against using Joyce's name; moreover, it contained an explicit endorsement from Joyce: "I willingly certify hereby that not only will your edition be the only authentic one in the United States but also the only one there on which I will be receiving royalties."[142]

The letter went on to declare that through Random House American readers would be able "to obtain the authenticated text of my

[140] *See, e.g.*, *Joyce Says 'Ulysses' Is Pirated Here*, N.Y. TIMES, Feb. 19, 1927, at 4 (describing Joyce's reaction to Samuel Roth's piracy of *Ulysses*); *Joyce Testimony on 'Ulysses' Here*, N.Y. TIMES, May 20, 1928, at 12 (discussing the deposition given by Joyce in Paris "for use at the trial of the suit brought by Joyce last year against Samuel Roth"); *Printing of 'Ulysses' Here Causes Protest*, N.Y. TIMES, Feb. 18, 1927, at 21 (noting that Roth's "unauthorized" publication of *Ulysses* "has provoked a long and warmly worded protest to the American public, signed by 160 leading literary men of the world").

[141] ELLICKSON, *supra* note 134, at 57.

[142] Letter from James Joyce to Bennett Cerf (Apr. 2, 1932), *in* JOYCE, *supra* note 122, at xvii.

book without running the risk of helping some unscrupulous person in his purpose of making profit for himself alone out of the work of another to which he can advance no claim of moral ownership."[143] With an eye for the legal *mot juste*, Joyce carefully avoided saying "legal ownership," for no law stood in the way of an unauthorized competitor's helping itself to the public domain. Only the moral force of the arrangement between Cerf and Joyce, cleverly memorialized in the opening pages of the Random House edition, could dissuade challengers from entering the field. Joyce and Cerf had revitalized the practice of trade courtesy and used it to fashion for *Ulysses* a "courtesy copyright" in the United States.

IV. RESTORED COPYRIGHTS AND EXTENDED COPYRIGHT TERMS

This essay has shown that *Ulysses*, because it could not comply with the protectionist provisions of the 1909 Copyright Act, lost its chance for American copyright within months of its French publication in 1922 and was thrust into the public domain in the United States. *Ulysses* did enjoy one brief period of copyright protection here, however. Title V of the Uruguay Round Agreements Act ("URAA"), as incorporated into the present Copyright Code,[144] contains a provision for restoration of copyright in original works of authorship that entered the public domain in this country due to "noncompliance with formalities imposed at any time by United States copyright law, including . . . failure to comply with any manufacturing requirements."[145] The URAA thus makes rather belated amends for America's long history of copyright protectionism.

[143] *Id.*

[144] Uruguay Round Agreements Act [URAA], Pub. L. No. 103–465, 108 Stat. 4809, 4976–81 (codified at 17 U.S.C. § 104A (1994)). Joyce scholar John Kidd, anticipating to some extent my analysis of the URAA here, has been quoted as saying that the "Global Agreement on Trades and Tariffs" restored the American copyright in *Ulysses* until the end of 1997. St. John, *supra* note 76, at 1. Kidd presumably had in mind section 101(d)(1) of the URAA, *supra*, at 4814, which states that the URAA applies to the "General Agreement on Tariffs and Trade 1994 (GATT)." *Cf.* Paul J. Sleven & Eric J. Weisberg, *GATT Implementation Bill Restores Copyright in Foreign Works*, 42 J. COPYRIGHT SOC'Y 272, 273–81 (1995) (analyzing the language of 17 U.S.C. § 104A).

[145] 17 U.S.C. § 104A(h)(6)(C)(i).

Copyrights restored under the URAA "subsist for the remainder of the term of copyright that the work would have otherwise been granted in the United States if the work never entered the public domain in the United States."[146] Joyce's novel, had it not entered the public domain, would have enjoyed a copyright term of seventy-five years from its French publication in 1922.[147] Thus, under the terms of restoration, *Ulysses*, after many adventures, salvaged two quiet, unremarked years of genuine copyright protection before lapsing—this time of natural legal causes—back into the public domain on January 1, 1998.[148]

But claims to copyright sometimes die harder than copyrights themselves. As the expiration of the restored 1922 copyright drew nigh, several American publishers announced plans to issue *Ulysses* under their own imprint.[149] The Estate of James Joyce, which had equivocated about the American copyright in the past,[150] now asserted that *Ulysses* was still protected in the United States. According to the Estate, the American copyright began in 1934 and thus should run for a statutory seventy-five years before expiring on January 1, 2010.[151] In response to these claims, some publishers retreated

[146] *Id.* § 104A(a)(1)(B).

[147] *See id.* § 304(b).

[148] *See id.* § 104A(h)(2)(A) ("The 'date of restoration' of a restored copyright is . . . January 1, 1996, if the source country of the restored work is a nation adhering to the Berne Convention or a WTO member country on such date . . . ."). France, the source country of the 1922 *Ulysses*, is a Berne signatory. *See* INTERNATIONAL TREATIES ON INTELLECTUAL PROPERTY 358 (Marshall A. Leaffer ed., 2d ed. 1997).

[149] Prior to January 1998, Oxford University Press, W. W. Norton, and Penguin Putnam had announced plans to market editions of *Ulysses* in the United States. *See* St. John, *supra* note 76, at 1.

[150] Stephen James Joyce, the author's grandson, stated in 1993:

"In the United States [James Joyce's] writings are covered for seventy-five years from the year during which they were first copyrighted and published in America, *assuming formalities are met*. For example, it is the understanding of the Estate of James Joyce that *Ulysses* remains in copyright *until 1997 and possibly beyond* . . . ."

Stephen James Joyce, Letter to the Editor, 30 JAMES JOYCE Q. 345, 347 (1993) (emphasis added). I wish to make it clear that in referring to the Joyce Estate's assertions and equivocations regarding the American copyright in *Ulysses*, I am not ascribing deceptive motives to these individuals. The history of *Ulysses* in America is a complex and tortured one; a putative copyright owner can scarcely be blamed for asserting rights when the facts have been in doubt for nearly 80 years.

[151] *See* St. John, *supra* note 76, at 1 ("Random House and the Joyce Estate say the [copyright] clock didn't start running until 1934, when, after overcoming an obscenity ban, *Ulysses* was published on U.S. soil."); *cf.* Robin Bates, *The Corrections Officer: Can John Kidd Save* Ulysses?, LINGUA FRANCA, Oct. 1997, at 38, 45 (quoting a Random House lawyer as stating that the "U.S. copyright [in *Ulysses*] does not lapse on 31 December 1997").

from their plans to bring out a public-domain Ulysses.[152] A few small houses issued facsimiles of the 1922 French edition, expensively priced so as not to compete with the Random House trade-edition monopoly in the United States.[153]

As a result of the assertions of the Joyce Estate and the cautious responses of publishers, the public-domain status of *Ulysses* in America remains misunderstood. The serviceable fiction of copyright that arose in 1934 threatens now to harden into unquestioned myth. This myth—or fiction turned seeming fact[154]—is all the more pernicious in that Congress has recently passed legislation that amends the 1976 Copyright Act by adding twenty years to existing copyright terms.[155] Works enjoying a copyright term of seventy-five

[152] Following protests by Random House and the Joyce Estate's literary agent in the United States,

> Oxford . . . pulled its edition. "We're holding off now and consulting," said Ellen Chodosh, Oxford's vice president and publisher of trade paperbacks. Penguin Putnam is also asking its counsel to advise . . . .
>
> . . . .
>
> . . . Norton has chosen a more diplomatic route. "We've chosen to try to arrange things with the Joyce Estate," said Victor Schmalzer, an executive vice president at Norton. "It's an ongoing discussion."

St. John, *supra* note 76, at 1. As of this writing, however, Yale University Press plans to release a modestly corrected edition of the 1922 text of *Ulysses* in the spring of 2000. Telephone Interview with a Representative from the Advertising Department, Yale University Press (Oct. 5, 1998).

[153] For example, facsimile versions of the 1922 edition of *Ulysses* have been published by Orchises Press of Alexandria, Virginia at $75.00, and by The First Edition Library of Shelton, Connecticut at $37.50. The Orchises Press version appeared in 1998; the First Edition Library version is undated.

[154] *See* FRANK KERMODE, THE SENSE OF AN ENDING: STUDIES IN THE THEORY OF FICTION 39 (1967) ("Fictions can degenerate into myths whenever they are not consciously held to be fictive.").

[155] Act of Oct. 27, 1998, Pub. L. No. 105–298, § 102(d)(1)(B), 112 Stat. 2827, 2828 (to be codified at 17 U.S.C. § 304(b) (1994)) (West, WESTLAW). This legislation, known as the Sonny Bono Copyright Term Extension Act, passed in the House on October 7, 1998, as Senate Bill 505, 105th Cong. (1997), containing the same amending language with respect to term extensions as House Bill 2589, 105th Cong. (1998). For passage of Senate Bill 505 in the House, *see* 144 CONG. REC. H9946–9954 (daily ed. Oct. 7, 1998). House Bill 2589, one of whose supporters was the late Sonny Bono (R-Cal.), was introduced in the House on October 1, 1997, and passed on March 25, 1998. For floor debate on and passage of House Bill 2589, *see* 144 CONG. REC. H1456–1483 (daily ed. Mar. 25, 1998). Senate Bill 505 was introduced in the Senate on March 20, 1997, by Senator Hatch (R-Utah).

years from the date of first publication will now enjoy a term of ninety-five years from the date of first publication.[156]

With copyright terms dramatically increased, the purported copyright in *Ulysses*, unless it is recognized as illusory, will likewise receive a twenty-year reprieve from the public domain and continue to exert a chilling effect upon publishers well into the next century. The effects of monopoly will go on being felt: Readers will pay noncompetitive prices for Estate-approved editions of *Ulysses*; scholars will be discouraged from producing alternative versions of the novel in print and electronic-text formats. In particular, the benefits of digitalization and cyberspace will be lost or muted where *Ulysses* is concerned.[157] Although avant-garde authors like Joyce typically have a limited readership, recent evidence suggests that the copyright monopoly artificially depresses the market for modernism.[158] When more and cheaper editions of difficult works are in supply, the

[156] *See* Act of Oct. 27, 1998, Pub. L. No. 105–298, § 102(d)(1)(B), 112 Stat. 2827, 2828 (to be codified at 17 U.S.C. § 304(b) (1994)) (West, WESTLAW).

[157] Several CD-ROM versions of *Ulysses* are in preparation as of this writing, notably those by Michael Groden and by John Kidd. *See* Bates, *supra* note 151, at 45–46 (discussing Kidd's proposed "Annotated 'Ulysses' on CD-ROM"); Robert Spoo, *Preparatory to Anything Else*, 33 JAMES JOYCE Q. 491, 493–94 (1996) (discussing Groden's proposed "hypertext version of *Ulysses*"). For a brief discussion of the complexities of copyright infringement in cyberspace, see Section VI.C.

[158] Since most works of "high modernism" (the mature novels of Virginia Woolf or William Faulkner, for example) are still in copyright in the United States, it is too soon to tell whether public-domain accessibility will result in a substantial increase in the audience for these works. The existing evidence, however, suggests that this process is indeed under way. For example, Joyce's first novel, *A Portrait of the Artist as a Young Man*, first published in the United States in 1916, entered the public domain here on January 1, 1992. *See* 17 U.S.C. § 304(b) (1994) (providing a term of 75 years from the initial date of copyright for works in their renewal term before January 1, 1978). In 1991, three versions of *A Portrait* were in print in the United States: a Penguin paperback at $4.95; a Penguin paperback with critical apparatus at $9.95; and a reprint edition by Amereon Ltd. at $17.95. *See* 6 BOOKS IN PRINT 1990–91, at 4924 (1990). In 1997, the same three versions were still in print, now retailing at $7.00, $14.95, and $20.95, respectively; but the following versions were also available, most of them first published in 1991 or after: a Bantam paperback at $3.95; a NAL-Dutton paperback at $4.95; a Dover paperback reprint at $2.00; a Holt student edition at $10.00; a Knopf edition at $17.00; a North Books large-type edition at $24.00; a Buccaneer Books reprint edition at $26.95; a Viking Penguin paper edition, with a new introduction and notes, at $8.95; a St. Martin edition, with a revised text and critical essays, at $35.00; a Garland hardcover, with a newly edited text and critical apparatus, at $55.00; and a Random House paper edition of the same text at $9.00. *See* 7 BOOKS IN PRINT 1996–97, at 6542 (1996). The last four titles give some idea of the scholarly creativity and industry that public-domain accessibility can unleash.

demand of the common reader may increase accordingly.[159] High culture may lose some of its perceived exclusivity when it is made more economically accessible to mass culture.

V. A PUBLIC-DOMAIN *ULYSSES* FOR THE TWENTY-FIRST CENTURY

The adventures of *Ulysses* on the tossing sea of American copyright law have been many and dramatic, like those of the Homeric wanderer himself. *Ulysses* fell victim early on to that convergence of American legal forces—obscenity statutes, customs seizures, the copyright law—that seemed specifically designed for the torment of authors living abroad, as well as "contrary to the welfare of letters in America," as Ezra Pound insisted.[160] Forced to steer between a copyright code framed to protect book manufacturers and an obscenity law written to prevent the public from encountering in print its own Jazz-Age energies, *Ulysses* ran aground upon the economic and moral isolationism of America in the first half of the twentieth century.

To keep pirates from boarding the wreck and plundering a treasure that in fact lay open to all, Joyce and Bennett Cerf had recourse to the benign fiction of courtesy copyright. Now, more than sixty years after Random House first published *Ulysses*, the legal reality of the work's public-domain status continues to be obscured by the increasingly pointless and pernicious illusion of copyright. The present uncertainty surrounding the status of *Ulysses* as intellectual property in the United States is the direct result of the novel's tortured copyright history. The law's failure to protect *Ulysses* in 1922 gave rise to confusions that in the course of time have all but eclipsed the truth that, as we near the millennium, Joyce's work continues to enjoy a wholly extralegal form of protection. The public domain, once

[159] *See* Warwick Gould, *Predators and Editors: Yeats in the Pre- and Post-Copyright Era*, *in* 8 OFFICE FOR HUMANITIES COMMUNICATION PUBLICATION, TEXTUAL MONOPOLIES: LITERARY COPYRIGHT AND THE PUBLIC DOMAIN 69, 74–80 (Patrick Parrinder & Warren Chernaik eds., 1997) (documenting the vastly increased sales in the United Kingdom of inexpensive editions of W. B. Yeats's poems following the expiration of Yeats's U.K. copyrights in 1990).

[160] Ezra Pound, Letter to the Editor, THE HOUND & HORN, July-Sept. 1930, at 574, 577, *reprinted in* 5 POETRY AND PROSE, *supra* note 2, at 228.

a threat to Joyce's interests, now faces the reverse menace of an unreasonably protracted de facto copyright monopoly in *Ulysses*.

In 1934, the equities unquestionably favored Joyce and his exclusive American publisher. Having lost more than a decade of the American market for his book and watched while pirates exploited his helplessness,[161] Joyce was entitled to a kind of makeshift restitution awarded at the expense of the public domain through the tacit agreement of publishers. His success in getting an entire industry to assist him in his self-help was a tribute to his flair for publicity and his talent for authorial self-fashioning. He managed to turn the cult of genius that had grown up around him into an intangible asset and to transfer the goodwill accumulated thereby to his literary creation, *Ulysses*.

In generating sympathy for his beset book, moreover, Joyce may have kindled an unarticulated respect among the American public for his moral rights as an author—his rights of "paternity" over *Ulysses*.[162] Largely unrecognized by American law, *le droit moral* nevertheless appeals to an intuitive sense of justice that, together with trade courtesy, may have helped win for *Ulysses* the protection that it was denied by the letter of the copyright law.[163]

[161] In his action against Samuel Roth, Joyce asked for damages of $500,000, basing his estimate of lost American sales on "a minimum price of ten dollars a copy and with a royalty to me of fifteen or twenty per cent, with an English-reading population of a hundred and twenty millions." Plaintiff's Deposition at 8, Joyce v. Roth (N.Y. Sup. Ct. Dec. 27, 1928) (Ezra Pound Papers, Beinecke Library, Yale University).

[162] Moral rights are those rights of authorship, including rights of attribution ("maternity" or "paternity" in the work) and integrity (freedom from distortion or mutilation of the work), that are protected in many countries. The Berne Convention specifically recognizes these rights, which are based on natural law conceptions and differ markedly from Anglo-American intellectual property rights. *See* Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. OF THE COPYRIGHT SOC'Y 1, 3–37 (1980) (discussing the overlapping categories of moral rights as they have developed in French law). Although the United States is a signatory to the Berne Convention, Congress has declared that the Berne provisions "do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the common law . . . ." Act of Oct. 31, 1988, Pub. L. No. 100–568, § 3(b), 102 Stat. 2853, 2853 (codified at 17 U.S.C. § 101 note (1994)).

Congress did enact the Visual Artists Rights Act of 1990, however, which protects rights of attribution and integrity in works of visual art. *See* 17 U.S.C. § 106A(a). But these rights diverge from their European cousins in that they are limited by a specific durational term (life of the author), applicability of fair use, and right of waiver. *See id.* § 106A(a), (d)-(e).

[163] Joyce himself was a strong advocate of authors' moral rights. *See* JAMES JOYCE, AN ADDRESS TO THE FIFTEENTH INTERNATIONAL P.E.N. CONGRESS (1937),

Today, however, the equities have shifted decisively in favor of the public domain. Had Joyce complied with the ad interim and manufacturing provisions and secured an American copyright in *Ulysses* in 1922, that copyright would have expired on January 1, 1998.[164] The argument for 1934 as the commencement of a *Ulysses* copyright in the United States has no basis in law and has lost the justification it once had in informal equity. To lay claim to copyright protection where no copyright exists is to play upon the credulity of the public and to take advantage of the legal risk aversion of publishers. Worst of all, it is to cheat the public domain.

To conceive of the public domain solely in terms of the expiration of intellectual property rights, as a kind of absence or negation of entitlements, is to miss the vital structural role that it plays in cultural production. The public domain operates at once as a terminus for copyrights and as a common reservoir from which new works, and therefore new copyrights, may be drawn. While it indeed presides over the demise of individual entitlements, the public domain also promises a rich afterlife of unimagined creativity. James Boyle has described the public domain as containing "the raw materials which future creators need to produce their little piece of innovation."[165] Yet Boyle also warns that a conception of the public domain as a positive value is far from being widely shared: "The structure of our property rights discourse tends to undervalue the public domain, by failing to make actors and society as a whole internalize the losses caused by the extension and exercise of intellectual property rights."[166] Without an adequate appreciation of the public costs of private intellectual property rights, the meaning and function of

reprinted in THE CRITICAL WRITINGS OF JAMES JOYCE 274, 274–75 (Ellsworth Mason & Richard Ellmann eds., 1959) (claiming that the court injunction obtained by Joyce against Samuel Roth's use of his name implies that a writing belongs to its author by virtue of a natural right and can be protected just as the author's name is protected against wrongful use); *see also* Carol Loeb Shloss, Privacy and Piracy in the Joyce Trade: James Joyce and "Le Droit Moral" (unpublished manuscript, on file with the author) (discussing French moral rights in the context of Joyce studies and Joyce family privacy).

[164] *See* 17 U.S.C. § 304(b) (1994) (providing a term of 75 years from the initial date of copyright for works in their renewal term before January 1, 1978).

[165] James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87, 98–99 (1997).

[166] *Id.* at 111. Boyle analogizes the public domain to the environment, suggesting that the negative externalities resulting from the expansion of intellectual property rights should be analyzed as, for example, industry-generated pollution has been, in terms of costs spread over the public at large and benefits redounding to relatively few owners. *See id.* at 108–12.

the public domain will remain largely invisible to us: a submerged continent of cultural wealth.

A moment of historical reflection will reveal that this essay examines two very different faces of the public domain. In the past, American copyright protectionism made expedient use of the public domain to penalize noncompliance with the manufacturing requirements and to reward domestic publishers and printers with a dubious windfall of unprotected foreign works. It is important to distinguish this punitive perversion of the public domain from its normal salutary function. As a tool of protectionism, the public domain undoubtedly deserved being branded as the accomplice of a thieving copyright law, as a receiver of stolen cultural goods. In its proper function, however, the public domain is a vast archive of freely usable works, a mechanism for generating and distributing creative opportunities.

In recent years, the public domain has been quietly enriched through the expiration of American copyrights in works created in the first decades of the twentieth century. Because advances in technology and mass-marketing have given modern intellectual property a potential dollar value undreamed of in earlier periods, copyright owners have had strong incentives to seek term extensions, either by legislation or by obfuscation.[167] Since copyrights are often thought of as ordinary personal property,[168] it is difficult to enlist broad support for a robust public domain. Yet by countenancing the formal or informal extension of copyrights and the concomitant erosion of the public domain, we risk rendering ourselves passive consumers of culture rather than active users and creators.[169] Where owners of copyrights may control intellectual property for inordinately long

[167] *See Keeping Copyright in Balance*, N.Y. TIMES, Feb. 21, 1998, at A10 (arguing that "no matter how the supporters of [the term extension] bill [such as the Walt Disney Corporation and the Gershwin Family Trust] frame their arguments, they have only one thing in mind: continuing to profit from copyright by changing the agreement under which it was obtained"); *see also Copyright Term Extension Bill Gets Mixed Reaction in House Hearing*, 50 Pat., Trademark & Copyright J. (BNA) No. 1237, at 282, 283 (July 20, 1995) (reporting Prof. Dennis Karjala's criticism of term extension as a harmful diminution of the public domain).

[168] *See* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 386 (1996) (contending that a neoclassic-economics conception of copyright as property "upends copyright's delicate balance between author incentives and public access"); *cf.* Boyle, *supra* note 165, at 105 ("[I]ntellectual property is a particularly inappropriate area to talk about property rights as if they were both natural and absolute.").

[169] *See* William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661, 1768 (1988) (asserting, in the context of copyright law and the fair use doctrine, that

periods of time, culture ceases to be fertile and participatory and becomes static and administered.[170]

The lesson of *Ulysses* in America from 1922 to the present is that special interests and copyright jurisprudence are mutually antagonistic. Prior to the 1976 Copyright Act, undue solicitude for domestic book manufacturers deprived foreign-based authors like Joyce of the fruits of their literary labor; of late, exaggerated concern for copyright owners poses a danger to the public domain. In both instances, a misplaced emphasis on one set of economic interests within the larger process of cultural production threatens to upset the careful balance of copyright logic. Both forms of protectionism have generated systematic pathologies or discontents that have affected copyright owners and users in different ways.

Limited copyrights and a strong public domain are reciprocally related. In providing for the transfer of intellectual property to the public domain after a certain term, Anglo-American copyright jurisprudence ensures the just and fertile distribution of cultural wealth. In the ecology of copyright, creators create with the expectation of deriving benefits from their creations for a limited term; in due course, their creations become freely available to others, who, acting upon those resources as users, may become creators in their turn.[171] The two phases of original expression—initial monopoly followed by public-domain accessibility—are both instrumental to the goal of copyright in our legal system: the generation of more original expression. Having fulfilled and outlived its purpose as private property in the United States, *Ulysses* should be allowed to

"[a]ctive interaction with one's cultural environment is good for the soul" and that "[a] person living the good life would be a creator, not just a consumer, of works of the intellect").

[170] *See* Steve Zeitlin, *Strangling Culture With a Copyright Law*, N.Y. TIMES, Apr. 25, 1998, at A15 (criticizing proposed legislation to extend copyright terms and noting the observation of Don Adams and Arlene Goldbard that "authentic cultural democracy . . . 'requires active participation in cultural life, not just passive consumption of cultural products'"); *see also* Netanel, *supra* note 168, at 288 (proposing a "democratic paradigm" that would concede to "authors a limited proprietary entitlement, designed to make room for—and, indeed, to encourage—many transformative and educative uses for existing works").

[171] *See* 1 GOLDSTEIN, *supra* note 84, § 1.14, at 1:40 ("The balance that copyright law strikes between the incentives that authors and publishers need to produce original works and the freedom that they and others need to draw on earlier copyrighted works rests on a judgment about social benefit."). *But see* Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1150 (1990) (characterizing incentive rationales for copyright as "utilitarian justification[s]" and advocating broader conceptions of social value and "fairness" in assessing doctrines involving the creator-user relationship).

realize its equally vital purpose as a common treasure of the public domain.

VI. CONCLUSION: SOME IMPLICATIONS FOR JOYCEANS

I would like to conclude a bit less formally by exploring some implications of the foregoing analysis for Joyceans. The climate during the past decade or so has led to great uncertainty about the relationship between Joyce scholars and Joyce copyrights. Many of us have come to fear that even minimal quotation from Joyce's copyrighted works might lay us open to legal reprisal. After all, permissions to quote from Joyce's writings, particularly his unpublished writings, are frequently denied by the Joyce Estate, and Stephen James Joyce has made it clear that he will protect the "privacy" of his family, past and present, by every means available to him.[172] The most convenient and effective strategy for fending off meddlesome scholars—the method that promises the greatest international reach—is the law of copyright.

To understand the power and the limitations of copyright law, one must distinguish between tangible and intangible property rights in literary works. For example, apart from any papers he himself possesses, Mr. Joyce is unable to forbid access to physical materials relating to his grandfather's life and writings: Scholars have virtually unrestricted access to writings by James Joyce in published editions and in manuscript archives.[173] But Mr. Joyce can control

[172] *See* Robert Spoo, *Preparatory to Anything Else*, 28 JAMES JOYCE Q. 7, 10 (1990) (quoting Stephen James Joyce as announcing at the 1990 International Joyce Symposium in Monaco that "Joyce family privacy . . . has been invaded more than that of the family of any personality in the twentieth century" and that "[w]e will defend the privacy of the Joyce family"); *see generally* Michael Patrick Gillespie, *The Papers of James Joyce: Ethical Questions for Textually Ambivalent Critics*, 2 NEW HIBERNIA REV. 99 (discussing family privacy and scholarly access in connection with archival materials relating to Joyce).

[173] Of course, manuscript archives have been known to place restrictions on physical access to materials at the behest of interested parties, including donors, sellers, family members, and copyright holders. We know, for example, that Stephen James Joyce persuaded the National Library of Ireland to release to him certain papers "of a purely personal family nature" contained in the recently unsealed James Joyce-Paul Léon collection. *See* Gillespie, *supra* note 172, at 112 (quoting Patricia Donlon, the former director of the National Library).

the dissemination of these materials by asserting his exclusive ownership of the intangible rights, or copyrights, that inhere in them. Because it distinguishes between ownership of a physical document and ownership of a copyright in the work embodied in that document,[174] the law of intellectual property permits exactly this kind of control. To illustrate: Mr. Joyce cannot stop you from reading James Joyce's erotic letters to Nora in the *Selected Letters*[175] nor from examining Lucia Joyce's unpublished memoirs at the Harry Ransom Humanities Research Center in Austin, Texas. He cannot stop you from talking about what you have read or examined. He cannot prevent you from writing about facts or ideas contained in these materials, nor from engaging in modest quotation under the doctrine of fair use (discussed more fully below). But he can use his power as a copyright holder to deny you permission to reproduce, adapt, distribute, publicly perform, or publicly display these materials.[176]

A valid *copy*right thus allows its owner to grant or deny permission to copy a protected work. Suppose you live in Butte, Montana, and are lucky enough to own an original letter by James Joyce. No one can contest your right to retain possession of that document, to sell it, to give it away, or, if you wish, to burn it. (Stephen James Joyce, who once announced that he had destroyed letters by Lucia and Samuel Beckett in his possession, is familiar with this privilege.[177]) But the owner of the copyright in the letter's contents, even if he lives thousands of miles away in Paris, France, can prevent you from making and distributing copies of the letter, and he can pursue a legal remedy against you if you go ahead and copy it anyway.

Having established this distinction between ownership of a physical document and ownership of a copyright in the work's original

[174] *See* 17 U.S.C. § 202 (1994) ("Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied."); *cf.* Act of Mar. 4, 1909, ch. 320, § 41, 35 Stat. 1075, 1084 ("[T]he copyright is distinct from the property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright . . . .").

[175] *See* SELECTED LETTERS OF JAMES JOYCE 157–96 (Richard Ellmann ed., 1975).

[176] *See* 17 U.S.C. § 106(1)-(6) (enumerating the exclusive rights in copyrighted works).

[177] *See* Thomas F. Staley, *Notes and Comments*, 26 JAMES JOYCE Q. 5, 7 (1988) (reporting Stephen James Joyce's announcement at the 1988 International Joyce Symposium in Venice that he had destroyed "letters from Lucia Joyce and letters to her from Samuel Beckett"); Caryn James, *Joyce Family Letters in Literary Debate*, N.Y. TIMES, Aug. 15, 1988, at 13 (interviewing Mr. Joyce about destroying the Lucia and Beckett material in the context of family privacy).

expression, I would like to move on to some of the pressing concerns of Joyce scholars. The following observations are all premised on my conclusion, presented in detail above, that the 1922 Paris edition of *Ulysses* never enjoyed a valid copyright in the United States, except for a period of two years—from January 1, 1996, to January 1, 1998—when the Uruguay Round Agreements Act (often referred to as GATT) restored copyrights in works like *Ulysses* that had failed to comply with the manufacturing requirements of the 1909 Copyright Act.[178] For the rest of the nearly eighty years since its French publication, *Ulysses* has quietly resided in the public domain in the United States. Only the gentlemen's fiction of courtesy copyright and the subsequent hardening of that fiction into seeming copyright fact have safeguarded the interests of the Joyce Estate and Random House.[179] Bear in mind that my theory about the 1922 edition is an inference based upon scholarly research and analysis, not the decision of a court of law or the advice of an attorney. The conclusions that I derive from that basic theory and offer below should likewise be taken as a scholar's opinions.

A. LATER EDITIONS OF ULYSSES AS DERIVATIVE WORKS

What of later editions of *Ulysses*? What, in particular, is the copyright status of those American editions of *Ulysses* that have boasted revisions to the text? I take it that the 1934 Random House edition is not high on anyone's list of reliable versions of Joyce's novel, so it is practically moot, from a scholar's point of view, whether or not the changes introduced into that text might have constituted copyrightable matter. Nevertheless, it is worth noting that, apart from the letter by Joyce that Bennett Cerf included in the front matter, the 1934 text is a very poor candidate for copyright protection, despite the fact that Cerf registered a copyright in all or part of the edition. In the rush to print *Ulysses* following the decision by Judge Woolsey, Cerf's typesetters inadvertently set the 1934 text from the wildly corrupt forgery of the ninth printing of the Paris edition.[180] Since the forgery mimicked what I conclude to have been a public-domain text and probably lost any chance it might have had for an enforceable

[178] *See supra* Part IV.

[179] *See supra* Section III.B.

[180] More accurately, the 1934 Random House edition was set from the pirated text and proofread against the 1932 Hamburg Odyssey Press edition. *See* John Kidd, *An Inquiry into* Ulysses: The Corrected Text, 82 PAPERS BIBLIOG. SOC'Y 411, 517 (1988).

copyright in its "revisions" by not complying with the notice and registration requirements of the 1909 Copyright Act,[181] the forgery provided a very flimsy basis for protectible expression in the 1934 edition. On this analysis, the 1934 Random House edition lacks copyright protection. The certificate of registration issued by the Copyright Office for that edition is, in my estimation, a presumption that may be rebutted.[182]

1. THE 1961 RANDOM HOUSE EDITION AND "THIN" COPYRIGHTS

More relevant to the work of Joyce scholars are the 1961 and 1986 Random House editions, the two versions that continue to be widely sold in the United States today. As editions incorporating a certain amount of new material, these texts must be considered "derivative works" in relation to the 1922 text of *Ulysses*. The 1976 Copyright Act defines a derivative work as "a work based upon one or more pre-existing works" and observes that "[a] work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.'"[183] Thus, to qualify as a derivative work, an edition must be based on a pre-existing or underlying work, and it must contain modifications that, taken as a whole, establish a separate work of

[181] *See supra* notes 17–18, 32–34 and accompanying text and *infra* note 196. As an unauthorized and uncopyrighted bookleg text, the forged Paris edition necessarily bore a fraudulent copyright notice: "Copyright by James Joyce." The 1909 Act provided a penalty for such an offense. *See* Act of Mar. 4, 1909, ch. 320, § 29, 35 Stat. 1075, 1082 ("[A]ny person who, with fraudulent intent, shall insert or impress any notice of copyright required by this Act, or words of the same purport, in or upon any uncopyrighted article . . . shall be guilty of a misdemeanor . . . .").

[182] *See* Durham Indus. v. Tomy Corp., 630 F.2d 905, 908 (2d Cir. 1980) ("It is clear . . . that a certificate of registration creates no irrebuttable presumption of copyright validity. Where other evidence in the record casts doubt on the question, validity will not be assumed.").

[183] 17 U.S.C. § 101 (1994). Other derivative works include "a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." *Id.* The 1909 Copyright Act had a similar provision for what it called "new works," which included "versions of works in the public domain, or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter . . . ." Act of Mar. 4, 1909, ch. 320, § 6, 35 Stat. 1075, 1077.

authorship embodying original expression and minimal creativity.[184] One of the exclusive rights of a copyright owner is "to prepare derivative works based upon the copyrighted work."[185]

It is a well-established legal doctrine that the copyright in a pre-existing work and the copyright in a derivative work based upon the pre-existing work are separate. The copyright in the derivative work covers only the original expression that has been added to the underlying work and does not extend to the underlying work.[186] Suppose that an opera librettist wishes to base his libretto on an earlier play. He has received a license from the playwright (who owns a valid copyright in the play) permitting him to make use of the play for the purpose of producing the libretto, a derivative work. He completes the libretto and secures a copyright in it. Now there are two copyrights, one in the original expression contained in the play and another in the new matter added by the librettist. Suppose further that the copyright in the play reaches the end of its term and expires.

[184] *See* Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) (stating that facts are not copyrightable because they do not satisfy the criteria of originality and minimal creativity).

[185] 17 U.S.C. § 106(2) (1994).

[186] *See, e.g.*, Russell v. Price, 612 F.2d 1123, 1128 (9th Cir. 1979) (reaffirming "the well-established doctrine [under the 1909 Copyright Act] that a derivative-work copyright protects only the new material contained in the derivative work, not the matter derived from the underlying work"); *cf. Durham Indus.*, 630 F.2d at 909 ("[T]he scope of protection afforded a derivative work must reflect the degree to which it relies on pre-existing material and must not in any way affect the scope of any copyright protection in that pre-existing material."); Adventures in Good Eating v. Best Places to Eat, 131 F.2d 809, 813 (7th Cir. 1942) ("The copyright covers the whole of the book, and the later copyrights [in revised editions] cover the supplemental material only, and not the earlier. There can not be two copyrights on the same material."); 1 NIMMER, *supra* note 68, § 3.04[A], at 3–18 ("Copyright in a derivative or collective work covers only those elements contained therein that are original with the copyright claimant. That is, a derivative or collected work copyright does not *per se* render protectible the pre-existing or underlying work upon which the later work is based."). The 1976 Copyright Act codified this doctrinal principle:

> The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the pre-existing material employed in the work, and does not imply any exclusive right in the pre-existing material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the pre-existing material.

17 U.S.C. § 103(b) (1994); cf. Act of Mar. 4, 1909, ch. 320, § 6, 35 Stat. 1075, 1077 ("[T]he publication of any such new works shall not affect the force or validity of any

Henceforth, anyone can make use of the public-domain play, but copyright protection of the libretto's original expression persists independently of the play's unprotected status.[187] The problem, of course, is how to distinguish the protected expression in the libretto from the public-domain matter in the play, since there is inevitably some overlap between the two works in terms of plot, themes, characters, and other elements.

To offer an example closer to our own concerns, imagine that a writer publishes a novel but somehow fails to secure a copyright in that novel. It is cast into the public domain. The writer goes on to publish a second version of the novel containing the very same text as the first one but incorporating numerous minor revisions—mostly changes of wording here and there. No sooner does the writer secure a valid copyright in this second version than a pirate comes along and publishes an unauthorized verbatim edition of the first version of the novel. The writer sues the pirate for copyright infringement. How should the court rule?

You may have recognized this hypothetical example as a slightly simplified rendering of the facts in the *Candy* litigation discussed earlier.[188] In that case, the District Court for the Southern District of New York stated that if a pirate copies a public-domain text, he cannot be held to have infringed any copyright. The court observed further that the plaintiffs' copyright in this case extended solely to any non-trivial revisions that they had incorporated into the second version of Candy.[189] That second version was, in effect, a derivative

subsisting copyright upon the matter employed or any part thereof, or be construed to imply any exclusive right to such use of the original works, or to secure or extend copyright in such orginal works.").

[187] The facts presented here are adapted from a famously complicated case involving three works: Puccini's *Madame Butterfly* and a novel and play upon which the opera was based. *See* Ricordi & Co. v. Paramount Pictures, Inc., 189 F.2d 469 (2d Cir. 1951) (holding that the plaintiff's copyright in an opera (a derivative work) based upon a play (a derivative work) based upon a novel (the underlying work) was separate from the copyright in the novel and from the expired copyright in the play, and that the plaintiff's motion picture rights extended only to the new matter contained in the operatic version, not to the original expression in the underlying novel, but that anyone could make use of the material in the public-domain play.

[188] *See supra* Section II.C.

[189] *See* G. P. Putnam's Sons v. Lancer Books, 239 F. Supp. 782, 785 (S.D.N.Y. 1965) ("The law is clear that when revisions or additions are made to a work which lies within the public domain, the copyright protection secured by registration of that work extends at most only to the revisions and additions, *i.e.*, to the work which was original with the author who seeks the copyright."); *see also* Axelbank v. Rony, 277 F.2d 314, 317 (9th Cir. 1960) ("[J]ust because the source of the material is in the public domain does not void the copyright [in the derivative work], but rather the protection is limited to the new and original contribution of the author."); American Code Co. v. Bensinger, 282 F. 829, 834 (2d Cir. 1922) ("If one takes matter which lies in the public domain, . . . and, adding thereto materials which are the result of his own efforts, publishes the whole and takes out a copyright of the book, the copyright is not void because of the inclusion therein of the uncopyrightable matter, but is valid as to the new and original matter which has been incorporated therein."); Kipling v. G. P. Putnam's Sons, 120 F. 631, 634 (2d Cir. 1903) (holding that a copyright in a new edition of an earlier work "did not operate to extend or enlarge prior copyrights or remove from the public domain the author's works which, by his own act, he had dedicated to the public").

[190] The *Candy* court wondered whether the minor revisions that the plaintiff had introduced into the second version of the novel were sufficient to establish a derivative-work copyright, observing: "In order to copyright revisions or changes made in a work in the public domain, the revisions must not be 'trivial.'" *G. P. Putnam's Sons*, 239 F. Supp. at 785; *see also* Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 103 (2d Cir. 1951) ("All that is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own.'"); Ziegelheim v. Flohr, 119 F. Supp. 324, 327 (E.D.N.Y. 1954) (holding that a Hebrew prayer book containing "numerous instances where letters, words or lines of the text were added, deleted or rearranged" to revise a public-domain version of the prayer book met "the standard of a 'distinguishable variation,' something more than a 'merely trivial' variation").

[191] JAMES JOYCE, ULYSSES: THE CORRECTED TEXT (Hans Walter Gabler et al. eds., Random House ed. 1986); JOYCE, *supra* note 38, at 6; *see also* Kidd, *supra* note 180, at 492–93 (arguing that Gabler erred in his handling of the historical name, Conolly Norman).

work based upon the underlying public-domain novel. The preexisting work was freely available for anyone to copy. Only the revisions were protected against unauthorized copying.[190]

We can apply these principles to the relationships among the 1922, 1961, and 1986 editions of *Ulysses*. The 1922 text is the preexisting work, and the two later versions, which effectively add revisions and corrections to the 1922 text, are derivative works. Since the 1922 edition is a public-domain text in the United States, the only question is what kind of copyright protection, if any, the 1961 and 1986 editions enjoy. Although Joyceans have gone to holy war over the minutest details of the text (should "Connolly Norman" be "Conolly Norman"?[191]), I think that a court of law would be unimpressed by the differences between the 1922 text and the other two versions. The changes in the 1961 text seem particularly insignificant. In "Telemachus," for example, I count some two dozen departures from the 1922 version, only three or four of which are of

a substantive nature.[192] The others involve accidentals: commas, hyphens, spellings, and the like. A court would be hard pressed, I think, to find in these revisions the original expression and minimal creativity required for copyright protection under the present law. At best, the 1961 edition may have qualified for a "thin" copyright[193] in its cumulative revisions, in the derivative work taken "as a whole."[194]

Determining when exactly a copyright in the 1961 derivative work may have begun is a more difficult matter. Since many of the changes that appear in the 1961 text began creeping into *Ulysses* editions and printings long before 1961,[195] there might be, strictly speaking, multiple mini-copyrights inhering in different strata of

[192] The 1961 text has "grey sweet mother" for the 1922's "great sweet mother"; "Stephen filled the three cups" for "Stephen filled again the three cups"; and "brow and lips and breastbone" for "brow and breastbone." JOYCE, *supra* note 124, at 5, 15, 22; JOYCE, *supra* note 38, at 5, 15, 21. The most significant addition to the 1961 "Telemachus" is the sentence: "He crammed his mouth with fry and munched and droned." JOYCE, *supra* note 124, at 13. Yet all of these changes, except for the omission of "again" from "Stephen filled again the three cups," entered the Random House text sometime prior to 1961. They are present, for examle, in the 1946 printing.

Compare the *Candy* court's juxtaposition of a sentence in the original version of the novel ("'I've read many books,' said Professor Mephesto, with an odd, weary finality, placing his hands flat on the podium.") with the sentence as revised in the later version ("'I've read many books,' said Professor Mephesto, with an odd finality, wearily flattening his hands on the podium."). The court described this change as "typical" of the plaintiffs' revisions, *G. P. Putnam's Sons*, 239 F. Supp. at 783, and added: "It is at least arguable that the revisions made in 'Candy' were so slight as not to meet even this lenient standard [of nontriviality for copyright protection]." *Id.* at 785; *cf.* Grove Press, Inc. v. Collectors Publishers, Inc., 264 F. Supp. 603, 605, 606 (C.D. Cal. 1967) (ruling that approximately 40,000 "trivial" changes to the spelling and punctuation of a public-domain biography did not suffice to produce a copyrightable derivative work, and stating that the changes "required no skill beyond that of a high school English student").

[193] *Cf.* Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) ("[T]he copyright in a factual compilation is thin. Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement.").

[194] 17 U.S.C. § 101 (1994).

[195] *See, e.g.*, Kidd, *supra* note 180, at 511 (discussing corrections made to the 1940 Modern Library imprint from the 1932 Odyssey Press edition). The 1961 Random House edition was set from the English Bodley Head edition of 1960, but, as Kidd points out, the complex genealogy of the revisions entering these two editions involves other editions and printings. *See id.* at 512–13, 517. The Historical Collation List in the third volume of Hans Walter Gabler's *Critical and Synoptic Edition* (1984) indicates, for example, that the 1961 text's "grey sweet mother" first entered the 1926 Paris second edition, and that the 1961's omission of "again" from "Stephen filled again the three cups" first occurred in the 1932 Odyssey Press edition. *See id.* at 1755, 1756. Since, however, the 1926 and 1932 editions,

revision,[196] each with its own durational term. Trying to compute such a patchwork copyright would be a metaphysical headache and a judicial nightmare. It would be rather silly as well. I am inclined to think that, apart from Joyce's letter in the front matter, the 1961 text, if its paucity of new matter does not render it a public-domain text *in toto*, is a public-domain text with an eggshell-thin copyright in its cumulative revisions. Infringement of the copyright in such a work, if conceivable at all, might be what the law calls *de minimis*.[197] Nevertheless, I would strongly discourage wholesale or even substantial copying of the 1961 text, an act that might be thought to sweep in enough revisional material to amount to legally cognizable infringement.

2. THE GABLER EDITION AND "SWEAT OF THE BROW"

I have been arguing that the derivative-work copyright in the 1961 text is confined to the revisional variance between that text and the 1922 version (together with the elusive factor of the revisions, copyrightable or not, that crept into Random House printings prior to 1961). The matter can be expressed, crudely but efficiently, by

published abroad, were in no better position to comply with the 1909 Act's ad interim and manufacturing provisions than was the 1922 edition, those editions, too, presumably, lost their chance for an American copyright. Any substantive revisions contained in the 1926 and 1932 editions that made their way into the 1961 text would be public-domain matter, unless such revisions were rescued by the URAA provisions discussed *supra* Part IV. Thus, the 1961 derivative-work copyright, if it exists at all, is very thin indeed, although a sufficiently original arrangement of public-domain material may qualify for a derivative-work copyright.

[196] Relevant to the validity of any such "mini-copyrights" under the 1909 Copyright Act would be the question of whether earlier Random House printings containing revisions—and indeed the 1961 edition itself—complied with the Act's notice, deposit, and registration requirements. *See supra* notes 17–18, 32–34 and accompanying text. Under the 1909 Act, special hazards attended the affixing of copyright notices to new editions. If the new edition contained substantial new matter, only the year date of publication of the new edition needed to appear in the copyright notice. *See* HOWELL, *supra* note 17, at 66. But if revisions were not of a substantial character, use of the year date of the new edition instead of that of the earlier edition ran the risk of "losing the copyright in toto," *id.* at 67, because courts held that use of a year date later than the year of a text's publication worked harm to the public domain. *See* American Code Co. v. Bensinger, 282 F. 829, 836 (2d Cir. 1922) (distinguishing between use of a year date earlier than the publication date and use of one later than the publication date and stating that the latter error alone is "against the public").

[197] "*De minimis*" is short for *De minimis non curat lex*: "The law does not concern itself with trifles."

simple arithmetic: 1961 edition (including any copyrighted pre-1961 revisions) — 1922 edition = a thin copyright in the 1961 derivative work. Not all courts and legal analysts have taken such an approach to derivative works, however. There was a school of thought that regarded the copyright in a derivative work as comprising both the pre-existing work and the additional original matter, the two being considered as forming a new whole for copyright purposes. On this view, the derivative-work copyright covered not only the new matter but also the underlying matter as used in the later work, leading in some cases to the paradoxical result that, while a public-domain text could be freely copied on its own, the same text as used in a derivative work could not be copied directly from that derivative work, even if the new matter were studiously avoided by the copier.[198] As Nimmer points out, "[t]hese cases generally rested upon the rationale that one should not freely reap the benefit of the industry of another in reporting and researching facts or other public domain material."[199] This theory has become known as the "sweat of the brow" doctrine,[200] and it was decisively rejected by the U.S. Supreme Court in the 1991 case of *Feist Publications, Inc. v. Rural Telephone Service Co.*,[201] which held that a mere alphabetical listing of names in a telephone directory, no matter how much labor and expense had gone into its compiling, did not rise to the level of original expression and minimal creativity required for copyright protection.[202] After *Feist*, the focus shifted from the all-inclusiveness of copyrights in derivative works and compilations—especially

[198] *See, e.g.*, Hartfield v. Peterson, 91 F.2d 998, 1000 (2d Cir. 1937) (holding, in a suit for infringement of a copyrighted cable and telegraphic code, that "no one can copy phrases or sequences which are original with the author or appropriate any other part of the copyrighted work, whether that part is in the public domain or not"); Jeweler's Circular Publ'g Co. v. Keystone Publ'g Co., 281 F. 83, 88 (2d Cir. 1922) ("The right to copyright a book [here, a jeweler's index] upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected are publici juris [public domain], or whether such materials show literary skill or originality . . . ."); Yale Univ. Press v. Row, Peterson & Co., 40 F.2d 290, 291–92 (S.D.N.Y. 1930) (Woolsey, J.) (reaffirming the rule in *Jeweler's Circular*); *see also* 1 NIMMER, *supra* note 68, § 3.04[B][1], at 3–21 (discussing the theory that a derivative work covered the pre-existing work along with the new matter).

[199] 1 NIMMER, *supra* note 68, § 3.04[B][1], at 3–21.

[200] *Id.*

[201] 499 U.S. 340 (1991).

[202] *See id.* at 352; *cf.* Paul J. Heald, *Reviving the Rhetoric of the Public Interest: Choir Directors, Copy Machines, and New Arrangements of Public Domain Music*, 46 DUKE L.J. 241, 250–51, 258–59, 266 (1996) (extending the *Feist* criterion of originality to test claims of copyright in new arrangements of public-domain music).

those containing public-domain material—to the particular original expression added to such works.

The notion of an all-inclusive derivative-work copyright was, however, at the heart of discussions in the early 1980s that led to the publication of Hans Walter Gabler's *Critical and Synoptic Edition*[203] in 1984 and the Random House *Corrected Text* in 1986.[204] Correspondence among Gabler, Peter du Sautoy, Philip Gaskell, Richard Ellmann, and others makes it clear that establishing a "new copyright"[205] in *Ulysses* was central to the Estate's approval of the Gabler project. The idea was that "the new text would be so much changed, and all based on materials provided by James Joyce himself, that an extended period of copyright will be established."[206] Thus, the sheer quantity of unpublished revisions, drawn primarily from the Rosenbach Manuscript, would generate a new text and a new copyright. Throughout the exchange of letters, which continued through 1985 at least, everyone seemed to think that the derivative-work copyright that would result—though no one called it that—would cover both the fresh revisions and the pre-existing text that embodied them, although Peter du Sautoy cautioned that the existence of a new copyright would not stop older editions from falling into the public domain and returning under new imprints to vie with the Gabler edition at competitive prices.[207]

[203] JAMES JOYCE, ULYSSES: A CRITICAL AND SYNOPTIC EDITION (Hans Walter Gabler et al. eds., Garland ed. 1984).

[204] *See supra* note 191.

[205] Letter from Peter du Sautoy to Philip Gaskell (May 5, 1983) (Richard Ellmann Papers, McFarlin Library, University of Tulsa). It appears from these letters that the correspondents had the British *Ulysses* copyright chiefly in mind, but at times they allude to the American context as well.

[206] Letter from Peter du Sautoy to Stephen James Joyce (Dec. 7, 1982) (Richard Ellmann Papers, McFarlin Library, University of Tulsa); *see also* ARNOLD, *supra* note 76, at 113–14 (discussing the correspondence of the Estate Trustees and the Gabler project advisers concerning the copyright question).

[207] *See* Letter from Peter du Sautoy to Stephen James Joyce (Dec. 7, 1982), *supra* note 206; *see also* Letter from Peter du Sautoy to Richard Ellmann, Philip Gaskell, and Clive Hart (Dec. 4, 1981) (Richard Ellmann Papers, McFarlin Library, University of Tulsa) (noting that, despite any extension of copyright in the Gabler edition, "the larger sales will still go to the older uncorrected texts which will be out of copyright and cheaper").

The copyright registration form for *Ulysses: A Critical and Synoptic Edition* also seems to reflect the assumption that a derivative-work copyright can comprise both the pre-existing text and fresh revisions. Form TX 1754418, filed with the Copyright Office by Elizabeth K. Quinson of Garland Publishing, Inc., on January 27, 1986, designates the Gabler edition as a derivative work. Naming James Joyce as the author, the form describes the "Pre-existing Material" as "James Joyce's *Ulysses*" and the "Material Added to This Work" as

The argument for a derivative-work copyright in the Gabler text seems to me much stronger than that for the 1961 text. Although the significance of the changes that Gabler introduced, many of which affect accidentals, has probably been exaggerated, the various new readings drawn from manuscript sources are more substantive than most of the corrections to the 1961 text. In "Telemachus" alone, Gabler included more than a dozen substantive alterations of wording and word order,[208] together with a host of punctuation and spelling changes. Again, I think that a court would be struck by the near-identity, to the untrained eye, of the 1922 and 1986 texts, but, upon demonstration of the differences, the court might well find a

"Draft texts, reading text, editing and compilation." No clear distinction is made between the pre-existing text and the new revisions; indeed, "reading text, "draft texts," and "editing" are lumped together. The word "compilation" in this context may denote the Gabler team's labor in assembling the continuous manuscript text—their "sweat of the brow"—a rationale which, since *Feist*, no longer justifies the extension of copyright protection to compilations and derivative works. *See supra* notes 198–202 and accompanying text.

A second document, Form TX 1754417, filed the same day, names Hans Walter Gabler as the author of a derivative work in the same edition and describes the "Pre-existing Material" as "James Joyce's *Ulysses*" and the "Material Added to This Work" as "Foreward [*sic*], Acknowledgements, Presentation of Genetic Synopsis and Notes." Taken together, the two forms appear to claim separate derivative-work copyrights in the 1984 text and revisions, on the one hand, and in Gabler's revisional apparatus, on the other.

On August 5, 1986, Margaret Gorenstein of Random House, Inc., filed a registration form for a derivative-work copyright in *Ulysses: The Corrected Text*. This document, Form TX 1897541, naming "Random House, Inc." as the author, describes the "Preexisting Material" by stating that "This corrected text was originally published in 1984" and indicates that "Material Added to this Work" consists of "Editorial revisions; new preface; new afterword." Gabler, as we know, made certain revisions to the 1984 text prior to its 1986 reprinting. *See* Hans Walter Gabler, *Afterword* to JOYCE, *supra* note 191, at 650 ("A small number of minor amendments to the reading text have been made before issue of this edition. They are detailed in the second impression of the critical edition."). It was on this basis, perhaps, that Random House claimed a derivative-work copyright separate from the one that Garland had claimed for the 1984 text on behalf of the Trustees of the Estate of James Joyce. The copyright page in The Corrected Text states in significant part: "Copyright © 1986 by Random House, Inc. Reading text copyright © 1984 by The Trustees of the Estate of James Joyce." *Id.* at iv.

On Form TX 1897541, Random House claimed copyright registration for *Ulysses: The Corrected Text* in its own name ("Random House, Inc."); the registration form for the 1934 edition seems to have done the same ("Modern Library, Inc."). On May 27, 1992, however, Random House executed a quitclaim deed surrendering the copyright in *Ulysses* to the Joyce Estate Trustees but reserving to itself all publishing and other rights that had previously been granted in the work. All of the documents cited in this note are on file with the Copyright Office.

[208] Examples include "*on* the mild morning air"; "called *out* coarsely"; "surrounding *land*"; "long *slow* whistle of call"; "Stephen said *thirstily*"; "bird*tweet* cries." JOYCE, *supra* note 191, at 3, 10, 16 (emphasis added).

derivative-work copyright in the 1986 text (and a separate copyright in Gabler's complex revisional apparatus on the left-hand pages of the *Critical and Synoptic Edition*). The 1986 text stands a much better chance than the 1961, therefore, of passing the "distinguishable variation" and "substantially different" tests that courts have used to assess the copyrightability of derivative works.[209]

Yet it is important to contain the "spread" of a derivative-work copyright, lest it threaten indirectly to revive a monopoly in the underlying public-domain text and therefore pose a danger to the public interest. The copyright in the 1986 text should, in my view, be confined narrowly to the original expression that Gabler introduced by way of substantive revisions; it should not extend to the bulk of the edition, which, being virtually identical with the 1922 text, is in the public domain. Because Gabler's revisions are scattered throughout the text, I strongly discourage wholesale or substantial copying of the 1986 edition. If extensive copying of the 1961 text might pose a danger of crossing over into infringement, that danger exists *a fortiori* in the case of the 1986 text.

Assuming that the 1986 text enjoys a derivative-work copyright, how long will that copyright last? Here we encounter yet another conundrum. The 1986 text was first published on the right-hand pages of the 1984 *Critical and Synoptic Edition*. 1984 is therefore our base-line date. Assuming further that the most substantial new matter in the 1984 text was that derived from the unpublished Rosenbach Manuscript,[210] the derivative-work copyright in the 1984 text should be governed by the provision of the 1976 Copyright Act that deals with works created but not published or copyrighted

[209] *See, e.g.*, Sherry Mfg. Co. v. Towel King, Inc., 753 F.2d 1565, 1568–69 (11th Cir. 1985) (employing the "distinguishable variation" test to assess infringement of a beach towel design); Gracen v. Bradford Exch., 698 F.2d 300, 305 (7th Cir. 1983) (substituting for the "distinguishable variation" test the requirement that a derivative work be "substantially different from the underlying work to be copyrightable," in a suit for infringement of photographs of Judy Garland as Dorothy in the movie, *The Wizard of Oz*).

[210] My characterization of the Rosenbach readings as the primary new matter in the 1984 text is provisional and heuristic, of course. Gabler drew on other pre-publication materials that have been reproduced in the 63-volume *James Joyce Archive* under the general editorship of Michael Groden and published by Garland between 1977 and 1980. I focus on the Rosenbach Manuscript as a way of making vivid and comprehensible the issues raised by a derivative work of the sort produced through complex textual editing. Inevitably, the 1984/1986 edition's derivative-work copyright is more elusive and stratified than my analysis can account for here. This is a case in which the nuances of copyright law and the intricacies of textual editing converge.

before January 1, 1978, the effective date of the Act. That section, as amended by the Sonny Bono Act, states that the copyright in any unpublished pre-1978 material will not expire before December 31, 2047, *if* that material is *published* on or before December 31, 2002.[211]

All this may seem very complicated, but essentially it is the 1976 Act's way of providing statutory copyright protection for unpublished works created before 1978 and at the same time offering an incentive for publishing such works sooner (pre-2003) rather than later. An essential insight of Anglo-American copyright jurisprudence, after all, is that because publication confers benefits upon the public, authors should be granted a limited monopoly in the form of a copyright as an incentive to create and publish new works.[212] Since the Rosenbach materials, created by Joyce before 1978, were incorporated and published as substantial new matter in the 1984 and 1986 texts, the 1986 Random House *Ulysses* should enjoy a derivative-work copyright in the United States until the last day of 2047.[213]

Or should it? Was the Rosenbach Manuscript unpublished as of January 1, 1978? The answer must be no. Recall that in 1975 Octagon Books of New York, a division of Farrar, Straus and Giroux, published a photo-offset facsimile of the Rosenbach Manuscript edited by Clive Driver.[214] The public has benefited from this publication, and the copyright owner, presumably, has benefited from the copyright.[215] Under the 1976 Act as amended by the Sonny Bono Act, a

[211] *See* Act of Oct. 27, 1998, Pub. L. No. 105–298, § 102(c), 112 Stat. 2827, 2827 (to be codified at 17 U.S.C. § 303 (1994)) (West, WESTLAW).

[212] *See* U.S. CONST. art. I, § 8, cl. 8.

[213] *See* 17 U.S.C. § 305 ("All terms of copyright provided by sections 302 through 304 run to the end of the calendar year in which they would otherwise expire.").

[214] JAMES JOYCE, ULYSSES: A FACSIMILE OF THE MANUSCRIPT (Clive Driver ed., 1975).

[215] The copyright notice in *Ulysses: A Facsimile of the Manuscript* is somewhat confusing. It reads in significant part: "Copyright © 1975 by The Philip H. & A. S. W. Rosenbach Foundation. Rights to all manuscript material reserved by the Literary Trustees of the James Joyce Estate." The notice would appear to declare two distinct sets of rights: a copyright held by the Rosenbach Foundation in the *published* facsimile (why should the Foundation, the owner of the physical manuscript, also have a copyright in its contents?), and a reservation of rights in the unpublished manuscript in favor of the Joyce Estate. Insofar as this language suggests that the Foundation can enjoy the benefits of copyright in a published work and that the Estate can exercise control over the same work as if it were unpublished, the notice strikes me as paradoxical and overreaching, an attempt to get too much out of the bundle of rights conferred by statutory copyright under either the 1909 or the 1976 Act. The notice would seem to ignore the bargain that the grant of a copyright makes with the public domain: a monopoly (limited by fair use and a durational term) given to the author in exchange for a work made available to the public.

work published before January 1, 1978, and in its first copyright term on that date (such a term lasted twenty-eight years under the 1909 Act[216]), enjoys a full copyright term of ninety-five years from the date of publication.[217] So: 1975 + 95 = 2070. The 1986 Random House edition of *Ulysses*, according to this calculus, would be protected by a derivative-work copyright in the United States until the last day of 2070. The impact of the recent statutory extension of copyright terms is made particularly vivid by such a reckoning.

B. FAIR USE FOR SCHOLARS

The fair use privilege was codified in the 1976 Copyright Act in significant part to encourage the work of scholars and critics.[218] Although any amount of unauthorized quoting from a copyrighted work renders the user vulnerable, in theory, to an infringement suit, most scholarly quoting goes unchallenged. The doctrine of fair use has a twofold function in our society. Its initial purpose is a supralegal one: to foster a climate of understanding in which authors, copyright owners, and users of protected expression recognize their respective rights and responsibilities and, ideally, work together to promote tolerance and creative progress.[219] When that understanding breaks down and a dispute results in litigation, fair use realizes its second purpose as an affirmative defense to a claim of copyright infringement. As such, it allows the defendant to acknowledge the act of copying protected expression but to raise affirmatively certain facts that justify the copying—notably, what the courts have come to call the "transformative" character of the defendant's use.[220] If a use transforms material taken from its source, it is likely to add in an innovative way to our culture's store of knowledge and to promote the progress of enlightenment envisaged in the Constitution's

[216] *See* Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. 1075, 1080.

[217] *See* Act of Oct. 27, 1998, Pub. L. No. 105–298, § 102(d), 112 Stat. 2827, 2827–28 (to be codified at 17 U.S.C. § 304(a) (1994)) (West, WESTLAW).

[218] *See* 17 U.S.C. § 107 (1994) (offering a nonexclusive list of purposes that may qualify for the fair use privilege, including "criticism, comment, news reporting, teaching . . . scholarship, or research").

[219] This conception of fair use in terms of a larger "supralegal" role in society—a role that transcends the strictly legal functions of the doctrine—may be compared to Professor Fisher's notion of fair use as contributing to "the good life." Fisher, *supra* note 169. at 1768.

[220] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (stating that a new work is considered to be transformative when it does more than merely offer itself as a substitute for the original and "instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message").

Copyright Clause.[221] Fair use protects modest copying of both published and unpublished works.[222]

Modest[223] scholarly quotation from a derivative work is a paradigmatic exercise of the fair use privilege. The kind of noncommercial[224] use that most scholars and critics make of the 1961 and 1986 Random House texts, combined with the fact that such use is unlikely to affect the potential market for or value of these works,[225] argues strongly in favor of the status quo of quoting in the Joyce world. I would even venture to suggest that, where copyrighted revisions are scattered discontinuously throughout a pre-existing public-domain text, as they are in the 1961 and 1986 Random House editions of *Ulysses*, quotation is almost guaranteed to be a fair use, unless it is so extensive as to sweep in substantial amounts of revisional material. As for quoting from the public-domain 1922 *Ulysses*, fair use is not a relevant consideration, since by definition that text is the common property of the public: non-Joyceans, Joyceans, and Joyces alike. Every use of the public domain is a fair use.[226]

C. *A SUMMARY OF* ULYSSES *COPYRIGHTS*

The following summary is offered not as the legal advice of an attorney, but as the considered opinion of a Joyce scholar with a strong research interest in copyright law. In the United States, the 1922 Paris edition of *Ulysses* is in the public domain and may be freely quoted, copied, or used as the basis for a new edition. The

[221] *See* U.S. CONST. art. I, § 8, cl. 8.

[222] *See* 17 U.S.C. § 107 ("The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above [fair use] factors."). Fair use claims regarding unpublished works have often failed to convince courts, although there are signs in the case law that this trend may be changing. *See generally* Robert Spoo, *Fair Use of Unpublished Works: Scholarly Research and Copyright Case Law Since 1992*, 34 TULSA L.J. 183 (1998). The question of fair use of unpublished manuscripts and letters is clearly of great importance to Joyceans.

[223] Contrary to the house rules adopted by some university presses and scholarly journals, the 1976 Copyright Act nowhere assigns precise quantities of quotation in defining fair use, stating only that one of the factors in determining fair use is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole . . . ." 17 U.S.C. § 107(3).

[224] *See id.* § 107(1) (stating that one of the fair use factors is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes . . . .").

[225] *See id.* § 107(4).

[226] Of course, a use of the public domain that constituted libel or unfair competition would not be a "fair" use, but such contingencies are extraneous to copyright law.

1934 Random House edition, set from a pirated type-facsimile of the public-domain Paris edition,[227] has no more claim to being a copyrightable derivative work than it has to being a reliable text of *Ulysses*. The 1961 Random House edition may embody a sufficient number of corrections to justify a wafer-thin derivative-work copyright. Such a copyright, under the Sonny Bono Act's extended copyright term, would last until the end of 2056. (1961 + 95 = 2056.) The 1986 Random House edition, the text with the best credentials for derivative-work status, will enjoy copyright protection in its substantive original revisions until either the end of 2047 or the end of 2070, depending on whether one considers the Rosenbach material and other new revisions to have been unpublished or published as of January 1, 1978. The fair use privilege applies to both the 1961 and the 1986 editions. Scholars may use the 1922 text without resort to fair use or to Tylenol.

In the United Kingdom, *Ulysses* entered the public domain at the end of 1991, pursuant to the then British copyright term of author's life plus fifty years, established by statute in 1911.[228] Upon Britain's implementation of the European Union Term Directive on January 1, 1996, however, the U.K. copyright term for literary works was extended to author's life plus seventy years.[229] Designed to harmonize copyright terms throughout the European Union, the Directive, as implemented in Britain, worked retroactively to restore copyrights in works whose authors had died more than fifty and less than seventy years ago. Thus, after a public-domain career of four years, Joyce's works have returned to copyright status in the United Kingdom for the remainder of their extended term.[230] *Ulysses* will remain in copyright in Britain and the rest of the European Union until the end of 2011. (1941 + 70 = 2011.)

Canada's copyright term continues to conform to the now obsolete British term of author's life plus fifty years.[231] Not being a

[227] For the term "type-facsimile," *see* Kidd, *supra* note 180, at 510.

[228] Copyright Act, 1911, 1 & 2 Geo. 5, ch. 46 (Eng.).

[229] Copyright Designs and Patents Act, 1988 (Eng.), as amended by Duration of Copyright and Rights in Performance Regulations, 1995 (Eng.).

[230] The implementation regulations contain provisions for reliance parties such as publishers and editors who undertook projects during the public-domain interval on the assumption that works would remain in the public domain. My understanding is that Danis Rose's edition of *Ulysses*, published in Britain by Picador and in Ireland by Lilliput in 1997, proceeded on the basis of the reliance provisions.

[231] Copyright Act, R.S.C., ch. C-42, § 6 (1985) (Can.).

member of the European Union, Canada has not been affected by the harmonization of copyright terms under the Directive or by the extension of U.K. copyright terms. Thus, the older British term remains in effect: 1941 + 50 = 1991. *Ulysses* has been in the public domain in Canada since the end of 1991.

I leave it to the imagination of those familiar with Internet technology to construct potential scenarios for cyberspace liability. Suppose that an edition of *Ulysses* available as a public-domain text in Canada is placed on a website there. It may be accessed throughout the world at the stroke of a key. The text is downloaded in Butte, Montana, and in Exeter, England—places where this edition is arguably protected by copyright. Who will be sued: the website owner, the Internet provider, or the individual downloaders?[232] All of these parties? What court in which country will have jurisdiction of the dispute? And how should the court rule?

Here is matter for one of the better-furnished Joycean nightmares—and for another essay.

[232] *See, e.g.*, Religious Tech. Ctr. v. Netcom On-Line Communication Servs., 907 F. Supp. 1361 (N.D. Cal. 1995) (adjudicating infringement claims against an Internet provider, the owner of a bulletin board service, and an individual who had posted copyrighted material to the service).