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**“FOR GOD’S SAKE, PUBLISH; ONLY BE SURE OF YOUR RIGHTS”:  
VIRGINIA WOOLF, COPYRIGHT, AND SCHOLARSHIP**

*by Robert Spoo*

In March 1928, Virginia Woolf wrote to Vita Sackville-West after learning that the latter wanted to translate Rainer Maria Rilke’s *Duino Elegies* for the Hogarth Press: “For God’s sake, translate Rilke: only be sure of your rights.”<sup>1</sup> The legal triangle implied here is one with which modernist scholars are familiar: a *publisher* warning an *author* that, for a project to go forward, copyright permissions will have to be obtained from a *literary estate*. (Rilke had died in 1926.) Now that legislative extensions of copyright have ensured that modernism will remain “propertized” for some time to come, scholars must gird themselves for the continuing challenge of permissions-gathering. I offer here some thoughts, as a copyright lawyer and modernist scholar, about intellectual property and Woolf studies.<sup>2</sup> I will begin by making a few general observations about literary estates and then go on to discuss the Woolf copyrights in various contexts. Because permissions are necessary only when scholars cannot avail themselves of any privilege or exception recognized by law, I will stress aspects of the law that allow scholars (and publishers with a little knowledge and mettle) to bypass the permissions game.

Literary estates come in many flavors. Some encourage scholarship; some do not. On a spectrum stretching from scholar-friendly to downright difficult, the estates of Ezra Pound and H.D. would nestle in the friendly zone, while the James Joyce estate would be practically off the chart in the other direction. The Woolf estate appears to fall somewhere between these extremes, though closer to friendly than to difficult, at least in ordinary cases. This is no doubt partly due to the Woolf estate’s use of the Society of Authors in London as an agent for handling routine scholarly requests. By “routine requests” I mean, chiefly, requests for permission to quote from Woolf’s *published* works. Such requests are usually granted, and license fees are charged.

Use of the Society of Authors as a permissions clearinghouse is generally a good thing for scholarship. It reduces what legal analysts call “transaction costs”—the hassles and uncertainties of bargaining with a rights-holder—and prevents “market failure,” where a use is refused altogether so that neither the scholar nor the estate benefits. One reason why the Joyce Estate has become a byword for intransigency among scholars is that some twenty years ago, the Estate stopped using the Society for routine academic requests and, gradually over time, came to insist that requests of all types be directed to the Estate’s trustee and to the author’s grandson. The result has been a loss of objectivity and efficiency in the processing of permissions requests, and a dramatic increase in uncertainty and anxiety among scholars. There is much to be said for a more dispassionate referee, like the Society, that treats requests largely as a business matter.

But there are drawbacks. Academics can become too dependent on the designated referee and forget that permissions are not always necessary. Quoting from copyrighted works for the purpose of criticism or scholarship is a core “fair use.” In the U.S., fair use is especially likely to apply when a use is “transformative,” that is, when it “adds something

new, with a further purpose or different character, altering the [copyrighted work] with new expression, meaning, or message.”<sup>3</sup> Reasonable quotations from *To the Lighthouse* to support an analysis of Lily Briscoe as an embodiment of modernism is the kind of transformative purpose for which the fair-use privilege was evolved. The U.S. Copyright Act stresses that fair use applies to both published *and* unpublished works, so that short, transformative quotations from an unpublished Woolf letter or manuscript would also be permissible, at least within the U.S.<sup>4</sup> (The parallel doctrine of “fair dealing” in Canada, the U.K., and other countries is somewhat more restrictive and is sometimes treated as *not* applying to unpublished writings.) Scholars should become familiar and comfortable with fair use, and academic publishers should not allow the privilege to atrophy through routine insistence on permissions-getting, even though requests can readily be referred to the Society of Authors. (The Society’s website notes the validity of fair dealing and opines as to when—in terms of word counts—fair dealing might apply.<sup>5</sup> Bear in mind, though, that the law does not define fair use or fair dealing as a certain quantity of quoted words; fair use is not a numbers game, but rather a flexible doctrine that permits a range of uses in appropriate contexts.)

What types of requests, then, does the Society of Authors regard as *not* routine? Jeremy Crow of the Society has explained that the Society typically refers requests for “unusually substantial usages” or “unusual exploitations” to estates themselves.<sup>6</sup> These would include requests to prepare a new edition of a novel; to adapt a work for the stage or cinema; or to use a work in advertising or on merchandise. These uses are also ones that would not likely qualify as fair use or fair dealing. Another type of request that the Society often refers to estates concerns previously unpublished material. Sometimes “arrangements have already been made for initial publication elsewhere,” or an estate believes that another project is “the most appropriate place for first publication.”<sup>7</sup> In such cases, an estate is protecting what the law refers to as “the right of first publication,” a concept that combines the right to decide where to publish a work first and the right to determine whether to divulge the work at all. It is understandable that an estate might want to invoke this right as a way of controlling the first appearance of a work. But I have seen the concept abused as a strategy for preventing *any* appearance of historically important documents created by famous, long-dead authors. A short quotation from an unpublished manuscript in a scholarly article or book should not interfere with the right of first publication.

Estates sometimes use copyrights to protect more than the right of first publication. Not infrequently, they use copyrights to ensure “respect for the known wishes of the deceased author, and the protection of the feelings and privacy of living persons mentioned in the works.”<sup>8</sup> Here we enter controversial terrain. The “known wishes” of a dead author may be difficult to determine, and it is not always clear who is in a better position to know authors’ wishes—estates or scholars—inasmuch as both groups are susceptible to self-serving bias. The issue becomes even more complicated when it is recalled that much of the unpublished material on which “privacy” claims are based is not private at all—in the sense of physically or legally unavailable—but rather held in archives to which the public has access. Scholars can learn the secrets buried in these documents; they just can’t safely quote their findings in publications, for fear of copyright threats. They can kiss but not tell.

So when an estate purports to be using its copyrights to protect the privacy of the living or the dead, it is well to take a closer look. Copyright is a limited right, granted for

a fixed term of years, subject to fair use and other exemptions, and powerless to prevent the disclosure of facts or ideas contained in a protected writing. Suppose that Virginia Woolf had confided the following to an unpublished scrap of paper dated September 1922 and held at the University of Sussex: "We saw Tom last night, dreadfully nervous over the coming reception of his poem. He had on again his marmoreal mask and manner, which always unnerve me. I think he had painted his lips and applied a cadaverous green powder to his cheeks and forehead." If a scholar encountered this (wholly invented) entry at Sussex, nothing in the law of copyright could prevent her from reporting the broadly-paraphrased facts or ideas in a published article. Fair use, in the U.S. at least, would allow her to state as well that Woolf had described Eliot as "marmoreal" and as wearing "cadaverous green powder." And, of course, once the copyright in the entry had expired, anyone could lawfully use the entry in its entirety, without any constraints.

So what does copyright have to do with protecting privacy? Very little, as a strict matter of law. Copyrights are primarily designed to safeguard economic rights, not privacy interests. The privacy of the deceased is something the law has little interest in anyway, and other areas of the law—such as defamation and the torts of "invasion of privacy" and "false light"—already offer protection to living persons in certain contexts. To use the ill-fitting machinery of copyright to try to stifle or discourage scholarly commentary is wrong and wrong-headed, in my opinion, yet the *in terrorem* effect of a copyright holder's threats, however unjustified, is often enough to cause a scholar or her publisher to omit quite reasonable quotations or paraphrased discussion, with the result that the documentary credibility of the scholar's claims is reduced.

In the U.S., courts are increasingly recognizing the problem of "copyright misuse," a term that generally refers to an attempt by a rights-holder to extend copyright protection beyond its appropriate sphere. Allegations of copyright misuse were a centerpiece of the lawsuit brought in 2006 by Professor Carol Loeb Shloss of Stanford University against the Estate of James Joyce.<sup>9</sup> (I have served as co-counsel for Shloss in this litigation.) Shloss had spent years researching a controversial subject—the sparsely-documented life of James Joyce's troubled daughter, Lucia—only to be forbidden by the Estate, for reasons of family privacy, to quote anything by Lucia, her father, or any Joyce family member, even though most of the documents the Estate declared off-limits were already published or held in collections open to the public. The case was settled—very favorably for Shloss—but not before the court had ruled that her claim of copyright misuse was an appropriate subject for litigation on the basis of the facts she had alleged.<sup>10</sup> Had the case continued, the court would have decided whether the Estate's aggressive attempts to deny scholarly fair use and other user rights in the name of "privacy" had crossed a legal line.

The public domain is the scholar's best friend, but when does a work fall into the public domain? The bad news is that copyright laws vary from country to country—copyright law is territorial—and the rules for when works enter the public domain are not uniform. The good news, for Woolf scholars, is that public-domain status of Woolf's works, including her currently unpublished writings, is not far off in some countries. Any work that Woolf published during her lifetime is now in the public domain in Canada and Australia, where copyrights of that vintage endure for the author's life plus fifty years. (Woolf died in 1941.) In the U.K., the Republic of Ireland, and many E.U. countries, copyrights last for the author's life plus seventy years, so works published during Woolf's

lifetime should enter the public domain in those countries at the end of 2011—barring any further legislative extensions of copyright.

The U.S.—for many years a copyright self-exile from the rest of the world—has different rules for Woolf's lifetime-published works. Works published prior to 1923, in the U.S. or abroad, are generally in the U.S. public domain. Woolf's works published after 1922—unless they entered the public domain in some other way—generally will enjoy copyright in the U.S. for 95 years from the date of first publication.<sup>11</sup> Thus, the first edition of *Jacob's Room*, published in New York and London in 1922, is now in the public domain in the U.S., Canada, and Australia, but will remain in copyright in Britain and other countries until at least 2011. By contrast, *To the Lighthouse*, published in 1927, will remain in copyright in the U.S. until the end of 2022 and in Britain until the end of 2011, while it is in the public-domain now in Canada and Australia. It is difficult, accordingly, to make worldwide plans for texts when their copyrights do not expire uniformly. A complete study of the international copyright status of a given text should be made before embarking on any publication project.

You will notice that I have been using the term “lifetime-published works.” What about works by Woolf that were published after her death? The rules for posthumously-published works are also complicated and difficult to encapsulate, since they, too, vary from country to country. In general, because many of Woolf's posthumously-published works were issued within the past few decades, they will likely enjoy copyright protection for some time to come in many countries. One more point about Woolf's lifetime-published works: the copyright in these works had expired in the U.K. at the end of 1991, but were “revived” in that country in 1996 when copyright terms were extended by twenty years in many countries of the European Union. To lessen the impact of revived copyrights, Britain enacted what are called “compulsory-license” provisions that permit anyone to make *any* use of a revived-copyright work *within the U.K.*, as long as the user gives reasonable advance notice to the copyright owner and agrees to pay a reasonable fee or remuneration at some point.<sup>12</sup> This means that anyone in the U.K. could re-edit and publish, within the U.K., a critical edition of the first printing of *Mrs. Dalloway*, after giving proper notice to the copyright holders and, at some point, paying a reasonable royalty or fee. Unfortunately, other E.U. countries in which Woolf's copyrights were revived, such as Ireland, lack such a compulsory license. This tends to limit the benefits of the U.K. compulsory license to the U.K., though it might be argued that the benefits could extend further in certain cases.

What about currently unpublished works by Woolf—letters, diary material, manuscripts? Here, too, the rules vary from country to country. In Canada, any work by Woolf that was unpublished as of 1997 entered the public domain there at the end of 2002.<sup>13</sup> This makes Canada the only major English-speaking country in which Woolf's currently unpublished works (and any works by her published for the first time after 1996 or so) are in the public domain. In the U.S., Woolf's currently unpublished works (and any works by her published for the first time after 2002) will enter the public domain at the end of 2011.<sup>14</sup> This means that, in the North American market, scholars will have a much freer hand with respect to Woolf's unpublished writings come 2012—though because copyright in Woolf's unpublished writings will remain in force longer in other countries, scholars will still have to seek permission for *worldwide* distribution.

## Notes

1. *The Letters of Virginia Woolf*, vol. 3, ed. Nigel Nicolson and Joanne Trautmann (New York: Harcourt Brace Jovanovich, 1977), 469.
2. This essay does not constitute legal advice concerning any particular proposed use.
3. *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 579 (1994).
4. See 107 U.S.C. § 107 (setting forth the definition of fair use and its factors).
5. See <[http://www.societyofauthors.org/publications/quick\\_guide\\_permissions/](http://www.societyofauthors.org/publications/quick_guide_permissions/)>.
6. E-mail from Crow to Bonnie Kime Scott (June 10, 2008).
7. *Ibid.*
8. *Ibid.*
9. Threats from the Joyce Estate caused Shloss to delete much quoted material from her biography, *Lucia Joyce: To Dance in the Wake*, published by Farrar Straus & Giroux in 2003.
10. Two court opinions have been published in the case: *Shloss v. Sweeney*, 515 F. Supp. 2d 1068, 1077 (N.D. Cal. 2007); *Shloss v. Sweeney*, 515 F. Supp. 2d 1083, 1086 (N.D. Cal. 2007).
11. See U.S. Copyright Act, 17 U.S.C. § 304(b).
12. Duration of Copyright and Rights in Performances Regs., 1995 S.I. No. 3297, §§ 24, 25.
13. See Canadian Copyright Act, R.S., 1985, § 7(4), as amended.
14. See U.S. Copyright Act, 17 U.S.C. § 303(a).