

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

ROBERT SPOO*

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I ask'd thee, "Give me immortality."
Then didst thou grant mine asking with a smile,
Like wealthy men who care not how they give.
But thy strong Hours indignant work'd their wills,
And beat me down and marr'd and wasted me,
And tho' they could not end me, left me maim'd
To dwell in presence of immortal youth,
Immortal age beside immortal youth,
And all I was in ashes.¹

Not one blossom of his loveliness would ever fade. Not one
pulse of his life would ever weaken. Like the gods of the
Greeks, he would be strong, and fleet, and joyous. What did it

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* Chapman Distinguished Chair, The University of Tulsa College of Law; B.A. Lawrence University; M.A., Ph.D. Princeton University; J.D. Yale University. This Article is an expanded and updated version of my monograph *Three Myths for Aging Copyrights: Tithonus, Dorian Gray, Ulysses*, published by the National Library of Ireland in 2004 as No. 6 in its Joyce Studies Series. A Spanish translation of that monograph appeared as *Tres mitos para envejecimiento de los copyrights: Titono, Dorian Gray, Ulises*, in *1 Función Lenguaje: Revista Multidisciplinar* 11 (2011), published by the Madrid Creative Writing School. I would particularly like to thank Dennis Karjala for helpful discussion of an early version of this Article, and The University of Tulsa College of Law for research funding. © 2012 Robert Spoo.

¹ ALFRED LORD TENNYSON, *Tithonus*, in *SELECTED POETRY OF TENNYSON* 90, 90–91 (Douglas Bush ed., Modern Library 1951) (1860).

matter what happened to the coloured image on the canvas?
He would be safe. That was everything.²

Old age hath yet his honor and his toil.
Death closes all; but something ere the end,
Some work of noble note, may yet be done,
Not unbecoming men that strove with Gods.³

INTRODUCTION

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

² OSCAR WILDE, *The Picture of Dorian Gray*, in THE COMPLETE WORKS OF OSCAR WILDE 11, 88 (J.B. Foreman ed., HarperCollins Publishers 1989) (1891).

³ TENNYSON, *Ulysses*, in SELECTED POETRY OF TENNYSON, *supra* note 1, at 89 (1842).

⁴ See, for example, Senator Orrin Hatch's defense of U.S. copyright term extensions. Orrin G. Hatch, *Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium*, 59 U. PITT. L. REV. 719 (1998). With respect to international harmonization, Hatch argued,

[c]opyrighted works move across national borders faster and more easily than virtually any other economic commodity, and with the techniques now in common use this movement has in many cases become instantaneous and effortless. The need to conform the duration of U.S. copyright to that prevalent throughout the rest of the world is increasingly pressing in order to provide certainty and simplicity in international business dealings.

Id. at 729 (quoting S. REP. NO. 94-473, at 118 (1975)). As for the argument from grandchildren, Hatch contended,

[i]n the United States, where works created before January 1, 1978 are still [as of 1998] afforded a 75-year fixed term of protection, the current term has proven increasingly inadequate to protect some works for even one generation of heirs as parents are living longer and having children later in life.

Id. at 732. In 1993, the Council of the European Communities issued a Directive requiring harmonization of copyright terms throughout the European Economic Community and enhancement of protection for the interests of authors and the first two generations of their descendants. Council Directive 93/98/EEC, *pmb.*, 1993 O.J. (L 290) 9 (EC).

⁵ Copyright Act, 1710, 8 Ann., c. 19 (Eng.). Under the Statute of Anne, "for new works the right was to run for 14 years, and the author was granted the privilege of renewal for 14 years more." HERBERT A. HOWELL, THE COPYRIGHT LAW: AN ANALYSIS OF THE LAW OF THE UNITED STATES GOVERNING REGISTRATION AND PROTECTION OF COPYRIGHT WORKS, INCLUDING PRINTS AND LABELS 2 (2d ed. 1948). For an excellent discussion of the Statute of Anne, see MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 42-48 (1993).

⁶ Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124.

The Act of 1790 assured protection to the author or his assigns of any "book, map or chart" for 14 years upon [completion of certain formalities involving recording the title with a court and publishing a copy of the record in a newspaper]. . . . The privilege of renewal of the copyright for 14 years more was granted to the author or his assigns on condition of again entering the title and publishing the record.

HOWELL, *supra* note 5, at 4-5.

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

The result of all this legislative largesse is compulsory old age for copyrights. The rallying cry for the past several decades has been "More Rights for Copyright Owners!" Now that we have entered the digital age, and every owner of a computer or a cell phone has the ability to reproduce and disseminate copies of works anywhere in the world at the press of a button, the call for expansive rights for copyright owners seems scarcely to require justification.¹⁰ That copyrighted works are an endangered species is now virtually unquestioned dogma; and lawmakers have responded with an unquestioning chivalry.¹¹ Yet, despite all this hum and buzz of rights talk, no one has ever thought to ask an aging copyright if it wished to go on living. (The distinction between a copyright and the work it protects will become clearer in a moment. Although this Article explores the phenomenon of aging copyrights, its essential focus is the quality of life of the works protected by those copyrights.) I suspect that if such a question could be put to many octogenarian and nonagenarian copyrights, they would answer, in the manner of the decrepit Sybil when she was teased by the children at Cumae: "I want to die."¹²

⁷ Council Directive 93/98/EEC, art. 1, 1993 O.J. (L 290) 9 (EC) (requiring member countries to implement by July 1, 1995, a term of protection equal to the life of the author plus seventy years).

⁸ 17 U.S.C. § 302(a) (2006).

⁹ *Id.* §§ 302(c), 304. The Sonny Bono Copyright Term Extension Act of 1998 added twenty years to the copyright terms of both existing and future works. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102(d)(1)(B), 112 Stat. 2827, 2828 (codified at 17 U.S.C. §§ 302, 304 (2006)).

¹⁰ "[T]he digital environment and the Internet have presented new challenges to existing copyright law. The digital format allows perfect copies to be made virtually instantaneously. The Internet allows copies to be widely distributed in a short period of time." Hatch, *supra* note 4, at 726.

¹¹ Legislators' fears have been especially keen in the context of online piracy: "Due to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy." S. REP. NO. 105-190, at 8 (1998).

¹² T.S. ELIOT, *The Waste Land*, in COLLECTED POEMS 1909-1962, at 51 (Harcourt Brace Jovanovich 1970) (1922). The enfeebled Sybil at Cumae—a legendary prophetess granted long life but not youth to match—appears in the epigraph to Eliot's poem. The Sibyl's words, which Eliot's epigraph gives in Latin and Greek, are usually translated as "I want to die." *E.g.*, RICHARD A. POSNER, AGING AND OLD AGE 101 (1995). Posner's economic analysis of aging is fascinating for the present context. He briefly touches on the Cumaean Sibyl and Tennyson's

If we really wanted to know the wishes of a copyright, we would have to consult the views of the public, for the purpose of copyrights lies in “the general benefits derived by the public from the labors of authors,” and copyright law “must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”¹³ But the public is largely silent on this subject. The consequences of copyright legislation impinge so lightly on each individual member of society that only a comparatively few motivated persons and organizations ever take the trouble to voice a dissenting view. The fallout from extended copyrights settles upon each of us like a fine, invisible dust. As with a penny sales tax, a copyright has no weight on the scale of our daily needs and wants. It is society, not its individual members, that experiences the cumulative effects of long copyright terms, and “society” as such has neither voice nor vote. Political economists call this a problem of public choice. In contrast to organized special interests that clamor for maximal proprietary rights, the typical citizen knows little about the role of copyrights in society and perceives no immediate, personal benefit or threat from any change that might be wrought in the laws of intellectual property.¹⁴

As an exercise in awareness, it would be interesting to think of copyrights as living creatures inhabiting time, keenly conscious of the long life dictated for them by forces beyond their control. By such a trick of personification, we might begin to understand the problem of aging copyrights, for copyrights indeed have an organic aspect that varies according to the length of protection they provide, the qualities of the works they protect, and the behavior of copyright owners. Adding allegory to personification, I propose, in Parts I and II of this Article, to imagine copyrights under two figures drawn from myth and literature—Tithonus and Dorian Gray—who exemplify the perils of attempting to defy the natural aging process. In Part III, I discuss the copyrights in

poems about Tithonus and Ulysses. *Id.* at 100–01.

¹³ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

¹⁴ James Boyle has described the public choice problem for users of intellectual property:

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

James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87, 110–11 (1997). In recent years, however, organizations such as the Creative Commons Corporation, the Electronic Frontier Foundation, and numerous amici curiae in high-profile court cases have sought to give voice to users of intellectual property. For examples of such amici curiae, see *infra* notes 23 and 43.

the works of the famous Irish author James Joyce (1882–1941)—including his novel *Ulysses* (1922)—which, along with the behavior of Joyce’s literary estate over the past three decades, offer a vivid illustration of the problem of prolonged copyrights in a changing culture. I conclude the Article by offering another Ulysses—not Joyce’s novel, but Homer’s legendary Greek king and warrior as reimagined by the nineteenth-century English poet Alfred Tennyson—as a normative model for a rational, compassionate copyright law that would accept the aging and death of exclusive rights as part of the cycle of creative life, and more wisely balance the interests of copyright owners and an expectant public.

I. TITHONUS: IMMORTALITY WITHOUT YOUTH

The myth of Tithonus presents the spectacle of immortality subjected to the ravages of time. Eos, goddess of the dawn, carried off the mortal, Tithonus, and made him her lover. She then asked Zeus to give Tithonus immortality, but neglected to ask that he be made ageless as well. With the cruel obligingness reserved for hasty petitioners, the gods granted Eos the letter of her wish, but no more. Tithonus remained with her in the realms of the east, but grew so old and feeble that, according to one version of the story, Eos had him shut up in a room behind heavy brazen doors, so that she would not have to hear his foolish chattering.¹⁵ Tennyson gives us a Tithonus in thoughtful, articulate despair over his predicament, longing to put off “cruel immortality” and to be restored to the condition of “happy men that have the power to die.”¹⁶ The poem is the immortal mortal’s frightened prayer for euthanasia to Eos, who, as Tithonus well knows, is helpless to alter what her own wish set in motion: “The Gods themselves cannot recall their gifts.”¹⁷

Most modern copyrights face Tithonus’s predicament. Few works ever have more than a brief shelf life; it is only the rare work, such as James Joyce’s *Ulysses* or *A Portrait of the Artist as a Young Man* (1916), that achieves a lasting fame. The vast majority of intellectual creations are destined for unremarkable and unmarketable obscurity,¹⁸ remaining of interest, if at all, to a handful of scholars, antiquarians, or persons with special tastes. Yet under our present laws, all such homely

¹⁵ EDWARD TRIPP, *THE MERIDIAN HANDBOOK OF CLASSICAL MYTHOLOGY* 580 (1970).

¹⁶ TENNYSON, *supra* note 1, at 90, 92.

¹⁷ *Id.* at 91.

¹⁸ See William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 473–74 (2003) (“[O]nly a tiny fraction of the books ever published are still in print; for example, of 10,027 books published in the United States in 1930, only 174, or 1.7 percent, were still in print in 2001. These data suggest that most copyrights depreciate rapidly”); Coree Thompson, *Orphan Works, U.S. Copyright Law, and International Treaties: Reconciling Differences to Create a Brighter Future for Orphans Everywhere*, 23 ARIZ. J. INT’L & COMP. L. 787, 824 (2006) (“The commercial value of many works does not outlast the copyright term.”).

works are protected indiscriminately by extravagantly long copyrights from the moment of their creation, or, in the jargon of copyright lawyers, when they are “‘fixed’ in a tangible medium of expression.”¹⁹ Forgotten by the public, of no economic value to publishers or even to their authors or their authors’ heirs, these aging works nevertheless remain tightly wrapped in the comparative immortality of copyright, “[a] white-hair’d shadow roaming like a dream / The ever-silent spaces of the East.”²⁰

It is no ordinary death for which an enfeebled copyright wishes. Rather, it longs for the afterlife of the public domain, where, in contrast to the limited goals and perspectives of its owner, numberless users are free to rejuvenate the formerly copyrighted work by ferreting out the work’s potential for new editions, adaptations, performances, and other transformative uses. When a work enters the public domain, its status as private property vanishes, along with its aura of untouchability.²¹ It becomes available for unfettered exploitation by anyone who cares to take the trouble. Until that time, however, even a copyrighted work that has been out of print for sixty years will seem off-limits to potential users. And if an aspiring user does make an effort to seek permission for reprinting or adapting the old work, its copyright owner may be impossible to locate,²² or, if found, may prove difficult or uncomprehending.²³ Publishers typically will not proceed with a project

¹⁹ 17 U.S.C. § 101 (2006) (defining “fixed”).

²⁰ TENNYSON, *supra* note 1, at 90.

²¹ For the sake of simplicity, I define “public domain” here as the common pool of works that lack copyright protection, either because they preceded the recognition of common-law or statutory rights in such works or because their copyrights have expired. See Miriam Bitton, *Modernizing Copyright Law*, 20 TEX. INTEL. PROP. L.J. 65, 69 (2011) (“[T]he public domain is composed of content that is completely free from intellectual property rights, such as works whose intellectual property rights have expired, and works that did not or do not qualify for intellectual property rights.”). I recognize that this is only one definition of the public domain. A growing body of scholarship has discovered the multiple meanings and assumptions that underlie uses of the term. See, e.g., Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 DUKE L.J. 783, 788–812 (2006) (discussing thirteen different conceptions of the public domain); James Boyle, *Foreword: The Opposite of Property?*, 66 LAW & CONTEMP. PROBS. 1, 28–32 (2003) (summarizing various scholars’ definitions of the terms “public domain” and “commons”).

²² Marybeth Peters, the former U.S. Register of Copyrights, has described what is often called the “orphan works” problem:

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

Copyright Term Extension Act of 1995: Hearing on S. 483 Before the S. Comm. on the Judiciary, 104th Cong. 18–19 (1995) (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

²³ For example, the authors of “Who Built America?” (an award-winning CD-ROM produced by the American Social History Project in collaboration with the Center for History and New Media), which contains many primary sources from the Depression Era and is intended for high school and college students and teachers, “had immense difficulties tracking down copyright owners, who, when found, sometimes wanted large payments for older works whose only present

until all rights are cleared and all rights-holders pacified.²⁴ The result is copyright gridlock, a paralysis of creative energies. Aging copyrights serve little purpose other than to endow many ordinary creations, like Tithonus, with a cruel immortality that benefits neither copyright owners nor the public.

There was a time when copyright law, in the United States at least, had a wiser policy for caring for its elderly. Prior to 1978, publication was the significant event in a copyright's life. When a work was published in the United States with a proper copyright notice, federal protection began and continued for a modest term of twenty-eight years.²⁵ In the last year of that term, the author or copyright proprietor, if he or she desired a further twenty-eight years of protection, was required to renew the copyright by completing an application and filing it with the U.S. Copyright Office in Washington, D.C.²⁶ If these formalities were not observed, the copyright would automatically terminate at the end of its first term, and the work would pass into the public domain at the youthful age of twenty-eight. This system had its flaws, of course. Sometimes, a copyright owner would bungle the paperwork or miss a deadline and be forced to pay the penalty of relinquishing the work to the public.²⁷ When the United States joined the international Berne Convention for the Protection of Literary and Artistic Works in 1989, a condition of its membership was that it do away with or modify many U.S. copyright formalities.²⁸ As a result,

value was historical." The authors were forced to omit many works entirely because "copyright owners insisted upon thousands of dollars for minor uses." Brief of College Art Ass'n et al. as Amici Curiae in Support of Petitioners at *7, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618).

²⁴ Richard J. Cox, a scholar of book preservation and other matters affecting libraries, has described the labyrinthine difficulties he encountered when his academic publisher effectively waived his privilege of fair use and required him to seek permission for all the quotations from a book by Nicholson Baker that Cox had included in his scholarly monograph replying to Baker. Richard J. Cox, *Unfair Use: Advice to Unwitting Authors*, 34 J. SCHOLARLY PUB. 31 (2002); see also Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 583-85 (2004) ("It should be no surprise that publishers . . . require permission for even brief quotations, resolving the legal uncertainty with a bright-line rule that affords security by rigidly controlling speech. . . . [P]ublishers generally now require permission for almost any copying, even in academic contexts, especially when images are involved.").

²⁵ Copyright Act of 1909, ch. 320, §§ 9, 23, 35 Stat. 1075 (repealed 1978).

²⁶ *Id.* §§ 23-24.

²⁷ See MARSHALL A. LEAFFER, *UNDERSTANDING COPYRIGHT LAW* 230-31 (3d ed. 1999) (noting that, formerly, copyright renewal terms were lost through authors' ignorance of the renewal requirements); HOWELL, *supra* note 5, at 102-03 (explaining that authors sometimes risked losing the renewal term through late submission of applications).

²⁸ While the Berne Convention originally made authors' rights subject to any formalities prescribed by the country of origin of a work, see Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 2(2), reprinted in LIBRARY OF CONGRESS, INTERNATIONAL COPYRIGHT UNION: BERNE CONVENTION, 1886; PARIS CONVENTION, 1896; BERLIN CONVENTION, 1908, at 33 (Copyright Off., Bull. No. 13, 1908), the 1908 Berlin amendments provided that "[t]he enjoyment and the exercise of such rights are not subject to any formality . . ." Berne Convention for the Protection of Literary and Artistic Works, Berlin Act, Nov. 13, 1908, art. 4(2), reprinted in *id.* at 19. On March 1, 1989, Congress passed the Berne

American copyright law, with a few exceptions, abolished the renewal requirement.²⁹ Henceforth, with respect to every kind of work, copyright protection would arise not upon publication, but at the moment of creation, and would last for a lengthy, unbroken term running from the death of the author into the far reaches of the future.³⁰

Abandoning the old bisected copyright term and the law's renewal requirement was a bad idea, no matter how much it may have helped the United States become a more acceptable partner in international copyright relations. The act of renewing a copyright meant that its owner cared enough about the property right to comply with the modest formalities required by the Copyright Act. It is surprising how few copyright owners ever took the trouble. Several decades ago, the U.S. Copyright Office conducted a study of original registrations of copyrights made during the fiscal year 1927, matching those registrations with their corresponding renewals filed twenty-seven years later, during the fiscal year 1954.³¹ Original registrations for all classes of works totaled 180,864; renewals totaled 17,304.³² This means that owners of statutory copyrights acquired in the year that Charles Lindbergh flew the Atlantic in a one-motor airplane renewed a startling 9.5%³³ of those copyrights in the year that U.S. Air Force B-47 Stratojets crossed the Pacific Ocean in under fifteen hours.³⁴

While some of those non-renewals no doubt resulted from inadvertent lapses, it is likely that a large number of copyright owners simply did not find it worth their while to renew copyright claims for works that held no economic or other significance for them.³⁵ When it is added that the highest percentage of renewals in 1954 were in the categories of published music (45%) and motion picture photoplays (43.7%),³⁶ it becomes clear that the vast majority of traditional literary

Convention Implementation Act of 1988. Pub. L. No. 100-568, 102 Stat. 2853 (1988).

²⁹ Copyright Renewal Act of 1992, Pub. L. No. 102-307, 106 Stat. 264 (1992) (codified at 17 U.S.C. § 304(a)(3)(B) (2006)) (abolishing renewal as a condition of extended copyright for works published and copyrighted between 1964 and 1977).

³⁰ The 1976 Copyright Act effectively abolished the renewal requirement for all works created after 1977 by establishing a continuous copyright term consisting of the author's life plus seventy years. 17 U.S.C. § 302(a) (2006).

³¹ JAMES J. GUINAN, JR., DURATION OF COPYRIGHT, STUDY NO. 30, COPYRIGHT LAW REVISION, PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE S. COMM. ON THE JUDICIARY, 86TH CONG. 82 (Comm. Print, 2d Sess. 1957).

³² *Id.*

³³ *Id.*

³⁴ JAN TEGLER, B-47 STRATOJET: BOEING'S BRILLIANT BOMBER 112 (2000). It was estimated that in 1959 approximately fifteen percent of then-existing copyrights were being renewed. BARBARA RINGER, RENEWAL OF COPYRIGHT, STUDY NO. 31, COPYRIGHT LAW REVISION, PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE S. COMM. ON THE JUDICIARY, 86TH CONG. 187, 221-22 (Comm. Print, 2d Sess. 1961).

³⁵ Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 519 (2004) ("Authors would not bother . . . to renew works that ceased to profit them at the end of the initial term and for which they held no realistic expectation of future profit.").

³⁶ GUINAN, *supra* note 31, at 82.

and dramatic works—books, stories, plays, and the like—were allowed to enter the public domain at the end of twenty-eight years, the same total term of protection that the earliest legislation in Britain and the United States had conferred upon creations of the intellect. The renewal requirement thus served as a valuable clearinghouse for unwanted copyrights, sweeping into the cultural commons vast quantities of works that no longer needed the protections of a legal monopoly. Essentially a mechanism for allocating resources to their highest and best use, the renewal formality permitted the diverse, undisciplined creativity of the public to go to work on previously neglected works whose transformative potential their owners had failed to recognize or exploit. And it allowed the public to do this decades in advance of what otherwise would have been the expiration of copyright protection.

Although the present scope of copyright law covers a much broader array of works than in the past, and digital technologies may have increased the shelf life of some works,³⁷ there is no reason to believe that today's copyright owners would be much more diligent in renewing copyrights in unprofitable works than copyright owners were in 1954. What *has* changed since 1954 is that all these works that were formerly allowed to go betimes into the good night of the public domain are now condemned to a lengthy term of mandatory protection from which there is no reprieve. Just as the immortal Tithonus, growing weaker and more useless with each dawn, longed to be restored to “the ground,” to the “grassy barrows of the happier dead,”³⁸ so these aging copyrights yearn for union with the good earth of the public domain, where at worst they will sink into a dignified obscurity and at best may attract the energies of individuals who perceive a potential for new, vital uses—uses that may in turn generate new, vital copyrights. What the Copyright Clause of the U.S. Constitution refers to as “the progress of Science”³⁹ (or the creation and spread of knowledge and learning)⁴⁰ depends crucially on the smooth functioning of this cultural ecosystem. While it lasted, the renewal system played an important role in administering a kind of public-spirited hemlock to Tithonus-like copyrights.

There have been various proposals for reviving copyright renewal requirements in the United States. Several years ago, law professor and legal activist Lawrence Lessig urged a modified version of renewal that

³⁷ See Hatch, *supra* note 4, at 734 (“Since 1976, the likelihood that a work will remain highly profitable beyond the current term of copyright protection has increased significantly as the rate of technological advancement in communications and electronic media has continued to accelerate, particularly with the advent of digital media and the explosive growth of the Internet.”).

³⁸ TENNYSON, *supra* note 1, at 92.

³⁹ U.S. CONST. art. I, § 8.

⁴⁰ Golan v. Holder, 132 S. Ct. 873, 888 (2012).

was introduced in Congress as a bill entitled the “Public Domain Enhancement Act.” The bill, had it been enacted, would have required every copyright holder to pay a one-dollar “maintenance fee” fifty years after the first publication of a work and every ten years thereafter until the end of the work’s copyright term. As the draft bill explained,

the existing copyright system functions contrary to the intent of the Framers of the Constitution in adopting the copyright clause and the intent of Congress in enacting the Copyright Act. Neither is intended to deprive the public of works when there is no commercial or copyright purpose behind their continued protection. It is, therefore, necessary to establish a mechanism by which abandoned American copyrights can enter the public domain.⁴¹

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

There is something melancholy about this vast uncultivated field of abandoned copyrights, each one forgotten or neglected by the necessarily limited vision of its single owner when it might be turned over to the many-eyed resourcefulness of the public domain. We have only to think of the millions of feet of copyrighted celluloid that lie crumbling in public archives or private collections. According to some estimates, as much as fifty percent of the film titles produced before 1950 have been lost.⁴² The owners of many of the films that do survive have the expertise, interest, and funding to restore them, but, because copyrights in the films are held by others, the owners lack an economic incentive to restore what they know they would be prevented by law from exhibiting or selling to the public. Conversely, “[e]ven if the copyright holder both knows and cares about the film, it cannot undertake restoration because it possesses no physical copy.”⁴³ This is a catch-22 of copyright law: a film owner without a copyright; a copyright holder without a film. As the Librarian of Congress put it, the consequence of all these multiple property interests and legal restrictions is that “[f]or many of those seeking copies of films,

⁴¹ Public Domain Enhancement Act, H.R. 2408, 109th Cong. § 306 (2005); H.R. 2601, 108th Cong. § 306(a) (2003). The bill was referred to the House Judiciary Committee and has not been passed. See also LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 251–52 (2001) (proposing a five-year copyright term, renewable fifteen times); Landes & Posner, *supra* note 18, at 473, 477 (proposing a system of indefinitely renewable copyright whereby owners, in order to maintain their property rights, would be required to renew copyright registrations every ten years or so by filing some paperwork and paying a fee).

⁴² 1 REPORT OF THE LIBRARIAN OF CONGRESS, *FILM PRESERVATION 1993: A STUDY OF THE CURRENT STATE OF AMERICAN FILM PRESERVATION* (1993), available at <http://www.loc.gov/film/study.html#six>.

⁴³ Brief of Hal Roach Studios & Michael Agee as Amici Curiae Supporting Petitioners at *13, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01–618).

archivists can look as if they are perversely saving films for a posterity that never quite arrives.”⁴⁴

It has been argued that longer copyrights are needed to provide movie studios with incentives to restore the films they hold,⁴⁵ but the works in the most urgent need of restoration are “orphan films.” Numerically the majority of movies remaining in our film legacy, these neglected works include documentaries, newsreels, independent productions, sound films made by now-defunct studios, and rare historic footage documenting daily life for ethnic minorities.⁴⁶ A compelling argument can be made for allowing these treasures to pass quickly into the cultural commons, where numberless potential researchers and investors may search out the value—economic, historical, sentimental, hobbyist—of these deteriorating images of the early twentieth century. Who is to say that the public domain, with its great, heterogeneous complex of ideas and purposes, would not prove the better custodian of our cinematic legacy? If Tithonus has a direct counterpart in the world of intellectual property, it must be in the copyrighted silver-nitrate dust of these vanishing witnesses to a vanished culture.

II. DORIAN GRAY: ETERNAL YOUTH WITHOUT MORALITY

Tithonus is one figure for conceptualizing the waste of overlong copyright protection. But not all copyrighted works are forgotten a few years after their birth. A few lucky works—a tiny fraction in comparison with the totality of cultural products—remain in print or available in some other medium for a few decades or more.⁴⁷ In turn, a small subset of those works are the truly charmed creations—James Joyce’s writings, for example—which enjoy a celebrity commensurate with their copyright terms, or longer. For those happy few copyrights, a different allegory is needed; and it can be found in Oscar Wilde’s strange tale of youth miraculously preserved into middle age. *The Picture of Dorian Gray* inverts the fate of Tithonus. Where the handsome young man of the myth of the dawn received everlasting life without eternal youth, the naïve hero of Wilde’s story prays for immortal youth but, under the influence of his decadent aristocratic friend Lord Henry, never thinks to ask for moral integrity to match.⁴⁸

Dorian Gray is the embodiment of *fin-de-siècle* art for art’s sake: a

⁴⁴ FILM PRESERVATION 1993, *supra* note 42.

⁴⁵ See, e.g., Hatch, *supra* note 4, at 736–37.

⁴⁶ FILM PRESERVATION 1993, *supra* note 42.

⁴⁷ See Landes & Posner, *supra* note 18, at 473–74 (“[O]nly a tiny fraction of the books ever published are still in print . . .”).

⁴⁸ Dorian strikes his Faustian bargain at the moment when, gazing enviously at his portrait, he murmurs, “‘If it were I who was to be always young, and the picture that was to grow old! For that—for that—I would give everything! Yes, there is nothing in the whole world I would not give! I would give my soul for that!’” WILDE, *supra* note 2, at 34.

beautiful design without ethical content. “They are the elect,” wrote Wilde, “to whom beautiful things mean only Beauty. There is no such thing as a moral or an immoral book. Books are well written, or badly written. That is all.”⁴⁹ That it is a painted image of Dorian, instead of its flesh-and-blood subject, that undergoes the effects of aging and moral abandonment is a further Wildean twist on the notion of a perfectly amoral art. The portrait of the young Adonis, hidden away in an attic schoolroom, takes on all the outward and visible signs of Dorian’s secret crimes and debaucheries. Yet all the while, London society sees only the perpetually youthful dandy with exquisite manners.

Although it is clear that copyright law confers on lesser, Tithonus-like works a wholly unnecessary and debilitating immortality, it might be thought that, conversely, the law is fully justified in bestowing such lavish protection on the comparatively few works that have proved their capacity for sustained popularity. It has been argued that prolonging the copyright monopoly for works such as these is a good thing: the owner of a successful resource has incentives to maintain and cultivate that resource if there is an enforceable property right to justify investment.⁵⁰ But the success of an aging copyright, like Dorian Gray’s uncanny youth, is purchased at a dear price: a famous eighty-year-old work might *appear* to have benefited from the youth-preserving effects of its copyright—one thinks, inevitably, of the ubiquitous merry demeanor of Mickey Mouse—but there are corruptions and deformations, carefully hidden away in the attic of our culture, that mar this perfect picture. The tale of Dorian Gray and his painted image captures this paradox of cultural monopoly perfectly. Like the handsome face of Dorian, the preservative qualities of long copyrights tell only half the story. What is shielded from the public’s gaze, because withheld from the public domain, is the other side of copyright. “Beneath its purple pall, the face painted on the canvas could grow bestial, sodden, and unclean. What did it matter? No one could see it.”⁵¹

The hidden corruption of a long-celebrated copyright manifests itself as an absence, a vacancy, an empty parenthesis of all the things that might have been, had that copyright not held them back from culture by permitting a sole monopolist to police for many decades the uses to which the work might be put. Stephen Dedalus, one of the chief characters in *Ulysses*, imagines the particular events of history as

⁴⁹ *Id.* at 17.

⁵⁰ The notion that granting and enforcing property interests will increase the care and efficiency with which resources are managed is a time-honored concept. “The economic utility theory justifies the protection of property interests as a means of creating incentives for the efficient use of resources.” Catherine M. Valerio Barrad, *Genetic Information and Property Theory*, 87 NW. U. L. REV. 1037, 1079 (1993).

⁵¹ WILDE, *supra* note 2, at 99.

displacing myriad other potentials: “Time has branded them and fettered they are lodged in the room of the infinite possibilities they have ousted.”⁵² A century-long copyright is an ouster of historical possibilities; it mounts vigilant guard over a work and watches with satisfaction as hosts of phantom projects file by in sullen disappointment, “white forms and fragments streaming by mutely, sustaining vain gestures on the air.”⁵³ Or, as Dorian Gray wonders of the slowly decaying painted image of himself: “Was it to become a monstrous and loathsome thing, to be hidden away in a locked room, to be shut out from the sunlight that had so often touched to brighter gold the waving wonder of its hair? The pity of it! The pity of it!”⁵⁴ Overlong copyrights inflict invisible losses; they put us mournfully in mind of the hidden might-have-beens of culture, the untested contenders, the possibilities surrendered by law so that an elderly copyright might retain superficial youth and beauty for a few more decades.

III. A PORTRAIT OF THE ARTIST AS AN ETERNALLY YOUNG MAN: THE ESTATE OF JAMES JOYCE

Few holders of aging copyrights have been more publicly aggressive about guarding their property than the estate of James Joyce. During the past three decades, copyright in the estate’s hands has become more a sword than a shield, and the estate has seemed to deny permissions almost on principle and often on the ground of personal taste.⁵⁵ In 2000, for example, the *Irish Times* reported that the estate had denied the request of a twenty-three-year-old Irish composer, David Fennessy, to use eighteen words from Joyce’s *Finnegans Wake* (1939)—a prose work of 628 pages⁵⁶—in a short choral piece

⁵² JAMES JOYCE, *ULYSSES* 21 (Hans Walter Gabler et al. eds., Random House 1986) (1922).

⁵³ *Id.* at 83 (describing the appearance of tombs and mortuary sculpture as a carriage enters a graveyard).

⁵⁴ WILDE, *supra* note 2, at 88.

⁵⁵ For the first several decades after Joyce’s death in 1941, the representatives of his literary estate generally encouraged and facilitated scholarship. For a history of the Joyce estate, see IAN HAMILTON, *KEEPERS OF THE FLAME: LITERARY ESTATES AND THE RISE OF BIOGRAPHY* 288–90 (1992); BRUCE ARNOLD, *THE SCANDAL OF ULYSSES: THE LIFE AND AFTERLIFE OF A TWENTIETH CENTURY MASTERPIECE* 96–102 (rev. ed. 2004). In the mid-1980s, Joyce’s grandson, Stephen James Joyce, declared his intention to assert himself forcefully in estate matters, and from that time forward he has used the estate’s copyright power to control uses of Joyce’s writings and to protect family privacy. *Id.* at 102, 109–10, 245–46. Scholars have documented and analyzed the Joyce estate’s aggressively restrictive policies. See generally David S. Olson, *First Amendment Based Copyright Misuse*, 52 WM. & MARY L. REV. 537, 547–55 (2010); Matthew Rimmer, *Bloomsday: Copyright Estates and Cultural Festivals*, 2 SCRIPTED 345 (2005), <http://www.law.ed.ac.uk/ahrc/script-ed/vol2-3/bloomsday.asp>; Robert Spoo, *Copyrights and “Design-Around” Scholarship*, 44 JAMES JOYCE Q. 563 (2007); Robert Spoo, Note, *Copyright Protectionism and its Discontents: The Case of James Joyce’s Ulysses in America*, 108 YALE L.J. 633, 660–63 & n.150 (1998).

⁵⁶ JAMES JOYCE, *FINNEGANS WAKE* (Viking 1974) (1939).

commissioned by Lyric FM for a Europe-wide broadcast.⁵⁷ The *Times* noted that Stephen James Joyce, the author's grandson and sole direct descendant, had written Fennessy that he and his wife simply did not like the composer's music. Fennessy was crushed and baffled:

I don't mind if they hate my music, but how can the personal taste of Stephen Joyce and his wife be the right criteria to use? . . . Now the whole thing is gone: it's not so much losing the commission fee, which I sorely needed, or the European broadcast. My piece can't ever exist because it can't be performed.⁵⁸

Around the same time, the news media reported that the Joyce estate had demanded that the Edinburgh Festival's Fringe organizers cancel a cabaret show, *Molly Bloom: A Musical Dream*, in which a Molly figure, played by the actress Anna Zapparoli, lay atop a grand piano, serving as her bed, and related her scandalous adventures. Zapparoli's adults-only reminiscences included "Rap of Spunk" and "Song of Sucking."⁵⁹ The estate was quoted as objecting in particular to the treatment of Molly's soliloquy as if it were a circus act or a jazz improvisation.⁶⁰ The Fringe producers defended their right to use Joyce's text by invoking a U.K. copyright provision that grants a "license as of right" (or what is often called a compulsory license) to anyone wishing to make use of a work whose copyright was revived in 1996 (as the Joyce copyrights were) by British legislation implementing the European Council's copyright-term harmonization Directive.⁶¹ A spokesman stated that the Fringe "is one of the biggest platforms for free speech and it would be going against the spirit of it if we cancelled. We understand that the production is perfectly legal and the permission of the Joyce estate is not needed so there is nothing we can, or would, do."⁶²

⁵⁷ See Medb Ruane, *The War of Words over Joyce's Literary Legacy*, IRISH TIMES, June 10, 2000.

⁵⁸ *Id.* at 9.

⁵⁹ Iain S. Bruce, *Joyce Grandson Fury over Fringe Musical Filth*, SUNDAY HERALD (Scot.), July 30, 2000, <http://www.highbeam.com/doc/1P2-19056477.html>.

⁶⁰ Vanessa Thorpe, *A Joyce Bans Molly's Musical Climax*, OBSERVER, July 30, 2000, http://www.themodernword.com/joyce/article_molly_observer.html (attributing these remarks to Stephen James Joyce).

⁶¹ The U.K. compulsory-license provision permits any use of a work that has been restored from the public domain pursuant to Council Directive 93/98/EEC, 1993 O.J. (L 290) 9 (EC), and requires only that the user give reasonable notice of the intended use and offer a reasonable royalty or remuneration to the copyright owner. If a reasonable sum cannot be agreed upon, a Copyright Tribunal will determine the license terms. Once the user has given reasonable notice, he or she is licensed, and the remuneration may be determined later. Duration of Copyright and Rights in Performances Regulations, 1995, S.I. 1995/3297, arts. 24–25 (U.K.). Thus, the license is compulsory, or "as of right." The copyright owner can haggle over royalties, but he or she cannot withhold the license.

⁶² Kate Watson-Smyth, *Joyce's Grandson Tries to Keep Explicit Molly Bloom off the Stage*, INDEP. (July 31, 2000), <http://www.independent.co.uk/arts-entertainment/theatre-dance/features/joyces-grandson-tries-to-keep-explicit-molly-bloom-off-the-stage-715671.html>.

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The estate evidently had no quarrel with the sexually explicit language that Joyce incorporated into “Penelope,” the famous final episode of *Ulysses*; rather, it objected to various adaptations of the episode. According to the *Observer*, Stephen James Joyce contended that “Penelope” had not been written for the stage or for performance, but rather was the final section of a “novel.”⁶³ His remark suggests that the estate’s goal has been to shield Joyce’s works from being modified by the kinds of transformative insights that derivative works—as copyright law calls them⁶⁴—can bring to even the greatest, most comprehensive masterpieces. The attempt by a copyright owner to use his exclusive derivative-work right (that is, the right to prepare adaptations of the copyrighted work) to enforce a kind of moral right is nothing new.⁶⁵ But the idea that *Ulysses* the “novel” (as Mr. Joyce called it) should remain faithfully confined to its own genre ignores the fact that *Ulysses* inhabits no such stable category in the first place, but instead owes much of its power as an avant-garde work to its refusal to become the product of anything except its own textual volatility. Tipsily based on Homer’s epic and Shakespeare’s tragedy, and incorporating catechisms, newspaper headlines, expressionist drama, literature anthologies, and a *fuga per canonem*, *Ulysses* is itself a derivative work *par excellence*, a full, unabashed confession that cultural borrowings make up the fabric of art and life.⁶⁶

⁶³ Thorpe, *supra* note 60.

⁶⁴ 17 U.S.C. § 106(2) (2006).

⁶⁵ See, e.g., *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 20–21, 25 (2d Cir. 1976) (holding that a broadcaster’s truncation of Monty Python skits likely infringed the comedy group’s adaptation right). In the litigation over Alice Randall’s revisionary novel *The Wind Done Gone*, the Margaret Mitchell Trust sued to prevent publication of what it argued was, among other things, a derivative work based without authorization on Mitchell’s novel *Gone With the Wind* (1936). Over the years, the Mitchell Trust has been extremely selective in permitting sequels to *GWTW* and has demanded that any derivative work it does authorize avoid such subjects as homosexuality and miscegenation. *TWDG* confronted both. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1282 & n.6 (11th Cir. 2001) (Marcus, J., concurring). The Eleventh Circuit reversed the trial court’s grant of a preliminary injunction to the plaintiff Trust, holding that, as a “highly transformative” parody, Randall’s novel constituted a fair use of otherwise protected elements of *GWTW*. *Id.* at 1269. The court’s strongly-worded opinion, which was unusual for the emphasis it placed on First Amendment values in the copyright context, concluded that, in light of *TWDG*’s transformative purpose and the unlikelihood that so subversive a work would usurp the market for the sanitized sequels that the Trust typically permits, the district court had erred in issuing a preliminary injunction. *Id.* at 1276–77; see also Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 2–3, 82–83 (2001) (discussing the copyright and First Amendment implications of the lawsuit over Randall’s novel). Of course, *GWTW* is another work that has benefited from the Sonny Bono Copyright Term Extension Act, see *supra* note 9, and, like *Ulysses*, *GWTW* has contributed a potent historical myth to a culture that has arguably outgrown the copyright that permits its legal owners to police the adaptations that the myth inspires or provokes. With its extended copyright term, *GWTW* will remain protected until 2031, 95 years after its first publication and 168 years after the Emancipation Proclamation. 17 U.S.C. § 304(b) (2006).

⁶⁶ Many scholars have examined the multiple literary genres and stylistic experiments that Joyce incorporated in *Ulysses*. See, e.g., RICHARD ELLMANN, *JAMES JOYCE* 459–60, 475–76 (rev. ed. 1983) (discussing Joyce’s stylistic experiments in *Ulysses*); see also generally, STUART GILBERT, *JAMES JOYCE’S ULYSSES: A STUDY* (Vintage Books 1955) (1930) (conducting an exhaustive

As the boundary between scholarly and popular uses of Joyce's works has become harder to locate, the desire to celebrate *Ulysses* as part of shared, communal events has increased. Each year, the sixteenth of June, or "Bloomsday"—the day on which the fictional events of *Ulysses* take place—inspires exuberant acts of homage, imitation, and declamation. Friends gather in pubs to sing "Love's Old Sweet Song," "The Croppy Boy," and other songs that Joyce wove into the larger symphony of *Ulysses*.⁶⁷ Far and wide, people come together to read *Ulysses* or to hear it read, privately or in public; sometimes these readings are even broadcast over the radio or streamed over the Internet.⁶⁸ It is hard to imagine anyone wanting to discourage such popular outpourings of love for a great book, but some years ago the Joyce estate sued over a Bloomsday audio-webcast of an international reading of *Ulysses*. Encouraged by Irish government officials and sponsored by prominent Irish businesses, this nonprofit global Internet reading was planned as a vehicle for uniting Joyce enthusiasts throughout the world.⁶⁹ By means of threats and litigation, the Joyce estate aggressively sought, and in part accomplished, an embargo of such Internet-based events for several years, until recently when *Ulysses* and other works by Joyce entered the public domain throughout the European Economic Area.⁷⁰

survey of Homeric parallels and other literary devices that Joyce included in his novel); WILLIAM M. SCHUTTE, *JOYCE AND SHAKESPEARE: A STUDY IN THE MEANING OF ULYSSES* (1957) (cataloguing quotations from and allusions to Shakespeare and his works in *Ulysses*). For Joyce's deployment of specific stylistic devices, see JOYCE, *supra* note 52, at 96–123 (newspaper headlines), 210–39 (*fuga per canonem*), 314–49 (literature anthologies), 350–497 (expressionist drama), 544–606 (catechism).

⁶⁷ See, e.g., JOYCE, *supra* note 52, at 52, 61, 232–35, 580 (quoting or alluding to "Love's Old Sweet Song" and "The Croppy Boy"). Advertisements for Bloomsday in various parts of the world regularly promise the performance of songs mentioned in Joyce's text. See, e.g., *First Bloomsday Event Announced—Songs of Joyce*, JAMES JOYCE CENTRE, <http://www.jamesjoyce.ie/detail.asp?ID=201> (last visited Sept. 14, 2012) (at Bewley's Café Theatre in Dublin, Ireland); *31st Annual Bloomsday on Broadway*, SYMPHONY SPACE, <http://www.symphonyspace.org/event/7093-31st-annual-bloomsday-on-broadway> (last visited Sept. 14, 2012) (at Symphony Space in New York City); *Bloomsday 2011 Readers List*, ROSENBACH MUSEUM & LIBRARY, <http://www.rosenbach.org/bloomsday-2011-readers-list> (last visited Sept. 14, 2012) (providing a Bloomsday reading list); *Bloomsday in Glasgow*, UNIVERSITY OF GLASGOW, <http://www.gla.ac.uk/events/music/?action=details&id=5428> (last visited Sept. 14, 2012) (at the U. Glasgow); *Bloomsday 2010—Curitiba*, VERDES TRIGOS, <http://www.verdestrigos.org/wordpress/?p=2139> (last visited Sept. 14, 2012) (in Curitiba, Brazil). As a Joyce scholar and former editor of the *James Joyce Quarterly*, I have attended many song-filled Bloomsday events.

⁶⁸ On June 16, 2011, readings from *Ulysses* by well-known actors and other personalities were broadcast over WBAI 99.5 FM in New York City and KPFK 90.7FM in Los Angeles and streamed internationally on wbai.org, as part of an event called Radio Bloomsday. See *Radio Bloomsday June 16, 2011*, RADIO BLOOMSDAY, <http://radiobloomsday.blogspot.com> (last visited Sept. 14, 2012).

⁶⁹ See Rimmer, *supra* note 55 (describing the Joyce estate's litigation over a 1998 Internet-based Bloomsday reading of *Ulysses*).

⁷⁰ Throughout much of Europe, editions of Joyce's works that were published during his lifetime, as well as his unpublished works, passed out of copyright at the end of 2011, seventy years after his death. Council Directive 93/98/EEC, art. 1, 1993 O.J. (L 290) 9 (EC) (requiring member countries to implement a copyright term of the author's life plus seventy years). The Irish law,

The threat of copyright litigation can be formidable, and it has intimidated even a few non-Joyce scholars. In 2011, the biologist J. Craig Venter and his U.S.-based team announced that they had created the first synthetic life form by replacing DNA from bacteria with computer-generated genetic code as a means of distinguishing the team's manufactured DNA from the kind occurring naturally. One of the synthetic texts that the team chose to splice into nature was a line from Joyce's *A Portrait of the Artist as a Young Man*: "To live, to err, to fall, to triumph, to recreate life out of life!"⁷¹ Venter soon received a demand letter from the Joyce estate threatening litigation.⁷² He explained that he had assumed that his use of fourteen words from Joyce's 253-page novel was a "fair use."⁷³ Venter's use was more than just fair. Early editions of the novel, all of which contain the identical phrase,⁷⁴ have been in the U.S. public domain since the end of 1991,⁷⁵ but the legally unprotected status of these texts did not stop the estate from bullying the scientist. The estate's act of overreaching continued a pattern of copyright misuse that has been evident for years, as I discuss below.

The Joyce estate has not confined itself to mere threats of litigation. In October 2000, the Irish High Court granted the estate an interlocutory (preliminary) injunction preventing Cork University Press from publishing extracts of Danis Rose's Reader's Edition of *Ulysses*⁷⁶ in an anthology entitled *Irish Writing in the Twentieth Century: A Reader*.⁷⁷ The publisher of the anthology had originally sought the estate's permission to publish extracts from an earlier *Ulysses* edition, but when the estate insisted on a fee of £7000–7500 for extracts from the 1922 Paris edition, the Press decided to go with the Rose edition instead, apparently believing that it could do so without the estate's

for example, states, "[t]he copyright in a literary, dramatic, musical or artistic work, or an original database shall expire 70 years after the death of the author, irrespective of the date on which the work is first lawfully made available to the public." Copyright and Related Rights Act 2000 § 24 (Act No. 28/2000) (Ir.), available at <http://www.irishstatutebook.ie/2000/en/act/pub/0028/sec0024.html#sec24>.

⁷¹ JAMES JOYCE, *A PORTRAIT OF THE ARTIST AS A YOUNG MAN* 172 (Chester G. Anderson ed., Viking 1968) (1916).

⁷² *James Joyce and the First Synthetic Life Form*, JAMES JOYCE Q. (Mar. 21, 2011, 12:27 PM), <http://jjqblog.wordpress.com/2011/03/21/james-joyce-and-the-first-synthetic-life-form>.

⁷³ Cory Doctorow, *Man Who Wants to Patent Genome Gets Legal Threat for Embedding James Joyce Quote in Artificial Lifeform*, BOINGBOING (Mar. 24, 2011), <http://boingboing.net/2011/03/24/man-who-wants-to-pat.html>.

⁷⁴ See, e.g., JAMES JOYCE, *A PORTRAIT OF THE ARTIST AS A YOUNG MAN* 200 (B. W. Huebsch 1916).

⁷⁵ Prior to the enactment of the Sonny Bono Copyright Term Extension Act in 1998, U.S. copyrights in works published before 1978 endured for seventy-five years from the year of first publication. 17 U.S.C. § 304(b) (1994) (amended 1998). *A Portrait of the Artist as a Young Man* was first published in New York in 1916. JOHN J. SLOCUM & HERBERT CAHOON, *A BIBLIOGRAPHY OF JAMES JOYCE* 18–19 (Greenwood Press 1971) (1953).

⁷⁶ JAMES JOYCE, *ULYSSES: A READER'S EDITION* (Danis Rose ed., Macmillan/Picador 1997) (1922).

⁷⁷ *IRISH WRITING IN THE TWENTIETH CENTURY: A READER* (David Pierce ed., 2000).

permission under Irish regulations protecting “third parties” who were affected by the revival of copyrights pursuant to the European Council Directive.⁷⁸ The Irish High Court agreed with the Estate’s contentions, however, and granted an injunction, whereupon Cork University Press decided to forgo further litigation and instead printed the anthology with the Joyce extracts carefully excised and a cardboard blank inserted bearing the notice, “Pages 323–346 have been removed due to a dispute in relation to copyright.”⁷⁹

A similar mutilation mars the pages of *Fredson Bowers and the Irish Wolfhound*, a learned bibliographic study published in 2002 by the Irish scholar J.C.C. Mays. On page seventy-one of this monograph, Mays had planned to reproduce an elaborate diagram, hand-drawn by Joyce himself rather in the style of the Book of Kells crossed with *Gray’s Anatomy*, and intended by Joyce to elucidate the biological and evolutionary themes underlying the “Oxen of the Sun” episode of *Ulysses*.⁸⁰ But this was not to be. In place of Joyce’s drawing, page seventy-one carries the following black-bordered notice:

The copyright-holder has refused permission to reproduce the chosen illustration and the reader must therefore consult either the original in London or a facsimile-transcription Meanwhile, visualize a sheet of paper containing nine enlarging ovals rising from the same

⁷⁸ Specifically, Cork University Press argued that it could lawfully receive a sublicense to print extracts of the Danis Rose edition from Rose’s existing licensee, Macmillan Publishers Ltd., under § 14(2) of the European Communities (Term of Protection of Copyright) Regulations, 1995, S.I. 158 (Ir.), as adopted in the Irish Republic. This regulation insulated from liability any “person” that “has acquired (whether before or after the commencement of these Regulations) rights” in a work . . . “from a person exploiting that work or other matter [if] copyright in that work or other matter has been revived by virtue of these Regulations.” *Id.* This broadly drafted provision raised a number of knotty questions that the Irish High Court was unwilling to resolve on a motion for a preliminary injunction. *Sweeney v. Nat’l Univ. of Ir. Cork*, [2001] 2 I.R. 6, [2001] 1 I.L.R.M. 310 (H. Ct., 2000) (Ir.), available at <http://www.bailii.org/ie/cases/IEHC/2000/70.html>. Because Cork University Press did not pursue the matter at a trial for a permanent injunction, these questions were not addressed definitively in the context of the Rose edition in Ireland.

There is no doubt that under Britain’s counterpart to the Irish regulations, an anthology issued in Northern Ireland or Britain could lawfully have printed extracts of the 1922 *Ulysses* under the compulsory license provision discussed earlier in this Article. See *supra* note 61 and accompanying text. The Irish regulations lacked such a compulsory license, however. This divergence between Ireland’s and Britain’s rules demonstrates some of the obstacles that faced “third parties” who hoped for wide dissemination in Europe of works they had created on the basis of works whose copyrights had been revived by the copyright-term harmonization Directive. “Differences in the nature of the transitional provisions adopted by each country are regrettable [and] produce further possible trade barriers within the European Economic Area.” Brad Sherman & Lionel Bently, *Balance and Harmony in the Duration of Copyright: The European Directive and Its Consequences*, in *TEXTUAL MONOPOLIES: LITERARY COPYRIGHT AND THE PUBLIC DOMAIN* 15, 23 (Patrick Parrinder & Warren Chernaik eds., 1997); see also Robert Spoo, *A Rose Is a Rose Is a Roth*, 16 *JAMES JOYCE LIT. SUPP.* 3–4 (Spring 2002) (discussing the Joyce estate’s lawsuits over Rose’s *Ulysses* edition).

⁷⁹ *IRISH WRITING IN THE TWENTIETH CENTURY*, *supra* note 77, at 323–46.

⁸⁰ *JOYCE*, *supra* note 52, at 314–49. Joyce’s diagram was reproduced in color as a foldout between pages 162 and 163 of *JAMES JOYCE, Oxen of the Sun, JOYCE’S ULYSSES NOTESHEETS IN THE BRITISH MUSEUM* (Phillip F. Herring ed., 1972).

base-point, drawn to represent the stages of foetal growth. Minutely-written gynaecological details are inserted at the apex of eight of the nine ovals. Surrounding the design, crowding in from each corner of the page, are words and phrases chosen to illustrate successive stages in the evolution of English prose.⁸¹

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

One reason why the Irish High Court was unwilling to let Cork University Press go forward with the extracts from Danis Rose's edition of *Ulysses* was that separate litigation over the Rose edition had not yet concluded in Britain. In an independent lawsuit commenced in the English High Court in 1997, the Joyce estate had sought an interlocutory injunction to prevent publication of the Rose edition by British Macmillan/Picador, in part because of the estate's well-publicized opposition to Rose's editorial methods and results.⁸² The estate's allegations included copyright infringement, the unfair-competition tort of "passing off," and violation of James Joyce's moral rights,⁸³ although the moral rights theory evidently dropped out at some point in the litigation.

After opening skirmishes in 1997, the Joyce estate decided to pursue the matter directly at trial, whereupon publication of the Rose edition went ahead as scheduled. In November 2001, after a full trial, Justice Lloyd of the English High Court, Chancery Division, ruled that the edition had infringed the copyrights in certain manuscript materials published after Joyce's death—notably, what has become known as the Rosenbach manuscript.⁸⁴

Justice Lloyd's lengthy opinion addressed three principal issues: (1) Did Rose's edition infringe the copyright in any text of *Ulysses* published during Joyce's lifetime? (2) Did the edition infringe the copyright in any work by Joyce published after his death? (3) Did the edition constitute "passing off"—that is, was the edition so different from the "class of goods" that is known to the reading and purchasing public as "*Ulysses* by James Joyce" that the edition, as an instance of false labeling, substantially harmed the "goodwill" that the Joyce estate had acquired in the "trade name" of "*Ulysses* by James Joyce"?⁸⁵

⁸¹ J.C.C. MAYS, FREDSON BOWERS AND THE IRISH WOLFHOUND 71 (2002).

⁸² See Stephen James Joyce, *The "Reader's edition" of "Ulysses"* (letter to the editor), *TIMES LIT. SUPP.*, June 27, 1997, at 17 (denouncing the Rose edition as an "outrageous misrepresentation of *Ulysses*," marred by many editorial "distortions").

⁸³ *Sweeney v. MacMillan Publishers Ltd.*, [2001] EWHC (Ch.) 460 (Eng.), available at <http://www.bailii.org/ew/cases/EWHC/Ch/2001/460.html>.

⁸⁴ *Id.*

⁸⁵ *Id.*

The court answered the first of these questions in the negative. At the time the case was decided, pursuant to the European Council's copyright-term harmonization Directive, lifetime editions of Joyce's works enjoyed "revived" copyright in the United Kingdom and the Republic of Ireland, and these resurrected rights were subject to statutory limitations that permitted third parties to use or reproduce the works without permission in specified circumstances, as noted above.⁸⁶ Having begun the project of re-editing *Ulysses* prior to Britain's target implementation date for revived copyrights (July 1, 1995), Rose and his publisher raised as a defense their position as "reliance parties," that is, parties who had relied upon the then public-domain status of *Ulysses*, and who, therefore, under British law, could not be held to have infringed.⁸⁷

But in a strict interpretation of the U.K. reliance-party exemptions, the High Court ruled that, because Rose had not actually completed work on his edition prior to certain cutoff dates set by the British regulations, and because he and Macmillan had not yet concluded a publishing contract by either of those dates, the reliance-party exemptions did not apply to the edition.⁸⁸ The court did rule, however, that a different third-party exception—one that provided for a compulsory license for *any* use of a revived copyright in Britain⁸⁹—rescued Rose and Macmillan from being infringers of any lifetime edition of *Ulysses* (in particular, the 1922 text, which the court determined had been the primary source for Rose's edition) and required only that Macmillan arrange for retroactive payment of a reasonable royalty to the Estate.⁹⁰

Justice Lloyd did find infringement, however. The third-party exceptions for use of revived copyrights did not apply to copyrights that had never been revived because they had never lapsed, such as those in Joyce's manuscript materials, which were published in the 1970s. In an interpretive move that resembles the text-editing theory known as "versioning,"⁹¹ the court held that pre-publication versions of *Ulysses*, to the extent that they differed in some significant way from the published text, constituted independent authorial "works" for purposes

⁸⁶ *Supra* notes 61, 78, and accompanying text.

⁸⁷ Duration of Copyright and Rights in Performances Regulations, 1995, S.I. 1995/3297, art. 23 (U.K.).

⁸⁸ *Sweeney*, [2001] EWHC (Ch.) 460. To put this another way, it was no defense that Rose finished most of the work on his edition while the 1922 *Ulysses* was out of copyright in Britain, or that he and Macmillan had engaged in preliminary contract discussions. The defense would have been good only if Rose either had begun and finished the edition within the public-domain window or had executed a contract with Macmillan during that interval.

⁸⁹ *See supra* note 61.

⁹⁰ *Sweeney*, [2001] EWHC (Ch.) 460.

⁹¹ *See* JEROME J. MCGANN, A CRITIQUE OF MODERN TEXTUAL CRITICISM 55–63 (1983) (discussing editorial reliance on particular historical versions of texts as an alternative to earlier approaches that sought to establish an ideal text embodying the author's intentions).

of copyright. The Court reasoned:

[I]f I am right in concluding that each successive stage of Joyce's work on *Ulysses*, from the proto-drafts of particular sections, via the Rosenbach manuscript and the typescripts, to the various proofs, constituted a new copyright work, at any rate in all cases where there was any change beyond the purely minimal and insignificant, it follows that the only work that was published was the last-pre-publication version, namely the final approved page proofs including any amendments made by Joyce on them.⁹²

What Judge John M. Woolsey's famous 1933 *Ulysses* decision had been to the problem of obscenity law and avant-garde literary values,⁹³ Justice Lloyd's opinion was to the interplay of copyright and textual theory. Both jurists, with the assistance of counsel and expert testimony, sought to understand the bearing of complex nonlegal theories on the law and the literary phenomenon of *Ulysses*.⁹⁴

According to Justice Lloyd, then, the Rosenbach manuscript, which he used to test for infringement, enjoyed its own U.K. copyright as a separate work of authorship. Concluding that Rose's use of words and phrases drawn from the Rosenbach manuscript had been "substantial," the court held that his edition infringed the copyright in the manuscript.⁹⁵ Moreover, in a ruling that highlighted some of the differences between British "fair dealing" and the generally more robust American doctrine of fair use,⁹⁶ Justice Lloyd held that Rose's emendations did not qualify as fair dealing, categorically, because they had not been made for "the purposes of research, private study, criticism and review."⁹⁷ In short, Rose and Macmillan were infringers of the copyright in that authorial "work" known as the Rosenbach manuscript—a heterogeneous assemblage of autograph pages which Joyce cobbled together over several years for sale to a collector,⁹⁸ and which few scholars today would consider a unitary "work" in any creative, organic sense.⁹⁹ But copyright law has its own pragmatic

⁹² *Sweeney*, [2001] EWHC (Ch.) 460.

⁹³ *United States v. One Book Called 'Ulysses,'* 5 F. Supp. 182, 185 (S.D.N.Y. 1933) (holding that *Ulysses* was not obscene under the federal Tariff Act of 1930 and could be admitted into the United States), *aff'd sub nom. United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705 (2d Cir. 1934).

⁹⁴ See PAUL VANDERHAM, JAMES JOYCE AND CENSORSHIP: THE TRIALS OF *ULYSSES* 115–31 (1998) (discussing Judge Woolsey's *Ulysses* decision and his solicitation of advice from "literary assessors").

⁹⁵ *Sweeney*, [2001] EWHC (Ch.) 460.

⁹⁶ See Michael J. Madison, *Madisonian Fair Use*, 30 CARDOZO ARTS & ENT. L.J. 39, 48 (2012) (noting that fair dealing in countries such as England and Canada is "clearly more narrow than fair use").

⁹⁷ *Sweeney*, [2001] EWHC (Ch.) 460.

⁹⁸ ELLMANN, *supra* note 66, at 481, 489, 558–59.

⁹⁹ See, e.g., GEORGE BORNSTEIN, MATERIAL MODERNISM: THE POLITICS OF THE PAGE 125 (2001) (describing the Rosenbach manuscript as a "combination of fair copies for most chapters and working drafts for three others, consisting mostly of a holograph manuscript on separate

needs and theoretical imperatives; and for Justice Lloyd's purposes, the Rosenbach manuscript was a "work."

Finally, Justice Lloyd held that sales of the Rose edition did not constitute "passing off" of an inferior product under the trade name of "*Ulysses* by James Joyce."¹⁰⁰ To be subject to passing off, the court noted, *Ulysses* would have to constitute a "class of goods" sufficient to be identified in the public mind with certain characteristics conferring "goodwill," or economic reputational value, on its present source, the estate.¹⁰¹ When challenged to describe the characteristics defining this class of goods, counsel for the estate pointed to Joyce's use of unconventional verbal forms, interior monologue, and other distinctive literary techniques. But how, persisted the court, can we know when a product such as Rose's edition is or is not within the alleged class of goods? Counsel replied that any edition approved by James Joyce himself or subsequently by his estate is within the class. The court dismissed out of hand this circular and self-serving definition, and rejected as well, for its "inherent uncertainty," the suggestion that "the general body of academic opinion at any given time" could serve to define what is and what is not within the class of goods known as *Ulysses*.¹⁰²

Justice Lloyd noted that a conventional instance of passing off would be "selling lemon juice in a plastic lemon-shaped container which customers associate with a different manufacturer."¹⁰³ One court observer quipped,

If someone went around selling copies of *Ulysses* that turned out to be John Grisham novels wrapped in the wrong dust-jacket, they might be liable. But while it could be argued (as many do) that Rose's isn't a good edition of *Ulysses*, you couldn't really say it wasn't *Ulysses* at all. And it is something, I suppose, to know that *Ulysses* doesn't fall into quite the same category as plastic lemons.¹⁰⁴

It is fortunate, in my view, that the court denied this "passing off" claim. Such an elastic concept, if dignified by legal precedent, might have strengthened the Joyce estate's hand against any *Ulysses*-based project that it had not pre-approved, and, further, might have been used by owners of revived copyrights to circumvent the various exemptions in favor of third-party users under British and Irish law. Indeed, because a theory of passing off operates independently of copyright law

leaves but including two notebooks for the last two chapters").

¹⁰⁰ *Sweeney*, [2001] EWHC (Ch.) 460.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Thomas Jones, *Short Cuts*, LONDON REV. BOOKS, Dec. 13, 2001, at 20, available at <http://www.lrb.co.uk/v23/n24/thomas-jones/short-cuts>.

and logic, such a theory might have been employed to resurrect protection for works whose copyrights had expired. Courts are properly wary of attempts to stack protections atop the already formidable copyright monopoly.

In 2003, the U.S. Supreme Court registered a similar discomfort with attempts to stretch what are essentially trademark concepts to fit the traditional subject matter of copyright law. In *Dastar v. Twentieth Century Fox Film Corp.*,¹⁰⁵ a videotape producer, Dastar, released its own adapted version of an earlier television series about the Second World War which had fallen into the public domain when Fox, the owner of the copyright in the earlier series, failed to renew the copyright. Despite the public-domain status of the series, Fox sued Dastar for adapting and selling the series without crediting Fox as the creator of the copied footage, alleging that in doing so, Dastar had passed the footage off as its own, in violation of federal trademark law. The Supreme Court squarely held that federal trademark law's prohibition of passing off refers to unlawful uses of physical goods in commerce, but not to expressive or communicative content, which is the province of copyright law.¹⁰⁶ The opinion of the Court, authored by Justice Scalia, reflected a healthy skepticism of efforts to use trademark as what he called "a species of mutant copyright law that limits the public's federal right to copy and to use."¹⁰⁷ Justice Scalia went on to envision an infinite regression of origins that such efforts would make possible:

A video of the MGM film *Carmen Jones*, after its copyright has expired, would presumably require attribution not just to MGM, but to Oscar Hammerstein II (who wrote the musical on which the film was based), to Georges Bizet (who wrote the opera on which the musical was based), and to Prosper Mérimée (who wrote the novel on which the opera was based). In many cases, figuring out who is in the line of "origin" would be no simple task.¹⁰⁸

The law, observed Justice Scalia, does not require a "search for the source of the Nile and all its tributaries."¹⁰⁹ Imagine a requirement of that sort being applied to Joyce's use of public-domain materials in *Ulysses*. Since nearly every page of the book contains quotations from or allusions to earlier works,¹¹⁰ Joyce's acknowledgments section would

¹⁰⁵ 539 U.S. 23 (2003).

¹⁰⁶ *Id.* at 31–33.

¹⁰⁷ *Id.* at 34 (internal quotation marks omitted).

¹⁰⁸ *Id.* at 35.

¹⁰⁹ *Id.* at 36.

¹¹⁰ See generally DON GIFFORD & ROBERT J. SEIDMAN, *ULYSSES ANNOTATED* (2d ed. 1988) (offering a page-by-page elucidation of Joyce's borrowing from other works); WELDON THORNTON, *ALLUSIONS IN ULYSSES: AN ANNOTATED LIST* (1968) (same).

have been practically as long as the text,¹¹¹ and the Joyce estate might years ago have been locked in trademark litigation with the Homer estate (or estates).

In 2006, the Joyce estate found itself in the novel position of being served as a defendant in a lawsuit. Professor Carol Loeb Shloss of Stanford University's English Department, after spending years researching the sparsely documented life of James Joyce's talented and troubled daughter, Lucia, had published a 576-page biography, *Lucia Joyce: To Dance in the Wake*, with Farrar, Straus and Giroux in 2003,¹¹² but not before she and her publisher deleted many quotations after receiving multiple threats from the Joyce estate. The estate had sent aggressive letters to Shloss, her publisher, her publisher's president, her publisher's lawyer, and her university's provost;¹¹³ and Shloss had felt that she had no choice but to make substantial cuts to the quotations that formed the evidentiary basis for many of her claims.¹¹⁴

Frustrated by the mutilation she was forced to inflict on her work, Shloss informed the Joyce estate in 2005 that she planned to launch a website containing the quoted material that she had stripped from the book. The website would, in effect, contain the author's cut, the version that she had originally hoped would reach the public. The estate promptly replied that any such website would constitute "an unwarranted infringement of the Estate's copyright," and rejected "the notion that the proposed use could be made in the absence of consent under the fair use doctrine."¹¹⁵ By the time she received the estate's warning, Shloss had assembled a legal team that included Lawrence Lessig, Mark Lemley, attorneys at the Stanford Center for Internet and Society, and myself.¹¹⁶

A few days before Bloomsday 2006, we filed Shloss's complaint in the U.S. District Court for the Northern District of California, naming the Joyce estate and its trustee, Seán Sweeney as defendants.¹¹⁷ The

¹¹¹ See PAUL K. SAINT-AMOUR, *THE COPYRIGHTS: INTELLECTUAL PROPERTY AND THE LITERARY IMAGINATION* 193–98 (2003) (conducting a "thought experiment" in which Joyce, writing *Ulysses* under the present copyright regime, is required to clear rights for many works that his novel quotes or adapts).

¹¹² CAROL LOEB SHLOSS, *LUCIA JOYCE: TO DANCE IN THE WAKE* (2003). The following account of Shloss's lawsuit is a revised and updated version of the account given in Robert E. Spoo, *Archival Foreclosure: A Scholar's Lawsuit Against the Estate of James Joyce*, 71 *AM. ARCHIVIST* 544 (2008).

¹¹³ Amended Complaint for Declaratory Judgment and Injunctive Relief at 4, 8–11, *Shloss v. Sweeney*, No. CV 06-3718 (N.D. Cal. Oct. 25, 2006), available at <http://cyberlaw.stanford.edu/publications/shloss-v-estate-joyce-amended-complaint>.

¹¹⁴ *Id.* at 11–12.

¹¹⁵ *Id.* at 12–14.

¹¹⁶ My involvement in the lawsuit spanned my employment at two law firms—Doerner, Saunders, Daniel & Anderson, LLP, in Tulsa, Oklahoma, and Howard Rice Nemerovsky Canady Falk and Rabkin, PC, in San Francisco, both of which provided substantial pro bono support in the lawsuit.

¹¹⁷ Complaint for Declaratory Judgment and Injunctive Relief; Demand for Jury Trial, *Shloss v. Sweeney*, No. CV 06-3718 (N.D. Cal. June 12, 2006), available at <http://cyberlaw.stanford.edu/>

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complaint sought, among other things, a judicial declaration that Shloss's proposed website (which was to be confined to IP addresses in the United States) made fair use of copyrighted Joyce materials under U.S. law and that the estate had unclean hands as a result of engaging in a pattern of inequitable conduct for years.¹¹⁸ An innovative contention of Shloss's lawsuit was that the Joyce estate was guilty of having committed copyright misuse—an attempt to extend its monopoly power beyond its proper economic sphere by leveraging copyrights to shut down scholarly discussion, to attack scholars, to prevent use of materials that had passed out of copyright or had never been protected by copyright, and to interfere with Shloss's access to physical documents in libraries and archives.¹¹⁹ If Shloss could prove copyright misuse, we felt, the estate might be prevented from enforcing its copyrights against her, at least until the estate had purged the misconduct and its effects.¹²⁰ Although copyright misuse is often asserted against monopolistic conduct violative of antitrust laws, we hoped to take advantage of a growing willingness on the part of courts to extend the doctrine to new fact patterns on public policy grounds.¹²¹

An unusual aspect of the copyright misuse doctrine is that it permits a defendant or a declaratory-judgment plaintiff to offer evidence not only of acts of misuse that have been directed at her, but also evidence of misuse visited upon nonparty individuals.¹²² This provides the defendant with evidentiary standing to blow the whistle on bad behavior that has not caused her any direct harm. As a result, Shloss's complaint alleged, with particularity, that the Joyce estate had misused its copyrights by consistently attempting to interfere with lawful uses by students, authors, and academics whose scholarly projects had been impaired or foreclosed by the estate's unjustified aggressions.¹²³

Once the estate had secured representation by the Los Angeles

attachments/Complaint%20Endorsed%20Filed%206-12-06.pdf.

¹¹⁸ *Id.* at 19–23.

¹¹⁹ Amended Complaint for Declaratory Judgment and Injunctive Relief, *supra* note 113, at 8, 15–19.

¹²⁰ *See Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 979 n.22 (4th Cir. 1990).

¹²¹ *See, e.g., Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191, 203 (3d Cir. 2003) (noting that the misuse doctrine might apply where a copyright owner tried to restrain another's creative expression, even though the owner had not engaged in anticompetitive behavior); *Assessment Techs. of Wis., LLC v. WIREdata, Inc.*, 350 F.3d 640, 647 (7th Cir. 2003) (suggesting that the misuse doctrine need not be confined to anticompetitive conduct); *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 792 (5th Cir. 1999) (explaining that copyright misuse is an “unclean hands defense” that forbids the use of a copyright to secure a right or monopoly not granted by the copyright and “which is contrary to public policy to grant”).

¹²² *See Lasercomb*, 911 F.2d at 979 (“[T]he defense of copyright misuse is available even if the defendants themselves have not been injured by the misuse.”); *Practice Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516, 520–21 (9th Cir. 1997) (holding that a declaratory-judgment plaintiff was permitted to raise a misuse defense by pointing to an anticompetitive copyright license granted to a nonparty).

¹²³ Amended Complaint for Declaratory Judgment and Injunctive Relief, *supra* note 113, at 15–19.

office of Jones Day, we engaged with counsel in a lengthy discussion of preliminary issues: personal jurisdiction over the estate and its trustee, scheduling, and possible settlement. In November 2006, the estate made its first significant move by filing a motion to dismiss Shloss's lawsuit in its entirety or, alternatively, to have certain allegations and claims stricken from the complaint.¹²⁴ The estate was particularly eager to strike allegations that it had engaged in copyright misuse.¹²⁵ The motion asserted that Shloss had no real and reasonable fear, at the time of the lawsuit, or ever, of being sued by the estate for copyright infringement.¹²⁶ As strange as that sounded to those who knew anything about the facts, we had to treat the argument as a serious one because federal law does not permit a U.S. court to entertain a lawsuit unless a genuine, concrete dispute exists between the parties.¹²⁷ Had it turned out that Shloss lacked a reasonable apprehension of suit, the court would not have had the power to go on refereeing a hypothetical controversy.

In its motion to dismiss, the Joyce estate was not content to challenge the legal basis for Shloss's lawsuit; it also launched attacks on her qualities as a scholar and her motivations as a plaintiff.¹²⁸ It asserted that her lawyers were only seeking "to air their views and test their theories in a public forum."¹²⁹ One of the estate's lawyers even spent two days at the Harry Ransom Humanities Research Center in Austin, Texas, studying a document by Lucia Joyce for the purpose of creating a lengthy motion exhibit analyzing Shloss's transcriptions of the document and pointing to minor copying errors.¹³⁰

We responded with opposition papers that placed before the court, along with other evidence, numerous letters that Joyce's grandson had written targeting Shloss's book project, including letters to her publisher announcing that the estate was "willing to take any necessary action to enforce its copyrights"; that the estate's "record in legal terms is crystal clear and that it [was] prepared to put [its] money where [its] mouth [was]"; that Shloss's book would be published "*à vos risques et périls*"

¹²⁴ Notice of Motion and Motion of Defendants Seán Sweeney and the Estate of James Joyce to Dismiss, or in the Alternative to Strike, Carol Loeb Shloss's Amended Complaint; Memorandum of Points and Authorities in Support Thereof, *Shloss v. Sweeney*, No. C06-3718 (N.D. Cal. Nov. 17, 2006) [hereinafter Notice of Motion and Motion to Dismiss], available at <http://cyberlaw.stanford.edu/files/blogs/Motion%20to%20Dismiss%20Shloss%20Complaint%5B1%5D.pdf>.

¹²⁵ *Id.* at 15–16.

¹²⁶ *Id.* at 10–12.

¹²⁷ *Denbicare U.S.A. Inc. v. Toys "R" Us, Inc.*, 84 F.3d 1143, 1146 (9th Cir. 1996); *Societe de Conditionnement en Aluminium v. Hunter Eng'g Co.*, 655 F.2d 938, 944 (9th Cir. 1981).

¹²⁸ Notice of Motion and Motion to Dismiss, *supra* note 124, at 3–5.

¹²⁹ *Id.* at 20.

¹³⁰ Declaration of Anna E. Raimer in Support of Defendants' Reply to Plaintiff's Opposition to Defendants' Motion to Dismiss, or in the Alternative to Strike, Carol Loeb Shloss's Amended Complaint at 1 & Exhibit B, *Shloss v. Sweeney*, No. C06-3718 (N.D. Cal. Jan. 8, 2007), available at <http://docs.justia.com/cases/federal/district-courts/california/candce/5:2006cv03718/180987/44>.

(“at your risk and peril”); and that “there are more ways than one to skin a cat.”¹³¹ In a nineteen-page order, Judge James Ware denied the estate’s motion to dismiss, holding that these communications from the estate, as alleged, “occurred regularly over a period of nine years, from 1996 to 2005, and easily left [Shloss] with a reasonable apprehension of copyright liability when she filed this suit in 2006.”¹³² The court added that, contrary to the estate’s assertion, the case was not a mere “academic war” or “hypothetical case.”¹³³

The court also refused to dismiss or strike Shloss’s copyright misuse claim, holding that

[the estate’s] alleged actions significantly undermined the copyright policy of “promoting invention and creative expression,” as [Shloss] was allegedly intimidated from using (1) non-copyrightable fact works such as medical records and (2) works to which [the estate] did not own or control copyrights, such as letters written by third parties.¹³⁴

Judge Ware concluded that Shloss had also properly alleged copyright misuse “based on [the estate’s] actions vis-a-vis [sic] third parties”—a ruling that permitted Shloss’s allegations about the estate’s treatment of other scholars to remain in the case.¹³⁵ Having denied the estate’s motion to dismiss, the court rejected all of the estate’s motion to strike, except as to one paragraph of Shloss’s complaint containing certain background allegations.¹³⁶ Shloss had defeated almost the entirety of the estate’s combined motions. This set the stage for settlement.

It was not Professor Shloss’s wish to settle her lawsuit; the estate forced her hand. At the hearing on the motion to dismiss, the estate’s lawyers stated in open court that the estate was considering filing a covenant not to sue Shloss for any of the material contained in her website.¹³⁷ Later, the estate made this intention even clearer. Had the

¹³¹ These statements by Stephen James Joyce appeared in his letter to Shloss, dated August 8, 2003, and his letter to Leon Friedman, an attorney for Farrar Straus and Giroux, dated November 21, 2002. Letter from Stephen James Joyce to Carol Loeb Shloss (Aug. 8, 2003) (on file with author); Letter from Stephen James Joyce to Leon Friedman, Farrar Straus & Giroux (Nov. 21, 2002) (on file with author). These letters and others by Mr. Joyce were quoted in the context of factual and legal argument in Plaintiff’s Opposition to Defendants’ Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion to Strike at 1, 5–8, No. CV 06-3718 (N.D. Cal. Dec. 15, 2006) (internal quotations omitted), *available at* <http://cyberlaw.stanford.edu/files/blogs/Shloss%20Brief%20FINAL.pdf>.

¹³² Shloss v. Sweeney, 515 F. Supp. 2d 1068, 1077 (N.D. Cal. 2007).

¹³³ *Id.* at 1079 (citing the estate’s Motion to Dismiss at 14) (internal quotations omitted).

¹³⁴ *Id.* at 1080.

¹³⁵ *Id.* at 1081.

¹³⁶ *Id.* at 1082.

¹³⁷ At the hearing, the estate’s attorney remarked, “Your Honor, certainly negotiating a covenant is something that the Estate has considered. . . . [I]t doesn’t seem that the Estate should have to give that covenant. That doesn’t mean it won’t.” Transcript of Oral Argument at 18, Shloss v. Sweeney, No. CV 06-3718 (N.D. Cal. Jan. 31, 2007) (on file with the author).

estate filed such a covenant with the court, Judge Ware would have had little choice but to dismiss the case upon the estate's motion, because a federal court, once again, is constitutionally forbidden to entertain a lawsuit where a genuine dispute no longer exists between the parties.¹³⁸ A covenant would have rendered the case moot because it would have given Shloss all the practical relief for which she had sued.

For us, the question became, what more could our client obtain if she accepted dismissal after settlement than if she waited for dismissal after a covenant? The answer can be found in the settlement that the parties entered into. Not only did the settlement permit Professor Shloss to publish her website exactly as she had originally intended, but she could also reproduce it in print form within the United States—something she had not prayed for in her complaint.¹³⁹

The nature of the settlement—a court-approved and court-enforceable settlement giving her all the practical relief she had sought, and more—permitted her, we thought, to ask the court to order the Joyce estate to pay her legal fees. Pro bono assistance may be entitled to compensation if the governing statute—here, the Copyright Act—permits fees to be awarded to the prevailing party.¹⁴⁰ So we moved for fees, and on May 30, 2007, Judge Ware granted our motion in a five-page opinion, holding that Professor Shloss was the prevailing party because “by the Settlement Agreement, [she] achieved a material, judicially sanctioned alteration in the parties’ legal relationship.”¹⁴¹ The court explained,

[Shloss] secured via Settlement Agreement the essence of the relief she had sought: the ability to publish the Electronic Supplement online for access within the United States, without threat of suit from [the estate]. Moreover, [Shloss] secured further relief not even requested in her First Amended Complaint: that is, the ability to publish her Electronic Supplement in *print* format, without fear of suit from [the estate]. In return, [Shloss] agreed only to dismiss her claims with prejudice; she did not agree to pay [the estate] money or to limit her conduct. [The estate’s] contention that they are the “prevailing party” because [Shloss] agreed to dismiss her claims with prejudice is untenable.¹⁴²

What did this order do? It stated in no uncertain terms that Professor Shloss “prevailed” on the basis of the results she obtained. Though Shloss did not establish, as she had hoped, a new legal

¹³⁸ *Paramount Pictures Corp. v. RePlayTV*, 298 F.Supp.2d 921, 926–27 (C.D. Cal. 2004).

¹³⁹ Settlement Agreement at 2, *Shloss v. Sweeney*, No. CV 06-3718 (N.D. Cal. Mar. 16 & 19, 2007), available at <http://cyberlaw.stanford.edu/system/files/Shloss+Settlement+Agreement.pdf>. This agreement was non-confidential.

¹⁴⁰ 17 U.S.C. § 505 (2006).

¹⁴¹ *Shloss v. Sweeney*, 515 F.Supp.2d 1083, 1086 (N.D. Cal. 2007).

¹⁴² *Id.* at 1085–86.

precedent for scholars on questions of fair use and copyright misuse, she did secure redress for her own project and put the Joyce estate on notice that scholars will not always passively endure abuse at the hands of a powerful copyright holder, particularly when there are attorneys ready to take up the challenge. Pursuant to a further agreement, the parties settled the question of the proper amount of attorney's fees and costs; and the estate paid a total of \$240,000, \$10,000 of which could be deposited in an account for Professor Shloss's scholarly research.¹⁴³

IV. LONG COPYRIGHTS AND QUIXOTIC LITERARY ESTATES

During an Irish radio interview in 2000, an intriguing justification was advanced for reprinting Joyce's words without leave of the Joyce estate: "James Joyce used the city of Dublin and Dublin people in his books, so the argument goes that the people should have a moral and cultural right to use James Joyce's material in different ways."¹⁴⁴ This is not the sort of argument that would carry much weight with a court, but it does point to some of the contradictions inherent in the private ownership of a public good like literature. *Ulysses* is a modern epic assembled from facts, personalities, and events in the Irish public domain;¹⁴⁵ in that respect, it is not unreasonable for the Irish to view the book as more immediately and intimately the property of the people than other works of the imagination, and to believe that they are entitled to continue the dialogue with Joyce that Joyce initiated with them. Joyce himself conceded that he was a "scissors and paste man,"¹⁴⁶ an adapter and arranger of what came freely to hand.

In January 2012, editions of Joyce's works published during his lifetime, including *Ulysses*, entered the public domain throughout the European Union.¹⁴⁷ Those editions had previously entered the public domains of Canada and Australia;¹⁴⁸ and in the United States, early editions of Joyce's *Dubliners*, *A Portrait of the Artist as a Young Man*, and *Ulysses* had shed copyright protection at varying intervals.¹⁴⁹ But many of Joyce's writings remain protected by copyright in different

¹⁴³ Settlement Agreement and Mutual Release, at 6-7, No. CV 06-3718 (N.D. Cal. Aug. 25 and 26, 2009), <http://cyberlaw.stanford.edu/files/blogs/Shloss%20Fee%20Settlement%20Agreement%20and%20Mutual%20Release.pdf>. This agreement was also non-confidential.

¹⁴⁴ *Interim Injunction Granted to Joyce Estate in Copyright Case*, RTE NEWS (Sept. 12, 2000) (see sixth audio link) (Interview with Medb Ruane, Morning Ireland), <http://www.rte.ie/news/2000/0912/morningireland.html>.

¹⁴⁵ ELLMANN, *supra* note 66, at 363-67.

¹⁴⁶ *Id.* at 626 (quoting Joyce).

¹⁴⁷ Most countries within the European Union provide copyright protection for the author's life plus seventy years. See *supra* note 70 and accompanying text.

¹⁴⁸ Copyright Act, R.S.C. 1985, c. C-42 § 6 (Can.); *Copyright Act 1968* (Cth) s 33(2) (Austl.).

¹⁴⁹ Prior to 1998, U.S. copyrights in works published before 1978 endured for seventy-five years from the year of first publication. See *supra* note 75. According to this calculus, *Dubliners* (first published in 1914), *A Portrait of the Artist as a Young Man* (in 1916), and *Ulysses* (in 1922) entered the American public domain at the end of 1989, 1991, and 1997, respectively. See SLOCUM & CAHOON, *supra* note 75, at 12-16, 18-19, 24-26.

parts of the world. His last great work, *Finnegans Wake*, will remain in copyright in the United States until the end of 2034,¹⁵⁰ though it has entered the public domain in other countries.¹⁵¹ Most of Joyce's posthumously published works, including several collections of letters, manuscripts, notes, and revised editions of *Ulysses* and other works, will enjoy copyright protection in the United States for some years to come.¹⁵² Joyce's unpublished writings—a vast array of letters, notes, and manuscripts—are now out of copyright in the United States¹⁵³ and in many European countries,¹⁵⁴ but they will not enter the public domain in the United Kingdom until 2039;¹⁵⁵ and in Australia they may be protected in perpetuity.¹⁵⁶ Added to all this is the fact that many European countries grant a special twenty-five-year economic right to the first person who makes available to the public a work that has entered the public domain without previously having been made available.¹⁵⁷ Claims to such post-copyright copyrights have already led to disputes over priority in Joyce's works.¹⁵⁸ An irregular patchwork of divergent national laws has given rise to an uncoordinated commons that threatens to function as an anticommons on a global scale,

¹⁵⁰ *Finnegans Wake*, first published in 1939, was still in copyright when the Sonny Bono Copyright Term Extension Act added twenty years to existing copyrights. See SLOCUM & CAHOON, *supra* note 75, at 59–61; Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102(d)(1)(B), 112 Stat. 2827, 2828 (codified at 17 U.S.C. §§ 302, 304 (2006)) (enacted in 1998); *supra* note 75 (explaining that before the act, copyrights lasted seventy-five years from publication). Therefore, its U.S. copyright runs for ninety-five years from 1939.

¹⁵¹ Throughout much of Europe, editions of *Finnegans Wake* that were published during Joyce's lifetime passed out of copyright at the end of 2011, seventy years after his death. Council Directive 93/98/EEC, art. 1, 1993 O.J. (L 290) 9 (EC) (requiring member countries to implement a copyright term of the author's life plus seventy years).

¹⁵² For example, the three major volumes of Joyce's letters (*Letters of James Joyce* (Stuart Gilbert & Richard Ellmann eds., 1957, 1966)) enjoy copyright protection for ninety-five years from the year of first publication. 17 U.S.C. §§ 302, 304 (2006). A revised edition of *Ulysses*, edited by Hans Walter Gabler and published in 1986, enjoys protection as a work made for hire for ninety-five years from 1986. JAMES JOYCE, *supra* note 52. See 17 U.S.C. § 302(c).

¹⁵³ See 17 U.S.C. § 303(a) (providing for a copyright term of the author's life plus seventy years for unpublished works).

¹⁵⁴ Council Directive 93/98/EEC, art. 1, 1993 O.J. (L 290) 9 (EC) (requiring member countries to implement a copyright term of the author's life plus seventy years).

¹⁵⁵ Copyright Designs and Patents Act, 1988, c. 48, sch. 1, para. 12(4) (U.K.).

¹⁵⁶ See *Copyright Act 1968* (Cth) s 33(3) (Austl.) (providing that a work that was not published or otherwise made available to the public before the author's death is protected for seventy years from the year in which the work is first published or first made available to the public).

¹⁵⁷ Council Directive 93/98/EEC, art. 4, 1993 O.J. (L 290) 9 (EC). The Irish law implementing the Directive accordingly provides:

Any person who, after the expiration of the copyright in a work, lawfully makes available to the public for the first time a work which was not previously so made available, shall benefit from rights equivalent to the rights of an author, other than the moral rights, for 25 years from the date on which the work is first lawfully made available to the public.

Copyright and Related Rights Act 2000 § 34 (Act No. 28/2000) (Ir.), available at <http://www.irishstatutebook.ie/2000/en/act/pub/0028/sec0034.html>.

¹⁵⁸ See Shane Harrison, *Battle over Copyright to James Joyce's Works*, BBC NEWS (Apr. 12, 2012, 8:44 PM), <http://www.bbc.co.uk/news/uk-northern-ireland-17686617> (discussing the dispute between Joyce scholar Danis Rose and the National Library of Ireland over who owns new European copyrights in Joyce's previously unpublished works).

condemning Joyce's writings to tragic underuse and selective availability.¹⁵⁹ Joyce-related copyrights and copyright holders will remain a challenge for the foreseeable future.

In the ecology of copyright, a work like Joyce's *Finnegans Wake* has its creative origins in the raw materials of the public domain. With the sanction of law, the work comes under private control for a certain term, and, when the term has expired, the work returns to the public domain to enrich those raw materials and to spur the creation of new works. But excessively long copyright terms upset this ecological cycle. Today, more than seventy years after Joyce's death, *Finnegans Wake* has become part of the furniture of our cultural life; it has outgrown the state-supplied monopoly that technically allows private parties to restrict its dissemination and adaptation—just as James Joyce has outgrown the efforts of his estate to shape his historical legacy according to criteria of family privacy.¹⁶⁰

In its attempts to control Joyce's image, the estate has taken arms against the ungovernable sea of celebrity at precisely the moment when Joyce is truly becoming an icon of popular culture (as demonstrated by the explosion of dramatic and cinematic treatments of his life and works in recent years).¹⁶¹ Over the years, Stephen James Joyce has increasingly appeared in the role of aggrieved plaintiff or outraged letter-writer seeking to contain history, to redirect the discourse of the public sphere, to re-fence the cultural commons. Armed with a few wasting copyrights and some sparse moral rights, and what personal authority he can command, Mr. Joyce has tilted repeatedly at the academic and pop-culture windmills which, he feels, are making a commodity of a beloved family member.

Mr. Joyce's efforts have not been without a certain quixotic integrity, but their strangely antic and belated quality serves to remind us that, in the normal course of culture, the protests of such an individual would not command much attention. But something has happened to the normal course of culture. Extremely long copyrights have given artificial voice and weight to the personal predilections of

¹⁵⁹ "In an anticommons . . . multiple owners are each endowed with the right to exclude others from a scarce resource, and no one has an effective privilege of use. When there are too many owners holding rights of exclusion, the resource is prone to underuse—a *tragedy of the anticommons*." Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 624 (1998).

¹⁶⁰ For the Joyce estate's efforts to protect "the much abused privacy of the Joyce family," see D.T. Max, *The Injustice Collector: Is James Joyce's Grandson Suppressing Scholarship?*, NEW YORKER, June 19, 2006, at 34, 35–36 (quoting Stephen James Joyce).

¹⁶¹ Each issue of the *James Joyce Quarterly* includes a current checklist that records Joyce-inspired cinematic and theatrical productions, radio, television, and Internet broadcasts, musical settings, and recordings. A recent issue lists a New York theatrical production based on the life of Lucia Joyce and three CD recordings based on Joyce's writings, one of them by the English singer-songwriter Kate Bush. William S. Brockman, *Current JJ Checklist (112)*, 48 JAMES JOYCE Q. 129, 146 (2010).

individuals who, in the absence of such rights, would be ordinary participants in the life of art and letters like most of the rest of us. These protracted monopolies create, or permit, peculiar and unaccustomed distortions of the public sphere; they encourage attempts to re-privatize that space, to reclaim it in the interests of family privacy or personal taste. They allow a mere rights-holder to become a privileged and arbitrary custodian of culture.¹⁶² And all of this would be exactly as it should be were these monopolies confined to one generation or two. But to see this capricious veto power being exercised at a period so startlingly remote from the cultural and historical origins of the work in question is dispiriting. The phrase “the dead hand” comes irresistibly to mind, except that it is a living hand that is allowed to reach out to control the spontaneous choices of the public domain.

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

Because of the increasing length and scope of present-day copyrights, our cultural and historical relationship to Joyce’s works is arguably quite different from Joyce’s relationship to the works of his own literary heritage.¹⁶³ The push for more expansive proprietary rights tends to ignore, at our peril, the reality that all cultural production is to some extent derivative, either in the specific copyright sense of adaptation or in the larger historical sense articulated by T.S. Eliot in his famous essay, *Tradition and the Individual Talent*, where he described the latter as compelling an author “to write not merely with his own generation in his bones, but with a feeling that the whole of the

¹⁶² Of course, one reply to this is to say that a grandson is no “mere rights-holder.” I realize that there are two sides to the question; in this case, I can occupy only one of them. I have more sympathy for the plight of Mr. Fennessy, the banned composer. See *supra* note 57 and accompanying text. However, for an intelligent and compassionate exposition of the other, familial perspective, see generally Michael Patrick Gillespie, *The Papers of James Joyce: Ethical Questions for Textually Ambivalent Critics*, 2 *NEW HIBERNIA REV.* 99 (1998), in which Gillespie discusses family privacy and scholarly access in connection with archival materials relating to Joyce.

¹⁶³ See SAINT-AMOUR, *supra* note 111, at 193–98 (discussing the less propertized literary climate in which Joyce wrote).

literature of Europe from Homer and within it the whole of the literature of his own country has a simultaneous existence and composes a simultaneous order."¹⁶⁴ Nowadays, attempts to engage in either type of derivation can raise the specter of lawsuits and court injunctions; copyright terms have grown so long that they play an unprecedented role in determining the availability of tradition to the individual talent. Eliot's relationship to the usable past of his own day is very different, I would contend, from the relationship of the present-day individual talent to Eliot; and much of that difference springs from the distortions introduced by overlong copyrights.¹⁶⁵

This is why aging copyrights for works like *Ulysses* or *Finnegans Wake* may be likened to Dorian Gray, a superficial attractiveness hiding the disfigurements of creative stagnancy, monopoly pricing, absence of competition, and underproduction.¹⁶⁶ Copyrights will continue to play a large role in our experience of Joyce's creativity well into the twenty-first century in many parts of the world. The global market for Joyce's works, as I suggested above, threatens to be impeded by a congested checkerboard of international laws. Global access to his complete writings may not be possible in the near future: a selective Joyce in selected countries may be all we can hope for.

Nevertheless, now that *Ulysses* and other works by Joyce have begun to enter the public domain in various countries, we may witness, just as we did some years ago when copyrights in *Dubliners* and *A Portrait of the Artist as a Young Man* expired in the United States, an explosion of cheap reprints and new editions of Joyce's writings.¹⁶⁷ We

¹⁶⁴ T.S. ELIOT, *Tradition and the Individual Talent*, in *SELECTED PROSE OF T.S. ELIOT* 37, 38 (Frank Kermode ed., Harcourt Inc. 1975) (1919).

¹⁶⁵ See Robert Spoo, *Ezra Pound's Copyright Statute: Perpetual Rights and the Problem of Heirs*, 56 *UCLA L. REV.* 1775, 1816–27 (2009) (discussing the restrictive policies of modernist literary estates and the different conditions under which T.S. Eliot and his contemporaries wrote).

¹⁶⁶ "The absence of copyright eliminates monopoly pricing, and marginal cost decreases when a royalty no longer has to be paid. The fundamental premise of copyright as an incentive is that it allows the extraction of monopoly profits during its term." Dennis S. Karjala, *Judicial Review of Copyright Term Extension Legislation*, 36 *LOY. L.A. L. REV.* 199, 225–26 (2002).

¹⁶⁷ *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 SLOCUM & CAHOON, *supra* note 75; see also *supra* note 149. Up to that time, three versions of the novel 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. 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. 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. See also Warwick Gould, *Predators and Editors: Yeats in the Pre- and Post-Copyright Era*, in *TEXTUAL MONOPOLIES*, *supra* note 78, at 74–80 (documenting the vastly increased sales in the United Kingdom of inexpensive editions of W.B.

may also see uninhibited use of the work in streamed Internet performances, public readings, dramatic and cinematic adaptations, and multimedia digital presentations complete with period photographs, Dublin maps, sound clips of Irish songs, and hyperlinks to critical interpretations and manuscript sources.¹⁶⁸ When that happens, Joyce's oeuvre will finally take its place with *The Odyssey* and *The Aeneid* as raw myth-making material for some future national epic. Indeed, it could be argued that works do not really become "classics" until they are unqualifiedly available for cultural exploitation. It would follow that overlong copyright protection is an inhibition on the full organic development of a classic.

CONCLUSION: ULYSSES AND THE WISDOM OF THE AGING

A wise copyright law would resemble, not Tithonus or Dorian Gray, but Tennyson's Ulysses, that figure for the dynamic possibilities of old age. In Tennyson's conception of the man of many devices, Ulysses' return to his island kingdom of Ithaca is only another brief stopover in a life of restless wanderings; already, the aging king has tired of his landlubberly responsibilities and is disgusted by the unadventurous appetites of his subjects, who "hoard, and sleep, and feed, and know not me,"¹⁶⁹ in contrast to his hardy seagoing companions. Ulysses is the antithesis of stasis and stay-at-home comfort; he knows that he cannot know himself fully until he encounters his non-self in the transformative strangeness of new experiences and foreign customs. He has been altered by and become a part of all that he has met, in a restless exchange of self and other, original and adaptation, individual talent and tradition. In contrast to the intrepid, impulsive Ulysses, his son Telemachus has all the qualities that make for competent kingship: he is just, capable, and blandly statesmanlike, but he is also unremarkable, better suited than his father to the tedious administering of "[u]nequal laws unto a savage race."¹⁷⁰ It galls Ulysses that he himself has "become a name,"¹⁷¹ a famous trademark rather than a creative force in action. "How dull it is to pause, to make an end, / To rust unburnish'd, not to shine in use!"¹⁷²

Yeats's poems following the temporary expiration of Yeats's U.K. copyrights in 1990). As of this writing, new, unauthorized editions of Joyce's works are already beginning to appear. See, e.g., JAMES JOYCE, *ULYSSES: REMASTERED* (Robert Gogan ed., Music Ireland Publ'ns 2012) (1922). Gogan's edition will likely prove controversial, as he has "remastered" Joyce's text to render its difficult style more accessible to the common reader.

¹⁶⁸ Multimedia versions of *Ulysses* and other works by Joyce have long been in preparation, notably a hypertext *Ulysses* project conceived by Professor Michael Groden of the University of Western Ontario. Robert Spoo, *Preparatory to Anything Else*, 33 JAMES JOYCE Q. 491, 493-94 (1996).

¹⁶⁹ TENNYSON, *supra* note 1, at 88.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 89.

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At its best, the law can resemble Tennyson's Ulysses in its capacity to resist a comfortable commercialism that permits a handful of old copyrights to generate a steady, protected income for an even smaller number of copyright holders, while myriads of forgotten works rust unburnished in the armory of unnecessary protection. Copyright law reveals its true genius when it challenges society to depart from the economically safe and the artistically predictable by using its older creations to discover new ones; to test the validity and staying power of popular works that have long enjoyed the comforts of monopoly; to subject famous sounds and images to the fires of irony, parody, and cultural vandalism; and to probe the transformative potential of forgotten works that have long lain under the deterrent pall of a useless copyright. Such a law would protect the rights of creators for a just and reasonable time, yet not needlessly bar the way to "that untravell'd world whose margin fades / For ever and for ever when [we] move."¹⁷³ Such a law would be worthy of a world equipped with more and better means of communicating imaginative products than ever before in history. We are entitled to a copyright law equal to our own brave possibilities, to our ambition, like that of the embarking Ulysses, "[t]o strive, to seek, to find, and not to yield."¹⁷⁴

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 90.