

## **The Impact of Modern Copyright Law on the Creation of Derivative Literary Works**

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Copyright law provides an important financial incentive to authors to create works that enrich our culture. But no great idea appears out of thin air, and a number of important works derive some of their ideas from existing literature. These derivative works play an important role in literature. However, there has been a trend over the last thirty years to expand the power of copyright-holders, which has hurt the ability of writers to create new pieces building on earlier literary works. The most significant legislation in this period is the Copyright Term Extension Act of 1998,<sup>2</sup> which closed the public domain from which all writers may draw for an additional twenty years.

I will begin by examining the legal background of copyright law and point how far the current law has strayed from its original intent. I will next discuss the often unacknowledged literary value of derivative works. I will then analyze the economic impact of modern copyright law, which is an economic regulation and should therefore be judged by its economic efficiency. I will follow this with a look at orphan works, which are out-of-print works still protected by copyright, as an unintended consequence of continuing expansion of copyright. I will conclude with an examination of some specific works affected by copyright expansion.

### **Legal Background**

Early English Antecedents – Prior to the invention of the printing press in the fifteenth century, literary works could only be copied by hand, which was an expensive and time-consuming process. Because the costs of copying a work were so great, there was little need for a legal regime to protect the intellectual property rights of authors.<sup>3</sup> This is not say, though, that there was no interest in copyright protection in earlier times. The first known copyright infringement case dates to 567 C.E., where an abbot complained to the Irish King Dermot that a visiting monk,

Columba of Iona, had copied his Psalter<sup>4</sup> without his permission. The King ordered the monk to return the copy to the abbot.<sup>5</sup> In dispensing royal justice, the King would have presumably rendered his decision based on his own conception of fairness, which indicates our modern respect for intellectual property rights is not particularly modern. With that being said, however, the Case of the Abbot's Psalter may be the only such recognition of authors' rights for the next thousand years. In this era, political and religious leaders were far more concerned with controlling the content of literature through censorship than they were in restricting the unauthorized copying of an artist's work through copyright law.<sup>6</sup>

Johann Gutenberg's printing press, invented in Germany around 1440, revolutionized the publishing industry.<sup>7</sup> The printing press allowed books to be printed quickly and inexpensively, which led to dramatic increases in literacy rates in the ensuing decades.<sup>8</sup> Gutenberg's invention reached England in 1476, not coincidentally the same year in which Parliament passed the first act regulating the publishing industry. This early precursor to modern copyright law was motivated not by a respect for intellectual property rights, but rather by a desire of the Crown to exercise control over publishers so that it could censor content.<sup>9</sup> There was also a desire to protect the fledgling publishing industry from too much competition over the relatively few literate consumers.<sup>10</sup> The law required printers to register a list of titles they wished to publish; if approved, a printer was then granted a *copye*, which gave the publisher (not the author) the right to publish the approved works. The rights granted by the *copye* came to be known as "copyrights."<sup>11</sup>

England enacted further regulations limiting, and then outlawing, the importation of foreign books, as well as strengthening the power of the State to prohibit publication of "naughty printed books."<sup>12</sup> The most important of these regulations granted a monopoly on publishing to a small group of publishers known as the Stationers' Company. Printing in violation of the Stationers' charter resulted in burning the prohibited books and imprisoning the publisher.<sup>13</sup> Under the charter and a subsequent system of royal privileges granted by Henry VIII, a publisher first gained the right to publish a given work exclusively and to also transfer that right

to another, both cornerstones of modern copyright law. Again, the purpose of this law was to implement more government control over the publishing industry, not to foster creativity by creating a property right in printed words.<sup>14</sup>

By the seventeenth century, Parliament became increasingly suspicious of the Crown's use of its power to grant monopolies because it was a way to raise royal revenues without seeking the approval of the legislature. In 1624, Parliament passed the Statute of Monopolies,<sup>15</sup> which eliminated all royal monopolies *except* the one granted to the Stationers' Company.<sup>16</sup> Additional licensing acts followed in subsequent decades, but a growing movement against government censorship led by John Milton and John Locke<sup>17</sup> pressured Parliament to allow these acts to expire by 1695.<sup>18</sup>

The Statute of Queen Anne – In 1710, Parliament passed the first real copyright law, “An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned,” which is typically referred to as the Statute of Queen Anne.<sup>19</sup> The primary motivation of the Act was to curtail the monopoly power of the Stationers' Company, making it, “[i]n effect...a trade regulation bill.”<sup>20</sup> This is supported by the fact the law prohibited the sale of “Books at such a Price or Rate as shall be Conceived by any Person or Persons to be High and Unreasonable.”<sup>21</sup> The act set an expiration date of “fourteen Years, to Commence from the Day of the First Publishing the same, and no longer” for all monopolies existing at the time of its enactment.<sup>22</sup>

The Statute of Queen Anne's great innovation was that it gave property rights to the creators of artistic works.<sup>23</sup> One of the Act's stated goals was “the Encouragement of Learned Men to Compose and Write useful Books,” which it achieved by granting authors or their assignees “the sole Right and Liberty of Printing such Book and Books for the Term of One and twenty Years.”<sup>24</sup> Thus, authors gained the exclusive right to publish their books for the statutory term, as well as the ability to sell that exclusive right to publishers. In this way, creators of

original creative works gained the rights of exclusivity and transferability already enjoyed by owners of real and personal property.

Publishers objected to the Statute's limitation on their monopoly rights and mounted a legal challenge. They were initially successful, convincing a majority of justices on the King's Bench to create a common law right to a perpetual monopoly for authors in the case of *Millar v. Taylor*.<sup>25</sup> The Court concluded that authors (and the publishers to whom they sell their copyrights) have a right to permanent copyright protection,

because it is just, that an author should reap the pecuniary profits of his own ingenuity and labour. It is just, that another should not use his name, without his consent. It is fit that he should judge when to publish, or whether he ever will publish. It is fit he should not only choose the time, but the manner of publication; how many; what volume; what print. It is fit, he should choose to whose care he will trust the accuracy and correctness of the impression; in whose honesty he will confide, not to foist in additions: with other reasonings of the same effect. <sup>26</sup>

The case was never appealed to the House of Lords, however, because the plaintiff, Andrew Millar of the Stationers' Company, died. In an effort to settle the question once and for all, a second challenge was mounted, culminating in the 1774 *Donaldson v. Becket*<sup>27</sup> decision. The House of Lords overturned the decision of the King's Bench in *Millar* and upheld the limited term of copyright protection provided for by the Statute of Queen Anne.<sup>28</sup> Thus by the time of the American Revolution, the legal dust had settled and it was established that copyright protection did not extend into perpetuity.

Copyright in the United States – In 1783, Connecticut passed the first colonial copyright act, a private bill in favor of Andrew Law's *A Collection of the Best and Most Approved Tunes and Anthems for the Promotion of Psalmody*.<sup>29</sup> The Continental Congress subsequently encouraged the other colonies to enact similar laws (the Continental Congress lacked the power to pass a federal copyright law under the Articles of Confederation<sup>30</sup>), and, by 1786, every state except Vermont had adopted a copyright act.<sup>31</sup> In an effort to create uniformity of protection and

enforcement, the new federal Constitution granted Congress the power, “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>32</sup>

Congress quickly exercised this power by enacting “An Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of Such Copies, during the Times Therein Mentioned,” more commonly known as the Copyright Act of 1790.<sup>33</sup> The statute granted an author the “sole right and liberty of printing, reprinting, publishing and vending” a work for fourteen years, with an option for a renewable term of an additional fourteen years.<sup>34</sup> If the author died during the first term, the work entered the public domain.<sup>35</sup> Copyright protection was not automatic, however, and many authors found “their works...routinely thrown into the public domain for failure to comply with the Act’s many formalities, adopted from the Statute of Anne.”<sup>36</sup>

In 1831, Congress extended the Act’s initial term of protection from fourteen to 28 years.<sup>37</sup> While the fourteen-year renewal term was not lengthened, an author’s heirs gained the right to file for renewal when the author died during the first term.<sup>38</sup> With these revisions, the maximum period of protection extended to 42 years, and it was now possible for a work to remain copyrighted long after the author’s death. In 1909, the renewal term was extended to 28 years, which kept works out of the public domain for a maximum of 56 years.<sup>39</sup>

In 1976, however, Congress dramatically extended the period for which a work retained copyright protection, in part to bring the United States into compliance with international law.<sup>40</sup> Under the new regime, the copyright term extended to 50 years after the death of an author, or 75 years after the date of publication in the case of works-for-hire.<sup>41</sup> Following this amendment, copyright protection not only *could* outlive the author, but would automatically do so for half a century.

In addition to extending the term of copyright protection, the 1976 law also relaxed the system of formalities that had previously allowed some works to slip into the public domain by accident.<sup>42</sup> After 1976, works no longer required

registration with the U.S. Copyright Office to obtain copyright protection; the effect of this change was to make all creative works automatically copyrighted, regardless of whether creators wished for such protection or not. Another copyright formality, the requirement that a copyright-holder give notice of copyright protection by affixing the © symbol, was eliminated in 1988.<sup>43</sup> In 1992, the third formality, the requirement of filing a renewal registration to obtain full copyright protection, was also removed.<sup>44</sup> In addition, this amendment retroactively renewed copyright in any work created between 1964 and 1977.<sup>45</sup>

The Copyright Term Extension Act of 1998 – Under the 1976 version of the Copyright Act, Walt Disney’s 1928 cartoon, “Steamboat Willie,” which featured the character Mickey Mouse for the first time,<sup>46</sup> was set to enter the public domain in 2003.<sup>47</sup> Disney and other corporate copyright-holders began lobbying Congress to extend the copyright term even further to protect the still-profitable interests in their works. Led by Congressman (and copyright-holding songwriter) Sonny Bono, who died shortly before the bill’s passage, Congress enacted the Copyright Term Extension Act (CTEA) of 1998.<sup>48</sup> Under the new law, the copyright term was extended to the life of the author plus 70 years, or to 95 years after publication for works for hire. As a result, Mickey Mouse will remain the exclusive property of the Walt Disney Company until 2023.

The law was immediately challenged in court on constitutional grounds. The plaintiffs argued that by continually extending the term of copyright protection, Congress violated the Constitution’s requirement that copyright be granted “for limited Times.”<sup>49</sup> In a 7-2 decision, the United States Supreme Court upheld the CTEA in the case of *Eldred v. Ashcroft*,<sup>50</sup> effectively declaring the law, in the words of one journalist, “dumb but not unconstitutional.”<sup>51</sup> By so ruling, the Court assured that from 1998 to 2018, no new works will enter the public domain.<sup>52</sup>

### **Literary Value of Derivative Works**

The response of many to the phenomenon of copyright term extension may be, “so what?” After all, why should we allow an author to steal from other authors?

What literary value can such a derivative work hold? An examination of some of the most significant works in English literature, however, reveals the extraordinary literary value that can be achieved when an author builds upon the work of other authors.

Perhaps the greatest user of derivative works in English literature is also the field's most highly-regarded author: William Shakespeare. Unburdened by modern copyright laws, he followed "[t]he dominant theory of literary creativity in the Renaissance...creative imitation, or incremental improvement: the imitator was free to borrow extensively from previous writers as long as he added to what he borrowed."<sup>53</sup> Scholars have found examples of what we would consider plagiarism in *The Tempest*, "the Bard's Roman plays," *Henry VI* (where 1,771 lines were copied verbatim from Holinshed's *Chronicles of England, Scotland, and Ireland*), and *Measure for Measure*.<sup>54</sup> And the most iconic love story of all time, *Romeo and Juliet* "would have infringed Arthur Brooke's *The Tragical Historye of Romeo and Juliet*, published in 1562, which in turn would have infringed several earlier *Romeo and Juliets*, all of which probably would have infringed Ovid's story of Pyramus and Thisbe."<sup>55</sup>

Shakespeare did not attempt to pass off the work of others as his own, but instead took well-known source material and made significant artistic improvements to them. For example, in the case of *Measure for Measure*, which was heavily influenced by George Whetstone's *Promos and Cassandra*, "Shakespeare made the plot more ingenious and rewrote the dialogue completely, while retaining the theme of justice perverted by a corrupt judge."<sup>56</sup> There is a good reason why William Shakespeare's name is well-known throughout the world five centuries after his death, while the names of Holinshed, Brooke, and Whetstone are known only to scholars – his derivative works were far better than their originals.

Writers continued to produce derivative works of high artistic value long after the Renaissance. Many contemporary authors have delved into source material to produce unique and imaginative contemporary works. E.L. Doctorow's *Ragtime*, which won the 1975 National Book Critics Circle Award<sup>57</sup> and ranked

among the top 100 novels of the Twentieth Century by the Modern Library,<sup>58</sup> contains a character named Coalhouse Walker, who is based on Heinrich von Kleist's *Michael Kohlhaas*.<sup>59</sup> Von Kleist's original work is in part a critique of the Reformation-era class system in Germany; Doctorow changes the hero to an African-American in the 1920's, which allows the themes of the original work to address the more contemporary social issue of American racism. A more recent example is Geraldine Brooks' 2006 Pulitzer Prize-winning novel *March*, which takes its eponymous hero from Louisa May Alcott's *Little Women*.<sup>60</sup> Another recent Pulitzer Prize-winner, Michael Cunningham's *The Hours*, borrowed characters from Virginia Woolf's *The Hours* (with permission from the original work's copyright-holder).<sup>61</sup>

Doctorow, Brooks, and Cunningham, like Shakespeare before them, have used the existing culture as building blocks to create valuable literary works that serve to create connections between the modern and the classic, enriching our overall understanding of existing works while expanding upon and modernizing their themes. As one commentator has stated, "This tendency for creative ideas to infiltrate other works is great news for culture. In fact, this commingling of creations is culture."<sup>62</sup>

Not all derivative works are designed to flatter their forebears, however. Alice Randall's *The Wind Done Gone* is a retelling of the classic Margaret Mitchell novel *Gone With the Wind* from the perspective of a bi-racial ex-slave.<sup>63</sup> Randall wrote the novel, which the National Writers Union called "a socially relevant work,"<sup>64</sup> to protest what she saw as racist elements in Mitchell's work. One scholar describes Randall's motivation: "Margaret Mitchell's work bent American culture in a certain way...If you're going to bend culture in a certain way, culture has the right to bend back."<sup>65</sup>

Perhaps the most imitated work in Western literature is Homer's *The Odyssey*. In 2000, Joel and Ethan Cohen were nominated for an Academy Award for a screenplay, *O Brother, Where Art Thou*, based on *The Odyssey*.<sup>66</sup> American literature's most famous re-telling of Homer's epic is Mark Twain's classic *The*

*Adventures of Huckleberry Finn*, which also employs a narrative voice that “draws on and improves the American oral storytelling tradition.”<sup>67</sup> The most well-known and highly-regarded work to borrow from *The Odyssey*, however, was James Joyce’s *Ulysses*,<sup>68</sup> “a derivative work *par excellence*,”<sup>69</sup> which the Modern Library declared the greatest novel of the twentieth century.<sup>70</sup>

Not all derivative works are award-winning, however. Some creators have drawn on the intellectual property of others to create whimsical works in other media. The cartoon character Wile E. Coyote (a character copyrighted by Warner Brothers, a company that lobbied heavily in favor of the CTEA) is derived in part from Mark Twain’s *Roughing It* and characters in Native American folklore.<sup>71</sup> Walt Disney’s Mickey Mouse, who many feel was the impetus for the CTEA, “bears a striking resemblance to an earlier large-eared, big-footed, button-nosed, wide-eyed, britches-wearing character called Oswald the Lucky Rabbit.”<sup>72</sup> Indeed, a number of Disney films are based on the works of others, including *Snow White*, *Cinderella*, *Pinocchio*, *The Hunchback of Notre Dame*, *Alice in Wonderland*, and *The Jungle Book*, the last of which was produced only one year after Rudyard Kipling’s copyright over the original work expired.<sup>73</sup>

There is therefore a rich tradition of building upon the works of others, which has resulted in a number of important advances in literature. It is for that very reason that the Framers sought to limit the monopolistic power of copyright protection to “limited Times.”

### **Economic Issues**

While literary merit is all well and good, the chief purpose behind copyright law is to decide who can profit from a particular creative work. As a piece of essentially economic legislation, the CTEA therefore must be evaluated on economic grounds.

In economic terms, a law is efficient if the expected benefits outweigh the expected costs; this type of efficiency is known as Kaldor-Hicks efficiency.<sup>74</sup> Under the CTEA, the likely beneficiaries are copyright-holders, and the likely bearers of

the costs will be writers looking to create derivative works and the public who may be deprived of such works. A group of economists, including Nobel Laureates George Akerlof, Kenneth Arrow, James Buchanan, Ronald Coase, and Milton Friedman, argued that as long as the benefit to the first group exceeds the costs to the second, the CTEA presents no problem from an economic perspective.<sup>75</sup>

The economists determined that “[t]he main economic rationale for copyright is to supply a sufficient incentive for creation.”<sup>76</sup> By granting authors a monopoly over the use of their own work for the term of copyright protection, the law hopes to ensure enough potential compensation to encourage investment of time and money in new works. Extending the term of copyright protection will increase incentives to create because it extends the amount of time in which a work will generate royalties for the copyright-holder, although this additional compensation will not take place until 50 years after an author’s death. In order to evaluate the extent of these incentives, the economists looked at a hypothetical author who lived for 30 years after publishing a work which generated \$1 in royalties each year.<sup>77</sup> Under the pre-CTEA regime, this author and his or her assignees would earn royalties for 80 years, and, under the CTEA, for 100 years. Assuming a 7% interest rate, \$80 earned over 80 years would have a present value of \$14.22. (That is, if a writer is given a lump sum of \$14.22 today and earns 7% interest on it, he or she will earn \$80 in 80 years.) Extending the term of copyright extension for twenty years increases the author’s present value by \$0.05. Thus, the additional incentive provided to authors today amounts to one-third of one percent.<sup>78</sup>

The previous analysis only applies to new works being created. The CTEA also extended copyright protection for works already in existence. As the creators of these works had no idea that Congress would one day lengthen the term of protection, the CTEA obviously provides no additional incentive to create works that already exist. The additional compensation granted by the CTEA to an author’s assignees is “simply a windfall.”<sup>79</sup>

The CTEA therefore provides incentives of less than one percent to future authors to create a new work, and no incentive to authors who have already created

a work. The law could still pass economic muster, though, if the costs are similarly low. By extending the term of copyright protection, the CTEA increases the length of time in which an author hoping to create a derivative work must seek permission from the copyright-holder, which typically requires payment of royalties. Increasing the cost to create derivative works decreases the number of such works that will be produced.<sup>80</sup> Additionally, the CTEA imposes a number of transaction costs on potential creators of derivative works. Transaction costs refer to costs incurred by a party to find a potential business partner, negotiate a contract, and ensure the contract is performed to specifications; these costs are paid to parties outside of the negotiation, such as agents or lawyers, so they tend to decrease the economic efficiency of the bargain.<sup>81</sup> Because it can be difficult even to locate a copyright-holder, particularly in the case of older works that have been under copyright for years, a potential creator of a derivative work will have to incur significant costs to negotiate a derivative agreement.<sup>82</sup> By increasing the necessity of these additional “wasteful expenditures,” the CTEA effectively “imposes an additional tax on innovation.”<sup>83</sup> The net effect is to “stifle the creative process.”<sup>84</sup>

### **The Problem of Orphan Works**

Much of the preceding economic discussion was predicated on the premise that the copyrighted work was continuing to earn a profit for the copyright-holder. A strict copyright regime is most defensible in these cases because an argument could be made that derivative works may detract from the value of the still-profitable work. However, what happens when the original work is no longer profitable?

Prior to 1976, when copyright-holders had to pay a small fee to renew their copyrights, fewer than 15% chose to do so.<sup>85</sup> Moreover, of the few copyrights renewed, only 11% of copyrights in books had any economic value in 1998.<sup>86</sup> A great number of copyrighted works are therefore of no value to the copyright-holders and would likely lapse into the public domain if the renewal formality was again allowed to serve as “a valuable clearinghouse for unwanted copyrights.”<sup>87</sup>

Of all the books in the world's library today, only 10% are still in print and only 15% are in the public domain, leaving the remaining 75% under copyright but out-of-print, "a continent of books left permanently in the dark."<sup>88</sup> Thus, three-quarters of books are unwanted by their publisher but also often practically untouchable by anyone else. The lack of formalities also means that there is no list of copyrighted works to consult in order to determine who owns a particular copyright. An author seeking to create a derivative work often "can't even know who's claiming a copyright over what."<sup>89</sup> Indeed many copyright-*holders* do not even know what copyrights they hold, particularly as older copyright assignments failed to contemplate advancements in technology that allow books to be re-published in other media such as audiobooks or CD-ROM's.<sup>90</sup> So even if an author is willing to incur the substantial transaction costs involved in locating a copyright-holder and bargaining for a derivative right, he or she may face an impossible task because the copyright-holder may be unaware of the copyright. One rather poetic legal scholar has lamented the orphan work, "endow[ed]...with a cruel immortality that benefits neither copyright owners nor the public," while 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.<sup>91</sup>

For practical purposes, the year 1923 represents a Mason-Dixon Line separating the public domain from copyright, works that are free for all to use from works still slaves to their copyright-holders. This line can be instructive because it allows one to compare works by authors of the time period to see how well the current copyright regime is serving the culture. For example, cursory searches on Google.com and Amazon.com for the lesser works of F. Scott Fitzgerald find *Fi! Fi!*, a 1914 musical score, still in print and available for free download on the Internet, while his 1923 play, *The Vegetable*, appears to be out of print and unavailable in any medium. Similar results can be found for Sinclair Lewis—*Free*

*Air* (1919) - in print, *The Prodigal Parents* (1938) - out of print—and Edna Ferber – *Roast Beef, Medium* (1913) - in print, *Come and Get It* (1935) - out of print.

This rather unscientific experiment shows that a number of less well-regarded works by major authors are kept out of print not due to their relative lack of literary merit, but rather due to their date of publication. Copyright-holders often find works to be insufficiently profitable to reprint, while others are unwilling to publish their own editions and pay royalties to the copyright-holders for the same reason. For works published before 1923, though, smaller publishers, scholars, and devoted fans, unburdened by profit motives, are willing to reprint the works or transcribe them onto the Internet, thus making them once again available to the world at large. The CTEA is keeping twenty years of significant, albeit unprofitable, literature out of the hands of readers as well as authors seeking to create new and interesting works that build upon them.

### **Works Affected**

The biggest problem with the CTEA is that we may never know what we are missing, what works may be subverted by “[t]he hidden corruption of a long-celebrated copyright [which] manifests itself as an absence, a vacancy, an empty parenthesis of all things that might have been....”<sup>92</sup> There are no records of derivative works never attempted because of the challenges presented by modern copyright law. One example, which is known only because the stymied creator chose to tell his story, involves Michigan State University professor David Stowe.<sup>93</sup> Stowe wanted to write a scholarly work examining racism and sexism in 1940’s big band jazz, and sought to use cartoons from the magazine *Down Beat* to that end. Still in print, the magazine declined to allow Stowe to use the fifty-year-old cartoons “at any price” because it would have been embarrassing to do so.<sup>94</sup> He was prevented from enhancing a serious scholarly work for which he would have earned little if any monetary compensation because the magazine had an absolute veto on his ability to do so.

Stowe's case is illustrative because it shows that copyright does not just grant its holders the right to royalties; it also grants them the right to censor. Each copyright-holder owns a monopoly on that work granting the power "to police for many decades the uses to which the work might be put."<sup>95</sup> One of the most notorious copyright constables is Stephen James Joyce, grandson of James Joyce and trustee of his estate.<sup>96</sup> While Joyce's works *Dubliners* and *A Portrait of the Artist as a Young Man* entered the public domain "to an explosion of cheap reprints and new editions," his most highly-regarded novel, *Ulysses*, suffers from "a superficial attractiveness hiding the disfigurements of creative stagnancy, monopoly pricing, absence of competition, and underproduction"<sup>97</sup> because of Stephen James Joyce's active prosecution of unauthorized uses of the work.<sup>98</sup> The works subverted by the younger Joyce include a cabaret, an anthology of Irish literature, a scholarly bibliography, and a "multimedia presentation[] complete with period photographs, Dublin maps, sound clips of Irish songs, and hyperlinks to critical interpretations and manuscript sources."<sup>99</sup>

The young Joyce, "a mere rights-holder[, has] become a privileged and arbitrary custodian of culture."<sup>100</sup> The great irony, of course, is that "*Ulysses* has its creative origins in the raw materials of the public domain."<sup>101</sup> It is

[t]ipsily 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, conscious and unconscious, make up the fabric of art and life.<sup>102</sup>

And if Joyce had been required to list all of the sources from which he borrowed, "[t]he acknowledgement section alone would be practically as long as the text...."<sup>103</sup>

Even a derivative work that has been published can demonstrate the dangerous influence wielded by "mere rights-holders" such as Stephen James Joyce. As discussed above, Alice Randall's *The Wind Done Gone* borrowed characters and settings from Margaret Mitchell's *Gone With the Wind* in order write a critical commentary of the earlier work. Mitchell's estate responded to the work by asking a federal judge to issue a preliminary injunction blocking publication, and was

initially successful.<sup>104</sup> An appellate court overturned the preliminary injunction, but left open the possibility that a jury could find a copyright infringement and award money damages.<sup>105</sup> The two sides eventually reached a settlement that allowed Randall to publish the book, but the issue of derivative rights for the *The Wind Done Gone* remains unresolved.<sup>106</sup>

The fact that Randall was ultimately successful in getting her book published may camouflage the problem – even where copyright-holders are unable to block publication of new works, they still can greatly increase the cost of publishing by forcing litigation. While Randall had been able to “overcom[e] the chilling effect of copyright term extension,” the case undoubtedly had a “discouraging effect on others, and the resultant costs to public culture[] are incalculable.”<sup>107</sup> One scholar elaborated on this problem

[Randall and her publisher] had to litigate through two courts to have the right to publish that book, essentially a critical commentary on *Gone With the Wind*. People say, eventually the courts got it right, but what they forget is that on the way to getting it right you had to spend tons of money on lawyers. But publishers don't have money to spend on lawyers. And that produces a publishing industry that's extraordinarily conservative. Never willing to take any risk. Because just having to answer a complaint is enough to destroy any profit that existed.<sup>108</sup>

The specter of litigation raised by increasingly longer copyright terms and the inability to know with certainty who holds a given copyright is preventing authors from even considering building upon the works of others. For every Alice Randall who is tenacious and well-financed enough to struggle through the legal morass to get her work published, how many Professor Stowe's are there, writers too discouraged by their prospects to mount a legal challenge?

## Conclusion

American copyright law, which was originally designed to provide sufficient incentive for writers and publishers to produce creative works, has now become a suit of nearly impenetrable armor that allows copyright-holders to block new works from entering the culture and to dictate how older works fit into our cultural

framework. The root cause has been the steadily increasing terms of copyright protection coupled with the elimination of formalities we have seen over the last thirty years, culminating in the Copyright Term Extension Act of 1998. This law ignores the strong tradition of derivative works in English literature, and fails to account for their high literary value. As a piece of economic legislation, the law also fails to satisfy the basic principle of economic efficiency, instead conferring immense power on individuals and corporations increasingly distant from the creative process. In addition, the law has expanded the already enormous pool of orphan works, books that are neither in print nor available for others to use, keeping the majority of books in existence out of the hands of readers. Finally, the law has presented hardships for publishing some important works, blocked publication of others, and effectively discouraged countless other works from even being considered. Congress must act to restore reasonable limits on the power of copyright before this gaping hole in our culture left by the absence of derivative works grows any larger.

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<sup>2</sup> Pub. L. No. 105-298, 112 Stat. 2827, §§ 101-207.

<sup>3</sup> Edward Samuels, *Copyright and Technology* 11 (2000).

<sup>4</sup> “A book containing the Book of Psalms or a particular version of, musical setting for, or selection from it.” Psalter. (n.d.) *The American Heritage Dictionary of the English Language* (4<sup>th</sup> ed. 2003).

<sup>5</sup> Harry William Chartrand, “Copyright C.P.U.: Creators, Proprietors & Users,” 30.3 *Journal of Arts Management, Law & Society* 209, 210 (2000), citing Susan E. Beck, *Copyright - L SC 311 Information Literacy*, New Mexico State University Library, Las Cruces, NM (1998), available at <http://lib.nmsu.edu/instruction/lsc311/beck/26notes.html>; William F. Patry, *Copyright Law and Practice* 4 (1994), citing A. Birrell, *The Law and History of Copyright* 42 (1899).

<sup>6</sup> Chartrand, at 211-212.

<sup>7</sup> Samuels, at 11.

<sup>8</sup> Richard L. Greaves et al., *Civilizations of the West: The Human Adventure, Vol. 1* 189 (Brief ed. 1994).

<sup>9</sup> Chartrand, at 212-113.

<sup>10</sup> Samuels, at 15.

<sup>11</sup> Chartrand, at 212-213.

<sup>12</sup> Id., at 213.

<sup>13</sup> Stationers’ Company Charter Granted by Phillip and Mary, 1557, Pat. 3 & 4 Phil. & Mar., part 10. m. 46., available at [http://victoria.tc.ca/~tgodwin/duncanweb/documents/stationers\\_charter.html](http://victoria.tc.ca/~tgodwin/duncanweb/documents/stationers_charter.html); Samuels, at 15; A.W. Ward et al., eds., *The Cambridge History of English and American Literature XVIII* § 1 (1921), available at <http://www.bartleby.com/214/1801.html>.

<sup>14</sup> Chartrand, at 213-214.

- <sup>15</sup> An Act concerning Monopolies and Dispensations with Penal Laws, and the Forfeitures thereof, 1623, 21 Jac. 1, c. 3, *available at* [http://ipmall.info/hosted\\_resources/lipa/patents/English\\_Statute1623.pdf](http://ipmall.info/hosted_resources/lipa/patents/English_Statute1623.pdf).
- <sup>16</sup> Chartrand, *at* 214-215.
- <sup>17</sup> Interestingly, under modern American copyright law, Locke would have had a strong copyright infringement case against Thomas Jefferson for the *Declaration of Independence*. Jefferson himself conceded the *Declaration* was “pure Locke” and, as one historian concluded, “[t]he lineage is direct: Jefferson copied Locke.” Carl Becker, *The Declaration of Independence: A Study in the History of Political Ideas* 79 (1922).
- <sup>18</sup> Chartrand, *at* 215-217.
- <sup>19</sup> 8 Ann., c. 19, *available at* <http://www.copyrighthistory.com/anne.html>, *et seq.* (compiled and edited by Karl-Erik Tallmo).
- <sup>20</sup> Chartrand, *at* 218. The Act may have also had an imperial motive, as it makes a point to exert jurisdiction over “that part of Great Britain called Scotland.” 8 Ann., c. 19, *at* <http://www.copyrighthistory.com/anne5.html>.
- <sup>21</sup> 8 Ann., c. 19, *at* <http://www.copyrighthistory.com/anne3.html>.
- <sup>22</sup> 8 Ann., c. 19, *at* <http://www.copyrighthistory.com/anne.html>.
- <sup>23</sup> Chartrand, *at* 218.
- <sup>24</sup> 8 Ann., c. 19, *at* <http://www.copyrighthistory.com/anne.html>.
- <sup>25</sup> 4 Burr. 2303, 98 Eng. Rep. 201 (1769) (Mansfield, Lord Chief Justice).
- <sup>26</sup> 4 Burr. 2303, 2398, 98 Eng. Rep. 201, 252.
- <sup>27</sup> 4 Burr. 2408, 98 Eng. Rep. 257 (H.L. 1774).
- <sup>28</sup> *See* Mark Rose, “The Author as Proprietor: *Donaldson v. Becket* and the Genealogy of Modern Authorship,” *Representations* No. 23, 51-85 (1988)
- <sup>29</sup> Patry *at* 18, *citing* The Public Records of the State of Connecticut from May 1780 to October 1799, Inclusive, 537-38 (1922).
- <sup>30</sup> Patry n. 54.
- <sup>31</sup> Lawrence M. Friedman, *A History of American Law* 256 (2d ed. 1985).
- <sup>32</sup> U.S. Const. art. I, § 8.
- <sup>33</sup> Act of May 31, 1790, 1st Cong., 2d Sess., 1 Stat. 124.
- <sup>34</sup> *Id.*
- <sup>35</sup> Patry n. 116.
- <sup>36</sup> *Id. at* 33.
- <sup>37</sup> Act of February 3, 1831, 21st Cong., 2d Sess., 4 Stat. 436.
- <sup>38</sup> *Id.*
- <sup>39</sup> Act of March 4, 1909, Pub. L. No. 60-349, 60th Cong., 2d Sess., 35 Stat. 1075.
- <sup>40</sup> Patry *at* 89.
- <sup>41</sup> Copyright Act of 1976, Pub. L. No. 94-553, 94th Cong., 2d Sess., 90 Stat. 2541.
- <sup>42</sup> Tobe Liebert, “The Problem of Orphan Works,” *LLRX.com* (May 14, 2005), *available at* <http://www.llrx.com/features/orphanworks.htm>.
- <sup>43</sup> Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853.
- <sup>44</sup> Copyright Amendments Act of 1992, Pub. L. No. 102-307, 106 Stat. 264, 272.
- <sup>45</sup> Liebert, *at* <http://www.llrx.com/features/orphanworks.htm>.
- <sup>46</sup> “Steamboat Willie,” *The Big Cartoon Database* (no date given), *available at* <http://www.bcdb.com/bcdb/detailed.cgi?film=3820>.
- <sup>47</sup> Chris Sprigman, “The Mouse that Ate the Public Domain: Disney, The Copyright Term Extension Act, and *Eldred v. Ashcroft*,” *FindLaw* (March 5, 2002), *available at* [http://writ.news.findlaw.com/commentary/20020305\\_sprigman.html](http://writ.news.findlaw.com/commentary/20020305_sprigman.html).
- <sup>48</sup> Pub. L. No. 105-298, 112 Stat. 2827, 17 U.S.C. §§ 101-207.
- <sup>49</sup> Brief of Petitioners, *Eldridge v. Ashcroft*, 537 U.S. 186 (2003)(No. 01-618).
- <sup>50</sup> 537 U.S. 186 (2003).

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- <sup>51</sup> Kevin Kelly, "Scan This Book!," *New York Times Magazine* (May 14, 2006), available at <http://www.nytimes.com/2006/05/14/magazine/14publishing.html?ei=5090&en=c07443d368771bb8&ex=1305259200&pagewanted=print>.
- <sup>52</sup> Lawrence Lessig quoted in Russell Roberts, "An Interview with Lawrence Lessig on Copyrights," *The Library of Economics and Liberty* (April 7, 2003), available at [www.econlib.org/library/Columns/y2003/Lessigcopyright.html](http://www.econlib.org/library/Columns/y2003/Lessigcopyright.html).
- <sup>53</sup> Richard A. Posner, *Law and Literature* 397-398 (2d. ed. 1998)(citation omitted).
- <sup>54</sup> *Id.* at 398, citing Alexander Lindey, *Plagiarism and Originality* 74-75 (1952).
- <sup>55</sup> Posner, *Law and Literature*, at 399 (citation omitted).
- <sup>56</sup> *Id.* at 398.
- <sup>57</sup> See Ken Lucien, "1975 National Book Critics Circle Award for Fiction," *Literary Annals* (no date given), available at <http://www.awardannals.com/award/NBCC/novel/1975#15399>.
- <sup>58</sup> See "100 Best Novels," *The Modern Library* (2003), available at <http://www.randomhouse.com/modernlibrary/100bestnovels.html>.
- <sup>59</sup> Posner, *Law and Literature*, at 69-71.
- <sup>60</sup> See *News Hour with Jim Lehrer: "March" Wins Fiction Pulitzer* (PBS television broadcast, April 18, 2006), transcript available at [http://www.pbs.org/newshour/bb/entertainment/jan-june06/pulitzer\\_4-18.html](http://www.pbs.org/newshour/bb/entertainment/jan-june06/pulitzer_4-18.html).
- <sup>61</sup> Michael Cunningham, *The Hours* vi. (1998).
- <sup>62</sup> Kelly, at <http://www.nytimes.com/2006/05/14/magazine/14publishing.html?ei=5090&en=c07443d368771bb8&ex=1305259200&pagewanted=print>.
- <sup>63</sup> Al Neuharth, "Is 'Wind Done Gone' a Parody or a Steal?," *USA Today* (June 22, 2001), available at <http://www.usatoday.com/news/opinion/columnists/neuharth/2001-06-22-neuharth.htm>.
- <sup>64</sup> Brief of *Amici Curiae* (National Writers Union, et al.), *Eldred v. Ashcroft*, 537 U.S. 186 (2003)(No. 01-618), at 26.
- <sup>65</sup> Lawrence Lessig, quoted in Roberts, at [www.econlib.org/library/Columns/y2003/Lessigcopyright.html](http://www.econlib.org/library/Columns/y2003/Lessigcopyright.html).
- <sup>66</sup> See "Awards for 'O Brother, Where Art Thou,'" *IMDb* (no date given), available at <http://www.imdb.com/title/tt0190590/awards>.
- <sup>67</sup> Brief of *Amici Curiae* (National Writers Union, et al.), at 9-10. Despite his own penchant for borrowing from other sources, Twain was himself a staunch, and characteristically witty, advocate of nearly limitless copyright protection. See Mark Twain, Testimony before the United States Congress (December 6, 1906), transcript available at <http://www.bpmlegal.com/cotwain.html>.
- <sup>68</sup> Posner, *Law and Literature*, at 403-04.
- <sup>69</sup> Richard Spoo, "Three Myths for Aging Copyrights: Tithonus, Dorian Gray, Ulysses," *Joyce Studies* 1, 14 (National Library of Ireland Monograph Series 2004).
- <sup>70</sup> See "100 Best Novels," *The Modern Library* (2003), available at <http://www.randomhouse.com/modernlibrary/100bestnovels.html>.
- <sup>71</sup> Brief of *Amici Curiae* (National Writers Union, et al.), at 13 (citation omitted).
- <sup>72</sup> *Id.* at 13 (citation omitted).
- <sup>73</sup> Sprigman, at [http://writ.news.findlaw.com/commentary/20020305\\_sprigman.html](http://writ.news.findlaw.com/commentary/20020305_sprigman.html).
- <sup>74</sup> Richard A. Posner, "The Nature of Economic Reasoning," in *Law and Economics Anthology* 10 (Kenneth G. Dau-Schmidt and Thomas Ulen, eds. 1998), from Posner, *Economic Analysis of the Law* (4<sup>th</sup> ed. 1992).
- <sup>75</sup> Brief of *Amici Curiae* (Economists), *Eldred v. Ashcroft*, 537 U.S. 186 (2003)(No. 01-618), at 2.
- <sup>76</sup> *Id.* at 4.
- <sup>77</sup> *Id.* at 6.
- <sup>78</sup> *Id.* at 6.
- <sup>79</sup> *Id.* at 8.
- <sup>80</sup> *Id.* at 10-12.

- <sup>81</sup> Ronald H. Coase, "The Problem of Social Cost," in *Law and Economics Anthology* 93-96, from 3 *Journal of Law & Economics* 1 (1960).
- <sup>82</sup> Brief of *Amici Curiae* (Economists), at 13-14.
- <sup>83</sup> *Id.* at 13-14.
- <sup>84</sup> Brief of *Amici Curiae* (National Writers Union, et al.), at 25 (citation omitted).
- <sup>85</sup> H.R. Rep. No. 94-1476, at 136 (1976); William A. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* 211-212 (2003); Barbara A. Ringer, "Renewal of Copyright," in *Studies on Copyright* 503, 616-20 (Arthur Fisher Memorial ed. 1963), cited in Brief of *Amici Curiae* (Economists), at 7.
- <sup>86</sup> Edward Rappaport, *Copyright Term Extension: Estimating the Economic Values*, Congressional Research Service Report 98-144E (1998), cited in Brief of *Amici Curiae* (Economists), at 7.
- <sup>87</sup> Spoo, "Three Myths for Aging Copyrights," at 7.
- <sup>88</sup> Kelly, at <http://www.nytimes.com/2006/05/14/magazine/14publishing.html?ei=5090&en=c07443d368771bb8&ex=1305259200&pagewanted=print>.
- <sup>89</sup> Lawrence Lessig, quoted in Roberts, at [www.econlib.org/library/Columns/y2003/Lessigcopyright.html](http://www.econlib.org/library/Columns/y2003/Lessigcopyright.html). See also U.S. Copyright Office, Report on Copyright and Digital Distance Education 41-43 (1999).
- <sup>90</sup> Kelly, at <http://www.nytimes.com/2006/05/14/magazine/14publishing.html?ei=5090&en=c07443d368771bb8&ex=1305259200&pagewanted=print>.
- <sup>91</sup> Spoo, "Three Myths for Aging Copyrights," at 5.
- <sup>92</sup> *Id.*, at 12.
- <sup>93</sup> Lydia Pallas Loren, "The Purpose of Copyright," *Open Spaces Quarterly* (Feb. 7, 2000), available at <http://www.open-spaces.com/article-v2n1-loren.php>.
- <sup>94</sup> Loren, at <http://www.open-spaces.com/article-v2n1-loren.php>.
- <sup>95</sup> Spoo, "Three Myths for Aging Copyrights," at 12.
- <sup>96</sup> *Id.* at 13.
- <sup>97</sup> *Id.*, at 25-26.
- <sup>98</sup> Although *Ulysses* has arguably entered the public domain in the United States, see Note [Richard Spoo], "Copyright Protection and Its Discontents: The Case of James Joyce's *Ulysses* in America," 108 *Yale L. J.* 633 (1998), it remains copyrighted in the United Kingdom until 2011. Spoo, "Three Myths for Aging Copyrights," at 13-25. Although there are minor differences between the American and British copyright laws, both adhere to the Berne Convention for the Protection of Literary and Artistic Works, (Sept. 9, 1886; revised July 24, 1971 and amended 1979; entered into force for U.S. Mar. 1, 1989 (Sen. Treaty Doc. 99-27) 1986 U.S.T. Lexis 160 or 1 B.D.I.E.L. 715, 828 U.N.T.S. 221, available at [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html). Signatories to the Berne Convention agree, in part, to provide copyright protection without registration for at least fifty years after the death of the author.
- <sup>99</sup> *Id.*, at 13-16, 26.
- <sup>100</sup> *Id.*, at 24 (citation omitted).
- <sup>101</sup> *Id.* at 23.
- <sup>102</sup> *Id.* at 14.
- <sup>103</sup> *Id.* at 22.
- <sup>104</sup> *Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Supp.2d 1357 (N.D. Ga. 2001), *rev'd* 268 F.3d 1257 (11<sup>th</sup> Cir. 2001).
- <sup>105</sup> *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11<sup>th</sup> Cir. 2001).
- <sup>106</sup> Calvin Reid, "Suit Done Gone, for Now," *Publisher's Weekly* (May 22, 2002), available at <http://www.publishersweekly.com/article/CA218030.html?pubdate=5%2F20%2F2002&display=archive>.
- <sup>107</sup> Brief of *Amici Curiae* (National Writers Union, et al.), at 27.

<sup>108</sup> Lawrence Lessig, *quoted in Roberts, at*  
[www.econlib.org/library/Columns/y2003/Lessigcopyright.html](http://www.econlib.org/library/Columns/y2003/Lessigcopyright.html).