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BLOOMSDAY: COPYRIGHT ESTATES AND CULTURAL FESTIVALS

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ABSTRACT

Copyright estates have been unduly empowered by the extension of the term of copyright protection in Europe, the United States, Australia and elsewhere. The Estate of the Irish novelist, James Joyce, has been particularly aggressive in policing his revived copyrights. The "keepers of the flame" have relied upon threats of legal action to discourage the production of derivative works based upon the canonical texts of the novelist. The Estate has also jealously guarded the reputation of the author by vetoing the use of his work in various scholarly productions. Most radically of all, the grandson Stephen Joyce threatened to take legal action to prevent the staging of "Rejoyce Dublin 2004", a festival celebrating the centenary of Bloomsday. In response, the Irish Parliament rushed through emergency legislation, entitled the Copyright and Related Rights (Amendment) Act 2004 (Ireland) to safeguard the celebrations. The legislation clarified that a person could place literary and artistic works on public exhibition, without breaching the copyright vested in such cultural texts. Arguably, though, the ad hoc legislation passed by the Irish Parliament is inadequate. The Estate of James Joyce remains free to exercise its suite of economic and moral rights to control the use and adaptation of works of the Irish novelist. It is contended that copyright law needs to be revised to promote the interests of libraries and other cultural institutions. Most notably, the defence of fair dealing should be expanded to allow for the transformative use of copyright works, particularly in respect of adaptations and derived works. There should be greater scope for compulsory licensing and crown acquisition of revived copyrights.

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1. INTRODUCTION

> *The artist, like the God of the Creation, remains within or behind or beyond or above his handiwork, invisible, refined out of existence, indifferent, paring his fingernails.*
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> James Joyce, *A Portrait of the Artist as a Young Man*.[1]

In 2004, the Irish Government staged a festival entitled "Rejoyce Dublin 2004", to celebrate the centenary of Bloomsday, the day on which James Joyce's novel *Ulysses* was set - 16 June 1904.[2] The website for the event proclaims:

> *For millions of people, June 16 is an extraordinary day. On that day in 1904, Stephen Dedalus and Leopold Bloom each took their epic journeys through Dublin in James Joyce's Ulysses, the world's most highly acclaimed modern novel. "Bloomsday", as it is now known, has become a tradition for Joyce enthusiasts all over the world. From Tokyo to Sydney, San Francisco to Buffalo, Trieste to Paris, dozens of cities around the globe hold their own Bloomsday festivities. The celebrations usually include readings as well as staged re-enactments and street-side improvisations of scenes from the story. Nowhere is Bloomsday more rollicking and exuberant than Dublin, home of Molly and Leopold Bloom, Stephen Dedalus, Buck Mulligan, Gerty McDowell and James Joyce himself. Here, the art of Ulysses becomes the daily life of hundreds of Dubliners and the city's visitors as they retrace the odyssey each year.*[3]

The Irish Government made a substantial contribution to the staging of the event in the vicinity of 700,000 pounds. They hoped that the event would be an international tourist attraction

The festival, "Rejoyce Dublin 2004", featured a smorgasbord of exhibitions, lectures, performances, events, and walking tours. The National Library of Dublin presented the centrepiece exhibition, *James Joyce and Ulysses*, at the National Library of Ireland. Highlights included rare manuscripts such as a signed copy of the first edition of *Ulysses* published in 1922; James Joyce's notebooks of *Ulysses*; and the fair copy manuscript of *A Portrait of the Artist as a Young Man*. The Irish Museum of Modern Art staged *High Falutin Stuff*, an exhibition of art influenced by James Joyce. University College Dublin offered a range of academic lectures on the life and work of James Joyce. The 19th Annual International James Joyce Symposium brought many of the finest Joyce scholars from around the world to Dublin. The festival re-released *Bloom*, a film adaptation of Joyce's masterpiece,

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1 J Joyce, *A Portrait of the Artist as a Young Man* (1914, reprinted 1992), 276.

2 http://www.rejoycedublin2004.com/

3 http://www.rejoycedublin2004.com/

directed by Sean Walsh. Furthermore, there were walking tours around key locations featured in the novel *Ulysses*.

However, the trustees of the James Joyce's Estate were hostile to the festival, "Rejoyce Dublin 2004". The grandson of the novelist, Stephen Joyce, argued that the *James Joyce and Ulysses* exhibition staged by the National Library of Ireland could breach copyright by displaying manuscripts and draft notebooks by James Joyce. The Estate also threatened to sue the Irish Government for breach of copyright if there were any public readings or recitations as part of "Rejoyce Dublin 2004".[4] The grandson likewise warned other organisations planning to use Joyce's words as part of their celebrations - including the Irish National Library, Irish national television, RTÉ, and the James Joyce Centre in Dublin. He also rejected a proposal by the Abbey Theatre to stage Joyce's play, *Exiles*.

This article considers copyright law and public exhibitions in light of the controversy over "Rejoyce Dublin 2004". It highlights the impact of the copyright term extension upon libraries, cultural institutions, and performing arts companies. Part 1 considers the European Union Term Directive, and the retrospective extension of the copyright term in the European Union. It bemoans the lack of policy discussion over this significant reform to copyright law. Part 2 examines the role played by copyright estates - the "keepers of the flame". It recites the litany of legal actions taken by the Joyce Estate to prevent readings, performances, publications, and exhibitions of the work of James Joyce. As Robert Spoo observes:

> *Few holders of aging copyrights have been more publicly aggressive about policing their property than the Estate of James Joyce. Copyright in the Joyce Estate's hands has become more a sword than a shield, and the Estate appears now to be denying permissions almost upon principle and often on the ground of personal taste.*[5]

Part 3 considers the legislative response of the Irish Parliament to the controversy over "Rejoyce Dublin 2004". It evaluates the impact of the emergency legislation, the *Copyright and Related Rights (Amendment) Act* 2004 (Ireland). This article argues that such *ad hoc* legislation does not go far enough. There is a need to repeal the copyright term extension in Europe and elsewhere. There should be a wider range of mechanisms to guarantee access to copyright works - such as a broader defence of fair dealing, extensive exemptions for libraries and cultural institutions, and flexible compulsory licensing provisions.

2. FINNEGAN'S WAKE: THE EUROPEAN COPYRIGHT TERM DIRECTIVE

Stephen Joyce, the grandson of the famous Irish novelist James Joyce, was a vehement supporter of the copyright term extension in the European Union. He observed to the Parisian newspaper *Le Monde* in March 1995:

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[4] N Byrne, "Joyce Grandson Threatens To Ban Readings At Festival", *The Scotsman*, 15 February 2004, <http://news.scotsman.com/international.cfm?id=182392004>

[5] R Spoo, "Three Myths for Aging Copyrights: Tithonus, Dorian Gray, Ulysses" (June 2004) 6 *Joyce Studies* (National Library of Ireland Monograph Series).

> *Like my grandfather, I will fight and go on fighting. I do not see why I should renounce my rights. What is most important for me is to protect the spirit and the letter of my grandfather and to defend his writings and struggles.*[6]

All of James Joyce's works published in his lifetime had gone out of copyright in Ireland on December 31, 1991, 50 years after his death. However, the European Copyright Term Directive revived copyright in these works from July 1, 1995, as the rules extended the lifetime of copyright to 70 years after the author's death.

In 1999, the Irish Government debated the *Copyright and Related Rights Bill* 1999 (Ireland), which would give force to the European Copyright Term Directive. A member of Parliament, Noel O'Flynn, expressed qualms about the extension of the copyright term:

> *Sections 24, 25 and 30 extend the duration of copyright in literary, artistic, dramatic, musical, films and computer-generated works from 50 years to 70 years after the author's death. This provision, had it been in force in the late 1980s, would have meant that the works of W. B. Yeats and James Joyce, to mention just two Irish authors, would still be copyright rather than freely available as now. We should debate those provisions seriously and decide how long copyright should exist rather than take the directives of the European Commission and Council.*[7]

The Minister for State, Tom Kitt, responded: "The preferred position of the Irish authorities on the duration directive did not favour the extension of the minimum term of copyright protection to 70 years."[8] Nonetheless, the Minister observed that the Irish Government was compelled to follow the European Copyright Term Directive: "It is, however, a reality of the EU legislative process that negotiation and compromise are required on a broad front if anything is to be achieved." [9] He observed: "The duration directive is now part of Irish law and must be reflected in the Bill." [10] In spite of such misgivings, the legislation was nonetheless passed in the Irish Parliament.

In the Seanad, Senator David Norris was concerned that the James Joyce estate would be a particular beneficiary of the copyright term extension: He was critical of the retrospective extension of the copyright term: "The artificial reinstatement violates a good legal principle that one should not introduce retrospective legislation."[11] Norris elaborated:

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6 C Bedarida, "Interview with Stephen James Joyce", *Le Monde*, 22 March 1995, 26, as translated in P Parrinder, "Licensing Scholarship: Some Encounters With The Wells Estate", in P Parrinder and W Chernaik (eds), *Textual Monopolies: Literary Copyright and the Public Domain* (1997) 57-67

7 N O'Flynn. "Copyright and Related Rights Bill, 1999: Second Stage" (11 November 1999) 510 Dáil Éireann 1089-1090.

8 T Kitt. "Copyright and Related Rights Bill, 1999: Second Stage", (11 November 1999) 510 Dáil Éireann 1089-1090.

9 Ibid.

10 Id., 1116.

11 D Norris, "Copyright and Related Rights (Amendment) Bill 2004", (27 May 2004) 176 Seanad Éireann 1418.

> *It is completely anomalous and very unsatisfactory that James Joyce should have come out of copyright in 1991, stayed out of copyright for three and a half to four years and then, during one of the tidying up operations of the European Union in which it decided to harmonise everything including the shape of bananas and the length of sausages, come back into copyright. Moreover, the Union decided to harmonise upwards in the direction of the French and German copyright laws.*[12]

Senator Norris questioned whether it is appropriate for the descendants of creators to enjoy a windfall as a result of the copyright term extension: "What have the descendants of writers done to deserve to participate uniquely and dictatorially in the estate of a writer for 70 years after the writer's death?"[13] The Senator observed: "I am puzzled as to what right of inheritance in works of the imagination descendants can have".[14] He warned: "We must be careful in extending the right of proprietorship over this material if we are not to diminish ourselves as a cultural entity."[15] The Senator observed that Ireland should have obtained derogations from the European Copyright Term Directive, because of its pernicious effects.

2.1 The European Copyright Term Directive

In light of the heated debates over the copyright term in the past, Brad Sherman and Lionel Bently were puzzled that there was so little policy discussion about the adoption of the European Copyright Term Directive in the United Kingdom.[16] They speculated upon the reasons for this lack of controversy, concluding: "It is rare, in the twentieth century, that we can debate issues and reach conclusions according only to our own perceptions of policy; usually the most pressing concern is whether our laws comply with international norms already reached by interest-group lobbying".[17]

In the European Union, there had been a concern about a lack of harmonisation in copyright standards between member nations. The copyright term for works of natural authors ranged from life of the author plus 50 years in some

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12 Ibid.

13 D Norris, "Copyright and Related Rights Bill", (29 June 1999) 159 Seanad Éireann 1573-1575.

14 Ibid.

15 Ibid.

16 B Sherman, and L Bently, "Balance and Harmony in the Duration of Copyright" in P Parrinder and W Chernaik (eds), *Textual Monopolies Literary Copyright and the Public Domain* (1997), 28. Consider the lackadaisical debate in the United Kingdom House of Commons: "Debates in British House of Commons on Extension of Copyright Term" (1995) 43 *Journal of the Copyright Society of the United States of America* 198. The only honourable mention should be made of Hoon who said: "It is important to consider the implications of revived copyright. The change in the duration of copyright means that copyright will be revived for a number of different works currently in the public domain, and thus are no longer subject to copyright. I have seen various lists of the copyright holders who will benefit from that change--for example, those who hold the copyright on the work of James Joyce, John Buchan, Thomas Hardy, and Rudyard Kipling."

17 B Sherman, and L Bently, "Balance and Harmony in the Duration of Copyright" in P Parrinder and W Chernaik (eds), *Textual Monopolies: Literary Copyright and the Public Domain* (1997), 27-28.

countries, to life of the author plus 60 years in Spain, to life of the author plus 70 years in Germany.

A number of precedents provided impetus for a policy directive to bring about the harmonisation of copyright term across member countries. In 1989, the European Court of Justice in *EMI Electrola* v *Patricia* considered differences in the terms of copyright in sound recordings in Germany and Denmark.[18] The sound recording rights in songs by Cliff Richard had expired in Denmark but not in Germany. The European Court of Justice held that the longer term of protection in Germany applied to prevent the importation of goods even where copyright protection had expired in other European Countries. Nonetheless, it observed that "in the present state of the Community, characterized by an absence of harmonization, it is for national legislatures to specify the conditions and rules for such protection." [19]

In 1994, the European Court of Justice held in the Phil Collins decision that there was a positive obligation upon European Union countries to grant nationals of other European countries the same protection that existed in their country.[20]

In 1995, the European Union extended the copyright term for its member states to the life of the author plus 70 years.[21] The change was a consequence of a Directive of the European Commission in 1993, which required member states to increase their basic term of protection. Anthony Robinson comments about this process of harmonisation:

> *Harmonisation of the duration of copyright protection will help to prevent distortions in competition across the E.C. and it will aid the smooth running of the internal market. However, its implementation into the United Kingdom will not necessarily be of benefit to the parties affected. Extensions in the term of copyright are rarely in the interest of the consuming public: the longer the term, the longer the prospect of higher prices for copies of a work.*[22]

He concludes that "it is ironic that harmonisation will, on a domestic level, greatly increase the difficulty of ascertaining whether, and for how much longer, works are protected by copyright."[23]

The Recitals of the European Copyright Term Directive provide an indication of the objectives of the process of harmonisation. Recital 5 noted that "the minimum term of protection laid down by the Berne Convention, namely the life of the author and 50 years after his death, was intended to provide protection for the author and the first two generations of his descendants." The Recital emphasized that "the average

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18 *EMI Electrola* v *Patricia* [1989] ECR 79

19 *EMI Electrola* v *Patricia* [1989] ECR 79

20 The Phil Collins case [1994] EMLR 108

21 Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights. Official Journal L 290, 24/11/1993 P. 0009 - 0013. R Bard and L Kurlantzick, *Copyright Duration: Duration, Term Extension, The European Union, And The Making Of Copyright Policy* (1998).

22 A Robinson, "The Life and Terms of UK Copyright in Original Works" (1997) 8 (2) *Entertainment Law Review* 60-70.

23 Ibid.

lifespan in the Community has grown longer, to the point where this term is no longer sufficient to cover two generations." Recital 6 took note that "certain Member States have granted a term longer than 50 years after the death of the author in order to offset the effects of the world wars on the exploitation of authors' works." Recital 9 stressed that "a harmonization of the terms of protection of copyright and related rights cannot have the effect of reducing the protection currently enjoyed by rightholders in the Community; whereas in order to keep the effects of transitional measures to a minimum and to allow the internal market to operate in practice, the harmonization of the term of protection should take place on a long term basis. Recital 11 stressed that "in order to establish a high level of protection which at the same time meets the requirements of the internal market and the need to establish a legal environment conducive to the harmonious development of literary and artistic creation in the Community, the term of protection for copyright should be harmonized at 70 years after the death of the author or 70 years after the work is lawfully made available to the public, and for related rights at 50 years after the event which sets the term running."

Article 1.1 provides that "the rights of an author of a literary or artistic work within the meaning of Article 2 of the Berne Convention shall run for the life of the author and for 70 years after his death, irrespective of the date when the work is lawfully made available to the public." Article 1.2 advises that "In the case of a work of joint authorship the term referred to in paragraph 1 shall be calculated from the death of the last surviving author." Article 1.3 provides that "in the case of anonymous or pseudonymous works, the term of protection shall run for seventy years after the work is lawfully made available to the public."

Article 2.2 provides that the "term of protection of cinematographic or audiovisual works shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work."

Article 3.1 emphasizes that "The rights of performers shall expire 50 years after the date of the performance." Article 3.2 provides that "The rights of producers of phonograms shall expire 50 years after the fixation is made." Article 3.3 emphasizes that "The rights of producers of the first fixation of a film shall expire 50 years after the fixation is made." Article 3.4 provides: "The rights of broadcasting organizations shall expire 50 years after the first transmission of a broadcast, whether this broadcast is transmitted by wire or over the air, including by cable or satellite."

Article 4 provides that the term for unpublished works shall be 25 years from the time when the work was first lawfully published or lawfully communicated to the public.

Article 5 emphasized that member States may protect critical and scientific publications of works which have come into the public domain for up to 30 years from publication. Article 9 noted that this Directive shall be without prejudice to the provisions of the Member States regulating moral rights.

In 1999, the European Copyright Term Directive was considered in the case of *Butterfly Music Srl* v *Carosello Edizioni Musicali e Discografiche Srl (CEMED)*.[24] The legal issue concerned the right to reproduce and exploit recordings which, after entering the public domain under the legislation previously in force, had again become protected as a result of the provisions transposing the Directive into national law. The case involved a compact disc, Briciole di Baci, which contained 16 songs interpreted by the singer Mina, which had been recorded in the period from 1958 to 1962. These recordings entered into the public domain at the end of 1992. Under the European Copyright Term Directive, the term of protection was increased for rights of producers of phonograms and of performers from 30 to 50 years.

Before the national court in Italy, Butterfly contended in particular that the European Copyright Term Directive implicitly precluded the renewal of rights which had expired. The Tribunale Civile e Penale considered that it was clear from Article 10(2) of the Directive that the protection of rights could be revived following the extension of the periods which was required in certain Member States by harmonisation of the terms of protection. However, having regard to the obligation to protect acquired rights of third parties, it questioned the lawfulness of Article 17(4) of Law No 52/96, as amended, which provides only a limited possibility for sound-recording media in respect of which rights of exploitation entered the public domain before the date on which the Law entered into force to be distributed by third parties who, before that date, had acquired the right to reproduce and market them.

The European Court of Justice commented that the European Copyright Term Directive could have the effect of protecting afresh works or subject matter which had entered into the public domain. Nonetheless, the Court observed that there was scope for national laws to deal with matters such as the acts of exploitation performed by a third party. The European Court of Justice held:

> *Article 10(3) of Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights does not preclude a provision of national law such as the provision which, in Italian Law No 52 of 6 February 1996, as amended by Italian Law No 650 of 23 December 1996, lays down a limited period in which sound-recording media may be distributed by persons who, by reason of the expiry of the rights relating to those media under the previous legislation, had been able to reproduce and market them before that Law entered into force.*[25]

The European Court of Justice held that the Italian law was legitimate in laying down a limited period in which sound-recording media may be distributed by persons who, by reason of the expiry of the rights relating to those media under the previous legislation, had been able to reproduce and market them before that law entered into force.

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[24] *Butterfly Music Srl* v *Carosello Edizioni Musicali e Discografiche Srl (CEMED)* 1999 WL 1048278, [2000] C.E.C. 200, [2000] 1 C.M.L.R. 587, [1999] ECR I-3939, [1999] E.M.L.R. 847, [2000] E.C.D.R. 1, Celex No. 698J0060, EU: Case C-60/98, ECJ, Jun 29, 1999.

[25] *Butterfly Music Srl* v *Carosello Edizioni Musicali e Discografiche Srl (CEMED)* 1999 WL 1048278, [2000] C.E.C. 200, [2000] 1 C.M.L.R. 587, [1999] ECR I-3939, [1999] E.M.L.R. 847, [2000] E.C.D.R. 1, Celex No. 698J0060, EU: Case C-60/98, ECJ, Jun 29, 1999.

In the 2002 case of *Hessen* v *Ricordi*, the European Court of Justice considered the harmonisation of the term of copyright in the European Union.[26] The applicant, G. Ricordi & Co. Buhnen- und Musikverlag GmbH (Ricordi), specialized in the publication of musical scores and librettos. It held the rights of performance in the opera La Boheme by the Italian composer Giacomo Puccini, who died in 1924. The defendant, Land Hessen, ran the Staatstheater (state theatre) in Wiesbaden in Germany. In the 1993/1994 and the 1994/1995 seasons, the Wiesbaden Staatstheater staged a number of performances of the opera *La Boheme*, by Giacomo Puccini, without the consent of Ricordi.

At first instance, Ricordi was successful in its action for copyright infringement in the Landgericht (the Regional Court). The appeal brought by the defendant before the Oberlandesgericht (Higher Regional Court), Frankfurt am Main, was unsuccessful. The Land Hessen then brought an appeal on a point of law (Revision) before the Bundesgerichtshof (Federal Court of Justice). A question of law was referred to the European Court of Justice for a preliminary ruling.

The Advocate General Ruiz-Jarabo Colomer considered the cultural history of La Boheme:

> *Despite the fact that it was an instant success, there was scepticism about La Boheme on the part of certain critics who had reservations about its durability; it has, however, gone from success to success in every theatre in the world. Thomas A. Edison was not mistaken when he wrote that men die and governments change, but the arias of La Boheme will live for ever. Ernst Krause considers La Boheme, with its intuitive mix of spirit, passion and colour, to be Puccini's masterpiece, and he draws particular attention to the orchestration and magnificent instrumental technique of the composer, which Verdi was the first to appreciate.* [27]

The Advocate General observed: "The dissemination of the opera gives an idea of the importance of the copyright and of the financial consequences which the interpretation sought by the national court could entail."[28]

The Advocate General Ruiz-Jarabo Colomer observed that there was a dispute between the parties as to whether the copyright in the works of Puccini had expired:

> *Whereas Ricordi asserted that the works of Puccini continued to enjoy protection in Germany until 31 December 1994, that being the date on which the term of seventy years post mortem auctoris expired as a result of the non-discriminatory application of national legislation (Articles 120 and 121 of the UrhG), the Land Hessen claimed that, under Article 7 of the Berne Convention, La Boheme was only entitled to the fifty-six years of protection provided for*

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[26] *Hessen* v *G Ricordi & Co Buhnen- und Musikverlag* GmbH (C360/00), 2002 WL 30004, Celex No. 600C0360, EU: Case C-360/00, ECJ, Feb 28, 2002

[27] *Hessen* v *G Ricordi & Co Buhnen- und Musikverlag* GmbH (C360/00), 2002 WL 30004, Celex No. 600C0360, EU: Case C-360/00, ECJ, Feb 28, 2002

[28] *Hessen* v *G Ricordi & Co Buhnen- und Musikverlag* GmbH (C360/00), 2002 WL 30004, Celex No. 600C0360, EU: Case C-360/00, ECJ, Feb 28, 2002

> *under Italian law, and that, accordingly, such protection had expired on 31 December 1980.*[29]

The Advocate General Ruiz-Jarabo Colomer observed: "The factor which differentiates the present case from the case-law cited is that, unlike the British citizens Phil Collins and Cliff Richard, the Italian composer Giacomo Puccini had already been dead for many decades when on 1 January 1958 the Treaty establishing the European Community, and with it the prohibition of discrimination on grounds of nationality, entered into force."[30] His Honour did not believe, though, that this circumstance warranted different treatment.

The Advocate General Ruiz-Jarabo Colomer concluded: "A national provision which leads to lesser protection being afforded to a literary or artistic work by reason of the nationality of its author is contrary to the prohibition of discrimination on the ground of nationality in the first paragraph of Article 12 EC."[31] However, his Honour did wonder about the possible impact of this ruling, wondering "whether there are considerations of legal certainty which are sufficiently pressing to warrant limiting the retroactive effect of its case-law."[32]

2.2 The Sonny Bono Copyright Term Extension Act

There has been much debate as to whether particular works of James Joyce benefited from the extension of the copyright term in the United States.

The Estate of James Joyce argues that the American copyright on James Joyce's work *Ulysses* began in 1934, after it was published by Random House. The Estate maintains that the book should receive statutory protection of 95 years from the date when it was first published - that is, until 2029. Robert Spoo challenges this position:

> *With copyright terms dramatically increased, the purported copyright in Ulysses, unless it is recognized as illusory, will likewise receive a twenty-year reprieve from the public domain and will continue to exert a chilling effect upon publishers well into the next century. The effects of monopoly will go on being felt: Readers will pay non-competitive prices for Estate-approved editions of Ulysses; scholars will be discouraged from producing alternative versions of the novel in print and electronic-text formats. In particular, the benefits of digitalization and cyberspace will be lost or muted where Ulysses is concerned.* [33]

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29 *Hessen* v *G Ricordi & Co Buhnen- und Musikverlag* GmbH (C360/00), 2002 WL 30004, Celex No. 600C0360, EU: Case C-360/00, ECJ, Feb 28, 2002

30 *Hessen* v *G Ricordi & Co Buhnen- und Musikverlag* GmbH (C360/00), 2002 WL 30004, Celex No. 600C0360, EU: Case C-360/00, ECJ, Feb 28, 2002

31 *Hessen* v *G Ricordi & Co Buhnen- und Musikverlag* GmbH (C360/00), 2002 WL 30004, Celex No. 600C0360, EU: Case C-360/00, ECJ, Feb 28, 2002

32 *Hessen* v *G Ricordi & Co Buhnen- und Musikverlag* GmbH (C360/00), 2002 WL 30004, Celex No. 600C0360, EU: Case C-360/00, ECJ, Feb 28, 2002

33 R Spoo, "Copyright Protectionism and Its Discontents: The Case of James Joyce's Ulysses in America", (1998) 108 (3) *The Yale Law Journal* 662-663.

Robert Spoo argues that the book *Ulysses* failed to satisfy the formal requirements of the *Copyright Act* 1909 (US) - namely the manufacturing and *ad interim* requirements. He maintains that the book entered into the public domain in the United States in 1922 after the publication of the novel in France. Spoo concludes that the assertion of copyright protection cheats the public domain: "To lay claim to copyright protection where no copyright exists is to play upon the credulity of the public and to take advantage of the legal risk aversion of publishers."[34]

The *Sonny Bono Copyright Term Extension Act* (US) was passed in 1998. Named after the late singer-Congressman, it retrospectively extended the term of copyright protection for works of natural authors by 20 years, in line with the European Union. Works by corporations were given protection for 95 years from the date of creation.

Dennis Karjala and fellow United States copyright law professors emphasized the costs of a diminished public domain:

> *While primary control over the work, including the rights to refuse publication or republication and to create derivative works, properly remains in the author who created it, giving such control to distant descendants of the author can deprive the public of creative new works based on the copyright-protected work. Artistic freedom to make creative derivative works based on public domain works is a significant public benefit, as shown by musical plays like Les Miserables, Jesus Christ Superstar, and West Side Story, as well as satires like Rosencratz and Guildenstern are Dead and even literary classics like James Joyce's Ulysses.*[35]

Such concerns led eventually to a series of constitutional challenges against the *Sonny Bono Copyright Term Extension Act* 1998 (US).

An electronic publisher called Eric Eldred launched a legal action against the constitutional validity of the *Sonny Bono Copyright Term Extension Act* 1998 (US), because he was concerned that he would be unable to publish books that had previously been in the public domain - such as Robert Frost's poems.[36] First of all, Eldred argued that the extension of the copyright term went beyond the scope of the Copyright Power under the United States constitution. That clause provides that the Congress has the power to "promote the Progress of Science… by securing for limited Times to Authors… the exclusive Right to their respective writings". Second, the electronic publisher maintained that the legislation violated the freedom of speech guaranteed under the First Amendment.

The Attorney-General, John Ashcroft, defended the constitutional validity of the *Sonny Bono Copyright Term Extension Act* 1998 (US). In amicus curiae briefs, a number of copyright estates lent support for the position of the United States

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34 Id at 664.

35 D Karjala, "Comment of US Copyright Law Professors on the Copyright Office Term of Protection Study" (1994) 16 (12) *European Intellectual Property Review* 531-537.

36 *Eldred v Ashcroft* (2003) 123 S. Ct. 769. For a wider discussion of this case by this author, see: M Rimmer, "The Dead Poets Society: The Copyright Term And The Public Domain" (2003) 8 (6) *First Monday*, <http://firstmonday.org/issues/issue8_6/rimmer/index.html>

government. Dr Seuss Enterprises - the owner of copyright in Dr Seuss's *Cat in the Hat*, and *Green Eggs and Ham*, amongst others - argued:

> *Extending the term of copyright protection can and does encourage further creative activity by copyright holders. As demonstrated by the legislative record, copyright holders in the real world, such as Amici here, have distributed their works in new forms of work not available when the works were originally created. Amici have embellished existing works and created and developed derivative works in the form of television programs, videos, motion pictures, stage productions, interactive CD-ROMS and more. None of these activities would have occurred without the exclusivity afforded by copyrights in the underlying works.*[37]

The motives of such copyright estates seem to differ from those of the James Joyce estate. Organisations such as Dr Seuss Enterprises want to engage in what Dr Simone Murray calls "content streaming" - in which media is translated from one platform to another.[38] By contrast, the James Joyce estate wants to prevent the production and dissemination of derivative works based upon the writings of James Joyce. Rather than engage in "content streaming", the estate wishes to protect Joyce's work from being debased by secondary interpretations or adaptations.

The majority of the Supreme Court rejected the arguments put forward by Eric Eldred. In the leading judgment, Justice Ginsburg opined that Congress had the authority under the Copyright Clause to extend the term of copyright protection: "Text, history and precedent, we conclude, confirm that the Copyright Clause empowers Congress to prescribe 'limited Times' for copyright protection and to secure the same level and duration of protection for all copyright holders, present, and future".[39] She observed that Congress was justified in passing the *Sonny Bono Copyright Term Extension Act* 1998 (US) in order to achieve a baseline harmonisation with the European Copyright Term Directive:

> *A key factor in the CTEA's passage was a 1993 European Union (EU) directive instructing EU members to establish a copyright term of life plus 70 years. Consistent with the Berne Convention, the EU directed its members to deny this longer term to the works of any non-EU country whose laws did not secure the same extended term. By extending the baseline United States copyright term to life plus 70 years, Congress sought to ensure that American authors would receive the same copyright protection in Europe as their European counterparts.* [40]

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37 Brief Amici Curiae Submission of Dr Seuss Enterprises. *Eldred* v *Ashcroft*, <http://cyber.law.harvard.edu/openlaw/eldredvashcroft/supct/opp-amici/drseuss.pdf>

38 S Murray, "Brand Loyalties: Rethinking Content within Global Corporate Media" (2005) 27 (3) *Media, Culture & Society* 415-435.

39 *Eldred v Ashcroft* 537 US 186 (2003) 123 S. Ct. 769 at 778.

40 *Eldred v Ashcroft* 537 US 186 (2003) 123 S. Ct. 769 at 781.

The judge maintained that the monopolies granted by copyright law were compatible with the freedom of speech and said a successful constitutional challenge could render all past copyright extensions similarly vulnerable.

Justice Breyer and Stevens strongly dissented against the ruling. In his dissent, Justice Breyer noted:

> *The economic effect of this 20-year extension - the longest blanket extension since the Nation's founding - is to make the copyright term not limited, but virtually perpetual. Its primary legal effect is to grant the extended term not to authors, but to their heirs, estates, or corporate successors. And most importantly, its practical effect is not to promote, but to inhibit, the progress of "Science' - by which word the Framers meant learning or knowledge.*[41]

His Honour questioned whether authors would be motivated to create copyright works out of a desire to provide royalties for their grand-children: "What potential Shakespeare, Wharton, or Hemingway would be moved by such a sum?"[42] He waspishly suggests: "What monetarily motivated Melville would not realize that he could do better for his grandchildren by putting a few dollars into an interest-bearing bank account?"[43] Justice Breyer observed that the legislation failed to achieve substantial harmonisation with the European Union. His Honour noted: "Despite appearances, the statute does *not* create a uniform American-European term with respect to the lion's share of the economically significant works that it affects – *all* works made "for hire" and *all* existing works created prior to 1978." [44]

The significance of the Supreme Court decision in *Eldred* v *Ashcroft* has been much debated and picked over by pundits.[45] There remain a number of other constitutional challenges underway against the *Sonny Bono Copyright Term Extension Act* 1998 (US) in the United States courts. In *Kahle* v *Gonzales* (formerly *Kahle* v *Ashcroft*), two archives have sought a declaratory judgment that copyright restrictions on orphaned works — works whose copyright has not expired but which are no longer available — violate the United States Constitution.[46] The District Court dismissed this complaint; the matter has currently before the Court of Appeals. In *Golan* v *Gonzales* (formerly *Golan* v *Ashcroft*), a Colorado conductor sought to have the *Sonny Bono Copyright Term Extension Act* 1998 (US) and the *Uruguay Round*

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41 *Eldred v Ashcroft* 537 US 186 (2003) 123 S. Ct. 769 at 801.

42 *Eldred v Ashcroft* 537 US 186 (2003) 123 S. Ct. 769 at 807.

43 *Eldred v Ashcroft* 537 US 186 (2003) 123 S. Ct. 769 at 807.

44 *Eldred v Ashcroft* 537 US 186 (2003) 123 S. Ct. 769 at 809.

45 There is a large secondary literature on this case. See, for instance, L Solum (Ed.) "Eldred v Ashcroft Symposium", (2002) 36 *Loyola of Los Angeles Law Review*, <http://llr.lls.edu/>; G Austin, "Copyright's Modest Ontology - theory and pragmatism in Eldred v. Ashcroft", (2003) 16 (2) *Canadian Journal of Law and Jurisprudence* 163-178; L Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (2004); E Walterscheid. "Musings on the Copyright Power: A Critique of Eldred v. Ashcroft" (2004) 14 (2) *Albany Law Journal of Science & Technology* 309-357; and E Walterscheid, "The Preambular Argument: The Dubious Premise of Eldred v. Ashcroft" (2004) 44 (3) *Idea* 331-379.

46 *Kahle v Ashcroft* 72 U.S.P.Q.2d 1888 (2004)

Agreements Act 1994 (US) declared unconstitutional.[47] The suit challenges Congress's ability to reclassify works that have already passed into the public domain as copyrighted, thereby giving ownership back to private entities. In *Luck's Music Library* v *Gonzales*, the sellers of public-domain foreign music and motion pictures challenged constitutionality of *Uruguay Round Agreements Act* 1994 (US) provision, restoring copyright protection to certain foreign works.[48] The District Court and the Court of Appeals held that provision does not overstep Congress' power under the Copyright and Patent Clause of Constitution. Thus this series of constitutional challenges to the copyright term extension in the United States seem to be doomed to failure.

2.3 Fair Use and Orphaned Works

In the wake of the United States Supreme Court decision in *Eldred* v *Ashcroft*, the Law and Economics gurus, William Patry and Richard Posner, contended that there should be greater scope for the operation of the defence of fair use. The authors observed:

> *Some, at least, of the unfortunate consequences of well-nigh perpetual copyright can, however, be mitigated without reopening the constitutional debate. One of these is the impact on publishers who wish to publish very old (but still copyrighted) works of limited or no commercial value (remember that some of these publishers are nonprofit). Because the works are very old, the costs of negotiating for a copyright license are high, but because the works have only limited commercial value, the income generated by publication is unlikely to cover those costs. A solution lies at hand, however, in the fair use doctrine, which is flexible enough to allow the copying of such works without having to obtain a copyright license, and which is not blocked by any provisions of existing copyright law.*[49]

Similarly, in his article, "Fair Use across Time", Justin Hughes proposes that, as a copyright work ages, the scope of fair use, at least as to derivative works and uses, should expand.[50] This is because the "market" for a copyrighted work has a temporal dimension; the copyrighted work has a market of a fixed number of years. The defence of fair use has been particularly useful in allowing access to copyright works, which have benefited inordinately from the copyright term extension produced by the *Sonny Bono Copyright Term Extension Act* 1998 (US).

In *Campbell* v *Acuff-Rose Music*, the United States Supreme Court found that a rap song, "Pretty Woman", recorded by the music group, 2 Live Crew, was a fair

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47 *Golan v Ashcroft* 310 F.Supp.2d 1215 (2004); and *Golan* v *Gonzales* 74 U.S.P.Q.2d 1808 (2005).

48 *Luck's Music Library* v *Gonzales* 407 F.3d 1262 (2005).

49 W Patry and R Posner, "Fair Use and Statutory Reform in the Wake of Eldred" (2004) 92 (6) *California Law Review* 1639 at 1660.

50 J Hughes, "Fair Use Across Time" (2003) 50 *UCLA Law Review* 775.

use of Roy Orbison's song, "Oh Pretty Woman."[51] It reasoned the fair use doctrine supports the transformative use of copyright material, which builds creatively upon existing works. Justice Souter contends that parody has an obvious claim to transformative value, because "like less humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one".[52] Thus parody, like other comment or criticism, has a claim to fair use protection.

Since this landmark decision, United States courts have interpreted the defence of fair use in a broad and flexible fashion. In *Dr. Seuss Enterprises* v *Penguin Books*, the Court of Appeals considered whether a book, *The Cat Not In The Hat*, which retold the incidents of the OJ Simpson murder trial, was a fair use of the famous children's book, *The Cat In The Hat*.[53] The Court held that the doctrine of fair use "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster".[54] Nonetheless, on the facts, it found that the stanzas had "no critical bearing on the substance or style of the original".[55] It held that the satirical work was not closely enough targeted at the original to warrant special consideration as a parody.

The copyright defence of fair use has been tested in a recent United States case involving the classic *Gone With The Wind*.[56] The case concerned an action by the estate of the author, Margaret Mitchell, to an unauthorised sequel to her novel by Alice Randall entitled *The Wind Done Gone*. A three-judge panel of the 11th U.S. Circuit Court of Appeals lifted the injunction against the publication of the parody. It rejected the judgment of the District Court that *The Wind Done Gone* was an infringement of the copyright in *Gone With The Wind*. The Court of Appeals provided an eloquent articulation of the goals of copyright law. It claimed, "The Copyright Clause was intended "to be the engine of free expression'."[57] It emphasized that the decision upheld the main objectives of copyright law: the promotion of learning, the protection of the public domain, the granting of an exclusive right to the author, and the prevention of private censorship. The Court of Appeals found that *The Wind Done Gone* was deserving of protection under the doctrine of fair use in relation to criticism and review. They stressed that "copyright does not immunise a work from comment and criticism".[58] The court of appeals argued that the commercial nature of the publication was strongly overshadowed by its highly transformative use of *Gone With The Wind*. It emphasized that *The Wind Done Gone* was a specific criticism of

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51 *Luther R Campbell, aka Luke Skyywalker, et al.,* v *Acuff-Rose Music, Inc.* (1994) 127 L Ed 2d 500.

52 *Luther R Campbell, aka Luke Skyywalker, et al.,* v *Acuff-Rose Music, Inc.* (1994) 127 L Ed 2d 500 at 516.

53 *Dr. Seuss Enterprises* v *Penguin Books USA* (1997) 109 F. 3dd 1394.

54 Ibid at 1399.

55 Ibid at 1401.

56 *Suntrust Bank, as Trustee of the Stephens Mitchell trusts* v *Houghton Mifflin Company* (2001) 136 F. Supp. 2d 1357; and M Rimmer "Gone with the Wind: Copyright Law and Fair Use" (2003) 24 (4) *Incite* 6, <http://alia.org.au/publishing/incite/2003/04/wind.gone.html>

57 Ibid at 265.

58 Ibid at 265.

the depiction of slavery and race relations in *Gone With The Wind*. It found that the injunction against *The Wind Done Gone*, was an extraordinary and drastic remedy that amounted to unlawful prior restraint in violation of the First Amendment.

Lawrence Lessig complained that the Mitchell estate was the undeserving beneficiary of successive extensions of the term of copyright protection by the American congress:

> *When Margaret Mitchell published "Gone With the Wind" in 1936, the law gave her a copyright for up to 56 years. Under that agreement, the book should have fallen into the public domain in 1993. Why, then, was Mitchell's copyright, now owned by her estate, still powerful enough to prevent the planned publication this month of Alice Randall's "The Wind Done Gone," a retelling of the story of 19th- century Southern plantation life from an African-American viewpoint? Following what has become a pattern, Congress had extended Mitchell's copyright — along with many others. Indeed, Congress has extended the term of existing copyrights 11 times in the past 40 years. Since the federal court decided that Ms. Randall's book derives from Mitchell's novel, the earliest publication date for the Randall book is now 2032 (unless Congress extends the term of copyrights again).*[59]

The academic concluded that a simpler solution to the dispute would have been to have prevented the retrospective extension of the copyright term in the first place.

In 2002, the Canadian children's novelist J. Emily Somma published the novel *After the Rain: A New Adventure for Peter Pan*.[60] She sought permission from the Great Ormond Hospital to publish the novel in the United States and the European Union. However, the Hospital refused her request to publish the book in the United Kingdom, the European Community, and the United States. The trustees asserted: "The play by J.M. Barrie is in full copyright in the U.S. until 2023." Furthermore, the trustees maintained: "Unauthorized works, which contain the Peter Pan characters and elements from the original work, are not adaptable in the U.S., without the permission of the Hospital, being protected by the laws of trademark and unfair competition." With the help of the Stanford Center for Law and the Internet, Emily Somma filed a pre-emptive lawsuit in the Federal Court of California against the Hospital to protect her derivative work, *After the Rain*. She sought a declaration that copyright had expired in J.M. Barrie's books in the United States, and the characters of Peter Pan, Tinker Bell, Captain Hook, and Wendy were in the public domain. In the end, there was a settlement between the parties. The joint statement recognised: "The parties wish to express their shared understanding that Ms. Somma's novel *After the Rain: A New Adventure for Peter Pan* constitutes a fair use which does not infringe on any of the US intellectual property rights currently held by the Hospital."[61]

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[59] L Lessig. "Let The Stories Go", *The New York Times*, 30 April 2001.

[60] M Rimmer, "Never Neverland: Peter Pan and Perpetual Copyright" (2004) 25 (12) *Incite* 8-9 <http://www.alia.org.au/publishing/incite/2004/12/copyright.html>

[61] Great Ormond Street Hospital, "Somma Statement", 22 March 2005, http://cyberlaw.stanford.edu/archives/SommaPressRelease.pdf

The US Copyright Office has held an inquiry into the issues raised by "orphan works" - copyrighted works whose owners are difficult or even impossible to locate. It noted: "Concerns have been raised that the uncertainty surrounding ownership of such works might needlessly discourage subsequent creators and users from incorporating such works in new creative efforts or making such works available to the public."[62] There has been much debate as to what legislative, regulatory or other solution could best address these concerns without compromising the legitimate interests of authors and right holders. The group, Public Knowledge, has proposed that there should be a new defence to copyright infringement for users who make a reasonable effort to locate the owner of a copyright work.[63]

Similarly, in response to concerns about orphaned works, the *Public Domain Enhancement Act* 2003 (US) was introduced into United States Congress in June 2003. Democrat Representative Zoe Lofgren introduced the bill, with the observations:

> *The public domain has always been a vital source for creativity and innovation. But with the advent of the Internet, it is now more important than ever. No longer are out-of-print books or forgotten songs automatically sentenced to the ash-heaps of our cultural history. The emergence of digital technology and the World Wide Web has created a way to reawaken these hidden treasures, and has empowered more and more of us to become creators in our own right.*[64]

The co-sponsor of the Bill, Republican John Doolittle added: "Opening access to historical works for restoration and rehabilitation is essential toward ensuring that classics will be appreciated and cherished for future generations to come."[65]

The Bill seeks to amend the *Copyright Act* 1976 (US) to allow abandoned copyrighted works enter the public domain after fifty years. It requires the Register of Copyrights to charge a fee of $1 for maintaining in force the copyright in any published U.S. work. It requires the fee to be due 50 years after the date of first publication or on December 31, 2004, whichever occurs later, and every ten years thereafter until the end of the copyright term. It terminates the copyright unless payment of the applicable maintenance fee is received in the Copyright Office on or before its due date or within a grace period of six months thereafter. It deems any ancillary or promotional work used in connection with the maintained work, such as an advertisement for a motion picture, also to be maintained in force.

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62 US Copyright Office. "Orphaned Works", (26 February 2005) 70 (16) *Federal Register* 3739-3743, <http://www.copyright.gov/fedreg/2005/70fr3739.html>

63 Public Knowledge, "In the Matter of Orphaned Works", 25 March 2005, http://www.copyright.gov/orphan/comments/OW0629-PublicKnowledge.pdf

64 Statement Of Congresswoman Zoe Lofgren (Ca-16th) Upon Introduction Of The Public Domain Enhancement Act, 25 June 2003, <http://zoelofgren.house.gov/iss_pubdomain_statement.shtml>

65 Representatives Lofgren and Doolittle Announce the *Public Domain Enhancement Act* to Address the Need for Copyright Reform, 25 June 2003.

Representative Zoe Lofgren reintroduced a version of the bill to the 109th Congress in 2005.[66] The proposed legislation is yet to win the support of the United States Congress.

2.4 Other Jurisdictions

In other jurisdictions, the work of James Joyce has entered into the public domain, because the copyright has expired.

The United States has relied upon bilateral free trade agreements with its major trading partners to raise the term of copyright protection in other jurisdictions. At the insistence of the United States, Australia has agreed to adopt a longer term of copyright protection for works and other subject matter. The *Australia-United States Free Trade Agreement* 2004 extended the copyright term for works of natural authors for the life of the author plus seventy years; and seventy years from publication for films and sound recordings. Attorney General Philip Ruddock defended the copyright term extension on the grounds of international harmonisation:

> *Australia generally does not advocate higher standards of intellectual property protection than those determined internationally. However, it is sometimes in Australia's interest not to lag behind emerging standards of important trading countries. It is clear that an international standard is emerging amongst our major trading partners for a longer copyright term. In these circumstances, term extension is a necessary and positive thing. It will ensure that Australia remains a competitive destination for cultural investment. It will also ensure that Australians are better able to trade their interests in an increasingly global market.*[67]

However, such harmonisation has been partial and selective, at best. Australia has decided upon a prospective extension of the copyright term; as opposed to the retrospective extension of the copyright term in the European Union and the United States. Furthermore, Australia has not adopted features of United States law which favours copyright users - such as a higher threshold of originality, or a defence of fair use. As a result, there have been concerns that the *Australia-United States Free Trade Agreement* 2004 will boost the position of copyright owners - at the expense of the interests of libraries, archives, cultural institutions, and other copyright users.

The critics of the *Australia-United States Free Trade Agreement* 2004 raised the case of the James Joyce estate as an exemplar of the problems which would arise in respect of the copyright term extension. The economist Peter Martin editorialized:

> *In June the James Joyce Centre in Dublin is to celebrate Bloomsday on the 100th anniversary of the date on which the novel Ulysses is set. But it may not be able to read the novel out loud. Joyce's grandson has banned public performances, saying he will sue for breach of copyright if anyone tries. Fortunately the organisers of Australia's Bloomsday celebrations are in the clear. In Australia Joyce's works entered the public domain in 1991, 50 years after his*

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66 *Public Domain Enhancement Act* 2005 (US) HR 2408 IH

67 P Ruddock, "Opening Address: Unlucky For Some", ACIPA Conference, 13 February 2004.

> *death. But they might not remain in the public domain for much longer. Australia's draft so-called Free Trade Agreement with the United States includes a little publicised clause that would extend our term of copyright from death plus 50 years to death plus 70, the new US and European standard.*[68]

In the end, the copyright term extension in Australia has not been retroactive, like the European Union and the United States. Thus the copyright in the published work of James Joyce expired in 1991, and will not be revived.

In Canada, Parliament provides for copyright protection for life of the author plus 50 years. The copyright of James Joyce has lapsed and his work is in the public domain. The Penguin Group in Canada publishes a number of the books of James Joyce in this jurisdiction. Random House in Canada offers books and e-books of the works of James Joyce, as part of its modern library collection. The James Joyce webring provides html versions of *Finnegans Wake* and *Ulysses* available via the World Wide Web, FTP and Gopher through the courtesy of Trent University.[69]

There was a failed attempt to extend the copyright term for unpublished works. Lucy Maud Montgomery (1874-1942) was the author of the popular and lucrative *Anne of Green Gables* novels. Her heirs wish to retain control over her unpublished writings. For posthumous unpublished works in Canada, the Copyright Act limited protection to the author's estate for 50 years after the death of the writer, plus a six-year "window" for the estate to either publish or communicate its intention to publish the material. Before 1997 perpetual copyright was granted to an estate for posthumous unpublished writings. Marian Hebb, a lawyer for the Montgomery estate, argued that with respect to the Lucy Maud Montgomery diaries, material was left unpublished because it would cause offence to living people. The Liberal Government pushed for amendments to the Copyright Act in Bill C-36, which would add anywhere from 14 years to 34 years of copyright to previously unpublished works of authors who died between Jan. 1, 1930 and Jan. 1, 1949. Canadian Alliance MP Chuck Strahl successfully stopped the "Lucy Maud Montgomery provision" from being passed through the Canadian Parliament. The House of Commons rejected the bill to extend copyright protection for unpublished works in April 2004.[70]

The United States has persuaded the Dominican Republic and countries from Central America to extend the copyright term as part of the *Central America Free Trade Agreement* 2005.[71] Chapter 15 deals with intellectual property. Article 15.5.4 provides that "each Party shall provide that, where the term of protection of a work (including a photographic work), performance, or phonogram is to be calculated: (a) on the basis of the life of a natural person, the term shall be not less than the life of the author and 70 years after the author's death; and (b) on a basis other than the life of a natural person, the term shall be: (i) not less than 70 years from the end of the calendar year of the first authorized publication of the work, performance, or

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68 P Martin, "The FTA Clause That Stifles Creativity", *The Sydney Morning Herald*, 14 April 2004.

69 http://www.trentu.ca/jjoyce/fw.htm

70 S Tuck, "Lucy Maud Provision Fades Out", *Globe And Mail*, 1 April 2004, R1.

71 http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html

phonogram, or (ii) failing such authorized publication within 50 years from the creation of the work, performance, or phonogram, not less than 70 years from the end of the calendar year of the creation of the work, performance, or phonogram."

The United States has also been keen to encourage the rest of America to extend the copyright term as part of a proposed *Free Trade Area of the Americas*.[72] Chapter 20 of the third draft agreement deals specifically with intellectual property. Article 9.1 sets out draft provisions in relation to copyright term.

Under one formula, each Party shall provide that "where the term of protection of a literary or artistic work is to be calculated on the basis of the life of a natural person, the term shall be the life of the author and no less than seventy (70) years after the author's death". Furthermore, "Whenever the term of protection of a literary or artistic work is calculated on a basis other than the life of a natural person, such term shall be no less than fifty (50) years from the end of the calendar year of authorized publication, or, failing such authorized publication within fifty (50) years from the making of the work, fifty (50) years from the end of the calendar year of making."

Under another proposal, "each Party shall provide that where the term of protection of a work (including a photographic work), performance or phonogram is to be calculated on the basis of the life of a natural person, the term shall be not less than the life of the author and seventy (70) years after the author's death". Furthermore, where the term of protection of a work (including a photographic work), performance or phonogram is to be calculated on a basis other than the life of a natural person, the term shall be not less than ninety-five years from first publication or not less than one hundred twenty years from the creation of the work.

It remains to be seen whether such proposals will command acceptance from all of the countries in North, Central, and South America.

3. THE KEEPERS OF THE FLAME: THE JOYCE ESTATE

In the wake of the revival of the copyright, the Estate of James Joyce has become active in controlling the reproduction and adaptation of the works of the modernist literary hero. As Robert Spoo observes:

> *In its attempts to control Joyce's image, the Estate has taken up arms against the ungovernable sea of celebrity at precisely the moment when Joyce is truly becoming an icon of popular culture (as witness the explosion of dramatic and cinematic treatments of his life and works in recent years). With increasing frequency, Mr. Stephen James Joyce has 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 tilts repeatedly at the academic and pop-culture windmills which, he*

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72 http://www.ftaa-alca.org/

> *feels, are rapidly making a commodity of a beloved family member.*[73]

The Estate of James Joyce seems to be motivated by a desire to prevent the popularisation and vulgarisation of the literary work of the deceased writer. It also seeks to guard against the author himself being transmogrified into a popular icon. The Estate has taken a keen interest in scholarship relating to James Joyce. It has sought to use its economic and moral rights to control and sometimes even censor interpretations of his life and work. The Estate has been particularly concerned about derivative works - such as musical adaptations, dramatic performances, and films. The worry seems to be that the original works of James Joyce will be cheapened by such copies - no matter how transformative they may be of the original material.

3.1 Biographies and Anthologies

Patrick Parrinder expressed his dismay about the potential impact of the copyright term extension in Europe upon literary scholarship - especially in relation to famous English and Irish authors, such as D.H. Lawrence, W.B. Yeats, Virginia Woolf and James Joyce.[74] He observed:

> *Literary scholarship, too, will be severely impeded. As authors approach classic status there is a growing need for definitive editions, for critical commentaries including quotation, and for extracts to be reprinted in anthologies. Where the work is in copyright, permission for these acts of exploitation is frequently refused. One result of this is that the work of virtually every major author still in copyright is perpetuated in corrupt, haphazard and sometimes bowdlerised editions. The author's own wishes are frequently overlooked, and printer's errors go uncorrected for decades.*[75]

The author presciently warned: "Had the new law been in force, the recent advances in our understanding of such a controversial text as Joyce's *Ulysses* would most likely have been delayed until well into the 21st century." [76]

The Joyce Estate has been reluctant to allow scholars and biographers access to the work of James Joyce, because of a desire to protect the privacy of the family. Robert Spoo observed, "There is a climate of concern bordering on fear among Joyce scholars that their work may suddenly come under copyright scrutiny."[77] He noted that Stephen Joyce "has announced that there will be no permission granted for the

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73 R Spoo, supra note 5.

74 P Parrinder. "The Dead Hand of European Copyright" (1993) 15 (11) *European Intellectual Property Review* 391-393.

75 Ibid.

76 Ibid.

77 D Smith. "A Portrait of the Artist's Troubled Daughter", *New York Times*, 22 November 2003.

foreseeable future for quotation from Joyce's letters."[78] This diktat has deprived scholars of access to a great number of both published and unpublished letters.

In 1988, Stephen Joyce forced the biographer Brenda Maddox to excise material about James Joyce's daughter Lucia from her book *Nora: The Real Life of Molly Bloom* published by Houghton Mifflin.[79] In a letter to *The New York Times Book Review* the following year, Stephen Joyce explained his decision. He observed: "The Joyce family's privacy has been invaded more than that of any other writer in this century."[80] He denied "trying to drum up royalties" and argued that scholars were distorting Joyce's writing by placing too great weight upon biographical sources.[81]

In the 2000 case of *Sweeney* v *New University of Ireland Co., trading as Cork University Press*,[82] the Joyce Estate sought an injunction against the threatened publication by the defendants of an anthology of twentieth century Irish prose - featuring a segment from the novel Ulysses. The Estate requested u 7,000 for the inclusion of the extract - which was more than the defendants were willing to pay. The Irish High Court was willing to grant an interlocutory injunction. The judge noted: "The terms and conditions, if not agreed upon, cannot be imposed by the applicant [Cork University Press] proceeding in the face of objection and seeking to publish in whole or part a protected work in the hope or knowledge that it can be a sum of money."[83]

The editor of the anthology, David Pierce, a professor of English at York St. John College in England, has lamented: "The copyright issue is so crucial, so difficult, that Joyce research is not something I would recommend."[84]

In the 2002 case of *Sweeney* v *Macmillan Publishers Ltd*, the trustees of Joyce's Estate sued for breach of copyright and passing off in respect of the publication of the Reader's Edition of James Joyce's *Ulysses*.[85] The court found that copyright in the 1922 edition of *Ulysses* had been revived by the Term Directive. The defendants could not take advantage of transitional regulations, because they had not made arrangements for the exploitation of the work before the relevant dates in 1995. Furthermore, the court held that copyright also subsisted in an early version of the work *Ulysses* called the Rosenbach manuscript, which was not published until 1975. It was found that this copyright was infringed by the publication of the Reader's Edition of the book. The claim in passing off failed. The court issued an injunction

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78 Ibid.

79 Ibid.

80 Ibid.

81 Ibid.

82 *Sweeney* v *New University of Ireland Co., trading as Cork University Press* [2001] ECDR 8; and, for commentary, see J Phillips, "The Risk That Rewards: Copyright Infringement Today", (2001) 12 (4) *Entertainment Law Review* 103-106; and P Coghlan, "Revival of Copyright in the Book Ulysses By James Joyce" (2001) 23 (4) *European Intellectual Property Review* 45-46.

83 *Sweeney* v *New University of Ireland Co., trading as Cork University Press* [2001] ECDR 8.

84 D Smith, supra, note 77.

85 *Sweeney* v *Macmillan Publishers Ltd* [2002] RPC 35 (Ch D); and for commentary, see A Horton, "The Continuing Trials of Ulysses" (2002) 24 (5) *European Intellectual Property Review* 281-286 and V King, "James Joyce's Ulysses - A Case of Preparatory Manuscripts and Revived Copyright" (2002) 13 (4) *Entertainment Law Review* 86-90.

banning further infringement and ordered the delivery up of 1,000 undistributed copies.

The decision has received significant criticism. Anthony Robinson comments that the retrospective extension of copyright term had the effect of discouraging learning: "In effect, copyright was a means by which author's estates could prevent further academic discourse and commentaries which included quotation of works, simply by refusal of permission."[86]

The Joyce Estate also disrupted the publication of a biography of James Joyce's daughter, Lucia Joyce. The biographer, Carol Loeb Shloss, explained:

> *Even before the book was in print, even before I published it, long before I thought about asking the estate for permission, I received a letter from Stephen Joyce which I'll never forget. And he was trying to second-guess me, he said 'I've heard by rumour that there's going to be a book and I assume it must be your book, and therefore you cannot quote', and then he began to make lists of everything he thought that I might use, since he'd never seen a word. And then he said almost as a post script, 'But you may quote from A Flower given to my Daughter which I'm sure he thought was a beautiful poem, for a fee which I will yet determine'. And so I didn't know what to do with it other than to forward it to my publishers. As publication date became nearer and nearer, and as these letters became more vehement and more frequent, the threats had to be taken more and more seriously. That means that there was a series of deletions.*[87]

The Joyce Estate took the contentious view that a figure of 500 words was acceptable as fair use in the book.

The biographer was concerned that, as a result of such restrictions, she needed to delete many of her opinions.[88] She observed:

> *I had to rewrite this book over and over again. The process of deleting things that had taken years to find out was just excruciating. The ability of people to use quotes from Joyce has ground to a standstill.*[89]

The end result, according to Carol Loeb Shloss: "… all in all, there were over 30 pages of deletions in a book that was 400 and some pages long."[90]

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86 A Robinson, "Copyright In Joyce's Ulysses: An Act for the Discouragement of Learning" (2002) 13 (8) *Entertainment Law Review*177 at 181.

87 D Carrick, "Copyright: The Estate of James Joyce", The Law Report, Radio National, ABC, 14 September 2004, <http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s1198816.htm>

88 Ibid.

89 D Smith, supra, note 77.

90 D Carrick, supra, note 87.

There have been similar problems over authors and estates relying upon copyright law to censor biographies through refusing to give permission to copyright works - both published matter, and unpublished documents, such as letters.[91]

Most famously, the writer Ian Hamilton sought to write a biography of the American novelist, J.D. Salinger, the celebrated author of *Catcher In The Rye*.[92] The novelist insisted that he would regard any biography written about his lifetime as an invasion of privacy. J.D. Salinger came out of exile in 1986 to stop Ian Hamilton publishing an unauthorised biography of him. J.D. Salinger asserted his copyright over unpublished letters obtained by the biographer. The question was whether the use of the letters was permissible under the fair use doctrine.

On appeal, the Full Federal Court granted the appellant a preliminary injunction, finding:

> *To deny a biographer like Hamilton the opportunity to copy the expressive content of unpublished letters is not, as appellees contend, to interfere in any significant way with the process of enhancing public knowledge of history or contemporary events. The facts may be reported. Salinger's letters contain a number of facts that students of his life and writings will no doubt find of interest, and Hamilton is entirely free to fashion a biography that reports these facts. But Salinger has a right to protect the expressive content of his unpublished writings for the term of his copyright, and that right prevails over a claim of fair use under 'ordinary circumstances'.*[93]

In September 1987, Random House applied to the Supreme Court for a writ of *certiorari* against the appeals court verdict. The publisher argued that the decision placed biographers in a double bind: their job required them to hunt information from sources but they were not at liberty to quote those materials.[94] In October 1987, the Supreme Court denied the petition for *certiorari*.

The estate of the American poet, Sylvia Plath, has been similarly guarded about allowing access to her copyright works.[95] In a letter to the *Guardian*, Ted Hughes complained about the intrusion of biographers:

> *In the years soon after her death, when scholars approached me, I tried to take their apparently serious concern for the truth about Sylvia Plath seriously. But I learned my lesson early. The honourable few who have justified my trust have been few indeed. With others, if I tried too hard to tell them exactly how something happened, in the hope of correcting some fantasy, I was likely to be*

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91 I Hamilton, *In Search Of J.D. Salinger* (1988); I Hamilton, *Keepers Of The Flame: Literary Estates And The Rise Of Biography* (1992); and J Malcolm, *The Silent Woman: Sylvia Plath and Ted Hughe*s (1994).

92 I Hamilton, *In Search Of J.D. Salinger*, supra 91, 4.

93 *Salinger* v *Random House* 650 F.Supp. 413 (1986); 811 F.2d 90 (1987); and *Random House* v *Salinger* 108 S.Ct. 213 (1987).

94 I Hamilton, *In Search Of J.D. Salinger*, supra 91, p 211.

95 I Hamilton, *Keepers Of The Flame*, supra 91.

> *accused of trying to suppress Free Speech. In general, my refusal to have anything to do with the Plath Fantasia has been regarded as an attempt to suppress Free Speech.*[96]

Writers and biographers have complained that the Sylvia Plath estate has restricted access to her works, and sought to censor their interpretations of the poet's life.[97] A dispute broke out in the *Times Literary Supplement* about the pressure which writers on Plath felt was exerted on them by the copyright estate in 1992. Olwyn Hughes justified the intervention of the estate in terms of the "forests of fantasy" that have grown up around Sylvia Plath. She said: "I know nothing, when I took the job on, of the snippets of vindictive and unjust rage in Plath's letters and comments."[98] Olwyn Hughes complained about the writers "who treat Sylvia Plath's family as though they are characters in some work of fiction, or a hundred years dead, and proper subjects for speculation and academic dissection."[99]

The American poet, TS Eliot, has also sought to ward off potential biographers. He added the memorandum to his will: 'I do not wish my executors to facilitate or countenance the writing of a biography of me'.[100] In his 1984 biography of T.S. Eliot, the author Peter Ackroyd prefaced by the caution of the author: "I am forbidden by the Eliot estate to quote from Eliot's published work, except for purposes of fair comment in a critical context, or to quote from Eliot's unpublished work or correspondence".[101] In a piece on T.S. Eliot in his collected works, Ackroyd reflects upon his experience of writing the biography of the poet.[102] He recalls the difficulties that he encountered in writing the biography because he was denied permission to use unpublished copyright works:

> *I wrote to Mrs Eliot explaining my intentions; but, since she is bound by her husband's wishes that there should be no biography, she could offer me no help. Faber and Faber, Eliot's publishers, were charmingly oblivious to my pressing need to write such a book and they also declined to help. I then began writing to those who knew Eliot: many did not reply, and those who did tended to do so in a cool or non-committal fashion.*[103]

On how he avoided the ban imposed by T S Eliot's estate on directly quoting Eliot's works in his biography of the poet, Ackroyd said with bravado: "I had to paraphrase the paraphrase". He observed: "The art of the biographer is, in that sense, one of interpretative scholarship - to avoid the fictional excesses which mark the biographies

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96 T Hughes, "I Asked Him To Give It Another Go", Letter To *The Guardian*, 20 April 1989.

97 J Rose, "This Is Not A Biography: Jacqueline Rose Writes About Her Conflict With the Estate Of Sylvia Plath" (2002) 24 (16) *London Review of Books*, 12-15.

98 Ibid.

99 Ibid.

100 I Hamilton, *Keepers Of The Flame,* supra 91.

101 Ibid, p 10.

102 P Ackroyd. *The Collection: Journalism, Reviews, Essays, Short Stories, Lectures* (2001), 374-376.

103 Ibid, 375.

of putative novelists, and to eschew the pale parade of facts which are sometimes forced to muster for a 'life'."[104]

3.2 Performances

In the 1990's, the Dublin Writers' Museum proposed a re-enactment and a seminar based on *The Cat and the Devil,* a story written by James Joyce, in the form of a letter, for his grandson. The performance was to be freely provided for the children of Dublin. The event was inhibited and prevented by the James Joyce estate. Senator Norris complained: "It was particularly laughable when, if one is at all literate, one knows the tale of *The Cat and the Devil* was not the work of Joyce's imagination but a European folk tale which Joyce adapted in a few moments to entertain his grandson."[105] He concluded: "The children of Dublin were denied an innocent afternoon's enjoyment because of the mean-mindedness and spite of someone who was placed by legislation in a position to act in a mean-minded and spiteful manner."[106]

In 1998, Stephen Joyce and the Estate successfully objected to readings of *Ulysses* live over the Internet. The former director of the James Joyce Centre, Senator David Norris, recalled the controversy over the performances of *Ulysses*:

> *We had a World Wide Web broadcast of Ulysses, which used Bloom's idea of the day continuing around the planet. There was always daylight in some particular place and there were broadcasts from Los Angeles, San Francisco, New York, Dublin, Ankara, Cyprus, China, etc. It was marvellous. Mary Robinson was President at the time and she did a reading, as did I, and it was really lovely to feel we were all linked in this way. We intended to do it again but our sponsors were attacked. However, we were able to demonstrate legally that we should have held copyright because we had our material in preparation during the window of opportunity.*[107]

The James Joyce estate brought legal action. The sponsors of the event, the *Irish Times* and *Irish Distillers*, settled out of court.[108] Senator Norris complained: "There were no reasonable or cultural grounds for such action – it was a case of pure, unmitigated spite against which we should be protected." [109]

In 2000, the Edinburgh Fringe Festival staged the show, *Molly Bloom: A Musical Dream*. The actress, Anna Zapparoli, performed a musical version of Molly Bloom's famous monologue. She lay atop a grand piano, related her scandalous adventures, and delivered the songs, "Rap of Spunk" and "Song of Sucking." A spokesman stated that the Fringe "is one of the biggest platforms for free speech and

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104 Ibid, 377.

105 D Norris, "Copyright and Related Rights Bill" (29 June 1999) 159 Seanad Éireann 1573-1575.

106 Ibid.

107 D Norris, "Copyright and Related Rights (Amendment) Bill 2004", (27 May 2004) 176 (18) Seanad Eireann 1419.

108 N Byrne, supra note 4.

109 D Norris, "Copyright and Related Rights Bill", (29 June 1999) 159 Seanad Éireann 1573-1575.

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."[110] The producers defended their right to use Joyce's text by invoking a United Kingdom copyright provision that grants a compulsory licence to anyone wishing to make use of a work.

The Joyce Estate objected to this musical version of Molly Bloom's famous monologue.[111] Stephen Joyce claimed that the show turned the "masterful" words of the book into a "circus act".[112] He observed: "We have read your submission carefully and have come to the conclusion that you propose to treat the Molly Bloom Monologue as if it were a circus act or a jazz element in a jam session." [113] Stephen Joyce contended:

> *This last chapter/episode was not written for the stage, or to be performed, but as the concluding part of a novel. I do not know who first authorised extracts from what has become known as the Molly Bloom monologue/soliloquy to be performed in theatres, even the radio, but looking back it was opening a Pandora's box.* [114]

The organisers of the Edinburgh Fringe Festival were unrepentant. A spokesman told *The Observer*: "The show will go on. We understand that in this case, because of the copyright rules, the permission of the estate is not needed." [115] However, in the end, the Festival did discontinue Zapparoli's show after several performances.

A 23 year-old Irish composer, David Fennessy, sought permission to use 18 words from *Finnegan's Wake* in a short choral piece commissioned by Lyric FM for a European broadcast. The brief quotation was "[a]s we there are where are we are we there from tomtittot to teetootomtotalitarian. Tea tea too too." Stephen Joyce refused to provide authorisation to use the copyright work because "to put it politely and mildly, my wife and I don't like your music."[116] The composer was devastated by the rejection: "I don't mind if they hate my music, but how can the personal taste of Stephen Joyce and his wife be thought the right criteria to use." [117] He lamented: "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".[118]

In 2004, the two famous Irish theatres, the Gate and the Abbey, declined to stage any Joycean production, because of the threat of litigation. However, the Australian scholar, Frances Devlin-Glass, sought to produce a play called "Her

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110 K Watson-Smyth, "Joyce's Grandson Tries to Keep Explicit Molly Bloom off Stage", *The Independent,* 31 July 2000, 7.

111 Ibid.

112 V Thorpe, "A Joyce Bans Molly's Musical Climax", *The Observer*, 30 July 2000.

113 Ibid.

114 Ibid.

115 Ibid.

116 N Byrne, supra note 4.

117 R Spoo, supra note 5.

118 Ibid.

Singtime Sung" during the festivities for "Rejoyce Dublin 2004". She reported, though, that the production was frustrated in Ireland by the stance of the Joyce Estate:

> *It was an original play but it had cameos of three women characters from Joyce. We had Gertie McDowell, Molly Bloom of course, and Bella Cohen. Now in January this year we discovered that while it was legal to perform this play in Australia, it was not going to be legal to perform it in Ireland and that the grandson, who is the trustee for the Joyce Estate, was very aggressively pursuing his copyright, not allowing performances. Even if we had applied for performance rights, chances are he wasn't giving them, we knew this... It was the 20% Joyce that was the problem, for performing under EU copyright laws. So having paid our fares for ourselves and 12 actors to go to Ireland, we're not about to lie down quietly.*[119]

As a result of the legal problems, the producer and the co-writer rewrote the play - so that it would not infringe the performance rights of the Joyce estate. Francis Devlin-Glass changed the title of the play to *Her Song be Sung* to avoid any allusion to Joyce. She rewrote the play, so that it was not reliant upon any copyright texts. Devlin-Glass observed that the production had the backing of the Australian Embassy, Deakin University, and the Bank of Ireland, Assets Management.

Similar controversies have arisen in the relation to the work of other great European literary figures.

The estate of Samuel Beckett, the Irish playwright and Nobel Laureate, have been aggressive in taking legal action against productions, which depart from the author's strict instructions.[120] In the biography *Damned to Fame*, James Knowlson documents a number of proceedings taken by Beckett and his agents to control the productions of his work:

> *In the last few years of his life, Beckett gained something of a reputation for objecting to productions of his play that deviated radically, at least as he and his friends saw it, from what he had written. He was often represented as a tyrannical figure, an arch-controller of his work, ready to unleash fiery thunderbolts onto the head of any bold, innovative director, unwilling to follow his text and stage directions to the last counted dot and precisely timed pause.*[121]

However, Knowlson notes that Beckett was inconsistent as to whether he would being action in any particular case: "It made a tremendous difference if he liked and respected the persons involved or if he had been able to listen to their reasons for wanting to attempt something highly innovative or even slightly different".[122]

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119 D Carrick. "Copyright: The Estate of James Joyce", supra 87.

120 M Rimmer. "Damned To Fame: The Moral Rights of the Beckett Estate" (2003) 24 (5) *Incite*, <http://www.alia.org.au/incite/2003/05/beckett.html>

121 J Knowlson,, *Damned To Fame: The Life Of Samuel Beckett* (1996), 691

122 Id., 693.

In 1984, Beckett objected to the American Repertory Theater Company's production of *Endgame*, which was directed by Jo Anne Akalitis. The playwright was upset about a number of features of the production - the elaborate theatre set; the use of music by Philip Glass as an overture and as incidental music; and the casting of two black actors in the roles of Hamm and Nagg. Famously, in 1988, Beckett brought legal action against a Dutch theatre company, which wanted to stage a production of *Waiting for Godot*, with women acting all the roles.[123] His lawyer argued that the integrity of the text was violated because actresses were substituted for the male actors asked for in the text. The judge in the Haarlem court ruled that the integrity of the play had not been violated, because the performance showed fidelity to the dialogue and the stage directions of the play. In 1992, a French court held a stage director was liable for an infringement of Beckett's moral right of integrity because the director had staged *Waiting for Godot* with the two lead roles played by women. [124] By contrast, a Susan Sontag production featuring female actors in Sarajevo went ahead in 1993 without conflict.[125] In 1998, a United States production of *Waiting for Godot* with a racially mixed cast attracted legal threats amid accusations it had "injected race into the play".[126]

In the 2000 New York Fringe Festival, a company made light of this ongoing conflict between the Beckett estate and artistic directors.[127] The work was entitled: The Complete Lost Works of Samuel. Beckett as Found in an Envelope (partially burned) in a Dustbin in Paris Labelled "Never to be performed. Never. Ever. EVER! Or I'll Sue! I'LL SUE FROM THE GRAVE!!!". The plot concerned a fight between three producers and the Beckett estate.

In 2003, the playwright's nephew and executor, Edward Beckett, threatened to bring a legal action against the Sydney company, Company B, for breach of contract on the grounds that unauthorised music appeared in the production. The director Neil Armfield protested vigorously against the intervention of the Beckett estate: "In coming here with its narrow prescriptions, its dead controlling hand, the Beckett estate seems to me to be the enemy of art".[128] Armfield was dismayed by the moves to further restrict artistic productions of the works of Samuel Beckett:

> *Beckett is the loser. It's censorship through legal contract, and absolutely against the freedom of artists to work with respect. Gradually, the only people who will work with it are those who conform to someone who's making prescriptions based on how something was done in 1953.*[129]

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123 C Bordewijk, "The Integrity of the Playtext: Disputed Performances of Waiting for Godot", *Samuel Beckett Today* (1992), 147-152.

124 P Loughlan, "Moral Rights (A View from the Town Square)" (2000) 5 (1) *Media and Arts Law Review* 1.

125 J Albert, "Beckett Vows To Stop The Music", *The Weekend Australian*, 11-12 January 2003, 3.

126 Ibid.

127 M Shmith, "Godot Won't Be Worth Waiting For", *The Sunday Age*, 12 January 2003, 15.

128 Ibid.

129 J Albert, "Beckett Vows To Stop The Music", *The Weekend Australian*, 11-12 January 2003, 3.

In the end, the Company B production denied that the contract made any such express provisions, which prohibited the use of music in the production. Edward Beckett was forced to withdraw his threat of legal action on the clarification that the Australian licence did not prohibit music, unlike the United States production contract. He contacted Fiona Ingliss, managing director of literary agent Curtis Brown Australia, to change the standard production contract in the future.

The copyright estate for the German playwright Bertolt Brecht (1898-1956) has also taken advantage of the copyright term extension. It is ironic that such a committed socialist should be the unlikely beneficiary of this capitalist bonanza. Brecht wrote forty plays in his lifetime - including *The Threepenny Opera*, *The Life of Galileo*, *Mother Courage and her Children*, *The Good Woman of Setzuan*, and *The Caucasian Chalk Circle*. Acclaimed Company B wanted to perform Bertolt Brecht's classic *The Threepenny Opera* at Sydney's Belvoir Street Theatre.[130] The company was nearly prevented after the Brecht estate, which owns the rights to the work, attempted to stop the play after an addition of music. Rachel Healy, the general manager of Company B, observed of her dealings with the estate:

> *They manage the process very tightly and clearly to give permission for the play to be performed, and they always have the final authority. They're known around the world for being ferocious.*[131]

However, the copyright estate has not been able to prevent productions of some plays. The artistic director Neil Armfield cites the example of the Brecht play, *Caucasian Chalk Circle*: "Barbara Brecht would not allow productions that weren't 'correct' - however, she couldn't use her powers in unruly Georgia, and the Rustaveli Theatre produced the most breathtaking, exquisite Caucasian Chalk Circle which reinvented the play."[132]

3.3 Exhibitions

In 2004, Stephen Joyce argued that the *James Joyce and Ulysses* exhibition staged by the National Library of Ireland could breach copyright by displaying manuscripts and draft notebooks by James Joyce. The Estate also threatened to sue the Irish Government for breach of copyright if there were any public readings or recitations as part of "Rejoyce Dublin 2004".[133] The grandson likewise warned other organisations planning to use Joyce's words as part of their celebrations - including the Irish National Library, Irish national television, RTÉ, and the James Joyce Centre in Dublin. He also rejected a proposal by the Abbey Theatre to stage Joyce's play, *Exiles*.

Nonetheless, Laura Weldon, national co-ordinator for "Rejoyce Dublin 2004", said the festival committee would respect copyright. She said:

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130 S Williams, "Family Pain", *Australian Financial Review*, 6 November 2003, 28.

131 Ibid.

132 N Armfield, "Waiting for Police." *The Sydney Morning Herald*, 10 January 2003, 30.

133 N Byrne, supra note 4.

> *Anything the government has a hand in organising there will be no infringement. So much can be done that doesn't require copyright.* [134]

However, Weldon said it was unfortunate that there couldn't be any major public reading of Joyce's work at the festival. A spokesperson for the Irish Government also confirmed its intention to comply with Joyce's wishes. "The department and the co-ordinating committee totally respect the rights of the James Joyce estate, and would neither condone nor excuse - let alone indemnify - any breach of copyright."[135] He also confirmed that neither the Government nor the committee had been involved in negotiations with the estate regarding payment of any copyright fees.

The former director of the James Joyce Centre, and member of the Irish Parliament, Senator David Norris, was concerned about the role played by the "keepers of the flame", the copyright estate:

> *James Joyce wrote Ulysses, James Joyce wrote Finnegans Wake, James Joyce wrote A Portrait of the Artist as a Young Man and James Joyce wrote Dubliners. His descendants, quite far down the line, took no part whatever in that process of creation although they have benefited enormously in a financial sense. If anybody talks of profiteering, he should be asked what he made out of works in whose creation he played no part himself.*[136]

He concluded: "It is an astonishing irony that a man such as James Joyce, who fought for freedom of expression, wanted to reach the widest possible audience by every means at his command and committed himself so totally against censorship throughout his life should now find his works being confined and removed from public gaze and performance and scholarship inhibited by his own estate."[137]

Scholar Andrew O'Baoill expressed disappointment at the decision of the Joyce Estate:

> *Of course, the Joyce estate is technically within its rights, but such vigorous enforcement is unnecessary and distasteful. We understand some of his actions have been aimed at issues such as protecting the memory of Joyce's daughter Lucia, who suffered from mental illness, from scrutiny. But some legal actions seem solely concerned with the financial health of the estate and have no concern for nurturing the greater cultural legacy of Joyce.* [138]

The acting director of the National Library of Ireland, Aongus O hAonghusa, observed: "It is a shot across the bows. We have no option [but] to keep going until

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134 Ibid.

135 Ibid.

136 D Norris, "Copyright and Related Rights (Amendment) Bill 2004" (27 May 2004) 176 (18) Seanad Eireann 1420.

137 Ibid.

138 N Byrne, supra note 4.

somebody tells us to stop. (But) it makes the holding of the exhibition problematic."[139]

Some participants abided the decision of Stephen Joyce to deny permission to perform the work of James Joyce. Seamus Deane observed:

> *It is something that can only be registered in a great work of art. Last night, we were talking about the greatest emancipatory text, and we couldn't read a word of it because of the Stephen Joyce handcuff. This is an example of how a work of art can be squeezed, asthmatised and asphyxiated into the notion of what constitutes copyright.*[140]

As a result, Deane, the writer, Edna O'Brien, and the actor Stephen Rea, read from the works of Joyce's contemporaries, Robert Musil, Thomas Mann and Marcel Proust.

In a popular uprising, ordinary Dubliners defied the warning of the Joyce Estate to desist from public readings of the work of James Joyce. The citizens declaimed their favourite passages from *Ulysses* on every street corner of Dublin in order to celebrate Bloomsday 2004. A commentator noted: "It would have taken a veritable army of copyright lawyers to track the multitude of impromptu readings which occured in a variety of locations, such as Duke Street, that had featured in Joyce's Magnum Opus."[141]

However, some literary figures remained critical of the exploitation of James Joyce and Bloomsday as a tourist attraction. The author of *The Commitments*, Roddy Doyle, lamented the growth of the "Joyce Industry".[142] He quipped: "They'll be serving Joyce Happy Meals next."[143] He believed that the work of James Joyce had been over-rated:

> *Ulysses could have done with a good editor. You know people are always putting Ulysses in the top 10 but I doubt that any of those people are really moved by it.*[144]

However, Laura Weldon, the national co-ordinator of the festival, denied that the event had vulgarized the work of James Joyce: "We have not done anything near what he has raised the spectre of."[145]

It is true, though, that there were commercial efforts to capitalize upon the Bloomsday anniversary. In 2004, the Swiss wine producer Provins Valais, launched its red and white "Cuvee James Joyce" to coincide with celebrations in Ireland to

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139 "Emergency Law To Prevent Copyright Threat To Joyce Show", *Ireland.com*, 27 May 2004.

140 L Marlowe, "Proust Comes to Hand as Joyce is Blocked", *Irish Times*, 17 June 2004, 11.

141 "Dubliners Defy Joyce Estate on Bloomsday", 19 June 2004, <http://apollogallery.ie/newsitem.shtml?id=272>

142 R Caldwell, "One Day Turns 100", *Globe and Mail*, 12 June 2004.

143 J Crowley, "Dublin's Celebration for Joyce Overshadowed by Ulysses Copyright Row", *Telegraph*, 14 June 2004.

144 Ibid.

145 Ibid.

mark the centenary of Joyce's classic *Ulysses*.[146] The Joyce Estate secured an injunction in the Swiss courts blocking further sales of the product. The winemaker protested: "We did not intend to dishonour the name of James Joyce or the names of his descendants."[147]

4. THE JAMES JOYCE BILL: COPYRIGHT AND RELATED RIGHTS (AMENDMENT) ACT 2004

> *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.*[148]

Famously, James Joyce and his family have had a rather ambivalent relationship with his birthplace of Ireland. The director of the Rejoyce festival, Laura Weldon reflected upon why Stephen Joyce was opposed to the festival:

> *I know Stephen. This is a long-standing poor relationship with Ireland, and it goes back to the fact that in 1941, when his grandfather died, the state intentionally did not send a representative to the funeral. That was a mistake; it was a decision that may have been a function of the times. There was however, someone there from the British Consul, so Stephen understandably bears a grudge. Now we have a national celebration of someone who was previously shunned. I cannot begin to speak on behalf of Stephen, but that is one element of the dynamic.*[149]

Asked about the Irish government not sending a representative to Joyce's funeral, Monaghan responded: "It was in the middle of World War II. Okay, so Joyce was disapproved of . . . but in Ireland, think of all the writers that made it onto the banned list - it meant you were doing something right." [150]

In the 1990's, the Irish Parliament had acrimonious dealings with the Joyce Estate. There were complaints within the Parliament that Stephen Joyce had destroyed letters relating to Joyce's daughter, which had been donated to the National Library of Ireland. Senator Norris complained about what he say was this act of vandalism:

> *[Stephen Joyce] acquired a number of letters from the library which had been left to it by the late Paul Léon and indicated he was going to destroy these on the grounds that they were personal. I understand a desire to retain privacy over a period of years but to distribute materials out of collections in this manner is grossly*

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146 J Hunt, "Swiss Winemakers Pay Tribute To Joyce", *SwissInfo*, 16 June 2004.

147 Ibid.

148 "Interim Injunction Granted to Joyce Estate in Copyright Case", Interview with Medh Ruane, Morning Ireland, RTE News, 12 September 2000, at <http://www.rte.ie/news/2000/0912/morningireland.html>

149 N Connolly, "Joyce vs Joyce", 13 June 2004, <http://archives.tcm.ie/businesspost/2004/06/13/story202579369.asp>

150 Ibid.

> *wrong and should not be done. This concern should be met and in future the library should not find itself in such a position. It was extremely embarrassing and resented internationally by Joyceans because of Stephen Joyce's attitude.*[151]

Stephen Joyce also asked Samuel Beckett to destroy letters and made a great point about it. Mary de Rachewiltz, Ezra Pound's daughter, and Michael Yeats remonstrated with Stephen Joyce about such actions. Undoubtedly, Joyce's descendant earned the ire of the Irish Parliament because of this incident.

In response to the threats of the Joyce estate, the Irish Government passed emergency legislation entitled "An Act to remove doubt in relation to the lawfulness, under the Copyright and Related Rights Act 2000, of displaying certain works in public." Its short title is the *Copyright and Related Rights Amendment Act* 2004 (Ireland). The explanatory memorandum comments: "This Bill is proposed to remove any doubt as to the right of any person to place literary or artistic works protected by copyright or copies thereof on public exhibition without committing a breach of copyright as provided for by Part II of the Copyright and Related Rights Act 2000." A member of Parliament, Mr Leyden, suggested that the legislation should be entitled the James Joyce Bill, even thought it referred to all artists.

4.1 Public Exhibition

The Minister of State at the Department of Enterprise, Trade and Employment, Michael Ahern, was prompted to introduce this emergency legislation because of concerns about the breadth of section 40 of the *Copyright and Related Rights Act* 2000 (Ireland). The provision stipulates that the right of making available a work to the work to the public includes performing, showing or playing a copy of the work in public. Such a right extends to such subject matter as literary, dramatic, musical and artistic works; as well as sound recordings, films, broadcasts, published editions, databases, and computer programs. The Minister's Department held a meeting with a number of national cultural institutions. It was suggested that the showing of an original protected artwork in the permanent collection of a gallery could be a restricted act. One of Ireland's leading legal firms stated that it was satisfied that the Act effectively created an exhibition right. The Minister's Department provided the advice that the legislation was not intended to create a "public exhibition right".

In his introductory comments, Minister Ahern emphasized that there was a need for the copyright regime to achieve an appropriate balance between the competing interests of stakeholders:

> *Intellectual property legislation provides for a complex, multi-layered system of protection for rights holders. As in any other area, the legislator must seek to strike the right balance between, on the one hand, the rights holders who will be seen as the beneficiaries and, on the other, the users. While I use this distinction, there is no doubt that users also benefit from intellectual property legislation, directly or indirectly... Whether we read books, listen to music or watch television or films, all these activities which improve the*

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[151] D Norris, "National Cultural Institutions Bill 1996" (30 October 1996) 149 Seanad Éireann 226.

> *quality of life would not be possible without copyright. While the rights holder may properly benefit, it would be foolish to believe that we would have the kind of publishing and entertainment structure we now enjoy if copyright protection was not in place to underpin it.*[152]

Such a statement was intended to indicate that the legislation was not meant to derogate from the rights of copyright owners in the larger scheme of the regime.

Minister Ahern commented that the emergency legislation was intended to clarify the operation of section 40 of the *Copyright and Related Rights Act* 2000 (Ireland):

> *While I believe that section 40 does not create a public exhibition right, it is clear that if the counter view were to be found correct, the implications of potential legal actions by copyright holders would be very serious. They would have a bearing on a national basis on practically every gallery, exhibition centre, and any other relevant premises that display copyrighted works across the country. The need for this amending Bill is to remove doubt over the display of artistic and literary works and to allow for their continued display in line with the strategic and business objectives of the relevant institutions.*[153]

The Minister noted that there had been discussion whether visual artists should enjoy a public exhibition right. At one point during the passage of the *Copyright and Related Rights Act* 2000 through the Oireachtas, consideration was given to the introduction of such a right. However, he notes: "This was subsequently dropped, which makes clear that it was not the intention of the Oireachtas to create such a right."[154] Rather than providing a right of public exhibition, the Minister observed that the situation of artists could be better served by the introduction of a right of resale.

The Minister Michael Ahern commented that the legislation was not intended to solely address the controversy over "Rejoyce Dublin 2004":

> *"Stately, plump Buck Mulligan came from the stairhead, bearing a bowl of lather on which a mirror and a razor lay crossed." So starts Ulysses, and I suspect that, as he progressed his way across Dublin, Mr. Bloom little thought that here today, almost 100 years later, we would be recollecting his epic saga. The reason I refer to this today is that if one were to look at the media coverage of this Bill, one might well infer that its sole purpose is to protect the exhibition "James Joyce and Ulysses" at the National Library of Ireland,*

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152 M Ahern, "Copyright and Related Rights (Amendment) Bill 2004", (27 May 2004) 176 (19) Seanad Éireann 1412.

153 Ibid.

154 Ibid.

> *which will open shortly and mark the centenary of Bloomsday. However, this is not the case.*[155]

Senator David Norris was glad for the legislative action to protect the National Library of Ireland: "It is general in nature but, specifically, it will act to rescue a very important exhibition being held in our National Library, which was the setting of one episode of *Ulysses* in which certain aspects of free speech are discussed."[156] He observes: "It would be appalling to think that over €12 million of taxpayers' money had been expended, quite correctly, courageously and appropriately, on acquiring this very remarkable collection of material but that the taxpayers were prevented from enjoying it and seeing what they had purchased because of some obscure and arbitrary intervention under the Copyright Act."[157]

The Minister was concerned that a right of exhibition could inhibit the capacity of galleries and cultural institutions in Ireland to display artistic works. The National Museum of Ireland exhibits the copyright work of Eileen Gray, a painter, designer and architect who made a major contribution to 20th century design. The Minister notes: "While copyright in the drawings and written material lies elsewhere, it should not be permitted to inhibit the National Museum from displaying and interpreting this important part of our Heritage."[158] The National Gallery of Ireland and the Irish Museum of Modern Art display a number of important works of art and cultural heritage. The Minister observes: "The role of the museum, which incorporates an award winning education and community department, could be severely hampered by the creation of an exhibition right."[159] Furthermore, the effects of an exhibition right would have a significant impact on the network of private galleries, which form an important part of the Irish art industry. He noted: "The absence of a right to display copyrighted works could seriously hamper the ability of galleries to engage with art dealers, art owners and art enthusiasts."[160]

The Minister was also alert to the impact of a right of exhibition upon cultural institutions - such as libraries. The National Library of Ireland plans to take advantage of new technology to place the works of Ireland's greatest writers on display in the coming years. The Minister observed: "Only now is the library finally in a position to share more of its treasures with the public and to offer the public the most up-to-date interpretative facilities."[161] He lamented: "An exhibition right would have a negative effect on the library's attempts to enhance its role as the repository of the world's largest collection of Irish documentary material."[162] Furthermore, the Minister noted: "Even exhibitions in local libraries could be undermined by doubts

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155 Ibid.

156 D Norris, "Copyright and Related Rights (Amendment) Bill 2004", (27 May 2004) 176 (18) Seanad Éireann 1419.

157 Ibid.

158 M Ahern, "Copyright and Related Rights (Amendment) Bill 2004", (2 June 2004) 586 (6) Dale Éireann 1455.

159 Ibid.

160 Ibid.

161 Ibid.

162 Ibid.

about the entitlement to display copyright materials."[163] He observed: "This would affect the many exhibitions organised by proactive librarians across the country."[164]

Philip Hogan of Fine Gael was sympathetic to the need to prevent the enforcement of the copyright in James Joyce's works: "It would be a tragedy if these works and others like them were to be kept from the Irish people."[165] Nonetheless, he chided the Irish Government for introducing emergency, *ad hoc* legislation to address the problem created by the revival of James Joyce's copyright in his literary works: "The *Copyright and Related Rights (Amendment) Bill* has its background not in the uncertainty of the law but in another Government blunder."[166] Hogan observed: "While I support the measure, the Government should consider that emergency legislation has become the norm rather than the exception. I am strongly of the view that we should not legislate our way out of problems at every hand's turn, which is happening almost every month."[167]

Brendan Howlin of the Labour Party was concerned about the introduction of the emergency legislation: "It is amazing that at the last minute a specific new legislative measure should have to be introduced in this House to avoid doubt about the legal right of the National Library to present State-owned original Joyce works."[168] The other parliamentary members were willing to support the legislation in order to allow the exhibition of James Joyce's works.

Although timely, the *ad hoc* response of the Irish Parliament was inadequate. The legislation only deals with the inadvertent creation of an "exhibition right". It fails to address the abuse of existing economic rights - such as the right of reproduction, the right of adaptation, and the right of communication to the public. It also does not deal with the potential for moral rights of attribution and integrity to be used to control creative and scholarly reinterpretations of the work of James Joyce.

The legislation only deals with the public exhibition of "literary and artistic works". The Irish Parliament fails to resolve the problems faced by performers who have been denied permission to perform musical and dramatic works based on the texts of James Joyce. Moreover the legislation does not address other forms of cultural production - such as cinematographic films, television productions, and Internet websites.

The Minister for State, Michael Ahern, observed that European Union had issued a directive in respect of the right of resale for artistic works:

> *One of the grievances of artists, that they do not benefit from a subsequent sale of their painting possibly at a much higher price, is being addressed. In September 2001, the European Parliament and Council adopted Directive 2001/84/EC on the resale right for the*

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163 Ibid.

164 Ibid.

165 P Hogan, "Copyright and Related Rights (Amendment) Bill 2004", (2 June 2004) 586 (6) Dale Éireann 1457.

166 Ibid.

167 Ibid.

168 B Howlin, "Copyright and Related Rights (Amendment) Bill 2004" (2 June 2004) Dale Éireann 1457.

> *benefit of an original work of art. The transposition date for this directive is 1 January 2006.*[169]

The Minister noted: "Primary legislation may be required on droit de suite."[170] There remains great debate between artists, galleries, and auction houses over the right of resale in respect of artistic works in the United Kingdom and European Union.

4.2 The European Information Society Directive

The legislation does not address the root cause of the whole controversy over the use of the works of James Joyce - the retrospective extension of the copyright term. The public debate over Bloomsday would have never arisen if the works of James Joyce had not been transferred from the public domain back into private control. As a member of the European Union, the Irish Government is limited in what it can do about the retrospective extension of the copyright term. At present, the Parliament has to abide by the European Copyright Term Directive. The Irish Government could also contemplate measures which would allow access to copyright works.

The Irish Parliament failed to take measures to bolster the position of users of copyright material. In 1999, the Minister for State, Tom Kitt, argued that the Irish Parliament should only adopt parsimonious exceptions in respect of copyright law:

> *The Government is convinced of the need for a specific range of exceptions. They are required for technical reasons, and as a small but important element in the process of balancing the interests of rights-holders with those of the users of protected materials. Exceptions must, however, remain strictly limited, principally for two reasons. Copyright and copyright royalties are not like taxes. They cannot lawfully be imposed or remitted by Government at will. They are property rights in much the same way as rights in the ownership of other classes of property and their status as such under Bunreacht na hÉireann has been recognised by the courts. Exceptions must remain very limited as Ireland's obligations under EU and international law place strict constraints on the scope for exceptions. Exceptions must be specific and limited and they must not interfere with the normal exploitation of copyright works.*[171]

The Minister asserted that international obligations severely limited Ireland's scope for enacting new exceptions or for broadening the exceptions already in existence under the *Copyright Act* 1963 (Ireland).

Senator Norris complained that the defence in fair dealing was inadequate: "I know of a large number of projects of various kinds – critical, artistic, theatrical and broadcasting – which were inhibited, despite the existence of the concept of fair usage, because the contending parties could not establish what they thought fair usage

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169 M Ahern, "Copyright and Related Rights (Amendment) Bill 2004: Second Stage", (27 May 2004) 176 (18) Seanad Éireann 1414.

170 Ibid.

171 T Kitt, "Copyright and Related Rights Bill, 1999: Second Stage", (11 November 1999) 510 Dáil Éireann 1089-1090.

might be."[172] Senator Norris raised the question of whether Ireland should adopt a broadly based defence of fair use, along the lines of the United States model:

> *I asked the Minister on a previous occasion… about the question of fair usage and whether a definition of fair usage would be included in the Bill. This is critically important. There is no legally binding definition of fair usage, yet it is a concept known to law. Therefore, one is obliged to demonstrate in every contested case that the usage concerned is within the concept of fair usage. There are rules of thumb but nobody quite knows the definition. It would be useful if we were given some indication of what proportion of a work being quoted constitutes fair usage.*[173]

It is certainly the case that the United States defence of fair use has a wider scope than the defence of fair dealing, which can be found in Commonwealth countries.

The European Union passed the Information Society Directive in 2001.[174] This Directive entered into force on 22 June 2001. Article 5(3) deals with exceptions to the rights of reproduction and communication to the public. Under Article 5(3), Member States may choose to provide exceptions or limitations in a number of cases - such as "teaching, scientific research, and certain other private study purposes", "criticism, review, caricature, parody and pastiche", "certain purposes relating to the dissemination of news, political speeches and public lectures", and "certain Governmental, judicial, ceremonial and public security purposes". In all cases the optional exceptions are required to comply with the three step test contained in the Berne Convention and the TRIPS Agreement. It appears that the Information Society Directive would not allow a Member State to have an open-ended 'fair use' exception.

In an editorial, Professor Bernt Hugenholtz of the Institute of Information Law at the University of Amsterdam was scathing about the list of exemptions contained in the European Information Directive. He despaired:

> *If the Directive does not produce much legal certainty, it does even less in terms of approximation. This is painfully visible in the pièce de résistance of the Directive, article 5 on copyright 'exceptions'. The Commission's original aim of limiting the number of exemptions to a bare minimum, enumerated in an exhaustive manner, has backfired dramatically. In the course of the negotiations in the Council Working Group the Member States have managed to maintain most, if not all, of the limitations currently existing in national law. Thus, article 5 now lists no fewer than 20 possible exemptions. An exhaustive list indeed!*
>
> *What makes the Directive a total failure, in terms of harmonisation, is that the exemptions allowed under article 5 are optional, not mandatory (except for 5.1). Member States are not obliged to implement the entire list, but may pick and choose at will.*

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172 D Norris, "Copyright and Related Rights Bill" (29 June 1999) 159 Seanad Éireann 1573-1575.

173 Ibid.

174 European Union Information Society Directive (Directive 2001/29/EC of 22 May 2001); for an extensive commentary on the Directive, see R Burrell and A Coleman, *Copyright Exceptions: The Digital Impact* (2005).

> *It is expected most Member States will prefer to keep intact their national laws as much as possible. At best, some countries will add one or two exemptions from the list, now bearing the EC's seal of approval. So much for approximation!*[175]

Hugenholtz argues that the very notion of drawing up a finite set of limitations was ill-conceived in the first place. He observed that such an exhaustive list of limitations, drafted in inflexible, technology-specific language, was unsuitable to deal with the dynamic developments wrought by the information age.

By contrast, some commentators argue that the European Information Society Directive should be reformed, rather than abandoned. Robert Burrell and Alison Coleman maintain:

> *Somewhat counter-intuitively, we argue that the Information Society Directive provides an opportunity for fundamental reform. Thus far, pro-user commentators have invariably been implacably opposed to the Information Society Directive, probably in large part because the initial proposals for a directive would have dramatically curtailed the range and scope of copyright exceptions across Europe. In contrast, we argue that it is important to look at the final version of the Directive and that if the wording of the Directive were to be followed closely this would result in the introduction of a range of flexible, but not entirely open-ended exceptions.*[176]

The authors tilt against the adoption of a United States-style defence of fair use in the United Kingdom and other European countries. They protest that the doctrine is not a "panacea" for all the frustrations of copyright users. The authors suggest that the open-ended defence of fair use is prone to certain vagaries and uncertainties, both in terms of its statutory definition and judicial interpretation. They maintain that the doctrine would be difficult to successfully graft onto United Kingdom law because it is very much the product of the peculiarities of American jurisprudence. However, the authors perhaps underestimate the problems that have been created by copyright term extension. As such, modest reform to the European Information Society Directive might not be in itself an effective means of dealing with such difficulties.

It is true that, in some instances, European courts have been willing to read the defence of fair dealing in light of broader protections of fundamental political and civil freedoms. In *Ashdown* v *Telegraph Group*, the United Kingdom Court of Appeals considered a matter of copyright infringement involving a newspaper using unauthorised quotations from the unpublished diaries of a prominent political leader.[177] It considered whether the *Human Rights Act* 1998 (UK) had impacted on the protection afforded to owners of copyright by the *Copyright, Designs and Patents Act* 1988 (UK). The Court of Appeals observed:

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175 B Hugenholtz, "Why the Copyright Directive is Unimportant, and Possibly Invalid", (2000) 22 (11) *European Intellectual Property Review* 501-502.

176 R Burrell and A Coleman, *Copyright Exceptions: The Digital Impact* (2005), 9-10.

177 *Ashdown* v *Telegraph Group* [2002] Ch 149, CA.

> *We have reached the conclusion that rare circumstances can arise where the right of freedom of expression will come into conflict with the protection afforded by the Copyright Act, notwithstanding the express exceptions to be found in the Act. In these circumstances, we consider that the court is bound, in so far as it is able, to apply the Act in a manner that accommodates the right of freedom of expression. This will make it necessary for the Court to look closely at the facts of individual cases (as indeed it must whenever a "fair dealing" defence is raised). We do not foresee this leading to a flood of litigation.*[178]

The Court of Appeals emphasized, in particular, the need to flexible with the use of remedies. It noted: "The fair dealing defence under section 30 should lie where the public interest in learning of the very words written by the owner of the copyright is such that publication should not be inhibited by the chilling factor of having to pay damages or account for profits."[179] It observed that "as damages are compensatory and not at large, they may produce a relatively mild chill." [180]

The Irish Government could seek to take advantage of all the flexibilities available within the European Information Society Directive. It could take advantage of the spectrum of exceptions permitted under the Directive. At present, the *Copyright and Related Rights Act* 2000 (Ireland) provides for fair dealing for the purposes of research or private study,[181] and criticism or review.[182] There is also a range of special exceptions for educational institutions, libraries and archives.[183] There are a range of minor exceptions for very particular circumstances.[184] Arguably, the Irish Government has scope for expanding the range of exceptions permissible under the European Information Society Directive. For instance, it could provide that the defence of fair dealing extends to derivative works, such as parody and pastiche. The Irish Government could also instruct the courts to read such provisions in light of fundamental rights - such as the freedom of expression and speech. It should also encourage judges to carefully consider the appropriate remedies to ensure that copyright law does not have an unduly chilling effect.

Alternatively, the Irish Government could always take a bolder course of action and challenge the validity of the European Information Society Directive. If successful, the Government could then replace the current set of narrow defences in respect of fair dealing with a broad-based defence of fair use. It could also legislate for extensive exemptions for libraries and cultural institutions, and a flexible compulsory licensing scheme. Such revisions would promote the original purpose of copyright law to promote the wider public interest in education, research, and learning.

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178 *Ashdown* v *Telegraph Group* [2002] Ch 149, CA.

179 *Ashdown* v *Telegraph Group* [2002] Ch 149, CA.

180 *Ashdown* v *Telegraph Group* [2002] Ch 149, CA.

181 S 50 of the *Copyright and Related Rights Act* 2000 (Ireland).

182 S 51 of the *Copyright and Related Rights Act* 2000 (Ireland).

183 SS 53-70 of the *Copyright and Related Rights Act* 2000 (Ireland).

184 SS 71-106 of the *Copyright and Related Rights Act* 2000 (Ireland).

The Irish Government could seek to engage in "compulsory licensing" of the works of James Joyce, subject to reasonable terms of compensation. As Lionel Bently and Brad Sherman comment:

> *In certain exceptional circumstances the law will intervene to force the copyright owner to license the work and require the 'licensee' to pay a fee. The basis for such action varies, as do the conditions on which the law permits the copyright owner's wishes to be overridden. Provisions of this nature are called 'compulsory licences'. In jurisprudential terms, the grant of a compulsory licence converts a property rule into a liability rule.*[185]

A compulsory licence can be invoked under domestic law; or can be imposed through the general powers of the European Commission.

In such a scenario, the Joyce estate would be unable to withhold its permission to use the various works of the Irish man of letters. Compulsory licensing would thus allow scholars and anthologists to draw upon the literary works of James Joyce. Such a mechanism would also enable actors, singers, and performers to use and adapt the works of James Joyce, without fear of recriminations from the Joyce estate. Furthermore, compulsory licensing would also be a means to ensure that cultural festivals, such as "Rejoyce Dublin 2004", were not unduly interrupted.

There are precedents for such a course of action. In the "Magill" case, the European Commission ordered the British and Irish television networks to grant licenses under their copyrights in their program schedules to a magazine publisher to enable it to print a consolidated listing of programs on all channels in a TV guide.[186] In the "IMS Health" case, the European Court of Justice expanded upon the judgment in the "Magill" matter, and subjected dominant firms to much broader duties to license.[187] Furthermore, there has been scope for compulsory licensing in the United Kingdom where copyright had lapsed but had been revived by the Duration Regulations.[188]

The Irish Government could even seek to acquire Crown ownership of the works of James Joyce in return for compensation to the Joyce estate. In other words, it could "nationalise" the works of James Joyce. The Irish Government could then take charge of the management of the literary works of James Joyce, and allow access to such works for free to interested parties.

Furthermore, on a more systematic level, the Irish Government could seek to lobby other members of the European Union to revise the offending European Copyright Term Directive. It could seek to implement measures to ameliorate the problems caused by the copyright term extension. In light of the extension of the copyright term in Ireland, there is a need for a serious contemplation of the United

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185 L Bently and B Sherman, *Intellectual Property Law: Second Edition* (2001), 258-259.

186 *RTE & ITP* v *EC Commission* C-241/91 and C-242/91 (Magill Case) [1995] ECR 808.

187 *IMS Health GmbH & Co OHG* v *NDC Health GmbH & Co KG* (2004) Case C-418/01; and D Gitter, "Strong Medicine for Competition Ills: The Judgment of the European Court of Justice in the IMS Health Action and its Implications for Microsoft Corporation", (2005) 15 *Duke Journal of Comparative and International Law* 153.

188 *Duration of Copyright and Rights in Performances Regulations* 1995 (SI 1995/3297), r 24 (1).

States proposed model of the *Public Domain Enhancement Act* 2005 (US). There needs to be a mechanism to deal with the creation of a large number of "orphaned" works under the European Copyright Term Directive.

There would be a need for any such legislative reforms to comply with relevant international treaties. Article 9 (2) of the *Berne Convention* set down the "3-step" test in the context of the economic right of reproduction: "It shall be a matter for legislation in the countries to permit the reproduction of such works in certain special case, provided that such reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." Article 13 of the *TRIPS Agreement* established the "3-step" test as a general rule for limitations and exceptions to copyright law: "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder." A World Trade Organization panel has considered the nature and scope of limitations under Article 13 in the matter of the *United States - Section 110 (5) of the US Copyright Act*.[189] In this matter, the Panel adopted a relatively restrictive understanding of the "3-step" test in its ruling against the so-called US "Fairness in Music Licensing Act", a special exemption for the use of music in some commercial establishment.

Some jurists have applied the "3-step test" in a stringent fashion. Most famously, Professor Samuel Ricketson has doubted whether the United States defence of fair use complies with the yardstick of the "3-step" test.[190] He has observed in a qualified fashion:

> *It is quite possible that any specific judicial application of Section 107 will comply with the three-step test as a matter of fact; the real problem, however, is with a provision that is framed in such a general and open-ended way. At the very least, it is suggested that the statutory formulation here raises issues with respect to unspecified purposes (the first step) and with respect to the legitimate interests of the author (third step).*[191]

Self-interested copyright owners have invoked the "3-step" test in a procrustean fashion, declaring that few, if any, exceptions meet this international standard.

However, other commentators believe that Article 13 of the *TRIPS Agreement* should be read in a less dogmatic manner.[192] Such scholars note that countries

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189 *United States - Section 110 (5) of the US Copyright Act*, document WT/ DS160/ R.

190 S Ricketson. "WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment", Standing Committee on Copyright and Related Rights, Ninth Session, Geneva, 23-27 June 2003, <http://www.wipo.int/documents/en/meetings/2003/sccr/pdf/sccr_9_7.pdf> See also D. J. Brennan, 'The Three-Step Frenzy - Why the TRIPS panel decision might be considered per incuriam' (2002) *Intellectual Property Quarterly*, 212-225; and J Ginsburg, "Toward Supranational Copyright Law? The WTO Panel Decision and the A Three Step Test for Copyright Exceptions" (2001) 187 *Revue Internationale du Droit d'Auteur* 3.

191 Ibid, 69.

192 P Samuelson, "Challenges for the World Intellectual Property Organization and the Trade-Related Intellectual Property Rights Council in Regulating Intellectual Property Rights in the Information Age" (1999) 21 *European Intellectual Property Review* 578; D Gervais, "Towards A New Core International Copyright Norm: The Reverse Three-Step Test" (2005) 9 *Marquette Intellectual*

entered into such trade agreements on the understanding that the defence of fair use and other exceptions were entirely acceptable. Such an interpretation is reinforced by Article 7 and Article 8 of the *TRIPS Agreement*, which extol the virtues of establishing a system of intellectual property "to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare". Furthermore, the *WIPO Copyright Treaty* emphasizes in its preamble "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research, and access to information, as reflected in the Berne Convention". Such a generous perspective suggests that Ireland and other countries can take advantage of a range of flexibilities - including fair use, compulsory licensing, crown use and orphaned works - within current trade agreements in order to address problems posed by the copyright term extension.

5. CONCLUSION

> *I will not serve that in which I no longer believe, whether it call itself my home, my fatherland, or my church: and I will try to express myself in some mode of life or art as freely as I can and as wholly as I can, using my defence the only arms I allow myself to use - silence, exile, and cunning.*
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> James Joyce, *A Portrait of the Artist as a Young Man*[193]

The controversy over "Rejoyce Dublin 2004" provides a cautionary tale about copyright law and cultural institutions. The Joyce Estate has brought an array of legal actions to control the publication and communication of the works of James Joyce. Such litigation has had a chilling effect upon literary scholarship, anthologies, music compositions, public performances, and cultural exhibitions. As Robert Spoo observes:

> *Extremely long copyrights have given artificial voice and weight to the personal predilections of one who, in the absence of such rights, would be an ordinary participant 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 right-holder to become a privileged and arbitrary custodian of culture. 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*

Property Law Review 1-37; and P Jaszi, "Public Interest Exceptions In Copyright: A Comparative and International Perspective" (May 2005) *Correcting Course: Replacing Copyright for Libraries in National and International Arenas* <http://correctingcourse.columbia.edu/paper_jaszi.pdf>

193 J Joyce, *A Portrait of the Artist as a Young Man* (1914, reprinted 1992).

> *remote from the cultural and historical origins of the work in question is dispiriting.*[194]

The case of the Joyce Estate is not an isolated one. There have been a spate of similar incidents involving the custodians of the work of JD Salinger, Sylvia Plath, TS Eliot, Samuel Beckett, Bertolt Brecht, to name a few. The trend towards copyright term extension has invested copyright estates with a great deal of power. There will be increasing conflict with scholars, biographers, artists, and performers who wish to use such copyright work before the expiry of the life of the author plus seventy years.

There is a need to revise and design copyright law in order to protect the interests of libraries, archives, galleries, and cultural institutions. As Brendan Howlin observed in the Irish Parliament:

> *Libraries are an extraordinary community resource. There has been an extraordinary development in the State-wide library network in the past five to ten years. Libraries are not just repositories of books which people take out and return within a week or a fortnight. For many communities, libraries are now a historical, cultural and artistic hub. We need to acknowledge that in a way we have not done up to now and allow libraries to develop to their full potential.*[195]

There should be stronger mechanisms to guarantee access to copyright works - such as a wide range of exceptions for fair dealing, or better still an open-ended defence of fair use, extensive exemptions for libraries and cultural institutions, and a flexible compulsory licensing scheme. Such revisions would promote the original purpose of copyright law to promote the wider public interest in education, research, and learning.

The *ad hoc* reforms of the Irish Parliament do not go far enough. The extension of the copyright term should be wound back in Europe and elsewhere, because of its impoverishment of the public domain. There is no need for the relatives of authors to enjoy such extensive post-mortem rights. The work of James Joyce should be allowed to fall into the public domain. As Robert Spoo comments:

> *When Ulysses finally enters the public domain worldwide, we will 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 Irish epic. We will 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. On that red-letter day for the public domain, Ulysses will finally take its place with The Odyssey as raw myth-making material for some future national epic. Indeed, it can be argued that a work does not*

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194 R Spoo, supra note 5.

195 B Howlin, "Copyright and Related Rights (Amendment) Bill 2004" (2 June 2004) 586 (6) Dale Éireann 1458-1459.

> *really become a "classic" until it is unqualifiedly available for cultural exploitation. It would follow that overlong copyright protection is an inhibition on the full organic development of a classic.*[196]

The time has come for the work of James Joyce to be emancipated from the private possession of his estate, and become part of the intellectual commons, free to be interpreted, adapted, and performed by scholars and artists alike.

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196 R Spoo, supra note 5.