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Copyright and Joyce: Litigating the Word: James Joyce in the Courts

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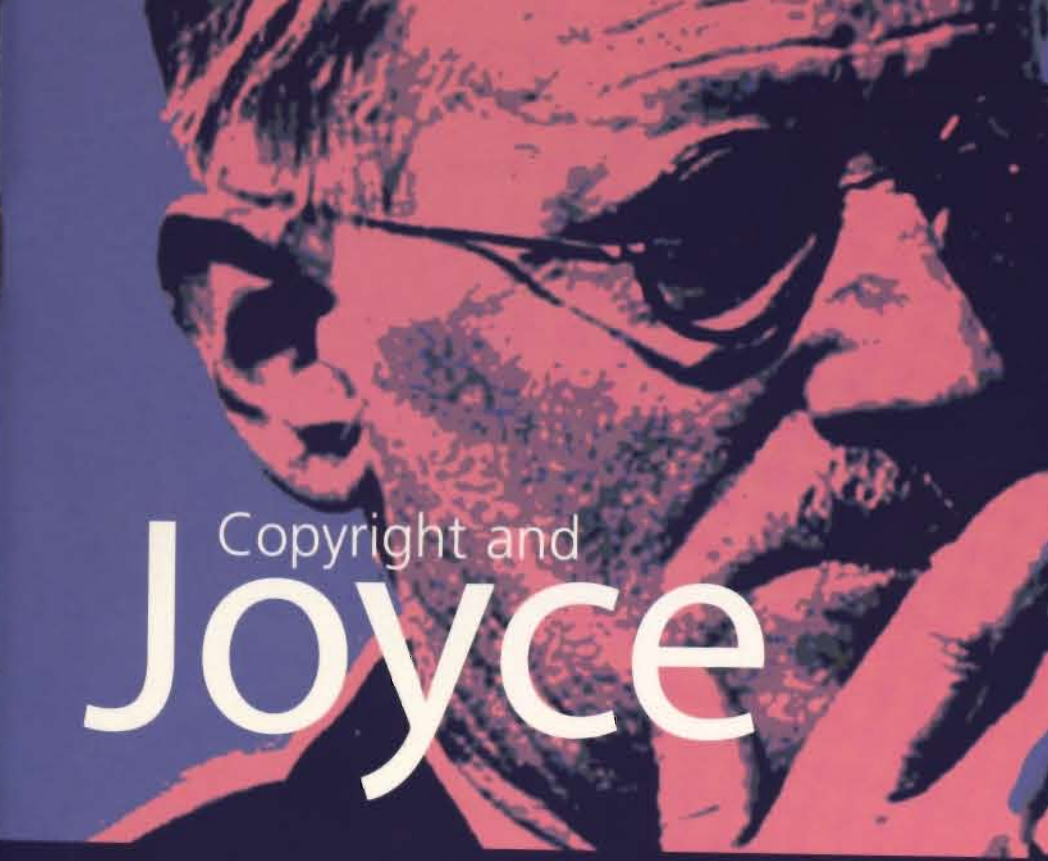

Copyright and Joyce

THE JAMES JOYCE CENTRE **DUBLIN**

...the language in which we are speaking is his before it is mine. How different are the words *home*, *Christ*, *ale*, *master*, on his lips and on mine! I cannot speak or write these words without unrest of spirit. His language, so familiar and so foreign, will always be for me an acquired speech. Stephen Dedalus, Ulysses

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Litigating the Word: **James Joyce in the Courts**

by Robert Spoo

Nora, Joyce and his solicitor

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It is in the Physics Theatre of what is now Newman House, University College Dublin, that James Joyce's alter ego, Stephen Dedalus, converses with the dean of studies about Thomas Aquinas and tundishes.[1] Under cover of scholarly banter, Stephen engages in what he perceives to be a tense contest of wits with this "courteous and vigilant foe" whom he knows to be an English convert to Jesuit Catholicism.[2] In the course of chatting about aesthetics and intellectual beauty, it occurs to Stephen that "the language in which we are speaking is his before it is mine. How different are the words *home*, *Christ*, *ale*, *master*, on his lips and on mine! I cannot speak or write these words without unrest of spirit. His language, so familiar and so foreign, will always be for me an acquired speech."[3] Stephen silently frets to think that the English language—the very material from which he hopes to fashion beautiful forms—is the possession of a foreign, conquering nation.

What Stephen feels in this disorienting moment is the sting of intellectual property—of being a user of words that are owned by another. While we normally think of intellectual property as something held by *persons*, natural or corporate, here we encounter, through Stephen, a fleeting glimpse of language owned and occupied by an entire people—a national copyright, as it were. It is an uncanny moment for him as he senses that these freighted and storied English words—"home," "Christ," "ale," "master"—are familiar yet foreign. His native tongue takes on the alienated luster of "an acquired speech"; Irish speakers of English, he seems to be thinking, are limited licensees of the British national copyright. Or, to use a metaphor with a different resonance, the Irish suddenly seem to him to be tenants of the English language, enjoying the narrowly defined and precarious rights of those who inhabit but do not own. After all, licenses are often revoked at will; tenants may be evicted if they cannot pay the price.

Stephen's experience is a starting-point for what I would like to discuss here: the increasingly common experience of being licensees or tenants within our own culture. Many have known it: scholars who wished to make use of manuscripts in a library or archive but ran up against the veto of a copyright owner; students who planned to make a short film containing historical film clips but could not locate a rights-holder; attorneys, like myself, who have assisted writers, scholars, composers, or filmmakers who had been denied permission, or had feared, to incorporate in their creations images, sounds, or texts that exist within our cultural heritage.

Many, when they first realize that the raw materials of culture are privately owned for very long periods of time, are incredulous. How can a work like *A Portrait of the Artist as a Young Man*, completed nearly a century ago, still be protected by copyright throughout the European Union? The answer, of course, is that legislatures in Europe, as in the United States, have seen fit to lengthen copyright terms in the interests of international harmonization, benefits to authors' descendants, and the additional incentives that copyright owners theoretically will have to put the protected works to new uses.

In a piece I wrote for the National Library of Ireland not long ago, I imagined aging copyrights in terms of two fictions of senescence: the myth of Tithonus and the story of Dorian Gray.[4] Most modern copyrights are like Tithonus, I suggested, the mortal who, at the behest of his lover Eos, the goddess of the dawn, was granted immortality but, cruelly, not eternal youth. Few copyrighted works ever have more than a brief shelf life; it is only the rare work, such as Joyce's *A Portrait*, that achieves an enduring fame. Most intellectual creations are destined for unremarkable and unmarketable obscurity, remaining of interest, if at all, to a handful of scholars. Yet under our present laws, all such homely works are protected indiscriminately by extravagantly long copyrights from the moment of their creation. Forgotten by the public, of no economic value to publishers or even to their authors or their authors' heirs, these aging works nevertheless remain wrapped in the comparative immortality of copyright, "[a] white-hair'd shadow roaming like a dream / The ever silent spaces of the East."[5] Were they permitted the good death yearned for by Tennyson's Tithonus, were they released into the public domain earlier, these works might attract the attention and energies of resourceful users who could rejuvenate them by discovering their potential for new editions, adaptations, performances, and other transformative uses.

In contrast to Tithonus copyrights are Dorian Gray copyrights. These are the successful copyrights, the ones associated with works that have conferred fame or fortune. But the success of an aging copyright, like Dorian's uncanny youth, is purchased at a dear price: a famous ninety-year-old work might appear to have benefited from the youth-preserving effects of its copyright, but there are corruptions and deformations, carefully hidden away in the attic of our culture, that mar this perfect picture. The tale of Dorian Gray and his painted image captures this paradox of cultural monopoly nicely, I think. Like the handsome face of Dorian, the superficial triumphs of long copyrights tell only half the story. What is shielded from the public's gaze, because withheld from the public domain, is the other side of copyright. As Wilde put it: "Beneath its purple pall, the face painted on the canvas could grow bestial, sodden, and unclean. What did it matter? No one could see it."[5] The hidden corruption of a long-celebrated copyright manifests itself as an absence, a vacancy. Overlong copyrights inflict invisible losses; they put us mournfully in mind of the hidden might-have-beens of culture, the possibilities surrendered by law so that an elderly copyright might retain superficial youth and beauty for a few more decades.

Tithonus copyrights impede those who seek to *preserve and reconstruct* our past: archive-going scholars, documentary filmmakers, public-domain publishers, alternative-canonists. It is easy to lose sight of the truth that our culture is not effortlessly given to us, that it does not exist as a usable past except through innumerable acts of preservation and custodianship. For a vivid example we have only to think of the millions of feet of copyrighted celluloid that lie crumbling in public archives or private collections. "Of the tens or hundreds of thousands of movies made before 1950, fully fifty percent are irretrievably lost."[7] One of the arguments made by proponents of copyright term extension in the United States was that longer protection was needed to provide movie studios with incentives to restore the old films they hold. But the works most urgently in need of restoration are what are known as "orphan films": obscure documentaries, newsreels, independent productions, rare historic footage.[8] These items—numerically the majority of existing films—are of little or no interest to studios and entrepreneurs, yet they lie under the deterrent pall of a copyright. If Tithonus has a direct counterpart in the world of intellectual property, it must be in the copyrighted silver-nitrate dust of these vanishing witnesses to a vanished past.

Dorian Gray copyrights hamper primarily those who seek to *change* our understanding of the past: adapters, arrangers, parodists, appropriation artists, allusive poets, revisionist novelists. Not content to be passive consumers of iconic literature, music, and art—a posture that is encouraged by many holders of celebrity copyrights—these individuals would alter, rearrange, exploit, sometimes desecrate well-known works. Copyright litigation in the United States often casts these individuals as rebels, outlaws, or vandals: examples include the rap group, 2 Live Crew, that turned a Roy Orbison ballad into coarse bawdry; the appropriation artist Jeff Koons who made a sculpture of lovingly photographed puppies and placed it in his Banality Show; the novelist Alice Randall who rewrote *Gone With the Wind* as *The Wind Done Gone*, an African-American inversion of Margaret Mitchell's picture of race relations in pre-Civil War America; and the social-satirist photographer Tom Forsythe who snapped pictures of Barbie dolls in attitudes of subjugation to vintage kitchen appliances, and titled the images Fondu à la Barbie, Malted Barbie, and Barbie Enchiladas.[9]

Even scholarly editors can pose a threat to Dorian Gray copyrights. We saw this when the textual scholar Danis Rose was sued in Britain by the James Joyce Estate for producing a "Reader's Edition" of *Ulysses* which the Estate deemed a mutilation of the letter and spirit of Joyce's epic. The Estate's lawsuit alleged both copyright infringement and the tort of "passing off"—a legal theory usually reserved for disputes between product manufacturers but used by the Estate to argue that Rose had sought to foist off on the public an inferior version of *Ulysses* that Joyce never wrote. That is, the Estate sued Rose both for copying Joyce's text (copyright infringement) and for deviating from the text (passing off): Rose was damned for seeking to preserve culture and for trying to change it. What the Estate was hoping to establish by its passing-off theory was that *Ulysses* was a kind of marketable goods, like Coca Cola or Fuji Film, that can be legitimately offered by only one commercial source. When pressed by the court to describe what would constitute a version of *Ulysses* falling within the legitimate "class of goods," counsel for the Estate replied that any edition approved by James Joyce himself or later by his Estate would be within the authorized class. The court roundly rejected this circular and subjective criterion—very fortunately, in my view. For the application of such an elastic concept to a work of literature, if dignified by legal precedent, would strengthen any copyright owner's hand against adaptations that it had not pre-approved, and might create a legal basis for preventing a work from being freely usable even after its copyright had expired. Courts are rightly wary of attempts to add legal protections atop the already formidable copyright monopoly.[10]

An anthologist is a preserver of culture who sometimes runs afoul of both Tithonus and Dorian Gray copyrights. In October 2000, as some will recall, the Irish High Court granted the Joyce Estate's request for an interlocutory injunction preventing Cork University Press from publishing extracts from Rose's *Ulysses* edition in an anthology entitled *Irish Writing in the Twentieth Century: A Reader* (2000), edited by Professor David Pierce of York St. John College. The editors at the Press had originally sought the Estate's permission to publish extracts from an earlier *Ulysses* edition, but when the Estate insisted on a fee of £7000-7500 sterling for extracts from the 1922 Paris edition, the Press decided to go with the Rose edition instead, apparently believing that it could do so without the Estate's permission under Irish regulations that protect "third parties" whose plans to make use of works were impacted by the revival of copyrights in the mid-1990s, following the European Union Directive on copyright harmonization.[11] Not persuaded by this argument, the Irish High Court granted an injunction,[12] whereupon the Press decided to forgo further litigation and instead printed the anthology with the Joyce extracts neatly excised and a cardboard blank inserted bearing the notice: "Pages 323-346 have been removed due to a dispute in relation to copyright."

Interestingly, there is no question that under the United Kingdom's counterpart to the Irish regulations, an anthology issued in Northern Ireland or Britain could have printed extracts from the 1922 *Ulysses* under a U.K. compulsory-license provision that permits anyone to make use of a revived-copyright work, as long as the user gives reasonable advance notice to the copyright owner and agrees to pay a reasonable fee or remuneration at some point.[13] The Irish regulations lack such a compulsory license, however. This divergence between Ireland's and the U.K.'s EU implementation rules points up some of the obstacles facing those who hope for wide dissemination in Europe of works they have created in reliance upon the short-lived public-domain status of older works.[14]

Perhaps it is too late for Irish lawmakers to add such a compulsory-license exception to the regulations, but I urge it anyway—I hope not presumptuously. I am emboldened in doing so by the swiftness with which three years ago the Irish Senate acted to avert another copyright catastrophe. During Dublin's 2004 ReJoyce celebrations, the National Library of Ireland unveiled stunning interactive digital displays of *Ulysses* manuscripts which the NLI had acquired in 2002. But the NLI would have been hard pressed to go forward with this impressive educational tool had it not been for an emergency copyright amendment approved by the Irish Senate in response to purported threats by the Joyce Estate. The amendment allows an institution to display an artistic or literary "work, or a copy thereof, in a place or premises to which members of the public have access."[15] Quite simply, Irish museums and libraries that possess works of art and literature may display them, or copies of them, on the premises. While some believe that such a commonsense privilege is implied in the law anyway, it is well that Ireland has joined other countries in expressly inscribing such a display right in its copyright law.

I have spoken of myths and general principles up to this point, but I have experienced these copyright issues quite concretely. I would like to talk a bit about that history. Mine is a tale of two careers—academic scholar and lawyer—and it grows out of my and others' encounters with various copyright holders, including the Estate of James Joyce. I take the Joyce Estate as my main text, not because it is a typical literary estate or copyright owner; in many ways it is not. But it is an entity that I came to know indelibly as a scholar and editor and later as an opponent in litigation. Despite its unusual, larger-than-life character, the Joyce Estate gives us insight into the problems and challenges of the present copyright regime.

I first want to say something that might not be obvious from my remarks so far: I am in favor of copyrights. I have spent a good deal of my time helping clients protect them. When used properly, copyrights add to and enhance our culture; they allow authors to control the uses of their creations and to benefit from their commercial exploitation. But copyrights are peculiar monopolies in that they protect private property in which the public has an interest. An author's text or a painter's canvas is different from a family heirloom or other personal property that is protected by more familiar laws. A text or a painting is an intangible public good (as economists call it) that can be reproduced and disseminated at relatively little cost, for the social weal, without depletion of its source.[16] Ease of copying, especially in our digital age, makes such works vulnerable to piracy but also endows them with an enormous capacity to teach and delight.

Recognizing these two aspects of copyrighted works—one turned towards private ownership, the other solicitous of the public interest—the law makes certain that copyrights are strong yet porous. While they confer a monopoly on creative expression, the doctrine of fair use (or fair dealing) and the idea/expression dichotomy—to name two venerable limitations on copyright control—permit unauthorized use of portions of that expression. As the great American Judge Learned Hand wrote of *Abie's Irish Rose*, Anne Nichols' 1920s stage comedy about Irish-Jewish intermarriage: "her copyright did not cover everything that might be drawn from her play; its content went to some extent into the public domain."[17] The leaky nature of copyrights ensures that the public's interest in individual creative expression is not thwarted. It is this dual nature of copyrights that has allowed me, as a practitioner, to view every legal question from both sides—that of the copyright owner and that of the copyright user, plaintiff and defendant.

Of course, the theory of copyrights that I am urging—the utilitarian, incentivist theory that they are limited entitlements that exist to stimulate creative activity and then recede from the picture—is not a theory shared by everyone. Some believe that a copyright is the recognition of an inalienable natural right inhering in property ownership, and that limitations placed upon this right are extraneous and possibly illegitimate.[18] Some, like the Joyce Estate and James Joyce himself, hold that authors are endowed with moral rights that protect them from mutilations and misattributions that would prejudice their honor and the integrity of their works; and they treat copyrights as the nearest tool to hand for approximating these moral rights.[19] These approaches contain important elements of truth, but they seem to me inadequate to the extent that they make the case for robust authorial rights without fully accounting for the public interest in a usable culture.

Sometimes, through myopia or self-interest, an author's estate loses sight of the public's lawful and moral interest in the copyrighted works of the author. I know well that not all estates are alike. Some are public-spirited and strongly supportive of scholarship; one thinks immediately of the heirs of W.B. Yeats. The Ezra Pound literary property trust, with which I have had close contact over the years, understands the importance of biography and criticism and has permitted many scholarly projects to go forward, even when they might treat Pound's political and social views less than flatteringly. It is precisely the unpredictable character of copyright holders that points up the folly of extremely long copyrights. Lengthy copyrights consign culture to a genetic lottery, giving our literary and artistic heritage as hostages to fortune. Modernism has been aptly characterized as "that which is still propertized."[20]

By the laws of testacy, intestacy, and contract, this property is sometimes placed in the hands of remote and unsympathetic owners; sometimes it is given to enlightened monopolists. One simply never knows, and that's the problem. Implicit in my remarks here is the suggestion—over-optimistic perhaps—that, as between the public domain and the lottery of heirs, works that have already enjoyed a life of copyright protection will find their highest and best use in the heterogeneous resourcefulness of the public domain.

I began as Editor of the *James Joyce Quarterly* in 1989 at the University of Tulsa in the United States. Little did I know then that my work as a Joyce scholar and editor would lead to unsought tension with the Estate of James Joyce. The Estate soon made clear its distaste for most contemporary critical and biographical writing on Joyce, and it increasingly used its control of copyrights to enforce its opposition. The Estate's special aversion, as it made abundantly clear, was for biographical treatments of James Joyce and his family. Bruce Arnold has described the Estate's position accurately, though with a note of approval from which I must respectfully dissent:

> Not only is Stephen [Joyce] protective of his grandfather; he is also concerned with intrusions into the private lives of his grandmother, his father and mother, and his mother's earlier family, and Lucia, his aunt. It is a legitimate position to adopt, and if the protection of it requires a stern attitude towards copyright, the only effective control over information he can employ, then so be it.[21]

It was the spectacle of what I saw as a growing misuse of copyrights that sparked my interest in the law. By 1996 I was a part-time law student, still teaching as a fulltime

academic; two years later I had transferred to the Yale Law School, where I took my degree in 2000. After a judicial clerkship, I entered fully into the practice of law and soon began to represent copyright owners and users alike—all the while maintaining my relationships with scholars of Joyce and modernism.

I have suggested that overlong copyrights inflict invisible losses. Stephen Dedalus in *Ulysses* imagines each event of history as having "ousted" an infinity of possibilities.[22] A century-long copyright is an ouster of possibilities. Most of the time we can only guess at what might have been in the absence of the copyright scarecrow. But because the Joyce Estate has been so colorful in some of its dealings with permission-seekers, the press has taken an interest. A few years ago, *The Irish Times* reported that the Estate had denied the request of a 23-year-old Irish composer, David Fennessy, to use eighteen words from *Finnegans Wake* in a short choral piece commissioned by Lyric FM for a Europe-wide broadcast.[23] The *Times* quoted Stephen James Joyce, trustee of the Estate, as having written Fennessy, "To put it politely, mildly[,] my wife and I don't like your music." Fennessy was devastated: "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. 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."

After years of working with and, more recently, acting as legal counsel for scholars and libraries, I can say that for every David Fennessy whose silencing has been publicized, there are multiple disappointed projects that never get widely reported. Perhaps the most disturbing of these are the ones involving digital and Internet technology, because of their potential for making Joyce's works widely accessible and comprehensible. For example, Professor Michael Groden, the noted Joyce scholar who was awarded an honorary D.Litt. degree by the National University of Ireland/University College Dublin in 2004, worked for years on a multimedia electronic version of *Ulysses*, complete with links to annotations, manuscripts and published versions of the book, maps of Dublin, period photographs, and audio clips of songs and arias mentioned in the text. Later conceived as a collaboration with the University at Buffalo, this digital *Ulysses* project folded in 2003 after the Joyce Estate demanded an initial fee of between $500,000 and $1,000,000 for permission to proceed, in addition to a royalty percentage on eventual subscriptions. The Estate also conditioned its permission upon the exclusion from the project of all Irish organizations and institutions as well as of the Zürich James Joyce Foundation. Another requirement was that Professor Groden himself be excluded unless he agreed to provide the Estate with information concerning the National Library of Ireland's purchase in 2002 of the Léon collection of Joyce papers. Although Professor Groden had served only as a scholarly advisor to the NLI's purchase, the Estate expected him to tell "everything he knows," including information about the sellers' claim to legal title to the papers.[24]

Some of these demands had little or nothing to do with protecting an economic interest in the copyrighted works of James Joyce; the Estate was attempting to use its literary rights to extract other concessions. This kind of thing is increasingly being challenged by litigants in the United States as "copyright misuse"—an attempt to extend copyright protection beyond its appropriate sphere.[25]

Most often, copyright misuse makes its appearance as a defense to a claim of copyright infringement. But occasionally it is affirmatively alleged by a plaintiff who, fearing an infringement suit, preemptively files what is called an action for a declaratory judgment, asking the court to rule that the plaintiff's activities are not infringing and that the defendant copyright holder has engaged in acts of copyright misuse. An unusual feature of the copyright-misuse doctrine is that a party has standing to allege acts of misuse that were perpetrated against persons not connected with the lawsuit in any way. That is, the alleged misuser's *general* conduct as a copyright owner can become an issue. If misuse is proved, the court may refuse to enforce the perpetrator's copyrights until the misuse and its effects have been purged.

Allegations of copyright misuse were a centerpiece of the declaratory-judgment action brought in 2006 by Professor Carol Loeb Shloss of Stanford University against the Estate of James Joyce.[26] Professor Shloss had spent years researching a challenging subject—the sparsely-documented life of Joyce's troubled daughter, Lucia—only to be told by the Estate that, for reasons of family privacy, she was forbidden to quote anything by Lucia, her father, or any other Joyce family member. Nearly all of the documents that the Estate had declared off-limits to Professor Shloss and other scholars are either already published or held in collections that are open to the public. So these documents are not "private" in the sense that they are physically or legally inaccessible. Scholars can learn any of their secrets; they just can't safely quote their findings in articles and books or on the Internet. They can kiss but not tell.

Professor Shloss finally published her biography, *Lucia Joyce: To Dance in the Wake*, with Farrar Straus & Giroux in 2003, but not before she and her publisher had cut pages of quotations after receiving reiterated threats from the Joyce Estate. Believing that an uncut version should be made available to scholars, Professor Shloss informed the Joyce Estate in 2005 that she was planning to launch a website that would contain material that had been removed from the book. The Estate replied, predictably, that this would constitute copyright infringement, and forbade the project. It was then that, having engaged the legal services of my law firm and the Stanford Center for Internet & Society, Professor Shloss filed a declaratory-judgment action against the Estate in the federal District Court for the Northern District of California.

For years, Professor Shloss's research on Lucia Joyce had been hampered by opposition from the Joyce Estate. She had, after all, chosen a subject that has been at the heart of the Estate's demand for privacy—a strange sort of demand, it must be said, made on behalf of deceased persons, concerning documents that reside in public archives, and to be enforced through the ill-fitting machinery of copyright law. One form the Estate's opposition took was strong letters sent to Professor Shloss, her publisher, her publisher's president, her publisher's lawyer, her university's provost, and, finally, to her Stanford lawyers after she expressed the intention of publishing her supplemental Lucia website. These letters became important evidence in the lawsuit. The letter-writing and other conduct alleged in Professor Shloss's Complaint—including allegations that the Estate or its intermediaries attempted to interfere with her physical access to archival materials and to prohibit her from quoting from Lucia Joyce's medical records, over which the Estate holds no copyright—these allegations and others formed the bedrock factual contentions in the case.

Professor Shloss's Complaint, which named the Joyce Estate and its trustee Seán Sweeney as defendants, was filed hard upon Bloomsday, June 16th, 2006.[27] The lawsuit sought, among other things, a judicial declaration concerning fair use, copyright misuse, and the public-domain status of the 1922 first edition of *Ulysses* in the United States. The proposed website containing materials cut from Professor Shloss's book was to be confined to U.S. Internet addresses, so that it could be downloaded only in that country. This decision was made because a U.S. court would be reluctant to entertain the case under multiple bodies of national law with which the court was not familiar—British or Irish fair dealing, for example—or to issue orders that would not necessarily be recognized by foreign courts.

Once the Estate had secured representation by the Los Angeles office of the large and prestigious Jones Day firm, a lengthy period followed as the parties' lawyers discussed preliminary issues: personal jurisdiction over the Estate and Mr. Sweeney, scheduling, possible settlement, and so on. It was not until November 2006 that the Estate made a significant move. On November 17, the Estate filed a motion to dismiss Professor Shloss's lawsuit in its entirety. Along with this motion, the Estate alternatively moved, in the event the action was not dismissed, to have certain allegations and claims stricken from her Complaint. The Estate was particularly eager to strike allegations that it had engaged in copyright misuse and that the 1922 *Ulysses* is in the public domain in the United States.

The essential assertion in the Estate's motion was that Professor Shloss had no real and reasonable fear, then or ever, of being sued by the Joyce Estate for copyright infringement. As strange as that may sound, we had to treat the argument as a serious one, because federal law does not permit a United States court to entertain a lawsuit unless there is a genuine, concrete dispute between the parties. If it turned out that Professor Shloss had never had a reasonable apprehension of suit, the court would not have the power to go on refereeing a hypothetical controversy. The Estate was not content to try to show that Professor Shloss's legal contentions were wrong; it also launched attacks on her qualities as a scholar and her motivations as plaintiff. It asserted in its moving papers that her lawyers were seeking only "to air their views and test their theories in a public forum."[28] One of the Estate's lawyers even spent two days at the Harry Ransom Humanities Research Center in Austin, Texas, studying a Lucia Joyce manuscript for the purpose of creating a lengthy motion exhibit analyzing Professor Shloss's transcriptions of the document.[29]

We responded to the Estate's motion with opposition papers that placed before the court, along with other evidence, numerous letters that Stephen James Joyce had written targeting Professor Shloss's book project, including letters to her publisher announcing that the Estate was "willing to take any necessary action" to enforce its copyrights; that the Estate's "record in legal terms is crystal clear" and that it was "prepared to put [its] money where [its] mouth is"; that Shloss's book would be published at "your risk and peril" [*à vos risques et périls*] and that "there are more ways than one to skin a cat."[30]

In a 19-page order, Judge James Ware denied the Estate's motion to dismiss, holding that these communications from the Estate, as alleged, "occurred regularly over a period of nine years, from 1996 to 2005, and easily left [Shloss] with a reasonable apprehension of copyright liability when she filed this suit in 2006."[31] The court

pointedly remarked that "[t]his case is not a mere '"academic" war' or a "'hypothetical" case,' as [the Estate asserts]."[32] The court also refused to dismiss or strike Professor Shloss's copyright misuse claim, holding that "[the Estate's] alleged actions significantly undermined the copyright policy of 'promoting invention and creative expression,' as [Shloss] was allegedly intimidated from using (1) non-copyrightable fact works such as medical records and (2) works to which [the Estate] did not own or control copyrights, such as letters written by third parties."[33] Professor Shloss had also properly alleged, Judge Ware said, copyright misuse "based on [the Estate's] actions vis-a-vis third parties," a ruling that permitted Professor Shloss's allegations about the Estate's treatment of *other* scholars to remain in the case.[34] Having denied the Estate's motion to dismiss, the court rejected all of the Estate's motion to strike except as to one paragraph of Professor Shloss's Complaint containing certain background allegations. Professor Shloss had defeated 99% of the Estate's combined motions.

It was never Professor Shloss's wish to settle her lawsuit; settlement was triggered by the Estate's actions in the case. At the hearing on the motion to dismiss, the Estate's lawyers stated in open court that the Estate was considering filing a "covenant not to sue" Professor Shloss for any of the material contained in her website.[35] Later, the Estate made this intention even clearer. A covenant is a formal, binding promise. Had the Estate filed such a promise with the court, Judge Ware would have had little choice but to dismiss the case upon the Estate's motion, because a federal court, once again, is constitutionally forbidden to entertain a lawsuit where there is no longer a genuine dispute between the parties.

A covenant would have rendered the case moot because it would have given Professor Shloss all the practical relief she had sued for. The question then became, what more could she obtain if she agreed to dismissal after settlement than if she waited for dismissal after a covenant? The answer can be found in the public settlement agreement: not only can Professor Shloss publish her website, but she can also reproduce it in print form within the United States—something she did not ask for in her Complaint.[36]

Some have expressed puzzlement that this case did not go to a final judgment and create a major precedent for other scholars and copyright users. Chalk it up to the Estate's decision not to litigate the case any further. It is true that the lawsuit did not generate a momentous public legal decision like Judge John M. Woolsey's famous 1933 opinion in *United States versus One Book Called "Ulysses"*, which held that a copy of *Ulysses* was not "obscene" under the federal Tariff Act and therefore could be admitted into the United States.[37] But even precedent has its limits. Judge Woolsey's opinion was the law only of the Southern District of New York, strictly speaking. Even after it was affirmed by the Second Circuit Court of Appeals, its writ ran only to the federal districts of New York, Connecticut, and Vermont.[38] Yet the Woolsey opinion shows that a case can have symbolic resonance and practical consequences far beyond its official reach. A just lawsuit can arouse public indignation against a misuse of law or power, and can offer the edifying example of an individual standing up to that misuse. It can also make a point about the costs of behaving badly. Much of our social order functions without the formal interventions of law.[39] A California publisher in 1935, though lacking the official protection of the Woolsey decision, might have drawn

inspiration and courage from that case to issue a progressive new novel. A publisher today might find in the Shloss case the message that scholarly fair use is real and vital enough for at least one academic and her attorneys to have cared enough to go to law over it. A lawsuit as right and resonant as *Shloss v. Estate of James Joyce* may have a long career of moral, if not legal, authority. (The Shloss case has nevertheless generated two significant published legal opinions—the decision denying the Estate's motion to dismiss, and a second opinion granting Shloss her attorney's fees. These are discussed and cited herein.)

The nature of Professor Shloss's settlement—a court-approved and court-enforceable settlement giving her all the practical relief she had sought, and more—permitted her, we thought, to ask the court to order the Joyce Estate to pay her legal fees. In contrast to Ireland and Britain, where the loser of a lawsuit is often required to pay the winner's legal fees, the winner of lawsuit in the United States is entitled to fees only in certain circumstances. In our case, the governing statute—the Copyright Act—permits fees to be awarded to the "prevailing party."[40] So we moved for fees, and on May 30, 2007, Judge Ware granted the motion in a five-page opinion, holding that Professor Shloss was the prevailing party because "by the Settlement Agreement, [she] achieved a material, judicially sanctioned alteration in the parties' legal relationship."[41] The court explained that

> [Shloss] secured via Settlement Agreement the essence of the relief she had sought: the ability to publish the Electronic Supplement online for access within the United States, without threat of suit from [the Estate]. Moreover, [Shloss] secured further relief not even requested in her First Amended Complaint: that is, the ability to publish her Electronic Supplement in print format, without fear of suit from [the Estate]. In return, [Shloss] agreed only to dismiss her claims with prejudice; she did not agree to pay [the Estate] money or to limit her conduct. [The Estate's] contention that they are the "prevailing party" because [Shloss] agreed to dismiss her claims with prejudice is untenable.[42]

What does this order do? It tells us in no uncertain terms that Carol Shloss "prevailed" on the basis of the results she obtained. Is it precedent on the attorneys' fees issue? Yes. The court's order granting fees has become an official published opinion. Is the case precedent on questions of fair use and copyright misuse? Partly, since the court's order denying the Estate's motion to dismiss, with its significant discussion of the copyright-misuse doctrine, has also become an official publication. Bear in mind that Judge Ware has ruled on the fact of fees; the parties still have to litigate the amount of fees.[43]

* * *

We inhabit a world just now that affords more opportunities for copying and disseminating the work of others, with or without permission, than at any other time in history. It is also a world that has erected more invisible fences than ever before; laws have increased the scope and duration of protection for the very forms by which many of us express ourselves. Just when works created seventy or eighty years earlier were about to enter the public domain, they were placed out of reach by legislatures throughout Europe and in the United States. Every DVD warns us, before we are permitted the pleasure of watching a movie in our homes, that criminal sanctions await us if we copy or perform any portion of the work without authorization. The gradual, cumulative sense of being an outsider or suppliant within one's own culture is

something I think more and more people are feeling. Stephen Dedalus's sense of exclusion from ownership of his own language is being replicated at the level of cultural participation.

One reason the Irish Senate acted so quickly to clear the way for the NLI's displays of Joyce manuscripts three years ago, I believe, was that it seemed intolerable that the country that had produced James Joyce should be forbidden to celebrate his achievements by allowing the public a glimpse of his creative process. Several years ago during a radio broadcast, Medh Ruane suggested an intriguing justification for reproducing Joyce's words without leave of the Estate. "James Joyce," she remarked, "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." There is a visceral truth here, even though this is not the sort of argument that would carry much weight in a courtroom.[44] *Ulysses* is a modern epic assembled from facts, personalities, and events in the Irish public domain—the quintessential *roman trouvé*. It is not wholly unreasonable to view Joyce's masterpiece as more immediately and intimately the property of the people than other works of the imagination. Joyce himself admitted that he was a "scissors and paste man," an adapter and arranger of what came to hand.[45] Of his final work, *Finnegans Wake*, he remarked: "It is not I who am writing this crazy book. It is you and you and you and that girl over there and that man in the corner."[46]

One senses in the reaction of the Irish to the Joyce Estate's assertions of ownership something akin to the outrage of countries whose plant genetic sources and traditional knowledge are being patented by the pharmaceutical companies of wealthier nations, with the result that the source countries may be excluded from their own resources by legal prohibition or physical depletion.[47] But copyrights are much more porous than patents, and a great novel is a public good whose riches cannot be exhausted by overuse. In the ecology of copyright, a work like *Ulysses* has its creative origins in the raw materials of the public domain. With the sanction of the law, the work comes under private control for a certain term, upon the expiration of which the work returns to the public domain to increase those raw materials and to spur the creation of new works—and, incidentally, new copyrights.

We are beginning to see the ways in which excessively long copyrights upset this ecological cycle. Today, more than sixty-five years after his death, and eighty-five years after the first publication of *Ulysses* as a book, Joyce and his writings have become part of the furniture of our cultural life; morally and practically, they have outgrown the legal monopoly that allows a private entity to restrict their adaptation and dissemination. Stephen Dedalus's sense of being a tolerated tenant within his own language is not a desirable condition for the production and enjoyment of literature and other art forms. Given the current legal regime, copyrights will continue to fall into the hands of those who might misuse them. Lawyers, judges, scholars, librarians, and others who can affect copyright's ecological balance must play a part in working towards a sane and balanced system. Legislators must resist the inevitable invitation to extend copyrights yet again.

Ulysses, *A Portrait*, *Dubliners*, *Finnegans Wake*—we deserve to encounter these titles without the unrest of spirit that the words *home*, *Christ*, *ale*, *master* cause in Stephen Dedalus. Copyrights are not only porous; they are temporary. In the end, and by legal design, it is the copyright owner who is the tenant of time; the once and future owner of creative works is the public.[48]

Notes

[1] This essay originated as a paper presented in the Physics Theatre of Newman House on November 19, 2007. I would like to thank University College Dublin, the James Joyce Centre, Professor Anne Fogarty, and Laura Barnes for making that talk possible. The views expressed in this essay are my own and not necessarily those of my former law firms; the Stanford Law School's Center for Internet and Society, its Cyberlaw Clinic and Fair Use Project; Professor Carol Loeb Shloss; University College Dublin; or the James Joyce Centre.

[2] James Joyce, *"A Portrait of the Artist as a Young Man" and "Dubliners"*, introd. Kevin J.H. Dettmar (1916; New York: Barnes & Noble, 2004), p. 167.

[3] Ibid.

[4] The following three paragraphs are an adaptation of material that was published in Robert Spoo, *Three Myths for Aging Copyrights: Tithonus, Dorian Gray, Ulysses* (Dublin, Ireland: National Library of Ireland, 2004), pp. 4-5, 11-12.

[5] Alfred Lord Tennyson, "Tithonus" (first published in 1860), reprinted in *"Idylls of the King" and a Selection of Poems* (New York: New American Library, 1961), p. 286, lines 8-9.

[6] *The Picture of Dorian Gray* (first published in book form in 1891), reprinted in *The Complete Works of Oscar Wilde: Stories, Plays, Poems & Essays* (New York: Harper & Row Publishers, 1989), p. 99.

[7] See Brief of Hal Roach Studios and Michael Agee as Amici Curiae Supporting Petitioners, p. 11, *Eldred v. Ashcroft*, 123 S. Ct. 769 (U.S. 2003) (citing Report of the Librarian of Congress, "Film Preservation 1993: A Study of the Current State of American Film Preservation" (1993), p. 3).

[8] See Brief of Hal Roach Studios and Michael Agee as Amici Curiae Supporting Petitioners, p. 15, *Eldred v. Ashcroft*, 123 S. Ct. 769 (U.S. 2003) (citing Report of the Librarian of Congress, "Film Preservation 1993: A Study of the Current State of American Film Preservation" (1993), p. 5).

[9] See, respectively, *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994); *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001); *Mattel Inc. v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2003).

[10] These observations about the Joyce Estate's lawsuit against Danis Rose and its "passing off" claim are more fully developed in my Introduction to the "Joyce and the Law" special issue of the *James Joyce Quarterly*, 37 (Spring/Summer 2000), 339-42. Hereafter cited as "Spoo, Introduction to *Joyce and the Law*."

[11] Cork University Press argued that it could lawfully receive a sublicense to print extracts of the Danis Rose edition from Rose's current licensee, Macmillan Publishers Ltd., under § 14(2) of the European Communities (Term of Protection of Copyright) Regulations, 1995 S.I. No. 158, as adopted in the Irish Republic. This regulation insulates from liability any "person" that "has acquired (whether before or after commencement of these Regulations) rights" in a work "from a person exploiting that work or other matter [if] copyright in that work or other matter has been revived by virtue of these Regulations." This broadly drafted provision raises a number of knotty questions that the Irish High Court was unwilling to resolve on a motion for an interlocutory injunction.

[12] See the court's opinion in this case: *Sweeney v. Nat'l Univ. of Ireland Cork, Trading as Cork University Press*, No. 10497P/2000 (Irish High Court, October 9, 2000).

[13] Under the U.K. compulsory license provision, if the user and the copyright owner cannot agree to a reasonable fee or royalty, the Copyright Tribunal will determine the license terms. Once the user has given reasonable notice, he or she is licensed, and the royalty may be determined later. Duration of Copyright and Rights in Performances Regulations, 1995 S.I. No. 3297, §§ 24, 25. The license is compulsory, or "as of right," because the copyright owner can haggle over royalties to a point, but he or she cannot refuse the license.

[14] "Differences in the nature of the transitional provisions adopted by each country are regrettable [and] produce further possible trade barriers within the European Economic Area." Brad Sherman & Lionel Bently, "Balance and harmony in the duration of copyright: the European Directive and its consequences," in *Textual Monopolies: Literary Copyright and the Public Domain*, eds. Patrick Parrinder and Warren Chernaik (Office for Humanities Communication Publication, No. 8, 1997), p. 23. For a more detailed discussion of the Pierce anthology and the litigation surrounding it, as well as the Estate's lawsuit against Danis Rose and Macmillan Publishers, see my article, "A Rose Is a Rose Is a Roth," *James Joyce Literary Supplement*, 16 (Spring 2002), 3-4.

[15] Irish Copyright and Related Rights Act, section 40(7)(a) (as amended). For a lively discussion in the Irish Senate of the amendment and what precipitated it, see Seanad Éireann, vol. 176 (May 27, 2004), Copyright and Related Rights (Amendment) Bill 2004: Second Stage (found at http://historical-debates.oireachtas.ie/S/0176/S.0176.200405270008.html (last visited July 28, 2007)).

[16] Copyrights and other forms of intellectual property are often referred to as "public goods." "A public good is something that is not depleted by use and can be held by more than one person at a time. It can be taken from the owner by others at minimal cost." Stephen L. Carter, "Owning What Doesn't Exist," *Harvard Journal of Law and Public Policy*, 13 (1990), 102. Public goods are "subject to non-rivalrous consumption, in the sense that one user's use of the idea does not reduce the value of the idea to another who wishes to use it"; it can be used by others "at a cost close to zero." Ibid.

[17] *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930).

[18] For a discussion of natural-rights interpretations of copyright, see Tom W. Bell, "Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works," *University of Cincinnati Law Review*, vol. 69 (2001), 741, 760-774.

[19] See James Joyce, "An Address to the Fifteenth International P.E.N. Congress" (1937), reprinted in *The Critical Writings of James Joyce*, ed. Ellsworth Mason and Richard Ellmann (New York: Viking Press, 1959), pp. 274-75.

[20] Paul K. Saint-Amour, Review of William M. Landes and Richard Posner, *The Economic Structure of Intellectual Property Law* (Cambridge: Harvard Univ. Press, 2003), in *Modernism/modernity*, 12 (2005), 511.

[21] Bruce Arnold, *The Scandal of "Ulysses": The Life and Afterlife of a Twentieth Century Masterpiece* (Dublin, Ireland: The Liffey Press Ltd, 2004), p. 318.

[22] James Joyce, *Ulysses* (1922), ed. Jeri Johnson (Oxford: Oxford University Press, 1993), p. 25

[23] Medh Ruane, *The Irish Times* (June 10, 2000) (found on the Internet at www.ireland.com/newspaper/newsfeatures/2000/0610/newsfea10.htm).

[24] These demands and conditions were set forth in letters written by the Joyce Estate to Professor Groden and officials of the University at Buffalo in January and September 2003, respectively. Those letters are broadly but accurately paraphrased here. The demands contained therein formed the basis of allegations in the lawsuit brought against the Joyce Estate by Professor Carol Loeb Shloss, discussed below.

[25] Copyright misuse is discussed and adjudicated in an increasing number of judicial decisions in the United States. See, for example, *Intel Corp. & Dell Inc. v. Commonwealth Scientific & Industrial Research Organization*, 455 F.3d 1364, 1368 (Fed. Cir. 2006); *Assessment Technologies of Wisconsin, LLC v. WIREdata, Inc.*, 350 F.3d 640, 647 (7th Cir. 2003); *Practice Management Information Corp. v. American Medical Association*, 121 F.3d 516, 520 (9th Cir.1997); *In re Napster, Inc. Copyright Litigation*, 191 F. Supp. 2d 1087, 1103 (N.D. Cal. 2002). The doctrine of copyright misuse is discussed in William F. Patry and Richard A. Posner, "Fair Use and Statutory Reform in the Wake of Eldred," *California Law Review*, 92 (2004), 1658-59.

[26] The following account of the Shloss litigation appears in somewhat different versions and contexts in two forthcoming essays by me: "Archival Foreclosure: A Scholar's Lawsuit Against the Estate of James Joyce," *American Archivist*; and "Litigating the Right To Be a Scholar," *Joyce Studies Annual 2008*.

[27] See Professor Shloss's Amended Complaint against Seán Sweeney and the Estate of James Joyce (found at http://cyberlaw.stanford.edu/system/files/Amended+Complaint+Final%5B1%5D.doc).

[39] Defendants' Motion to Dismiss, or in the Alternative to Strike, Carol Loeb Shloss's Amended Complaint, p. 20.

[40] Declaration of Anna E. Raimer in Support of Defendants' Reply to Plaintiff's Opposition to Defendants' Motion to Dismiss, or in the Alternative to Strike, Carol Loeb Shloss's Amended Complaint, p. 1, Exhibit B.

[41] These statements by Mr. Joyce appear in his letter to Professor Shloss, dated August 8, 2003, and his letter to Leon Friedman, an attorney for Farrar Straus & Giroux, dated November 21, 2002. These letters and others by Mr. Joyce were included in their entirety with Professor Shloss's Opposition to Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion to Strike. The Opposition, which quotes from the letters in the context of factual and legal argument, may be found at http://cyberlaw.stanford.edu/system/files/Shloss+Brief+FINAL.pdf.

[42] *Shloss v. Sweeney*, 515 F. Supp. 2d 1068, 1077 (N.D. Cal. 2007).

[43] Ibid., 1079.

[44] Ibid., 1080.

[45] Ibid., 1081.

[46] At the hearing, an attorney for the Joyce Estate stated: "Your Honor, certainly negotiating a covenant is something that the Estate has considered. . . . [I]t doesn't seem that the Estate should have to give that covenant. That doesn't mean it won't." Transcript of Proceedings Before the Honorable James Ware, January 31, 2007, p. 17.

[47] A copy of the Settlement Agreement, signed by the parties on March 16 and 19, 2007, may be found at http://cyberlaw.stanford.edu/system/files/Shloss+Settlement+Agreement.pdf. Professor Shloss's Lucia Joyce website may be found at http://www.lucia-the-authors-cut.info/. Because of the nature of the lawsuit and its settlement, this website can be accessed only within the United States.

[48] 5 F. Supp. 182 (S.D.N.Y. 1933).

[49] *United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705 (2d Cir. 1934).

[50] See generally Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge, Mass.: Harvard Univ. Press, 1991).

[51] See 17 U.S.C. § 505.

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

[53] Ibid., 1085-86.

[54] Also pending as of this writing is Professor Shloss's Motion for Clarification of Judge Ware's order granting her fees.

[55] A related discussion of Ruane's remarks can be found in Spoo, Introduction to *Joyce and the Law*, 342-43.

[56] James Joyce letter to George Antheil, 3 January 1931, *Letters of James Joyce*, vol. 1, ed. Stuart Gilbert (New York: Viking Press, 1957), p. 297.

[57] Eugene Jolas, *Man From Babel*, eds. Andreas Kramer and Rainer Rumold (New Haven: Yale Univ. Press, 1998), p. xxi.

[58] Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy* (London: Commission on Intellectual Property Rights, 2002), Executive Summary, pp. 8-12 (found at http://www.iprcommission.org/graphic/documents/final_report.htm).

[59] The notion that the public is the eventual owner of intellectual property is not merely rhetorical. In a recent decision, a federal appellate court in the United States held that a legislative enactment that removed certain works from the U.S. public domain by restoring their copyrights may violate the public's free-expression rights because "the speech at issue here belonged to [individuals wishing to make free use of lapsed copyrights] when it entered the public domain. . . . By removing works from the public domain, [the law] arguably hampers free expression and undermines the values the public domain is designed to protect." Golan v. Gonzales, No. 05-1259, 2007 U.S. App. LEXIS 21199, at *37-*38 (Sept. 4, 2007).

All moanday, tearsday, wailsday,
thumpsday, frightday, shatterday
till the fear of the Law.

Finnegans Wake

This booklet, written by Robert Spoo, Associate Professor of Law, University of Tulsa College of Law, is based on his talk given as part of a Joyce Lecture Series at Newman House, November 2007, co-sponsored by UCD and the James Joyce Centre.

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