

## EZRA POUND'S COPYRIGHT STATUTE: PERPETUAL RIGHTS AND THE PROBLEM OF HEIRS

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*This Article explores the historical and present-day significance of proposals for copyright reform advanced in 1918 by the controversial American poet, Ezra Pound. These proposals have never been discussed by legal scholars and have received but scant attention from literary scholars. Yet, like William Wordsworth and Mark Twain, whose efforts to reform copyright law are much better known, Pound is a major writer whose views shed considerable light on the state of copyright law and the conditions of authorship in his time. Pound's proposed statute—offered as a “cure” for American book piracy—begins by making authors' copyrights exclusive and perpetual, and goes on, surprisingly, to introduce broad compulsory-license provisions that would prevent authors and their heirs from interfering with later efforts to disseminate authors' works and require publishers only to pay a fixed royalty on sales. The tension in Pound's proposal between a perpetual, exclusive copyright and expansive compulsory licenses shows him to be an inheritor of two legal and economic traditions: on the one hand, a Lockean and Romantic belief in a strong property rule grounded in an author's natural rights and unique personality, and, on the other, an anti-monopoly, free-trade preference for a liability rule that would encourage wide dissemination of affordable works to serve the public interest. As the author of such a dual-purpose proposal, Pound emerges as remarkably and presciently alert to the dangers currently posed by lengthy copyright terms unaccompanied by limitations that adequately protect the public. Today, the estates of James Joyce, T.S. Eliot, Marianne Moore, Samuel Beckett, and other modernist authors use extended copyrights to discourage or control use of those authors' works by scholars, critics, and others. Pound's perpetual, royalty-based copyright would, in principle, have removed or reduced such obstacles to the study and enjoyment of modernist authors. Moreover, Pound's draft statute anticipates recent proposals by Richard Posner, Lawrence Lessig, and others for mitigating the conflict between the lengthy copyright monopoly and the needs of the public.*

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INTRODUCTION.....	1776
I. POUND'S COPYRIGHT STATUTE AND LEGALIZED AMERICAN BOOK PIRACY.....	1782
II. POUND'S COPYRIGHT STATUTE: TEXT AND HISTORICAL INFLUENCES .....	1788
A. The Text .....	1788
B. Historical and Philosophical Influences .....	1797
1. Genius, Intellectual Labor, and Oil Stock.....	1798
2. Nineteenth-Century Royalty Schemes and Anti-Monopoly Reform .....	1803
III. LITERARY IMPLICATIONS OF POUND'S PROPOSED STATUTE .....	1807
A. International Copyright and Communication Among Nations .....	1807
B. Competing With the Dead: Copyright and the Public Domain .....	1810
C. Significant Omissions From Pound's Statute.....	1814
IV. THE PROBLEM OF HEIRS AND LONG COPYRIGHTS.....	1819
A. Pound's Prescience.....	1820
B. Recent Proposals for Balancing Long Copyrights With the Needs of the Public.....	1828
CONCLUSION .....	1831
APPENDIX .....	1833

## INTRODUCTION

In mid-September 1918, an independent American army under the command of General John J. Pershing struck a swift and decisive blow against German positions at the St. Mihiel salient in northeastern France.<sup>1</sup> Catching the Germans in the act of abandoning the salient, Pershing's forces, assisted by French colonial troops and strong aircraft cover, quickly overran the enemy position and recaptured the fortified area, which had been in German hands for four years.<sup>2</sup> The success of the Americans, who had been regarded as inexperienced latecomers to the European conflagration, boosted Allied morale and persuaded Pershing and Allied Commander Marshal Foch that American doughboys had the fighting ability to make a difference in the war.<sup>3</sup>

Among those who welcomed the news of the victory was Ezra Pound, the American expatriate poet who had been living in London since 1908. Brash and outspoken, Pound had made no secret of his detestation of the

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1. See JOHN H. MORROW, JR., *THE GREAT WAR: AN IMPERIAL HISTORY* 249–50 (2004); David R. Woodward, *The Military Role of the United States in World War I*, in *THE AMERICAN MILITARY TRADITION FROM COLONIAL TIMES TO THE PRESENT* 127, 145–46 (John M. Carroll & Colin F. Baxter eds., 2d ed. 2007).

2. See MORROW, *supra* note 1, at 249–50.

3. See JAMES L. STOKESBURY, *A SHORT HISTORY OF WORLD WAR I*, at 286–87 (1981); ROBERT H. ZIEGER, *AMERICA'S GREAT WAR: WORLD WAR I AND THE AMERICAN EXPERIENCE* 99–100 (2000).

Great War, which he frequently referred to as “Armageddon.”<sup>4</sup> Several of his friends and fellow artists had gone to the conflict, and some had not returned.<sup>5</sup> In a poem published not long after the war, Pound lamented the “[y]oung blood and high blood, / fair cheeks, and fine bodies” that had been sacrificed “[f]or a botched civilization.”<sup>6</sup> His sense of the waste and futility of war, combined with a growing belief that wars were created for profit by powerful international banking interests, fed a bitterness that eventually caused him to lose faith in the efficacy of liberal democracies.<sup>7</sup>

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4. See, e.g., Ezra Pound, *A Shake Down*, LITTLE REV., Aug. 1918, at 9, 11, reprinted in 3 EZRA POUND'S POETRY AND PROSE CONTRIBUTIONS TO PERIODICALS 145, 147 (Lea Baechler et al. eds., 1991) [hereinafter POETRY AND PROSE CONTRIBUTIONS] (“As Armageddon has only too clearly shown, national qualities are the great gods of the present . . . ”).

5. Pound's friends, the French sculptor and artist Henri Gaudier-Brzeska and the English philosopher and poet T.E. Hulme, were killed in action in 1915 and 1917, respectively. See EZRA POUND AND DOROTHY SHAKESPEAR: THEIR LETTERS: 1909–1914, at 345–47 (Omar Pound & A. Walton Litz eds., 1984).

6. EZRA POUND, *Hugh Selwyn Mauberley (Contacts and Life)* (1920), reprinted in PERSONAE: THE SHORTER POEMS OF EZRA POUND 183, 188 (Lea Baechler & A. Walton Litz eds., rev. ed. 1990).

7. The story of Pound's disenchantment with democratic societies is a tragic one. Throughout the 1930s, his journalism and correspondence grew increasingly anti-Semitic as he more and more associated the problems of modern political and economic systems with what he called international “usury” and the bankers’ conspiracy that he imagined sustained it. See generally Robert Spoo, *Introduction to EZRA AND DOROTHY POUND: LETTERS IN CAPTIVITY, 1945–1946*, at 1–2 (Omar Pound & Robert Spoo eds., 1999) [hereinafter LETTERS IN CAPTIVITY]. In 1928, Pound moved to Italy and came to embrace the charismatic fascism of Benito Mussolini. See *id.*; see also generally HUMPHREY CARPENTER, *A SERIOUS CHARACTER: THE LIFE OF EZRA POUND* 457–58, 489–93 (1988) (discussing Pound's admiration for Mussolini). By 1940, he was broadcasting over Rome Radio in support of the Duce, and he continued to do so even after the United States entered World War II on the side of the Allies. During his radio talks, he held forth on the history of money, the supposed evils of international finance and “Jew-ruin'd England,” and savagely denounced Winston Churchill, Franklin D. Roosevelt, and their policies. LETTERS IN CAPTIVITY, *supra*, at 2–4; see also CARPENTER, *supra*, at 583–97 (describing Pound's radio broadcasts). Pound's broadcasts did not go unnoticed by the U.S. Department of Justice. When Italy fell to the Allies in 1945, he was captured and held on charges of treason against the United States. After a Washington, D.C. jury found him mentally unfit to stand trial, he was confined to a federal mental institution for the next twelve years. See generally LETTERS IN CAPTIVITY, *supra*, at 4–36; CARPENTER, *supra*, at 750–53. Commentators have found Pound's prejudice and fascist politics difficult to reconcile with his achievements as one of the twentieth century's greatest poets and translators. See, e.g., ALAN M. DERSHOWITZ, *AMERICA ON TRIAL: INSIDE THE LEGAL BATTLES THAT TRANSFORMED OUR NATION* 297 (2004) (“Ezra Pound was a great poet with perverse and bizarre opinions about world politics. Like many others in the 1930s and 1940s, Pound attributed the ills of the universe to a worldwide ‘Jewish conspiracy.’”); JEAN STEFANCIC & RICHARD DELGADO, *HOW LAWYERS LOSE THEIR WAY: A PROFESSION FAILS ITS CREATIVE MINDS*, at xii (2005) (describing Pound as “this country's foremost modernist poet” and a person who “embraced bizarre economic theories and became an admirer of Mussolini and Italian fascism”); *Ezra Pound May Escape Trial and Be Allowed to Go to Italy*, N.Y. TIMES, Apr. 2, 1958, at 16, reprinted in A CASEBOOK ON EZRA POUND 128 (William Van O'Connor & Edward Stone eds., 1959) (“Pound, regarded by many critics as among the greatest American poets, was indicted for treason because of pro-Fascist activities in Italy during World War II.”).

But in September 1918, with Pershing's brilliant stroke at St. Mihiel fresh in the news, Pound could not conceal his patriotic pride. Writing in the British periodical *The New Age*, he hailed the battle as a "magnificent and epic incident" that might smooth the way for warmer relations and better understanding between Britain and the United States.<sup>8</sup> Such an entente was critical now, Pound felt, because significant legal and bureaucratic obstacles still stood in the way of full and free interaction between the two nations. Chief among these obstacles, he believed, were the copyright laws of the two countries, especially America's "thieving copyright law," as he would later call it.<sup>9</sup> In his *New Age* article, entitled "Copyright and Tariff," Pound declared:

The present American copyright regulations tend to keep all English and Continental authors in a state of irritation with *something* American—they don't quite know what, but there is a reason for irritation. There is a continuous and needless bother about the prevention of literary piracy, a need for agents, and agents' vigilance, and the whole matter produces annoyance, and ultimately tends to fester public opinion.<sup>10</sup>

Insisting that even an American victory on the Western Front was no lasting remedy for the strained relations between Britain and his native country, Pound called for a "cure" that only a new law of "reciprocal copyright" could bring about.<sup>11</sup> "The cure must be effected *now*," he declared, "now while the two countries are feeling amiable."<sup>12</sup>

Pound had been profoundly dissatisfied with the copyright law of the United States as it stood in the early part of the twentieth century. He considered it to be a hindrance to authorship and an open and cynical invitation to literary piracy of foreign works,<sup>13</sup> or what earlier critics had called "bookaneering."<sup>14</sup> No true cultural bond could exist between Britain and the

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8. See Ezra Pound, *Copyright and Tariff*, *NEW AGE*, Oct. 3, 1918, at 363, 363, reprinted in 3 POETRY AND PROSE CONTRIBUTIONS, *supra* note 4, at 208, 208.

9. See Ezra Pound, Letter to the Editor, *Pound for President?*, *NATION*, Dec. 14, 1927, at 684, 685, reprinted in 4 POETRY AND PROSE CONTRIBUTIONS, *supra* note 4, at 393, 393.

10. Pound, *supra* note 8, at 208. In the same article, Pound railed against the American book tariff as another hindrance to amity with foreign nations. *Id.* at 209. Pound's views on the book tariff, though in many ways consistent with his attitudes toward copyright law, are beyond the scope of this Article. *Id.*

11. See *id.* at 208, 209.

12. *Id.* at 208.

13. For a discussion of Pound's criticisms of the U.S. copyright law, see Robert Spoo, Note, *Copyright Protectionism and Its Discontents: The Case of James Joyce's Ulysses in America*, 108 YALE L.J. 633, 633–34, 641–42 (1998). See also EZRA POUND AND SENATOR BRONSON CUTTING: A POLITICAL CORRESPONDENCE, 1930–1935, at 28–29 (E.P. Walkiewicz & Hugh Witemeyer eds., 1995) [hereinafter POUND AND CUTTING] (discussing Pound's interest in international copyright and in efforts to amend American copyright law).

14. See, e.g., THOMAS HOOD, *Copyright and Copywrong, Letter II*, in PROSE AND VERSE pt. 2, at 83, 84 (New York, Wiley & Putnam 1845) ("[I]f a work be of temporary interest it shall

United States, he believed, until the copyright laws of the two nations were amended to provide better protection for foreign authors. Convinced that he could do a better job than the legislators, Pound used the pages of *The New Age* to "set down a sketch of what the copyright law ought to be, and what dangers should be guarded against."<sup>15</sup>

This "sketch" was more than a poet's florid wish for a better world; it was a set of detailed prescriptions expressed in a statutory idiom, with separate provisions for entitlements, exceptions, and remedies. Although Pound did not specify a mechanism for giving his plan the force of law, he seems to have imagined it as a kind of self-executing treaty or a statute to be implemented by each nation on the basis of a bilateral protocol. Because of the form in which he wrote it, Pound's sketch may appropriately be referred to as a "statute," as I will do here. (The relevant portion of Pound's article is included in full in the Appendix hereto.)

This Article demonstrates the historical and present-day significance of Pound's proposed statute, which has never been discussed by legal scholars and has received but scant attention from literary scholars.<sup>16</sup> Like William Wordsworth and Mark Twain, whose efforts to reform copyright law are much better known,<sup>17</sup> Pound is a major writer whose views on literary property were shaped by a particular conception of authorship and the role of art in society. Part I of this Article places Pound's statute within its immediate historical context. Pound offered his statute as a contribution to the debate over protectionist features of U.S. copyright law that for more than a century had

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virtually be free for any Bookaneer to avail himself of its pages and its popularity with impunity."); STYLUS, AMERICAN PUBLISHERS AND ENGLISH AUTHORS 10 (Baltimore, Eugene L. Didier 1879) ("We have shown the fatal result of the bookaneering practice of our [American] publishers in poetry and fiction."). In the first decades of the twentieth century, the term "booklegging" was used to refer to literary piracy and the trade in pornography. See JAY A. GERTZMAN, BOOKLEGGERS AND SMUTHOUNDS: THE TRADE IN EROTICA, 1920–1940, at 15, 87 (1999).

15. Pound, *supra* note 8, at 208.

16. Pound's *New Age* article containing his proposed copyright statute is mentioned, but not discussed, in POUND AND CUTTING, *supra* note 13, at 240 n.10.

17. For Wordsworth's copyright-reform work, see generally Susan Eilenberg, *Mortal Pages: Wordsworth and the Reform of Copyright*, 56 ENG. LITERARY HIST. 351 (1989); Russell Noyes, *Wordsworth and the Copyright Act of 1842*: Addendum, 76 PUBLICATIONS MOD. LANGUAGE ASS'N 380 (1961); Paul M. Zall, *Wordsworth and the Copyright Act of 1842*, 70 PUBLICATIONS MOD. LANGUAGE ASS'N 132 (1955). See also MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 110–12 (1993) (discussing Wordsworth's views on copyright reform); CATHERINE SEVILLE, LITERARY COPYRIGHT REFORM IN EARLY VICTORIAN ENGLAND: THE FRAMING OF THE 1842 COPYRIGHT ACT 159–75 (1999) (same). For Mark Twain's similar efforts, see generally SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* 35–80 (2001). See also Catherine Seville, *Authors as Copyright Campaigners: Mark Twain's Legacy*, 55 J. COPYRIGHT SOC'Y U.S. 283, 311–52 (2008) [hereinafter Seville, *Authors as Copyright Campaigners*].

favored the interests of American printers and book manufacturers at the expense of foreign authors' rights. Even though Congress amended the law in 1891 and again in 1909 to give foreign authors a better chance of obtaining copyright protection in the United States,<sup>18</sup> the technical requirements were onerous and many authors could not comply with them.<sup>19</sup> As a result, Pound and others complained that the formalities of U.S. copyright law permitted and even encouraged legalized piracy of foreign authors by American publishers.

Part II sets forth the specific terms of Pound's statute and explores the philosophical and historical influences that informed his proposed copyright scheme. Pound's statute begins by declaring that copyrights should be exclusive and perpetual. He goes on, surprisingly, to introduce broad compulsory-license provisions that would prevent authors and their heirs from interfering with later efforts to reprint and translate works, and would only require publishers to pay a fixed royalty on sales. Similar royalty schemes had been urged by British and American proponents of copyright reform during the previous century, but in 1918 compulsory licenses had been adopted in only limited forms by Britain and the United States.<sup>20</sup> The tension in Pound's proposal between a perpetual, exclusive copyright and expansive compulsory licenses shows him to be an inheritor of two legal and economic traditions. On the one hand, Pound embraced a Lockean and Romantic belief in a strong property rule grounded in an author's natural rights and unique personality. On the other, he espoused an anti-monopoly, free-trade preference for a liability rule that would encourage wide dissemination of affordable works to serve the public interest. Pound thus advocated what might strike many as an economic contradiction: perpetual copyright protection grounded in a consumer-side commitment to the unhampered spread of culture.

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18. See *infra* notes 50–59 and accompanying text.

19. Without ready access to a willing American publisher, many foreign authors could not comply with the formalities for obtaining copyright protection in the United States. For example, the British novelist Arnold Bennett observed in 1909: "A year ago no American publisher would publish my work on any terms, and the copyright of *The Old Wives' Tale* [Bennett's novel] was lost there for this cause." Journal Entry of Arnold Bennett (Oct. 27, 1909), in THE JOURNAL OF ARNOLD BENNETT 341, 342 (Viking Press, Inc. 1933). Because James Joyce could not satisfy the American copyright formalities within a few months of the publication of *Ulysses* in France, he lost the chance of securing an American copyright in his novel. Spoo, *supra* note 13, at 647–48. Referring to the same formalities, the English modernist author and painter Wyndham Lewis wrote Pound in 1926: "6 months after publication in England [of his book, *The Art of Being Ruled*] it has to be setup in or arranged for in America, else I lose the american [sic] copyright. . . . I know nothing whatever about American publishers . . ." Letter From Wyndham Lewis to Ezra Pound (Jan. 15, 1926), in POUND/LEWIS: THE LETTERS OF EZRA POUND AND WYNDHAM LEWIS 162 (Timothy Materer ed., 1985); see also *infra* notes 50–59 and accompanying text.

20. See *infra* notes 163–166 and accompanying text.

Part III explores the literary implications of Pound's statute, in particular his attempts to promote unimpeded communication among living writers of all nations and encourage fair and robust competition between living and dead authors through his copyright scheme. Pound crafted his compulsory-license provisions to permit wide dissemination of books while ensuring a financial return to copyright owners. At the same time, he believed that a perpetual copyright would promote fair competition between past and present writers in the marketplace. A system that permitted copyrights to expire, he believed, allowed publishers to reprint older works cheaply, while contemporary works, still protected by copyright, were sold at supracompetitive prices.<sup>21</sup> The resulting price difference would always give an unfair market advantage to earlier authors, who already enjoyed the benefit of being familiar to readers. By contrast, serious contemporary authors who were not content with imitating the past faced the double hurdle of trying to market innovative experiments at prices that publishers of public-domain works could easily beat. Pound sought to ensure that modern authors could compete more successfully for the attention of readers by eliminating the distinction between protected and public-domain works through a perpetual, royalty-based copyright. His statute was thus, in significant part, a strategy for promoting literary modernism.<sup>22</sup>

Finally, Part IV demonstrates that in proposing special safeguards against the abuse of copyrights by authors' heirs, Pound showed himself to be remarkably and presciently alert to the dangers posed by lengthy copyright terms unaccompanied by limitations that adequately protect the public interest. Today, the estates of James Joyce, T.S. Eliot, Marianne Moore, Samuel Beckett, and other modernist authors use extended copyrights to discourage or control use of those authors' works by scholars, critics, and others.<sup>23</sup> Pound's perpetual, royalty-based copyright would, in principle, have removed or reduced such obstacles to the study and enjoyment of modernist authors. Moreover, Pound's

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21. See *infra* notes 193–203 and accompanying text.

22. An international movement that prized innovation and experimentation, modernism included authors as different as Pound, Gertrude Stein, W.B. Yeats, James Joyce, T.S. Eliot, Virginia Woolf, and Marianne Moore, to name only some of the most prominent figures. Flourishing between 1890 and 1945, literary modernism was characterized by

(1) a revulsion against urban, industrial, bourgeois society, with its technologies of mass warfare; (2) a disposition to interpret modern experience in terms of patterns derived from archaic cultures and ancient mythologies; (3) a fascination with the unconscious and irrational activities of the human psyche; and (4) a rejection of post-Renaissance techniques of naturalistic representation in favor of spare, elemental, disjunctive, and ironic modes.

Hugh Witemeyer, *Introduction: Modernism Resartus*, in THE FUTURE OF MODERNISM 1, 1 (Hugh Witemeyer ed., 1997).

23. See *infra* notes 238–266 and accompanying text.

statute, as unusual as it may have seemed in its own time, anticipates recent proposals by Richard Posner, Lawrence Lessig, and others for mitigating the conflict between the lengthy copyright monopoly and the needs of the public.

### I. POUND'S COPYRIGHT STATUTE AND LEGALIZED AMERICAN BOOK PIRACY

Pound made it clear that one of the chief purposes of his proposed copyright statute was to render it "easier for an author to retain the rights to the work of his brain than for some scoundrel to steal them."<sup>24</sup> "The stupidity of the [American] copyright regulations," he declared, "is most deleterious to America's relations with foreign countries," because those "regulations tend to keep all English and Continental authors in a state of irritation."<sup>25</sup> The particular source of this irritation was the "continuous and needless bother about the prevention of literary piracy."<sup>26</sup> Legalized American book piracy was a theme Pound returned to again and again over the next decade. In 1927, he announced that "[f]or next President I want no man who is not lucidly and clearly and with no trace or shadow of ambiguity against . . . the thieving copyright law."<sup>27</sup> The "infamous state of the American law," he wrote his friend and fellow modernist author James Joyce, "not only tolerates robbery but encourages unscrupulous adventurers to rob authors living outside of the American borders."<sup>28</sup> At every opportunity, Pound heaped colorful invective on the U.S. copyright law: "dishonest[],"<sup>29</sup> "rascally,"<sup>30</sup> a "clot,"<sup>31</sup> and a law "originally designed to favour the printing trade at the expense of the mental life of the country."<sup>32</sup>

Pound's anger had been shared by many who complained of "Yankee pirates" during the nineteenth century.<sup>33</sup> By the 1830s, the "practice of

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24. Pound, *supra* note 8, at 208.

25. *Id.*

26. *Id.*

27. Pound, *supra* note 9, at 393.

28. Letter From Ezra Pound to James Joyce (Dec. 25, 1926), in POUND/JOYCE: THE LETTERS OF EZRA POUND TO JAMES JOYCE, WITH POUND'S ESSAYS ON JOYCE 226, 226 (Forrest Read ed., 1967).

29. Ezra Pound, *The Exile*, EXILE, Spring 1928, at 102, para. 7, reprinted in 5 POETRY AND PROSE CONTRIBUTIONS, *supra* note 4, at 16, 17.

30. *Ezra Pound and Will Irwin Denounce Copyright and Boston Censorship*, CHI. TRIB. (Paris), Mar. 9, 1928, at 2, reprinted in 5 POETRY AND PROSE CONTRIBUTIONS, *supra* note 4, at 27.

31. Ezra Pound, *Newspapers, History, Etc.*, 3 HOUND & HORN 574, 577 (1930), reprinted in 5 POETRY AND PROSE CONTRIBUTIONS, *supra* note 4, at 227, 229.

32. *Id.*

33. See, e.g., S.S. Conant, *International Copyright: An American View*, MACMILLAN'S MAG., May-Oct. 1879, at 151, 159.

reprinting British books and periodicals" without permission had become "widespread in the American book trade."<sup>34</sup> Although some American publishers made ex gratia payments to British authors, the U.S. copyright law, which withheld protection from foreign writers,<sup>35</sup> did not impose any such duty. Other publishers in the highly competitive book trade capitalized on this legal vacuum by reprinting British works without authorization or courtesy payments.<sup>36</sup> In 1842, Charles Dickens denounced the "scoundrel-booksellers" who "grow rich [in the United States] from publishing books, the authors of which do not reap one farthing from their issue," and the "vile, blackguard, and detestable newspaper[s]" that reprinted British writings without authorization or remuneration.<sup>37</sup> Even Walt Whitman, usually a lyrical advocate of the interests of American multitudes, lamented his compatriots' exploitation of the legal vulnerability of foreign authors:

Do not our publishers fatten quicker and deeper? (helping themselves, under shelter of a delusive and sneaking law, or rather absence of law, to most of their forage, poetical, pictorial, historical, romantic, even comic, without money and without price—and fiercely resisting the timidest proposal to pay for it.)<sup>38</sup>

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34. JOHN FEATHER, PUBLISHING, PIRACY AND POLITICS: AN HISTORICAL STUDY OF COPYRIGHT IN BRITAIN 153 (1994); see also DAVID SAUNDERS, AUTHORSHIP AND COPYRIGHT 155–56 (1992) (noting that "such reprinting was not illegal, even though it might be deemed unethical" and discussing the practice of making ex gratia payments to British authors in exchange for authorization to reprint).

35. For example, the first U.S. copyright statute conferred protection only on "citizens of these United States, or residents therein," and expressly provided that "nothing in this act shall be construed to extend to prohibit the importation or vending, reprinting or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States." Act of May 31, 1790, ch. 15, §§ 1, 5, 1 Stat. 124, 124–25 (repealed 1831). These provisions remained consistent through later revisions of the copyright law. See, e.g., Act of Feb. 3, 1831, ch. 16, §§ 1, 8, 4 Stat. 436, 436, 438 (repealed 1870) (same).

36. See FEATHER, *supra* note 34, at 154, 157–58. It should be noted "that some British publishers were equally unscrupulous in reprinting American books without permission" in the nineteenth century. See *id.* at 154; see also Conant, *supra* note 33, at 160 (noting that many American titles were reprinted in Britain without remuneration to their authors).

37. Letter From Charles Dickens to Henry Austin (May 1, 1842), in 3 THE LETTERS OF CHARLES DICKENS, 1842–1843, at 228, 230 (Madeline House et al. eds., 1974); see also CATHERINE SEVILLE, THE INTERNATIONALISATION OF COPYRIGHT LAW: BOOKS, BUCCANEERS AND THE BLACK FLAG IN THE NINETEENTH CENTURY 165–69 (2006) (discussing Dickens's efforts to influence American opinion on the international copyright question).

38. WALT WHITMAN, DEMOCRATIC VISTAS (1871), *reprinted* in 2 THE COMPLETE POETRY AND PROSE OF WALT WHITMAN AS PREPARED BY HIM FOR THE DEATHBED EDITION 208, 242 (Malcolm Cowley ed., 1948).

Another nineteenth-century American poet, James Russell Lowell, condensed his frustration with American book piracy into a single uncompromising quatrain, which he entitled “International Copyright”:

In vain we call old notions fudge,  
And bend our conscience to our dealing;  
The Ten Commandments will not budge,  
And stealing will continue stealing.<sup>39</sup>

Efforts to establish a reciprocal Anglo-American copyright law repeatedly met with obstacles during the nineteenth century. British law granted copyright to foreign authors on conditions roughly similar to those imposed on British authors,<sup>40</sup> but a comparable privilege did not exist for British authors in the United States.<sup>41</sup> Although some American publishers observed what was called “courtesy of the trade”—a self-regulating system in which the first publisher to reprint a British work, after paying the author a sum, enjoyed “title” to the work that competitors in the American book market generally respected—no formal protections existed for foreign writers.<sup>42</sup>

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39. JAMES RUSSELL LOWELL, *International Copyright*, in THE COMPLETE POETICAL WORKS 433, 433 (Boston, Houghton Mifflin 1896).

40. In the late nineteenth century, a foreign author could obtain copyright protection in Britain if (1) publication was made in the United Kingdom, (2) there was no previous publication, and (3) the author was within the British dominions at the time of publication. British authors had to comply with the first two conditions, but not the third. See EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 230 (Boston, Little, Brown & Co. 1879); see also A COMPANION TO THE VICTORIAN NOVEL 19 (Patrick Brantlinger & William B. Thesing eds., 2002) (“An 1854 Act of Parliament . . . enabl[ed] American authors to secure British copyrights for their work by simply being present in Britain or any of its dependencies at the time of publication.”). As Matthew Arnold pointed out in 1880, American authors could obtain British copyright if they visited England or even Canada at the time their book was published in Britain. See Matthew Arnold, *Copyright*, FORTNIGHTLY REV., Mar. 1880, at 319, 331, reprinted in 9 MATTHEW ARNOLD, ENGLISH LITERATURE AND IRISH POLITICS 114, 130 (R.H. Super ed. 1973); see also *id.* (“Mr. Henry James [the American author who lived in England] gets [copyright] in the same way at this moment for those charming novels of his which we are all reading. But no English author can acquire copyright in the United States.”).

41. See *supra* note 35.

42. See FEATHER, *supra* note 34, at 160; SAUNDERS, *supra* note 34, at 156–57; see also WILLIAM BRIGGS, THE LAW OF INTERNATIONAL COPYRIGHT, WITH SPECIAL SECTIONS ON THE COLONIES AND THE UNITED STATES OF AMERICA 111–14, 115–16 (1906) (discussing American “courtesy of the trade” and “courtesy copyright”); *id.* at 116 (“[A]t the present day [1906] leading publishing firms in the large cities of America pay substantial sums to English authors for their American ‘rights,’ well knowing that in America these rights are moral only, not legal.”); 1 JOHN TEBBEL, A HISTORY OF BOOK PUBLISHING IN THE UNITED STATES 208 (1972) (describing trade courtesy in nineteenth-century America); see 2 *id.* at 54–55 (same); Arnold, *supra* note 40, at 133 (discussing “trade-courtesy” and publishers that refused to observe it); Conant, *supra* note 33, at 157–59 (discussing American publishers’ “law of courtesy” and payments made to British authors for reprints); Spoo, *supra* note 13, at 656–59 (discussing the history of trade courtesy and the courtesy

In response to a petition presented by British authors, Senator Henry Clay introduced a bill in Congress in 1837 that would have recognized British copyrights in the United States.<sup>43</sup> The bill encountered strong opposition from the American book trade and never became law.<sup>44</sup> In 1854, President Franklin Pierce signed an Anglo-American copyright treaty providing for reciprocal recognition of the rights of authors and publishers in the two countries.<sup>45</sup> Once again, stubborn resistance from publishers and booksellers caused the treaty to fall short of ratification by the Senate.<sup>46</sup> Writing in 1880, British poet and essayist Matthew Arnold complained that the United States had repeatedly "refused to entertain the question of international copyright."<sup>47</sup> A series of Anglo-American copyright bills introduced in Congress between 1886 and 1890 met with the same fate.<sup>48</sup> One historian has observed, "The publishers of cheap reprint series were against [such legislation], and so too were the increasingly powerful trade unions in the printing industry who feared loss of work if the copyright in imported books were protected under American law."<sup>49</sup>

When Congress finally granted rights to foreign authors in the Chace International Copyright Act of 1891,<sup>50</sup> protection came at the price of large concessions to American book manufacturers.<sup>51</sup> Chief among these were the express conditions that a foreign work in any language could acquire copyright protection in the United States only if the work was printed from type set within this country and two copies of the American imprint were deposited in the Copyright Office on or before the date of first publication anywhere else.<sup>52</sup> Although resourceful or well-connected foreign authors might be able to satisfy this tricky requirement of first or simultaneous publication in the United States,<sup>53</sup> many others could not.<sup>54</sup>

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copyright that was improvised for the edition of James Joyce's *Ulysses* published in the United States in 1934).

43. See FEATHER, *supra* note 34, at 158; SAUNDERS, *supra* note 34, at 158–59.

44. See FEATHER, *supra* note 34, at 158; see also SEVILLE, *supra* note 37, at 160–62 (discussing the Clay bill and opposition to it from the American publishing trade).

45. FEATHER, *supra* note 34, at 167.

46. See *id.* at 166–67; see also SAUNDERS, *supra* note 34, at 161 (describing the failure of the 1854 treaty to gain ratification).

47. Arnold, *supra* note 40, at 130.

48. See FEATHER, *supra* note 34, at 168.

49. *Id.*

50. Act of Mar. 3, 1891, ch. 565, 26 Stat. 1106.

51. See SAUNDERS, *supra* note 34, at 165; FEATHER, *supra* note 34, at 168.

52. See Act of Mar. 3, 1891, ch. 565, sec. 3, § 4956, 26 Stat. 1106, 1107–08.

53. See FEATHER, *supra* note 34, at 169 (describing negotiations by George Bernard Shaw's publisher for publication in New York of Shaw's *The Perfect Wagnerite* in 1898).

The 1909 U.S. Copyright Act—the law in force when Pound proposed his copyright statute in 1918—modified the manufacturing conditions of the Chace Act but did not abolish them.<sup>55</sup> First, the 1909 Act granted automatic protection to foreign-language works of foreign origin by exempting them from the manufacturing requirements.<sup>56</sup> Second, the 1909 Act relaxed the manufacturing requirements for foreign-origin works in English somewhat by providing a thirty-day “ad interim” copyright if a copy of the foreign edition was deposited in the U.S. Copyright Office within thirty days of its publication abroad.<sup>57</sup> Once a copy was deposited, the work then had to be reprinted on U.S. soil within the thirty-day ad interim window.<sup>58</sup> Failure to do so—and thus give American artisans their due—would result in the loss of American copyright after ad interim protection had expired.<sup>59</sup>

When Pound denounced the U.S. copyright law as “originally designed to favour the printing trade at the expense of the mental life of the country,”<sup>60</sup> he had in mind the history of codified protectionism for domestic book manufacturers that, as one American observer put it in 1879, “has been the occasion of more bitter feelings between the two countries than many a war has engendered.”<sup>61</sup> Although there were other, more altruistic reasons for withholding automatic protection from British works—such as the fear that

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54. For example, French, German, and Italian authors found the administrative challenges posed by the manufacturing requirements almost “insuperable,” inasmuch as their works had to be translated into English before being published in the United States. See Geo. Haven Putnam, *Preface to the Second Edition of THE QUESTION OF COPYRIGHT*, at iii, v–vi (Geo. Haven Putman ed., New York, G.P. Putnam’s Sons, 2d ed., rev. 1896) (1891); see also SEVILLE, *supra* note 37, at 248 (discussing the difficulties posed by the manufacturing requirements for foreign authors).

55. Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075.

56. See *id.* § 15, 35 Stat. at 1078–79.

57. See *id.* § 21, 35 Stat. at 1080.

58. See *id.* § 22, 35 Stat. at 1080. In recognition of the disruptions caused by the war, the ad interim and reprinting provisions were extended in 1919 to sixty days and four months, respectively. See Act of Dec. 18, 1919, ch. 11, § 21, 41 Stat. 368, 369. Later, the time periods were lengthened again to six months and five years, respectively. See Act of June 3, 1949, ch. 171, sec. 2, § 22, 63 Stat. 153, 154. For a general discussion of the ad interim and manufacturing provisions and their impact on foreign authors, see Spoo, *supra* note 13, at 642–53; see also generally Charles Rembar, *Xenophilia in Congress: Ad Interim Copyright and the Manufacturing Clause*, 69 COLUM. L. REV. 770 (1969); Dorothy M. Schrader, *Ad Interim Copyright and the Manufacturing Clause: Another View of the Candy Case*, 16 VILL. L. REV. 215 (1970). For a succinct account of the mechanics and consequences of an ad interim filing by a former Assistant Register of Copyrights, see HERBERT A. HOWELL, *THE COPYRIGHT LAW: AN ANALYSIS OF THE LAW OF THE UNITED STATES GOVERNING REGISTRATION AND PROTECTION OF COPYRIGHT WORKS, INCLUDING PRINTS AND LABELS* 89–92 (2d ed. 1948).

59. See RICHARD ROGERS BOWKER, *COPYRIGHT: ITS HISTORY AND ITS LAW* 147 (1912) (explaining that failure to comply with the 1909 Act’s ad interim and manufacturing provisions “will forfeit the right to obtain copyright protection and throw the foreign work into the public domain”).

60. Pound, *supra* note 31, at 229.

61. Conant, *supra* note 33, at 156.

inexpensive American reprints of British titles, which served a large and increasingly literate population,<sup>62</sup> would be replaced by small and pricey British import editions<sup>63</sup>—there is no question that this protectionism rendered the United States an outcast from the international copyright community. The manufacturing requirements, together with other copyright formalities, prevented the United States from joining the Berne Convention for the Protection of Literary and Artistic Works for more than one hundred years after other major nations had signed it.<sup>64</sup> The Berne Convention of 1886 established an International Copyright Union, and made protection “automatic throughout all the countries acceding to it in behalf of the authors and artists of every country in the world, whether inside or outside of the Union, and without the need of complying with any formalities whatever . . .”<sup>65</sup> Berne protected the rights of authors as long as their works were first published in any of the member countries.<sup>66</sup> It was not until 1989, a few years after the last vestiges of the manufacturing clause had been repealed, that the United States finally adhered to Berne.<sup>67</sup>

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62. The 1850 U.S. Census reported a literacy rate of approximately 90 percent among white men and women. See CANDY GUNTHER BROWN, THE WORD IN THE WORLD: EVANGELICAL WRITING, PUBLISHING, AND READING IN AMERICA, 1789–1880, at 10 (2004); SEVILLE, *supra* note 37, at 147 (same).

63. See SAUNDERS, *supra* note 34, at 156.

64. See FEATHER, *supra* note 34, at 165, 168; SAUNDERS, *supra* note 34, at 166.

65. HOWELL, *supra* note 58, at 6. The Berne Convention was originally signed by ten nations in 1886, a number that grew substantially in the decades that followed. *Id.* at 6–7, 266–67.

66. Beginning with the first text of the Berne Convention, the principle of national treatment was predicated on publication of a work in any member country. See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 2(1), reprinted in ARPÁD BOGSCH, WORLD INTELLECTUAL PROP. ORG., THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS, FROM 1886 TO 1986, at 228, 228 (1986) [hereinafter BERNE CONVENTION FROM 1886 TO 1896] (“Authors belonging to any country of the Union . . . shall enjoy in the other countries for their works, whether published in one of those countries or unpublished, the rights which the respective laws do now or may hereafter grant to natives.”); see also Putnam, *supra* note 54, at xvii–xviii (noting that the Berne Convention eliminated formalities as a condition of copyright protection for aliens).

67. On March 1, 1989, Congress enacted the Berne Convention Implementation Act of 1988. Pub. L. No. 100-568, 102 Stat. 2853. The version of the manufacturing clause that had survived into the 1976 Copyright Act expired on July 1, 1986. See Pub. L. No. 97-215, 96 Stat. 178, 178–79 (1982) (codified at 17 U.S.C. § 601(a) (2006)); see also PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 152 (rev. ed., Stanford Univ. Press 2003) (1994) (noting the phasing out of the manufacturing clause and U.S. adherence to Berne in 1989).

## II. POUND'S COPYRIGHT STATUTE: TEXT AND HISTORICAL INFLUENCES

### A. The Text

In his 1918 *New Age* article, after explaining the urgent need for an Anglo-American copyright law to "cure"<sup>68</sup> American book piracy and the ill will it has fostered, Pound settles down to the details of his proposed statute. He begins by declaring that "[t]he copyright of any book printed anywhere should be and remain automatically the author's," and that "[c]opyright from present date should be perpetual."<sup>69</sup> Under Pound's statute, copyright in a work published anywhere in the world would vest automatically and exclusively in the author and would last forever.<sup>70</sup> His statute's indifference to the country of publication would have tacitly repealed the manufacturing requirements of the 1909 Copyright Act and would have brought U.S. law closer to the principles of the Berne Convention.

Two things are immediately striking about this first provision of Pound's statute. First, as might be expected of a poet and freelance journalist, Pound thinks of authorship in traditional, individualistic terms, apart from any rights that an employer might acquire through work-made-for-hire principles.<sup>71</sup> He therefore makes no provision for employer- or corporate-owned copyrights and does not address basic issues of joint authorship and copyright transfer.<sup>72</sup>

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68. Pound, *supra* note 8, at 208.

69. *Id.*

70. Other American authors have urged that copyrights be made perpetual. For example, Samuel Clemens (Mark Twain) made a similar argument in an unpublished manuscript, *The Great Republic's Peanut Stand*, composed in 1898, and again before a select committee of the British House of Lords in 1900. See VAIDHYANATHAN, *supra* note 17, at 69–78 (summarizing and quoting from *The Great Republic's Peanut Stand*); see also *id.* at 78–79 (describing Clemens's appearance before the House of Lords); Seville, *Authors as Copyright Campaigners*, *supra* note 17, at 322, 338–42, 345–46, 351 (discussing Clemens's advocacy of perpetual copyright). The American lexicographer and author, Noah Webster, also believed that copyrights should be perpetual. *Id.* at 289.

71. The 1911 British Copyright Act provided that, absent an agreement to the contrary, the copyright in a work created by an employee within the course of regular employment initially vested in the employer, but that the author of a newspaper or magazine article retained the right to prevent unauthorized reproduction of the article apart from its periodical appearance. See Copyright Act, 1911, 1 & 2 Geo. 5, c. 46, § 5(1)(b) (Eng.). The 1909 U.S. Copyright Act provided for renewal of copyright by the "proprietor" of a work made for hire, or by an author or his or her heirs in the case of a separately registered periodical contribution. See Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. 1075, 1080; see also *id.* § 62, 35 Stat. at 1088 ("[T]he word 'author' shall include an employer in the case of works made for hire.").

72. Compare Copyright Act, 1911, 1 & 2 Geo. 5, c. 46, § 5(2) (Eng.) (transfer of ownership); *id.* § 16 (joint authorship), with Act of Mar. 4, 1909, ch. 320, §§ 41–46, 35 Stat. 1075, 1084–85 (transfer of ownership).

Nor does he concern himself with copyrightable subject matter beyond traditional “books” and “works” by authors, even though by 1918 copyright law had come to embrace many other creative media.<sup>73</sup> For example, the 1909 U.S. Copyright Act, as originally enacted, included within its scope dramatic and dramatico-musical compositions, musical compositions, works of art, photographs, prints, and periodical illustrations.

Second, and more startlingly, Pound blithely proposes a “perpetual”<sup>74</sup> copyright, despite the fact that such an enactment would be unconstitutional in the United States, where the supreme law of the land empowers Congress to grant copyrights only for “limited Times.”<sup>75</sup> Pound was not the first or the last prominent American to argue that authors’ rights should last for eternity,<sup>76</sup> but his unconstitutional prescription is especially curious in light of his originalist insistence on the plain meaning of the Constitution later in his career.<sup>77</sup>

In exchange for exclusive, perpetual rights, Pound’s statute requires the author to “place on file copies of his book at the National Library, Washington, and in the municipal libraries of the four largest American cities.”<sup>78</sup> This requirement reflects Pound’s commitment to the preservation and accessibility of cultural products. The 1909 U.S. Copyright Act already required that domestic authors deposit two copies of the “best edition” of a copyrighted work in the Copyright Office,<sup>79</sup> and that foreign authors deposit one copy of the foreign edition in order to obtain an ad interim copyright.<sup>80</sup> Pound expands the requirement to include libraries in the four largest American cities—at the time,

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73. See Act of Mar. 4, 1909, ch. 320, §§ 5–6, 35 Stat. 1075, 1076–77. Motion pictures and motion-picture photoplays were soon added. See Act of Aug. 24, 1912, ch. 356, § 5, 37 Stat. 488, 488.

74. Pound, *supra* note 8, at 208.

75. See U.S. CONST. art. I, § 8, cl. 8; see also *Eldred v. Ashcroft*, 537 U.S. 186, 199–204 (2003) (discussing the “limited Times” requirement and the history of congressional enactments under it).

76. See *supra* text accompanying note 70. Lending her support to the Sonny Bono Copyright Term Extension Act, Congresswoman Mary Bono stated, “Sonny wanted the term of copyright protection to last forever. I am informed by staff that such a change would violate the Constitution. . . . [T]here is also [President of the Motion Picture Association of America] Jack Valenti’s proposal for a term to last forever less 1 day. Perhaps the Committee may look at that next Congress.” 144 CONG. REC. 24,336 (1998) (statement of Rep. Bono).

77. Pound believed that the clause empowering Congress “[t]o coin Money [and] regulate the Value thereof,” U.S. CONST. art. I, § 8, cl. 5, by its clear terms gave the power to regulate the value of money exclusively to the federal government, effectively prohibiting banks and other private interests from fixing usurious lending rates or otherwise “arrogat[ing] to themselves unwarranted responsibilities.” EZRA POUND, *A Visiting Card* (1942), reprinted in SELECTED PROSE: 1909–1965, at 306, 326–27 (William Cookson ed., New Directions 1973) (1952) [hereinafter SELECTED PROSE].

78. Pound, *supra* note 8, at 208.

79. Act of Mar. 4, 1909, ch. 320, § 12, 35 Stat. 1075, 1078.

80. *Id.* § 21, 35 Stat. 1075, 1080.

New York, Chicago, Philadelphia, and either St. Louis or Detroit<sup>81</sup>—apparently in emulation of the 1911 British Copyright Act's provision for deposit of copies in the British Museum and, upon demand, libraries in Oxford, Cambridge, Edinburgh, Dublin, and Wales.<sup>82</sup>

The deposit requirement is the only copyright formality that Pound retains in his statute. All the other formalities that the 1909 U.S. Copyright Act included as mandatory—domestic manufacture, affixation of copyright notice, renewal of the copyright after the first 28-year term<sup>83</sup>—are silently repealed by his proposal.<sup>84</sup> The 1909 Act made satisfaction of these formalities a condition of copyright protection; failure to comply meant that the work was automatically injected into the public domain.<sup>85</sup> As long as American law made copyright protection for foreign authors turn upon such technicalities, the United States could not hope to join the Berne Convention.<sup>86</sup> Pound's statute is pointedly pro-Berne in this respect.

No sooner has Pound settled upon his perpetual copyright, however, than he dramatically qualifies it: "BUT the heirs of an author should be powerless to prevent the publication of his works or to extract any excessive royalties."<sup>87</sup> "If the heirs neglect to keep a man's work in print and at a price not greater

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81. The four largest American cities in 1916, according to population size, were New York, Chicago, Philadelphia, and St. Louis, in descending order. RALPH S. TARR & FRANK M. McMURRY, WORLD GEOGRAPHIES: SECOND BOOK 413 (rev. ed. 1919). By 1920, Detroit had replaced St. Louis as the fourth largest city. See FRANK M. McMURRY & A.E. PARKINS, ADVANCED GEOGRAPHY app. at 481 (1921).

82. See Copyright Act, 1911, 1 & 2 Geo. 5, c. 46, § 15 (Eng.). Pound was not alone in urging that the number of copyright depositaries in the United States be increased. See, e.g., Samuel H. Ranck, *Need of Additional Copyright Depositories*, in PAPERS AND PROCEEDINGS OF THE SEVENTEENTH GENERAL MEETING OF THE AMERICAN LIBRARY ASSOCIATION HELD AT DENVER AND COLORADO SPRINGS, AUGUST 13–16 AND 21, 1895, at 43, 45 (n.p., Am. Libr. Ass'n 1895) (arguing that additional copyright depositaries should be established in Denver, Chicago, New Orleans, and San Francisco, as well as smaller depositaries in each state).

83. See Act of Mar. 4, 1909, ch. 320, §§ 9, 18–20, 35 Stat. 1075, 1077, 1079–80 (affixation of notice); *id.* §§ 15, 21–22, 35 Stat. at 1078–80 (domestic manufacture and ad interim copyright); *id.* §§ 23–24, 35 Stat. at 1080–81 (renewal of copyright).

84. This assumes that Pound's statute was intended to repeal these American copyright formalities rather than merely supplement them. That seems a fair assumption given the breadth of Pound's statute and his reiterated opposition to technical hindrances to copyright protection.

85. See KENNETH D. CREWS, COPYRIGHT LAW FOR LIBRARIANS AND EDUCATORS: CREATIVE STRATEGIES AND PRACTICAL SOLUTIONS 17–18 (2d ed. 2006) (discussing the consequences under the 1909 Act of failure to affix copyright notice and to renew copyright).

86. While the Berne Convention originally made authors' rights subject to any formalities prescribed by the country of origin of a work, see Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 2(2), *supra* note 66, at 228, the 1908 Berlin amendments provided that "[t]he enjoyment and the exercise of such rights shall not be subject to any formality . . ." Berne Convention for the Protection of Literary and Artistic Works, Berlin Act, Nov. 13, 1908, art. 4(2), reprinted in BERNE CONVENTION FROM 1886 TO 1986, *supra* note 66, at 229, 229.

87. Pound, *supra* note 8, at 208, 209.

than the price of his books during his life,” Pound goes on, “then unauthorised publishers should be at liberty to reprint said works, paying to heirs a royalty not more than 20 per cent. and not less than 10 per cent.”<sup>88</sup> This provision strips heirs of the power to prevent the printing and reprinting of authors’ works or to raise book prices above those that existed during authors’ lifetimes, and substitutes a royalty entitlement to be fixed by statute, regulation, or judicial decision.

Pound’s vision of copyright recalls Guido Calabresi and A. Douglas Melamed’s discussion of property rules and liability rules in their classic article, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*.<sup>89</sup> Once the state has chosen to grant an entitlement, it must decide what sort of protection to throw around that entitlement. “An entitlement is protected by a property rule,” Calabresi and Melamed explain, “to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller.”<sup>90</sup> By contrast, a liability rule strips the entitlement holder of bargaining autonomy and renders the transaction a compulsory one, limiting the holder to monetary compensation. “Whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule.”<sup>91</sup> When an entitlement is protected by a property rule, the holder typically may obtain injunctive relief to protect the entitlement, because the holder legally may refuse to permit others to have access to the entitlement. A liability rule, however, deprives the holder of this ability to deny access and typically substitutes non-injunctive, monetary remedies.<sup>92</sup> Subsequent scholarship has extended Calabresi and Melamed’s taxonomy of rules to the problems of protecting intellectual property.<sup>93</sup>

Pound’s statute protects author’s rights by a property rule granting them perpetual copyright, but a compulsory license provision is, in effect, a liability rule that requires authors and their heirs “to give a license to use the property

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88. *Id.*

89. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

90. *Id.* at 1092.

91. *Id.*

92. See *id.* at 1115–27 (discussing injunctive and non-injunctive remedies in the context of nuisance-pollution problems).

93. See, e.g., Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1819 (2007) (“In intellectual property as in property, moving from property rules to liability rules is but one method of softening the basic presumptive exclusion regime, but the information-cost advantage of basic exclusion points toward greater strength of the presumption in favor of exclusion and property rules than is often argued.”).

to anyone who meets governmentally-set criteria . . . at governmentally-set rates of compensation.”<sup>94</sup> Perpetual copyright would allow authors to control access to their works and seek injunctive relief against unauthorized users. But Pound’s compulsory license, once triggered, would render authors or their heirs powerless to deny access to the author’s work; their bargaining autonomy terminates in favor of a forced transaction that pays them a fixed royalty on copies sold.

Pound’s compulsory license, however, is activated not so much by aspiring publishers who meet certain statutory criteria as by the inaction or greed of heirs who fail to keep authors’ works in print at affordable prices. His statute effectively makes heirs the stewards of their ancestors’ works and gives them an opportunity to profit by their own diligence in keeping those works in print at low cost to the reading public. If heirs do not act as faithful stewards, their exclusive property right vanishes and they may no longer seek injunctive relief against unauthorized uses.<sup>95</sup> Their only protection is then found in a liability rule that gives them a right to recover any royalties withheld by the state-licensed publisher.

Pound’s daring blend of property and liability rules does not end there. Declaring that “the protection of an author should not enable him to play dog in the manger”<sup>96</sup> (that is, to prevent others from making use of something that he is not using himself), Pound adds a second, even more aggressive compulsory license:

IF, having failed to have his works printed in America, or imported into America, or translated into American, an American publisher or translator apply to said author for permission to publish or translate a given work or works, and receive no answer within reasonable time, say six months, and if said author do not give notice of intending other American publication (quite definitely stating where and when) within

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94. Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1574 n.204 (1993) [hereinafter Gordon, *A Property Right*]; see also Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1623–24 & n.131 (1982) (discussing compulsory licenses created by copyright legislation).

95. See Pound, *supra* note 8, at 208, 209 (making a right “at law” to unpaid royalties the sole remedy for copyright owners who have not acted as good stewards, and therefore necessarily excluding injunctive relief). Pound appears to require that heirs actually keep authors’ works in print, so that merely maintaining a license agreement with a publisher presumably would not be sufficient to preserve the exclusive property right. If an author fell out of favor with the public, and the heirs could not find a publisher for some period of time, Pound’s scheme would seem to permit another publisher to take advantage of the compulsory license, without seeking permission from the heirs, if publishing the work had become economically feasible again. Any harm to the heirs would be mitigated by payment of royalties on copies sold, and the public would benefit by having access to the work.

96. Pound, *supra* note 8, at 209.

reasonable time or designate some other translator, then, the first publisher shall have the right to publish or translate any work, paying to the original author a royalty of not more than 20 per cent. and not less than 10 per cent. in the case of a foreign work translated. The original author shall have right at law to the minimum of these royalties.<sup>97</sup>

This complicated limitation on the author's perpetual monopoly is even more startling than the first one. According to this rule, a foreign author retains the exclusive right to control reproduction, distribution, and translation of a work in the United States unless the author fails to have it printed in or imported into the country, or does not grant translation rights for an American edition. If the author slumbers on these rights or refuses to exercise them—and Pound does not indicate how long authorial inaction must continue before the exception is triggered—an American publisher or translator may step forward and apply to the author for permission to make use of the work. If the author does not reply within a reasonable time and gives no notice of specific plans for authorized American uses, the publisher or translator may proceed with the proposed use, with the sole duty—enforceable at law—of paying a minimum royalty of 10 percent.<sup>98</sup> Once again, Pound has fashioned a penalty for the copyright owner's failure to make works available to the public: The author loses the protection of a strong property rule, at least within the United States,<sup>99</sup> and must be content with a liability rule in the form of a fixed royalty. Thus, Pound's statute allows an author to maintain

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97. *Id.* The expression "dog in the manger" refers to Aesop's fable of the dog that lay down in an ox's eating trough and refused to allow the ox to eat the hay that had been provided there. See THE FABLES OF AESOP 63–64 (Samuel Croxall trans., Geo. Fyler Townsend ed., London, Frederick Warne & Co. 1866). Pound's reference to authors who play dog in the manger likely refers to authors who refuse to reprint works or permit translations for almost any reason, not just authors who do so to be difficult or spiteful. Pound's point in alluding to Aesop's fable is to underscore the basic perversity of not allowing a public good to achieve its highest and best use when the author is not making active use of the public good herself. Pound is even clearer about this in his compulsory-license provision for under-performing heirs: "BUT the heirs of an author should be powerless to prevent the publication of his works or to extract any excessive royalties." Pound, *supra* note 8, at 209 (emphasis omitted). In Pound's scheme, heirs lose their exclusive property right simply by trying to prevent publication, apparently for any reason. Pound's intolerance of obstructive heirs has special significance in light of attempts in recent years by heirs of modernist authors to discourage or control use of those authors' copyrighted works by scholars, critics, and others. See *infra* notes 238–266 and accompanying text.

98. Though Pound does not make the point explicit, presumably the same rule applies to heirs who do not authorize an affordable translation of a foreign author's work for the American market. Moreover, if the author licensed a translation during her lifetime, it follows that her heirs would have the responsibility of keeping the translation in print at affordable prices.

99. Pound's focus here is on the availability of foreign authors' works in the United States, but nothing he says suggests that he did not intend the same rules to be applied to the comparable failure of American authors and heirs to keep works in circulation abroad, as well as in the United States.

exclusive rights in the United States only if he or she performs certain mandatory duties following the request of a publisher or translator. If the author does not do so, publishing rights may be involuntarily shared with others who, in effect, assume control of disseminating the author's work within the United States.

Pound then adds an exception to the exception: "But no unauthorised translation should inhibit the later publication of an authorised translation. Nevertheless, an authorised translation appearing later should not in any way interfere with preceding translations save by fair and open competition in the market."<sup>100</sup> Thus, once a translation has entered the marketplace pursuant to the compulsory-license provision, the author (or the author's heirs) may grant permission for a new translation to compete with the unauthorized one, and the only limitations on competition between the negotiated-license edition and the compulsory-license edition would be those arising from supply and demand, the quality of the translations, the tastes of the public, and other nonlegal factors.<sup>101</sup>

Finally, Pound includes a special exception for extremely successful works: "After a man's works have sold a certain number of copies, let us say 100,000, there should be no means of indefinitely preventing a very cheap reissue of his work. Let us say a shilling a volume. Royalty on same payable at rate of 20 per cent. to author or heirs."<sup>102</sup> According to this rule, even if an author complied fully with Pound's statute by supplying the American market with copies of a work and authorizing a translation, and even if the author's heirs were diligent in keeping the work in print at a fair price, once the work had sold 100,000 copies, any publisher would be free to bring out a shilling edition, with royalty payments fixed at 20 percent.<sup>103</sup> As a British shilling was worth approximately twenty-five American cents (in unadjusted 1918 dollars)

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100. Pound, *supra* note 8, at 209.

101. See *id.* Pound makes it clear that an author loses the exclusive right to control translations if she does not respond in a reasonable time to a request for such use. His statute also provides that the author is free to license a subsequent translation that may then compete with the compulsory-license translation in the marketplace. But Pound does not indicate whether, once the author has licensed the competing translation, new unauthorized translations may be published without the author's permission, pursuant to a kind of tacking to the initial compulsory license. Although we cannot be sure, Pound probably would have struck the balance, on these facts, in favor of authorial control, and required later translations to be blessed by a license. For discussion of a similar compulsory-license provision for translations in the Berne Convention of 1896, see *infra* note 157 and accompanying text.

102. Pound, *supra* note 8, at 209.

103. Samuel Clemens in his unpublished manuscript, *The Great Republic's Peanut Stand*, also proposed a perpetual-copyright regime with a special provision for inexpensive books. After twenty years of copyright protection, a work's publisher would be required to issue a cheap edition and keep it in print forever. See VAIDHYANATHAN, *supra* note 17, at 76.

at the time Pound was writing,<sup>104</sup> a compulsory-license edition would have been regarded as inexpensive. (In a related article written in 1918, Pound complained of having to pay three dollars for a reprint of an old book.<sup>105</sup>)

Pound's compulsory license for cheap editions of successful works is an especially radical innovation, representing a significant impairment of the author's copyright. Instead of allowing a best-selling author to control the market for cheap editions and to choose, if she wishes, to continue to extract profits from exclusive, pricey editions, Pound treats the author's copyright as if its incentivizing purpose has run its course, and supply-side rewards must now yield to demand-side realities. The *ex ante* incentives of the property right, having served to induce creation and generate profits, are retired in favor of the public's need for inexpensive reprints. Pound has thus found a way to mitigate the unconstitutionality of his perpetual copyright. Rather than imposing an external time limitation on copyrights, he renders them self-limiting—in a sense, self-consuming—by making a work's popularity serve as a proxy for the essentially legislative task of determining the appropriate duration of the property right. When sales of a work reach 100,000, the copyright with respect to inexpensive editions may no longer be enforced by a strong property rule and the author must content herself with set royalties on cheap editions. Pound's notion of self-consuming copyrights is fully consistent with his wariness about what he called the “superstitious sacro-sanctity of ‘property’”<sup>106</sup> and his decades-long crusade for “cheap books.”<sup>107</sup> His call for a compulsory license for inexpensive editions suggests the depth of his commitment to free trade in cultural works.

In sum, Pound's unusual statute begins by granting a perpetual monopoly to authors, and ends by carving out extremely broad compulsory licenses that would permit any qualifying publisher to issue reprints or translations of works that authors or their heirs had failed or refused to keep in circulation. The statute thus eclectically combines property and liability rules to create an international system for keeping books and translations in print upon pain of

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104. In 1918, the British pound sterling was worth \$4.8665 in U.S. dollars. There were twenty shillings in a pound. See 8 THE WORLD BOOK: ORGANIZED KNOWLEDGE IN STORY AND PICTURE 4802 (M.V. O'Shea et al. eds., 1920); see also TWO THOUSAND QUESTIONS AND ANSWERS ABOUT THE WAR 197 (Review of Reviews Co. ed., 1918) (“[A British pound] is worth \$4.8665. . . . For convenience in figuring, the value of a sovereign or pound sterling is usually taken as \$5 when only round numbers are required.”).

105. See Ezra Pound, *Tariff and Copyright*, NEW AGE, Sept. 26, 1918, at 348, 349, reprinted in 3 POETRY AND PROSE CONTRIBUTIONS, *supra* note 4, at 190, 191.

106. EZRA POUND, ABC of Economics (1933), in SELECTED PROSE, *supra* note 77, at 233, 256.

107. Letter From Ezra Pound to Dorothy Pound (Oct. 14, 1945), in LETTERS IN CAPTIVITY, *supra* note 7, at 131.

loss or impairment of the exclusive property right. As long as the foreign author does not delay in authorizing American publications and translations, he or she retains a strong property right to engage in supracompetitive monopoly pricing and to sue for injunctive and monetary relief in the event of infringement. Likewise, heirs may maintain the author's original monopoly pricing and sue for injunctive and monetary relief, but only if they keep the work in print and do not raise the price. If any of these conditions is not met, the property rule favoring authors and heirs turns into a liability rule favoring the public; the perpetual copyright becomes a mere right to damages in the form of a fixed royalty. Finally, even if all statutory conditions are satisfied, authors and heirs will not be able to insist upon monopoly pricing once a work sells 100,000 copies. At that point, Pound's self-limiting copyright makes a compulsory license for cheap reprints available to any publisher, regardless of the wishes of the copyright owner.

Pound's conditioning of exclusive rights upon compliance with statutory directives strangely recalls the 1891 and 1909 U.S. Copyright Acts, under which foreign authors could obtain American copyright only by complying with the manufacturing requirements and other formalities<sup>108</sup>—requirements that Pound vehemently opposed. The difference, of course, is that the primary intended beneficiaries of the protectionist manufacturing requirements were American printers and bookbinders, whereas under Pound's statute it is the reading public that is meant to benefit from statutory compliance by authors and heirs. Moreover, by quietly repealing the manufacturing clause and granting perpetual and exclusive copyright protection, his statute sought to restore legal symmetry and reciprocity to the transatlantic publishing scene, effectively elevating all foreign-origin works from second-class citizenship to copyright equality with works originating on U.S. soil.

What is perhaps most intriguing about Pound's scheme is that it sets up elaborate machinery to arrive at essentially the same result that American publishers of the nineteenth century had brought about through "courtesy of the trade"<sup>109</sup>: a wide dissemination of inexpensive books, with a fair payment to authors. What, then, is the difference between Pound's statute and trade courtesy? The chief difference is that in the latter system, once an American publisher had been the first to reprint and pay for a British work, other competitors in the book trade voluntarily respected the publisher's "courtesy copyright" or "title" in the work. Under Pound's statute, once the compulsory-license provision is triggered by the neglect or obstinacy of authors or their

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108. See *supra* notes 50–59 and accompanying text.

109. See *supra* note 42 and accompanying text.

heirs, any and all qualifying publishers may issue the work, non-exclusively and simultaneously (unless publishers begin to observe something like trade courtesy again).<sup>110</sup> Of course, under Pound's proposal, foreign authors and their heirs initially have much more control over publication of works than they did when American copyright law afforded foreign-origin works little or no protection. But that control is precarious; it is lost or greatly impaired if authors or heirs fail to meet Pound's criteria. Pound's scheme is radically free-trade in its orientation and deeply committed to unfettered dissemination of works as a way of promoting international understanding.

It is not hard to see that what Pound initially characterizes as perpetual protection for authors' intellectual labor is essentially a scheme for maximizing the availability of works and translations. In the end, Pound seems more interested in supplying the market with affordable books than with increasing protections for authors. His is a rare kind of copyright proposal: a consumer-side scheme couched in a plea for creators' rights.

But if dissemination of works and robust competition among publishers and translators were Pound's primary goals, why did he grant a perpetual copyright in the first place? Why didn't he propose to abolish copyright altogether and rely on the public domain to achieve these ends? There are two parts to the answer. First, Pound believed that authors' intellectual labor entitled them to royalties and to a property right that they could pass on to their progeny.<sup>111</sup> Second, he distrusted the public domain because he believed that it gave earlier, public-domain authors an unfair competitive advantage over contemporary, copyrighted authors in the economic and intellectual marketplace.<sup>112</sup> Both of these points are discussed below.

## B. Historical and Philosophical Influences

In 1899, the English politician and law professor Augustine Birrell wrote, "Perpetual copyright is dead. Nobody cares about it any longer."<sup>113</sup> Recent scholarship has echoed his assessment: "[P]erpetual copyright was a dead issue by the end of the nineteenth century. So . . . was the notion of an

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110. Though Pound does not make the point explicit, if an author failed to reply to the requests of multiple publishers, Pound's statute on its face would permit each of those publishers to issue the work and require each to remit royalties. The proposal does not attempt to regulate the conduct of multiple publishers in simultaneously marketing the same title, presumably because Pound favored unfettered free trade once authors or heirs had lost the exclusivity of their property right.

111. See *infra* notes 117–141 and accompanying text.

112. See *infra* notes 193–204 and accompanying text.

113. AUGUSTINE BIRRELL, SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS 206 (London, Cassell & Co. 1899).

alternative to fixed-term monopoly copyright [in a broad-based royalty or compulsory-license scheme].”<sup>114</sup> But in his 1918 *New Age* article, Ezra Pound sought to resurrect both lost causes—everlasting copyright and comprehensive compulsory licensing—and, even more ambitiously, to fit them together in a workable scheme.

As idiosyncratic and eclectic as such an effort may seem—and it is both—Pound’s statute is nevertheless a product of identifiable legal traditions and copyright discourses that he inherited from the nineteenth century and his own time. One of those traditions—the practice of “trade courtesy” among American publishers—is discussed above.<sup>115</sup> Others include the Lockean theory of labor as the source of natural rights in property, the Romantic ideology of unique personality, and, most importantly, nineteenth-century efforts to reform British and American copyright law by introducing a royalty system to replace the copyright monopoly.<sup>116</sup> The latter movement, with its daring proposals for compulsory licenses and liability rules, was the most powerful influence on Pound’s idea of legislating a perpetual monopoly that could quickly turn into a bare entitlement to royalties if the conduct of authors or heirs threatened to deprive the public of a plentiful supply of inexpensive literature. These influences are discussed in the following two subsections.

### 1. Genius, Intellectual Labor, and Oil Stock

In his *New Age* article, Pound justifies his proposal for a perpetual copyright by invoking two related traditions of copyright discourse. First, he observes, “It ought to be easier for an author to retain the rights to the work of his brain than for some scoundrel to steal them.”<sup>117</sup> In another version of the same article, Pound makes the allusion to authorial labor even more emphatic: “It should be easier for a man to keep or keep the right to the work of his hands, *or of his brain*, than for another to steal it.”<sup>118</sup> Second, he likens copyrights to more familiar forms of property. “In my own case,” he writes, “I wish to leave my royalties as a literary endowment. I should be able to do this with as much security as if I had acquired oil stock, or government bonds, instead of producing literature.”<sup>119</sup> These two remarks—one appealing to a

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114. PAUL K. SAINT-AMOUR, THE COPYRIGHTS: INTELLECTUAL PROPERTY AND THE LITERARY IMAGINATION 81 (2003).

115. See *supra* note 42 and accompanying text.

116. See *infra* notes 145–162 and accompanying text.

117. Pound, *supra* note 8, at 208.

118. Ezra Pound, *Tariff and Copyright*, LITTLE REV., Nov. 1918, at 21, 24, reprinted in 3 POETRY AND PROSE CONTRIBUTIONS, *supra* note 4, at 226, 228.

119. Pound, *supra* note 8, at 208.

notion of natural rights grounded in authorial labor, the other to the nonsense intuition that property is property—derive from related areas of copyright discourse, or property talk,<sup>120</sup> and help us to understand Pound's willingness to legislate a perpetual right for the products of authorship.

The idea that intellectual property has its genesis in the mental exertions of authors is often traced to John Locke's labor theory of the origins of property.<sup>121</sup> Locke conceived of property as something appropriated from the spontaneous common state of nature by one who, having “a *Property* in his own *Person*” and in the “*Labour* of his Body, and the *Work* of his Hands,” “mixe[s] his *Labour* with [what he has removed from the state of nature], and joyn[s] to it something that is his own, and thereby makes it his *Property*.<sup>122</sup> Having removed a portion of the commons and “annexed” his labor to it, the laborer is entitled to “exclude[ ] the common right of other Men.”<sup>123</sup> Property is therefore a natural right that results from a merger of private labor and public domain in something that can be demarcated and owned. Locke viewed this “original Law of Nature, for the beginning of Property” as antecedent to the “positive Laws” that are enacted “to determine Property.”<sup>124</sup>

Although Locke was not writing of intellectual property, in later years scholars, courts, and polemicists came to apply his labor theory to copyrights, patents, and other intangibles.<sup>125</sup> In 1776, the British Protestant minister William Enfield wrote, “Labour gives a man a natural right of property in that which he produces: literary compositions are the effect of labour; authors have therefore a natural right of property in their works.”<sup>126</sup> Throughout the

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120. I allude to Carol M. Rose's characterization of the various approaches to explaining the institution of property as “scholarly property-talk.” See Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 602 (1998).

121. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 285–302 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

122. *Id.* at 287–88.

123. *Id.* at 288.

124. *Id.* at 289 (emphasis omitted).

125. See generally BRAD SHERMAN & LIONEL BENTLY, THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE, 1760–1911, at 23–24 (1999) (discussing the use of Lockean labor theory by courts and pamphleteers to legitimize the concept of literary property).

126. WILLIAM ENFIELD, OBSERVATIONS ON LITERARY PROPERTY (1774), reprinted in THE LITERARY PROPERTY DEBATE: EIGHT TRACTS, 1774–1775, at 21 (Stephen Parks ed., Garland Publ'g, Inc., 1974). Even in recent times, scholars have found Locke's labor theory a fertile source for debates over the nature and purpose of intellectual property. See, e.g., Gordon, *A Property Right*, *supra* note 94, at 1540–83 (setting forth a Lockean theory of natural rights as applied to the public's right to use intellectual property, and citing numerous scholarly invocations of Locke in the intellectual-property context). Courts over the centuries have also resorted to the Lockean labor concept to uphold intellectual property. See, e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002–04 (1984) (citing Locke in holding that trade secrets can be “property” under the Fifth Amendment's Taking Clause) (citing JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (C.B.

nineteenth century, proponents of strong copyright protection employed a loose Lockean rhetoric in asserting that authors had special “abstract rights . . . in what is called ‘brain production.’”<sup>127</sup> Often, these proponents suggested that authorial labor justified the belief that “literary property exists by the common law,”<sup>128</sup> even though it had long been settled in the courts, at least with respect to published works, that copyright was a limited creature of statute rather than a perpetual common law entitlement.<sup>129</sup> This did not stop polemicists from contending that copyright “should be perpetual, like other kinds of property,” and from arguing that it was “a strange perversion of justice to limit an author’s right in the creations of his mind, and a time may come when this anomaly shall cease to be a stain on our statute-books.”<sup>130</sup>

The nineteenth-century British philosopher Herbert Spencer, an ardent champion of authors’ rights, elaborately invoked the Lockean theory to make his point:

[The author] has simply combined with certain components of [the common stock] something exclusively his own—his thoughts, his conclusions, his sentiments, his technical skill: things which more truly belong to him than do any visible and tangible things to their owners; since all of these contain raw material which has been removed from the potential use of others. So that in fact a production of mental labour may be regarded as property in a fuller sense than may a product of bodily labour; since that which constitutes its value is

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Macpherson ed., Hackett Publishing 1980) (1690)); *Millar v. Taylor*, (1769) 98 Eng. Rep. 201, 252 (K.B.) (holding that copyrights are valid because “an author should reap the pecuniary profits of his own ingenuity and labor”), *overruled by Donaldson v. Beckett*, (1774) 1 Eng. Rep. 837 (H.L.). The Lockean labor theory overlaps with the concept of “laborious authorship,” whereby copyright was found to exist in factual works, such as calendars, maps, catalogues, and other informational works, by virtue of the labor and expense that were invested in assembling them. See Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1875–81 (1990) (discussing the development of the “laborious authorship” basis for copyright in scholarly commentary and judicial opinions of the eighteenth and nineteenth centuries). In *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), the Supreme Court rejected “sweat of the brow” or “industrious collection” as in itself a basis for copyright protection in the United States, holding that copyright law did not prevent alphabetical listings in the white pages of a phone book from being appropriated by a competitor. *Id.* at 352–53, 363–64.

127. Conant, *supra* note 33, at 151.

128. *Id.*

129. In *Donaldson v. Beckett*, (1774) 1 Eng. Rep. 837 (H.L.), the British House of Lords overturned a King’s Bench decision (*Millar v. Taylor*, (1769) 98 Eng. Rep. 201 (K.B.)) that had held that a perpetual common law right survived the limited term of copyright for published works imposed by the Statute of Anne, 1710, 8 Ann., c. 19 (Eng.). A comparable decision in the United States was rendered in *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), in which the Supreme Court held that published works were subject to the limited copyright term provided by the U.S. copyright statute, and were not protected by a perpetual common law right. *Id.* at 660–61.

130. Conant, *supra* note 33, at 151.

exclusively created by the worker. And if so, there seems no reason why the duration of the possession in this case should not be at least as great as the duration of possession in other cases.<sup>131</sup>

Spencer's chain of reasoning traces a familiar argumentative crescendo: An author's labor is more intimately bound up with his or her unique emotion and intellect than is manual labor. It follows that an author's intellectual property is more truly property than other kinds of property. If mere chattel or other common forms of property can be owned and transferred forever, then intellectual property a fortiori should be entitled to such benefits.<sup>132</sup>

Pound's reference to "the work of [an author's] hands, or of his brain"<sup>133</sup> comes directly out of this tradition of applied Lockean labor theory, trailing with it implications of authorial natural rights. But, as the quotation from Spencer also hints, this discourse drew as well upon a conception of the author as someone possessing unique personality and genius. Spencer's reference to the author's "sentiments" glances at the Romantic underpinnings of copyright law as it developed in the eighteenth and nineteenth centuries. Scholars have examined this aesthetic and ideological dimension of copyright at length, noting that "the originality of the work, and consequently its value, becomes dependent on the individuality of the author," and also that the notion of authorial personality dovetailed with "Locke's primary axiom" that property arises from the mixing of the laborer's "person" with the elements of the commons.<sup>134</sup>

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131. HERBERT SPENCER, JUSTICE: BEING PART IV OF THE PRINCIPLES OF ETHICS § 60, at 108–09 (London, Williams & Norgate 1891).

132. See also BIRRELL, *supra* note 113, at 14 (observing of eighteenth-century copyright polemics that it was believed that if authors could claim a "property" right in their writings "in the same way as lands, houses, goods and chattels, it followed that this right was one of indefinite duration, and could be so disposed of in the market *inter vivos*, or bequeathed or left to descend to relatives according to the laws of inheritance"). Lawrence Lessig has used more homely terms to describe attempts to analogize intellectual property to traditional forms of property:

"Property," ordinary people think, is "absolute and mine forever." If you say to ordinary people, "What do you think of the idea of fair use of your property, or only having your property for limited times?" they are likely to think, "Well, that's weird. You don't have a fair use right to my car, nor are you able to say after a limited time the state can come in and take away my house."

Lawrence Lessig, *The Creative Commons*, 55 FLA. L. REV. 763, 775–76 (2003).

133. Pound, *Tariff and Copyright*, *supra* note 118, at 228.

134. See ROSE, *supra* note 17, at 121. Scholars and critics have extensively explored how "[o]riginality became the watchword of artistry and the warrant for property rights." JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 54 (1996); see also generally *id.* at 51–60 (arguing that the Romantic theory of authorship arose as a solution to various ideological tensions within the concepts of property, authorship, the public and the private); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'*, 17 EIGHTEENTH-CENTURY STUD. 425 (1984) (tracing the growth of the meaning of the author, the book, and writing as property in the eighteenth century).

Given the growing ideological connection between originality and literary property, it should be no surprise that William Wordsworth, the dominant British Romantic poet of the first half of the nineteenth century, was a passionate advocate of strong copyright protection for works of genius. He believed that lengthy copyright terms were necessary for original writings because, unlike popular books, their innovations were slow to find a receptive audience and so yielded monetary returns late, if ever, in their authors' lifetimes.<sup>135</sup> Long copyrights would also help ensure that authors' descendants received financial benefits when innovative works finally came into their own.<sup>136</sup>

Wordsworth famously recorded his disdain for opponents of strong copyright protection in his sonnet "A Plea for Authors, May 1838," in which he warned that "social Justice" would become "a mockery and a shame" if it did not show reverence for "natural rights."<sup>137</sup> Combining Lockean natural rights with a salute to Romantic "Genius," Wordsworth declared that only a longer copyright term—a "lengthened privilege"—could properly incentivize and protect the "streams of truth" that flowed from their source in original authorship.<sup>138</sup> The sonnet goes on to assert that the "Law" would be but a "servile dupe of false pretence" if it "guard[ed] grossest things from common claim / Now and for ever" but begrudged a "short-lived fence" to "works that came / From mind and spirit."<sup>139</sup> This is the a fortiori argument that was advanced some decades later by Herbert Spencer: If chattel and other common forms of property ("grossest things"<sup>140</sup>) are protected forever from theft and trespass, how can legislators withhold a similar right from the lofty creations of the intellect?

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135. See William Wordsworth, Letter to the Editor, *KENDAL MERCURY*, Apr. 12, 1838, reprinted in 3 THE PROSE WORKS OF WILLIAM WORDSWORTH 309, 312 (W.J.B. Owen & Jane Worthington Smyser eds., 1974) (arguing that longer copyrights would encourage "the production of works, the authors of which look beyond the passing day, and are desirous of pleasing and instructing future generations"); see also SAINT-AMOUR, *supra* note 114, at 31–33 (discussing the notion of copyright reformers Wordsworth and Thomas Noon Talfourd that longer copyright terms were necessitated by the nature of original works); MARTHA WOODMANSEE, THE AUTHOR, ART, AND THE MARKET: REREADING THE HISTORY OF AESTHETICS 145–46 (1994) (discussing Wordsworth's argument for longer copyright terms for original works).

136. See WOODMANSEE, *supra* note 135, at 145–46. The poet and essayist Thomas Hood, a contemporary of Wordsworth, summarized the Wordsworthian argument by noting that "works of permanent value and utility . . . often creep but slowly into circulation and repute," and that "just then, when the literary property is realized . . . the law decrees that then all right or interest in the book shall expire in the author, and by some strange process, akin to the Hindoo transmigrations, revive in the great body of the booksellers." THOMAS HOOD, *Copyright and Copywrongs*, Letter I, in PROSE AND VERSE, *supra* note 14, at 73, 80.

137. 2 WILLIAM WORDSWORTH, A Plea for Authors, May 1838 (1838), in THE POEMS 818, 818 ll. 3–4 (John O. Hayden ed., 1977).

138. *Id.* ll. 9, 13–14.

139. *Id.* ll. 5–8.

140. *Id.* l. 6.

Wordsworth's blending of labor theory and the ordinary-property argument is present as well in Pound's justification for a perpetual copyright. Pound combines the Locke-like reference to "the work of [an author's] hands, or of his brain" with the assertion that he should be able to bequeath his copyright royalties "with as much security as if [he] had acquired oil stock, or government bonds, instead of producing literature."<sup>141</sup> Even more emphatically than Wordsworth and Spencer, Pound argues that the law's recognition of perpetual rights in common forms of property like oil stock and government bonds—Wordsworth's "grossest things"—renders anomalous its failure to offer the same protection to literary property.

While overt references to authorial genius are absent from Pound's *New Age* article, the Romantic justification for authorial property is nevertheless tacitly present. In another essay published only a month earlier, Pound announced that "[a]rtists are the antennae of the race" and that "it is the business of the artist to make humanity aware of itself."<sup>142</sup> In Pound's view, artists—by which he meant authors as well as other kinds of creators—have a superior awareness of reality and a responsibility to enhance others' awareness.<sup>143</sup> This definition of artists is not unlike the famous assertion of the Romantic poet Percy Bysshe Shelley that "[p]oets are the unacknowledged legislators of the world."<sup>144</sup> In his *New Age* article, Pound sought to be both the sensitive, prescient "antennal[]" of Anglo-American cultural relations and, literally, a legislator of world copyright.

## 2. Nineteenth-Century Royalty Schemes and Anti-Monopoly Reform

Pound's statute is Janus-faced. One aspect gazes off into the realm of perpetual copyright; the other more mundanely scrutinizes the practical needs of the public. The latter imperative he addresses by proposing a compulsory-license or royalty system<sup>145</sup> that is triggered when authors or their heirs fail or refuse to keep affordable reprints and translations in circulation, or when a successful work reaches sales of 100,000 and a cheap edition is necessary to

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141. Pound, *supra* note 8, at 208.

142. Ezra Pound, *In Explanation*, LITTLE REV., Aug. 1918, at 5, 8, reprinted in 3 POETRY AND PROSE CONTRIBUTIONS, *supra* note 4, at 142, 144.

143. *Id.*

144. PERCY BYSSHE SHELLEY, A DEFENCE OF POETRY (1821), reprinted in THE SELECTED POETRY AND PROSE OF PERCY BYSSHE SHELLEY 494, 522 (Carlos Baker ed., Random House 1951).

145. I use the terms "compulsory license" and "royalty scheme" interchangeably, recognizing that they can have different connotations. Cf. Gordon, *A Property Right*, *supra* note 94, at 1574 n.204 ("Viewed retrospectively, a liability rule operates like a monetary remedy for violation of a right. Viewed prospectively, a liability rule might be viewed as granting potential defendants a compulsory license to use a creators' product.").

satisfy popular demand.<sup>146</sup> Although Pound's broad compulsory licenses may have struck readers as unusual in 1918, they had distinct nineteenth-century antecedents in Britain, the United States, and other countries.

Proposals to adopt royalty schemes or compulsory licenses for solving the problems of international copyright were not unknown in nineteenth-century America.<sup>147</sup> In 1887, the Philadelphia author and revivalist preacher Robert Pearsall Smith advocated a system by which any American publisher would be free to reprint any foreign book upon payment to the author of 10 percent of the retail price.<sup>148</sup> This fixed royalty was to be paid, prior to publication, by purchasing from the author a quantity of "stamps" equal to the number of copies to be printed.<sup>149</sup> Only books bearing authentic stamps would be regarded as genuine articles, and there would be suggested penalties for issuing unstamped books.<sup>150</sup> Although it met with the "quasi approval" of some noted British authors, Pearsall Smith's idea was assailed as a "crude and visionary scheme[]"<sup>151</sup> on various grounds: authors and publishers know better than the government how to fix proper compensation for authors; such a proposal would invade the "trust" relationship between authors and publishers and limit their freedom of contract; authors would lose control over the quality and accuracy of their texts; and publishers would be wary of investing in the production of a successful book if other publishers could come along and compete cheaply.<sup>152</sup>

Royalty schemes and compulsory licenses were introduced or proposed in other countries as well. The British Copyright Act of 1842 contained a provision permitting a complaint to be filed with the Judicial Committee of the Privy Council if a copyright proprietor refused to allow the reprinting of a book after the death of its author; the statute empowered the Privy Council to grant a printing license to the complainant.<sup>153</sup> According to a system in vogue in Italy around 1900, works that had entered their second forty years of copyright

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146. See *supra* notes 87–110 and accompanying text.

147. Such a scheme "was suggested in 1872 by John P. Morton, John Elderkin, and others, in connection with the attempt then made to secure international copyright." THE QUESTION OF COPYRIGHT, *supra* note 54, at 67. Morton, a Louisville publisher, proposed that general publication of foreign works be permitted upon payment of a 10 percent royalty to the authors. See BOWKER, *supra* note 59, at 352. Elderkin's recommendation of a 5 percent royalty was incorporated in a bill introduced in the House and the Senate in 1872. *Id.*

148. Pearsall Smith's proposal was published as *An Olive Branch From America*, in 22 NINETEENTH CENTURY 602 (1887). It is summarized in THE QUESTION OF COPYRIGHT, *supra* note 54, at 65–76.

149. THE QUESTION OF COPYRIGHT, *supra* note 54, at 65.

150. *Id.*

151. *Id.* at 66.

152. *Id.* at 67–73; see also SEVILLE, *supra* note 37, at 226–27 (discussing Pearsall Smith's royalty scheme).

153. Copyright Act, 1842, 5 & 6 Vict., c. 45, § 5 (Eng.).

protection could be issued by any publisher upon payment of a fixed royalty.<sup>154</sup> "In Canada, as far back as 1872, a Bill was passed to permit Canadian publishers to reprint English copyright works, on payment of a royalty to the owner of the copyright. This, however, failed to obtain the consent of the Crown."<sup>155</sup> Three years later, a modified Canadian bill was ratified by the British Parliament, after the addition of protections for the British book trade.<sup>156</sup> Moreover, Article 5 of the Berne Convention as amended in 1896 provided that an author's exclusive translation right would cease to exist "if the author shall not have availed himself of it, during a term of ten years from the date of the first publication of the original work, by publishing or causing to be published, in one of the countries of the Union, a translation in the language for which protection is to be claimed."<sup>157</sup>

The most concerted effort to introduce a full-fledged royalty system was made in Britain by members of the Royal Commission on Copyright of 1876–78, established to make a thorough review of British copyright law and to recommend reforms.<sup>158</sup> The membership was divided between those who supported traditional monopoly copyright and those who advocated a royalty system for fostering free trade and diffusion of cheap books. According to one scholar, the Royal Commission was "a serious attempt from within the government to abolish copyright law or at the very least rethink its imminent ideology and economics from a standpoint of free trade, and, at least putatively, in the name of the public interest."<sup>159</sup>

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154. BRIGGS, *supra* note 42, at 114; see also BOWKER, *supra* note 59, at 450 (discussing the Italian compulsory-license system); BIRRELL, *supra* note 113, at 38 (same).

155. BRIGGS, *supra* note 42, at 115.

156. See Copyright Act, 1875, 38 Vict., c. 88 (Eng.), amended by Copyright Act, 1875, 38 & 39 Vict., c. 53 (Eng.); see also FEATHER, *supra* note 34, at 185 (discussing the 1875 bill); SAINT-AMOUR, *supra* note 114, at 61 (same).

157. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886 (amended May 4, 1896), art. 5, *supra* note 66, at 228. The 1896 amendment altered the 1886 text's flat 10-year term for the author's translation right. *Id.* art. 5(1), at 228 ("Authors . . . shall enjoy in the other countries the exclusive right of making or authorizing the translation of their works until the expiration of ten years from the publication of the original work in one of the countries of the Union."). The amendment allowed the author to retain an exclusive translation right beyond ten years, but only on the condition that the author made diligent use of that right, as in Pound's statute. As Briggs observed: "If during this ten years' period—commonly called *délai d'usage*—the author does not himself publish a translation of his work, his exclusive translating right lapses altogether, and anyone is at liberty to translate his work into any language . . ." BRIGGS, *supra* note 42, at 114. Great Britain was an original signatory to the Berne Convention of 1886, which applied to Canada as a colony of Great Britain. Sunny Handa, *A Review of Canada's International Copyright Obligations*, 42 MCGILL L.J. 961, 969 (1997). Britain also acceded to the 1896 version of Berne. Lionel Bently, *Copyright, Translations, and Relations Between Britain and India in the Nineteenth and Early Twentieth Centuries*, 82 CHI.-KENT L. REV. 1181, 1186 (2007).

158. See SAINT-AMOUR, *supra* note 114, at 55.

159. *Id.*

T.H. Farrer, Permanent Secretary to the Board of Trade and one of the chief proponents of what was called “royalty copyright,”<sup>160</sup> testified before the Commission that he believed a royalty system to be preferable to monopoly copyright as a means of protecting British authors’ interests and disseminating their works in Britain, the United States, and Canada:

The ideal of a copyright system is that it should be co-extensive with the English language, giving the author the benefit of an enormous market, and the reader the benefit of a price proportionately reduced. But in order to effect this, monopoly must be in some way restricted. And I have heard of no means of doing this which sounds practicable except that of a right of republication with a royalty.<sup>161</sup>

Despite the vigorous efforts of Farrer and the other free-trade members, the Commission voted to retain monopoly copyright, and the Commission’s report so reflected: “We have arrived at the conclusion that copyright should continue to be treated by law as a proprietary right, and that it is not expedient to substitute a right to a royalty defined by statute, or any other right of a similar kind.”<sup>162</sup> Thus ended the last comprehensive attempt in Britain to substitute royalties and compulsory licenses for the system of copyright as it is known today.

Of course, compulsory licenses would eventually enter copyright law in more limited forms. By the time Ezra Pound came to draft his statute, both British and U.S. copyright laws had “mechanical license” provisions that allowed anyone to reproduce copyrighted musical works on records, piano rolls, and other devices without permission, as long as the copyright owner had authorized at least one earlier mechanical reproduction of the work and the user paid a fixed royalty per copy.<sup>163</sup> The 1911 British Copyright Act also retained a version of the old Privy Council license for post mortem reprints in certain circumstances,<sup>164</sup> and included another compulsory license permitting anyone to reprint the published work of an author who had been dead for

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160. Other prominent proponents included Sir Louis Mallet, Under Secretary of State for India, formerly at the Board of Trade, and Robert Andrew Macfie, a former Liberal member of Parliament. For accounts of the 1876–78 Royal Commission on Copyright, see FEATHER, *supra* note 34, at 185–95; SAINT-AMOUR, *supra* note 114, at 53–89; SEVILLE, *supra* note 37, at 268–78.

161. Farrer’s (Board of Trade) Evidence, in R.A. MACFIE, *COPYRIGHT AND PATENTS FOR INVENTIONS: PLEAS AND PLANS FOR CHEAPER BOOKS AND GREATER INDUSTRIAL FREEDOM, WITH DUE REGARD TO INTERNATIONAL RELATIONS, THE CLAIMS OF TALENT, THE DEMANDS OF TRADE, AND THE WANTS OF PEOPLE* 294, 299 (Edinburgh, T. & T. Clark 1879).

162. Extracts From Report of Royal Commission on Copyright, in MACFIE, *supra* note 161, at 274, 274.

163. Act of Mar. 4, 1909, ch. 320, § 1(e), 35 Stat. 1075, 1076; Copyright Act, 1911, 1 & 2 Geo. 5, c. 46, § 19 (Eng.).

164. Copyright Act, 1911, 1 & 2 Geo. 5, c. 46, § 4 (Eng.). For a discussion of the Privy Council license contained in the British Copyright Act of 1842, see *supra* note 153 and accompanying text.

twenty-five years, upon written notice and payment of a 10 percent retail royalty to the copyright proprietor.<sup>165</sup>

The compulsory-license provisions in the 1909 U.S. Act and the 1911 British Act reflected a legislative awareness of situations in which arm's-length bargaining between copyright owners and aspiring users would be difficult or undesirable.<sup>166</sup> But none of these provisions was as sweeping and aggressive as the royalty reforms urged by the anti-monopoly minority members of the 1876–78 Royal Commission on Copyright. Pound's compulsory-license proposals, in their expansiveness and public-mindedness, hearken back to the free-trade spirit of those Commissioners. Moreover, the stark contrast within Pound's proposal between a perpetual copyright and easily-triggered royalty provisions echoes the sharp philosophical and ideological divisions within the Commission between advocacy of a strong monopoly right and calls for anti-monopoly mechanisms for making cheap books available to a wide readership. Pound was the inheritor of both traditions, and the tensions are evident in his copyright statute. In the final analysis, however, as shown in Parts III and IV, he was more an anti-monopoly free-trader than a perpetual-rights diehard.

### III. LITERARY IMPLICATIONS OF POUND'S PROPOSED STATUTE

#### A. International Copyright and Communication Among Nations

Pound envisioned an international copyright law that would provide authors fair remuneration for their intellectual labor but would not stand in the way of wide, and, if necessary, statutorily compelled, dissemination of their works and translations at affordable prices. He believed that, with America's entry into "Armageddon,"<sup>167</sup> the need for cross-cultural communication among writers and thinkers was more urgent than ever, and he sought to eliminate the barriers raised by "the red tape and insecurity of the copyright regulations" and high American book tariffs.<sup>168</sup> Such "hindrance[s] to international

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165. Copyright Act, 1911, 1 & 2 Geo. 5, c. 46, § 3 (Eng.).

166. Modern copyright statutes have added further compulsory or statutory licenses. See, e.g., 17 U.S.C. §§ 111(c)–(d) (2006) (secondary transmissions by cable systems), 114(d) (certain digital transmissions of sound recordings), 119 (certain secondary transmissions by satellite carriers), 122 (same). In the United Kingdom, compulsory licenses exist for use of works whose copyrights were revived in the mid-1990s as a result of a European Union Directive (Council Directive 93/98, 1993 O.J. (L 290) 9) requiring EU member countries to implement a term of copyright protection equal to the life of the author plus 70 years. See Duration of Copyright and Rights in Performances Regs., 1995, S.I. 1995, No. 3297, ¶¶ 24, 25.

167. See *supra* note 4 and accompanying text.

168. Pound, *supra* note 105, at 190.

communication," Pound wrote, were "serious at any time, and doubly serious now when we are trying to understand France and England more intimately."<sup>169</sup>

Pound believed that now and again a gifted author emerges as an unofficial communicator among nations, a sort of literary ambassador-interpreter with the ability to "translate" the meaning of one culture for the benefit of other cultures.<sup>170</sup> A month or so before his copyright proposal appeared in *The New Age*, Pound edited a special issue of the New York literary magazine *The Little Review*, which was devoted to the American writer Henry James.<sup>171</sup> James's recurrent theme in *The American* (1877), *The Portrait of a Lady* (1881), *The Ambassadors* (1903), and other works of fiction had been the moral and cultural implications of the encounter between Americans and Europeans and the differences between the New World and the Old. Like Pound, James had lived as an American expatriate in England and had deplored the coming of the Great War.<sup>172</sup> In *The Little Review*, Pound wrote that James—who had died in 1916—had spent a "life-time . . . in trying to make two continents understand each other, in trying . . . to make three nations [Britain, France, and the United States] intelligible one to another."<sup>173</sup> James, Pound observed, was a "hater of tyranny" whose entire career had been a "labour of translation, of making America intelligible, of making it possible for individuals to meet across national borders."<sup>174</sup>

As Pound saw it, James had been a literary laborer for world peace. "Peace comes of communication," Pound observed in one of his essays on James.<sup>175</sup> "The whole of great art is a struggle for communication. All things set against this are evil whether they be silly scoffing or obstructive tariffs."<sup>176</sup>

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169. *Id.*

170. See *supra* notes 142–144 and accompanying text (discussing Pound's notion that writers have a special ability to perceive realities and communicate them to the world); see also Pound, *supra* note 142, at 145 ("No man of our time has so laboured to create means of communication as did the late Henry Jaems [sic]. . . . And this communication is not a levelling, it is not an elimination of [national and cultural] differences. It is a recognition of differences, of the right of differences to exist, of interest in finding things different").

171. See LITTLE REV., Aug. 1918.

172. See JONATHAN ATKIN, A WAR OF INDIVIDUALS: BLOOMSBURY ATTITUDES TO THE GREAT WAR 79 (2002); see also Letter From Henry James to Howard Sturgis (Aug. 4, 1914), in 2 THE LETTERS OF HENRY JAMES 382, 384 (Percy Lubbock ed., 1920) (referring to the just-declared war as "a nightmare of the deepest dye," and asking, "How can what is going on not be to one as a huge horror of blackness?").

173. Pound, *supra* note 142, at 143.

174. *Id.* at 143–44. For a discussion of Pound's treatment of James as a cultural communicator, see generally the chapter entitled *Ezra Pound's American Scenes: Henry James and the Labour of Translation*, in DANIEL KATZ, AMERICAN MODERNISM'S EXPATRIATE SCENE: THE LABOUR OF TRANSLATION 53–70 (2007).

175. Pound, *supra* note 142, at 145.

176. *Id.*

Pound's campaign to reform copyright laws and book tariffs was consistent with James's attempts to remove cultural barriers through the creation of fictional worlds. For Pound, a reformed copyright law would serve as a legal counterpart to James's efforts to get nations to understand each other. As he wrote in his *New Age* article, forging an international copyright law would require "reciprocal intelligence and reciprocal action between England and America."<sup>177</sup> James's novels demonstrate the same need by showing how important and yet how difficult it is for different cultures to achieve reciprocity.<sup>178</sup>

Pound's belief that communication was a panacea for international strife reflected a simplicity that sometimes bordered on the shockingly naïve. He was so convinced that honest, unhampered communication could change the minds of belligerent nations that later, when the Second World War came, he seized the opportunity of a Rome Radio microphone to broadcast passionate denunciations of Britain, the United States, and international finance.<sup>179</sup> In 1945, writing from an American detention camp near Pisa where he was being held on charges of treason, Pound still hoped that his Rome Radio work had helped the cause of peace: "What I am in absolute ignorance of is: whether anyone actually heard my broadcasts; whether they did any good, by which I mean whether they in any way contributed to a better understanding [in Britain and the United States] of certain economic fundamentals."<sup>180</sup> By 1945, Pound had traveled far from the comparatively tame zealotry of proposing copyright reforms at the end of the first war, yet his professed motive was the same: spreading mutual understanding among nations.

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177. *Id.* Henry James also took an interest in international copyright law and used it as the basis of a witty colloquy, *An Animated Conversation*, first published in *Scribner's Magazine* in 1889. Like Pound, James refers to American book piracy and the U.S. tariff on cultural products. HENRY JAMES, *An Animated Conversation*, in ESSAYS IN LONDON AND ELSEWHERE 267, 280–85 (New York, Harper & Bros, 1893).

178. For example, the plot of James's novel *The American* revolves around the experiences of a wealthy, retired American businessman, Christopher Newman, who travels to France and there meets and falls in love with a French noblewoman, Claire de Cintré. In this encounter between the Old and New Worlds, Christopher and Claire are driven apart by her corrupt, aristocratic family, who cannot reconcile themselves to Christopher's unsophisticated, egalitarian nature and his former career as a "commercial person." HENRY JAMES, THE AMERICAN 371 (Houghton Mifflin Co. 1907) (1877). Pound observed: "In his books [James] showed race against race, immutable; the essential Americanness, or Englishness or Frenchness—in *The American*, the difference between one nation and another; not flag-waving and treaties, not the machinery of government, but 'why' there is always misunderstanding, why men of different race are not the same." Pound, *supra* note 142, at 145.

179. LETTERS IN CAPTIVITY, *supra* note 7, at 2–4.

180. Letter From Pound to Shakespear & Parkyn (Oct. 5, 1945), in LETTERS IN CAPTIVITY, *supra* note 7, at 107, 111.

### B. Competing With the Dead: Copyright and the Public Domain

Like many of his fellow modernists, Pound viewed contemporary writers as in a struggle with literary predecessors who, because they were established and familiar, more readily commanded the attention and respect of readers.<sup>181</sup> Lamenting the reluctance of the public to expand its tastes to include modern artists, Pound wrote in 1917, "The British public liked, has liked, likes and always will like all art, music, poetry, literature, glass engraving, sculpture, etc. in just such measure as it approaches the Tennysonian tone."<sup>182</sup> Critics have noted that modernist authors' relationships to their predecessors were intensely competitive and often fraught with anxiety.<sup>183</sup> Harold Bloom, for example, has claimed that T.S. Eliot's "true and always unnamed precursor was . . . an uneasy composite of Tennyson and Whitman."<sup>184</sup> Modernists frequently registered their sense of rivalry with earlier authors in the form of ridicule or dismissiveness. Eliot once wrote that Tennyson had "a large dull brain like a farmhouse clock."<sup>185</sup> Pound wickedly mocked Tennyson's status as Poet Laureate by pointing to "the edifying spectacle of . . . Tennyson in Buckingham Palace."<sup>186</sup> "Wordsworth is a dull sheep," Pound wrote in 1916,

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181. Modernism's generational competitiveness has often been noted by scholars. See generally LOUISE BLAKENEY WILLIAMS, MODERNISM AND THE IDEOLOGY OF HISTORY: LITERATURE, POLITICS, AND THE PAST 21–38 (2002) (discussing five modernist writers—Ezra Pound, T.S. Eliot, W.B. Yeats, Ford Madox Ford, and D.H. Lawrence—and their sense of Victorian culture as burden and rival); see also *id.* at 31 (discussing modernists' uncomfortable awareness that their Victorian counterparts "were respected, they sold books, they made money, they forced their audience to think, and they occasionally even produced results"); *id.* ("[T]he Modernists envied the fact that the Victorians were responsible to the world and were taken seriously."); Jane Lilienfeld, *Flesh and Blood and Love and Words: Lily Briscoe, Stephen Dedalus, and the Aesthetics of Emotional Quest*, in NEW ALLIANCES IN JOYCE STUDIES: "WHEN IT'S APED TO FOUL A DELFIAN" 165, 166 (Bonnie Kime Scott ed., 1988) ("Modernism, as a literary movement, resolutely set its face against the Victorian aesthetic of an art expected to offer beauty, solace, and moral uplift. Modernism despised Victorian expressions of feeling as sentimental, weak, and embarrassing").

182. Ezra Pound, *The Rev. G. Crabbe, LL.B.*, 1 FUTURE 110, 110 (1917), reprinted in 2 POETRY AND PROSE CONTRIBUTIONS, *supra* note 4, at 188, 188. Lord Alfred Tennyson (1809–1892), author of numerous books of poetry, succeeded William Wordsworth as England's poet laureate in 1850. See THE OXFORD COMPANION TO ENGLISH LITERATURE 808 (Sir Paul Harvey ed., 4th ed. rev. 1967).

183. See, e.g., MARY ELLIS GIBSON, EPIC REINVENTED: EZRA POUND AND THE VICTORIANS 14 (1995) (discussing Pound's "resistance . . . to . . . certain Victorian predecessors, notably Tennyson and the Pre-Raphaelites").

184. HAROLD BLOOM, THE BREAKING OF THE VESSELS 21 (1982).

185. Aptyryx (T.S. Eliot), *Verse Pleasant and Unpleasant*, 5 EGOIST 43, 43 (1918).

186. Ezra Pound, *How to Read, or Why: Part III: Conclusions, Exceptions, Curricula*, N.Y. HERALD TRIB. BOOKS, Jan. 27, 1929, reprinted in 5 POETRY AND PROSE CONTRIBUTIONS, *supra* note 4, at 116, 117.

and “Byron’s technique is rotten.”<sup>187</sup> Matthew Arnold was limited by his “mind’s frigidity.”<sup>188</sup> In her famous essay “Mr. Bennett and Mrs. Brown,” Virginia Woolf took to task precursor novelists such as H.G. Wells and Arnold Bennett for failing to treat “life” as “human nature.”<sup>189</sup> These novelists “have made tools and established conventions which do their business,” Woolf wrote.<sup>190</sup> “But those tools are not our tools, and that business is not our business. For us those conventions are ruin, those tools are death.”<sup>191</sup> The sense of a gulf between the present generation and previous ones, between us and them, pervades the writings of modernist authors.

For Pound, however, rivalry with the past was more than aesthetic competition; it had a distinct economic dimension. If books were too expensive, they would fail to make their mark on culture, no matter how important their contents. “Only cheap good books can compete with cheap bad books,” he noted in his discussion of the costs imposed by the U.S. book tariff.<sup>192</sup> Copyright played an important role in this contest between present and past authors. Among the reasons Pound gave in his 1918 *New Age* article for advocating a perpetual copyright was that “the present law by which copyright expires permits dead authors to compete on unjust terms with living authors. Unscrupulous, but well-meaning publishers, well serving the public, print dead authors more cheaply than living ones BECAUSE *they do not have to pay royalties.*”<sup>193</sup> Thus, in addition to the advantage they held by having shaped the tastes of present readers and ingratiated themselves through passage of time, “dead authors”<sup>194</sup> could undersell contemporary authors because their works had shed copyright protection and were free for the taking. “This is to the disadvantage of contemporary literature, to the disadvantage of literary production,” Pound declared.<sup>195</sup> Publishers could reprint the deceased

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187. Letter From Pound to Iris Barry (July 27, 1916), in *SELECTED LETTERS OF EZRA POUND: 1907–1941*, at 88, 90 (D.D. Paige ed., 1970).

188. EZRA POUND, *THE SPIRIT OF ROMANCE* 222 (rev. ed. 1968).

189. VIRGINIA WOOLF, *Mr. Bennett and Mrs. Brown* (1924), in *1 COLLECTED ESSAYS* 319, 330 (Leonard Woolf ed., 1966).

190. *Id.*

191. *Id.*

192. Pound, *supra* note 105, at 191. By “cheap bad books” Pound probably had in mind popular literature and best-sellers rather than public-domain works of literary significance. But he believed throughout his career that inexpensive new books were critical for the spread of knowledge and culture, whatever the literary competition might be. See Letter From Ezra Pound to Dorothy Pound (Oct. 14, 1945), in *LETTERS IN CAPTIVITY*, *supra* note 7, at 131 (remarking of Armed Services Editions, “AT LAST cheap books as I have been wailing for for past 30 years”).

193. Pound, *supra* note 8, at 208–09.

194. *Id.*

195. *Id.*

Tennyson's public-domain texts,<sup>196</sup> for example, without the additional overhead of copyright royalties. In this respect, modernist authors were handicapped even when copyright law succeeded in protecting them.<sup>197</sup>

Pound's solution to this competitive imbalance between living and dead authors was the radical one of making copyrights perpetual "from present date."<sup>198</sup> Because the public domain, regularly augmented by expiring copyrights, would always contain a ready supply of works of high quality, eliminating this free resource was the only way to redress the competitive imbalance.<sup>199</sup> But there are questions that Pound does not answer. Would only future works come within his statute, or would existing copyrights be extended for eternity as well? Would the statute also retroactively restore copyright to works that had previously entered the public domain when their statutory terms expired? Would it go further and grant protection to works such as *Beowulf* and Chaucer's *Canterbury Tales* that predated copyright regimes altogether? Would other world classics such as *The Odyssey* and *The Divine Comedy*—texts that Pound regularly drew upon for his own creative work—be included?<sup>200</sup> These questions are not irrelevant. According to Pound's

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196. Under the British Copyright Act of 1842, copyrights endured for the author's life plus seven years or until forty-two years after first publication, whichever term was longer. Copyright Act, 1842, 5 & 6 Vict., c. 45, § 3 (Eng.). This means that many of Tennyson's important works—such as *The Princess: A Medley* (1847), *In Memoriam* (1850), *The Charge of the Light Brigade* (1854), and *Maud, and Other Poems* (1855)—entered the public domain in Britain in 1899, seven years after his death in 1892.

197. Whether and to what extent Pound's belief that contemporary works cost more than public-domain works reflected the reality of the book trade in 1918 is beyond the scope of this Article. However, examples of expensive modernist works are not hard to find. In 1922, James Joyce used his monopoly power in France to market the limited first edition of *Ulysses* there at prices ranging from \$14.00 to \$30.00—a substantial sum of money at the time. LAWRENCE RAINY, INSTITUTIONS OF MODERNISM: LITERARY ELITES AND PUBLIC CULTURE 62–64 (1998). The same power enabled Joyce to extract from his publisher 66 percent of the net profits from that edition. *Id.* at 64.

198. Pound, *supra* note 8, at 208.

199. A variation on Pound's worry over competition with the dead is the concern expressed by some authors that a shorter copyright term would allow early versions of their own works to enter the public domain and compete cheaply with later, revised versions of the same works that were protected by copyright. Wordsworth, for example, was distressed that he would not be able to control the reprinting of his youthful writings after they had passed out of copyright. See ZACHARY LEADER, REVISION AND ROMANTIC AUTHORSHIP 75–77 (1996) (discussing Wordsworth's frustration over publishers who exploited expiring copyrights in an author's early, unrevised writings).

200. See generally STEPHEN SICARI, POUND'S EPIC AMBITION: DANTE AND THE MODERN WORLD 1–16 (1991) (discussing Pound's use in his poetry of Homer, Dante, and other epic writers). For example, the opening canto of Pound's major poetic sequence, *The Cantos*, contains his translation of a substantial portion of Book 11 of Homer's *Odyssey*: the story of Odysseus' visit to the underworld to speak with the shade of the prophet Tiresias. CANTOS OF EZRA POUND 11. 1–67, at 3–5 (13th prtg. 1995) [hereinafter CANTOS]; see also GEORGE KEARNS, GUIDE TO EZRA

logic, only a complete abolition of the public domain would place all authors—past, present, and future—on a level economic playing field. Anything less would give some portion of the dead an unfair advantage over the living.

A statutory scheme that left part of the public domain intact—and this would be almost inevitable—would sustain to some degree the competitive imbalance of which Pound complained. But he probably did not have in mind an economic rivalry with Homer, Dante, Shakespeare, or other classic authors. Rather, it was competition from authors who had more recently entered, or were entering, the public domain—for example, Wordsworth, Tennyson, and Matthew Arnold—that Pound likely thought would have the greatest impact on contemporary writers' sales and ambitions.<sup>201</sup> These new additions to the public domain were among the Romantic and Victorian predecessors with whom Pound and other modernist writers felt a keen sense of rivalry.<sup>202</sup>

Moreover, within the United States, the copyright law's double standard for foreign authors had created the anomalous situation in which American authors, already at a disadvantage as comparative newcomers to world literature, saw their books marketed at monopoly prices while pirated British works were sold at bargain rates. In 1819, the American author Washington Irving had written that "the public complains of the price of my work—this is the disadvantage of coming in competition with those republished English works

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POUND'S SELECTED CANTOS 17–21 (1980) (discussing Pound's translation from Book 11 of *The Odyssey*). In addition, in Cantos 14 and 15—known as the "Hell Cantos"—Pound paints a sordid picture of greed and usury modeled, in general, on Dante's *Inferno*. SICARI, *supra*, at 36. The first line of Canto 14 is a direct quotation from *The Inferno*: "Io venni in luogo d'ogni luce muto." CANTOS, *supra* l. 1, at 61; see also SICARI, *supra*, at 36 (discussing Pound's quotation from Dante in Canto 14).

201. Under the British Copyright Act of 1842, many of Tennyson's major poetic works entered the public domain in 1899, seven years after his death. See *supra* note 196. Later works by Tennyson, such as *Tiresias, and Other Poems* (1885), which were still in copyright when Britain adopted the 1911 Copyright Act, benefited from that Act's extension of copyright terms to fifty years after the author's death. Copyright Act, 1911, 1 & 2 Geo. 5, c. 46, § 3 (Eng.); see also KEVIN GARNETT ET AL., COPINGER & SKONE JAMES ON COPYRIGHT § 5-148 (2005) ("The term of copyright conferred by the 1911 Act in respect of published works was longer than that subsisting under the pre-existing law, and this longer term was conferred on existing works which were still in copyright at the commencement date of the 1911 Act."). Thus, when Pound proposed his copyright statute in 1918, many of Tennyson's earlier works had entered the public domain, but his later works were still in copyright. The case of Matthew Arnold, who died in 1888, was similar. All of Wordsworth's writings, however, had entered the public domain by 1918. Under the 1842 Act, the copyrights in Wordsworth's works began to expire in 1857, seven years after his death, and continued to do so until 1892. See *supra* note 196; Stephen Gill, *Copyright and the Publishing of Wordsworth, 1850–1900*, in LITERATURE IN THE MARKETPLACE: NINETEENTH-CENTURY BRITISH PUBLISHING AND READING PRACTICES 74, 76 (John O. Jordan & Robert L. Patten eds., 1995).

202. See *supra* notes 181–191 and accompanying text.

for which the Booksellers have not to pay any thing to the authors.”<sup>203</sup> Nearly one hundred years later, Pound echoed Irving’s frustration, with a twist: “As America has less past literature than other countries it is particularly to American disadvantage that the living author should not fare as well as the dead one.”<sup>204</sup> Pound evidently meant that contemporary American authors had to vie not only with pirated contemporary European authors, but also with centuries of unprotected Old World matter. The burden of the past weighed even more heavily when economic advantages were added to historical and cultural ones.

### C. Significant Omissions From Pound’s Statute

By including compulsory-license provisions in his copyright statute, Pound ensures that the public will not be deprived of reprints and translations. But his statute does not address other copyright-related rights and activities. For example, apart from translations, Pound offers no discussion of derivative works, such as dramatic or cinematic adaptations, or of performance rights, though by 1918 copyright laws addressed all these issues in one way or another.<sup>205</sup> Nor does Pound show any solicitude for fair use or fair dealing, a doctrine that had recently been codified in Britain.<sup>206</sup> Yet adaptation rights and fair use are vital to the creative process, as Pound the poet surely knew.

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203. Letter From Washington Irving to Henry Brevoort (Aug. 12, 1819), in 1 WASHINGTON IRVING, LETTERS 1802–1823, at 553, 554 (Ralph M. Aderman et al. eds., 1978). “In 1834 the average retail cost of a volume was \$1.20 for American authors, and 75c for British and other foreign reprints.” SEVILLE, *supra* note 37, at 150.

204. Pound, *supra* note 8, at 209.

205. For example, the 1911 British Copyright Act protected an author’s right to convert a dramatic work into a nondramatic work, and *vice versa*, and the right of public performance, including the performance of a translation. Copyright Act, 1911, 1 & 2 Geo. 5, c. 46, § 1(2) (Eng.). Similar provisions were included in the 1909 U.S. Copyright Act. Act of Mar. 4, 1909, ch. 320, § 1(b)-(e), 35 Stat. 1075, 1075–76. Pound referred to such subsidiary rights in a 1930 article in which he criticized Congress’s slowness to enact a revision of the copyright laws: “[T]he welfare of letters is postponed until cinema and radio, and by now I suppose talki-o and smellio, rights have been puddled and muddled and strained out to the satisfaction of all the ‘parties interested.’” Pound, *supra* note 31, at 229.

206. See Copyright Act, 1911, 1 & 2 Geo. 5, c. 46, § 2(1)(i) (Eng.) (defining fair dealing as use of a copyrighted work “for the purposes of private study, research, criticism, review, or newspaper summary”); see also SAINT-AMOUR, *supra* note 114, at 182 (discussing the codification of fair dealing in the 1911 Act). In the United States, the roughly analogous privilege of fair use remained an exclusively common law doctrine until it was codified in the 1976 Copyright Act. See 17 U.S.C. § 107 (2006). Pound did not refer directly to fair use or fair dealing, but he showed an awareness of the lawfulness of reasonable though unauthorized quotation when, in a periodical piece published in 1920 in which he quoted a portion of an article by Lord Monkswell, he remarked that readers “would probably be more diverted by a quotation in toto than by any ‘garbled excerpts’ I can give, but space and, perhaps, copyright, forbid an entire transcription.” Ezra Pound, *The Revolt of Intelligence* (pt. VII), NEW AGE, Jan. 22, 1920, at 186, 186, reprinted in 4 POETRY AND PROSE CONTRIBUTIONS, *supra* note 4, at 10, 11.

If Pound the legislator felt the need to include statutory provisions preventing authors and their heirs from blocking reprints and translations, why did he not incorporate comparable safeguards for other reasonable uses of copyrighted works?

Most likely, Pound included in his statute only those matters that he believed needed urgent attention on an international level—perpetual copyright and rules for reprints and translations—leaving other matters to be dealt with by domestic legislation. After all, duration of copyright, piracy, cheap reprints, timely translations—these were the issues that had dominated discussions of international copyright for the past century,<sup>207</sup> and Pound was consciously entering that conversation and proposing a unified theory for the needs of authors and readers. Moreover, the focus of Pound's statute is less on the creative process than on the diffusion of affordable works with fair compensation to authors. That was the pragmatic challenge that he chose to address: putting in place statutory machinery that would facilitate the kind of cross-cultural communication that Henry James had made the focus of his fiction-writing.

Yet Pound's omission of any discussion of fair use and derivative works (other than translations) is puzzling, because the freedom to create adaptations of, and to borrow extensively from, others' works is a defining feature of modernist writing.<sup>208</sup> It is well known, for example, that portions of Pound's major poetic sequence *The Cantos* were modeled on Homer's *Odyssey* and Dante's *Divine Comedy*, among other literary sources.<sup>209</sup> James Joyce composed and promoted his novel *Ulysses* as a modern-day epic based on *The Odyssey* and, to a lesser extent, on *Hamlet* and other works.<sup>210</sup> Both *The Cantos* and *Ulysses* adapt and quote freely from texts that were copyrighted at the time,<sup>211</sup>

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207. See *supra* notes 33–61, 147–166, and accompanying text (discussing American book piracy, debates over copyright duration, and legislative proposals for compulsory-license schemes for making books more widely available).

208. See WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 59 (2003) (observing that “the echoing of the literature of the past has been a common device of modernist literature,” and citing as examples the works of James Joyce, T.S. Eliot, Franz Kafka, and W.B. Yeats).

209. See generally SICARI, *supra* note 200, at 1–16 (discussing Pound's use in his *Cantos* of Homer, Dante, and other epic writers).

210. See generally STUART GILBERT, JAMES JOYCE'S ULYSSES: A STUDY (1930) (tracing in detail Joyce's systematic use of Homer's *Odyssey* in *Ulysses*); Jennifer Levine, *Ulysses*, in THE CAMBRIDGE COMPANION TO JAMES JOYCE 122, 122–25 (Derek Attridge ed., 2d ed. 2004) (discussing Joyce's use of *The Odyssey* and *Hamlet* in *Ulysses*).

211. See, e.g., CANTOS, *supra* note 200, at 24 (quoting phrases from Gustave Flaubert's *Un Coeur simple*); *id.* at 190 (adapting and quoting from the writings of economic theorist, C.H. Douglas); *id.* at 470–71 (reproducing photographically pages from Gerhard (or Gerhart) Münch's modern arrangement for violin and piano of a 16th-century musical composition); *id.* at 516 (quoting from a poem by Padraig Colum); see also 1 CARROLL F. TERRELL, A COMPANION TO

and there is no indication that Pound or Joyce ever sought licenses.<sup>212</sup> T.S. Eliot likewise perfected the craft of generating strikingly original verse by assembling mosaics of previous authorship, both ancient and modern.<sup>213</sup> Various poems by Marianne Moore contain precise and sometimes lengthy quotations from contemporaneous sources, such as books and magazines.<sup>214</sup> And many other examples could be cited.<sup>215</sup>

It is hard to imagine literary modernism without its extensive and overt use of texts by others, yet that aspect of the writer's craft does not seem to

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THE CANTOS OF EZRA POUND 30 (1980) (noting Pound's quotations from Flaubert's *Un Coeur simple*); *id.* at 157–58 (identifying sources in C.H. Douglas's writings for Pound's borrowings); *2 id.* at 389 (discussing Münch's musical arrangement which Pound reproduced); *id.* at 432 (noting Pound's quotation from Colum). Each of these writers or composers was still living when Pound borrowed from these works, or had died recently enough for the works to have been protected by copyright in some countries: Flaubert (died 1880), see OXFORD COMPANION TO ENGLISH LITERATURE, *supra* note 182, at 302; Douglas (died 1952), see LETTERS IN CAPTIVITY, *supra* note 7, at 52; Münch (died 1988), see EZRA POUND, THE PISAN CANTOS 131 (Richard Sieburth ed., New Directions Books 2003) (1948); and Colum (died 1972), see OXFORD COMPANION TO IRISH LITERATURE 108 (Robert Welch ed., 1996). As for Joyce's *Ulysses* (first published in 1922), the first chapter of that novel adapts and quotes from, among other authors, Oscar Wilde, W.B. Yeats and Algernon Charles Swinburne. See JAMES JOYCE, ULYSSES 6, 8–9, 13 (Hans Walter Gabler ed., Bodley Head 1986) (1922); see also DON GIFFORD, ULYSSES ANNOTATED: NOTES FOR JAMES JOYCE'S ULYSSES 16, 18, 21 (2d ed., rev. 1988) (identifying Joyce's borrowings from Wilde, Yeats, and Swinburne). The writings of Yeats, who lived until 1939, see OXFORD COMPANION TO ENGLISH LITERATURE, *supra* note 182, at 903, were protected by copyright in 1922 in many parts of the world. Works by Wilde and Swinburne were also likely protected in many countries in 1922. Wilde had died in 1900. See *id.* at 887. Swinburne had died in 1909. See *id.* at 793. A later chapter of *Ulysses* borrows from and parodies at least five authors (Thomas Carlyle, John Henry Newman, Walter Pater, Thomas Huxley, and John Ruskin) whose works were still in copyright in 1922. See SAINT-AMOUR, *supra* note 114, at 181.

212. See generally SAINT-AMOUR, *supra* note 114, at 193–98 (discussing potentially copyrighted sources that Joyce drew upon, without permission, in *Ulysses*). Interestingly, Pound did acknowledge the need to obtain copyright permissions in the scholarly context. For his study of medieval literature, *The Spirit of Romance*, he obtained permission to use lengthy quotations from modern, copyrighted translations of the writings of Dante and Michelangelo. POUND, *supra* note 188, at 7; see also Ezra Pound, The Poems of Cavalcanti, TIMES LITERARY SUPPLEMENT, Dec. 5, 1912, at 562, reprinted in 1 POETRY AND PROSE CONTRIBUTIONS, *supra* note 4, at 110 (noting that it was "not practicable for reasons of copyright and so on" to include Dante Gabriel Rossetti's modern translations of the 13th-century Italian poet Guido Cavalcanti in Pound's own volume of Cavalcanti translations).

213. Eliot's Notes to his major poetic sequence, *The Waste Land*, first published in 1922, indicate that the poem contains quotations from and paraphrases of numerous works potentially still in copyright in 1922 in various parts of the world, including works by F.H. Bradley, Hermann Hesse, Paul Verlaine, Richard Wagner, and Jessie L. Weston. T.S. ELIOT, Notes on "The Waste Land", in COLLECTED POEMS 1909–1962, at 70–76 (1963) [hereinafter COLLECTED POEMS].

214. See, e.g., MARIANNE MOORE, An Octopus, in THE POEMS OF MARIANNE MOORE 167, 167–72 (Grace Schulman ed., 2003); see also *id.* at 381–82 (listing sources for lines in *An Octopus*); Cary Nelson, Modern American Poetry, in THE CAMBRIDGE COMPANION TO AMERICAN MODERNISM 68, 85–86 (Walter Kalaidjian ed., 2005) (discussing Moore's use of quotation and comparing it to T.S. Eliot's).

215. See LEONARD DIEPEVEEN, CHANGING VOICES: THE MODERN QUOTING POEM at viii (1993) (treating quotation as a defining feature of 20th-century poetry and noting that "appropriation of previously existing material may well be the aesthetic of [that] century").

have concerned Pound in 1918 when he proposed his copyright statute. Although some of the most celebrated achievements of modernism, such as *Ulysses* (1922) and *The Waste Land* (1922), were not yet published, or not yet fully published,<sup>216</sup> when Pound wrote his *New Age* article, the use of quotation, allusion, and textual collage was already well established in Pound's own literary practice and that of his contemporaries.<sup>217</sup> That Pound saw no need to address issues of adaptation rights and fair use in any of his discussions of copyright suggests that he did not regard these kinds of literary borrowing as unlawful, unethical, or otherwise controversial. Moreover, there is no record of Pound, Eliot, Joyce, or other modernist writers being challenged by copyright owners, either informally or by means of legal process.

Had Pound and his fellow modernists produced their writings under today's regime of intellectual-property laws, they likely would have met with legal obstacles or found it necessary to alter their literary practices to conform to a legal climate more jealously protective of authors' rights than in 1918.<sup>218</sup> As Paul Saint-Amour noted in 2003 with respect to Joyce's signature use of quotation and parody, "[i]t is difficult to imagine that *Ulysses*, had it been written and published under [the current copyright] regime, would have made nearly as extensive use of its protected source texts or of the unpublished writings . . . of others."<sup>219</sup> Many other works of modernism likewise might have been different had they been created in an intellectual-property climate "that recognizes the smallest reuse of material as a potential infringement and reduces fair use to the quotation of brief passages for review."<sup>220</sup>

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216. In March 1918, *Ulysses* began appearing serially in issues of the *Little Review*, for which Pound served as foreign editor. GEORGE BORNSTEIN, MATERIAL MODERNISM: THE POLITICS OF THE PAGE 87 (2001).

217. See DAVID PERKINS, A HISTORY OF MODERN POETRY: FROM THE 1890S TO THE HIGH MODERNIST MODE 473–79 (1976) (noting the qualities of allusion, juxtaposition, and learned reference in the pre-1922 writings of Pound, T.S. Eliot, and James Joyce).

218. See Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 8 (2002) ("[T]he field of intellectual property . . . today . . . is enjoying unprecedented growth, both in importance and scope."). Today, the modernist practices of quotation, adaptation, and paraphrase might be deemed to run afoul of the author's exclusive rights to reproduce copies of the work and to make derivative works. See 17 U.S.C. § 106(1)-(2) (2006); Salinger v. Random House, Inc., 811 F.2d 90, 97–100 (2d Cir. 1987) (finding that a biographer's quotation and close paraphrase of an author's unpublished letters were not fair use, and directing issuance of a preliminary injunction). For an interesting "thought experiment" concluding that James Joyce's techniques of quotation and parody would be much harder to practice in today's intellectual-property climate, see SAINT-AMOUR, *supra* note 114, at 193–98.

219. SAINT-AMOUR, *supra* note 114, at 197.

220. *Id.* Saint-Amour refers here as much to the protective attitudes of many current copyright owners as to the actual legal standards created by legislatures and courts. For a discussion of the aggressiveness of the current holders of modernist copyrights, see *infra* notes 246–266 and accompanying text.

The more permissive and less propertized climate in which Pound and other modernists produced their richly allusive and collagist experiments was an enabling condition that those writers evidently were able to take for granted.<sup>221</sup> They did not record any gratitude for copyright laws that left intact a public domain brimming with raw materials that the individual talent could use without cost to situate itself in relation to tradition.<sup>222</sup> Although Pound in his *New Age* article complained about the impact on contemporary writers of unequal competition with public-domain authors, he does not seem to have considered the real cost savings that he and his fellow writers enjoyed by being able to borrow freely from those same authors.<sup>223</sup> It could be argued that any competitive disadvantage that modernist writers experienced with respect to earlier literary periods was at least mitigated by modernists' ability to mine those same periods for literary material without having to contend with permissions fees, transaction costs, or threats of litigation. The cost savings that allowed publishers to issue Shakespeare more cheaply than T.S. Eliot arose from the same free public resource that permitted Eliot in *The Waste Land* to quote from and adapt Shakespeare without having to acquire a license<sup>224</sup>—although this does not alter the fact that in 1922 a publisher of Shakespeare's sonnets could presumably undersell a publisher of *The Waste Land*.<sup>225</sup>

In drafting his copyright statute, Pound was more concerned with inequities in the marketplace than with the economics of the creative process.<sup>226</sup> Problems of distribution and compensation, not the scene of writing, captured his imagination as a volunteer legislator. Accordingly, Pound does not treat authorial labor as something that needs to be incentivized by enhanced

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221. See Paul K. Saint-Amour, Book Review, 12 MODERNISM/MODERNITY 511, 511 (2005) (reviewing LANDES & POSNER, *supra* note 208) (describing modernist writing under the present intellectual-property laws as “[t]hat which is still propertized”).

222. I allude to T.S. Eliot's famous discussion of contemporary authors' relationship to literary tradition. See T.S. ELIOT, *Tradition and the Individual Talent* (1919), in SELECTED PROSE OF T.S. ELIOT 37–44 (Frank Kermode ed., 1975).

223. See LANDES & POSNER, *supra* note 208, at 52 (“[T]he absence of copyright protection is, paradoxical as this may seem, a benefit to authors as well as a cost to them. It reduces the cost of writing by enabling an author to copy freely from his predecessors.”).

224. Eliot quotes from or echoes Shakespeare at numerous points in *The Waste Land*. See, e.g., T.S. ELIOT, *The Waste Land*, in COLLECTED POEMS, *supra* note 213, l.48, at 54, ll. 77–78, 125, 128 at 56–57, l. 172, at 59, ll. 191–92, at 60, l. 257, at 62.

225. Of course, Shakespeare, too, took much of his material for free from unprotected sources. See LANDES & POSNER, *supra* note 208, at 58–60.

226. Pound worried to some degree that depriving authors of remuneration for their writings might harm ex ante incentives to create. See Pound, *supra* note 8, at 208–09 (asserting that “[the fact that dead authors' public-domain works undersell living authors' copyrighted works] is to the disadvantage of . . . literary production”). On balance, however, Pound was more interested in mechanisms for disseminating works already created.

copyright protection. Perpetual copyright can provide an income stream and make for a fairer marketplace, but he does not offer his eternal monopoly as an *ex ante* stimulus to literary production. Similarly, by requiring publishers who take advantage of compulsory licenses to make royalty payments, he simply acknowledges the right of authors and their heirs to *ex post* remuneration. Pound's legislative energies were stirred by the prospect of unchecked dissemination of books and art, not by economic stimulus packages for creators. His theory of copyright is therefore essentially a consumer- or demand-side theory, though he does not ignore the plight of pirated writers.

#### IV. THE PROBLEM OF HEIRS AND LONG COPYRIGHTS

Except in his poetic practice, Pound did not overtly acknowledge modernism's dependence on the literary public domain.<sup>227</sup> Nevertheless, in his copyright statute he shows a keen awareness of the problems that a maximalist copyright regime can create. After declaring that copyrights should be perpetual, he immediately turns to what he candidly refers to as the "dangers [that] should be guarded against" in such a system of strong protection.<sup>228</sup> Chief among these dangers are authors and heirs who, now possessed of an everlasting copyright, might "play dog in the manger"<sup>229</sup> or exercise their power to "prevent the publication of [the authors'] works"<sup>230</sup> by perversely interfering with the affordable use and dissemination of previously published works.<sup>231</sup> Given his grant of an eternal copyright, Pound had good reason to worry that heirs might let an author's works fall out of print or somehow stand in the way of cheap reprints and translations, thus impeding communication among

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227. Pound often paid tribute, however, to the "cultural heritage," which he defined as "the whole aggregate of human inventions, ameliorations of seed, of agricultural and mechanical process belonging to no one man, and to no group, escaping the possibilities of any definition of patents under any possible system of patent rights . . ." EZRA POUND, *The Individual in His Milieu: A Study of Relations and Gesell* (1935), in SELECTED PROSE, *supra* note 77, at 272, 275.

228. Pound, *supra* note 8, at 208.

229. *Id.* at 209.

230. *Id.*

231. See *id.* Pound's concern about obstructive heirs contrasts sharply with William Wordsworth's confidence that

as long as the [copyright] privilege remained in the hands of the author's children or descendants, who can doubt that they would be peculiarly prompted to extend the circulation of his works, not merely for their own pecuniary advantage, but out of respect or reverence for his memory, and to fulfil [sic] what could not but be presumed to be his wish?

Letter From William Wordsworth to the Editor of the Kendal Mercury (Apr. 12, 1838), in 3 THE PROSE WORKS OF WILLIAM WORDSWORTH, *supra* note 135, at 309–10.

nations. The subsequent history of modernist writing and scholarship has shown that Pound's fears were justified.

#### A. Pound's Prescience

In 1918 when Pound proposed aggressive liability rules that would prevent the misuse of a perpetual property right, the actual term of copyright in the United States was a total of fifty-six years from the date of publication; in Britain, the term was the author's life plus fifty years.<sup>232</sup> Although these terms have since grown dramatically,<sup>233</sup> even in 1918 Pound perceived that a lengthy copyright term could deliver a mischievous power into the hands of authors' heirs, to the detriment of the public interest. Like the current copyright regime, Pound's statute seeks to assure authors' descendants of an income stream, but, unlike current laws, his statute renders those descendants virtually powerless to interfere with later publications and translations of authors' works if the compulsory license provision is triggered.<sup>234</sup> In this respect, Pound showed himself to be remarkably prescient, for in the past few decades the

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232. See Copyright Act, 1911, 1 & 2 Geo. 5, c. 46, § 3 (Eng.) (providing for a copyright term of the author's life plus fifty years); Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. 1075, 1080 (providing for copyright protection for 28 years from the date of first publication, renewable for another 28 years upon application to the Copyright Office).

233. Copyright terms in the United States and the United Kingdom currently endure for the author's life plus seventy years. 17 U.S.C. § 302(a) (2006); Copyright, Designs and Patents Act, 1988, c. 48, § 12(2).

234. For example, the Sonny Bono Copyright Term Extension Act increased existing and future copyright terms by twenty years in the United States, but included virtually no counterbalancing limitations on copyright owner's exclusive rights. Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298 sec. 102(b), § 302 and sec. 102(d), § 304, 112 Stat. 2827, 2827–28 (amending 17 U.S.C. §§ 302, 304 (2006)). (The Sonny Bono Act did include a limited exception for library and archival uses of works during the last twenty years of their copyright terms. Act of Oct. 27, 1998, Pub. L. No. 105-298, sec. 104, § 108, 112 Stat. 2827, 2829 (codified at 17 U.S.C. § 108(h) (2006))). In enacting this legislation, Congress had authors' heirs specifically in mind. See 141 CONG. REC. 6,553 (1995) (statement of Sen. Feinstein) (contending that copyright duration under the 1976 Copyright Act as originally enacted did not adequately secure "the right to profit from licensing one's work during one's lifetime and to take pride and comfort in knowing that one's children—and perhaps their children—might also benefit from one's posthumous popularity"); 144 CONG. REC. S12,377 (1998) (statement of Sen. Hatch) ("Among the main developments [compelling reconsideration of the 1976 Act's original term of protection] is the effect of demographic trends, such as increasing longevity and the trend toward rearing children later in life, on the effectiveness of the life-plus-fifty term to provide adequate protection for American creators and their heirs."); *see also* Eldred v. Ashcroft, 537 U.S. 186, 206–08 & n.15 (2003) (citing the testimony of artists concerning the needs of their heirs as a rational basis for Congress's increasing copyright terms in the Sonny Bono Act). Pleas for the welfare of heirs have long been a staple of arguments favoring copyright term extensions. See, e.g., WOODMANSEE, *supra* note 135, at 145–47 (1994) (summarizing Wordsworth's efforts in the first half of the 19th century to persuade British legislators to extend the copyright term for the economic benefit of authors and their descendants).

actions and attitudes of the heirs of a number of major modernist authors have become an acute problem for scholars and others who wish to make use of those authors' works.

It should be said at the outset that the specific "dangers"<sup>235</sup> envisaged by Pound—absence of translations and reprints of previously published works—have not occurred, for the most part. Although many important modernist works are still in copyright,<sup>236</sup> they tend to be kept in print, thanks in no small part to the demand created by college students who are required to read these texts in literature courses.<sup>237</sup> (It can be argued, however, that these copyrighted texts are sold at higher prices than Pound would have approved.<sup>238</sup>) But other writings by modernists have not fared so well. Not infrequently, heirs and estates have refused to allow scholars to quote from or reproduce unpublished manuscripts, letters, diaries, and other important documents (even though many of those documents exist in archives that are accessible to the public). Copyright owners have also prevented the public from experiencing new derivative works and creative performances based on established modernist masterworks. Although Pound did not discuss the intersection of intellectual property and unpublished writings, it is reasonable to think that he would have been troubled by copyright impediments to the dissemination of at least certain categories of unpublished material. When early in his career he was given access to the unpublished notebooks of the recently

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235. Pound, *supra* note 8, at 208–09.

236. For a discussion of the copyright status of modernist works, see Spoo, *supra* note 13, at 660–63 & n.158.

237. Many scholars have noted the large market for literary modernism in the university classroom. See, e.g., LEONARD DIEPEVEEN, THE DIFFICULTIES OF MODERNISM 226 (2003) ("[The university] established a stable—and, after World War II, a large—readership [of modernist texts]. With classes being established in literary modernism, annual sales of Joyce's *Ulysses* would easily outpace the sales of the novel in its first ten years."); Mark S. Morrison, *Publishing, in A COMPANION TO MODERNIST LITERATURE AND CULTURE* 133, 142 (David Bradshaw & Kevin J.H. Dettmar eds., 2006) ("The entrance of modernism into the university classroom . . . paved the way for modernist works such as *Ulysses*, or *The Great Gatsby*, or even the poetry of T.S. Eliot to reach new audiences—the size of which would have astounded the original small press and little magazine publishers of modernism."); Lawrence S. Rainey, *Canon, Gender, and Text: The Case of H.D.*, in *REPRESENTING MODERNIST TEXTS: EDITING AS INTERPRETATION* 99, 104 (George Bornstein ed., 1991) (discussing the modernist poet H.D. (Hilda Doolittle) and "the massive transmission of [her] writings to a large new public commanded by the professoriate and the agency of university curricula").

238. See, e.g., Warwick Gould, *Predators and Editors: Yeats in the Pre- and Post-Copyright Era*, in 8 OFFICE FOR HUMANITIES COMM'C'N, TEXTUAL MONOPOLIES: LITERARY COPYRIGHT AND THE PUBLIC DOMAIN 69, 74–80 (Patrick Parrinder & Warren Chernaik eds., 1997) (documenting the increased sales of inexpensive editions of W.B. Yeats's poems following the expiration of Yeats's U.K. copyrights in 1990).

deceased Oriental scholar Ernest Fenollosa,<sup>239</sup> he dedicated himself to mining these documents for Noh dramas, poetry, and other works, which he dutifully edited and saw into print over the course of several years.<sup>240</sup> Later in his career, Pound was among the first modernists to authorize and encourage the publication of his own unpublished letters.<sup>241</sup>

Although barriers erected by heirs and estates to the use of unpublished materials are not the precise dangers of which Pound warned in his copyright proposal, they constitute comparable obstacles to understanding the achievements of modernist writers. The spirit of Pound's copyright statute, and of his own practice as editor of important unpublished materials, favors dissemination of writings by and about Joyce, Eliot, Beckett, and other major writers, many of whom were expatriates who, like Henry James, sought to communicate the significance of one culture to other cultures. As these authors have long since died, scholarship has become the chief vehicle for carrying on their Jamesian "labour of translation"<sup>242</sup>—the project of "making it possible for individuals to meet across national borders."<sup>243</sup> Yet scholars have often met with the "dog in the manger"<sup>244</sup> attitudes that Pound worried might be encouraged by long copyrights. His insistence that "the heirs of an author should be powerless to prevent the publication of his works"<sup>245</sup> suggests a broad rejection of interference by later copyright owners, whatever the reasons those owners might have for interfering.

It has not been uncommon for heirs and estates to use their ownership of copyrights to suppress or control scholarship. For many years, Valerie Eliot, the widow of T.S. Eliot, has vigilantly protected the memory and the unpublished letters and papers of her famous husband.<sup>246</sup> As her former research assistant noted in 2005, "[Mrs. Eliot] continues to guard his letters, restricts access to the Eliot papers at universities and refuses permission to

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239. See CARPENTER, *supra* note 7, at 219–20. Because Pound received these notebooks only a few years after Fenollosa's death in 1908, see *id.* at 219, the notebooks were still protected by copyright. It should be noted that Pound was encouraged by Fenollosa's widow to make use of the notebooks, *id.* at 220, so there was no question of opposition by a copyright owner.

240. See *id.* at 222–23, 237, 265–69, 271–73, 307 (discussing Pound's editing and publication of Noh dramas, essays, and poems culled from Fenollosa's notebooks).

241. THE SELECTED LETTERS OF EZRA POUND, 1907–1941 (D.D. Paige ed., New Directions 1971) (1950). The volume contains over 300 letters by Pound. Its editor, D.D. Paige, noted that Pound had "generously given the editor access" to copies of his letters, and thanked "Mr. and Mrs. Pound" for assisting with the volume. *Id.* at xxiv–xxv.

242. Pound, *supra* note 142, at 144.

243. *Id.*

244. Pound, *supra* note 8, at 208–09.

245. *Id.* at 209.

246. Karen Christensen, *Dear Mrs. Eliot . . .*, GUARDIAN, Jan. 29, 2005, at 4, available at <http://www.guardian.co.uk/books/2005/jan/29/classics.thomasstearnseliot>.

quote his work. Scholars are tremulous in dealing with the Eliot estate.<sup>247</sup> Ian Hamilton, a noted literary biographer, wrote in 2000,

Perhaps the most impregnable estate today is that of T S Eliot. Eliot has been dead for more than 30 years, but still there is no sign of any authorised biography. There have been unauthorised *Lives*—and good ones, too—by Peter Ackroyd and Lyndall Gordon, but neither of these writers enjoyed much assistance from the Eliot Estate: that is to say, from Valerie Eliot, the poet's fiercely loyal widow. Valerie holds all the copyrights; if Eliot scholars want to print quotations from the poet's work, they have to go through her—and this, by all accounts, is not at all straightforward. If Valerie does not like a critic's line, she may well feel disinclined to grant permissions. In some cases, her refusal could scupper a scholar's entire project.<sup>248</sup>

Although Mrs. Eliot has issued some of Eliot's unpublished writings<sup>249</sup> and has approved the publication of others,<sup>250</sup> her control over his estate since his death in 1965 has severely hampered a full understanding of Eliot's life and career.

The Eliot estate is not alone in its controlling attitude. The niece of the poet Marianne Moore "has been unusually strict with permissions" for academic and biographical uses.<sup>251</sup> Restrictions imposed by the Moore estate on quotations

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247. *Id.* Twenty years ago, a single volume of Eliot's letters was published, covering the early part of his career up to 1922. See 1 THE LETTERS OF T.S. ELIOT, 1898–1922 (Valerie Eliot ed., 1988). Since that time, Mrs. Eliot, who presides over the letters project, has published no further volumes, even though hundreds or perhaps thousands of letters remain unpublished—several volumes worth, according to her former assistant. Christensen, *supra* note 246, at 4. "The Eliot letters still linger in [Mrs. Eliot's] flat in Kensington, and it's said that it is unlikely that more will be published during Valerie Eliot's lifetime . . ." *Id.*

248. Ian Hamilton, *Keepers of the Flame*, NEW STATESMAN, May 29, 2000, at 45, 46; *see also* Matthew Rimmer, *Bloomsday: Copyright Estates and Cultural Festivals*, 2 SCRIPT-ED: J.L. TECH. & SOC'Y 345, 368–69 (2005), available at <http://www.law.ed.ac.uk/ahrc/script-ed/vol2-3/bloomsday.pdf>, (describing the Eliot estate's refusal to allow an unauthorized biographer to quote from either published or unpublished writings by Eliot).

249. See, e.g., T.S. ELIOT, THE WASTE LAND: A FACSIMILE AND TRANSCRIPT OF THE ORIGINAL DRAFTS INCLUDING THE ANNOTATIONS OF EZRA POUND (Valerie Eliot ed., 1971).

250. See, e.g., T.S. ELIOT, INVENTIONS OF THE MARCH HARE: POEMS, 1909–1917 (Christopher Ricks ed., 1996) (containing unpublished early poems by Eliot).

251. D.T. Max, *The Injustice Collector: Is James Joyce's Grandson Suppressing Scholarship?*, NEW YORKER, June 19, 2006, at 34, 36; *see also id.* ("[In 1989, [Moore's niece] demanded that a biographer remove all quotations from the poet's unpublished letters."). A webpage for a Yale University online Open Course on modern poetry states, "At the request of the Literary Estate of Marianne Moore, the poetry of Marianne Moore is not included in Open Yale Courses." Lecture 17, Marianne Moore, Open Yale Courses, <http://oyc.yale.edu/english/modern-poetry/content/sessions/lecture17.html> (last visited June 6, 2009). While quotations from other poets studied in this Open Course are included in web-published transcripts of the lectures, quotations from Moore's poems are omitted and referred to by line numbers only. See Langdon Hammer, Modern Poetry: Lecture 17 Transcript (Apr. 2, 2007), [http://oyc.yale.edu/english/modern-poetry/content/transcripts/engl310\\_17a\\_040207\\_final.html](http://oyc.yale.edu/english/modern-poetry/content/transcripts/engl310_17a_040207_final.html).

and the high permissions fees demanded by Moore's publishers have discouraged scholarly work on the poet.<sup>252</sup> The estate of Samuel Beckett, overseen by his nephew, notoriously holds an "iron grip on the playwright's works," and has used legal threats to shut down disapproved performances and ensure that producers and directors show undeviating fidelity to what the estate believes are Beckett's intentions.<sup>253</sup>

The Beckett estate combats what it views as contaminations of the author's intentions and legacy, a practice not limited to the heirs of modernist authors.<sup>254</sup> But in doing so, it has chilled the communication of new interpretations of works that have attained a prominent and sometimes controversial status in our culture.<sup>255</sup> One commentator has observed that Beckett's estate "is setting

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252. E-mail From Patricia Willis, Former Curator, Collection of Am. Literature, Beinecke Library, Yale Univ., to Robert Spoo (Mar. 20, 2008, 3:25 p.m. EST) (on file with author).

253. Barbara McMahon, *Beckett Estate Fails to Stop Women Waiting for Godot*, GUARDIAN (London), Feb. 4, 2006, at 19, available at <http://www.guardian.co.uk/world/2006/feb/04/arts.italy>; see also Rimmer, *supra* note 248, at 373 (describing the Beckett estate's legal threats against an Australian production of a Beckett play that used unauthorized music). In 2006, the estate tried and failed to persuade an Italian court to enjoin an otherwise licensed performance of *Waiting for Godot* after the estate learned that the two lead male roles were to be played by women. See McMahon, *supra*, at 19; see also Katie Charles, *Chin Up: How Fiona Shaw Got Over Her Aversion to Beckett's Happy Days*, N.Y. MAG., Dec. 30, 2007, available at <http://nymag.com/arts/theater/features/42365> ("[T]he Beckett estate adheres to a strict policy of gender appropriateness: Male roles must be played by men, and female roles by women."). In 1994, the "[f]amously proprietary" estate shut down a London performance of Beckett's *Footfalls* because the director had cut five lines of text and permitted an actress to move about the stage in a manner not indicated by the stage directions. *Id.* A few years earlier, legal threats by the estate forced a Northwestern University graduate student to remove certain visual experiments from her production of Beckett's *Endgame*; the estate strongly disapproved of the experiments, even though the text of the play was not altered. Casey Newton, *Beckett's Estate Brings Down Curtain on 'Endgame' Role*, DAILY NW., May 5, 2000, <http://media.www.dailynorthwestern.com/media/storage/paper853/news/2000/05/05/Campus/Becketts.Estate.Bringing.Down.Curtain.On.endgame.Role-1904358.shtml>.

254. The owners of Margaret Mitchell's copyrights have also insisted on strict fidelity to her presumed intentions. In 2001, when the Mitchell trusts learned that an unauthorized novel was to be published that made use of plotlines, characters, and settings from Mitchell's *Gone With the Wind*, they sought and temporarily obtained injunctive relief. See *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001). The enjoined work, entitled *The Wind Done Gone*, was a retelling of Mitchell's famous 1936 novel from the point of view of a mixed-race slave. Its author, Alice Randall, sought "to expose the erasure of black subjectivity in *Gone with [sic] the Wind*, to combat its racial stereotypes, and to impugn its nostalgic, romantic vision of the Old South." Rubenfeld, *supra* note 218, at 9; see also *id.* at 8–9 (discussing *The Wind Done Gone* and the litigation over it); SAINT-AMOUR, *supra* note 114, at 207–18 (same). The Mitchell trusts permit sequels to *Gone With the Wind* only when certain "ground rules" are observed, including the requirement that no "interracial or homosexual sex" be depicted and that Scarlett O'Hara not die. *Id.* at 210. *The Wind Done Gone* violated all these taboos. *Id.* Mitchell, though contemporaneous with modernist writers, is not regarded as one herself, but the latter-day holders of her copyrights have shown an aggressiveness in safeguarding her authorial reputation similar to that of the estates of Joyce, Eliot, and Beckett.

255. See ANTHONY CRONIN, SAMUEL BECKETT: THE LAST MODERNIST 449 (1999) (discussing Beckett's "celebrity as a controversial playwright"); Carol Gelderman, *Samuel Beckett*, in 1 McGRAW-HILL ENCYCLOPEDIA OF WORLD DRAMA 284, 285 (Stanley Hochman ed., 2d ed. 1984) ("[T]he Paris

the stage for his great works to become so conventional—by order of his voice from beyond the grave—that they are lost on future generations.”<sup>256</sup> Long copyright terms allow Beckett’s heirs to prevent enterprising directors and other creative users of his plays from engaging in what Pound, referring to the efforts of Henry James, called the “labour of translation”<sup>257</sup>: the enterprise of making earlier works intelligible and meaningful to other times and other readers. Pound’s capacious sense of “translation” is significant and instructive in this context. His literal desire to increase the quantum of translated works by means of compulsory licenses was an extension of his broader commitment to the Jamesian labor of translation by which different nations and cultures, and by implication different generations, could come to “meet across . . . borders.”<sup>258</sup> The obstructionist behavior of the Beckett estate is inconsistent with Pound’s cultural imperative to maximize communication through translation, both in the specific publishing sense and in the larger Jamesian sense.

Probably the most fiercely vigilant and obstructive modernist estate in recent years has been that of James Joyce. The Joyce estate, which is controlled chiefly by the Irish author’s grandson, Stephen James Joyce, has been described as “muffling a whole field of study with a combination of litigation and bravado.”<sup>259</sup> In 1988, Mr. Joyce insisted that an epilogue to a biography of Joyce’s wife, which discussed Joyce’s mentally disturbed daughter, be deleted from a book already in press, and that the biographer agree that she and her descendants would never publish the omitted material.<sup>260</sup> Mr. Joyce has sued or threatened to sue various users of Joyce’s works, including: the editor of an unauthorized edition of *Ulysses*; a university press that issued an anthology containing excerpts of Joyce’s writings; and the National Library of Ireland, which had planned to display newly acquired *Ulysses* manuscripts during a Joyce celebration

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production of *Waiting for Godot* (1953) immediately established [Beckett] as one of the most controversial dramatists of his time and brought the so-called theatre of the absurd to popular attention.”).

256. News Blog, *Waiting for the Estate of Samuel Beckett*, CHRON. OF HIGHER EDUC., June 29, 2006, <http://chronicle.com/news/article/645/waiting-for-the-estate-of-samuel-beckett>.

257. Pound, *supra* note 142, at 144.

258. *Id.*

259. Max, *supra* note 251, at 37.

260. *Id.* at 34. With the date of publication approaching, the biographer, Brenda Maddox, and her publisher grew increasingly worried as Stephen Joyce continued to withhold permission for quotations from Joyce material used throughout the text of the biography. “Maddox . . . agreed to drop [the epilogue] as barter for retaining all quoted material.” James Woodall, *My Tussle With James Joyce’s Censor: Nixing the Portals of Discovery*, MORE INTELLIGENT LIFE, Oct. 15, 2008, <http://www.moreintelligentlife.com/story/my-tussle-with-james-joyce039s-censor>.

in 2004.<sup>261</sup> The estate has refused permission for, or otherwise made difficult or impossible, numerous scholarly and creative projects—notably, an electronic multimedia version of *Ulysses* that an academic had spent years developing.<sup>262</sup> Because Mr. Joyce “rejects nearly every request to quote from unpublished letters,” some 1,500 Joyce letters remain available only in libraries and archives around the world.<sup>263</sup> Stephen Joyce claims that he is “only protecting and preserving the purity of [his] grandfather’s work [and] what remains of the much abused privacy of the Joyce family.”<sup>264</sup> The Joyces’ private life is “no one’s fucking business,” he has remarked, adding that academics are like “rats and lice—they should be exterminated!”<sup>265</sup> The Joyce estate’s obstructionism is profoundly at odds with the spirit of Ezra Pound’s belief that “the heirs of an author should be powerless to prevent the publication of his works . . .”<sup>266</sup>

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261. Max, *supra* note 251, at 35. For a discussion of lawsuits brought by the Joyce estate, see Robert Spoo, *Three Myths for Aging Copyrights: Tithonus, Dorian Gray, Ulysses*, in 6 JOYCE STUDIES 2004, at 15–21 (Luca Crispi & Catherine Fahy eds., 2004).

262. Max, *supra* note 251, at 37; see also Rimmer, *supra* note 248, at 364–71, 374–76 (discussing the Joyce estate’s efforts to block various scholarly, creative, and popular uses of Joyce’s writings); Robert Spoo, *Copyrights and “Design-Around” Scholarship*, 44 JAMES JOYCE Q. 563, 567–68 (2007) (describing scholarly projects that have been affected by the attitudes of the Joyce estate); Spoo, *supra* note 261, at 13–15 (describing various projects that the Joyce estate has discouraged or attempted to discourage).

263. Max, *supra* note 251, at 35, 37.

264. *Id.* at 35–36.

265. *Id.* at 36.

266. Pound, *supra* note 8, at 209. In recent years, however, scholars have made some inroads into the estate’s flat prohibition on use of protected unpublished materials. In 2006, Professor Carol Loeb Shloss of Stanford University’s English Department, who had been bullied by Mr. Joyce, decided to turn the tables and file a lawsuit against the Joyce estate. The background of Shloss’s lawsuit is recounted in Max, *supra* note 251, at 40–43. See also generally Robert Spoo, *Archival Foreclosure: A Scholar’s Lawsuit Against the Estate of James Joyce*, 71 AM. ARCHIVIST 544–51 (2008) (discussing in detail the events of the lawsuit). Shloss had spent years researching a biography of Joyce’s talented and troubled daughter, Lucia, and at last published it in 2003, see CAROL LOEB SHLOSS, LUCIA JOYCE: TO DANCE IN THE WAKE (2003), but not before she and her publisher deleted many quotations from unpublished material after receiving multiple threats from Mr. Joyce. When Shloss informed the estate that she intended to create a website that would contain the deleted quotations placed within a scholarly context, the Estate forbade the project as unauthorized and infringing. Having engaged legal counsel (disclosure: I have served as co-counsel to Shloss in her lawsuit against the Joyce estate, along with the Stanford Center for Internet & Society and Fair Use Project and other counsel), Shloss filed an action against the estate in a California federal court, seeking a declaration that her proposed website made fair use of the copyrighted materials and that the estate’s actions with respect to her and other scholars over the years constituted copyright misuse. See generally Amended Complaint for Declaratory Judgment and Injunctive Relief, Shloss v. Sweeney, 515 F. Supp. 2d 1068 (N.D. Cal. Oct. 25, 2006) (No. CV 06-3718), available at <http://cyberlaw.stanford.edu/system/files/Amended+Complaint+Final%5B1%5D.doc>. After losing its motion to dismiss, see Shloss v. Sweeney, 515 F. Supp. 2d 1068, 1082 (N.D. Cal. 2007), the Joyce estate agreed to a settlement whereby Shloss was able to place on her website all of the quoted material she had planned to include, and to make additional uses of the material that she had not sought in her complaint. The nonconfidential Settlement Agreement is available online. See Settlement Agreement, Civil Actions CV 06-3718 JW HRL & C07 00517 MEJ, available at

Not all heirs and estates of modernist authors have been so difficult. The estate of W.B. Yeats, overseen until recently by the poet's children, has been generous in granting permissions and making unpublished materials available to scholars and libraries.<sup>267</sup> The Ezra Pound Literary Property Trust, administered by New Directions Publishing Corporation in collaboration with the poet's son and daughter, has given permission for many scholarly projects in the United States and abroad, including books reproducing Pound's unpublished letters and manuscripts.<sup>268</sup> In this respect, Pound's children and the trust that administers his literary property have acted in the spirit of Pound's own commitment to unrestrained dissemination of authors' writings.

Pound's fear that authors or heirs would "play dog in the manger"<sup>269</sup> with the copyrights they control, or exercise a broad power to "prevent" publication,<sup>270</sup> has been realized in the case of Joyce, Eliot, Beckett, and other modernist authors. The root of the problem is plain. Extremely long copyrights have placed monopoly control in the hands of heirs and transferees who are remote historically, and sometimes temperamentally, from the authors whose rights they administer and from the origins of the writings they jealously protect. Genetic connection is no guarantee of literary sensitivity or historical responsibility. For every Pound estate that strives to foster understanding of an author, there is a Joyce estate that places family privacy or reputational purity above all other considerations. Lengthy copyrights allow mere rightholders to become privileged and sometimes arbitrary custodians of culture. The power to dictate the shape of scholarship and biography can be especially dangerous when an author has become as important, and even iconic, as some of the modernist writers. Pound foresaw this possibility that heirs would block the progress of learning, and thus crafted broad compulsory-license provisions to rein in the potential abuse of copyrights.

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<http://cyberlaw.stanford.edu/system/files/Shloss+Settlement+Agreement.pdf> (last visited June 5, 2009). The court also issued an order declaring that Shloss was the "prevailing party" under the copyright statute and was entitled to her costs and reasonable attorneys' fees. See *Shloss*, 515 F. Supp. 2d at 1086.

267. See BORNSTEIN, *supra* note 216, at 42 (noting that "not all copyright holders for other poets have been as cooperative or as scrupulous as the Yeats estate for works still under restriction"); see also Bernard Adams, *Michael Yeats*, INDEP. (London), Jan. 10, 2007, at 32 (describing, in an obituary of Yeats's son Michael, the courtesy and generosity with which Michael and his sister responded to scholarly inquiries).

268. Scores of books and articles attest to the cooperation of the Pound Trust and its agents. See, e.g., LAWRENCE S. RAINES, *EZRA POUND AND THE MONUMENT OF CULTURE: TEXT, HISTORY, AND THE MALATESTA CANTOS* at xiv (1991) ("I am also grateful to New Directions Publishing Corporation, agents for the Trustees of the Ezra Pound Literary Property Trust, for permission to quote from published and unpublished materials by Ezra Pound . . .").

269. Pound, *supra* note 8, at 209.

270. *Id.* at 208–09.

### B. Recent Proposals for Balancing Long Copyrights With the Needs of the Public

Pound's compulsory-license scheme was fueled by a simple intuition: Heirs (and even authors) might not be the best stewards of literary legacies. If such individuals proved to be inadequate to the task of keeping reprints and translations in circulation, compulsory licenses would allow that role to be shared by anyone who chose to spend the time and resources to ensure dissemination of works. Essentially, this was a mechanism for placing literary property in the hands of those who would make the highest and best use of it. Pound's compulsory licenses, once they were triggered by the abdication of copyright owners, would transfer reprint and translation rights to those more motivated to exercise them, with the sole requirement that they make fixed royalty payments to the copyright owners.

This scheme would have created a sort of paying public domain, where publishers and translators with the requisite funds, energy, and insight could assume control of literary resources. The ordinary public domain as we know it today also calls forth such volunteers, but without the necessity of royalty payments.<sup>271</sup> Pound's paying public domain would have the signal advantage of permitting unauthorized uses, not when copyrights at long last expire (they don't under his scheme), but rather when copyright owners threaten market failure by neglecting authors' works or by guarding those works too zealously. Transposed to the present day and its elastic conception of publication (which for many includes the countless forms of self-publishing on the Internet),<sup>272</sup> Pound's scheme might be effective in breaking some of the impasses encountered by scholars.<sup>273</sup>

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271. The same conclusion has been suggested in the idiom of law and economics. See, e.g., Dennis S. Karjala, *Congestion Externalities and Extended Copyright Protection*, 94 GEO. L.J. 1065, 1079 (2006) ("[A] belief that the original creator (or his transferee) can best manage the work in the public interest runs strongly contrary to our long-standing and fundamental reliance on free markets to allocate resources to the production and distribution of goods."); Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 141–48 (2004) (discussing the market wisdom of granting exclusive rights in intellectual property and the effects of such grants on the availability and cost of information).

272. See generally Caryn S. Wesner-Early, *Self-Publishing Online*, in 4 ENCYCLOPEDIA OF LIBRARY AND INFORMATION SCIENCE 2589–94 (Miriam A. Drake ed., 2d ed. 2003) (discussing definitions of self-publishing in the online context).

273. For example, if online self-publication qualified as "publishing" under Pound's statute, the academic scholar whose electronic multimedia version of *Ulysses* was effectively vetoed by the Joyce estate could, under Pound's scheme, have gone forward with launching his project on the Internet, with the sole obligation of paying the estate an ex post royalty on revenues earned from the project. See *supra* note 262 and accompanying text for reference to the vetoed electronic version of *Ulysses*.

In addition to recalling nineteenth-century free-trade royalty schemes, Pound's statute anticipates recent academic and legislative proposals for balancing the effects of long copyrights with the needs of the public. These proposals are often different from Pound's scheme in detail and scope, but they spring from the same sense of urgency to ensure that expansive intellectual-property rights do not interfere with the availability of cultural products. For example, William M. Landes and Richard A. Posner have advocated a system of indefinitely renewable copyright whereby owners, in order to maintain their property rights, would be required to renew copyright registrations every ten years or so by filing some paperwork and paying a fee.<sup>274</sup> Because only those with financial or other incentives for maintaining copyrights would take the trouble to renew, “[m]ore works will be in the public domain, thus minimizing access, transaction, and administrative costs, while those few copyrights that retain their value will remain in copyright protection indefinitely . . .”<sup>275</sup> Like Pound's statute, this scheme gives copyright owners an opportunity to maintain their rights perpetually, but also allows works to become freely available for use by the public if owners abdicate their stewardship.

Similarly, Lawrence Lessig has proposed a system whereby owners would have to renew their copyrights every five years in order to maintain the property right.<sup>276</sup> If the current “no effort” monopoly handout were replaced with a regime in which owners have the burden of re-registering copyrights, orphan works and other abandoned or underexploited products would lose copyright protection and become available to the public sooner rather than later.<sup>277</sup> In recent years, various bills, entitled the Public Domain Enhancement Act, have been introduced in Congress to amend the Copyright Act by requiring a maintenance fee, or tax, of one dollar to be paid fifty years after the publication of a work and “every 10 years thereafter until the end of the copyright term.”<sup>278</sup> Under these proposals, if the fee is not paid within a certain period, the work loses its copyright and becomes available for anyone to use.<sup>279</sup> The purpose of these proposals is, in part, “to establish a mechanism by which abandoned

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274. William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 473, 477 (2003).

275. *Id.* at 518. Like Pound, Landes and Posner do not let constitutional barriers prevent them from urging a potentially infinite copyright. See *id.* at 473 (“[W]e are interested in the economics of indefinitely renewing the copyright term and express no view on its legality.”).

276. LAWRENCE LESSIG, THE FUTURE OF IDEAS 251–52 (2001) (proposing a five-year copyright term, renewable fifteen times).

277. *Id.* at 250.

278. H.R. 2408, 109th Cong. § 306 (2005); H.R. 2601, 108th Cong. § 306(a) (2003).

279. H.R. 2408, 109th Cong. § 306; H.R. 2601, 108th Cong. § 306(a).

American copyrights can enter the public domain.”<sup>280</sup> So far, these orphan-works bills have been referred to the House Judiciary Committee and have not emerged.<sup>281</sup>

In 1997, Canada succeeded in enacting legislation to address the problem of orphan works<sup>282</sup>—that is, works whose copyright owners cannot be located.<sup>283</sup> These rules permit anyone who has failed to locate a copyright owner after making a reasonable search to apply to the government for a nonexclusive license to use a published work still under copyright.<sup>284</sup> Once a license is issued by the Copyright Board of Canada, the licensee may make a wide range of uses, with the sole duty of paying a fixed royalty if the copyright owner comes forward within a prescribed period.<sup>285</sup>

Other recent proposals for altering the copyright law share the spirit, if not the precise details, of Pound’s statute. For example, Jed Rubenfeld has urged special remedy rules that he argues would render American copyright law more consistent with First Amendment principles.<sup>286</sup> In this system, copyright owners could continue to seek damages and injunctive relief for nontransformative piracies of protected works, but they could bring only an action for profit allocation for unauthorized derivative works.<sup>287</sup> Because derivative works require an exercise of what Rubenfeld calls “the freedom of imagination,” a sharing of profits is the only remedy for such infringements that would not violate the First Amendment.<sup>288</sup>

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280. H.R. 2408, 109th Cong. § 2(5) (2005).

281. For the referral of H.R. 2601 to committee, see the Library of Congress THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR02601:@@@X> (last visited June 28, 2009). For the referral of H.R. 2408 to committee, see *id.*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR02408:@@@X> (last visited June 28, 2009).

282. An Act to Amend the Copyright Act, 1997 S.C., ch. 24, ¶ 50 (Can.).

283. Copyright Act, R.S.C., ch. C-42, § 77(1) (1985) (Can.).

284. *Id.* § 77(1)–(2).

285. *Id.* § 77(1), (3). In the United States, legislation has been proposed that would limit the damages that may be obtained from an infringer of the copyright in an orphan work if the infringer performed a reasonably diligent search for the copyright owner and met other statutory requirements. See Orphan Works Act of 2008, H.R. 5889, 110th Cong. (2008); Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. (2008).

286. See generally Rubenfeld, *supra* note 218. Copyright law arguably interferes with First Amendment freedoms by enabling rightholders to obtain court orders regulating speech on the basis of its content, and even its viewpoint, inasmuch as speech is deemed infringing under copyright law if it is substantially similar to previously copyrighted speech (that is, embodies a certain content), unless the challenged speech qualifies as, for example, fair-use criticism (having adopted a certain critical viewpoint). *Id.* at 6–7. Moreover, copyright law permits prior restraints by authorizing courts to issue pre-publication injunctions. *Id.* at 6.

287. *Id.* at 48–49, 55–57.

288. *Id.* at 54; see also Alex Kozinski & Christopher Newman, *What’s So Fair About Fair Use?*, 46 J. COPYRIGHT SOC’Y 513, 525–26 (1999) (proposing a profit-allocation regime for derivative works as a replacement for the current fair-use doctrine).

Pound's compulsory-license rules permitting translations of published works to be made and disseminated under certain conditions foreshadow Rubenfeld's goal of encouraging the creation of transformative works that increase the quantity of imaginative expression in our society. Indeed, Pound's statute resembles each of the foregoing proposals in its attempt to come to grips with the unintended consequences of long copyrights and the loss to the public resulting from under-exploitation of existing works. Pound saw, as Lessig and others would later, that placing copyrights in the hands of single owners for lengthy periods of time is a policy fraught with peril. Heirs and other transferees, ever more removed from the moment of authorial creation, cannot be depended upon to keep the public interest in view.

## CONCLUSION

Ezra Pound did something that few advocates of a perpetual copyright would dream of doing: He candidly faced and articulated some of the dangers to which such a strong property right could give rise. Wordsworth, another great poet-polemicist who believed that copyrights should be everlasting, never conceded the harm that concentrating such potent rights in a single owner might inflict on the public interest. Pound was a man whose *idées fixes* about politics and economics ultimately led him into foolish and tragic errors, yet on the question of copyright he was open-minded and flexible enough to see beyond his own interests as an author and property owner.<sup>289</sup> That flexibility was so great that in proposing an international copyright law he combined an extremely strong property rule with extremely aggressive liability rules in a scheme that surpassed other historical proposals for amending copyright laws by first granting a perpetual monopoly and then radically curtailing its potential abuses.

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289. Although Pound did not pursue his copyright proposal in later years, he avidly followed the efforts of others to reform copyright law along somewhat similar lines. In particular, he admired the attempts of Congressman Albert Henry Vestal (1875–1932) in the 1920s and early 1930s to conform American copyright law to international standards. See Ezra Pound, *The Exile*, EXILE, Spring 1928, at 102, para. 7, reprinted in 5 POETRY AND PROSE CONTRIBUTIONS, *supra* note 4, at 16, 17 (“[T]hose impeding Vestal's reform of copyright dishonesty ought to be suspended in chains.”). Had they been enacted, Vestal's proposals would, among other things, have extended the copyright term to the author's life plus fifty years, eliminated formalities as a condition of copyright protection, reduced the impact of the manufacturing requirements on foreign authors, and permitted the United States to join the Berne Convention. See H.R. 12549, 71st Cong. §§ 1–2, 12, 28–29, 34, 41, 61 (1930); see also H.R. 6988, 71st Cong. §§ 1–3 (1929) (authorizing the President to proclaim adherence of the United States to international copyright conventions and providing copyright protection for foreign authors). For Pound's support of Vestal's proposals, see POUND AND CUTTING, *supra* note 13, at 28–29, 45–46.

Pound passionately believed that communication should not be hampered by the monopoly power that copyrights confer. Undoubtedly influenced by the anti-monopoly, royalty campaigns of the nineteenth century, he was a copyright free-trader at heart. Yet he did not feel that the work of dissemination could be left to an unfettered public domain, because he believed that authors and their heirs were entitled to remuneration for as long as works remained of interest to the public, and he worried that the expiration of copyrights created unequal competition between past and present writers. These convictions were reinforced by his Romantic conception of the artist and his Locke-like notion that authors were entitled to protection for their mental labors.

Divergent views of the purpose of copyright shaped Pound's statute as they have shaped the history of copyright for two centuries. We can learn from him, as we can from that history, that the law cannot safely continue on a course of unqualified maximalist protection for copyright owners. Pound's attitude toward copyright law was ultimately an instrumental one: He viewed authorial rights as a means of furthering international and intergenerational communication. The spread of new translations of authors' writings, by dint of legal compulsion if necessary, would advance a much larger work of translation—the encouragement of nations, generations, and individuals to translate their differences back and forth in a restless, unending encounter with the unfamiliar. If what Pound and Henry James thought of as the labor of translation among generations and cultures is to continue today, the law must find a better balance between authorial entitlements and the public weal.

## APPENDIX

The following text, containing Ezra Pound's proposals for copyright reform, is excerpted from Pound's Oct. 3, 1918 *New Age* article, *Copyright and Tariff*.<sup>290</sup>

[ . . . ] The copyright of any book printed anywhere should be and remain automatically the author's. The author should in return for this protection place on file copies of his book at the National Library, Washington, and in the municipal libraries of the four largest American cities. Such placing on file of the work should dispose of any further dispute over the matter. (I need hardly point out that said libraries would under this system acquire invaluable collections free of cost to the public.)

Copyright from present date should be perpetual.

In my own case I wish to leave my royalties as a literary endowment. I should be able to do this with as much security as if I had acquired oil stock, or government bonds, instead of producing literature.

Secondly, the present law by which copyright expires permits dead authors to compete on unjust terms with living authors. Unscrupulous, but well-meaning publishers, well serving the public, print dead authors more cheaply than living ones BECAUSE *they do not have to pay royalties*. This is to the disadvantage of contemporary literature, to the disadvantage of literary production. As America has less past literature than other countries it is particularly to American disadvantage that the living author should not fare as well as the dead one.

BUT the heirs of an author should be powerless to prevent the publication of his works or to extract any excessive royalties.

If the heirs neglect to keep a man's work in print and at a price not greater than the price of his books during his life, then unauthorised publishers should be at liberty to reprint said works, paying to heirs a royalty not more than 20 per cent. and not less than 10 per cent.

BUT the protection of the author should not enable him to play dog in the manger.

IF, having failed to have his works printed in America, or imported into America, or translated into American, an American publisher or translator apply to said author for permission to publish or translate a given work or works, and receive no answer within reasonable time, say six months, and if said author do not give notice of intending other American publication (quite definitely stating where and when) within reasonable time or designate some other translator, then, the first

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290. Ezra Pound, *Copyright and Tariff*, NEW AGE, Oct. 3, 1918, at 363, reprinted in 3 EZRA POUND'S POETRY AND PROSE CONTRIBUTIONS TO PERIODICALS 208 (Lea Baechler et al. eds., 1991).

publisher shall have the right to publish or translate any work, paying to the original author a royalty of not more than 20 per cent. and not less than 10 per cent. in the case of a foreign work translated. The original author shall have right at law to the minimum of these royalties.

But no unauthorised translation should inhibit the later publication of an authorised translation. Nevertheless, an authorised translation appearing later should not in any way interfere with preceding translations save by fair and open competition in the market.

No perpetual copyright should come into effect without these safeguards. They are very important.

In addition:

After a man's works have sold a certain number of copies, let us say 100,000, there should be no means of indefinitely preventing a very cheap reissue of his work. Let us say a shilling a volume. Royalty on same payable at rate of 20 per cent. to author or heirs. [ . . . ]