Papers on Joyce 10/11 (2004-2005): 163-68

The Censor Swings Again: Freedom of Inquiry and the Principle of Suppression

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Abstract

If limitations on artistic and scholarly work based on obscenity law have decreased in the Anglo-American cultural environment, limitations of a different sort have replaced them in the Copyright Term Extension Act of 1998 and the USA Patriot Act of 2001. Since the passage of the first of these Acts, Joyceans have experienced special problems with copyright-related issues, exacerbated by the irrational protectiveness of the Joyce estate. The result has been frustration for many scholars and the demise or interruption of major scholarly enterprises. The problems raised by the Patriot Act are no less serious, though of a different order. Various sections of this act give the United States government surveillance powers so broad that they constitute a form of censorship with the potential of indiscriminate application. For the scholar seeking a free exchange of ideas with colleagues throughout the world, the Patriot Act creates a well-founded worry of invasion of privacy in communication and limitations of freedom of inquiry.

"The true censor has objectives beyond the masking of the erotic
and the indecent. The end in view is an established
principle of suppression, available anywhere
in the field of the mind."
Charles Rembar, *The End of Obscenity*

This remark of Charles Rembar, lead attorney in the string of celebrated cases involving obscenity law and literature in the United States in the 1960's, succinctly links two major areas of censorship, one defined by obscenity law, the other by what is broadly termed intellectual property law.[1] Despite the major differences between these two

categories, their effect, when applied to artistic production or scholarly inquiry, is essentially the same: suppression of freedom of inquiry established by a long tradition in Anglo-American—indeed, Western—legal history.

For Joyceans, concerns about encroachments on freedom of expression resulting from the application of obscenity law are no longer of much significance. While these were not entirely resolved by the celebrated Woolsey decision of 1934, in which *Ulysses*, after a non-juried trial arranged by Random House and argued by Morris L. Ernst, was judged to be lacking in prurient intent, nowhere, except perhaps in isolated instances of censorship at local or regional levels has there been any serious attempt to block distribution of the book since then.[2] (Significantly enough, in none of the celebrated obscenity cases of the 1960's, ultimately resolved by the non-literary *Miller v. California* decision of the U.S. Supreme Court in 1973, was *Ulysses* or any other Joycean text, a player.)[3] In fact, obscenity cases in recent years in the United States have focused on other forms of cultural production: music, movies, and the media. The Communications Decency Act passed by the United States Congress in 1996 as Title V of the Telecommunications Act, though of dubious constitutionality, is the only serious, far-reaching piece of federal legislation dealing with obscenity issues to be enacted in decades. Though nominally applicable to print media (or their electronic equivalent), this Act was really conceived as a way of censoring the broadcasting industry and the Internet, purging them of content deemed inappropriate by conservative religious and political groups.[4]

Indeed, it is arguable that, even in the context of the increasingly conservative cultural and political environment of the United States, literature is no longer deemed important or influential enough to be worth the effort of censoring, except when it infringes on the values of specific interest groups. The exposure of a media star's breast in the half-time entertainment of a Super Bowl game caused more cries for limiting freedom of expression than any book published here in the last forty years.

Unfortunately, however, the Joycean community, indeed, the entire community of scholars in the humanities, has other things to worry about. As limitations on artistic and scholarly work based on obscenity law have decreased, approaching, if not quite reaching, the point of insignificance, limitations of a different sort have replaced them, embodied in the Copyright Term Extension Act of 1998 and the Patriot Act of 2001.

Since the passage of the first of these Acts, and the endorsement by the United States in 1989 of the Berne Convention for the Protection of

Literary and Artistic Works, Joyceans have experienced special problems with copyright-related issues. Permission denials have become a particular source of frustration among scholars, editors, and publishers, all of whom are caught in the same net of restrictions. A literary scholar dealing with twentieth-century literature who is unable to cite relevant passages of a text or a piece of correspondence, whether flattering or not to its author, is like a singer without a song. In the case of Joyce, it is especially ironic that an author so penalized in his lifetime by censorship in various forms and by the lack of copyright protection, should now have his literary legacy in the control of someone who exercises one in the name of the other.

The irrational protectiveness of the Joyce estate has created the situation in which even the smallest use of Joycean texts may exact a symbolic pound of flesh in return. As Paul Saint-Amour observes in his deeply researched study, *The Copywrights: Intellectual Property and the Literary Imagination* (2003), "The phenomenon of 'copyright creep,' however much one might regret its reapportioning of public and private domains, appears to have resulted from the influence of the private sector on the legislative climate, rather than from some privatizing drive inherent in copyright's metaphysics."[5] This influence has put Mickey Mouse and the interests of the Disney Corporation on the same level as the literary legacies of Joyce and other major modern authors.

Besides creating frustration in individual cases, it has also led to the demise or interruption of major scholarly enterprises. Thomas Staley's invaluable *Joyce Studies Annual* (from University of Texas Press), long dedicated to archival-based research and textual criticism, ceased publication largely because of the sheer difficulty of gaining permissions from the Estate. The hypermedia concordance to *Ulysses* criticism, a major project of Michael Groden of University of London (Ontario), has been interrupted by the same set of restrictions.[6] Were these restrictions imposed only on irresponsible publishers, eager, like Samuel Roth in the 1920's, to profit from copyright lapses by releasing poorly edited editions of Joyce's work, then there might be some good in them.[7] But to see them applied to the work of people who have given much of their scholarly lives to the explication of Joyce's work and the perpetuation of his literary reputation is a very cruel irony indeed. The report of the Fact-Finding Panel on Copyright and Permissions, established in 2004 by the Joyce Foundation "to gather information about the permissions history and criteria of the Joyce Estate"[8] may clarify the issues of greatest concern and pave the way to better relations with the Joyce Estate. (This report is shortly to appear at the time of this writing.)

The problems raised by the more recent Patriot Act are no less

serious, though of a different order. Enacted shortly after the 9/11 attack on New York City and Washington, D.C., this Act has established broad surveillance powers at the federal level with the intent of preventing future instances of terrorism on U.S. soil. So broad are these powers and so lengthy the Act that created them that many in this country have suspected that much of this legislation had already been drafted prior to the sad events of 9/11. Such suspicions notwithstanding, the Patriot Act contains provisions that directly affect the freedoms required by scholarly exchange on an international level, the very kind of exchange for which the Joyce Foundation was created. As the Joycean community continues its expansion world wide, with more translations of Joyce texts being added to what is already a very long list, exchange of scholarly opinion by the Internet on a world-wide basis will be ever more important. It is precisely this kind of free exchange that is potentially threatened by some of the provisions of the Patriot Act.

In the name of protecting against acts of terrorism, various sections of the Patriot Act, along with related pieces of legislation and executive orders, give government agencies authority to intercept any wire, oral, or electronic communication, even check the records of library patrons, without court warrant. Essentially, these provisions create the broadest surveillance measures ever enacted in this country, even in times of war, and seriously damage the privacy rights of all citizens.

If such surveillance tactics were in fact restricted in some way to communication directly related to identifiable terrorist networks, then perhaps there might be less reason to be concerned. Unfortunately, it is difficult to put that much trust in government agencies that have led this country and the world down a slippery slope in the past several years. An example from American popular culture illustrates the perils as well as anything else that might be said.

Following the release in 1963 of The Kingsmen's rock and roll version of the song "Louie Louie," the Federal Bureau of Investigation began compiling a file on the song, convinced of the prurient and possibly subversive intent of its largely unintelligible lyrics. This investigation, which ultimately led nowhere, went on for several years, at the same time the FBI—convinced they were part of a communist conspiracy—was tapping the phones of people like the Reverend Martin Luther King, Jr., and other leaders of the civil rights movement. The fact that this investigation of a popular song led to no indictments or convictions in no way detracts from its inappropriateness nor its obvious infringement on the rights of free speech.

In the light of such bad judgments by a major federal agency, how can a Joyce scholar today feel sure that, in communicating by e-mail with a colleague in, say, the Middle East or Asia, a portion quoted from the *Wake* in the message will not be intercepted, interpreted as some sort of code, and lead to a knock on the door? Paranoid, you say? Not in a country where, like China, journalists are being jailed for failing to disclose their sources, and citizens are expected to give up basic civil liberties to a government that doesn't seem to respect, or even understand, them.

We can hope that the terms of the Patriot Act will be modified to diminish such fears before its life is extended by the United States Congress early in 2006. Unfortunately, nothing in the recent history of the current government and its actions gives me much reason to think so.

Notes

[1] See Charles Rembar, *The End of Obscenity* (New York: Harper & Row, 1986) 173. In this book Rembar provides a full account of the string of celebrated cases culminating in the crucial decision of 1966 involving John Cleland's eighteenth-century novel, *Memoirs of a Woman of Pleasure*, better known as *Fanny Hill*.

[2] For the most part, such censorship, including that in the former Soviet bloc, is ideologically inspired. For the full history of the Random House case, along with all relevant opinions, see *The United States v. One Book Entitled "Ulysses" by James Joyce: Documents and Commentary—A 50-Year Retrospective* (Frederick, Md.: Univ. Publications of America, 1984.)

[3] A broad discussion of Miller and preceding opinions is provided in Ernest J. Schopler, Annotation, "Supreme Court's Development, Since Roth v. United States, of Standards and Principles Determining Concepts of Obscenity in Context of Right of Free Speech and Press," 41, *United States Supreme Court Reporter: L.Ed.2d*, 1257 (1975).

[4] Initial fears about the negative effect of this Act on literary studies have been effaced by various challenges to its constitutionality and the nullifying effect of the Copyright Protection Act, discussed below, on hypermedia-based research. For an early reaction to the Communications Decency Act, see my article, "The Censor Swings: Joyce's Work and the New Censorship," *James Joyce Quarterly* 33.3 (Spring 1996) 374.

[5] Paul Saint-Amour, *The Copywrights: Intellectual Property and the Literary Imagination* (Ithaca, N.Y.: Cornell University Press, 2003) 6. Robert Spoo's *Three Myths for Aging Copyrights: Tithonus, Dorian Gray, and Ulysses* (Dublin: National Library of Ireland, 2004), v. 6 in the Joyce Studies pamphlet series, deals with the same problems.

[6] As reported in January of 2004, "The editors of "Digital *Ulysses*" were unable to reach an agreement with the Estate of James Joyce for permission to use the texts of Joyce's works for the project, and as a result work on "Digital *Ulysses*" (and by extension on the earlier "James Joyce's *Ulysses* in Hypermedia") is suspended as of the end of the Mellon Grant [supporting the project] in January 2004." See <http://publish.uwo.ca/~mgroden/ulysses/>.

[7] For a discussion of the fruits of one such ill-advised enterprise, see Fritz Senn's letter about a recent ten-volume edition of the works of Joyce for which its publisher, Robert Fredericks Ltd, Bath, is being sued by the Joyce Estate: *James Joyce Quarterly* 41:1/2 (Fall 2003/Winter 2004) 325-6.

[8] *James Joyce Literary Supplement* (Fall 2004) 6.