

MODERNISM & COPYRIGHT

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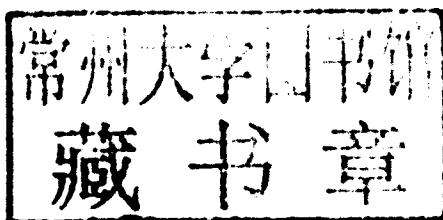
by Randal

EDITED BY
PAUL K. SAINT-AMOUR

Modernism and Copyright

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Series Editors' Foreword

Choosing the first essay collection to appear in the Modernist Literature and Culture series felt like a big decision: a big decision that, ultimately, was no decision at all. Scholarly presses are rightly wary of taking a risk on collections, which often don't sell as well as monographs; in kicking off the series, Mark and I had an agreement with our editor, Shannon McLachlan, that we'd establish MLC exclusively with monographs. But we also knew that there would be room, when the time was right, for just the right collection.

And then at just the right moment, Paul Saint-Amour brought it to us: *Modernism and Copyright*. A collection "by many hands," in that quaint old publishing phrase, can prove its worth by doing one of two things. The first is to bring together ten or twelve luminaries to polish up a topic that has started to lose its luster. A mixture of established and younger scholars, for instance, on the current status of "the death of the Author" (still dead?), or *New Directions in [Your Problematic Here]*. Such a volume serves to establish the state-of-the-discipline, or state-of-the-discourse: it might venture one or two forward-looking pieces, but its primary project is consolidation, as it attempts to master all it surveys.

Modernism and Copyright is not in the business of rehabbing well-worn ground. Rather, it earns its spot on the Modernist Literature & Culture list by giving shape to a field that has, to date, remained largely inchoate: the field so simply denominated in its title. This is the second great service that an edited volume can perform for the profession or the discipline: to focus, to galvanize, a scholarly conversation; to draw together the various threads in a conversation hitherto only dimly recognized as a conversation. In short, the most powerful collections of this kind help to

establish a field of inquiry, and to provide it with a theoretical and methodological basis, where before one heard only individual voices crying in the scholarly wilderness. Before the intervention of this kind of collection, we know there's something happening but we don't know what it is: the volume comes along and gives it a name, and an intellectual center.

Writing for the first type of collection is a chore, something of a scholarly obligation (unless one happens to be the new kid in the volume); when writing for the second type, one has the sense of redrawing the boundaries of disciplinary inquiry, being part of something big.

We're very pleased with the wide range of essays in what might, to the uninitiated, sound like a somewhat narrow project; Paul Saint-Amour must be commended not just for this range, which he had the foresight to seek out, but for the very clear organization of paired essays on topics ranging from "Portraits of the Modernist as Copyright" to "The Fall and Rise of Remix Culture" to "Modernism after Modernism after Modernism." If this is the ideal first collection for the MLC series, Paul is ideally positioned at the center of this intellectual welter. His first book, *The Copyrights: Intellectual Property and the Literary Imagination* effectively put issues of intellectual property on the radar of modernist studies, and his years of working on these questions, in both very theoretical and highly practical terms, pay a great dividend here. "Modernism and the Lives of Copyright," Paul's introduction to the collection, goes far beyond the typical remit of a collection introduction, adumbrating at least two important new matrices for understanding the volume's titular interaction: his novel application of Foucaultian biopolitics to questions of copyright maximalism, on the one hand, and his deft deployment of counterfactual narratives, on the other. At the other end of the volume, *Modernism and Copyright* adapts an eminently practical FAQ for modernist scholars on questions of copyright, the public domain, fair use, and permissions, initially prepared by a group of scholars chaired by Saint-Amour at the behest of the International James Joyce Foundation.

In between these rich bookends, a wealth of information and provocation on modernism's vexed relationship with evolving international copyright systems and with adjacent regimes of privacy, publicity, and attribution: laws that modernist works provoked and contested, decried and celebrated.

We feel confident now in saying that modernism's interpellation within questions of intellectual property—and the inseparability of copyright law itself from the intellectual and juridical structures of modernism—has achieved the status of

an important subfield within modernist studies. *Modernism and Copyright* is something like its establishing text; we're proud to have played a role in bringing the book to light.

KEVIN J. H. DETTMAR AND MARK WOLLAEGER

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Gravity and levity met often in the making of this book. My collaborators at Oxford University Press and its Modernist Literature and Culture series have been a delight to work with. I am grateful to Shannon McLachlan for encouraging me to undertake this project in the first place and for leavening the years of its assembly with her curiosity, enthusiasm, and commitment to scholarly access. Kevin Dettmar and Mark Wollaeger befriended the book early on, guiding its editor with their signature mix of wit, precision, and generosity. Amid his whiplash-quick responses to my queries, Brendan O'Neill made a strong case for faux chinchilla outerwear, even if he remained unaccountably skeptical about the magnificent Prefab Sprout. And two anonymous readers for the press gave the book a strong push toward its current shape.

Modernism and Copyright's contributors are an exceptional, and exceptionally patient, group of writers; each of them has my gratitude and admiration. I would like to single out Robert Spoo for particular thanks: he not only contributed the book's opening essay but also served as the project's unofficial legal advisor. Bob's friendship and good will were nothing less than this book's enabling conditions. My research assistant, Beth Blum, was dauntless in pursuit of documents, alive to serendipities, and a terrific interlocutor. Jed Esty helped me to sharpen my introduction, and Hilary Schor, Caroline Levine, and Richard Begam supplied crucial hints and correctives. The vigilant Merryl Sloane copyedited the manuscript, saving us from innumerable lapses.

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Introduction

Modernism and the Lives of Copyright

Paul K. Saint-Amour

No one listening to the hit records “I Got You Babe” or “The Beat Goes On” in the 1960s would have singled out their writer, Sonny Bono, as the future patron saint of perpetual copyright. It wasn’t until the mustachioed songster had spent four years as mayor of Palm Springs and gone on to the U.S. House of Representatives that he became a public advocate of longer copyright terms, thanks in part to his involvement with the rights-heavy and litigious Church of Scientology. After Congressman Bono’s 1998 death in a skiing accident, his widow and political successor, Mary Bono, took up the copyright cause as a way of commemorating her husband. “He was active on intellectual property issues,” she told the House during its deliberations, “because he truly understood the goals of [the] Framers of the Constitution: that by maximizing the incentives for original creation, we help expand the public store-house of art, films, music, books, and now, also, software.... Actually, Sonny wanted copyright to last forever.” If the framers of the Constitution had indeed wanted to *maximize* incentives, they had also created an impediment to that aim by empowering Congress to confer exclusive rights only “for limited Times” upon authors and inventors.¹ As an eventual remedy for this oversight, Mary Bono suggested, her colleagues might work toward a copyright

1. The U.S. Constitution (art. I, § 8) empowers Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

term that lasted “forever less 1 day.” For the present, though, a substantial increase in the length of protection would serve as “a very fitting memorial for Sonny.”² Even if it fell vastly short of the eternal term he had wanted, the new law would be another pulse in copyright’s steady prolongation, and thus a legal complement to the late congressman’s epitaph: “And the Beat Goes On.”

When the Sonny Bono Copyright Term Extension Act was passed on October 27, 1998, it introduced a change of enormous consequence to scholars of modernism, adding twenty years to the duration of copyright in published and unpublished works. As a result of the Bono Act, works published between January 1, 1923, and December 31, 1977, are now copyrighted for ninety-five years from their first publication, while works created after that period enjoy protection for the author’s life plus seventy years. Copyrights in unpublished works created before January 1, 1978, and not theretofore in the public domain or copyrighted now subsist for the author’s life plus seventy years.³ A wide range of people—scholars, teachers, adapters, publishers, performers, preservation groups—had timed their projects to the 1976 Copyright Act’s shorter terms. After the Bono Act, many of them had to alter, shelve, or abandon their ventures. Because the threshold between property and the public domain had frozen for twenty years at the end of 1922, U.S. copyright reform had effectively cut modernism in half at its wonder year, partitioning it into a freely accessible early modernism and a heavily protected late one.⁴ The Proust shelves of libraries and bookstores in the United States exhibit this cut with stark clarity. In 1995, Penguin announced a new English translation of *À la recherche du temps perdu* (1913–1927), but the Bono Act intervened: although the four volumes originally published before Proust’s death in 1922 have appeared under the Penguin imprint, the 1998 act extended Random House’s right in the classic Moncrieff-Kilmartin translation of the final three volumes. Until 2019 at the earliest, the new translations of *The Prisoner*, *The Fugitive*, and *Time Regained* will sit in the same suspended state as compositions by Ravel, Bartok, and Strauss; orphaned films awaiting restoration; and countless other post-1922 works whose

2. Statement of Mary Bono (R-CA), *Congressional Record, House* 144 (1998), 9952, 9951.

3. Under 17 U.S.C. § 303, as amended by the Bono Act, any such works (i.e., unpublished before January 1, 1978, and not theretofore in the public domain or copyright) that were subsequently published before January 1, 2003, enjoy a bonus copyright protection through December 31, 2047. This amendment added twenty years to the corresponding bonus protection (through Dec. 31, 2027) put in place by the Copyright Act of 1976.

4. Another reason that 1922 is the *annus mirabilis* of modernism: until 2019, it is the last year whose works are all in the public domain in the United States.

entry into the public domain and thus into a new phase of accessibility and circulation has been deferred.⁵

The fortification of U.S. copyright during the 1990s was not an eccentric domestic move but was spurred by developments across the Atlantic, most immediately by a 1993 EU directive calling for member states to harmonize their copyright terms at seventy years *post-mortem auctoris* (*p.m.a.*).⁶ Although this was the same term that the United States would shortly adopt, it was implemented differently in Europe. To begin with, term extensions in the European Union did not completely halt the advance of the public domain for twenty years as the Bono Act subsequently did. Instead, they delayed public-domain status on an author-by-author basis, according to the date of a given author's death.⁷ More spectacularly, the EU directive differed from Bono by reviving copyrights in works that had fallen into the public domain during the previous twenty years.⁸ Works by authors who died on or between January 1, 1925, and December 31, 1944—works that had already entered the public domain under the old term of fifty years *p.m.a.*—went back into copyright for the remainder of the new seventy-year postmortem term. In much of Europe, for instance, works of Virginia Woolf and James Joyce that

5. Peter Brooks, "The Shape of Time," *New York Times* (Jan. 25, 2004). For a partial list of publishing, performance, and restoration projects delayed by the Bono Act, see *Eldred v. Ashcroft* (01-618), 537 U.S. 186 (2003), 239 F.3d 372, *aff'd*, especially "Brief for Petitioners," 3-7.

6. This was EU Copyright Directive 93/98/EEC, passed in 1993 and implemented in 1995 by various statutory instruments.

7. Until the 1976 act implemented a fifty-year postmortem term, U.S. law had granted copyright for a set term from the date of a work's publication. Works that appeared under that earlier regime continue to have their copyrights measured from their publication date, with the result that extensions to their copyright terms freeze the moving wall of the public domain for the duration of the extension. Under Bono, nothing new will enter the public domain in the United States until 2019, when the ninety-five-year copyright in works published during 1923 expires. Because most European countries have been measuring copyright from the date of the author's death since the 1886 Berne Convention for the Protection of Literary and Artistic Works, if not before, term extensions in Europe delay public-domain status on an author-by-author basis rather than halting the advance of the public domain altogether. In 1996, when the EU directive took effect in the United Kingdom, the works of authors who died in 1946 (J. M. Keynes, Gertrude Stein, H. G. Wells) were a year away from entering the public domain under the old fifty-year *p.m.a.* term and gained protection under the new one until 2017. Copyright in the works of authors who died in 1965 (Winston Churchill, T. S. Eliot, Somerset Maugham) was extended from 2016 to 2036.

8. Although the Bono Act did not revive already-expired copyrights in the United States, the 1994 Uruguay Round Agreements Act did revive the U.S. copyright in a foreign work when that copyright had been prematurely forfeited due to the rights-holder's earlier non-compliance with the U.S. law.

were published during the authors' lifetimes had entered the public domain at the end of 1991, fifty years after both writers died in 1941. Under the 1995 harmonization, their copyrights were revived until the end of 2011, alongside those of many other modernist writers and their contemporaries.⁹ The EU directive also reactivated protection in works by some of the longer-lived late Victorians.¹⁰ To pore over a list of authors who died between 1924 and 1945 and were therefore subjected to revived copyrights is to confront odd facts about both mortality and property.¹¹ It reminds us that Arthur Conan Doyle and D. H. Lawrence, writers whose best-known contributions were separated by about thirty years, both died in 1930, and that because of Lawrence's early death his copyrights would lapse nine years *before* those of W. B. Yeats, a writer twenty years his senior. Such a list exhibits the more arbitrary effects of pinning a copyright's duration to the date of a writer's biological death. And it opens territory to which we will return—that of actuarial tables, demographic calculations, average life expectancies, and generational lengths, all of which bear with surprising force on copyright law.

Modernism and Copyright was written in the wake of the European directive, the Sonny Bono Act, and the Digital Millennium Copyright Act.¹² In the wake, too, of *Eldred v. Ashcroft*, the 2003 U.S. Supreme Court case that upheld the constitutionality of Bono. The *Eldred* decision, said a *New York Times* editorial, "makes it likely that we are seeing the beginning of the end of [the] public domain and the birth of copyright perpetuity."¹³ Determined not to see this likelihood become fact, several of this book's contributors have been involved in efforts to mitigate the recent legislation's chilling effects on teaching and scholarship

9. E.g., Arnold Bennett (d. 1931); John Galsworthy (d. 1933); G. K. Chesterton and Federico García Lorca (d. 1936); Ford Madox Ford (d. 1939); F. Scott Fitzgerald (d. 1940); and Robert Musil (d. 1942).

10. E.g., Thomas Hardy (d. 1928); Arthur Conan Doyle (d. 1930); Rudyard Kipling (d. 1936); and Arthur Rackham (d. 1939).

11. For one version of such a list, see Clive Reynard, "The Impact of the European Directive on Inexpensive Reprint Editions," in *Textual Monopolies: Literary Copyright and the Public Domain*, ed. Patrick Parrinder and Warren Chernaik (London: Office for Humanities Communication, 1997), 49–54. Reynard, a company secretary and chief editor at the bargain classics publisher Wordsworth Editions, provides two useful tables: one of leading authors whose works were revived by the EU directive and one of authors whose works would, in the absence of the directive, have entered the public domain during the next twenty years.

12. Passed in October 1998 and signed into law on the same day as the Bono Act, the DMCA increased penalties for internet infringement and criminalized technological attempts to circumvent measures to control access to protected works.

13. "The Coming of Copyright Perpetuity," *New York Times* (Jan. 16, 2003).

generally and, in some cases, on modernist studies specifically. In that respect, *Modernism and Copyright* precipitates directly out of the advocacy and activism provoked by the last wave of copyright extensions and thus testifies to the invigorating effects that overreaching legislation can have on scholarly communities. For those of us who must reproduce protected material in the course of our work, this book is planted crucially in the twenty-first-century present with an eye to our prospects in the coming decades. In theoretical, practical, and polemical terms, it addresses how, under current laws and coming reforms, we are to do what we do.

At the same time, however, *Modernism and Copyright* seeks to extend the conversation about its keywords beyond present-day concerns with term extension, scholarly practice, and digital rights, as important as those concerns are. Delving back into late nineteenth- and early twentieth-century legal debates and reforms, it brings to light how significantly copyright has shaped the composition, publication, reception, and institutionalization of modernisms in a range of media. In the process, the book's contributors revisit and deepen some of the central currents in modernist studies past and present. While scholars have long recognized in modernism a "radical intertextuality"—a drive to excerpt, adapt, quote, appropriate, translate, and recombine earlier expressive works—we think about how these moves traverse, disrupt, and replenish fields of propertized expression.¹⁴ Where recent work has taken modernism's portrait of the artist as a lone insurgent and repopulated it with collaborators, coteries, patronage networks, and canny commercial ventures, we place *this* broadened portrait, in turn, amid decades when corporations became authors and personality began to look like a property right.¹⁵ As current scholarship works at theorizing a modernist Atlantic, we consider how transatlantic exchange was skewed by disparities among

14. See, for example, Jennifer Schiffer Levine, "Originality and Repetition in *Finnegans Wake* and *Ulysses*," *PMLA* 94 (1979): 106–120; Perry Meisel, *The Myth of the Modern: A Study in British Literature and Criticism after 1850* (New Haven, CT: Yale University Press, 1987).

15. See, for example, Jennifer A. Wicke, *Advertising Fictions: Literature, Advertising, and Social Reading* (New York: Columbia University Press, 1988); Kevin J. H. Dettmar and Stephen Myers Watt, eds., *Marketing Modernisms: Self-Promotion, Canonization, Rereading* (Ann Arbor: University of Michigan Press, 1996); Joyce Piell Wexler, *Who Paid for Modernism? Art, Money, and the Fiction of Conrad, Joyce, and Lawrence* (Fayetteville: University of Arkansas Press, 1997); Lawrence Rainey, *Institutions of Modernism: Literary Elites and Public Culture* (New Haven, CT: Yale University Press, 1998); Catherine Turner, *Marketing Modernism between the Two World Wars* (Amherst: University of Massachusetts Press, 2003); Aaron Jaffe, *Modernism and the Culture of Celebrity* (Cambridge: Cambridge University Press, 2005).

national copyright regimes.¹⁶ And as modernist studies becomes more interested in its own disciplinary history, *Modernism and Copyright* explores how the law shapes what is published, studied, and canonized, and how “copying” has come to signify differently in postcolonial societies versus former and current imperial centers.

But for all that law shapes works of culture, it is itself, quintessentially, a work *shaped*; indeed, one could say that nothing is more “made” than law. So during a period when copyright was vastly expanding what could be protected as “writing,” thereby exhibiting its own capacity to be rewritten, we should not be surprised to find modernists engaging vigorously with the law as a made, rather than a given, thing. Some—predominantly writers and composers—became conversant enough with intellectual property law to circumvent or design around its constraints on their creativity. Others attempted through legal actions to enlist copyright, along with neighboring regimes such as unfair competition and the nascent right of publicity, in safeguarding the integrity of their works and maximizing those works’ status and profitability.

There have been vociferous objections to the law, too. In one of international modernism’s first public moments of canon formation—the 1927 protest against Samuel Roth’s unauthorized serialization of Joyce’s *Ulysses* (1922)—162 prominent writers signed their names both to deplore the book’s exclusion from U.S. copyright and, so they hoped, to spur the reform of the copyright laws that had made Joyce’s novel vulnerable to piracy.¹⁷ And as Robert Spoo shows in this volume’s opening chapter, at least one prominent modernist—Ezra Pound, who refused to sign the 1927 protest because he thought its opposition to “the infamous state of the American law” too oblique—went so far as to propose an alternative U.S.

16. See, for example, the Modernist Atlantic Conference organized by the Modernist Magazines Project and held in July 2007 at De Montfort University, Leicester, United Kingdom.

17. For the text and signatories of the protest, see James Joyce, *Letters of James Joyce*, ed. Richard Ellmann (New York: Viking, 1966), 3:151–153. Joyce described the protest to his brother Stanislaus as intended “to make [the case against Roth] a test case for the reform of U.S. law” (*ibid.*, 149). Sylvia Beach, Joyce’s publisher and agent and one of the protest’s orchestrators, dictated the following in a letter to George Bernard Shaw: “The suit we have entered against Roth may not be successful under existing Am[erican] law but a repeal of that law is what is ultimately aimed at and the more comprehensive the protest is the firmer will be the basis for a vigorous international movement of writers in that direction” (Sylvia Beach to G. B. Shaw, 1927, Sylvia Beach Papers, box 194, folder 6, Princeton University Library). Beach hoped (in vain, as it turned out) that Shaw would sign the protest.

copyright statute that would harmonize national regimes and enable living authors to compete more favorably with the dead.¹⁸

Because a number of the essays in this book are rooted in early twentieth-century law, it is worth surveying the copyright regimes and the influential reforms that were roughly contemporary with modernism. During most of the nineteenth century, copyright systems from one country to the next differed widely. Where works by foreign authors enjoyed any protection, it was through a patchy array of trade courtesy practices and bilateral agreements.¹⁹ Transnational piracy was rampant, and countries whose domestic intellectual property had not yet, as David Saunders puts it, “acquired importance as an exportable product and as a source of cultural legitimacy” had little incentive to enter into reciprocal relations with net exporters of such works.²⁰ But as more and more European nations began to see themselves as net exporters of copyrightable works, and therefore as victims rather than as beneficiaries of piracy, the way opened for what was called “universal” copyright. In 1886, the signing of the Berne Convention for the Protection of Literary and Artistic Works established the first multilateral system of reciprocal copyright privileges. Among Berne signatories, a work originating in one country enjoyed the same rights and privileges in other countries as works by their nationals did, though for a term not to exceed the term of copyright in the work’s country of origin. What’s more, these rights and privileges subsisted from the moment a work was created and therefore applied to unpublished as well as to published works. The new arrangement created an impetus for member states to harmonize their domestic copyright systems, particularly the term of copyright, so that countries with shorter terms did not put their authors at a disadvantage abroad. The Berne Convention’s inaugural signatories were Belgium, Haiti, Italy, Liberia, Switzerland, and Tunis, and four major colonial powers: France, Germany, Great Britain, and Spain. Because these acceded to the convention on behalf of their territories, colonies, and protectorates, Berne had a sizable jurisdiction from the start.

18. “The minor peccadillo of Mr. Roth,” Pound concluded, “is dwarfed by the major infamy of the law.” Ezra Pound, *Pound/Joyce: The Letters of Ezra Pound to James Joyce, with Pound’s Essays on Joyce*, ed. Forrest Read (New York: New Directions, 1967), 226.

19. At the time of the first Berne Convention, two European countries, France and Belgium, unilaterally protected works published abroad.

20. David Saunders, *Authorship and Copyright* (London: Routledge, 1992), 171. The asymmetries among national copyright regimes during the nineteenth century—some of which persist today—would have been major contributors to the geoliterary rivalries described by Pascale Casanova in *The World Republic of Letters*, trans. M. B. DeBevoise (Cambridge, MA: Harvard University Press, 2004).