Life, Death, Public Domain?

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It has long been assumed that copyright must progress through a three-part sequence of creation, then exclusive rights, and then permanent entry into the public domain. In *Golan v. Holder*, however, the Supreme Court held that Congress could restore copyright protection to millions of works that had already entered the public domain. In doing so, it upended what amici called the “life cycle consisting of three distinct stages” and what the Tenth Circuit termed the “ordinary copyright sequence.” Although *Golan* has been widely criticized as weakening the public’s ability to freely copy, reuse and modify creative works once the copyright term expires, this Article shows that the three-part life sequence can operate to make such activities harder during the term itself. Looking closely at the arguments in *Golan* and pulling from rich bodies of temporality scholarship developed in other fields, this Article shows that a constitutionally enshrined public domain can perpetuate the long, broad rights it purports to limit.

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Introduction

A three-part life sequence has been built into the basic doctrinal structure of copyright. Copyright is born when an author is incentivized to create new work, it lives through a long but limited period of exclusive rights, and its death is marked by permanent entry into the public domain. In *Golan v. Holder,* however, the Supreme Court held that Congress could restore copyright protection to millions of works that had already entered the public domain. The Court rejected arguments that all copyrighted works must go through a “life cycle consisting of three distinct stages,” and it upended what the Tenth Circuit had termed “the ordinary copyright sequence” in which “a work progressed from 1) creation; 2) to copyright; 3) to the public domain.”

Even though issues of duration and “Limited Times” have received much critical attention in copyright law and scholarship, questions about sequence and the basic

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1 See *infra* Part I(A); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984). Themes of birth, life and death also have been present in copyright scholarship for some time. See, e.g., Rebecca Tushnet, *Scary Monsters: Hybrids, Mashups, and Other Illegitimate Children,* 86 NOTRE DAME L. REV. 2133, 2134 (2011) (“[A]nxieties about reproduction, who gets to control it, and whether appropriate reproduction can consist of cutting and pasting what's gone before are central . . . to current debates over fair use . . .”); Laura A. Heymann, *How To Write A Life: Some Thoughts On Fixation And The Copyright/Privacy Divide,* 51 WM. & MARY L. REV. 825, 830 (2009) (“Fixation thus causes a kind of death in creativity even as it births new legal rights. Once an ‘author’ has fixed a certain version of her work, she has propertized its subject, subordinating the work to the various law and tropes that come with a property-based regime . . .”). Some specific themes include “orphan works” and “authors as parents” metaphors. See, e.g., Lydia Pallas Loren, *Abandoning the Orphans: An Open Access Approach to Hostage Works,* 27 BERKELEY TECH. L.J. 1431, 1435 (2012) (“In the metaphor of the romantic author, the works he creates are his children, born of his labor and genius . . . Using the word ‘orphans’ to describe works whose copyright owners cannot be located pulls on that metaphor and triggers the concerns any humane person would have toward abandoned children.”); George H. Taylor & Michael J. Madison, *Metaphor, Objects, and Commodities,* 54 CLEV. ST. L. REV. 141, 161 (2006) (“[T]here is a long custom in intellectual property law and among authors themselves of both believing that books and other expressive works are the ‘children’ of their creators and referring to those works accordingly.”); MARK ROSE, *AUTHORS AND OWNERS 38-39* (1993) (“[T]he most common figure in the early modern period is paternity: the author as begetter and the book as child.”).


4 501 F.3d 1179, 1189 (10th Cir. 2007).

5 See U.S. Const. Art. I, § 8 cl.8 (empowering Congress “To 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.”).

6 See, e.g., Eldred v. Ashcroft, 537 U.S. 186 (2003) (upholding the twenty year extension of the copyright term to already-existing works); Kahle v. Gonzales, 487 F.3d 697 (9th Cir. 2007) (upholding the automatic copyright renewal of works first published between 1964 and 1977)

7 Although some copyright scholars have explored the relationship between copyright and time, they have not looked at how conceptions of time serve to construct our understanding of the copyright system. Scholars looking at copyright and time have generally proposed that copyright protections should slowly
temporal structure of copyright have not. Notwithstanding widespread criticism of Golan, this Article shows that the three-part life sequence undercuts progressive copyright reform in ways largely unnoticed by scholars and advocates. The life sequence promises freely available creative works after copyright expires, but in exchange it becomes harder for the public to meaningfully engage with creative works during the preceding 70+ years of protection. Furthermore, to the extent the life sequence framework is understood to mediate competing interests in copyright law, this Article shows that it unnecessarily fortifies the battle lines between copyright owners and the general public.

The public domain has been widely embraced for ensuring free access, use and engagement with creative works, but this “speech-protective” function can be significantly diminished when the public domain is offset temporally and conceptually from the stages that precede it. Within the life sequence framework, the public domain comes into play only at the very end of copyright’s three stages, and the public’s interest in engaging with creative works becomes salient only after the copyright term has expired. Indeed, petitioners and amici in Golan champion a long line of authors, artists and musicians who have pulled source material from the public domain, yet they repeatedly downplay speech-protective doctrines, such as fair use and the idea/expression distinction, which operate during the copyright term itself. This push-and-pull relationship between the “after” and the “before” is difficult to see within the forward-moving trajectory of the life sequence. Without accounting for this dynamic, protecting the public domain as copyright’s final stage can, perhaps counterintuitively, sustain the long, strong, exclusive rights of copyright owners that spurred public domain litigation in the first place.

By presenting creation, protection and public domain as three distinct stages, the life sequence obscures the conceptual and historical interplay between them. Although opponents of restoration argue that the public domain has been a “bedrock principle” of copyright law since 1710, the concept of a “public domain” instead emerged in the late nineteenth century alongside a substantial expansion in the scope and subject matter of copyright protection. Only once copyright expanded beyond a verbatim publishing and diminish in strength over the course of the copyright term, keeping the linear, solely forward-moving thrust of copyright’s life sequence intact. See Ariel Katz, *Substitution and Schumpeterian Effects over the Life Cycle of Copyrighted Works*, 49 Jurimetrics J. 113, 116 (2009); Joseph P. Liu, *Copyright and Time: A Proposal*, 101 Mich. L. Rev. 409 (2002); Justin Hughes, *Fair Use Across Time*, 50 UCLA L. Rev. 775 (2003).

8 See infra note 89.

9 The “public domain” is generally, and most commonly, understood as all materials not or no longer subject to copyright protection. This Article does not attempt to mine and analyze the many articulations and definitions of the public domain; its analysis is largely limited to the public domain as presented in the restoration debates: final, inviolable and formally set off from the reach of copyright. For a useful taxonomy of public domain definitions, see Pamela Samuelson, *Enriching Discourse on the Public Domain*, 55 Duke L.J. 783 (2006).

vend right was there any practical need for a countervailing domain “outside” copyright. Conversely, once the boundaries of a “negative” domain became rooted in our understanding of copyright, the “positive” domain of copyright protection could more justifiably expand to the borders of the public domain. The life sequence framework ultimately obscures this symbiosis between—and the historical contingency of—the public domain and the broad rights that have accompanied it.

In recent decades, the progression from exclusive rights to the public domain has functioned as the central “balance”—the “carefully crafted bargain”—between the “artist’s right to control the work” and “the public’s need for access to creative works.”11 This long-term public/private bargain, however, has justified granting expansive protections to copyright holders in the short term, and advocates should be wary of reproducing the central framework of the system they seek to reform. The eventual balance of public and private interests over the course of time is an inadequate and in some ways unnecessary substitute for continuously harmonizing competing interests throughout the life cycle of a creative work.12

Part I provides background on the doctrinal roots of the traditional sequence before turning in detail to Golan v. Holder and constitutional challenges to copyright restoration. It will focus in particular on the explicit use of a life sequence framework Golan as well as the supporting “resurrection” and “zombie” narrative used to emphasize the threats posed by section 514 of the Uruguay Rounds Agreement Act.

Part II pulls from rich bodies of temporality scholarship in other fields and shows that time and sequence operate in ways that have largely eluded copyright scholars and advocates. Queer and poststructural scholars13 have shown that sequential frameworks tend to mask the interplay between the various steps in a sequence, falsely privileging the steps that come first as independent baselines for the steps that follow.14 Moreover, several legal scholars have argued that time-limiting rights, for example through statutes of limitations, is a problematic ways of substantively balancing a plaintiff’s legal rights

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11 Stewart v. Abend, 495 U.S. 207, 228, 230 (1990); Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 33-34 (2003) (“The rights of a patentee or copyright holder are part of a ‘carefully crafted bargain,’ under which, once the patent or copyright monopoly has expired, the public may use the invention or work at will and without attribution.” (quoting Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U. S. 141, 150-151 (1989)).
12 See Julie Cohen, Creativity and Culture in Copyright Law, 40 U.C. DAVIS L. REV. 1151, 1196 (2007) (“References to balancing in copyright rhetoric contain a “semantic ambiguity” that results in slippage between notions of balance as process and notions of balance as correct result.”).
13 Although developed largely to address questions of sexuality and gender, this scholarship has important, transferrable implications. On the application of queer theory outside the realm of sexuality, see, e.g., AFTER SEX? ON WRITING SINCE QUEER THEORY (Janet Halley & Andrew Parker, eds. 2011). For intellectual property scholarship pulling from postmodern feminist theory, see, e.g., Dan Burk, Feminism and Dualism in Intellectual Property, 15 AM. U. J. GENDER SOC. POL’Y & L. 183 (2007); Sonia K. Katyal, Performance, Property, and the Slashing of Gender in Fan Fiction, 14 AM. U. J. GENDER SOC. POL’Y & L. 461 (2006).
against competing societal interests, such as preventing fraud and allowing “repose” for potential defendants.\(^\text{15}\) Lastly, this Part examines how time and narrative can work in conjunction to advance a particular normative goal.\(^\text{16}\) A life sequence narrative in particular may be useful in highlighting existential threats to the status quo, but at the same time it can insulate the status quo from potentially valuable critique and disruption.

Part III returns to the *Golan* litigation and show these dynamics at work in the sequential framing of copyright protection and the public domain. First, the emphasis on the permanent public domain as a key First Amendment limitation on copyright protection downplays the significance of doctrines that function during the term of protection. By shifting attention towards the end of copyright’s sequence and lowering the “costs” of exclusive rights, the sequential framing of the public domain reifies and justifies the broad exclusive rights of the copyright holder during its earlier life stages. Second, positing the public domain as a remedy or safety valve for an expansive, oppressive entitlement regime obscures the role of the public domain in producing and propping up problematic aspects of both steps 1 (creation) and step 2 (protection). Regarding step 1, by designating certain materials as the “raw materials” for “original authorship,” the public domain reinforces heavily-critiqued notions of “romantic authorship”\(^\text{17}\) and renders invisible the human labor and creativity serving as its inputs.\(^\text{18}\) Regarding step 2, a concept of the “public domain” did not come into mainstream usage in the United States until the late nineteenth century as copyright expanded from a narrow printing right to broad dominion over the use and adaptation of creative works. The ontology of copyright proffered to the Court, however, collapses these historical differences and freezes in place a sequence marked by expansive, centralized control, mitigated primarily by the eventual lapse of exclusive rights.

Part IV concludes by briefly exploring some of the potential reforms enabled post-*Golan*. Recently, the Register of Copyright has called for “The Next Great Copyright Act,”\(^\text{19}\) the Chairman of the House Judiciary Committee has called for a “Comprehensive Review” of U.S. copyright law,\(^\text{20}\) and in 2018, copyright terms will begin again to expire after a twenty year hiatus.\(^\text{21}\) With reform efforts on the horizon,


\(^{16}\) This Article will not, however, explore the deeper philosophical connections between time, narrative and identity. See most prominently Paul Ricoeur, *Time and Narrative* (1983-85).


\(^{19}\) http://www.law.columbia.edu/media_inquiries/news_events/2013/march2013/manges-lecture


\(^{21}\) See Joseph Liu, *The New Public Domain*, 2013 U. Ill. L. Rev. 1395 (2013). In this article, Liu anticipates the upcoming term extension battles and explores what might happen if certain mass cultural figures, most prominently Mickey Mouse, were to enter the public domain. He does not, however, explore how *Golan* or restoration might alter the contours of that debate.
there is great potential in approaching copyright through a new temporal framework. By letting go of the one-way, one-size-fits-all life sequence, a much wider range of sensible—and politically feasible—options emerge. We might, for example, allow renewable terms for works with continuing commercial value and/or provide alternative forms of incentives in exchange for clearer limitations on the derivative work right or “reformalizing” certain substantive and remedial aspects of copyright. A more permeable boundary between exclusive rights and public access might better account for the diversity of contemporary creative practices and allow copyright protection to be more closely tailored to the needs of sectors where it plays a valuable, facilitative role without sweeping unnecessary costs, uncertainty, and rent-seeking behavior into sectors where it does not.

Public domain scholarship has introduced a rich, diverse set of public interest values previously missing from the copyright system and broken down formal distinctions between the realms of intellectual property and a domain of free public access. Nonetheless, some of these insights have been lost in the move from scholarship to advocacy. Public domain advocates have sought to constitutionalize a public domain that is formally distinct from the realm of copyright, and in doing they have risked shoring up the very structure of centralized ownership and control that many

25 See, e.g., Maria Pallante, The Next Great Copyright Act, 36 COLUM. J. L. & ARTS 315, 337 (2013) (“[A]t least in some instances, copyright owners would have to assert their continued interest in exploiting the work by registering with the Copyright Office in a timely manner. And if they did not, the works would enter the public domain.”); Christopher J. Sprigman, Reform(alizing) Copyright, 57 STAN. L. REV. 485 (2004). The United States’ international treaty obligations do, however, place important limits on the use of formalities.
27 See, e.g., Cohen, supra note 10 (proposing a “cultural landscape model” in which “the entitlements described by this formulation do not comprise a geographically or ontologically separate entity”); Samuelson, supra note 26 (showing that public domain scholars do not see IP-protection and the public domain as “binary opposites, but rather as points along a continuum”); see also Merges, supra note 26 (discussing open source licensing and other contractually constructed information commons).
of them have sought to transform. In “reifying the negative” of the public domain, there is a risk of obscuring the positive, and efforts to constitutionalize what copyright does not protect accordingly have both separated out and taken as given the “preceding” question of what copyright affirmatively covers. Golan, like other decisions rejecting First Amendment challenges to copyright, may be guilty of shrinking the stock of materials that are completely outside the grasp of copyright, but through rejecting the widely-assumed concept of a final, bounded public domain, the decision reshapes a key structural element supporting a system that so many have critiqued. Looking at copyright through a different temporal lens—one not framed solely by a work’s birth, death, and ascent to the public domain—might create spaces for new political common ground that more accurately reflect contemporary economic and cultural values.

I. The Traditional Sequence and the Golan Litigation

A formal sequence has played a key role in structuring copyright’s central “balance” between authors and users, yet until the Golan litigation, this sequence received little critical analysis from courts, scholars and advocates. This section will provide the factual and doctrinal background for such analysis. It will (A) briefly explore the doctrinal roots of the sequence in several prominent copyright decisions; (B) introduce section 514 of the Uruguay Rounds Agreement Act and Congress’s restoration of copyright protection to a large swath of foreign-authored works in the public domain; and (C) track the explicit emergence of the “copyright sequence” in the Golan litigation and its challenge to the constitutionality of copyright restoration.

A. Doctrinal Roots of the Sequence

Courts and commentators repeatedly describe copyright law in terms of a “balance” between financially incentivizing authorship through a set of exclusive rights and ensuring that the public has access to the fruits of this labor. In Stewart v. Abend, for example, the Supreme Court observed, “[T]he [Copyright] Act creates a balance between the artist’s right to control the work during the term of the copyright protection and the public’s need for access to creative works. The copyright term is limited so that the public will not be permanently deprived of the fruits of an artist’s labors.” Similarly in Twentieth Century Music Corp. v. Aiken, the Court stated, “[T]he limited copyright duration required by the Constitution reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation

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28 See James Boyle, The Second Enclosure Movement and the Construction of the Public Domain, 66 L. & CONTEMP. PROBS. 33, 69 (2003); see also Sunder, supra note 17, at 101 (observing that “Boyle’s work may now be inadvertently helping to reconstruct some of the very same false binaries he set to tear down”).
29 See, e.g., Abraham Drassinower, From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law, 34 J. CORP. L. 991, 992 (2009) (“Few propositions are more frequently asserted in contemporary copyright discussion than the proposition that copyright is a balance between authors and users.”); ROBERT BURRELL & ALLISON COLEMAN, COPYRIGHT EXCEPTIONS: THE DIGITAL IMPACT 188-91 (2005)
must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”

In the short run, copyright provides a bundle of exclusive rights to authors, but copyright’s ultimate goal is the long run edification of the general public. “The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.” This immediate spur to create works that will enrich the public in the long run harm harmonizes copyright law with the First Amendment, rendering copyright law “the engine of free expression.”

This short-run/long-run distinction ultimately formalized around a set of temporal divisions in which copyright’s private/public balance was realized primarily through a progression from creation to copyright protection to the public domain. In *Sony*, the Supreme Court stated that the “limited grant” of copyright “is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.” In its much-cited decision in *Suntrust*, the Eleventh Circuit similarly observed that one of the goals of the “Copyright Clause is to ensure that works enter the public domain after an author’s rights, exclusive, but limited, have expired . . . The grant of a copyright encourages authors to create new works . . . and the limitation ensures that the works will eventually enter the public domain, which protects the public’s right of access and use.”

Until its decision in *Golan*, the Supreme Court seemed largely committed to a necessary progression from creation to protection to a permanent public domain. For example, in *Dastar v. Twentieth Century Fox Film*, Fox produced and broadcasted a television series in 1948 about Eisenhower’s World War II military campaign, and it let the copyright expire in 1977. In 1995, Dastar copied and reedited the series and released the resulting video set solely under its own name. In response, Fox asserted a

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31 Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (holding that the reception of copyrighted musical work through a radio in a fast food restaurant was not an unlawful performance of that work)

32 Aiken, 422 U.S. at 156; see also *Fox Film v. Doyal*, 286 U.S. 123, 127 (1932) (“The statute confers upon the author . . . the exclusive right for a limited period to multiply and vend copies and to engage in the other activities described by the statute,” but nonetheless “[t]he sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”).


34 See Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 33-34 (2003) (“The rights of a patentee or copyright holder are part of a “carefully crafted bargain,” under which, once the patent or copyright monopoly has expired, the public may use the invention or work at will and without attribution.” (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150–151 (1989))).

35 *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). Courts have repeatedly quoted *Sony* for this statement. See, e.g.[].

36 *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1262 (11th Cir. 2001)

37 539 U.S. 23, 26 (2003). Prior to the enactment of the 1976 Copyright Act (effective January 1, 1978), copyright protection extended for an initial term of 28 years and could extend for an additional 28-year term if the copyright owner timely renewed its registration.
“reverse passing off” claim under federal trademark law for selling the video set “without proper credit” to the original producer. The Supreme Court held that such a claim was impermissible under the Lanham Act in part because such a claim “would create a species of mutant copyright law that limits the public’s ‘federal right to ‘copy and to use’” expired copyrights.” 38 It explained that “the rights of a patentee or copyright holder are part of a ‘carefully crafted bargain . . . under which, once the patent or copyright monopoly has expired, the public may use the invention or work at will and without attribution.” 39

Other intellectual property cases reiterated that Congress and the Framers had designed copyright and patent systems with a permanent public domain in order to fulfill the constitutional imperative “To promote the Progress of Science and the useful Arts.” 40 Most explicitly, in Graham v. John Deere, the Court observed:

Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available. Innovation, advancement, and things which add to the sum of the useful knowledge are inherent requisites in a patent system which by constitutional command must ‘promote the Progress of . . . the useful Arts’ 41

Accordingly, the final, permanent public domain emerged from this case law as a central component in patent and copyright’s instrumentalist commitments.

B. Copyright Restoration

In 1994, Congress raised serious doubts about whether a permanent public domain would continue to be a necessary component of copyright. To bring the United States into fuller compliance with the Berne Convention for the Protection of Literary and Artistic Works (“Berne”), 42 Congress enacted Section 514 of the Uruguay Round

38 Dastar, 539 U.S. at 34.
39 Id. at 33-34 (quoting Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 150–151 (1989)); see also Lee v. Runge, 404 U.S. 887, 890 (1971) (Douglas, J., dissenting from denial of cert) (“An author’s ‘Writing’ or an inventor’s ‘Discovery’ can, in the constitutional sense, only extend to that which is his own. It may not be broadened to include matters within the public domain.”).
41 383 U.S. 1, 5 (1966); see also Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 237 (1964) (“To forbid copying [under state law unfair competition law] would interfere with the federal policy, found in Art. I, § 8, cl. 8, of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain.”)
42 “This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.” Berne Convention for the Protection of Literary and Artistic Works, Art. 18(1). In the United States, a vast array of creative works—both domestic and foreign—had entered the public domain not through “expiry of the term of protection” but through failure to comply with domestic formalities, including failures to register with the Copyright Office, to affix proper notice, and to renew registration before the expiration of the first 28 years of protection. Although the United States did not initially restore copyright protection upon acceding to Berne in 1988, when it became a member of the World Trade Organization (and subject to its enforcement mechanisms), it was required under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) to comply with the first twenty articles of Berne. See Agreement on Trade-Related Aspects of Intellectual Property Rights Article 9(1); Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15, 1994.
Agreements Act (“URAA”), which restored copyright protection to certain foreign works that had gone into the public domain in the United States. Restoration under Section 514 has been criticized on a number of policy grounds, but for purposes of this Article, I will focus primarily on the First Amendment challenges to the statute as well the life sequence narratives used in their service.

Repeatedly since enactment of the URAA, Section 514 has been accused of disrupting the normal life and death sequence of copyright. David Nimmer, in both a series of articles and his influential treatise, immediately employed the metaphor of “resurrection” to describe Section 514’s extension of copyright to the public domain.


44 One year early, as part of the North American Free Trade Agreement (“NAFTA”), Congress had restored copyright protection to certain Mexican and Canadian films that had fallen into the public domain between 1978 and 1988 for failure to meet U.S. notice requirements. See North American Free Trade Agreement Implementation Act § 334, 107 Stat. 2115. Congress replaced this relatively limited restoration with the far more extensive provisions of § 104A. To the extent that restoration criticisms were directed at NAFTA as opposed to the URAA, this distinction appears largely irrelevant for purposes of my analysis here.

45 See, e.g., Elizabeth Townsend Gard, Copyright Law v. Trade Policy: Understanding the Golan Battle Within the Tenth Circuit, 34 Colum. J. L. & Arts 131, 179-83 (2011) (decrying the limited protections for “reliance parties” who continue to use once-freely available public domain works); Daniel Gervais, Golan v. Holder: A Look at the Constraints Imposed by the Berne Convention, 64 Vand. L. Rev. En Banc 147 (2011) (observing that Berne provided far greater flexibility to the United States in implementing Article 18(1)); Golan, 132 S. Ct. at 905 (Breyer, J., dissenting) (warning that Section 514 exacerbates copyright’s “orphan works” problem); Elizabeth Townsend Gard, In the Trenches with § 104A: An Evaluation of the Parties’ Arguments in Golan v. Holder as It Heads to the Supreme Court, 64 Vand. L. Rev. En Banc 199, 214-19 (2011) (noting the extreme complexities of determining whether a particular work is restored); David S. Olson, A Legitimate Interest in Promoting the Progress of Science: Constitutional Constraints on Copyright Laws, 64 Vand. L. Rev. En Banc 185 (2011) (maintaining that restoration fails to incentivize the creation of any new creative works or “promote the Progress of Science and useful Arts” as required by the Article I, section 8, clause 8 of the Constitution)

46 See, e.g., Gard, supra note 45, at 145 (“Section 104A resurrected copyright to foreign works that had fallen into the public domain in the United States in three situations . . .”); Christina Bohannon & Herbert Hovenkamp, IP and Antitrust: Reformation and Harm, 51 B.C. L. Rev. 905, 978 (2010) (“Congress has resurrected copyrights for many works that previously had fallen into the public domain.”); Graeme W. Austin, Does the Copyright Clause Mandate Isolationism?, 26 Colum. J.L. & Arts 17, 20 (2002) (“Golan challenges section 104A of the Copyright Act of 1976, which resurrects copyright terms of works of foreign origin that fell into the public domain for failure to comply with U.S. law formalities.”); Robert Spoo, Note, Copyright Protectionism and Its Discontents: The Case of James Joyce's Ulysses in America, 108 Yale L.J. 633, 649 (1998) (“Except in very rare circumstances, a work cannot be resurrected from the public domain, because a temporary public domain is foreign to United States copyright concepts.” (citations and alteration omitted)).

According to Nimmer, “death has always been a part of every copyright,” and when a work suffered an “untimely death,” “one could offer the owner of the work a tissue, but no hope for life after copyright death.” After the URAA however, “the unsettling prospect of complete and total resurrection of the dead is now no longer merely the stuff of copyright science fiction.” This “resurrection” narrative also figured prominently in challenges to the constitutionality of Section 514. For example, petitioners in Golan argued that “[r]emoving works from the public domain violates the ‘limited [t]imes’ restriction by turning a fixed and predictable period into one that can be reset or resurrected at any time, even after it expires.” Within this resurrection framework, restoration produces “Copyrights Undead,” and foreign-authored works are transformed into “zombie copyrights” living among us (and hungry for brains?). Entrance into the public domain was supposed to mark the entry of “legally dead” works into their “second life,” but after restoration it became a “way-station of suspended protection, a limbo from which works could potentially be rescued.” Just as the attempts in Dastar to undermine copyright’s “carefully crafted bargain” produced unlawful “mutant”


48 Nimmer, supra note 47, at 28. This was not, however, strictly true. See Golan, 132 S. Ct. at 886-87 (recounting, inter alia, passage of several private bills restoring copyright protection in the nineteenth century as well as extension of protection to works that had gone into the public domain during World Wars I and II).

49 9A NIMMER ON COPYRIGHT § 9A.01; William Patry also employs the resurrection conceit in his copyright treatise; under the URAA, “foreign works were resurrected from the dead. These phoenixes are called ‘restored works.’” 7 PATRY ON COPYRIGHT § 25:30


52 Nimmer, End of Copyright, supra note 47, at 1403.


54 See Gard, supra note 53, at 138; see also 3-9A NIMMER ON COPYRIGHT § 9A.01 (“Whatever the reason for lapse of protection, the public domain was generally viewed as a final resting place from which there was no rescue.”).

55 3-9A NIMMER ON COPYRIGHT § 9A.01.
copyrights, copyright restoration’s intrusions into the previously inviolable public domain yielded analogous “zombie” narratives.

If restoration constitutes resurrection, and extending copyright protection to public domain works robs these zombies of their “second life,” then these narratives beg the question: what is the first life of a copyrighted work? For a work to be resurrected, it must have lived, and died, and come back to life again. But what conception of copyright’s life is implicitly put into place by the narrative of resurrection? Phrased in a manner more familiar to copyright scholars, what are the “traditional contours” of the life of copyright?

In 2007, the Tenth Circuit in Golan attempted to answer this question. Plaintiffs in Golan were a group of artists, performers and business entities who had “relie[d] on artistic works in the public domain for his or her livelihood.” For example, Lawrence Golan performed and taught “works by foreign composers including Dmitri Shostakovich and Igor Stravinsky,” and other plaintiffs regularly performed restored foreign works, such Prokofiev’s “Peter and the Wolf.” They argued that copyrighting works in the public domain violated the “limited Times” and “promote the Progress of Science” provisions of the Copyright Clause and that Section 514 interfered with their constitutionally-protected speech in violation of the First Amendment.

Although the Tenth Circuit affirmed the district court’s denial of the Copyright Clause claim, it reversed and remanded on the denial of the First Amendment claim. In Eldred v. Ashcroft, Justice Ginsburg’s opinion rejected the notion that “copyrights [are] categorically immune from challenges under the First Amendment,” but it upheld the Copyright Term Extension Act in light of copyright law’s “built-in First Amendment accommodations”—i.e. the idea/expression dichotomy and the fair use defense. The Court observed that “when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.” Relying heavily on this dictum, the Tenth Circuit in Golan distinguished copyright restoration from term extension and concluded, “The traditional contours of copyright protection include the principle that works in the public domain remain there and that § 514 transgresses this critical boundary.”

56 Golan v. Gonzales, 501 F.3d 1179, 1182 (10th Cir. 2007).
57 Id.
59 Id. at 788-89.
60 “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” 17 U.S.C. § 102(b); see also Eldred, 537 U.S. at 789 (As we said in Harper & Row, this “idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression.” (quoting 471 U.S. 539, 556 (1985))).
61 See 17 U.S.C. § 107; see also Eldred, 537 U.S. at 789 (“The fair use defense affords considerable latitude for scholarship and comment, and even for parody” (internal citations and quotation marks omitted)).
62 Eldred, 537 U.S. at 789.
63 Golan, 501 F.3d at 1183, 1189
From the concept of “traditional contours” in *Eldred* and the basic copyright principles set forth in *Sony, Aiken, Dastar* and *Harper & Row*, the Tenth Circuit extracted a “Copyright sequence” of First Amendment significance.  

Although the court acknowledged that the phrase “traditional contours” did not appear “in any other federal authority that might shed light on its meaning,” it inferred “both a functional and a historical component.” A “contour” is defined by Webster’s Dictionary as “an outline” or “the general form or structure of something,” and it concluded that “[b]ecause the term copyright refers to a process as well as a form of intellectual property rights, we assess whether removing a work form the public domain alters the ordinary procedure of copyright protection.”

The court observed that the URAA contravened this ordinary procedure:

> Until § 514, every statutory scheme preserved the same sequence. A work progressed from 1) creation; 2) to copyright; 3) to the public domain. Under § 514, the copyright sequence no longer necessarily ends with the public domain: indeed, it may begin there. Thus, by copyrighting works in the public domain, the URAA has altered the ordinary copyright sequence.

Because the URAA “transformed the ordinary process of copyright protection and contravened a bedrock principle of copyright law that works in the public domain remain in the public domain,” it “altered the traditional contours of copyright protection.”

Moreover, the historical evidence was too scarce and contested “to conclude that the Framers viewed removal of works from the public domain as consistent with the copyright scheme they created.” The government argued that the first Copyright Act in 1790 extended protection to works in the public domain because not all states had previously enacted copyright statutes, but “plaintiffs argue[d] convincingly that most, if not all, of these works were covered by a state common-law copyright.” Additionally, the subsequent passage of a handful of private copyright bills in the nineteenth century and limited restoration of works published during the two World Wars “were, at most, a brief and limited departure from a practice of guarding the public domain.”

Before the Supreme Court, petitioners and amici wove the “ordinary procedure of copyright protection” together with the narrative of “resurrection” to breathe

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64 Id.
65 Id.
66 Id.
67 Id.
68 Id. at 1192.
69 Id. at 1191.
70 Id. at 1190-91.
71 Id. at 1191-92.
72 The Golan court remanded to the district court to determine whether Section 514 was a valid content-based or content-neutral regulation of speech. 501 F.3d at 1196. On remand, the district court found Section 514 to be an unconstitutional content-neutral abridgement of speech, insufficiently justified by Congress’s proffered reasons for restoration, and overly restrictive of plaintiffs’ speech interests. Golan v. Holder, 611 F. Supp. 2d 1165 (D. Colo. 2009). On appeal, however, a different panel of the Tenth Circuit found Section 514 to be a valid content-neutral restriction. Golan v. Holder, 609 F.3d 1076 (10th Cir. 2010).
metaphorical life into the “Copyright Sequence.” Although petitioners and other amici pull from these themes, perhaps the clearest example comes from a brief filed by Yale Law School’s Information Society Project:

The URAA undermines central features of the constitutional arrangements that drive copyright’s engine of free expression. That engine of free expression consists of a three-stage life cycle in which works are created, exclusive rights are granted to authors for limited times to incentivize production, and finally works are released permanently into the public domain. The last stage in the life cycle is crucial to copyright’s free speech bargain because it allows future creators to make use of public domain material to produce new creations and new innovations.74

This “life cycle of creative works” is “essential to copyright’s function as an engine of free expression”; it “establishes” the “bargain” between the economic rewards to the author and the public’s ultimate enjoyment of the author’s works.75

The precise contours of such a life are as follows. During “Stage I: Creation Of a Work of Authorship,” “a prospective author or creator draws upon a variety of ideas and expression, and combines those inputs with new concepts and inspirations to produce a discrete output—a work of authorship.”76 During “Stage II: Legal Protection Of a Work,” “Congress may confer on its authors exclusive rights to protect and exploit its value . . . recoup[ing] the costs of production by requiring compensation from others who wish to use or perform the work.”77 Finally, during “Stage III: Permanent public availability of a work,” works enter the public domain and “are available for all to use . . . New creators have the chance to use, distribute, contextualize, modify and improve upon previous public domain work without permission.”78 Within this tripartite structure, “[f]air use and the idea/expression dichotomy by themselves are insufficient . . . These

73 See supra note 50-51; see also Oral Argument Tr. at 54 (“[T]he copyright sequence provides ever-increasing protection for public speech rights. It gives partial protection for some public speech interests during any initial period of protection, but that blossoms into complete protection for all public speech interests, once we reach the limit Congress picks, once they place the work in the public domain. Petitioners’ Reply Brief, at *16 (“Copyright’s protection of First Amendment interests has always progressed from partial protection to complete protection of those interests. The government’s suggestion that Congress can reverse that sequence at will is precisely the departure from tradition that triggers First Amendment scrutiny.”); cf. Petitioners’ Brief, supra note 51, at *16 (“The entry of a work into the public domain must mark the end of protection, not an intermission.”). 74 Yale ISP Brief, supra note 50, at *3; see also id. at *12 (“American copyright law furthers and is made consistent with First Amendment values by moving creative works through a life cycle consisting of three distinct stages. This life cycle of creative work—expression, protection, and public use—is implicit in the Constitution’s grant of Congressional power to create copyrights for ‘limited times.’”); Brief of the American Civil Liberties Union, Golan v. Holder, 2011 WL 2578555, at *14 (U.S. June 20, 2011) (“As the Tenth Circuit aptly explained, the copyright system furthers expression by establishing a sequence for creative works. . . . By altering this sequence and taking works out of the public domain, Section 514 has broken this creative cycle that has proven so critical to the development of creative works for centuries.”). 75 Id. at *11. 76 Id. at *13. 77 Id. 78 Id. at *15; see also Petitioners’ Brief, supra note 51 at *25-26 (“The Framers intended to create a stable and permanent public domain from which works could not be removed.”).
doctrines protect free speech values during the first two stages of the three-stage life cycle; but both fail to adequately guard against piecemeal deterioration of the third.”

Stage three of copyright’s life cycle accordingly must be firmly and clearly “set off” from the earlier stages, and copyright law’s previously-identified First Amendment accommodations fail to ensure such a boundary.

Although the Golan briefs provide perhaps the clearest articulation of a formal life sequence, the concepts of birth, life and death have emerged repeatedly in copyright scholarship. For example, Ariel Katz has explained, “[M]ost works exhibit a life cycle. A copyrighted work is born when an idea is conceived and initially expressed and fixed; it is then brought to the market and matures. Sooner or later its glory days fade away (perhaps with some chances for a potential comeback), until it is ultimately forgotten in the archives of cultural relics.” Robert Spoo has similarly humanized copyright. “It is no ordinary death for which an enfeebled copyright wishes. Rather, it longs for the afterlife of the public domain.” The heavily used term “orphan works,” to refer to works without an identifiable rightsholder, also implies concepts parenthood, birth and childhood within copyright law. Additionally, the metaphor of the “author as parent,” which locates the “birth” of copyright in the creation of an original work, has been used for centuries both to justify and critique the expansion of copyright.

Ultimately, the Supreme Court shifted away from the life sequence embedded in its earlier decisions and refused to give constitutional weight to a permanent public domain. In a 6-2 opinion by Justice Ginsburg, the Court withheld heightened First Amendment scrutiny of Section 514 because “Section 514 leaves undisturbed the ‘idea/expression’ distinction and the ‘fair use’ defense” and “Congress adopted measures to ease the transition from a national scheme to an international copyright regime.” The Court observed “nothing in the historical record, congressional practice, or our own jurisprudence [that] warrants exceptional First Amendment solicitude for copyrighted works that were once in the public domain.” The Court acknowledged that “anyone has

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79 Id. at *20. Several briefs similarly emphasize that.
80 See Amicus Brief of Project Petrucci, LLC in Support of Petitioners, Golan v. Holder, 2011 WL 2578554, at *25 (U.S. June 21, 2011) (“This Court has long recognized that the Public Domain should be clearly set off from the domain of copyright”); Petitioners’ Brief, supra note 51, at *24-25 (“To fulfill [copyright’s public] purpose, the boundaries of protection must be clear, stable and reliable . . . Section 514 erased those boundaries.”)
81 See, e.g., Katz, supra note 7, at 116
83 See Loren, supra note 1, at [] (“In the metaphor of the romantic author, the works he creates are his children, born of his labor and genius.”);
84 See Rose, Authors and Owners; Rebecca Tushnet, Payment in Credit: Copyright Law and Subcultural Creativity, 70 L. & CONTEMP. PROBS. 135, 163 (2007) (“Like noncustodial parents forced to pay child support, authors may be connected to their illegitimate ‘children’ over their objections.”); see also Heymann, supra note 1, at [] (Fixation thus causes a kind of death in creativity even as it births new legal rights.”).
85 Golan, 132 S. Ct. at 890-91.
86 Id. at 891 (“Neither this challenge nor that raised in Eldred, we stress, allege Congress transgressed a generally applicable First Amendment prohibition; we are not faced, for example, with copyright protection that hinges on the author's viewpoint.”)
free access to the public domain,” but it rejected petitioners’ contention that public domain works “belonged to them” upon expiration of copyright.\(^{87}\) “Once the term of protection ends, the works do not revest in any rightholder. Instead, the works simply lapse into the public domain.”\(^{88}\)

Most copyright scholars and advocates who have written on the matter have criticized the Supreme Court’s firm rejection of the constitutional claims in *Golan*.\(^{89}\) Despite an enormous body of scholarship\(^{90}\) and several lawsuits\(^{91}\) seeking to inject First Amendment values into copyright law, the Supreme Court has left open at most a narrow window for bringing First Amendment challenges to copyright laws. Moreover, given the Court’s previous commentary on the right to freely copy after the expiration of copyright, the *Golan* decision is perhaps surprisingly inhospitable to the public domain and the values it is purported to represent.

Nonetheless, in forcing us to rethink the ordinary sequence of copyright protection, our notions of the life and death of copyright, and the role of a public domain within them, the *Golan* decision marks an opportunity to approach some of copyright law’s most intransigent elements from new perspectives. Moreover, the *Golan* litigation brought to the surface a set of sequential dynamics that largely have gone unnoticed by progressive copyright reformers. As the following Parts will show, the accepted wisdom

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\(^{87}\) Id. at 892.  
\(^{88}\) Id.  
\(^{90}\) Id.  
of the life sequence—and the inattention to how it can operate in practice—has distorted copyright reform in such a way that progressive defeats look like victories and that seeming victories reinforce some of the most problematic aspects of copyright law.

II. The Trouble with Sequence

The sequential narrative in Golan—in which the ordinary life cycle of copyright is interrupted by resurrection—appears to serve two principal functions within challenges to restoration. First, it sets up the public domain as a necessary remedy or solution to the otherwise problematic aspects of copyright law. It is the final “quid pro quo”92 inuring to the public’s benefit after enduring a period of exclusive rights and economic appropriation; it keeps the “engine of free expression” firing in a manner that earlier-acting doctrine like fair use and the idea/expression distinction can only “partially” achieve.93 Second, this narrative articulates a normal and natural life course of constitutional significance; there is an unbroken “tradition” dating back to 171094 of creative works being channeled through the ordinary stages of creation, protection, public domain.95 Moreover, to emphasize the threat posed to those traditions by restoration, the life sequence narrative employs a figurative “monster” poised to wreak havoc on the copyright system. This Part argues (A) that a sequential framework is a difficult and largely flawed way of addressing the “problems” of copyright law and (B) the supporting “life sequence” narrative compounds this difficulty by insulating from critique the traditions it protects and maintains.

A. Sequence and Balance

A three-part sequence on its face seems to provide a clear and straightforward framework for a well-balanced copyright system. The actual operation of the sequence, however, is far more complex, and the failure of scholars and advocates to account for this operation yields serious conceptual and normative problems for progressive copyright reform.

92 See Appellants’ Reply Brief, Golan v. Gonzales, 2005 WL 6148017, at *19 (10th Cir. Nov. 4, 2005) (“The system articulated in the 1790 Copyright Act accordingly assured the quid pro quo in the copyright bargain - namely, that the system would ‘admit the people at large, after a short interval, to the full possession and enjoyment of all writings and inventions without restraint’ . . .”).

93 See supra note 73

94 Petitioners’ Reply Brief, supra note 73 at 16 (“The government's suggestion that Congress can reverse that sequence at will is precisely the departure from tradition that triggers First Amendment scrutiny.”); id. (“The tradition of protecting the public's right to unrestricted use of the public domain dates back to 1710 and the Statute of Anne. That tradition was plainly important to the Framers, who assured the creation of a stable and growing public domain, the First Congress, which followed through on that promise in the 1790 Act, and subsequent Congresses, which left the public domain intact through nineteen amendments over two hundred years.”);

As scholars in other fields have explored—and as I have argued in the context of copyright’s rights/remedies relationship—a formal, temporal sequence can serve to obscure the interplay among the various stages of that sequence and both naturalize and privilege its contestable early stages. As Annamari Jugose has explained, within the “narrative mechanism of numerical or chronological progression,” what is posited as chronologically first within a conceptual sequence serves as that sequence’s “true north,” casting what occurs later in the sequence as the “exaggeration” or “diminution” of what precedes it. In the remedies context, the conventional sequence of adjudication posits the determination of a “pure” substantive right as occurring first in time, abstracted from any real-world consequence, and only afterward at the remedial determination does the judge “decide to scale it back or enhance it with remedial add-ons.” Within this sequential framework, the later-occurring phenomenon can derive from, modify, upset what comes earlier, but what comes earlier is presented as standing on its own, ontologically and epistemically independent. Even if what occurs first-in-time seems unjust or unfair, its independence nonetheless places it in a privileged, foundational role that can be critiqued for its consequences, but not for its basic truth.

Moreover, the independence of “foundational” elements is often illusory. Beginnings and endings are deeply intertwined, but in the “first things first” framework, the “reciprocal relation” between constituent components is obscured. Again in the remedies context, “future” remedial considerations are deeply implicated in the identification of “preexisting” rights. The prospect of setting large number of

97 See, e.g., ELIZABETH GROSZ, TIME TRAVELS: FEMINISM, NATURE, POWER 5 (2005) (“[T]emporality and the forward movement of time are . . . relentlessly at work in all those social and political practices . . . that attempt to ameliorate existing conditions or compensate for past ones.”); JOSÉ ESTEBAN MUÑOZ, CRUISING UTOPIA 22 (2009) (critiquing “an autonaturalizing temporality that we might call straight time”).
98 ANNAMARIE JUGOSE, INCONSEQUENCE 27 (2002); see also id. at ix (“As second is to first, so the cultural weighing of heterosexuality as first-order and homosexuality as second-order is secured through the self-licensing logic of sequence.”).
100 Id. at 858 (“While it is meaningless to speak of remedies apart from their instrumental value in operationalizing some right, rights can be talked about and understood--indeed, can be best understood--in complete isolation from (merely) remedial concerns. In a phrase, rights and remedies are made of different stuff--and the rights stuff is better.”).
102 See Jugose, supra note 98, at 27; see also JUDITH BUTLER, BODIES THAT MATTER 5 (1993) (“But this sex posited as prior to construction will, by virtue of being posited, become the effect of that very positing.”).
103 Similarly in the sexuality context, despite being posited as sexuality’s normative baseline, the very coherence of heterosexual identity depends on the continued stability of its homosexual counterpart. See, e.g., EVE SEDGWICK, EPISTEMOLOGY OF THE CLOSET 3 (1990) (noting that the concept of homosexuality preceded heterosexuality); Kenji Yoshino, Epistemic Contract of Bisexual Erasure, 52 STAN. L. REV. 353 (2000).
prisoners free, or bankrupting a municipality, or enjoining a multi-million dollar film can deter a finding of liability during the merits determination.\textsuperscript{104} The sequential narrative, however, is unable to see the interplay between the “ends” of a sequence and what appears as the sequence’s beginnings.\textsuperscript{105}

In the patent context, Dennis Crouch and Robert Merges have made a similar argument about sequence. They argue that despite the “lexical ordering” of the Patent Act, determining whether subject matter is eligible for patent protection under section 101 of the Act need not precede deciding whether a particular claim is novel under section 102 or nonobvious under section 103.\textsuperscript{106} They argue, “in many ways the very idea of a sequence of discrete patentability requirements is conceptually misleading.”\textsuperscript{107} Instead, “the policy underpinnings of various requirements overlap in complex ways, so that in reality patentability doctrine does not test for a series of discrete independent qualities that are distinct from and mutually exclusive of each other.”\textsuperscript{108} The numerical sequence appears to prioritize the broader question of eligibility and to isolate it from the more specific requirements that appear later in the statute, but in fact patent law’s various validity “steps” overlap in both purpose and operation.\textsuperscript{109}

Similar dynamics are at work in copyright’s traditional sequence. Copyrighted works progress from creation to exclusive rights to the public domain, and within that framework the initial broad protection for original works of authorship serves as the foundation for copyright’s eventual public benefit. For example, although the Supreme Court in \textit{Stewart} acknowledged that “the copyright term is limited so that the public will not be permanently deprived of the fruits of an artist’s labors,” it explained in the same paragraph that “nothing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright” and that “a copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work.” In many ways it is the expansion and abuse of these rights to “hoard” and behave “arbitrarily” that have motivated constitutional limits on copyright,\textsuperscript{110} yet within the sequential framework they are treated as the independent baselines for constitutionalizing an inviolable public domain. The opposing sides of the restoration debate certainly disagree on the nature and value of the public domain,\textsuperscript{111} but both sides proceed with the first two steps in the

\begin{footnotesize}
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\item[\textsuperscript{104}] See Levinson, \textit{supra} note 99 at 884-85; Gilden, \textit{supra} note 96, at 1151-52.
\item[\textsuperscript{105}] See JUDITH BUTLER, EXCITABLE SPEECH 128 (1997)(observing that the idea that censorship produces speech inverts the “temporal relation” typical of the conventional view of adjudication); Madhavi Menon, \textit{Spurning Teleology in Venus and Adonis}, 11 GLQ J. LESBIAN & GAY STUD. 491, 492 (2005) (“[T]eleology depends on a sequence leading to an end that can retrospectively be seen as having had a beginning.”).
\item[\textsuperscript{107}] Id. at 1674.
\item[\textsuperscript{108}] Id.
\item[\textsuperscript{109}] Id. at 1688 (“All of the patentability doctrines seek to ensure that granted patents are not overreaching but instead are given their appropriate scope.”).
\item[\textsuperscript{110}] See, e.g., Boyle, \textit{The Second Enclosure Movement}
\item[\textsuperscript{111}] Compare, e.g., Statement of Jack Valenti, H.R. Subcomm. on Cts. & Intell. Prop. of the Jud. Comm., \textit{Copyright Term, Film Labeling, and Film Preservation Legislation-Hearing on H.R. 989, H.R. 1248, and H.R. 1734}, 104th Cong. (June 1, 1995) (“A public domain work is an orphan. No one is responsible for its life. But everyone exploits its use, until that time certain when it becomes soiled and haggard, barren of its
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life sequence largely taken as given. By focusing critical energy solely on the last stage of copyright’s life cycle, without accounting for the system as a whole, protecting the public domain serves to buttress its preceding stages. The loss (or absence) of protection at the work’s death enables stronger, more exclusive protection during its lifetime.

Moreover, the permanent public domain cannot be neatly set apart from the other stages in the copyright sequence. As shown above, the ultimate ability of the public to freely copy a work is a key component of the carefully crafted bargain that justifies the rights holder’s ability to “hoard.” Furthermore, the public domain cannot be conceptually separated from the stages of copyright that appear to precede it. For example, the conceit of “originality” requires designating certain cultural resources as the “raw materials” for authorship, and through providing such raw materials, the public domain “reaches back” and shores up some of the central conceptual difficulties with trying to identify the “real” originator of any creative endeavor. As explored more fully in Part III, the formal sequence of creation → protection → public domain makes it difficult to see this conceptual interplay, propping up some of the most heavily critiqued aspects of copyright law alongside a robust public domain.

Even if the public domain is cast not as support for, but instead as a critique of, the many well-documented problems of copyright law, the same sequential dynamics maintain. Because the forward-moving sequence takes creation and exclusive rights as “given,” it is easy to view the endpoint as solving, or remedying, “problems” that occur at earlier stages. Problems are often taken as “ready-made . . . as if they were drawn out of the city’s administrative filing cabinets, forc[ing] us to solve them.” As Gilles Deleuze has observed, however, “it is the solution that counts. The problem always has the solution it deserves.” The solutions of limited remedies or of the permanent public domain appear to solve some pre-existing problems, but instead these “[s]olutions are engendered at precisely the same time that the problem determines itself. This is why people quite often believe that the solution does not allow the problem to subsist.”

Because solutions and problems develop alongside each other, it is “wrong to believe that

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previous virtues.”) with David Lange, *Reimagining the Public Domain*, 66 L. & CONTEMP. PROBS. 463, 465 (2003) (“[I]t should be a place of sanctuary for individual creative expression, a sanctuary conferring affirmative protection against the forces of private appropriation that threatened such expression.”).


114 GILLES DELEUZE, BERGSONISM 15 (Tomlinson & Habberjam trans. 1988)

115 Id. at 16; Chauncey P. Colwell, *Deleuze and Foucault: Series, Event, Genealogy*, 1 THEORY & EVENT 21 (1997); see also id. (“Problems, as such, always have specific and singular solutions.”); Grosz, *supra* note 97, at 66 (“[A]n origin never could infect an end unless it wasn’t simply an origin, and an end is always implicated in the origin that it ends.”); Silbey, *supra* note 101, at 326 (“Origin stories, then, are essentialist narratives that do more than simply uncover beginnings: they authorize implicitly particular solutions.”). For example, framing the problem of being unable to identify and locate a copyright owner as an “orphan works” problem produces a set of solutions consistent with the abandoned child analogy, for example requiring diligent searches for parents and appointing a guardian to represent their interests in court. See Loren, *supra* note 1.

116 GILLES DELEUZE, THE LOGIC OF SENSE 121 (1990); see also id. (“By means of an appropriate process, the problem is determined in space and time and as it is determined, it determines the solutions in which it persists.”).
the true and the false can only be brought to bear on solutions, that they only begin with solutions . . . True freedom lies in a power to decide, to constitute problems themselves.”  

This freedom to construct the conditions for problem solving—as opposed to merely discovering solutions for pre-existing problems—is denied by a remedial framework that formally segregates problems and solutions. By placing temporal and conceptual wedge between copyright’s problems and solution—broad entitlements and limited remedies, exclusive rights and free speech exceptions, lengthy duration and the permanent public domain— reform efforts become focused solely on the solution within each pair. Scholars repeatedly argue for the need to protect the public domain or limit remedies in service of First Amendment values, but if a strong, long and broad set of preceding exclusive rights persists, the attending victories would appear to be limited. Implementing a solution may appear to eliminate a pre-existing problem when instead it serves to crystallize and sustain that problem, albeit in a more palatable form.

If the purpose of the permanent public domain is to moderate what is considered by many to be an unduly broad substantive right, similar efforts in the statute of limitations context should give pause to copyright advocates. As several scholars have acknowledged, time is a clumsy instrument for balancing a substantive right against competing societal concerns; it often sharply limits legal recourse without adequately addressing the offsetting interest. I provide just a few examples here. In toxic tort litigation, statutes of limitations aim to ensure high quality fact finding, but they instead encourage premature claims with insufficiently developed scientific evidence of

117 Deleuze, Bergsonism at 16
118 See Levinson supra note 99, at []; Ned Snow, The Forgotten Right of Fair Use, 62 CASE W. RES. L. REV. 135 (2011) (demonstrating that fair use concerns were formerly implicated in the question of infringement as opposed separated out as an affirmative defense); Bracha, supra note 10, at [] (observing inverse relationship between scope of protection and development of idea/expression distinction); Judith Butler, Excitable Speech at [] (arguing that the judicial act of censorship produces the obscene speech it purports to punish).
119 See Gilden, supra note 96 (observing that limiting injunctive relief in copyright cases can lead to the expansion in the substantive right, bringing a broader swath of speech within the copyright entitlement); Salinger v. Colting, 607 F.3d 68 (2d Cir. 2010) (eliminating presumption of irreparable harm in copyright decisions in part to protect First Amendment interests but simultaneously rejecting defendant’s strong fair use argument in a single paragraph).
120 See Grosz, supra note 97, at 161 (“These misformulations of the problem preempt or foreclose the experiments, the inventions necessary for the development of a solution; they pose the question as already resolvable in given terms.”).
causation. In immigration law, asylum applicants face a one-year filing deadline meant to deter fraudulent applications, but there are numerous other checks on veracity throughout the asylum process that could address these concerns without foreclosing a tremendous number of legitimate persecution claims at the outset. Under Title VII, employees must charge discrimination within 180 days in order to promote “repose” for employers facing stale claims. However, as Justice Ginsburg observed in Ledbetter v. Goodyear Tire, courts could deal with actual prejudice to employers through equitable doctrines such as laches, waiver, estoppel, and equitable tolling without denying relief to a wide swath of aggrieved employees. Although these doctrines might themselves be considered “time limits,” it is important to note that they are not triggered by the pure passage of time, but instead by a concern with prejudicial reliance by the defendant and/or deceptive conduct by the plaintiff. These doctrines accordingly are better tailored to the actual needs of specific litigants and less likely to foreclose large numbers of meritorious claims.

Copyright’s sequential approach to balancing exhibits similar drawbacks. It treats the interests of the copyright owner as strong when a work is new and the interests of the public as strong when a work is old, overlooking both the strong public interest in interacting with new works and the ongoing commercial exploitation of certain works beyond the copyright term. By cutting off the rights holders cause of action, the public domain is meant to do the normative work of accounting for free speech interests, but

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122 See Michael D. Green, The Paradox of Statutes of Limitations in Toxic Substances Litigation, 76 Cal. L. Rev. 965, 970 (1988) (“Leaving the timing to plaintiffs would improve the overall quality of evidence, most significantly by delaying litigation until scientific understanding of causation can be more fully developed.”). This concern is not, however, universal. See, e.g., Richard A. Epstein, The Temporal Dimension in Tort Law, 53 U. Chi. L. Rev. 1175, 1181-82 (1986). Statutes of limitations in the criminal context rely quite heavily on this deterioration of evidence rationale. See Stogner v. California, 539 U.S. 607, 615 (2003) (“[A] statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict. And that judgment typically rests, in large part, upon evidentiary concerns—for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable.” (citations omitted))


125 Even where scholars have attempted to soften the transition from strong to zero protection at the end of the copyright term, time nonetheless is treated as a good proxy for value. Justin Hughes and Joseph Liu, for example, have proposed incorporating time into the fair use analysis so that the fair use defense becomes gradually stronger over the course of the term. This slow blur into the public domain may mitigate some of the problems with the three-part sequence’s discrete boundary between protection and public domain, but it still presupposes a strong, exclusive right at the very beginning of that sequence. See Justin Hughes, Fair Use Across Time, 50 UCLA L. Rev. 775, 781 (2003) (“When a work is new, unauthorized uses are less likely to be fair uses; when a work approaches the end of its copyright term, unauthorized uses are increasingly likely to be fair.”); Joseph P. Liu, Copyright and Time: A Proposal, 101 Mich. L. Rev. 409, 435 (2002) (“[T]he longer a work has been available to the public the more it becomes a likely candidate for others to build upon.”).
there are other doctrines—such as fair use or scènes à faire—\textsuperscript{126} that are much better suited for balancing the various expressive and economic interests surrounding a particular use of a creative work. The sequential approach attempts to pull competing interests apart and deal with them one-at-a-time, but the ordering process itself privileges and prioritizes certain interests over others. As the Supreme Court has observed, “statutes of limitation go to matters of remedy, not to destruction of fundamental rights.”\textsuperscript{127} To the extent that the copyright sequence cuts off the claims of rights holders for the sake of the general public, it nevertheless keeps intact a long, broad and exclusive conception of the underlying substantive rights.

B. Narratives of Resurrection and Repose

The fact that the narratives in Golan are framed not just in terms of sequence, but in terms of ordinary life sequence, further signals the normative troubles lurking beneath. A life sequence conceit is a powerful way of imbuing legal narrative with a sense of what is normal, stable and deserving of protection.\textsuperscript{128} All copyrights are born, live out many decades of protection, and peacefully ascend to the public domain at death. This ordinary life course serves the lofty goal of cultural progress into future generations and the continuing reproduction of the creative cycle.\textsuperscript{129} By disrupting these life stages, the URAA’s resurrected works—its “zombie copyrights”—monstrously threaten the available stock of raw materials for cultural production. The public domain ensures appropiable raw materials, and copyright’s creative cycle cannot be reproduced without them. Problem: zombies inhibit the creative cycle; Solution: kill them for good. Given

\begin{itemize}
  \item \textsuperscript{126} Under the scènes à faire doctrine, copyright does not extend to “incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic.” Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 979 (2d Cir. 1980) (finding German beer halls scenes and the German National Anthem to be non-copyrightable elements of a historical account of the Hindenburg disaster). The concern underlying this doctrine is that exclusive rights over “stock” or standardized literary devices would close off entire genres or subject matters to subsequent authors.
  \item \textsuperscript{127} Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945); \textit{Pickett v. Prince}, 52 F. Supp. 2d 893, 899 (N.D. Ill. 1999) aff’d, 207 F.3d 402 (7th Cir. 2000) (“[L]imitations periods are not generally to be viewed as affecting substantive rights.” (citations omitted)).
  \item \textsuperscript{128} See Taylor & Madison, \textit{supra} note 1, at 160 (“Our use of metaphor carries with it an evaluative dimension that is always at least implicit.”); Jerome Bruner; Edwards on steady state; see also JOSÉ ESTEBAN MUÑOZ, CRUISING UTOPIA 11 (2009) (critiquing the “ontological certitude” of pragmatic gay contemporary identity)
  \item \textsuperscript{129} See, e.g., Petitioners’ Reply Brief, \textit{supra} note 73, at *3 (“[The Public Domain] assures the unrestricted spread of existing works and provides the public with free access to the building blocks of future creativity. Removing works from the public domain destroys this guarantee, and frustrates the cycle of free expression and creativity the Copyright Clause is designed to ensure.”); Brief of Public Domain Interests, \textit{supra} note 50, at *24-25 (“[Public domain films] are used . . . to acquaint younger generations with the experiences of their parents, grandparents, and great-grandparents. As such, they communicate American culture and values to new generations and support democratic participation.”); Brief of Petrucci, \textit{supra} note 80, at *19 (“This reconceptualization of society’s production of cultural works uniformly militates in favor of a comparable reconceptualization of the Public Domain . . . as the fundamental and necessary soil for the generation of new arts and sciences.”).
\end{itemize}
the norm of ensuring continued cultural progress, this logic seems persuasive, if not entirely natural.\footnote{Cf. Loren, supra note 1, at 1435-36 (“These orphans have suffered the tragic loss of their parents. These are works whose parents have been lost or killed, or whose parents have long ago abandoned them. We reflexively begin to believe that orphan works need the kind of protection that society provides to abandoned children.”).}

The “kill the zombie” logic, however, glosses over repeated criticism of copyright law’s approach to (re)production,\footnote{See Tushnet, supra note 1, at 2134; Heymann, supra note 1 at 830. This “reproduction” analogy was historically quite salient. See, e.g., Mark Rose, Authors and Owners 61-62 (1993).} accumulation\footnote{Margaret Chon, Postmodern “Progress”: Reconsidering the Copyright and Patent Power, 43 DePaul L. Rev. 97, 120 (1993) (critiquing the “quest for universal abundance” underlying intellectual property law’s conception of “progress”); Cohen, Configuring the Networked Self.} and futurity,\footnote{See Shubha Ghosh, Forward: Why Intergenerational Equity, 2011 Wis. L. Rev. 103, 108 (2011) (“The danger is that future generations serve as a fiction and lure for present interests.”); see also Muñoz, supra note 128 at 22 (“Straight time tells us that there is no future but the here and now of our everyday life. The only futurity promised is that of reproductive majoritarian heterosexuality, the spectacle of the state refurbishing its ranks through overt and subsidized acts of reproduction.”).} and it assumes that reproducing the ordinary life cycle of copyright is unquestionably good. Opponents of restoration in \textit{Golan} emphasize the longstanding, unbroken tradition of the ordinary life cycle of copyright,\footnote{See, e.g., Brief of ACLU, supra note 74, at *14 (“Section 514 has broken this creative cycle that has proven so critical to the development of creative works for centuries.”).} but like many longstanding cultural norms, this tradition has been marked by privilege, hierarchy and marginalization.\footnote{See, e.g., Sunder, supra note 17, at 83 (“Intellectual property does not merely incentivize and reward creators; it structures cultural and social relations.”); Neil Weinstock Netanel, Copyright and a Democratic Civil Society, 106 Yale L.J. 283 (1996); James Boyle, Shamans, Software, and Spleens: Law and the Construction of the Information Society (1996); Rosemary J. Coombe, The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law (1998).} Despite the instinct to preserve and protect these norms, they are far from inevitable, and the emergence of “monsters” in copyright law presents opportunities to reconceive and engage with our baseline assumptions of normality.\footnote{See, e.g., Butler, Bodies that Matter at 3 (“The abject designates here precisely those ‘unlivable’ and ‘uninhabitable’ zones of social life . . .”); Julia Kristeva, Powers of Horror: An Essay on Abjection 4 (1982) (“It is thus not lack of cleanliness or health that causes abjection but what disturbs identity, system, order. What does not respect borders, position, rules.”); Michel Foucault, Abnormal: Lectures at the Collège de France, 1974-1975, at [] (2003); Jacques Derrida, Passages—From traumaatism to promise, in Points... Interviews 1974-1994, at 385 (1995) (“Faced with a monster, one may become aware of what the norm is and when this norm has a history . . . any appearance of monstrosity in this domain allows an analysis of the history of the norms.”); see also Grosz, supra note 97, at 64 (“We must refuse the knee-jerk reactions of straightforward or outright condemnation before we understand the structure and history of that modality of violence, its modes of strategic functioning, its vulnerabilities and values.”).} The presence of the zombie may indeed pose a serious threat to the ways we have become accustomed to understanding the nature and purpose of the copyright system, but the automatic response should not be to simply dig in our heels, celebrate our tradition, and prop up one of its core structural components.\footnote{See Silbey, supra note 101, at 201 (“Simply put, can the Access Movements effect change if they fail to modulate these central features of the origin myths of intellectual property?”).}
It is important to acknowledge, however, that despite the rhetorical scare tactics employed in opposition to restoration the “resurrection” and “zombie” narratives ultimately were unsuccessful. This begs the obvious question: why not?

Again, statute of limitations literature may be useful. A frequently-cited reason for limiting a cause of action is that it allows “repose” for the potential defendant, i.e. peace of mind and relief from the anxiety of lawsuit or prosecution.138 “Repose” is in some ways the very opposite of “resurrection”; we should let the claim rest in peace because it would be unfair to bring it back to life at some far-off date.139 The appeal to repose, however, only tends be successful when there is some sense of justice in permitting a defendant to get away with potentially unlawful conduct.140 For example, where defendants can show prejudicial reliance, the revival of an expired limitations period can trigger due process concerns.141 By contrast, claims are quite often “resurrected” when there does seem to be some injustice in the underlying conduct and/or the consequences to defendant are not demonstrably egregious.142 Accordingly, the rhetorical weight of the “repose” hinges upon the normative value attached to the underlying substantive law.

This suggests that there may be something missing from copyright’s life sequence narrative: a normative theory of value and harm. Opponents of restoration warned repeatedly about the dangers of resurrecting public domain works, but the Court was unable to perceive any real injustice in requiring repose for plaintiffs beyond the protections already built into the URAA:143

138 See Ochoa & Wistrich, supra note 121 at 460.
140 See Ochoa & Wistrich, supra note 121, at 461 (“In assessing the validity and weight of this purpose, therefore, it is necessary to ask how much value should be placed on the desire of wrongdoers.”); Malveaux, supra note 15, at 112-14 (discussing the repose rationale for time-barring controversial reparations litigation); Richard A. Epstein, Past and Future: The Temporal Dimension in the Law of Property, 64 Wash. U. L.Q. 667, 685-86 (1986) (observing that courts tend to toll statutes of limitations in presence of a defendant’s bad faith); see also Stogner, 539 U.S. at 631 (“Memories fade, and witnesses can die or disappear. Such problems can plague child abuse cases, where recollection after so many years may be uncertain, and “recovered” memories faulty, but may nonetheless lead to prosecutions that destroy families.”).
141 Chase Sec. Corp. v. Donaldson, 325 U.S. 304 (1945) (“This is not a case where appellant's conduct would have been different if the present rule had been known and the change foreseen. It does not say, and could hardly say, that it sold unregistered stock depending on a statute of limitation for shelter from liability.”).
142 Malveaux, supra note 15, at 113-14 (“Prosecutors have recently seen it fit to reopen numerous criminal cases involving civil rights violence perpetrated decades ago.”). For example, the Constitution provides greater leeway to legislatures to revive expired statutes of limitations in civil cases than in criminal prosecutions. Compare Stronger, 539 U.S. at 631-32 (prohibiting revival of statute of limitations for child sex abuse offense under Ex Post Facto Clause) with Chase, 325 U.S. at 315-16 (permitting revival of expired statute of limitations for civil securities fraud claim)
143 Golan, 132 S. Ct. at 891 (“Congress adopted measures to ease the transition from a national scheme to an international copyright regime.”); id. (“[N]othing in the historical record, congressional practice, or our own jurisprudence warrants exceptional First Amendment solicitude for copyrighted works that were once in the public domain.”).
Prokofiev’s Peter and the Wolf could once be performed free of charge; after § 514 the right to perform it must be obtained in the marketplace. This is the same marketplace, of course, that exists for the music of Prokofiev's U.S. contemporaries: works of Copland and Bernstein, for example, that enjoy copyright protection, but nevertheless appear regularly in the programs of U.S. concertgoers.\textsuperscript{144}

By contrast, the Court \textit{did} perceive some injustice in denying copyright protection to foreign authors:

Section 514 continued the trend toward a harmonized copyright regime by placing foreign works in the position they would have occupied if the current regime had been in effect when those works were created and first published. Authors once deprived of protection are spared the continuing effects of that initial deprivation.\textsuperscript{145}

This suggests that no matter the accuracy of petitioners’ historical arguments or the numerous doctrinal hooks for a permanent public domain, a First Amendment argument lacked the normative heft to convince the Court to strike down a provision of the Copyright Act for the first time.

In a candid essay about his loss in \textit{Eldred v. Ashcroft}, Lawrence Lessig observed that in retrospect he should given greater emphasis to the actual speech-related harms of a twenty-year term extension rather than focus on abstract arguments about federal power.\textsuperscript{146} In addition to demonstrating the structural limits of Congress’s copyright power, he needed “to make the issue seem ‘important’ to the Supreme Court. It had to seem as if dramatic harm were being done to free speech and free culture.”\textsuperscript{147} \textit{Golan} similarly suggests that formal arguments about copyright’s traditional life sequence, even when buttressed by life and death narratives, were unlikely to prevail without empirically-supported theories of harm.\textsuperscript{148} The life sequence framework did not do the empirical work it needed, and, as shown below, undercut the normative goals it aimed to further.

\section*{III. Copyright’s Sequence and Consequences: \textit{Golan} Revisited}

The previous Part discussed the potential dangers from using a sequential narrative to frame legal problems. This Part will revisit the narratives employed in \textit{Golan} and show how the concerns raised above specifically play out in efforts to constitutionalize a permanent, clearly-demarcated public domain as the final stage in the life sequence of copyright. By framing the public domain as temporally following the

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\textsuperscript{144} Id. at 892.
\textsuperscript{145} Id.
\textsuperscript{146} Lawrence Lessig, \textit{How I Lost the Big One}, Legal Affairs, March/April 2004.
\textsuperscript{147} Id.
\textsuperscript{148} Other scholars have previously observed the lack of a clear normative compass to guide copyright law. See, e.g, Pamela Samuelson, \textit{Preliminary Thoughts on Copyright Reform}, 2007 Utah L. Rev. 551, 551 (2007) (“The statute is [ ] far too complex, incomprehensible to a significant degree, and imbalanced in important ways. Moreover, it lacks normative heft—that is, the normative rationales for granting authors some protections for their works and for limiting the scope of those protections . . . ”).
\end{footnotes}
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very problems that it is meant to solve—or at least mitigate—these narratives risk essentializing and preserving some of the most heavily-criticized aspects of the copyright system: narrow and/or ineffective fair use limitations, broad exclusive rights, romantic notions of authorship, and industry capture. This dynamic has two general components: (A) through a formal temporal division between the three stages of copyright, focusing narrowly on the public domain overlooks the potentially inverse relationship between the public domain and copyright’s alternative free speech limitations; (B) positing the public domain as the “end” of copyright’s life sequence overlooks the role of the concept of public domain in producing and sustaining the “earlier” stages.

A. Interplay between the Length and Scope of Copyright

Formalizing and segregating the discrete stages of the ordinary copyright sequence elides the interplay between those stages and overlooks the potential for copyright to equilibrate in response to a shift in one of its components. As some scholars have acknowledged, the length and breadth of copyright protections are not strictly independent, and a longer, narrower protection actually may be preferable to shorter, more robust one. Because designing a copyright scheme (at least within the conventional incentives rationale) hinges upon this trade-off between length and robustness of the entitlement, we should not expect that limiting the length of protection, i.e. accelerating the date of entry into the public domain, functions independently of the scope of protection, i.e. the range of uses that fall within copyright’s exclusive rights.

I have argued elsewhere that limiting available copyright remedies lowers the “costs” of a preceding finding infringement, thereby incentivizing an expansion in the substantive entitlement. A similar dynamic is arguably at play here. By constitutionalizing the permanent public domain, copyright protections are guaranteed to come to an end, so the decision to grant broad protections in favor of a rights holder is not deterred by the prospect of a quasi-perpetual, potentially revivable robust entitlement. As Fred Schauer has observed, “As a matter more of political and sociological fact than of necessary logical correlation, rights can more plausibly be absolute when the range of coverage is narrow.” A “tension-reducing role” of the mandatory permanent public domain might accordingly welcome broad protections during the “life” of copyright.

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149 See, e.g., Landes & Posner, supra note 22; William W. Fisher III, Reconstructing the Fair Use Doctrine, 101 HARV. L. REV. 1659, 1719 n. 265 (1988) (“[I]t will always be more efficient to select a long patent or copyright life” and then “determine which small set of entitlements would be optimal than to select a shorter life” and “identify a larger set of entitlements.”).

150 See Gilden, supra note 96, at 1152. For example, if a finding of infringement no longer necessitates enjoining a book’s publication, a court may be more likely reject a fair use argument and find infringement. See id.; see also Salinger v. Colting, 607 F.3d 68 (2d Cir. 2010)(eliminating presumption of irreparable harm in copyright preliminary injunctions but rejecting colorable fair use in a single paragraph).

151 Cf. Cohen, supra note 10, at 136 (“[I]f the public domain n copyright is a discrete place, there are no significant barriers to commodification of everything else.”).


153 Bracha, supra note 10, at 247 (“[T]he tension-reducing role played by the idea/expression dichotomy explains the inverse proportion between the rise of this doctrine and the general reality of copyright law.”).
Indeed, within the *Golan* life sequence narrative, efforts to shore up the public domain consistently come at the expense of within-term limitations. For example, a brief filed by a diverse range of “Public Domain Interests” argues that the “public, including the artists, educators and innovators represented among *amici*, depends on the public domain as the primary resource that fuels new cycles of speech.”

It then proceeds over the course of ten pages to document example after example of where “[t]he Public Domain is Essential to Creative Expression,” including:

1.  
   If Picasso could not refer to El Greco; if James Joyce could not borrow freely from Homer; and if Laurents and Sondheim could not turn *Romeo and Juliet* (much of which Shakespeare borrowed from others) into *West Side Story*[,] then copyright would cease to stimulate expression and would instead impede it.  

2.  
   For his masterwork, *The Ring of the Nibelung*, Wagner used Old Icelandic, Germanic, and other sources to construct[,] his own myth, picking, choosing and adapting to his own taste. . . In the score for *Don Giovanni*, Mozart used peasant dances to evoke the class barriers the troublesome Don insisted on traversing.  

3.  
   Michael Chabon borrowed from many public domain sources for his novel *Summerland*, including Norse and American Indian Trickster mythology, the Greek story of Prometheus, and American folktales about Paul Bunyan, John Henry, Mike Fink, and Pecos Bill.  

4.  
   Traditional music performed by local musicians plays a key role in *amicus* Barbara Kopple’s documentary *Harlan County, USA*, which depicts Kentucky coal miners’ struggles to obtain safe working conditions and fair labor practices. The traditional songs featured in the film evoke a specific time and place, and the community’s culture and history.  

The brief acknowledges in a footnote that “[f]air use may provide protection in some such cases, though it may be at a cost,” and although it concedes that these doctrines “all provide needed breathing space for expression while copyright is in force,” it maintains nonetheless that “these safeguards are limited in scope and effect, and cannot substitute for the right to use entire expressive works in the public domain.”

The Yale Information Society Project Brief similarly downplays the significance of fair use and the idea/expression distinction within the context of the copyright life sequence. “During the first decades of a works existence, the author reaps the economic rewards of protection; after the conclusion of the copyright term, the public enjoys the

155 Id. at *8-9.  
156 Id. at *10 (internal citations and quotation marks omitted).  
157 Id. at *11.  
158 Id. at *13.  
159 Brief of Public Domain Interests, *supra* note 50, at *15 n.16.  
160 Id. at *31.
benefits, and later authors can use these materials free of charge.”

During its explication of the “Three-Stage Life Cycle,” the brief makes no mention of fair use in connection with “Stage II: Legal Protection of A Work,” and only at Stage III do “[n]ew creators have the chance to use, distribute, contextualize, modify, and improve upon previous public domain work without asking permission.” The brief does acknowledge that the public domain, “along with other doctrines like fair use and the idea/expression distinction,” are crucial to balancing copyright and the First Amendment, but it notes that “the scope of fair use is limited by an inquiry into whether a ‘reasonable copyright owner would have consented to the use’” and “[t]he public domain extends beyond that narrow scope.”

Although the Golan briefs are right to point out the costs and uncertainty often accompanying a determination of fair use, current doctrine nonetheless envisions far more extensive public engagement with copyrighted works than allowed by the briefs in Golan. None of the examples proffered by the Public Domain Interests present a clear case of infringement but for the public domain status of the earlier work, and there would appear to be strong, or at least defensible, grounds for each activity. Public domain works do provide “raw materials” for the creative life cycle, but at the same time “if the original work is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings – this is the very type of activity that the fair use doctrine intends to protect . . .” Critical reinterpretations of copyrighted works have been deemed fair use, as have uses of copyrighted works in historical fiction and non-fiction, and the modification and contextualization available at Stage III of the life cycle approximate the “transformative uses” at the heart of fair use. Moreover, the Yale ISP brief overstates a “reasonable copyright owner” limitation from Harper &

161 Yale ISP Brief, supra note 50, at *11.
162 Id. at *13-15.
163 Id. at *15.
165 See, e.g., Lawrence Lessig, Free Culture at [] (describing fair use as the right to hire a lawyer); Bruce P. Keller & Rebecca Tushnet, Even More Parodic than the Real Thing, 94 TRADEMARK REP. 979 (2004) (critiquing the parody/satire distinction often employed in fair use decisions).
166 See, e.g., Brief of Public Domain Interests, supra note 50, at *8.
167 Cariou v. Prince, slip op. at 11, -- F.3d -- (2d Cir. 2013) (citations and internal alternations omitted).
169 See Bill Graham Archives v. Dorling Kindersley, Ltd., 448 F.3d 605 (2d Cir. 2006) (finding reproduction of Grateful Dead concert posters in biography of group to be fair use); SOFA Entm’t, Inc. v. Dodger Productions, Inc., No. 2:08-cv-02616 (9th Cir. Mar. 11, 2013) (finding use of seven-second clip of the Éd Sullivan show in a musical about the singing group the Four Seasons to be fair use).
170 See, e.g., Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994) (“The central purpose of this investigation is to see . . . whether the new work merely supersed[e]s the objects of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’” (internal citations and quotation marks omitted)).
Row, the use of basic plot sequences and stock storytelling elements are unprotectable under the scenes a faire doctrine, and accordingly some of these examples might not even be “substantially similar” to their source materials.

In order to constitutionalize the permanent public domain, it may make sense to emphasize its role in mitigating the harms from broad exclusive rights, but these arguments appear to hinge upon conceding—as opposed to challenging—the narrowness of speech-related limitations. The permanent public domain may serve to lower the social costs of copyright protections, but these protections are not the independent variable assumed by the life sequence framework. Even in the Golan arguments, these lower social costs appear to “reach back” and retroactively install a system with only weak limits on exclusive rights. The permanent, bounded public domain might allow zero-cost use of the entirety of a work, but that use only begins seventy years after the death of the author of that work. The public has an arguably stronger interest in engaging with, critiquing, and experiencing creative works during the work’s commercial “life,” and the public domain cannot be the primary resource or essential to creative expression.

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171 The Court in Harper & Row did not condition a finding of fair use on whether a reasonable would in fact consent to the use; it observed, “[T]he author’s consent to a reasonable use of his copyrighted works has always implied by the courts . . . since a prohibition of such use would inhibit subsequent writers from attempting to improve upon prior works and thus frustrate the very ends sought to be attained.” 471 U.S. at 549. It made this observation to distinguish the publication of a work, whereby the author impliedly consented to “reasonable and customary uses” such as a critical book review, from unpublished works like the memoir at issue in Harper & Row, which were not traditionally subject to such implied consent. Id. at 550. To the extent courts have placed a “reasonableness” limitation on fair use, they have looked at whether the claimed purpose, e.g. parody, could be “reasonably perceived” and whether the amount used is “reasonable” in light of that purpose. See, e.g., Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 116 (2d Cir. 1998) (“The reasonableness of taking additional aspects of the original depends on the extent to which the “overriding purpose and character” of the copy “is to parody the original.”). If fair use depended on what a “reasonable copyright owner” would actually permit, no negative book reviews or parodies—prototypical fair uses—would be permitted by copyright.

172 See Frye v. YMCA Camp Kitaki, 617 F.3d 1005, 1008 (8th Cir. 2010) (“[S]cènes à faire—defined as “incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic”—cannot amount to infringing conduct.”); Benay v. Warner Bros. Entm’t, Inc., 607 F.3d 620, 627-28 (9th Cir. 2010) (“Given that both works involve an American war veteran who travels to Japan to help the Emperor fight a samurai rebellion, it is not surprising that they share certain settings: a scene of the protagonist sailing into Japan, scenes in the Imperial Palace, scenes on the Imperial Army's training grounds, and battle scenes in various places in Japan. These are all scenes-a-faire that flow naturally from the works' shared unprotected premise . . .”).

173 See, e.g., Funky Films, Inc. v. Time Warner Ent’mt, Inc., 462 F.3d 1072 (9th Cir. 2006) (in light of differences in plot details, character development, themes, and general mood, finding no substantial similarity between television show “Six Feet Under” and screenplay that also featured a small funeral home in which the father, who had run the business for decades, died unexpectedly and left the business in equal shares to his two sons).

174 See Barton Beebe, Fair Use and Legal Futurism, 25 LAW & LIT. 10, 16 (2012) (“[F]air use commentators may be tempted to overstate just how bad things have gotten in an effort to shock the reader into action . . . Courts may mistake the alarmist description of the law as accurate, and rule accordingly.”).

175 See, e.g., Sunder, supra note 17; Cohen, supra note 10 at 145 (“Today, pop culture rather than Greek mythology or Catholic hagiography provides a primary source of new material. The substitution of earthly deities for heavenly ones does not render creative borrowing fundamentally different.”); Tushnet, supra note 1.
without putting forth a rather cramped view of how we interact with relatively new creative works.  

Historical arguments about the public domain similarly put in place a baseline *entitlement* that is broad and perpetual. Rather surprisingly, the *Golan* litigation found Lawrence Lessig—key architect of First Amendment challenges to copyright—arguing that authors enjoyed *perpetual, common law* copyright protection upon enactment of the first Copyright Act. Because opponents of restoration alleged that removal of works from the public domain was unprecedented, they needed to argue that the first Congress didn’t remove works from the public domain, despite the failure of several states to enact copyright statutes during the Articles of Confederation. Relying on the heavily-criticized New York Court of Appeals decision in *Capitol Records v. Naxos*, and contrary to Supreme Court precedent, opponents argued that New York and at least two other states granted perpetual common law protection to authors following publication of a work. Congress did not remove works from the public domain in 1790; instead, it created it. Rather than frame federal copyright law as *granting* a particular entitlement for a limited period of time, the ordinary life sequence frames federal copyright law as *taking away* a right that preexists the public domain.

Just as the permanent public domain concedes broad exclusive rights during the copyright term, the historically inviolable public domain is premised upon authors’ even more fundamental right to perpetually control dissemination of their works. To highlight just how important the public domain is within traditional copyright framework, opponents of restoration reinforce one of the key narratives used to justify copyright expansions for at least four centuries, and one that was deployed throughout the 1990s to produce some of the very laws copyright reformers have vehemently opposed. The public domain might remain intact, but the very behavior targeted by public domain advocates—long, broad protections for rights holders—is historically and rhetorically sustained in the process. In order to essentialize the public domain within the fabric of American copyright, and to cast it as the basic remedial mechanism within the ordinary copyright sequence, the foundation for that sequence becomes authors’ and publishers’

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176 The amicus brief for Project Petrucci LLC epitomizes this tension. It acknowledges that “fans of television shows, movies, comic books, and bands themselves participate in the creation of that culture,” see *supra* note 80, at *19 (quoting Chon, *supra* note 132, at 129-30), seemingly requiring some ability to interact with *contemporary* culture, but it nonetheless casts the *Public Domain* as “the ideal wellspring because it provides a bevy of pre-existing ideas that may be manipulated infinitely, without limitation.” Id. 177 See Brief for Creative Commons Corporation as Amicus Curiae in Support of Petitioners, Golan v. Holder, 2011 WL 2470826, at *10-17 (U.S. June 20, 2011); see also Petitioners’ Reply Brief, *supra* note 73. 178 See Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834) (rejecting authors’ common law copyright after first publication of their writings). 179 See Creative Commons Brief, *supra* note 177, at *11-12. 180 See Petitioners’ Brief, *supra* note 51, at *3 (“In the first Copyright Act of 1790, Congress created the public domain of the United States by replacing a patchwork of state law protection with a uniform federal system that placed works in the public domain quickly and reliably.”). 181 See Wheaton v. Peters 182 See Oren Bracha, *supra* note 10; Rose, Authors and Owners (discussing Statute of Anne lobbying); 1838 copyright revision lobbying. 183 See Patry, Moral Panics and the Copyright Wars (2009)
expansive, exclusive control over the publication, dissemination, and reuse of their works.

B. Masking the Performative Dynamic of the Public Domain

In addition to obscuring the interplay between the public domain and earlier stages in copyright’s life cycle, the sequential narrative obscures the embeddedness of the public domain in the very construction of copyright’s “birth” and “life.” Despite the persistent characterization of the public domain as an essential safeguard for free speech, the public domain is not an ontologically distinct concept residing somewhere “out there,” beyond the reaches of the copyright apparatus and in need of our protection and conservation.184 Instead, as some scholars have acknowledged, what we generally understand to constitute the public domain185 is much more intimately tied up in the creative and legal processes imagined and protected by copyright law.186 As Julie Cohen has observed, “The common in culture is not a geographically separate domain, but rather the cultural landscape within (and against and through) which creative practices take place.”187 She cautions that “[a]n affirmative legal conception of the common in culture that respects creative practice will not flow from reifying the ‘public domain’ as such, but rather from adoption of an organizing metaphor that more clearly rejects formal and experiential separation.”188 Attempting to carve out a “public” space without at the same time delimiting a correlative “private” space is a “non-sequitur,” and accordingly the

184 See Cohen, supra note 10 at 154. I should note that this implied distinction between the “nature” of the public domain and the “culture” promoted through copyright protection permeates both public domain literature, see, e.g., Boyle, The Second Enclosure Movement, and the idea proffered in the Golan briefs that the public domain provides “raw materials” for creative progress, see, e.g., Brief of Public Domain Interests, supra note 50, at *8. Within a considerable body of feminist literature, such nature/culture, raw/cooked distinctions have been critiqued as applied to women and men for perpetuating gender hierarchies and justifying men’s appropriation of women’s bodies and labor. See, e.g., Sherry B. Ortner, Is Female to Male as Nature is to Culture, 1 FEMINIST STUDIES 5 (1972); NATURE, CULTURE, AND GENDER (Carol P. McCormack & Marilyn Strathern, eds 1980); see also Burk, supra note 13, at [] (noting the nature/culture dualism implicit in a number of areas of intellectual property); Keith Aoki [].

A full exploration of nature/cultural distinctions with regard to the public domain is beyond the scope of this article, but to the extent that the life sequence narrative does segregate copyright from the public domain and overlooks the inequities entailed by that division, see infra, it appears to facilitate such a nature/culture distinction. Cf. Madhavi Sunder, supra note 17 (Reifying the public domain may have the unintended effect of congealing traditional knowledge as “the opposite of property,” presenting poor people's knowledge as the raw material of innovation—ancient, static, and natural—rather than as intellectual property—modern, dynamic, scientific, and cultural invention.”).

185 And the precise contours vary substantially. See Pamela Samuelson, Enriching Discourse on the Public Domain, supra note 7 (documenting 13 different understandings of what constitutes the public domain).

186 See, e.g., Chander & Sunder, supra note 18, at 1339 (“Private property and the public domain are paired together in a perpetual dance.”); Litman, supra note 112.

187 Cohen, supra note 10, at 124.

188 Id. at 158. In rejecting the spatial separation of the public domain, Cohen pulls from Pamela Samuelson’s mapping of the public domain’s “core” and “contiguous terrains,” including a terrain “consisting of some intellectual creations that courts have treated in the public domain for some, but not all, purposes.” See id. (quoting Samuelson, supra note 26, at 148-51). According to Cohen, Samuelson’s exposition of the map reveals that “the terrains inside and outside the core overlap, merge and diverge in ways that we would not expect to see if public and private terrains were formally separate.” Id.
project of constructing an intellectual commons is deeply bound up in “the doctrines that determine copyright breadth and depth during the copyright term.”

Although Cohen’s analysis focuses on the limitations of the geographic/spatial public domain metaphor, the temporal/sequential framing of the public domain similarly disguises the interconnectedness of copyright’s various life stages. Instead of capping off the three-stage sequence of creation, protection, public domain, the public domain posited at stage 3 of the life sequence serves to both prop up and obscure some of the core troubles at stage 2 (protection) and stage 1 (creation). The public domain does not just function remedially, but performatively; it produces some of the very problems it purports to address.

First, despite being repeatedly posited as central to the foundational copyright bargain and as providing fundamental breathing space for speech since 1790, the public domain as a distinct concept did not emerge until the late-1800s alongside a rapid expansion of copyright protection. From the Statute of Anne in 1710 through the Founding through the mid-1800s, Anglo-American copyright prohibited a very narrow scope of activities: the verbatim publishing of books and a limited set of other subject matter. Translations, adaptations, reinterpretations and performances of copyrighted

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189 Id. at 157.
190 The rules of copyright law, like those developed for libel law, obscenity law and the law of seditious advocacy, require special privileges that balance Congress's interests in regulation against free speech values... The entrance of works into the public domain, and the corresponding right to use such works without seeking permission, is a constitutional privilege of citizens that furthers key First Amendment values.

Yale ISP Brief, supra note 50, at *26-27

191 This notion of performativity has its roots in speech-act theory as developed most notably by Austin and Searle. Speech-act theory distinguishes between “constantive” speech, which describes some preexisting phenomenon, and “performativ” speech, which produces the phenomenon it names. For example, a court’s pronouncement that a defendant is “guilty” or that a couple is “man and wife” produces the convict and married couple it is addressing. See J.L. Austin, How to Do Things With Words (1962); John Searle, Speech Acts: An Essay in the Philosophy of Language (1969).

192 See Bracha, supra note 10, at 191 (“Ironically, the broader and stronger copyright protection became, the more vocal grew the insistence that copyright left all knowledge free as the air.”); Mark Rose, Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain, 66 L. & Contemp. Probs. 75, 84 (2003) (“[T]here was, in the early period [before the mid-to-late nineteenth century], no positive term in which to speak affirmatively about the public domain.”); Cohen, supra note 10, at 125 (“The metaphoric notion of a ‘public domain’ in US copyright law did not exist until the turn of the twentieth century.”). The use of the term in intellectual property law is generally traced back to the French term “domaine public” in the Berne Convention of 1884, see Tyler Ochoa, Origins and Meanings of the Public Domain, 28 U. Dayton L. Rev. 215, 225 (2002), although Cohen has noted that the term previously had been used in the connection with the disposition of publicly-owned lands. Cohen, supra note 10, at 127-28.

193 See Bracha, supra note 10, at 199-200 (“[C]opyright, far from bestowing general control or even generalized control over an object of property, remained the traditional printer’s entitlement to print and sell copies of the product of the printing press.”); Rose, Nine-Tenths of the Law, supra note 10 at 86 (“In the early period, protection did not extend to abridgements or translations, and the right protected was specifically the right to print and publish.”); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1261
works typically fell outside the scope of the entitlement, musical compositions were not covered until 1831, and visual art was not protected until 1870. Thus, very few of the activities that have typically produced conflicts between copyright and free speech were present in the early days of copyright, and there accordingly was no need for the public domain’s “breathing space” or its “raw materials” for creative activity.

As a purely factual matter, there of course has always been material outside the reach of copyright, but the concept of a public domain as used in contemporary copyright discourse does not trace back to copyright’s earliest days. Admittedly, some notion of “public property,” “common property” and “publici juris” had circulated before the 1890s, but the idea of a “geographically separate preserve” outside of copyright did not. It was only in the late 1800s upon the rapid expansion of scope of copyright protection—to a broad range of subject matters and derivative uses of these “works”—that some sense of a “space” outside the reach of copyright made any real sense conceptually or pragmatically. To be sure, copyright produced monopolistic pricing and a reduced supply of copyrighted books, but the public domain only emerged as copyright evolved to the point of impacting downstream creative practices. The public domain may have functioned since the late 1800s as a copyright safeguard, but the copyright system—and sequence—it supports is a distinctly modern one.

(11th Cir. 2001) (“Throughout the nineteenth century, the copyright in literature was limited to the right ‘to publish and vend books.’” (quoting L. Ray Patterson, Understanding the Copyright Clause, 47 J. COPYRIGHT SOC’Y USA 365, 383(2000)).

194 See Litman, Digital Copyright at 176 (“Public performances, translations, adaptations, and displays were all beyond the copyright owner’s control.”); Stowe v. Thomas, 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (rejecting argument that unauthorized translation of Uncle Tom’s Cabin was copyright infringement).

195 Cf. Rose, Nine-Tenths of the Law, supra note 10, at 86 (“True, Locke and Johnson both imagined copyright terms that were long and based on the author’s life, but neither imagined anything like the depth of protection that modern copyright affords.”).

196 See Ronan Deazley, Rethinking Copyright: History, Theory, Language 108 (2006) (“While the rhetoric of copyright and the public domain may well be interdependent, if historically contingent, the actuality of the public domain did in fact pre-date copyright.”).

197 Cohen, supra note 10 at 124-25. Tyler Ochoa refers to this as a “semantic” distinction, Ochoa, supra at 232, but for purposes of this article, the emergence of a bounded, conceptually distinct “public domain” is quite important. See Mary W.S. Wong, Toward An Alternative Normative Framework For Copyright: From Private Property To Human Rights, 26 CARDOZO ARTS & ENT. L.J. 775, 789 (2009) (noting the “distinction . . . between the existence of legal ownership by a person and the existence of legal rights of other persons with respect to the thing”).

198 See Bracha, supra note 10, at 191 (“Ironically, the broader and stronger copyright protection became, the more vocal grew the insistence that copyright left all knowledge free as the air.”); Litman, Digital Copyright, supra note 194, at 79 (“Because copyright never took from the public any of the raw material it might need to use to create new works of authorship, the dangers arising from overprotection ranged from modest to trivial.”).

199 See, e.g., Rose, Nine-tenths of the Law, supra note 10, at 81 (noting the observation of Lord Kames that “the limited term was useful because it provided an incentive for authors at the same time that it avoided the evils of a perpetual monopoly which would raise the price of books and limit their sale to the rich.”); William F. Patry, 1 Copyright Law and Practice 23 (1994) (collecting statements from the Founders about the dangers of monopolies in copyright).

200 See Bracha, supra note 10, at 247 (“The more copyright extended to create tighter control over the flow of ideas and the more supportive it became of a hierarchical social structure for creating and disseminating information, the more severe grew the tension with the republican ideal of the free flow of knowledge.”).
Nonetheless, challenges to restoration repeatedly overlook the historical contingency of the public domain. Petitioners declare, “[T]he Framers intended to create a stable and permanent public domain from which works could not be removed.”\textsuperscript{201} Another brief similarly states that “[t]he Founders recognized that an intellectual property regime requires a delicate balance between copyright interests and the Public Domain” and that “Jefferson found the basis of the Public Domain in the concept that ‘ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition . . . ’”\textsuperscript{202} The Founders were certainly concerned with restrictions on the spread of ideas through publishing monopolies,\textsuperscript{203} but the “Public Domain” as an expressive space outside the scope of copyright protection appears nowhere in the cited documents.

Oddly, Petitioners acknowledge the historical contingency of fair use and the idea/expression distinction, yet they nonetheless insist on the timelessness of the Public Domain:

Whatever historic compatibility exists between copyright and the First Amendment cannot rest solely on the fair use doctrine and idea/expression dichotomy. There is no indication the Framers attached special significance to them, and they only began to assume their modern forms in the nineteenth century . . . The tradition of protecting the public's right to unrestricted use of the public domain dates back to 1710 and the Statute of Anne. That tradition was plainly important to the Framers, who assured the creation of a stable and growing public domain . . . \textsuperscript{204}

It is true that the fair use and idea/expression doctrines did not emerge until the nineteenth century,\textsuperscript{205} but neither did the concept of the public domain. As Mark Rose has observed, “although the influence of anti-monopoly and Enlightenment ideas on the Statute of Anne is clear, the Statute is a sketchy document that did not in itself directly contribute much to the development of a discourse of the public domain.”\textsuperscript{206} With a limited right of verbatim printing and reprinting prior to that time, there was no need to carve out a domain for expressive activity either during or after the term of protection. In order to place the inviolable public domain into copyright’s essential structure, opponents of restoration are willing to read the later-emerging public domain into the Framers’ constitutional design, but they are unwilling to do the same with respect to other limiting doctrines. The result is an essential life sequence in which the public domain does free speech’s heavy lifting and in which other limiting doctrines lack “special significance.” Again, the public domain emerged historically as the complement of an increasingly

\textsuperscript{201} Brief of Petitioners, supra note 51, at *25.
\textsuperscript{202} See Brief of Project Petrucci, LLC, at *23.
\textsuperscript{203} See Tyler T. Ochoa & Mark Rose, The Anti-Monopoly Origins of the Patent & Copyright Clause, 49 J. Copyright Soc’y U.S.A. 675, 680-81 (2002); see also [Scott Enderle dissertation on file w/ author].
\textsuperscript{204} Petitioners’ Reply Brief at *16.
\textsuperscript{205} See Folsom v. Marsh, 9 F.Cas. 342 (C.C.D. Mass. 1841); Bracha, supra note 10, at 229, 238 (“The more abstract and broad copyright protection became, the stronger was the insistence that it was limited to concrete expressions.”).
\textsuperscript{206} Rose, Nine-Tenths of the Law, supra note 192, at 79
expansive set of exclusive rights, and by propping up the public domain these expansive rights become baked into copyright law’s basic constitutional design.

Second, the life sequence narrative fails to acknowledge the role of the public domain in perpetuating empirically and conceptually questionable understandings of “original authorship” and actual creative practices. Copyright attaches to “original works of authorship,” typically understood as emerging from an individual (and occasionally individuals) whose “creative spark” gives life to an original, expressive work. As numerous copyright scholars have recognized, however, this individualized, romantic authorship is often a myth. All expression is iterative and derivative, and it can be difficult to draw lines between copyright-worthy “originals” and infringing “copies.” In designating certain materials as “raw material” for original authorship, however, the public domain serves to maintain these distinctions. In her insightful 1990 article, Jessica Litman explained that the public domain is “a device that permits the rest of the system to work.” Originality—the trigger for copyright protection and step 1 of the life sequence—“is an apparition,” and the public domain “permits us to continue to exalt originality without acknowledging that our claims to take originality seriously are mostly pretense.”

The public domain allows us to mark the beginning of the copyright life cycle and celebrate “original” creative endeavors by distinguishing between those endeavors that do and do not trigger the beginning of that cycle. To be sure, prior to the public domain movement, copyright often comfortably proceeded as if authors created out of nothing, and recognizing the public domain highlighted the importance of conserving the human, cultural and intellectual capital that feeds into “original” creative practices. Nonetheless, even where the public domain is valued and conserved, the copyright/public domain boundary legitimates certain creative and inventive activities at the expense of others. As Anupam Chander and Madhavi Sunder have shown, copyright law often excludes creative practices in developing nations, freeing them up for appropriation and commercial exploitation elsewhere. Moreover, even when viewed as “traditional

207 See, e.g., Cohen, supra note 10, at 132-33 (“The public domain is the negative pregnant that enables authors, and the copyright system more generally, to demarcate what can feasibly be characterized as the product of individual authorship.”).
210 Litman, supra note 17, at 968; cf. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 35 (2003) (“Without a copyrighted work as the basepoint, the word “origin” has no discernable limits.”).
211 Id. at 1023.
212 See Chander & Sunder, supra note 18, at 1343 (“[T]he public domain is essential to our private property system because it offers a sphere of free works upon which capitalists can draw without either seeking consent or drawing liability”); see also Dan L. Burk, Feminism and Dualism in Intellectual Property, 15 AM. U. J. GENDER, SOC. POL’Y & L. 183, 202 (2006) (“It may be those entities already endowed with the greatest resources that are best positioned to take advantage of such freely available resources.”); Rosemary Coombe, Fear, Hope and Longing for the Future of Authorship and a Revitalized Public Domain, 52
knowledge,” protection comes as a reward for “preserving” traditional cultural expression, overlooking ongoing creativity and cultural dynamism among the global poor. The visibility of the public domain does not dislodge, and indeed may fortify, hierarchy between authors and their raw materials.

The Golan briefs at no point acknowledge the performative underbelly of the public domain. Litman’s discussion of the public domain—namely that the public domain ensures “raw material” available for future authors—is cited repeatedly, but in a manner entirely stripped of its broader critique of copyright’s baseline assumption. Restoration opponents do acknowledge that notions of romantic authorship are out of step with contemporary creative practices, and that “recent scholarship has increasingly challenged the notion that ‘authors create something out of nothing’,” yet they gloss over the role of the public domain in keeping the individual creator at the center of copyright policy. For example, the ACLU quotes Litman’s observation that the public domain is “a device that permits the rest of the system to work” to support its assertion that “the public domain is critical to our cultural and intellectual heritage and future” and that “Section 514 has made it that much more difficult for future artists and inventors to create the next great work.” Moreover, exploitation of the public domain remains free of ethical concerns. Perhaps most blatantly, Disney emerges within the Golan briefs as a champion of the public domain. Although repeated mention of Disney’s many adaptations of public domain stories—Snow White, Cinderella, Mulan, The Little Mermaid—presumably highlights the tension between Disney’s copyright maximalism and heavy reliance on the public domain, it’s arguable abuses of its privileged role within a cultural commons model remain absent.

DEPAUL L. REV. 1171 (2003) (“To the extent that we are committed to the cultural public domain, we need to consider a wider range of activities and practices than those that copyright law traditionally recognized as acts of authorship and those most characteristic of Western creators.”).
213 Sunder, supra note 17, at 109.
214 Id. at 107 (“Ironically, the cultural environmentalism metaphor has fortified the very boundary between authors and raw materials that Boyle himself had begun to tear down.”).
215 See Amicus Brief of American Library Association et al., Golan v. Holder, 2011 WL 2533007, at *25 (2011); Brief of Project Petrucci, supra note 80, at *18; Brief of Public Domain Interests, supra note 50, at *6-7, 8; see also Petitioners’ Brief, supra note 51, at *4 (“The public domain promotes the diffusion of knowledge, and provides the raw material to expand it.”).
216 See Brief of Project Petrucci, supra note 80, at *18 (quoting Litman, supra note 17); see also Brief of Public Domain Interests, supra note 50, at *15 (“Drawing from the cultural commons for new creativity is not only universal to artists; it is necessary for building new expression.”).
217 Brief of ACLU, supra note 74, at *14.
218 See Brief of Creative Commons, supra note 177, at *6 (“Just as Walt Disney drew from public domain fairy tales to create prolific, culture-defining films like Snow White and the Seven Dwarfs, all creators stand upon the shoulders of those who came before them.”); Brief of Public Domain Interests, supra note 45, at *12 (“Myriad films appropriate public domain works and recast them into the immersive motion picture medium. Disney’s many films based on folk and fairy tales -Snow White and the Seven Dwarfs, Cinderella, Mulan, and The Little Mermaid, to name just a few - make prominent examples.”); Amicus Brief of Peter Decherney, Golan v. Holder, 2011 WL 2470832, at *16 (discussing the making of Snow White and the Seven Dwarves).
219 See Brief of ACLU, supra note 74, at *13 (“Even Disney, one of the leading voices for stronger copyright protections, has created numerous works based principally on public domain material.”)
It is understandable that petitioners and amici in Golan would focus on the valuable attributes of the public domain in order challenge a law that restores copyright protection to a tremendous swath of previously unencumbered works. And it is also undeniable that the public domain scholarship relied on by petitioners and amici has infused copyright law with a much-needed dose of public-, user-, and speech-oriented values. However, as Ronan Deazley has observed:

[T]he public domain has considerable value, not only in what it reveals about the manner in which the public domain facilitates the operation of the copyright regime, but also in that it provides a fruitful opportunity for exploring the fundamental nature of copyright as a constantly evolving, artificial and institutional construct. That is, in better understanding the nature and relevance of the public domain we begin to better understand the nature of copyright including both its limits and its limitations.\(^{221}\)

In other words, much of the value in exploring the public domain is its ability to highlight what copyright is, what it isn’t, and what it normatively should be. Within such critical context, the public domain is unquestionably performative: as copyright’s temporal and conceptual limits evolve and transform, so too must the contours of copyright itself.\(^ {222}\) Unfortunately, the copyright life sequence pulls apart the life and death of copyright temporally and conceptually, simultaneously obscuring the public domain’s performative role and undermining its critical value.\(^ {223}\)

IV. New Opportunities After Golan

If the ordinary life sequence of copyright obscures the interplay between its various life stages, and interferes with our ability to normatively engage with copyright’s basic design, then rejection of the life sequence in Golan opens up new opportunities to approach copyright law from novel, creative and critical perspectives. After Golan, not all creative works must go through the same three formal life stages, the public domain is no longer a one-way ratchet, and the lines between protection and public use become far more porous. To be sure, these conditions have the potential for abuse within a political arena heavily prone to industry capture, but approaches to copyright that eschew its assumed traditional form have the potential to better tailor copyright to contemporary cultural and economic needs. Within the traditional life sequence, the interests of

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\(^{220}\) See, e.g., Sunder, From Goods to a Good Life at 149, 153-56. For example, the Lion King movie is extremely similar both in its cast of characters and in many specific scenes to the Japanese cartoon “Kimba the White Lion,” and one of the songs featured therein, “In the Jungle” was an international hit for which its poor South African musician did not receive a cent. The copyright owners for Kimba the White Lion have never sued Walt Disney, but they have filed a “Notice of intent to enforce a copyright restored under the Uruguay Rounds Agreement Act.” See, e.g., http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?v1=1&it=1,1&CNT=50&HC=1&RelBibID=6873169&HostBibID=6873170&ProfileCode=RECLNK&SEQ=20130502150028&PID=zPyTBsR7uHpL7D5SnZLrK99null4.

\(^{221}\) Deazley, supra note 196, at 133-34.

\(^{222}\) See Cohen, supra note 10, at 157 (“[P]artially or differently public without the correlative partially or differently private is a non sequitur.”).

\(^{223}\) See id. at 158 (“An affirmative legal conception of the common in culture that respects creative practice will not flow from reifying the ‘public domain’ as such, but rather from adoption of an organizing metaphor that more clearly rejects formal and experiential separation.”).
copyright owners and everyone else are dealt with sequentially, separately and in stark opposition, but the relationships between “private” and “public” are far more synergistic than the tradition lets on.  

Although designing the ideal copyright system is far beyond the scope of this article, this Part will briefly show how some of the many scholarly proposals to meaningfully reform copyright become far more feasible in a post-Golan world. At the very least, Justice Ginsburg’s (and the government’s) repeated assurance that fair use and the idea/expression distinction adequately protect First Amendment interests emphasizes the importance of making sure that these doctrines actually fulfill this purpose. As Neil Netanel has observed, “Golan imposes potentially significant First Amendment constraints on copyright protection, notwithstanding that it narrowly defines the traditional contours of copyright protection.” In his view, Golan and Eldred move copyright law towards a “definitional balancing” of free speech interests, whereby copyright complies with the First Amendment so long as it doesn’t prohibit the copying of ideas and subjects infringing speech to a fair use analysis. In contrast with the sequential balancing set forth in the Golan litigation, the decision itself “fortifies and gives First Amendment import to the idea/expression dichotomy and the fair use defense in traditional copyright infringement litigation.”

Moreover, whether the Court meant to or not, by rejecting the notion that copyright protection must end by crossing a permanent public domain threshold, Golan potentially enables a range of far more substantial reforms. Although international treaty obligations would likely impose limits on the extent of permissible reforms, Golan and Eldred v. Ashcroft’s broad deference to Congress under the Copyright and Patent clause at the very least clear a number of presumed domestic limitations on copyright reform. Because the expiration of the copyright term is no longer necessarily a one-way ticket into the public domain, copyright reform may be less politically-constrained by

224 See Abraham Drassinower, From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law, 34 J. Corp. L. 991, 992 (2009) (arguing that “we should think of copyright less as a ‘balance’ between authors and users than as a ‘dialogue’ between authors and users”); see also MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE at 64-76 (2012) (documenting examples of participatory culture, including Harry Potter-inspired quidditch leagues and Star Wars-themed weddings); Carol Rose, The Comedy of the Commons: Custom, Commerce, and Inherently Public Property, 53 U. Chi. L. Rev. 711, 766-71 (1986).
225 Netanel, supra note 89, at 1103.
226 Id. at 1085-86 (quoting Melville Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 U.C.L.A. L. Rev. 1180, 1184-93 (1970)).
227 Id. at 1103.
228 Although scholars are currently debating the extent to which Berne and TRIPs would inhibit substantial reform, such as through the conditioning term extensions or certain types of substantive protections on adhering to statutory formalities. See Reform(al)izing Copyright Conference, U.C. Berkeley Law School, April 18-19, 2013, audio and slides available at http://www.law.berkeley.edu/15235.htm; see also Pamela Samuelson, Is Copyright Reform Possible?, 126 HARV. L. REV. 740, 748, 750 (2013) (observing that Berne would permit shortening copyright term and require formalities for U.S. authors and enable reuse of ‘orphan works’); Pamela Samuelson et al., The Copyright Principles Project: Directions for Reform, 25 BERKELEY TECH. L.J. 1175, 1200-01 (2010) (suggesting that registration could be used as a gateway to a broader set of rights for registrants than for non-registrants)
rightsholders’ perceived need to maximize revenues before the end of the term or to lobby for across-the-board term extensions.\(^{229}\) Entry into the public domain is no longer necessarily permanent and, at least where there is some rational basis for doing so, Congress might extend and/or restore protection for certain classes of works and not others.\(^{230}\) Upon some affirmative administrative act, particular works with continuing economic value might receive continued protection, satisfying the needs of the content industry while allowing the vast majority of works to enter the public domain.\(^{231}\) Moreover, the newfound ability of content industries to extend their terms of protection (perhaps indefinitely) might clear the way for new, clear limitations on the substantive entitlement itself, for example through one of the many proposed limitations on the derivative work right\(^{232}\) or explicit new categories of fair use.\(^{233}\) Under this approach, it is true that Mickey Mouse might never enter the public domain within any of our lifetimes, but as Lawrence Lessig has acknowledged:

[T]he real harm done to society is not that Mickey Mouse remains Disney’s. Forget Mickey Mouse. Forget Robert Frost. Forget all the works from the 1920s and 1930s that still have commercial value. The real harm is to the works that are not famous, not commercially exploited, and no longer available as a result.\(^{234}\)

Additionally, even if Mickey might remain a profit source for Disney long into the future, refocusing First Amendment arguments on fair use as opposed to the public domain,\(^{235}\)

\(^{229}\) Congressional Power and Limitations Inherent in the Copyright Clause, 30 Colum. J.L. & Arts 259, 261 (2007) (“The expiration of the Mickey Mouse copyright motivates Disney to seek relief. They seek it, and they get it.”); Landes & Posner, supra note 22.

\(^{230}\) See Sprigman, Reformalizing Copyright, supra note 25, at 491 (“[A] system of new-style formalities would replicate the important work that our pre-1976 conditional copyright system was able to do: filtering commercially valueless works out of copyright and focusing the system on those works for which it could potentially do some good.”).

\(^{231}\) See Samuelson et al., Is Copyright Reform Possible?, supra note 228, at 750-51 (“[P]roposal to restore formalities in U.S. copyright law may enjoy greater support from copyright industry groups than his recommendation to shorten copyright terms.”).


\(^{234}\) Lawrence Lessig, How I Lost the Big One, Legal Affairs, March/April 2004, at *57, 58.

\(^{235}\) See M.S. Levine, Golan v. Holder: In Praise of Breyer’s Dissent, M Publishing (Jan. 25, 2012), http://www.publishing.umich.edu/2012/01/25/golan-holder-breyer/ (“[M]aybe in the short run, it’s possible that this case will cause courts to look more closely at fair use as a social necessity” (internal quotations omitted)).
along with the proposed statutory limits above, might nonetheless ensure public access and engagement with the white-gloved mouse.

Moreover, without a formal sequence to do the work of balancing public and private interests, there is an increasingly pressing need to develop guiding normative theories of harm and value in copyright. A substantive, definitional balancing approach would tether copyright protection less to the mere passage time and more closely to a valuable contemporary socio-economic function. One good candidate for this normative work might be copyright’s ability to facilitate investment in and commercial exploitation of creative works.236 Instead of providing a one-size-fits all property right in order to supposedly incentivize nearly all forms of creative activity,237 copyright might be tied to the active commercial exploitation of a work, both in terms of the uses that trigger rights and in terms of uses that constitute infringement.238 In this respect, copyright’s new life cycle might pull from some of the virtues of trademark law: fluid in form and potentially perpetual, but tied to a specific activity that is deemed normatively desirable for both rights holders and downstream users.239 Trademark law certainly has its own sets of problems—widely varying legal standards for fair use, unnecessarily high litigation costs, and sometimes overly simplistic understandings of human language—but it nonetheless has a core set of normative principles generally well-suited to actual decision making.240 If copyright could similarly tether itself to some guiding normative principle241 such as commercial exploitation, it might come closer to acknowledging both that copyright owners derive substantial value from large swaths of “derivative” uses of copyright works,242 and that much “amateur” creativity “build[s] from a foundation laid by mass commercial culture.”243

Lastly, if the bounded, permanent public domain does indeed facilitate the conceit of original authorship, and Golan does, as warned, hobble this aspect of the public domain, how might copyright law acknowledge and reward valuable creative activity? Instead of adhering to the fictional and somewhat ethically questionable “raw materials” metaphor, copyright law might consider other ways of signaling inspiration and derivation without upending its basic formula for allocating rights. It might dole out what Jeanne Frommer has termed “expressive incentives,” such as attribution rights

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236 See Julie Cohen, Copyright as Property in the Post-Industrial Economy: A Research Agenda, 2011 Wis. L. REV. 141, 143 (2011) (“In the contemporary information society, the purpose of copyright is to enable the provision of capital and organization so that creative work may be exploited.”).

237 On critiques of the incentives model, see, e.g., Diane L. Zimmerman, Copyrights as Incentives: Did We Just Imagine That?, 12 THEORETICAL INQUIRIES 29 (2011).

238 See Litman, Digital Copyright, supra note 194, at 180-81; Pamela Samuelson et al., The Copyright Principles Project: Directions for Reform, 25 BERKELEY TECH. L.J. 1175, 1209-14 (2010).

239 See Sara K. Stadler, Copyright as Trade Regulation, 155 U. PA. L. REV. 899 (2007) (developing an unfair competition approach to copyright protections).

240 See William McGeveran, Rethinking Trademark Fair Use, 94 IOWA L. REV. 49 (2008) (arguing that trademark law generally reaches speech-protective results on the merits but is limited by an uncertain procedural structure).

241 See MERGES, JUSTIFYING INTELLECTUAL PROPERTY (2011)

242 See SUNDER, FROM GOODS TO THE GOOD LIFE 64-76(providing numerous examples of “participatory culture”).

243 Cohen, supra note 9, at 159-60.
currently largely unavailable for copyright holders.\textsuperscript{244} Moreover, authors might have a “menu of incentives packages,”\textsuperscript{245} reflecting a marked shift from the existing one-size-fits-all regime. These new, varied forms of entitlement have the potential to open the door for copyright to acknowledge the actual interplay among cultural works, while allowing greater leeway for downstream uses than under a purely pecuniary incentives/rewards system.\textsuperscript{246} Rather than encouraging individuals to obscure their cultural inspirations and present themselves in the mold of the romantic author, we might find new ways to embrace the newly fluid, porous boundary between protection and public domain.

Without a discrete, bounded public domain enshrined in the Constitution, there are new opportunities to shift away from the inherited model of an independent creator who has exclusive rights for a long, fixed number of years before the public has unrestricted access to the work. This model is tailored to the needs of no one. First, creative works, whether in a movie studio or in online fan fiction communities, are pretty rarely produced like this.\textsuperscript{247} Second, the public and the creators of that work both have an interest in and derive value from engagement with a work during this period of exclusivity.\textsuperscript{248} The Golan decision may be largely unloved for its infelicitous take on the

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\item[244] See Jeanne C. Fromer, Expressive Incentives in Intellectual Property, 98 VA. L. REV. 1745 (2012). Fromer interestingly characterizes the “originality” requirement as one form of existing expressive incentives, see id. at 1807, presumably one that could be offset by one of the other incentives she proposes. Under current law, a relatively narrow set of visual artists have attribution rights under the Visual Artist Rights Act of 1990 (“VARA”), 17 U.S.C. §§ 101, 106A.
\item[245] Id. at 1823.
\item[246] Id. at 1748 (“In fact, it is plausible that, to secure expressive incentives, individual creators would be willing to relinquish some traditional pecuniary incentives are costly for society to provide.”); see also Orphan Works Report, at 10 (“[T]o qualify for the orphan works limitations on remedies: throughout the use of the work, the user must provide attribution to the author and copyright owner of the work if such attribution is possible and as is reasonably appropriate under the circumstances.”).
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In Dastar Corp. v. Twentieth Century Fox Film, the Supreme Court rejected claims for attribution under section 43(a), the “false designation of origin” provision, of Lanham Act, as it would create “mutant copyrights” (a cousin of the copyright zombie?). It observed:

Reading "origin" in § 43(a) to require attribution of uncopyrighted materials would pose serious practical problems. Without a copyrighted work as the basepoint, the word "origin" has no discernable limits. A video of the MGM film Carmen Jones, after its copyright has expired, would presumably require attribution not just to MGM, but to Oscar Hammerstein II (who wrote the musical on which the film was based), to Georges Bizet (who wrote the opera on which the musical was based), and to Prosper Mérimée (who wrote the novel on which the opera was based). In many cases, figuring out who is in the line of "origin" would be no simple task.

539 U.S. 23, 35 (2003). This concern for infinite regress is only a problem, however, if we really are wedded to the concept of “originality.” As Creative Commons licensing practices have shown, requiring attribution is highly desired and can be entirely compatible with downstream use of a copyrighted work.

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\item[248] See, e.g., SUNDER, FROM GOODS TO A GOOD LIFE 64-76; Cohen, supra note 236, at 148 (“A copyright regime that works to enable the production of big-budget Hollywood movies and long-running television series is not a bad thing. Mass culture has a value that goes beyond the merely economic; it is what gives us
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public domain, but in rejecting copyright’s ordinary life sequence it has opened up a
diverse range of alternative life courses that may better reflect our creative culture’s
actual needs and practices.

Conclusion

The narratives we use to describe the law both reflect our assumptions about how
the law operates and shape our understanding of how the law can and should operate in
the future. When an advocate employs a particular narrative, he or she does not simply
provide an empirical observation, but instead both makes sense of the present and
delineates plausible trajectories for future. Narrative integrates “the ‘is,’ the ‘ought,’ and
the ‘what might be.’”249 At the same time, an effective legal narrative covers over these
discursive dynamics, masks its own normative thrust, and makes it difficult to conceive
of the law through a different perspective.

The life sequence narrative explored in this article has all of these qualities. It
induces from several centuries of copyright practice a tripartite structure that is taken as
the normative baseline for a copyright system going forward. It pulls from tradition
and provides a formal, easily administrative framework for assessing copyright reform while
at the same time tapping into widespread anxieties about birth, life and death. It
establishes norms; it produces monsters. Although these features may have appeared
attractive in combatting copyright restoration, viewing copyright through a life sequence
framework entrenches and insulates from critique some of the most problematic aspects
of that sequence. To the extent that the “ordinary copyright sequence” has reflected a
widely held understanding about how copyright must balance competing interest, it
stands in the way of a system better tailored to contemporary social, economic and
cultural needs and less encumbered by the ghosts of its past.

things to talk about with one another, to celebrate or criticize, and to define ourselves against.”); Cf.
investments of time, attention, and money can have a strong impact on the economic value of a brand . . .
Consumers invest their favorite brands with personal loyalty, developing bonds that mimic the dynamics of
personal relationships.”).

249 Robert Cover, Nomos and Narrative, 97 HARV. L. REV. 4, 10 (1983); see also Cohen, supra note 10, at
158 (“[I]t is the metaphors that do the mediating”).