Life, Death, Public Domain?
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Although copyright law and scholarship over the past two decades has devoted considerable attention to questions of duration and “limited Times,” there has been little attention to how conceptions of time and sequence shape—and perhaps stymy—copyright reform efforts. In Golan v. Holder, petitioners and amici argued that the restoration of copyright protection to public domain works upended what the Tenth Circuit previously had deemed the “ordinary copyright sequence,” in which “a work progressed from 1) creation; 2) to copyright; 3) to the public domain.” This “life cycle consisting of three distinct stages” built off a sustained line of critique that Congress had realized “the unsettling prospect of complete and total resurrection of the dead.” Restoration produced “zombie copyrights”; restored works were “copyright life after death.”

This paper argues that this framing of copyright law in terms of a formalized life and death sequence obscures and entrenches some of copyright’s most criticized features. For example, to emphasize the importance of the public domain and those who appropriate from it, opponents of restoration repeatedly downplay within-term limiting doctrines such as fair use and the idea/expression distinction, employ long-discredited notions of romantic authorship and authors-as-parents, and discount the actual human labor that supplies the public domain’s “raw materials.” Moreover, to essentialize the public domain as a central, inviolable aspect of American copyright since the Founding, petitioners and amici overlook the historical contingency of the public domain concept as a product of the rapid expansion of copyright protections during the late-nineteenth century.

I do not endorse the majority’s reasoning in Golan or defend the law it upheld, but its rejection of the sequential life narrative provides new opportunities to rethink some of the core assumptions built into the temporal structure of copyright. Such rethinking is incredibly difficult within a framework that temporally and conceptually segregates creation from exclusive rights from the public domain and then presents the public domain “endpoint” as the key solution to the problems that “precede” it. The public domain instead is deeply implicated in our understanding of original creation and exclusive, time-limited rights, but the three-phase sequence papers over this performative role. By letting go of the notion
that copyright protection “ends” by crossing a permanent public domain threshold, we can start to think of copyright law in ways that: (1) are less politically-constrained by rights holders’ perceived need to maximize revenues before copyright expires; (2) allow for a diversity of life trajectories for creative works; and (3) embrace more fluid, porous boundaries between protection and public domain.