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Unlimited Times: DMCA Anticircumvention Measures on Public Domain Films

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By Sarah Buquid Jordan

“The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved.”

– Justice Stevens

ABSTRACT

The Constitution guarantees that intellectual property will enter into the public domain after a limited time, however the amount time in which that happens for copyrighted works is has been extended numerous times since the writing of the Constitution. While the Digital Millennium Copyright Act was not enacted by Congress to extend copyright protection limits, it has inadvertently granted unlimited protections to public domain films in digital formats. As early films begin to enter the public domain, a select few have the means to provide those films in digital format, but the public does not have the right to exploit those digital films. This article explores the extent of protections on digital public domain films under the DMCA, examines the current system meant to prevent such protections, and offers possible solutions to the problem of digitally protected public domain works.

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INTRODUCTION

Jane Austen’s novels were published between the years of 1809 and 1815, prior to the Berne Convention for the Protection of Literary and Artistic Works (Berne) and Britain’s Copyright Act of 1911 which declared that the duration of copyright would be the life of the author plus fifty years.\(^2\) Austen passed away in 1817 and a publisher by the name of Richard Bentley purchased the remaining copyrights to all of Austen’s novels.\(^3\)

Nearly 200 years later, the works of Austen have spawned multiple classic film adaptations of all of her novels, about half a dozen modernized adaptations, a few biopics, and at least one film inspired by Austen herself.\(^4\) Her works have been published by nearly every major publishing house multiple times, both individually and as a collection. Her popularity has spawned an international fan fiction phenomenon and there is a prolific market of books inspired by, adapted from, and building on Austen’s novels. For the past 30 years, a new adaptation of Pride and Prejudice has been filmed once a decade introducing each new generation to Austen’s most beloved work. All of this was made possible because Austen’s work has been in the public domain for a very long time.

This is one example of what it means to promote the progress of Science and the useful Arts by protecting authors and inventors for limited times.\(^5\) By allowing works to pass into the public domain and allowing the public to freely access them, an entire genre of works has blossomed and continues to thrive. However, as a new class of works, silent films, enters into the public domain, those who would seek to exploit the films that belong to the public are,

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unfortunately, enabled to effectively reestablish copyright protections in those films by virtue of the Digital Millennium Copyright Act’s anticircumvention provisions.

This article begins with a brief look at the evolution of the durational aspect of copyright law with an in-depth look at the DMCA’s anticircumvention provisions and gives real-life examples of why the DMCA has created a pressing problem by protecting public domain films under the Copyright Act. Once the article has established a ground work in the law, it will examine the limited times provision in the Constitution and discuss how Congress overstepped its Constitutional powers by enacting the DMCA. The ability to protect digital works under the DMCA has essentially given digital restorers a monopoly on public domain films that effectively reestablishes copyright infinitely. The article will then look at derivative works, the copyrightability of those derivations, and how production companies are able to use copyright law to exclusively exploit public domain films through digital means. Finally, the article examines the DMCA’s exception provision, which allows the Librarian of Congress to assign anticircumvention exceptions to certain classes of works every three years, and offers suggestions to make the exception aspect of the DMCA’s anticircumvention provision fairer and solutions to making digital copies of public domain films freely accessible.

Allowing works to enter into the public domain has always been important. The framers of the U.S. Constitution decided that copyright protection for a limited time was important enough to empower Congress to make laws to that end.6 Over the years, Congress has amended the original statute drafted in 1906 and copyright duration has been extended by some period each time.7 However, there has always been an end to copyright protection in sight.

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7 17 U.S.C. § 302(a) (prior to the Copyright Act of 1906 works would receive fourteen years of protection at the end of which the author could renew for an additional fourteen years; the 1906 Act doubled the amount allowing
I. THE EVOLUTION OF DURATION

A. Copyright Law Overview

In 1787 the founding fathers of the United States drafted the document that would dictate the manner in which the country would be governed indefinitely. The drafters determined that it was important to protect the rights of inventors and authors and so empowered Congress to make laws for that purpose. Since then, Congress has periodically, and methodically, increased Copyright protections in a number of ways, including type of works protected, duration of protection, and manner of protection.

1. Constitutional Provision of Limited Times and Past Judicial Interpretation

The United States Constitution states that “Congress shall have the power…[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries…” This clause managed to convey both a rigid construction and a malleable scope of protection for authors and inventors.

By stating the specific purpose of the clause, to promote the progress of science and useful arts, the drafters conveyed that they wished specifically to protect the rights of inventors and authors beyond the scope of the Statute of Anne, the law of the land they had so recently revolted against. Authors’ rights were to be exclusive, which granted a previously unimagined monopoly that did not need to be sold outright for the purpose of publishing.

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10 U.S. Const. art. I, § 8.
11 Statute of Anne (1710) (the Statute conveyed to authors, or those who had purchased the work, a fourteen year term of exclusive rights to publish or re-publish those works).
12 Statute of Anne (1710) (the Statute extended copyrights to publishers who had purchased the work. Under current US law, an author has a bundle of rights that may be licensed to a publisher, but the publisher will not have exclusive copyright in the work).
The first Copyright Act enacted by Congress protected maps, charts, and books for an initial term of fourteen years, similar to the duration of rights under the Statute of Anne, but allowed for a renewal of rights by the author or author’s heirs, assigns, or executors for another fourteen year term.\textsuperscript{13} In 1909, Congress amended copyright law to expand both the type of works to be protected and the duration of protection.\textsuperscript{14} The new duration doubled both the initial copyright term and the renewal term, bringing the total possible term of protection to fifty-six years with proper registration and renewal.\textsuperscript{15} Congress revisited the Copyright Act in 1976 and made several major changes to the law, including extending the term of copyright protection to life of the author and fifty years, which brought the US into line with the Berne Convention and brought the country one step closer to becoming a member country.\textsuperscript{16}

The most recent change to copyright duration came in 1998 when Congress enacted the Copyright Term Extension Act (CTEA).\textsuperscript{17} The CTEA extended copyright another 20 years making the term life of the author plus 70. Many believe that the CTEA, introduced by then-Representative Sonny Bono (R-CA), was initiated by the Walt Disney Company whose copyright protections of its earliest films were due to expire in 1998.\textsuperscript{18} This final extension came as a major blow to the community of artists who make a living exploiting public domain works by making derivative works.\textsuperscript{19} In response to this extension, those artists filed suit claiming the CTEA was unconstitutional.\textsuperscript{20} The Supreme Court ruled that the CTEA was constitutional

\begin{itemize}
  \item \textsuperscript{13} 1 Stat. 124 § 1; 1st Cong., 2d Sess., c. 15 (1790).
  \item \textsuperscript{14} Copyright Act (1909).
  \item \textsuperscript{15} Copyright Act (1909).
  \item \textsuperscript{16} Berne Convention for the Protection of Literary and Artistic Works, art. 7(1), Sept. 9, 1886, \textit{available at} http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P123_20726.
  \item \textsuperscript{17} S. 505, 105th Cong. § 102 (1998).
  \item \textsuperscript{19} Eldred v. Ashcroft, 537 U.S. 186, 193 (2003).
  \item \textsuperscript{20} Eldred v. Ashcroft, 537 U.S. 186, 198 (2003).
\end{itemize}
because the term of 70 years could be deemed limited as it was not infinite.\textsuperscript{21} The Court’s interpretation of limited times was quite literal as the Court referenced dictionaries dating back to the 1780s.\textsuperscript{22} However, the Court cited several other reasons, none of which involved Walt Disney, validating the extension of copyright terms.\textsuperscript{23}

2. Fair Use Provisions

The idea of fair use first arose in 1841 when Justice Story attempted to determine whether the Defendants in the case had created an abridgement of the Plaintiffs’ materials, which was lawful at the time of the decision.\textsuperscript{24} In his opinion, Justice Story wrote, “[i]n short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.”\textsuperscript{25} These principles are now recognized as three of the four factors used when determining fair use of copyrighted works. Justice Story’s test would remain a judicial doctrine until it was incorporated into the Copyright Act of 1976 with the addition of the first factor, the purpose of the use.\textsuperscript{26}

The copyright clause of the Constitution is a perfect example of the founding fathers’ desire to balance between rewarding those who create and disseminating those creations to the public. While the Constitution expresses this need for balance by limiting the amount of time a creator’s work should be protected, Congress took this idea to the next step by adding Justice Story’s factors to the statute.\textsuperscript{27} Although many people have benefited from this limitation of

\begin{enumerate}
\item \textsuperscript{21} Eldred v. Ashcroft, 537 U.S. 186, 199-200 (2003).
\item \textsuperscript{22} Eldred v. Ashcroft, 537 U.S. 186, 199 (2003).
\item \textsuperscript{24} RALPH S. BROWN & ROBERT C. DENICOLA, COPYRIGHT: UNFAIR COMPETITION, AND RELATED TOPICS BEARING ON THE PROTECTION OF WORKS OF AUTHORSHIP 349 (10th ed. 2010).
\item \textsuperscript{25} Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D.Mass. 1841).
\item \textsuperscript{26} 17 U.S.C. § 107 (Lexis 2012).
\item \textsuperscript{27} 17 U.S.C. § 107 (Lexis 2012).
\end{enumerate}
rights, it is not generally known that the benefits conferred were specifically intended for educational purposes. The fair use exception is now touted as a Constitutional right.

One excellent example of an unintended beneficiary of fair use is Paramount Pictures who produced the film *Hugo*, directed by Martin Scorsese. The full story of *Hugo* and its importance to this topic is explored below, but for the purposes of fair use one must look to a specific scene in the film in which two of the main characters are using a textbook to learn about the early days of film. Scorsese’s team created a montage using a combination of still photos and clips from motion pictures to convey the narrative of book. The clips from motion pictures are used in such quick succession that it is impossible to determine what films they come from and, therefore, whether they are in the public domain. However, any film from the early 1920s would not enter the public domain until sometime after 2020 if the producer of the film had properly registered the work with the Copyright Office and renewed those protections.

Scorsese would have been able to use these clips without permission from the production companies because of the fair use exception, though it is possible that some of the clips were also in the public domain.

3. What is the Public Domain?

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28 H.R. REP. NO. 94-1476, at 61–62 (1976), reprinted in 1976 U.S.C.A.N.N. 5679 (although the works and uses to which the doctrine of fair use is applicable are as broad as the copyright law itself, most of the discussion of section 107 has centered around questions of classroom reproduction, particularly photocopying).
29 Universal City Studios, Inc. v. Corley, 273 F.3d 429, 458 (2d Cir. 2001) (plaintiffs argue that the DMCA should be interpreted as prohibiting fair use in violation of the Constitution).
30 HUGO (Paramount Productions 2011).
31 HUGO (Paramount Productions 2011).
Outside of copyright protection there is a collection of works that belong to the public. These works are the domain of the public and cannot be protected by copyright. The 1909 Copyright Act stated that:

“[n]o copyright shall subsist in the original text of any work which is in the public domain, or in any work which was published in this country or any foreign country prior to July 1, 1909, and has not been already copyrighted in the United States, or in any publication of the United States Government, or any reprint, in whole or in part, thereof, except that the United States Postal Service may secure copyright on behalf of the United States in the whole or any part of the publications authorized by section 405 of title 39.”

This principle continues today. Works that have entered the public domain cannot be protected by copyright.

A work enters the public domain either because copyright protection has expired, never existed, or the work was a government document. Many original works which were created prior to the Copyright Act of 1976 are in the public domain if they were published, but not properly registered with the Copyright Office. Once those works have entered the public domain it is nearly impossible to protect them again, but it has legitimately happened on a few occasions.

In 1994, Congress enacted section 514 of the Uruguay Round Agreements Act (URAA) which restored copyright in works from authors of WTO or Berne member countries that had fallen into the public domain, so long as they complied with certain conditions. Copyright would be restored to works that were still under copyright in the country of origin and were in the public domain in the US because of one of the following reasons: (1) the author failed to comply with formalities of registration; (2) The Copyright Act did not cover the subject matter

33 Copyright Act § 8 (1909) (section 405 of title 39 refers to postage stamps).
35 17 U.S.C. § 104A.
(i.e. sound recording fixed before Feb. 15, 1972); or (3) The author’s country lacked national eligibility, meaning there was no reciprocity between the US and the country of origin at the time. The US had joined the Berne Convention in 1989, but until the URAA had adopted an extremely minimalist approach to compliance.

One of the major requirements of Berne was national treatment, or the notion that member countries should extend copyright to works from other member countries as they would to works from their own. The URAA brought US copyright law in compliance with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), as several Berne Convention member countries had been questioning the US’s compliance with Berne, but had no way in which to enforce national treatment of their authors’ works.

The Uruguay round created the World Trade Organization (WTO) and TRIPS, both of which created real consequences for countries that were not extending national treatment to Berne member countries. With the threat of tariffs or retaliation, Congress brought the US into line with Berne with the URAA. However, the enactment of the URAA brought a similar outrage from the US public as the CTEA. A group consisting of orchestra conductors, musicians, publishers, and others who had previously exploited works that had entered the public domain brought suit against the Attorney General to have the URAA declared unconstitutional.

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36 17 U.S.C. § 104A.
Golan v. Holder was brought under very similar circumstances as Eldred and the Supreme Court gave the case similar treatment. The plaintiffs in Golan argued that once works enter the public domain, no one, not even Congress, is authorized to protect them again. The Supreme Court disagreed and cited several occasions in the history of Copyright Law when Congress had removed works from the public domain. However, the most significant of those examples was the Copyright Act of 1790 in which Congress attempted to unify erratic state laws that did not protect the same types of works. While this action did protect works that had previously been in the public domain of certain states from a lack of protection, its purpose was in fact to nationalize copyright law. Essentially, the Supreme Court decided that the interest of protecting US authors abroad outweighed the interests of the public domain.

Golan is seen by some as an abuse of Congress’s power under the Copyright Clause of the Constitution. The Supreme Court’s decision potentially allows Congress to reach even further into the public domain. But the DMCA’s anticircumvention provisions have taken steps towards protecting works in the public domain that will become a major issue in coming years.

B. DMCA Anticircumvention Provisions

Congress enacted the Digital Millennium Copyright Act (DMCA) in compliance with the World Intellectual Property Organization’s Copyright Treaty (WCT) in 1996.\(^{51}\) Article 11 of the WCT states that member countries must provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention” and restricting acts that are not authorized by the author.\(^{52}\) Congress implemented the DMCA in 1998 which included the anticircumvention clause\(^{53}\) and the anti-trafficking clause,\(^{54}\) the first of which states that technological protection measures (TPMs) are not to be circumvented and the second of which states that if you manage to circumvent the TPM you are not to share the means of circumvention in any manner.

The problem of public domain works protected by TPMs may not seem like a problem at first blush. The statute clearly states that “[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title.”\(^{55}\) Public domain films, by their very nature, are not protected under the copyright statute and therefore, circumvention of TPMs to access them is not prohibited by law. However, the issue of derivative works, which is more thoroughly discussed below, creates an entirely new concern. Most public domain works protected by TPMs would be considered derivative works, but the underlying public work is not protected by copyright and therefore use of that work alone would not infringe the author’s


\(^{52}\) World Intellectual Property Organization Copyright Treaty, art. 11, Dec. 20, 1996.


\(^{54}\) 17 U.S.C. § 1201(a)(2) and (b)(1).

rights. But if the derivative work is protected by a TPM then the public domain work is inaccessible and essentially protected by the DMCA.

The next provision in the DMCA creates a three-year exception from the previous anticircumvention provision.\(^{56}\) This exception is created by the Librarian of Congress (LOC) who determines the type of work excepted in a rule-making that occurs every three years.\(^{57}\) Under the statute, the LOC makes a determination “upon the recommendation of the Register of Copyrights, who shall consult with the Assistant Secretary for Communications and Information of the Department of Commerce,” that a user of a certain type of copyright works is “adversely affected” by the anticircumvention provision in making non-infringing uses.\(^{58}\) The statute demands that the Librarian’s results be published which is done on the Copyright Office website.\(^{59}\)

The next provision in the statute makes it clear that the LOC’s exception refers only to the anticircumvention of TPMs. The statute states that “[n]either the exception…nor any determination made in a rulemaking…may be used as a defense in any action to enforce any provision of this title other than this paragraph.”\(^{60}\) Effectively, the exceptions created by the LOC will not apply to any provisions that follow, including the anti-trafficking provision.

The DMCA has two anti-trafficking provisions in it. The first establishes that no one shall knowingly traffic in any technology that’s primarily designed to circumvent access controls, including CSS if that is the primary purpose of the technology.\(^{61}\) This provision, following as it does the limit on the anticircumvention exception, begs the question, how are

\(^{58}\) Id.
those excepted meant to circumvent the TPMs? Before that question can be answered, the second anti-trafficking provision is considered an additional violation and prohibits knowingly trafficking in technology primarily designed to circumvent copy controls. The ability to circumvent, created by the Librarian of Congress, is now possibly stymied by the inability to procure the technology to do so. Realistically, there are most likely any number of circumvention technologies available on the internet, as it is a global community, however, technically, those who provide that technology, even for non-infringing uses excepted by the LOC, open themselves up to liability for allowing someone else to access that technology.

The question of how those whose circumvention is excepted by the LOC are meant to circumvent TPMs is answered in the reverse engineering provision of the statute. This provision states that if a person is able to reverse engineer a circumvention technology, they may use it for non-infringing purposes. Essentially, a user of an excepted type of work may circumvent a TPM to access the work for non-infringing uses, as long as they have reverse engineered the circumvention technology themselves. These provisions are the most important to the present discussion, so it is important to determine how the courts have interpreted them.

Courts have disagreed over a user’s ability to circumvent TPMs for fair use purposes. In *Universal v. Corley*, the court stated that owners of DVDs were not stopped from using the content for fair use purposes, they were simply not allowed to circumvent the TPMs in order to reach that content. The court went so far as to suggest that users film their television in order to capture the relevant content. In *United States v. Elcom*, the court suggests that Congress did

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66 Id.
67 Id.
not ban the act of circumventing, merely the trafficking in, and marketing of, circumvention technology.68 The court cites subsection e which states that “[n]othing in the statute affects the rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.”69 The Elcom court has a fair point, except that this provision does not exempt the user from liability for circumvention, it merely provides the user who has circumvented a TPM a defense.

Furthermore, the anticircumvention provision does not mention fair use or any other rights, remedies, limitations, or defenses, which means that Congress did ban the act of circumventing, but allowed a reasonable defense of the circumvention if the user can prove the act was non-infringing. If Congress had not banned the act of circumvention, then why would the LOC exception be necessary? The exception exempts the user from liability thereby making the act of circumvention legal.

The general focus of these cases has been the anti-trafficking provisions. It is inherently easier to find and sue those who traffic in technology rather than those who circumvent TPMs. It does not necessarily mean that one is not liable for circumventing access controls, but it does mean that the act of circumventing is made all the more difficult by a lack of technology. Therefore, the issue of perpetual copyright on public domain films lies not in one’s liability for circumventing the TPMs, but in one’s ability to circumvent. This issue will become more prevalent in coming years as many early films reach the end of their copyright protections and with the unusual amount of attention early and silent films have received in the media recently.

C. Hugo

The movie Hugo, based on the children’s book The Invention of Hugo Cabret, is the story of an orphan who lives inside of the walls of a Paris train station in the 1930s. Through a series of events, Hugo befriends a young girl whose guardian happens to be the filmmaker Georges Méliès. When Hugo and his friend, Isabelle, discover who Papa Georges really is, they embark on a journey to return the now anonymous filmmaker to his former glory. Ben Kingsley as Georges Méliès is a remarkable likeness to the man himself and Martin Scorsese does an excellent job of transferring his own love of film onto the screen. Scorsese does so by utilizing clips from dozens of early films including Méliès’s own Trip to the Moon.

Georges Méliès was a magician who first fell in love with films in 1895 and was making his own films about a year later. Méliès was the first filmmaker to use such techniques as fading, dissolve, and stop-animation in order to create a narrative. His works were often fantastical and Méliès is considered the father of special effects. Méliès’s work has been admired for over a century, but with author Brian Selznick and Martin Scorsese’s assistance it has been introduced to a new generation.

Most of Méliès’s works entered into the public domain in France sometime around 2008, which is the year that a complete collection of his life’s works was released on DVD. For a mere 62 dollars (US) you can own a complete collection of public domain films. However, if you

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70 HUGO (Paramount Productions 2011).
71 Id.
72 Id.
73 Id.
75 Id.
76 Id.
circumvent the Content Scramble System (CSS) in order to access and copy the films, you are violating the DMCA. Thanks to Flicker Alley Studios, Méliès’s work is once again protected by copyright.

This problem will only worsen with time as Oscar-winning films The Artist and Hugo have sparked a renewed interest in silent films. Studios will take advantage of this interest by creating compilations of public domain works for people to have in their homes, which will not only grant derivative work copyrights in the selection and organization of the movies, but will also grant protection to the works under the DMCA in perpetuity. In addition, Méliès’s work as used in the movie Hugo may not be protected by Scorsese’s use and yet it is protected by its transfer to DVD. While this issue has yet to be brought before a court, it is an acknowledged problem and it treads very heavily on the Constitution’s Intellectual Property Clause which grants Congress the power to protect works for a limited time.78

II. LIMITED TIMES

The Constitution states very clearly that Congress has the power to grant exclusive rights to authors for a limited time.79 The Supreme Court has interpreted that phrase, “limited Times,” as the framers knew it and has come to the decision that so long as authors’ rights do not last in perpetuity, with no end in sight, they are limited.80 It has been posited that the “limited Times” restriction is an important factor in the promotion of the progress of science and the useful arts and that public domain works are essential for this progress.81 To that end, copyrights have always expired and should always expire, thereby allowing all creative works to enter into the possession of the public to be used freely. The problem arises when works that are already in the

81 Eldred v. Ashcroft, 537 U.S. 186, 211-12 (2003) (Petitioners argued that the Copyright Term Extension Act was contrary to Congress’s Constitutional power to “promote the progress of Science and Useful Arts”).

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public domain are suddenly removed and given renewed copyright protection or, worse yet, removed from the public domain without renewed copyright protection.

A. Eldred v. Ashcroft

In 1998, Congress enacted the Sonny Bono Copyright Term Extension Act (CTEA) which extended the copyright term of existing and future works by 20 years.⁸² Eric Eldred and others filed suit against the Attorney General (Janet Reno in lower courts and John Ashcroft in the Supreme Court) claiming that the CTEA went beyond Congress’s powers as dictated by the Copyright clause of the US Constitution.⁸³ Eldred and company were in the business of creating products and services that built upon public domain works and were now faced with the prospect of waiting another twenty years to restore and exploit works that were on the cusp of entering into the public domain.⁸⁴ This means that the public would have to wait another twenty years to experience and enjoy about 98% of works nearing the end of their copyright life.⁸⁵

Congress’s decision to extend copyright terms was based on several factors; mainly, extended life expectancy, changes in economics, and technological advances.⁸⁶ The main reason to have copyright last 50 years beyond the life of the author was so the author’s heirs might enjoy the fruits of her labor.⁸⁷ However, those heirs were now living longer and over time

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⁸⁴ Arlen W. Langvardt and Kyle T. Langvardt, Unwise or Unconstitutional?: The Copyright Term Extension Act, the Eldred Decision, and the Freezing of the Public Domain for Private Benefit, 5 MINN. J.L. SCI. & TECH. 193, 246 (2004) (Eldred was a restorer of old films).
⁸⁵ Eldred v. Ashcroft, 537 U.S. 186, 248 (Breyer, J. dissenting) (“only about 2% of copyrights between 55 and 75 years retain their commercial value”).
economic changes had possibly decreased the value of initial licenses entered into by the authors.88

Finally, Congress hoped that advances in technology would spur authors to re-release earlier works thereby sending them into the marketplace for a new generation.89 This theory works in practice for those authors who are living, but, ironically, it kept works by authors who were already deceased out of the hands of that same generation for twenty years more than it would have prior to the enactment. It could be argued that the authors’ heirs would then have incentive to re-release those earlier works, but that incentive is no guarantee that it would happen. In fact, many heirs fight viciously to protect their interests in their ancestor’s work and it is not until that work has passed into the public domain that affordable copies of the work will abound.90

The Supreme Court upheld the CTEA as being within Congress’s Constitutional power and US copyright duration is currently life of the author plus 70 years. While this did not technically remove works from the public domain, it did stop works from entering the public domain. Arguably, the extension brought US copyright law in line with most of European copyright terms, which was another impetus for Congress to enact the amendment.91 Around the same time that the CTEA was being passed, Congress passed the DMCA which also had an effect on authors’ limited protections.

88 Milne Ex Rel. Coyne v. Stephen Slesinger, Inc., 430 F.3d 1036 (9th Cir. 2006) (the granddaughter of A.A. Milne sought to terminate Milne’s original contract with Slesinger in order to enter into an agreement with the Walt Disney Co. after the enactment of the CTEA).
89 Eldred at 207.
90 Robert Spoo, Note, Copyright Protectionism and Its Discontents: The Case of James Joyce’s Ulysses in America, 108 YALE L.J. 633, 661-62 (December 1998) (publishers had been ready to make Ulysses available in public domain versions at the time copyright was set to expire); Arlen W. Langvardt and Kyle T. Langvardt, Unwise or Unconstitutional?: The Copyright Term Extension Act, the Eldred Decision, and the Freezing of the Public Domain for Private Benefit, 5 MINN. J.L. SCI. & TECH. 193, 246 (2004) (“At the same time, many of [the older works], though not cost-effective investments for their current rights-holders, would stand a far better chance of restoration or other revisitation if they were in the public domain”).
91 Eldred v. Ashcroft, 537 U.S. 186, 205-06
B. *Universal City Studios v. Corley*

At the advent of digital technology, the entertainment industry saw the DVD not as a godsend allowing them to disseminate high-quality copies of their works in a more compact and long-lasting package, but as a threat to their profits. The film industry was reluctant to move to the newer medium without some assurances that their copyrights would be protected. The answer was CSS, developed in 1996, which encrypted the content on DVDs and could only be unlocked by a key that is found on DVD players. Studios now had a plan to protect content and a licensing scheme that ensured manufacturers of DVD players would comply with this protection plan.

The studios’ plans were certain to succeed when the DMCA was enacted in 1998 and DVDs were further protected from possible future piracy. Finally, in 1999, Jon Johanssen managed to reverse-engineer a decryption key that allowed him to play CSS-protected DVDs on a Linux operating system, which had previously been impossible. He called the program DeCSS and posted the object code on his website.

Eric Corley, publisher of a magazine geared towards computer hackers called *2600: The Hacker Quarterly*, posted both the DeCSS object and source code on the magazine’s website, 2600.com, and a comprehensive guide of how to use the code. Corley and two other defendants were sued in 2000 by Universal City Studios and several other film studios for

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92 Universal City Studios, Inc. v. Corley, 273 F.3d 429, 436 (2d Cir. 2001) (DVDs were a medium from which multiple copies were easily made and each copy would be as clear as the original).
93 Universal City Studios, Inc. v. Corley, 273 F.3d 429, 436 (2d Cir. 2001).
95 Universal City Studios, Inc. v. Corley, 273 F.3d 429, 437 (2d Cir. 2001).
96 Universal City Studios, Inc. v. Corley, 273 F.3d 429, 437 (2d Cir. 2001).
97 Universal City Studios, Inc. v. Corley, 273 F.3d 429, 437 (2d Cir. 2001).
98 Universal City Studios, Inc. v. Corley, 273 F.3d 429, 438-39 (2d Cir. 2001) (object code is not meant for every layperson to use).
violating the DMCA anti-trafficking provisions. At the District court level, Corley et. al. argued that CSS prevented consumers from making legitimate use of the DVD. In a footnote, the court admits that there is a risk of limiting access to non-copyright protected works, including public domain works, through technological measures, but in the text of the case the court holds that the facts of this case do not pose that risk.

Corley, determined to fight, appealed the decision of the Southern District of New York and a number amici curiae were filed in his support. One of those briefs was a thoughtful argument from Professor Julie Cohen of Georgetown University Law Center. Writing on behalf of herself and 45 other intellectual property professors from around the country, she argued that the DMCA oversteps Congress’s authority to grant protection to works for a limited time. Professor Cohen had the foresight to imagine works that integrated public domain works and then protected them, thereby giving them perpetual copyright protection. Further, Professor Cohen argues that no part of the Constitution that gives Congress the power to make laws allows Congress to create such technological restrictions on works regardless of originality, duration, or infringement.

The court rejects this supposition for two reasons. The main reason is that the argument did not have merit at the time. The court was correct in that, at the time, no issue had been

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100 Universal City Studios, Inc. v. Corley, 273 F.3d 429, 436 (2d Cir. 2001) (Reimerdes and Kazan settled prior to appeal at the Circuit Court).
raised that mirrored those facts. It was a future concern and, therefore, could not hold any weight in the current discussion.\footnote{Universal City Studios, Inc. v. Corley, 273 F.3d 429, 445 (2d Cir. 2001) (agreeing with the lower court that the concern does not appear to be a problem yet).} The second, and possible more vexing, reason, was that Defendants-Appellants had relegated the argument to a footnote.\footnote{Universal City Studios, Inc. v. Corley, 273 F.3d 429, 444-45 (2d Cir. 2001).} The court refused to consider the argument because footnotes are not given appellate consideration and an amicus brief can only be helpful in elaborating on properly presented issues.\footnote{Universal City Studios, Inc. v. Corley, 273 F.3d 429, 445 (2d Cir. 2001).}

The Circuit court was not persuaded by Corley’s various constitutional arguments and affirmed the lower court decision to enjoin Defendants from trafficking in the circumvention technology, which included posting the code on their website and linking to the code on other websites.\footnote{Universal City Studios, Inc. v. Corley, 273 F.3d 429, 434 (2d Cir. 2001).} But the lower court and the appellate court were correct in assuming that sometime in the future the technological protection of public domain works would become a problem. As discussed above, the resurgence of classic silent movies has posed a problem of accessing public domain works on DVDs. Those who do have access to the originals may even be able to create a copyright interest in those public domain works by creating derivative works. But those derivative works only acquire partial protection and the problem is still posed that the parts that are no longer protected by copyright, when placed on a DVD, are then technically protected by copyright.

III. DERIVATIVE WORKS

Derivative works are works based on one or more pre-existing works.\footnote{17 U.S.C. § 101.} An author creates a derivative work when she translates, fictionalizes, adapts, abridges, or condenses another copyright-protected or public domain work.\footnote{17 U.S.C. § 101.} Creating a derivative work is one of the...
rights inherent in copyright and an author may not make a derivative of a copyright-protected work without permission of the original work’s author.\textsuperscript{113} For that reason, making derivative works from public domain works has become a prolific industry.\textsuperscript{114} Derivative works made from copyright-protected works is not unheard of, but difficulties can arise in such situations, especially if the authors of the original works are deceased.\textsuperscript{115} The creation of derivative works from public domain works phenomenon has given rise to the latest craze of mixing public domain works with unrelated genres, fan fiction, and comic book adaptations.\textsuperscript{116} Another product of this practice is modern films incorporating public domain films as part of the narrative.

A. Public domain works in Copyrighted works and Compilations

The public domain is an intangible place made up of works that are not copyright protected either because they cannot be copyrighted or because copyright protections have expired.\textsuperscript{117} It is becoming a frequent practice that modern authors are taking works from the public domain and simply inserting them into their original work.\textsuperscript{118} The issue with this practice is determining what rights are conferred on the modern author. To answer that question, we must first determine whether or not the author’s contribution is creative and more than

\textsuperscript{113} \textsc{David Nimmer & Melville Nimmer, Nimmer on Copyright} § 3.01 (Matthew Bender 2011).
\textsuperscript{114} Arlen W. Langvardt and Kyle T. Langvardt, \textit{Unwise or Unconstitutional?: The Copyright Term Extension Act, the Eldred Decision, and the Freezing of the Public Domain for Private Benefit}, 5 \textsc{Minn. J.L. Sci. \\& Tech.} 193, 246 (2004) (Eldred was a restorer of old films).
\textsuperscript{115} Heirs and estates can be fiercely protective of their ancestor’s works. \textit{See, e.g.}, SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001) (Margaret Mitchell’s heir’s estate sued publisher of parody derivative work \textit{The Wind Done Gone}).
\textsuperscript{116} \textit{See, e.g., Seth Grahame-Smith \\& Jane Austen, Pride and Prejudice and Zombies} (Quirk Books 2009); Marsha Altman, \textit{The Darcys \\& Bingleys: A Tale of Two Gentlemen’s Marriages to Two Most Devoted Sisters} (Sourcebooks Landmark 2008) (previously posted at fanfiction.net as two separate stories); Nancy Butler, Jane Austen, \\& Sonny Liew, Sense and Sensibility (Marvel Classics) (Marvel 2011).
\textsuperscript{118} \textit{See, e.g., Seth Grahame-Smith \\& Jane Austen, Pride and Prejudice and Zombies} (Quirk Books 2009) (Grahame-Smith uses segments of Austen’s original work verbatim throughout his story); \textsc{Hugo} (Paramount Pictures 2011) (Scorsese inserts several clips from silent films throughout the latter half of the movie).
minimal. In the past, the court in Maljack Productions v. UAV Corp. found that using pan-and-scan technology to alter a public domain film as well as enhancing the soundtrack meets the *de minimus* degree of creativity required to establish valid copyright. Pan-and-scan technology is an intelligent program that scans horizontally across a 4:3 aspect ratio image while keeping the action in the middle of the screen. This technology was widespread when films shot for widescreens were being viewed on a standard square television set. While the process of panning-and-scanning seems entirely technical and, therefore, not copyrightable, it was found that the person whose job it is to pan and scan has a number of options and that his or her decisions meet the creative criteria.

The court in *L. Batlin & Son v. Snyder* found that there is a higher standard for determining the copyrightability of contributions and additions to public domain works. The same court later determined that there were two limitations when considering copyrightability of derivative works. Those limitations were:

1. To support a copyright the original aspects of a derivative work must be more than trivial. 2. The scope of protection afforded a derivative work must reflect the degree to which it relies on the preexisting material and must not in any way affect the scope of any copyright in this preexisting material.

The Copyright Office used these limitations in determining whether or not colorization of black and white films should be copyrightable, specifically on public domain films.

119 DAVID NIMMER & MELVILLE NIMMER, NIMMER ON COPYRIGHT § 3.03 (Matthew Bender 2011).
125 Oman, *supra* note 124.
Ralph Oman determined that the only portion of copyrightable work in the colorized derivative would be in the original selection of color, but that the public domain film would remain in the public domain and would be available to others who wished to create their own colorized versions.\textsuperscript{126}

Compilations are another type of derivative work that is given copyright protection.\textsuperscript{127} Collecting a series of public domain works into one place is another common practice evidence by complete works books and DVDs. Courts have found that the act of collecting scenes from public domain films was considered enough of a contribution to the original work to be deemed copyrightable.\textsuperscript{128}

However, the copyright granted to the derivative work does not also protect the public domain work.\textsuperscript{129} The artistic process of panning and scanning is copyrighted and no other film studio is allowed to copy the results of that process, however the film itself is still in the public domain and other film studios may use the original and edit and adjust it however they see fit, so long as they do not copy the first derivative work.\textsuperscript{130} Making a compilation of public domain works can often require a great deal of skill and hard work, or it can be an easy way to make money. In either case, the compiler is only guaranteed copyright in his or her selection, coordination, and arrangement of the works.\textsuperscript{131} The essential lesson learned from derivative works is that once a work has passed into the public domain, no author should be able to take it out again. Generally, that is the case.

\begin{itemize}
  \item \textsuperscript{126} Oman, supra note 124.
  \item \textsuperscript{127} Nimmer, supra note 119 (3.03).
  \item \textsuperscript{128} Nimmer, supra note 119 (3.03).
  \item \textsuperscript{129} David Nimmer & Melville Nimmer, Nimmer on Copyright § 3.04 (Matthew Bender 2011).
  \item \textsuperscript{130} Nimmer, supra note 129 (3.04).
  \item \textsuperscript{131} Nimmer, supra note 129 (3.04).
\end{itemize}
The Golan case proved the falsity of this claim, though the works that were removed from the public domain would eventually return upon expiration of copyright protection.¹³² In the URAA, the Act whose constitutionality is challenged in Golan, Congress made provisions for derivative works made from public domain works that would no longer be in the public domain.¹³³ The author of the derivative work was allowed to continue to exploit the work without incurring liability for infringement as long as she paid a fee to the original owner.¹³⁴ However, in the case of films that are still in the public domain, the addition of those films to copyrighted films or the creation of derivative works in digital form has the potential to create a perpetual copyright.

Though the court in United States v. Elcom would disagree, stating that “the DMCA does not prevent access to matters in the public domain or allow any publisher to remove from the public domain and acquire rights in any public domain work.”¹³⁵ The problem with this supposition is that the court in Elcom generally spoke of public domain books in electronic format and posited that the digital version was not the only version available to readers.¹³⁶ In the case of public domain films, it is not nearly so easy to acquire copies and in many circumstances a compilation DVD of early silent films might be the only access available to a user. And in other cases, a DVD of the movie Hugo might be the only access a user has to the films of Méliès.

Bringing the book The Invention of Hugo Cabret to life as the film Hugo required Scorsese to use numerous public domain works throughout the film. The author of the book, Brian Selznick, admits to having seen Méliès’s movie A Trip to the Moon and hoping to write a

¹³⁶ Id.
book about the artist one day. The result was a children’s graphic novel about a young boy who becomes friends with the famous director. It naturally follows that the film adaptation of the book should include the original movies of Méliès. At one point in the film, Hugo and Isabelle are looking through a book titled *The Invention of Films*, an illustrated guide to movies (circa 1930). Scorsese brings this book to life with a montage of clips from early films. Scorsese’s selection and arrangement of the public domain clips creates a derivative work and earns Paramount Pictures the protection of copyright. To copy that montage exactly as it is assembled by Scorsese would be infringement. Each individual clip is free for use, but the montage moves so quickly and the clips are so short that Scorsese has all but guaranteed protection for this particular compilation.

The same principle works for the second montage at the end of the film in which a number of Méliès’s films are shown. However, a pivotal scene in the film comes when Hugo, Isabelle, and Maman Jeanne (Jeanne D’arcy, Méliès’s wife) are watching *A Trip to the Moon*. During this scene, we see short clips of the film with shots of character reactions between. The clips might be considered protected according to the standards of the *Maljack* court, because the *Hugo* soundtrack has character commentary playing over the clips which courts might consider an enhancement of the soundtrack. However, Scorsese and his team did not enhance the original soundtrack, because there was no original soundtrack. A film made in 1902 would have been released by the studio with a thematic cue sheet for a live musician to play in the

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139 *HUGO* (Paramount Pictures 2011).
140 *NIMMER, supra note 129* (3.04).
141 *NIMMER, supra note 129* (3.04).
142 *HUGO* (Paramount Pictures 2011).
This means that the score playing over the film is an original creation of Hugo composer, Howard Shore, which is copyright protected. Therefore, if one wanted to copy the individual clips of A Trip to the Moon they are welcome to do so, but they may not copy the clips with Howard Shore’s composition or screenwriter John Logan’s script playing over it.

Paramount Pictures can be assured of absolute copyright in the selection, arrangement, and alterations made to the public domain films used in Hugo. Even if someone were able to copy the clips used without violating Paramount’s copyright in the compilation, the original soundtrack on the clips ensures that the copier would be infringing Paramount’s copyright. The only way a copier might feasibly access the public domain content without violating Paramount’s rights in Scorsese’s compilation and original score would be to remove them digitally, which, as we know, is illegal under the DMCA.

B. Digital Restoration of public domain works

Digital restoration of public domain works is an incredibly important practice that takes works that are in disrepair and cleans them up for established fans and new generations to enjoy. It is, however, not a practice that is profitable by itself. In the past, the work of a restorer might have been protected under the sweat of the brow doctrine, but the Supreme Court’s ruling in Feist determined that the hard work undertaken by a restorer to maintain historical accuracy is not enough to give the work copyright protection. In order for one to enjoy copyright in their derivative work, the contribution must be derivative of the original, which is antithetical to the practice of a restorer. A restorer’s job is to return a classical work to its original glory. This

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145 NIMMER, supra note 129 (3.04).
148 NIMMER, supra note 119 (3.03).
should not allow for the addition of new soundtrack, pan-and-scan technology, or additional stories. However, digital restorers can combine their efforts with other artists who will add those things, as well as package the product and distribute it for sale.¹⁴⁹ In this way, the minimal contributions made by the restorer are enhanced and protected by the original score of a composer and the digital format of the package.

Flicker Alley Studio is a company that specializes in this process of restoring and creating collections of public domain works and then placing those collections on DVD and selling them.¹⁵⁰ Their mission is to bring film history to new audiences.¹⁵¹ This admirable goal is somewhat spoiled by the exorbitant prices they charge for works that one should be able to access for free. Flicker Alley is able to charge these prices because their works are sold on DVDs and are therefore protected from unauthorized copying by the DMCA anticircumvention provision.¹⁵²

Digital restoration of films is an important aspect of preserving history in the form of early films. In order to promote restoration, absent copyright protection, Congress created the National Film Preservation Foundation.¹⁵³ The Foundation is headed by a Board composed of prominent members of various motion picture organizations, including Martin Scorsese representing the Director’s Guild of America.¹⁵⁴ The purpose of the Foundation is to make early films available for study and research and to that end they provide grants around the country to

¹⁵¹ Id.
¹⁵³ About the NFPF, National Film Preservation Foundation, http://www.filmpreservation.org/about (last visited Apr. 9, 2012).
promote film preservation. However, when the process is done for commercial gain the results are much different, often restricting access to those early films rather than promoting it.

Ideally, the process of restoring public domain films and placing them on DVD should make it easier to freely disseminate these classical films. Even if the restoration companies create derivatives by adding soundtracks, that should not preclude audiences from accessing and legally copying to the visual portion of the films. But the CSS protections prevent copying of any and all content on the DVD ensuring that public domain films are essentially copyright protected. Furthermore, the protection on these films appears to be in perpetuity unless the DMCA is amended, overruled as unconstitutional, or the Librarian of Congress sees fit to exempt the public from liability under the anticircumvention provision for copying such films. Unfortunately, the latter is the most likely and the least effective.

IV. LIBRARY OF CONGRESS EXCEPTIONS

At the time that Congress was considering passing the DMCA they recognized the potential issue of limiting fair use access to content for educational and other important social uses. In order to pass the bill that would eventually become the DMCA, drafters included a provision that empowered the Librarian of Congress, a non-political presidential appointee, to choose certain categories of content that would be exempted from the anticircumvention provision.

Section 1201(a)(1)(C)-(D) of the Copyright Statute gives the Librarian of Congress the power to grant exceptions to the anticircumvention provision to certain categories of works. However, the grant lasts only three years, at the end of which the proponents of said categories

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155 About the NFPF, NATIONAL FILM PRESERVATION FOUNDATION, http://www.filmpreservation.org/about (last visited Apr. 9, 2012).
will have to appeal for an exception again. During the rulemaking, the Librarian considers the availability for use of the works, the availability for use of works for nonprofit, archival, preservation, and educational purposes, the impact that the prohibition on circumvention has on criticism, comment, news reporting, teaching, scholarship, or research, the effect of circumvention on the market value of works, and other factors that the Librarian deems appropriate.

A. Rulemaking efficacy

The first rulemaking by the Librarian of Congress occurred in 2000 and the most recent rulemaking concluded in 2010. The rulemaking process is a unique investment of power in an official who is not elected. As a nod to valid fair use concerns, the Commerce Committee report stated, “[t]he primary goal of the rulemaking proceeding is to assess whether the prevalence of these technological protections, with respect to particular categories of copyrighted materials, is diminishing the ability of individuals to use these works in ways that are otherwise lawful.” Therefore, the public is invited to apply to the Librarian of Congress for an exception every three years and if that request is denied then the requestors may pursue their application through the Administration Procedure Act.

Currently, there are six exceptions available: 1. Circumvention of CSS on legally acquired Motion Pictures for Fair Use; 2. Circumvention of protections that prevent certain applications from working on cell phones; 3. Work-arounds that allow users to connect cell

162 Jeff Sharp, Coming Soon to Pay-Per-View: How the Digital Millennium Copyright Act Enables Digital Content Owners to Circumvent Educational Fair Use, 40 AM. BUS. L.J. 1,43 (Fall 2002).
164 Sharp, supra note 162, at 44.
phones to wireless networks; 4. Accessing video games solely for the purpose of testing for
security flaws; 5. Computer programs protected by a broken or obsolete dongle, a small piece of
hardware that allows users to access software they have legally purchased; and 6. Circumvention
of controls that prevent screen readers so that blind people may use ebooks.\footnote{165} The fair use
exception is an incredibly important exception for the education industry, but the most socially-
conscious and useful exception is the sixth. The sixth exception is also number two on the next
list of proposed classes of works.\footnote{166} The need for blind people to circumvent TPMs on ebooks in
order to enjoy their books has not changed since the Librarian of Congress released the 2003 list
and one might presume that this need will continue indefinitely.\footnote{167}

One could argue that the rulemaking process is a necessary evil considering the ever-
changing nature of technology, because in three years’ time a new technology might require a
new exception to be made. As people find chinks in the armor of TPMs, they will create newer
and stronger technologies to work around. However, it is clear that the exception is ephemeral
at best, providing a very short term of protection and a waste of resources when parties are
required to apply for exception again. The concern of several members of Congress at the
inception of the DMCA was:

\begin{quote}
[T]hat marketplace realities may someday dictate a different outcome, resulting in
less access, rather than more, to copyrighted materials that are important to
education, scholarship, and other socially vital endeavors. This result could flow
from a confluence of factors, including the elimination of print or other hard-copy
versions, the permanent encryption of all electronic copies, and the adoption of
business models that depend upon restricting distribution and availability, rather
than upon maximizing it.\footnote{168}
\end{quote}

\footnote{167} U.S. Copyright Office, \textit{Exception to Prohibition on Circumvention of Copyright Protection Systems for Access
This legitimate concern was apparently waylaid by the addition of the Librarian of Congress’s exception, but the three year limitation should have raised an alarm. For example, the report mentions “the elimination of print or other hard-copy versions” which is an excellent reason to maintain exception six for screen readers assisting the blind. It would make more sense to maintain exceptions indefinitely because those types of uses worthy of exception will most likely never be protected again. Changing technology will ensure that only new exceptions will need to be made and it only makes sense to keep the old ones in place for those who continue to use older technology. Those who circumvent TPMs to allow a screen reader for the blind will only continue to need this exception as more and more books enter the digital domain. However, it is unlikely that the blind will no longer need the exception after three years so it seems like a waste of time and resources to require them to lobby for that exception every three years.

The onus of the process should be placed on the owners of the content who feel that their TPMs should not be circumvented without liability. This reform would require applicants to make their case for a specific class of work. The Librarian of Congress, with the help of the Register of Copyrights and the Secretary of Communications and Information of the Department of Commerce, could determine that the class is worthy of an exception at which point the class would be placed on the exception list until such time as the owners of the digital content appeal to the Librarian of Congress to have the class of work removed. Digital content owners often have access to large associations that litigate on their behalf and should have no trouble appealing to the Librarian of Congress every three years.\footnote{For example, the record industry has the RIAA, the movie industry has the MPAA, etc.}

The ephemerality of the exception also exists in the anti-trafficking provisions.\footnote{17 U.S.C. § 1201(a)(2)(A)-(b)(2)(B)} While the Library of Congress’s rulemaking exempts those specific classes of works from liability for

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circumvention TPMs, the rulemaking does not apply to trafficking in circumvention tools.\textsuperscript{171} It does not follow that those who are able to circumvent must also traffic in circumvention technologies, but in order for the less technically savvy to take advantage of those legal and fair uses exempted by the Librarian of Congress, the circumvention technology must be available somewhere. As long as those who are able to reverse engineer are prevented from sharing their work with the public, the general public will be unable circumvent the TPMs. Essentially, what the Librarian of Congress exception means is that the public is allowed to reverse engineer a de-encryption code or develop a work around and then they are allowed to use those tools to access the content on a specific type of work that is going to change in three years’ time.\textsuperscript{172}

As of the close of business on February 10, 2012, the date by which all proposed classes are due to the Librarian of Congress, the only mention of public domain works is made by the Open Book Alliance and refers to literary works in the public domain made available in digital copies.\textsuperscript{173} The next rulemaking is due for 2015, therefore, the public will have to wait until 2016 before another individual or group might be able to propose motion pictures in the public domain made available on digital versatile disks. On the positive side, having to wait until 2015 is not a bad thing for US movies in the public domain. If Charlie Chaplin Productions had renewed their copyright on \textit{The Gold Rush} in 1953, the CTEA would have extended copyright protections to the film until 2020. Those films that are still hanging on to copyright protection now would very likely become available by the time of the next rulemaking, which means that companies like Flicker Alley Studios would be able to re-introduce them into the mainstream.

\textsuperscript{172} Aaron K. Perzanowski, \textit{Evolving Standards & The Future of the DMCA Anticircumvention Rulemaking}, 10 J. of Internet L. 1, 23 (April, 2007) (“[w]hile the DMCA rulemaking can exempt certain classes of works from the anticircumvention provision, Congress vested no authority in the Copyright Office or Librarian of Congress to grant corresponding exceptions from the anti-trafficking provisions”).
B. Reaching Public Domain Works

There are a few options available to circumvent the potentially perpetual copyright protection of public domain films. The first, and most logical, option is for the Library of Congress to digitize the films in their possession that are in the public domain. While a director such as Martin Scorsese may have the ability to travel to Washington, D.C. to acquire the footage he needs to incorporate into his movie, this is not a feasible option for many people seeking to exploit public domain films. Having access to those films in digital form through the Copyright website would simplify the process and avoid issues with TPMs.

However, the protections present on DVDs from those TPMs still theoretically creates perpetual copyright on public domain works, regardless of whether it is necessary to circumvent the TPMs to access the films. The derivative work argument can only carry the authors so far, because it is physically possible to remove a video file from a DVD without touching the audio file, which essentially leaves the derivative work untouched. Being able to circumvent any anti-copying protections in order to use the video from public domain films would solve the problem created the DMCA’s section 1201.

The ability to reach the video of a public domain film independent of the audio means that films such as Hugo are protected as true derivative works, because the public domain films are so inextricably woven into the copyright-protected work that it would not be practical to allow circumvention of CSS in order to extract a few seconds of film from so many places. However, those who restore films and add soundtracks have no such excuse. Therefore, a Library of Congress exception should be made for DVDs of collections that feature public domain films.

CONCLUSION

The potential for perpetual copyright on digital versions of public domain films that have been placed on DVDs protected by TPMs is a very real thing. Without, at best, modifications to the DMCA or, at least, an exception made by the LOC production companies that add a new sound track to public domain films and sell those films back to the public will have copyright protection not only for the audio aspect of the film, but for the video aspects as well.

Understanding that a large portion of the population will not be able to access the original films makes the need to circumvent TPMs on the DVDs that they are able to access even more important. Users of a DVD that they paid money for have a right to access the public domain video on those DVDs without liability. Furthermore, making the circumventing technology available is an important part of the process. Unfortunately, it would require a modification to the statute that allows an exception for those who traffic in the technology that makes circumvention possible. The best possible solution to avoid the widespread infringement that would most likely occur if these technologies are made available would be to license the technology from a controlled source and for a limited time, such as the Library of Congress.

While the ephemeral exception currently existing at the hands of the LOC needs revamping, the LOC seems to be the key to working around this problem. The Library has hundreds of public domain films on file because of the deposit formality of the 1909 Copyright Act and could utilize the National Film Preservation Foundation to restore and digitize those films to be made available on the internet for starters. But surpassing this singular issue, there is a need for people to access circumvention technology to enjoy their media in non-infringing ways and the Library of Congress could feasibly create an exclusive license with those who reverse engineer those technologies, such as universities who research such things. It is not the
responsibility of those who exploit public domain films to make the films available to the public freely, but it is the duty of Congress to make sure that the public has access to public domain films.