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## *ESSAY*

### EDITING CLASSIC BOOKS: A THREAT TO THE PUBLIC DOMAIN?

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*Over the past few years, there has been a growing trend in the publishing industry of hiring sensitivity readers to review books for offensive tropes or racial, gender, or sexual stereotypes. In February 2023, for instance, reports that Puffin Books had edited several classics by Roald Dahl—in consultation with sensitivity readers—generated immediate backlash from the public and several renowned authors and politicians. While most of that backlash focused on accusations of “censorship” and “cancel culture,” this Essay examines an actual legal consequence of revising classic books: the creation of copyrightable derivative works in updated editions. Derivative works are new works based on or built off of preexisting works. The creator of a derivative work can obtain copyright protection by adding sufficient original expression to the preexisting work. The creation of derivative works, especially from public domain works, is generally encouraged because derivative works can foster creativity, disseminate culture and knowledge, and allow original works to reach new*

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*audiences. However, this right can also be misused and misapplied. Specifically, while copyright in derivative works only extends to the new materials added to an underlying work, there are instances where overreaching copyright claims and ambiguous lines between the original work and the derivative work can have the practical effect of extending exclusive rights in the original underlying works. This Essay examines instances where editors have claimed copyright in new illustrations or new editions of classic books. More specifically, it considers the potential creation of copyrightable derivative works when editors revise and publish new editions that remove cultural, ethnic, and gender stereotypes. It argues that copyright law must strike a balance to ensure that follow-on creativity is encouraged and editors are rewarded for updating classic books to suit a modern readership, but it must also guard against the inadvertent consequence of diminishing the public domain of classic books.*

#### INTRODUCTION

Some called it “absurd censorship.”<sup>1</sup> Others labeled it “corporate safetyism.”<sup>2</sup> It was criticized as “cultural vandalism,”<sup>3</sup> “the woke’s ‘war’ against culture,”<sup>4</sup> and “gobblefunk[ing] around with words.”<sup>5</sup> In February 2023, news outlets reported that Puffin Books, a subsidiary of Penguin Random House and publisher of Roald Dahl’s books, had edited at least ten of Dahl’s classic children’s books to “make them less offensive and more inclusive.”<sup>6</sup> With the public’s increasing awareness of racial,

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<sup>1</sup> Salman Rushdie (@SalmanRushdie), Twitter (Feb. 18, 2023, 5:41 PM), <https://twitter.com/SalmanRushdie/status/1627075835525210113> [<https://perma.cc/28DV-UNWF>].

<sup>2</sup> Helen Lewis, Roald Dahl Can Never Be Made Nice, Atlantic (Feb. 21, 2023), <https://www.theatlantic.com/ideas/archive/2023/02/without-nastiness-roald-dahl-isnt-roald-dahl/673141/> [<https://perma.cc/73B5-NEXP>].

<sup>3</sup> Brendan O’Neill, The Rewriting of Roald Dahl Is an Act of Cultural Vandalism, Spectator (Feb. 19, 2023, 10:57 AM), <https://www.spectator.co.uk/article/the-rewriting-of-roald-dahl-is-an-act-of-cultural-vandalism/> [<https://perma.cc/SAG9-USZ4>].

<sup>4</sup> Sky News Austl., ‘Vandalism’: Roald Dahl the ‘Latest Victim’ of the Woke’s ‘War’ Against Culture, YouTube (Feb. 20, 2023), <https://www.youtube.com/watch?v=K7crIcZ3qM> [<https://perma.cc/6VKJ-VMNU>].

<sup>5</sup> William James, UK PM Sunak Condemns ‘Gobblefunk’ Changes to Roald Dahl’s Books, Reuters (Feb. 20, 2023, 10:25 AM), <https://www.reuters.com/lifestyle/uk-pm-sunak-condemn-s-gobblefunk-changes-roald-dahls-books-2023-02-20/> [<https://perma.cc/WNV2-QUGP>].

<sup>6</sup> Derrick Bryson Taylor, Roald Dahl’s Books Are Rewritten to Cut Potentially Offensive Language, N.Y. Times (Feb. 20, 2023), <https://www.nytimes.com/2023/02/20/books/roald-dahl-books-changes.html> [<https://perma.cc/2X6N-8R4X>]. See generally Ed Cumming, Abigail Buchanan, Genevieve Holl-Allen & Benedict Smith, Roald Dahl Rewritten: The

gender, and sexual stereotypes in classic books, more publishers appear to be hiring sensitivity readers to review books for offensive tropes and insensitive content. In consultation with sensitivity readers, Puffin Books published new editions of Dahl's classic books, altering words used to describe characters' appearances, race, gender, weight, and mental health. These edits included, for instance, removing descriptions of children as "fat," women as "ugly," and people as "crazy," replacing phrases like "you old hag" with "you old crow," and updating "weird African language" so it was no longer "weird."<sup>7</sup> The public backlash to the news was immediate and attracted criticism from several high-profile public figures, including renowned authors Salman Rushdie and Philip Pullman,<sup>8</sup> filmmaker Wes Anderson,<sup>9</sup> U.K. Prime Minister Rishi Sunak,<sup>10</sup> U.K. Queen Consort Camilla,<sup>11</sup> and the CEO of powerful nonprofit organization PEN America.<sup>12</sup> Shortly after the Dahl controversy, certain media outlets reported that Scholastic Corporation had similarly revised R.L. Stine's popular *Goosebumps* series, and publishers had hired sensitivity readers to review and suggest updates to classic works by Agatha Christie and Ian Fleming, causing further public criticism.<sup>13</sup> In spite of the significant media coverage and public

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Hundreds of Changes Made to Suit a New 'Sensitive' Generation, Telegraph (Feb. 24, 2023, 4:20 PM), <https://www.telegraph.co.uk/news/2023/02/17/roald-dahl-books-rewritten-offensive-matilda-witches-tweets/#:~:text=By%20comparing%20the%20latest%20editions,are%20now%20the%20Cloud%2DPeople> [https://perma.cc/C89B-HDG2] (comparing older and newer excerpts from Roald Dahl's books).

<sup>7</sup> Cumming et al., supra note 6.

<sup>8</sup> Rushdie, supra note 1; Taylor, supra note 6.

<sup>9</sup> Christian Holub, Wes Anderson Criticizes Editing of Roald Dahl Books to Remove 'Offensive' Language: 'What's Done Is Done,' Ent. Wkly. (Sept. 1, 2023, 1:36 PM), <https://ew.com/movies/wes-anderson-criticizes-editing-of-roald-dahl-books-i-dont-even-want-the-artist-to-modify-their-work/> [https://perma.cc/5QHS-83LX].

<sup>10</sup> James, supra note 5.

<sup>11</sup> Jane Dalton, Queen Consort Attacks Censorship of Authors as Roald Dahl Row Rages, Independent (Feb. 23, 2023, 5:49 PM), <https://www.independent.co.uk/life-style/royal-family/camilla-queen-roald-dahl-censorship-b2288196.html> [https://perma.cc/TXN2-MVKA].

<sup>12</sup> Armani Syed, Why Rewrites to Roald Dahl's Books Are Stirring Controversy, Time (Feb. 21, 2023, 1:21 PM), <https://time.com/6256980/roald-dahl-censorship-debate/> [https://perma.cc/82ST-AF2S].

<sup>13</sup> See, e.g., Lucy Knight, Sensitivity Readers: What Publishing's Most Polarising Role Is Really About, Guardian (Mar. 15, 2023, 4:00 AM), <https://www.theguardian.com/books/2023/mar/15/sensitivity-readers-what-publishings-most-polarising-role-is-really-about> [https://perma.cc/THS6-VA2T]; Althea Legaspi, Agatha Christie Novels Edited to Remove Racist Language, Rolling Stone (Mar. 27, 2023), <https://www.rollingstone.com/culture/>

discussion of those announcements, little attention has been paid to any actual *legal* controversy of revising classic books.

This Essay focuses on one possible legal consequence of revising classic books: the creation of copyrighted “derivative works” in updated editions of classics. Derivative works are new works based on or built off of preexisting works. The creator of a derivative work can obtain a copyright to the original expression that they add to the preexisting work. The creation of derivative works, especially from public domain works, is generally encouraged because they can foster creation, disseminate culture and knowledge, and allow original works to reach new audiences.<sup>14</sup> However, in certain circumstances, this right can have the practical effect of extending exclusive rights in original underlying works. Even though copyright in derivative works only extends to the new materials added to an underlying work, the difference between the original work and the derivative work is not always clear. Additionally, overreaching copyright claims and copyright assertions to trivial edits to classic books can threaten the public domain of classic books and disrupt the copyright bargain between creators and the public.

This Essay examines the potential creation of derivative works when editors revise and publish new editions of classic books to remove cultural, ethnic, and gender stereotypes, and how granting copyright to those new editions of classic books can incentivize the creation of socially valuable edits but also threaten the public domain of classic books. It proceeds as follows: Part I briefly highlights the many updates to classic books, especially children’s books, over the past decades. This history shows that revising classic books to update offensive terms or remove stereotypes is not a new practice. Part II explains the legal right that allows authors, copyright owners, and publishers to revise classic books, and provides some of the arguments for and against revising classic books. Part III describes how new editions of classic books could be considered copyrightable derivative works and provides examples of editors claiming copyright in their updated editions of classic books. Finally, Part IV examines some of the overreaching practices of editors

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culture-news/agatha-christie-novels-edited-remove-racist-language-1234704199/  
[<https://perma.cc/54GT-JE2T>].

<sup>14</sup>The Public Domain and New Derivative Works, Authors All. (Jan. 12, 2021), <https://www.authorsalliance.org/2021/01/12/the-public-domain-and-new-derivative-works/>.  
[<https://perma.cc/MNF9-ZAX3>].

claiming copyright in updated books to the detriment of the public domain.

### I. A BRIEF HISTORY OF REVISING CLASSIC BOOKS

Editing books is not a new practice. Sometimes classic books are edited for accuracy and relevance, other times to decrease page numbers, and often to remove outdated or offensive racial stereotypes to make books more palatable to modern readers. Authors have often updated their own books. In 1974, ten years after Roald Dahl first published *Charlie and the Chocolate Factory*, he changed the Oompa Loompas from pygmies that Willy Wonka shipped from “the very deepest and darkest part of the African jungle where no white man had ever been before” to white people from Loompaland with long hair and rosy cheeks.<sup>15</sup> In 1978, Theodore Seuss Geisel, more commonly known as “Dr. Seuss,” removed the bright yellow skin and pigtail from an Asian character in his 1937 book *And to Think That I Saw It on Mulberry Street* and changed the accompanying text from “[a] Chinaman [w]ho eats with sticks” to “[a] Chinese man [w]ho eats with sticks.”<sup>16</sup> Beginning in 1980, Richard Scarry updated his 1963 *Best Word Book Ever* to include father-bunny cooking in the kitchen alongside mother-bunny, change gendered terms like “pretty stewardess” to “flight attendant” and “policeman” to “police officer,” add a menorah to a holiday scene, and remove a stereotypical Native American outfit and feather headdress from a mouse in a canoe.<sup>17</sup>

There are other instances where authors’ heirs and copyright holders to classic books are faced with difficult decisions about how to keep classic works relevant, up-to-date, and unproblematic. In the afterword of the 1988 edition of his father Hugh Lofting’s 1920 *The Story of Doctor*

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<sup>15</sup> Livia Gershon, Roald Dahl’s Anti-Black Racism, JSTOR Daily (Dec. 10, 2020), <https://daily.jstor.org/roald-dahls-anti-black-racism/> [<https://perma.cc/AU7X-87PL>].

<sup>16</sup> Taylor Weik, Why Dr. Seuss Got Away with Anti-Asian Racism for So Long, NBC News (Mar. 12, 2021, 2:46 PM), <https://www.nbcnews.com/news/asian-america/dr-seuss-got-away-anti-asian-racism-long-rcna381> [<https://perma.cc/6KQL-8ZFY>]; Katie Ishizuka & Ramón Stephens, The Cat Is Out of the Bag: Orientalism, Anti-Blackness, and White Supremacy in Dr. Seuss’s Children’s Books, 1 Rsch. on Diversity Youth Literature, Feb. 2019, at 1, 15, <https://sophia.stkate.edu/cgi/viewcontent.cgi?article=1050&context=rdyl> [<https://perma.cc/6KQL-8ZFY>].

<sup>17</sup> Laura Willard, 8 Changes That Were Made to a Classic Richard Scarry Book to Keep Up with the Times. Progress!, Upworthy (Feb. 17, 2023), <https://www.upworthy.com/8-changes-that-were-made-to-a-classic-richard-scarry-book-to-keep-up-with-the-times-progress> [<https://perma.cc/C82F-KKC7>].

*Dolittle*, Christopher Lofting summed up his challenge with making changes in that new edition.<sup>18</sup> On the one hand, a publisher's job is to publish, not to censor. And, where classic works are involved, there is a principled argument they should not be tampered with at all. On the other hand, there was never an intent for *Dolittle* to be offensive, and the potentially offensive content was not an integral or important part of the story. Should Christopher Lofting nonetheless stand on principle, refuse to make changes, disrespect the feelings of others, and nudge the book into obsolescence, to be hidden away from future generations of children? Ultimately, he authorized changes to the book, including rewriting portions of chapters 11 and 12 about Dr. Dolittle's escape from Prince Bumpo and his family to tone down their racial stereotyping and to remove references to Prince Bumpo's dream of turning white.<sup>19</sup> Christopher justified those edits based on his "strong belief that the author himself would have immediately approved of making these alterations."<sup>20</sup> He added that his father "would have been appalled at the suggestion that any part of his work could give offense and would have been the first to have made the changes himself."<sup>21</sup>

The first books in the *Nancy Drew* mystery series were revised beginning in 1959 to remove racial and antisemitic stereotyping, such as the frequent description of criminals as "darker-complexioned and lower class," and Nancy Drew solving mysteries through blatant racial profiling.<sup>22</sup> *The Hardy Boys* series faced similar issues with characters being portrayed through racial stereotypes, and was also updated

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<sup>18</sup> Christopher Lofting, Afterword to Hugh Lofting, *The Story of Doctor Dolittle* 152–54 (1988).

<sup>19</sup> See Selma G. Lanes, *Children's Books; Doctor Dolittle, Innocent Again*, N.Y. Times, Aug. 28, 1988, at 20, <https://www.nytimes.com/1988/08/28/books/childrens-books-doctor-dolittle-innocent-again.html> [<https://perma.cc/S6QC-4XPV>] (noting that "[t]he centenary edition's new excisions and revisions are far more extensive" than previous edits to the books); Dewey W. Chambers, *How Now, Dr. Dolittle?*, 45 *Elementary Eng.*, Apr. 1968, at 437, 438.

<sup>20</sup> Lofting, Afterword to *The Story of Doctor Dolittle*, supra note 18, at 153.

<sup>21</sup> *Id.*

<sup>22</sup> Marjorie Ingall, *Nancy Drew and the Case of the Politically Incorrect Children's Books*, *Tablet Mag.* (Dec. 17, 2013), <https://www.tabletmag.com/sections/community/articles/nancy-drew> [<https://perma.cc/5U7G-SS3C>]; Kelly Robinson, *Dr Seuss 'Cancelled'? There's Nothing New About Cutting Racism from Children's Books*, *Guardian* (Mar. 9, 2021, 12:15 PM), <https://www.theguardian.com/books/2021/mar/09/dr-seuss-cancelled-theres-nothing-new-about-cutting-racism-from-childrens-books> [<https://perma.cc/QMX8-VVQC>].

beginning in 1959.<sup>23</sup> Older books, such as Mark Twain’s 1885 *Adventures of Huckleberry Finn* and Helen Bannerman’s 1899 *The Story of Little Black Sambo*, have also been edited, updated and, in the case of *Sambo*, entirely retold.<sup>24</sup> NewSouth Publishing, for instance, published an expurgated version of *Huckleberry Finn* in 2011 that changed a racial slur to the word “slave,” removed an offensive word for Native Americans, and changed “half-breed” to “half-blood.”<sup>25</sup> *Sambo* has gone through re-illustrations such as in the book *The Story of Little Babaji*, and several retellings that “offer[] readers a distinctively African-American hero,”<sup>26</sup> or create an “emancipatory retelling” of the original story.<sup>27</sup>

More recently, Puffin Books updated Roald Dahl’s children’s books after employing sensitivity readers to review those books for controversial or offensive content.<sup>28</sup> Scholastic Publishing, copyright holder to R.L. Stine’s *Goosebumps* book series, has similarly updated Stine’s popular children’s horror books to replace words such as “crazy” with “silly,” or describing a character as “cheerful” instead of “plump”—apparently without Stine’s knowledge.<sup>29</sup> Finally, recent news reported that both Ian Flemings’s works and Agatha Christie’s novels were also put through sensitivity readers to remove offensive language, including insults and references to race and ethnicity.<sup>30</sup>

<sup>23</sup> Brandon Tensley, The Knotty Nostalgia of the *Hardy Boys* Series, Atlantic (Jan. 27, 2019), <https://www.theatlantic.com/entertainment/archive/2019/01/reading-hardy-boys-nostalgia-disappointment-racism/581071/> [<https://perma.cc/H9Q5-ZQC8>].

<sup>24</sup> See Matthew Fellion & Katherine Inglis, *Censored: A Literary History of Subversion and Control* 123 (2017); Brandon Murakami & Brianna Anderson, *Mgambo, Sam, and the Tigers: Restorying Little Black Sambo Adaptations of the 1990s*, *Childs. Literature Educ.*, Feb. 18, 2022, at 1, 2, <https://rdcu.be/cZeyP> [<https://perma.cc/6QRW-CSSB>].

<sup>25</sup> Fellion & Inglis, *supra* note 24, at 123.

<sup>26</sup> Murakami & Anderson, *supra* note 24, at 3.

<sup>27</sup> *Id.* at 11.

<sup>28</sup> Taylor, *supra* note 6 (explaining that Puffin Books made changes to Roald Dahl’s books following collaboration with an organization that “champions diversity and accessibility in children’s literature”).

<sup>29</sup> Raina Raskin, ‘Goosebumps’ Author Accuses Publisher of Unsanctioned Edits to His Beloved Children’s Series, N.Y. Sun (Mar. 8, 2023, 3:20 PM), <https://www.nysun.com/article/goosebumps-author-accuses-publisher-of-unsanctioned-edits-to-his-beloved-childrens-series> [<https://perma.cc/GJ2W-GSRY>].

<sup>30</sup> Rachel Hall, Agatha Christie Novels Reworked to Remove Potentially Offensive Language, *Guardian* (Mar. 26, 2023, 9:36 AM), <https://www.theguardian.com/books/2023/mar/26/agatha-christie-novels-reworked-to-remove-potentially-offensive-language> [<https://perma.cc/V4HQ-UTY5>].

## II. THE RIGHT TO REVISE &amp; NORMATIVE ARGUMENTS FOR REVISIONS

In all the scenarios above, the editors of classic books had the legal right to revise and publish new editions of those classic books. For books that are still protected by copyright, the copyright owner generally has the exclusive right to revise, republish, or authorize the revision and republication of new editions of their books. If the copyright term for a book has expired, the book is then in the public domain, which would allow anyone to revise and republish the book in any original or updated format.

Regardless of the editors' legal rights to make changes to classic books, copyright owners and publishers have been accused of "censorship" and "cultural vandalism" when they make changes to classic books to reflect modern attitudes and sensitivities to social and cultural stereotypes.<sup>31</sup> There is no doubt that something *is* lost when a classic book is edited. Classic books occupy a special place in literary culture that, like great works of art or historic monuments, can make their preservation feel vital to the very existence of society's shared heritage. Because of their status, any suggestion of changing them can feel like an attack on a society's culture itself. Of course, *whose* shared heritage and *whose* culture these "classic" books represent are certainly up for debate, especially when original versions of those books included portrayals of people in hurtful or stereotypical ways. Nevertheless, editing classic books does rupture the artistic integrity of a work and can disturb the author's original intent. It can also make it harder to contextualize a work and to understand the culture of the period in which the work was created. Instead of updating books to reflect modern attitudes, some authors have called for offensive books to be left alone and allowed to fade away or go out of print.<sup>32</sup> Some publishers have simply ceased publishing or licensing problematic books, such as Dr. Seuss Enterprises' March 2021 announcement that it would cease publishing and licensing *Mulberry Street* and five other children's books.<sup>33</sup>

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<sup>31</sup> O'Neill, *supra* note 3.

<sup>32</sup> Annabel Nugent, Philip Pullman Suggests Roald Dahl Books Should Go 'Out of Print' Amid Edits Controversy, *Independent* (Feb. 20, 2023, 10:22 AM), <https://www.independent.co.uk/arts-entertainment/books/news/roald-dahl-philip-pullman-edits-b2285643.html> [<https://perma.cc/W4R6-3YLL>].

<sup>33</sup> Statement from Dr. Seuss Enterprises, *Seussville* (Mar. 2, 2021), <https://www.seussville.com/statement-from-dr-seuss-enterprises/> [<https://perma.cc/7WTX-NMC9>].



Even though something might be lost when classic books are updated, there is also gain when books are updated for inclusivity. Words matter, especially words used to describe people in books, and children's books should especially be held to a higher standard of sensitivity. Children learn about their society, culture, and world from the books that they read, and literature can affirm historically entrenched ideologies of race, gender, and class.<sup>34</sup> Authors and publishers can also widen readership of their classic books by giving readers non-offensive alternatives to the original versions of classic books, allowing readers to choose the books they want to read and recommend. Disney Enterprises, for instance, frequently creates new stories or films based on preexisting public domain books, often changing the stories in the process to make them more palatable for children.<sup>35</sup> This allows classic books and stories to evolve and reach new audiences. These gains may justify legal incentives to encourage editors to create updated versions of beloved classic books, and copyright can provide that incentive through protection of derivative works.

### III. CREATING COPYRIGHTED DERIVATIVE WORKS IN REVISED CLASSIC BOOKS

A new edition of a classic book could be considered a copyrightable derivative work. Derivative works are new works based on or built off of preexisting works. In order to create a derivative work, an editor must change an underlying work by adding “incremental original expression” or “‘nontrivial’ variation[s]” to the underlying work.<sup>36</sup> The nontrivial variations “do[] not require a high degree of [incremental] originality,”<sup>37</sup> but they must independently meet copyright’s low-threshold originality requirement. Some common creations of derivative works include translations, motion picture versions of books, sequels to a novel or motion picture, or new musical arrangements of a composition. A new, updated, or revised edition of a book is also a common type of derivative work, where “the editorial revisions, annotations, elaborations, or other

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<sup>34</sup> Ishizuka & Stephens, *supra* note 16, at 6; Dorothy L. Hurley, *Seeing White: Children of Color and the Disney Fairy Tale Princess*, 74 *J. Negro Educ.* 221, 222–23 (2005).

<sup>35</sup> *The Public Domain and New Derivative Works*, *supra* note 14.

<sup>36</sup> See *Schrock v. Learning Curve Int’l, Inc.*, 586 F.3d 513, 520–21 (7th Cir. 2009).

<sup>37</sup> *Id.* at 521 (internal quotation marks omitted).

modifications represent, as a whole, an original work.”<sup>38</sup> Derivative works can be created from works already in the public domain, such as when editors re-illustrated images for a classic like *Little Black Sambo*.<sup>39</sup> They can also be created from works that are still protected by copyright if they are edited or authorized by the copyright owner, like Christopher Lofting’s new storyline added to *Dolittle* or Richard Scarry’s updated illustrations in his *Best Word Book Ever*.<sup>40</sup>

While derivative works do not extend the original copyright terms of underlying works, the new copyrightable elements in those derivative works are protected under a new copyright term. This means that, even though the underlying work and any story elements in that original work might be in the public domain, a copyright owner could protect the newer elements they added to create a derivative work.<sup>41</sup> For instance, Bannerman’s original *Sambo*, first published in 1899, is in the public domain. However, the newly illustrated book *The Story of Little Babaji* is a copyrighted derivative work.<sup>42</sup> Therefore, even though copyright would not protect the storyline of *Babaji*, which was the same as *Sambo*, it would protect the added expressive elements in that new work—specifically the new illustrations in *Babaji*. The creator of *Babaji* registered his new edition with the U.S. Copyright Office in 1996 on the basis of the book’s “new illustrations, rev. & updated.”<sup>43</sup> Similarly, Hugh Lofting’s original 1920 version of *Dolittle* may have entered the public domain in 1995, but the re-written story and elements added by Christopher in the 1988 derivative are protected by copyright and would remain off-limits for many more decades. The copyright notice in the 1988 edition of *Dolittle* confirms the copyright claim to the new edition:<sup>44</sup>

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<sup>38</sup> Circular 14: Copyright in Derivative Works and Compilations, U.S. Copyright Off., <https://www.copyright.gov/circs/circ14.pdf> [<https://perma.cc/85AQ-NF4V>] (reviewed July 2020).

<sup>39</sup> *Supra* Part I.

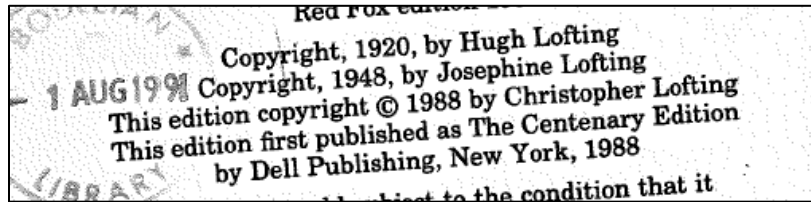
<sup>40</sup> *Id.*

<sup>41</sup> *Klinger v. Conan Doyle Est., Ltd.*, 755 F.3d 496, 500–02 (7th Cir. 2014).

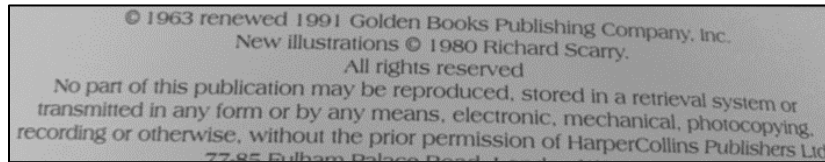
<sup>42</sup> Linton Weeks, *Taking a Tiger By the Tale: Little Black Sambo Loses Racist Elements in Two Retellings*, *Wash. Post* (Sept. 17, 1996), <https://www.washingtonpost.com/archive/lifestyle/1996/09/17/taking-a-tiger-by-the-tale-little-black-sambo-loses-racist-elements-in-two-retellings/3793375b-797e-422e-80cb-dbbc1e9cae72/> [<https://perma.cc/NE58-YT23>]; Helen Bannerman, *The Story of Little Babaji* (1st ed. 1996).

<sup>43</sup> U.S. Copyright Off. Registration No. TX0004375179 (Sept. 24, 1996).

<sup>44</sup> Hugh Lofting, *The Story of Doctor Dolittle* (1988).



Because derivative works can also be created from copyrighted works, some derivative works may have material that enters the public domain at different times. For instance, Richard Scarry’s *Best Word Book Ever*, first published in 1963, will enter the public domain in 2059, but the illustrations he added to the 1980s derivative works will be protected under copyright law until January 1, 2065.<sup>45</sup> The copyright notice in the updated version of the book clarifies the copyright date for the new illustrations (© 1980) versus the original copyright date (© 1963):<sup>46</sup>



The revised books in the *Nancy Drew* series and *The Hardy Boys* series are likely in the same situation, where the original editions that were published beginning in 1930 will be in the public domain before their new editions that were published beginning in 1959. For instance, the first book in the Nancy Drew Mystery Stories, *The Secret of the Old Clock*, was published in 1930 and will enter the public domain by January 1,

<sup>45</sup> What *Could* Have Entered the Public Domain on January 1, 2020? Under the Law that Existed Until 1978 . . . Works from 1963, Ctr. for Study Pub. Domain, <https://web.law.duke.edu/cspd/publicdomainday/2020/pre-1976/#fn1text> [<https://perma.cc/N7Z3-W35Q>] (last visited Sept. 15, 2023) (explaining that the “Copyright Term Extension Act expanded the term for works published in 1963 to 95 years from the date of publication, so long as the works were published with a copyright notice and the term renewed,” while works published after January 1, 1978, enjoy copyright protection for “70 years after the date of the author’s death”); Eric Pace, Richard Scarry, 74, Children’s Book Author and Illustrator, Dies, N.Y. Times (May 3, 1994), <https://www.nytimes.com/1994/05/03/obituaries/richard-scarry-74-children-s-book-author-and-illustrator-dies.html> [<https://perma.cc/9HVZ-9EME>]. Because Richard Scarry died in 1994, the new illustrations he added beginning in 1980 will expire 70 years after his death, on January 1, 2065.

<sup>46</sup> Richard Scarry, Richard Scarry’s Best Word Book Ever (1980).

2026.<sup>47</sup> The new and updated edition of *The Secret of the Old Clock* was published in 1959, which will enter the public domain by 2055.<sup>48</sup>

This *seems* reasonable. Copyright owners and editors who contribute original expression to classic books should be rewarded with copyright exclusivity to their new and original contributions. The ability to protect their new contributions, updates, and edits to classic works could encourage editors to find original and creative ways to replace racist or sexist tropes, stereotypes, imagery, and content from classic books. This incentive might itself spur substantial creativity in discovering artful ways of removing offensive content from classic books without disrupting the artistic value and integrity of the underlying works. It may also allow classic books and stories to continue to remain relevant to new generations of readers.

Furthermore, under copyright law, the copyright in derivative works only extends to “the incremental additions of originality contributed by the authors of the derivative works.”<sup>49</sup> This means that the original version of a classic book will enter the public domain, and the creation of a new edition or derivative work should not extend or otherwise affect the original scope or duration of the copyright protection in the original preexisting work.<sup>50</sup> Nevertheless, as discussed below, sometimes the lines are not as clear in practice as they appear in the law.

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<sup>47</sup> See Carolyn Keene, *The Secret of the Old Clock* (1987) (displaying 1930 as the original year of publication); see also Lloyd J. Jassin, *New Rules for Using Public Domain Materials*, CopyLaw.com, [https://www.copylaw.com/new\\_articles/PublicDomain.html](https://www.copylaw.com/new_articles/PublicDomain.html) [<https://perma.cc/MY32-XJJN>] (last visited Oct. 10, 2023) (explaining that, under the Sony Bono Copyright Term Extension Act (“CTEA”), “a work published in 1930, if properly renewed, will expire at the end of 2025”).

<sup>48</sup> See Ingall, *supra* note 22 (discussing the 1959 revisions); see also *What Could Have Entered the Public Domain on January 1, 2016? Under the Law that Existed Until 1978 . . . Works from 1959*, Ctr. for Study Pub. Domain, <https://web.law.duke.edu/cspd/publicdomainday/2016/pre-1976/> [<https://perma.cc/VN4P-RCSP>] (last visited Oct. 10, 2023) (noting that “under current copyright law, we’ll have to wait until 2055” for “works published in 1959”).

<sup>49</sup> *Klinger v. Conan Doyle Est., Ltd.*, 755 F.3d 496, 501–02 (7th Cir. 2014) (internal citation omitted); see also 17 U.S.C. § 103(b) (codifying that “[t]he copyright in a compilation or derivative work extends only to the material contributed by the author of such work . . . and does not imply any exclusive right in the pre-existing material”).

<sup>50</sup> 17 U.S.C. § 103(b).

## IV. THE THREAT TO THE PUBLIC DOMAIN

The copyright in a derivative work only covers the new material, including additions and changes, that appear in the work. However, it is not always easy to distinguish the original underlying work from the new copyrightable elements, and copyright owners can exploit this ambiguity to attempt to overextend their exclusive rights in classic books. The disputes over the use of the Sherlock Holmes character and the copyright protection of Anne Frank's diary are examples of copyright owners protecting public domain works through their copyrighted derivative works.

Prior to the U.S. Court of Appeals for the Seventh Circuit's 1994 ruling in *Klinger v. Conan Doyle Estate, Ltd.*, the Doyle Estate regularly prevented follow-on creators from using the character Sherlock Holmes in their works, because—even though most of Doyle's stories featuring Sherlock Holmes were in the public domain—the final ten stories were not.<sup>51</sup> In *Klinger*, the Doyle Estate argued that Doyle had created a “single complex character complete in sixty stories” over a thirty-year period and, therefore, the character of Sherlock Holmes was still protected by copyright because his character was inseparable from the later, still-protected short stories.<sup>52</sup> The court disagreed, finding that the Sherlock Holmes character entered the public domain when the copyright in the original books expired.<sup>53</sup> However, the court left open the possibility that certain features of the Holmes character that appeared only in the later still-copyrighted stories could be protected by copyright.<sup>54</sup>

In 2020, the Doyle Estate again filed suit to stop a new Sherlock Holmes production, this time against Nancy Springer and Netflix over their production of the Enola Holmes films, which were based on Springer's popular young adult mystery series about Sherlock Holmes's

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<sup>51</sup> Mike Masnick, *Sherlock Holmes and the Case of the Never Ending Copyright Dispute*, TechDirt (May 26, 2015, 8:12 AM), <https://www.techdirt.com/2015/05/26/sherlock-holmes-case-never-ending-copyright-dispute/> [<https://perma.cc/PM6T-JQQR>]. See generally Elizabeth L. Rosenblatt, *The Adventure of the Shrinking Public Domain*, 86 *Colo. L. Rev.* 561 (2015) (explaining how copyright holders have tried to slow the entry of literary characters into the public domain and suggesting an examination of current copyright doctrine to protect the public domain from encroachment).

<sup>52</sup> Aaron Moss, “Enola Holmes” and the Case of the Overreaching Copyright Owner, *Copyright Lately* (Sept. 1, 2020) (internal citation omitted), <https://copyrightlately.com/enola-holmes-copyright-infringement-case/> [<https://perma.cc/PW3E-H2NV>].

<sup>53</sup> *Klinger*, 755 F.3d at 502–03.

<sup>54</sup> *Id.* at 502.

sister.<sup>55</sup> In *Conan Doyle Estate Ltd. v. Springer*, the Doyle Estate admitted that Sherlock Holmes’s character was in the public domain, but claimed that certain key attributes of Holmes were still protected by copyright.<sup>56</sup> According to the Doyle Estate, those new character traits included developing Holmes “into a character with a heart” who “became warmer,” “became capable of friendship,” “could express emotion,” and who “began to respect women.”<sup>57</sup> The Doyle Estate argued that these additional features of Holmes’s personality, only added in the later stories, were protected by the unexpired copyright in those later works.<sup>58</sup> This dispute was settled out of court.

A similar dispute transpired in Europe over *The Diary of a Young Girl*, also known as Anne Frank’s diary. *The Diary* was originally written by Anne Frank while in hiding with her family in Nazi-occupied Amsterdam during World War II.<sup>59</sup> Anne Frank tragically died in 1945 in the Bergen-Belsen Nazi concentration camp.<sup>60</sup> In January 2016, two French researchers published *The Diary* in its original Dutch language, arguing that the copyright to *The Diary* expired seventy years after Anne Frank’s death.<sup>61</sup> Anne Frank Fonds—the foundation founded by Anne’s father Otto Frank, which owned the copyright to *The Diary*—denied that copyright in the book had expired. While the Fonds acknowledged that Anne Frank was the sole author of the original diaries, it claimed that the published versions of *The Diary* were in fact derivative works attributed to Otto Frank and children’s author and translator, Mirjam Pressler. Specifically, the Fonds claimed that they were “‘responsible for the various edited versions of fragments of the diary’” and that “‘the copyrights to these adaptations [published in 1947 and 1991, respectively]

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<sup>55</sup> Moss, *supra* note 52; Complaint for Injunction and Damages at 2–3, *Conan Doyle Est. Ltd. v. Springer*, No. 20-cv-00610 (D.N.M. June 23, 2020), 2020 WL 3451968, at \*2–3.

<sup>56</sup> Moss, *supra* note 52.

<sup>57</sup> *Id.* (quoting Complaint for Injunction and Damages at 7, *Conan Doyle Est. Ltd.*, No. 20-cv-00610 (D.N.M. June 23, 2020)).

<sup>58</sup> *Id.*

<sup>59</sup> Colin Dwyer, ‘Mein Kampf’ Enters Public Domain; Arguably, Anne Frank’s Diary May Too, NPR (Dec. 31, 2015, 7:48 PM), <https://www.npr.org/sections/thetwo-way/2015/12/31/461606275/mein-kampf-enters-public-domain-arguably-anne-franks-diary-may-too> [<https://perma.cc/G4F4-ULBR>].

<sup>60</sup> Alison Flood, Anne Frank’s Diary Caught in Fierce European Copyright Battle, *Guardian* (Jan. 18, 2016, 3:00 AM), <https://www.theguardian.com/books/2016/jan/18/anne-franks-diary-caught-in-fierce-european-copyright-battle> [<https://perma.cc/M6JL-Q9JZ>].

<sup>61</sup> *Id.*

have been vested in Otto Frank and Mirjam Pressler.’”<sup>62</sup> A cease and desist letter from the Fonds to one of the French researchers described how Otto Frank had created a new edition of the book when he “merged, or compiled, the two versions of the diary that Anne Frank left, that were both incomplete and that partly overlapped, into one reader-friendly version.” As a result, “[t]he book he created earns his own copyright” and “[f]or the purposes of copyright, [Otto] is to be viewed as an ‘author’ of that version.”<sup>63</sup> Therefore, Anne Frank’s original diaries may have entered the public domain on January 1, 2016,<sup>64</sup> but copyright to Otto Frank’s derivative work that was created from Anne’s original diaries will not expire until 2050—seventy years after Otto’s death.<sup>65</sup>

These disputes demonstrate how difficult it can be to delineate the line between the original underlying work and its added elements in a derivative work. They also show how the assertion of rights in derivative works could, at times, have the unintended practical consequence of limiting access to the original underlying work—even when that work is in the public domain.

The issue becomes most troubling, however, when editors assert copyright in trivial and unoriginal edits to classic books. Most courts should not find mere trivial edits to classic children’s books, such as removing a word or cutting out a few lines from a book, to be enough to create a copyrightable derivative work in the new edition.<sup>66</sup> For instance,

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<sup>62</sup> Id.

<sup>63</sup> Dwyer, *supra* note 59; see also Cease and Desist Letter from Anne Frank Fond to Oliver Ertzscheid (Dec. 28, 2015), reproduced at [https://affordance.typepad.com/mon\\_weblog/2015/12/la-lettre-de-lavocat-du-fonds-anne-frank.html](https://affordance.typepad.com/mon_weblog/2015/12/la-lettre-de-lavocat-du-fonds-anne-frank.html) [<https://perma.cc/JR9G-VDLW>] (last visited Sept. 16, 2023) (alleging Otto Frank’s copyright claim to *The Diary*).

<sup>64</sup> There is a separate dispute over whether *The Diary* entered the public domain seventy years after Anne Frank’s death. See, e.g., Natalia Mileszyk, Anne Frank and the Term of Copyright Protection: Why It’s Time to Move from Harmonisation to Unification, *Communia* (Apr. 25, 2016), <https://communia-association.org/2016/04/25/anne-frank-term-copyright-protection-time-move-harmonisation-unification/> [<https://perma.cc/L75Z-3NEZ>]; see also Jacob Rogers, Wikimedia Foundation Removes The Diary of Anne Frank Due to Copyright Law Requirements, *Diff* (Feb. 10, 2016), <https://diff.wikimedia.org/2016/02/10/anne-frank-diary-removal/> [<https://perma.cc/7FGA-5R8F>] (explaining Wikimedia Foundation’s decision to “remove[] the Dutch-language text of *The Diary of a Young Girl*” in order “to comply with the United States’ Digital Millennium Copyright Act (DMCA),” which they believe provides copyright protection to “the Anne Frank original text . . . until 2042”).

<sup>65</sup> Dwyer, *supra* note 59.

<sup>66</sup> *Clean Flicks of Colo., LLC v. Soderbergh*, 433 F. Supp. 2d 1236, 1242 (D. Colo. 2006) (finding that mere removal of offensive words or scenes from a film fails to constitute a derivative work). But see Judge Sweet’s dissent in *Matthew Bender & Co. v. West Publishing Co.*, 158 F.3d 693, 709 (2d Cir. 1998) (Sweet, J., dissenting), which appears to support an

the recent changes to Roald Dahl's children's books, which removed words such as "fat" and "ugly," or swapped out words like "man" with "people" and "you old hag" with "you old crow,"<sup>67</sup> do not appear to be original enough to create copyrightable derivative works in their updated editions. Similarly, Scholastic's changes to R.L. Stine's *Goosebumps* books, which included replacing "crazy" with "silly" and a "plump" character with a "cheerful" one,<sup>68</sup> also appear to lack the minimal creativity required to warrant protectability as a derivative work under copyright.

However, even if these trivial additions do not legally create a copyrightable derivative work, editors can still overreach by *claiming* a copyrighted derivative to dissuade others from copying their edited versions of classic books. For instance, Mark Twain's *Huckleberry Finn* entered the public domain almost a century ago. As noted above, in 2011, Alan Gribben and NewSouth Publishing published a revised edition of *Huckleberry Finn* that merely swapped out certain racial slurs for other less offensive words, most notably replacing "one disturbing racial label" with the word "slave."<sup>69</sup> Such trivial edits to a public domain work should not create a copyrighted derivative work in the new edition. Nevertheless, the copyright notice for their 2011 edition of *Huckleberry Finn* reads: "Copyright © 2011 by NewSouth Books. Introduction, notes, and texts copyright © 2011 by Alan Gribben. Reproduction of any part without explicit written permission from the editor and publisher is strictly forbidden."<sup>70</sup> Even if the editors have no legal basis to claim a copyrighted derivative work in their 2011 edition, the copyright notice printed in the book is a clear overreach of copyright and could deter third parties from reproducing that edition of the book.

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argument that the "totality" of edits, rather than each individual edit to a work, could result in a copyrightable "compilation work."

<sup>67</sup> Cumming et al., *supra* note 6.

<sup>68</sup> Raskin, *supra* note 29.

<sup>69</sup> About the Book: Mark Twain's *Adventures of Huckleberry Finn: The NewSouth Edition*, NewSouth Books, [http://www.newsouthbooks.com/bkpgs/detailtitle.php?isbn\\_solid=1603062351](http://www.newsouthbooks.com/bkpgs/detailtitle.php?isbn_solid=1603062351) [<https://perma.cc/4PAW-QLV9>] (last visited Sept. 16, 2023).

<sup>70</sup> Copyright Notice, *in* Mark Twain's *Adventures of Tom Sawyer and Huckleberry Finn: The NewSouth Edition* (Alan Gribben ed., 2011). A copyright officer at Nova Southeastern University noted that the Mark Twain Project also asserted copyright to its 2003 edition of *Adventures of Huckleberry Finn*. Stephen Carlisle, *Claiming Copyright in Public Domain Works: It's Time to Put an End to Publishing Sleight of Hand*, NSU Fla. Blog (Aug. 27, 2014), <http://copyright.nova.edu/claiming-copyright-public-domain/> [<https://perma.cc/ABV4-P6NM>].



There are special concerns with protecting new editions of classic children's books that were revised to remove offensive stereotypes. First, at some point, the original offensive versions of those works will be in the public domain free for all to copy, use, and reproduce, but the updated versions will remain off-limits due to their later and longer copyright terms. For instance, the cruel and racially offensive illustrations of Prince Bumpo and his parents, and the story of Bumpo's dream of becoming a white prince in the original *Dolittle*, may be reproduced, copied, or even adapted into other works, such as films, because the original book is in the public domain. However, the revised edition that replaced those racist tropes would be off-limits because the later-added elements remain protected by copyright. This could result in an increase, rather than a decrease, of replication of racial stereotypes in classic children's books.

Second, as noted in the disputes involving Sherlock Holmes and Anne Frank's diary, it can be confusing for follow-on creators to know which elements of a derivative work were in the original work and free to use, and which elements in the derivative work are still protected by copyright. This analysis can become even more complicated if the widely published version of a work was the derivative work and the original public domain work is less accessible, such as the situation involving Anne Frank's diary.

Finally, there are distinct concerns with editors who claim copyright in trivial edits to a classic book. In those situations, public domain expression is removed from the public without the public gaining anything in exchange. Not only are those contributions undeserving of copyright, but they can also inadvertently protect the *idea* of a revised or expurgated work. Take the 2011 changes to *Huckleberry Finn* as an example, where the editors replaced racial slurs with less offensive words. While the editors may argue that it required some modicum of creativity or originality to come up with appropriate replacement words for racial slurs, there are only so many words that can be used to replace slurs without altering the meaning of a story. Protecting those few words and trivial edits under copyright law would end up protecting the *idea* of an expurgated *Huckleberry Finn* and could prevent others from publishing similarly updated versions of public domain books. Even though the editor, Alan Gribben, took a personal and reputational risk by editing this popular classic novel so that it may reach a wider readership, including in

schools,<sup>71</sup> the overclaiming of copyright to derivative works can have unintended consequences as discussed above.

But in the case of classic books, especially *children's* books, do the benefits of granting copyright to derivative works outweigh their potential concerns? Would the ability to gain copyright protection of derivative works encourage their creation, and should society bear the cost of potentially extended exclusive rights if it means classic books get updated in socially beneficial ways? Copyright balances the interests of creators and the public by limiting copyright terms in time and scope. When a copyrighted work enters the public domain, that work becomes available for free use and distribution by the public. The public domain is an important source of free expression, allowing follow-on creators to freely use and build upon existing works in the creation of new works. When a copyright owner or follow-on editor attempts to extend their exclusive rights through minimal or trivial edits, they are removing expression from the public domain without contributing anything original to the common good, which disrupts the copyright bargain between creators and the public. This can have the practical effect of depriving others of the opportunity to use and build upon the original work. It can potentially limit future editors that wish to publish their own updated or revised versions of classic books, ultimately limiting the free expression that the public domain is intended to promote.

#### CONCLUSION

Roald Dahl's original *Charlie and the Chocolate Factory* will enter the public domain on January 1, 2060.<sup>72</sup> In 37 years, which version of *Charlie and the Chocolate Factory* will kids want to read? Will they read about the African pygmies that Wonka discovered and shipped to England to work for him? Or just the "small men" or, more recently, the "small people" that work in the chocolate factory? Will Augustus Gloop be "fat" or merely "enormous," or perhaps a new word will replace the description

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<sup>71</sup> Abby Liebing, *The Man Who Changed the N-Word in Huck Finn*, *Collegian* (Oct. 24, 2019), <https://hillsdalecollegian.com/2019/10/the-man-who-changed-the-n-word-in-huck-finn/> [https://perma.cc/423B-FFXN].

<sup>72</sup> What *Could* Have Entered the Public Domain on January 1, 2021? Under the Law that Existed Until 1978 . . . Works from 1964!, *Ctr. for Study Pub. Domain*, <https://web.law.duke.edu/cspd/publicdomainday/2021/pre-1976/> [https://perma.cc/3T6F-TZGL] (last visited Sept. 16, 2023) (discussing the Copyright Term Extension Act's delay of the copyright expiration date for books published in 1964 from January 1, 2021, to January 1, 2060).

of his appearance? Classic books, especially children's books, have been and will continue to be revised for artistic or economic reasons, to increase popularity and appeal, and to remain relevant to modern readers. At its core, the controversy about editing classic books is about the rights, power, and benefits that copyright bestows upon authors and copyright holders in exchange for their creation of valuable works of authorship. Consequently, authors and copyright holders also undertake a responsibility to educate and shape attitudes and minds through their books.

In the meantime, editors who contribute original and expressive revisions to classic children's works can create derivative works in their new editions, allowing those editors to assert copyright in their new contributions. As discussed above, several editors of classic books have claimed copyright in the new illustrations or new editions of their books. Sometimes those derivative works are created from works that are in the public domain. Other times, derivative works are created from works that are still protected by copyright. Because new expression in derivative works enjoys new copyright terms, many original classic books are in the public domain or could be in the public domain before their updated editions. This practice could encourage editors to make substantial creative contributions to classic books, such as re-illustrating books, re-writing stories, re-creating characters, or re-telling stories, allowing those classic books and stories to reach new audiences. At the same time, the practice can be susceptible to misuse by editors who assert copyright to trivial edits and create the practical effect of extending exclusivity to classic books that are in or should soon be in the public domain. Copyright must strike a balance to ensure follow-on creativity is encouraged and editors are rewarded for updating classic books to suit a modern audience and readership, but also guard against the inadvertent consequence of diminishing the public domain of classic books.