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# **DISSEMINATION MUST SERVE AUTHORS: HOW THE U.S. SUPREME COURT ERRED**

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## **DISSEMINATION MUST SERVE AUTHORS: HOW THE U.S. SUPREME COURT ERRED**

WENDY J. GORDON

ABSTRACT. The US Congress has enacted expansions of copyright which arguably impose high social costs and generate little incentives for authorial creativity. When the two most expansive statutes were challenged as unconstitutional, the US Supreme Court rebuffed the challenges, partly on the supposed ground that copyright law could legitimately seek to promote non-authorial interests; apparently, Congress could enact provisions aiming to support noncreative disseminative activities such as publishing, or restoring and distributing old film stock, even if authorial incentives were not served. Such an error might have arisen because of three phenomena (in economics, history, and law, respectively) that might easily be misunderstood but which, when unpacked, no longer lead plausibly to a stand-alone embrace of disseminator interests. The purpose of this article is to analyse and comment on this error from several relevant points of view.

### 1. INTRODUCTION: THE ERROR OF THE SUPREME COURT

In 1998, the United States Congress extended the already long copyright term by another twenty years. Challengers to the statutory extension brought lawsuits claiming that the extension was unconstitutional and thus invalid. In support of such a challenge, seventeen noted economists, including five Nobel laureates, signed a brief submitted to the Supreme Court (see Akerlof et al., 2003). In this nearly unprecedented document, the economists jointly stated that the then-recent extension of copyright term in the US could not appreciably increase incentives to authors (Akerlof et al., 2003, pg. 2).

By implication, the economists' brief backed the common wisdom: that when the American Congress extended copyright from life of the author plus fifty years to life-plus-seventy, the goal was not to encourage new authorship; rather, the industry actors who primarily stood to benefit were downstream copyright holders, primarily companies like Disney that profit by exclusive control over the dissemination of authorial works created long ago. The statute in question, formally known as

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the Copyright Term Extension Act (CTEA), or the “Sonny Bono Copyright Term Extension Act”,<sup>1</sup> was even jokingly referred to as the Mickey Mouse Protection Act (Mickey, a copyrighted cartoon character, was ‘saved’ from the public domain by the enactment of term extension, and the owner of Mickey’s copyright, Disney, had been very active in lobbying for the extension when it was adopted<sup>2</sup>).

A majority opinion of the Supreme Court nevertheless upheld the CTEA (*Eldred v. Ashcroft*, 537 U.S. 186, 2003). In doing so, the Court exhibited some unease with the economists’ brief. The majority opinion indicated that even if a statute doesn’t help authorial incentives, it might be valid if it encourages noncreative behavior that helped knowledge and the arts to progress.<sup>3</sup> For an example, in *Eldred* (537 U.S. at 206-7) the Court cited the way that term extension might encourage some companies to take old films out of mothballs and physically restore the film stock. In the cited passage, the majority opinion states that Congress had “rationally credited projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works” (citing *inter alia* H.R.Rep. No. 105-452, at 4 (1998)).

This twist of reasoning stunned me. Only a few years earlier, in the famous *Feist* case, the same Court had decided that copyright could not extend to noncreative compilations, no matter how much in need of incentives the compilation-maker might stand.<sup>4</sup> In *Feist* the Court had held that only creative works were within the legitimate range of Congressional concern under the Constitution’s copyright clause.<sup>5</sup>

Then, in *Eldred*, a bare eleven years later, the same Court was saying that even although *Feist* was right (that Congress and courts could not grant copyright to noncreative works), Congress could use noncreative activity to justify rules about how creative works were handled.<sup>6</sup>

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<sup>1</sup><http://www.copyright.gov/legislation/s505.pdf> (naming the statute after Sonny Bono, a composer, performer, and Congressman).

<sup>2</sup>See, for example the article in the Chicago Tribune, October 17, 1998 (page 22); “Disney Lobbying for Copyright Extension No Mickey Mouse Effort; Congress OKs Bill Granting Creators 20 More Years”.

<sup>3</sup>Federal power to enact copyright legislation is granted by U.S. Const. art. I, § 8, cl. 8, sometimes known as the Copyright and Patent Clause or the Intellectual Property Clause. It provides that “The Congress shall have Power to . . . promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

<sup>4</sup>*Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 499 U.S. 340, 359-60 (“originality, not ‘sweat of the brow,’ is the touchstone of copyright protection in directories and other fact-based works.”).

<sup>5</sup>The court held that Rural’s telephone directory was not copyrightable because the “age-old practice” of alphabetical arrangement “does not possess the minimal creative spark required by the Copyright Act and the Constitution”.

<sup>6</sup>See *Eldred*, 537 U.S. at 206-7, where it is explained that encouraging noncreative “restoration and . . . distribution” was a valid purpose of the CTEA.

The two cases presented questions that weren't technically identical – *Feist* dealt with works that were noncreative in their inception, while *Eldred* dealt with works that were creative in their inception.<sup>7</sup> Nevertheless the holding of *Feist* seemed to me then, and seems to me now, totally opposed to the essence of the holding of *Eldred*.

What was the result of the *Eldred* Court upholding the extension of copyright for another twenty years? People who wanted to copy and adapt works made between 1924 and 1944 – people who stood ready to post digital versions of those works or to build new creative works out of the old materials – were burdened with an obligation they would not otherwise have had. They could not carry out their plans without seeking out and obtaining the permission of the copyright holders.

This became particularly bad news for efforts like Google Books, which seeks to digitize entire libraries: after term-extension and *Eldred*, thousands of old, about-to-be available books could not be digitized without permission. As another example, the New York Public Library's efforts to digitize a donated collection of over twelve thousand items relating to the New York World's Fair of 1939 and 1940 were burdened by a "time consuming and, ultimately, fruitless" effort to locate extant rights holders.<sup>8</sup> This vain search would not have been necessary but for the increased copyright term upheld in *Eldred*. Similarly, efforts to make publicly available the recently discovered Savory record collection, a "cultural treasure" comprised of approximately "a thousand discs of the greatest [1930s jazz] performers of all time" that do not exist anywhere else, have been outright thwarted due to search costs and liability exposure created by the CTEA (see Seidenberg, 2011). Since many of these (dubbed "orphan works") had copyright owners who could no longer be identified or located, only a risk-loving actor would dare make copies of them.

That in sum was the *Eldred* case, in which the US Supreme Court upheld an extension of copyright term (*Eldred*, 537 U.S. at 194). In it the Court's discussion of film stock restoration and other noncreative disseminative activities was disturbing, but at least the discussion left a bit of doubt whether such activities standing alone could justify a statute enacted pursuant to the Copyright Clause. I therefore still had some hope that the Court didn't really mean that a copyright statute which

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<sup>7</sup>I am indebted to Jane Ginsburg for pointing this out.

<sup>8</sup>From a letter from Ann Thornton, Andrew W. Mellon Director of the New York Public Libraries, to Karyn Temple Claggett, Associate Register of Copyrights, United States Copyright Office, re: Reply Comments to Orphan Works and Mass Digitization: Notice of Inquiry (77 F.R. 204) (Docket No. 2012-12) (March 6, 2013). Available at [http://www.copyright.gov/orphan/comments/noi\\_11302012/New-York-Public-Library.pdf](http://www.copyright.gov/orphan/comments/noi_11302012/New-York-Public-Library.pdf).

prevented works from falling into the public domain could be upheld simply because it assisted noncreative activity.<sup>9</sup> More recently, my hope was largely snuffed out.

In *Golan v. Holder*, decided last year, the Court addressed the question of whether Congress exceeded its power when it enacted a remarkable US statute that pulled works out of the public domain and put them back into private hands (*Golan v. Holder*, U.S. 132 S. Ct. 873, 878, 2012).<sup>10</sup> The Court upheld the statute. In doing so, the majority opinion indicated unequivocally (though over vigorous dissent) that Congress could, in carrying out its Constitutional mandate to “promote the Progress of Science,” legitimately enact provisions extending copyright’s reach even if the statute’s sole effect would be to aid only noncreative disseminators.<sup>11</sup> Wrote the majority, “The provision of incentives for the creation of new works is surely an essential means to advance the spread of knowledge and learning. We hold, however, that it is not the sole means Congress may use “[t]o promote the Progress of Science.”’ (See *Golan* at 889).<sup>12</sup>

Only a historian can tell us what the Framers intended, and so far the historians have not reached consensus on this point. But the constitution and our initial and successive copyright statutes speak in terms of protecting authors. Even the English *Statute of Anne*, which was probably enacted at the urging of disseminator interests (the Stationers’ Company), gives rights only to authors. Further, the Supreme Court’s pronouncement in *Golan* is a sharp departure from centuries of understanding. It is the traditional understanding – that copyright is for “authors” – to which I adhere.

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<sup>9</sup>Compare, for example, 537 U.S. at page 195, stating that Congress had a legitimate purpose in encouraging film restoration, with 537 U.S. at page 227 emphasizing the “overriding purpose of providing a reward for authors’ creative activity”.

<sup>10</sup>The Court upheld 17 U.S.C. § 104A, which had been adopted to further US compliance with the Berne Convention. Under Berne, member nations cannot condition copyright ownership on compliance with formalities; yet under earlier U.S. law, many works over the years had entered the public domain because of a failure to comply with then-required U.S. formalities such as placing a prescribed form of copyright notice on all published copies of a work. Section 104A allowed restoration of copyright in some of the non-U.S. works that had lost copyright in this way.

<sup>11</sup>See *Golan v. Holder* at 888; “Nothing in the text of the Copyright Clause confines the ‘Progress of Science’ exclusively to “incentives for creation. . . Evidence from the founding, moreover, suggests that inducing dissemination – as opposed to creation – was viewed as an appropriate means to promote science.”

<sup>12</sup>Note the institutional solecism of the language. Courts do not ordinary “hold” what a legislative purpose is. Rather they “hold” that a piece of legislation is or is not valid. Yet the Court here “holds” that legislative purpose contains a particular policy. Such a “holding” is a scholarly contention, not a rule of law. As such, it is no more binding than any other statement of rationale. In the common-law system, at least in practiced in the US, consistency of results is more important than consistency of rationale. Therefore, the US Supreme Court is less bound by this purported ‘holding’ than may appear.

In this short essay I will indicate some of the reasons why the Supreme Court and even some of my scholarly colleagues<sup>13</sup> might have stumbled into what I see as an error, and some of the reasons why I think their new interpretation erroneous.

## 2. WHY THE ERROR ARISES

Why does dissemination appear plausible as a legitimate purpose of copyright? First and most obviously, copyright makes dissemination easier, and dissemination is a requisite for Progress to occur. Creativity concealed makes little contribution to the public wealth. Second, both history and contemporary experience show that publishers and other disseminators profit from selling copyrighted works, and that they are active in lobbying for copyright. Third, many copyright doctrines – ranging from now-extinct doctrines that gave special importance to publication, to still-valid rights such as the ‘right to distribute’ – give importance to dissemination.

Given all this, the Supreme Court’s error is not surprising. But the nature of the error and the weakness of its foundations can be revealed fairly straightforwardly. I will first address the analytic issue of dissemination’s economic importance and its role in furthering Progress. Second, I will briefly review the history and experience of publisher involvement in copyright. Third, I will examine the provisions of statute and doctrine that seem to privilege disseminators. It will become clear that disseminators are honored in copyright only for the purpose of assisting authorial incentives.

## 3. ECONOMIC ANALYTICS AND THE ARROW INFORMATION PARADOX

Economic analysts sometimes describe copyright law as a compromise between its positive effect of inducing initial creativity, and its negative effect of reducing dissemination. The negative effect arises because, once a work is created, copyright enables the work to be priced above marginal cost and thus reduces the number of copies disseminated. If each copy were priced at marginal cost, by contrast, more people would buy copies than they buy at the higher, copyright price; every person who values a copy above marginal cost but below actual price does without. That consumer then shifts his or her purchase to a less-desired resource, giving rise to the social burden of ‘deadweight loss’.

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<sup>13</sup>See, e.g., Barnett (2013), who argues that “[c]opyright is best conceived...as a system for incentivizing investment by the intermediaries responsible for undertaking the capital-intensive tasks required to deliver a creative work from an individual artist to a mass audience”; Cohen (2007), who concludes that a good copyright system must take into account goals other than encouraging creators, such as the “control of copying, manipulation, and derivation” exercised by disseminators, which “enables the organization of entire sectors of economic activity in ways that produce a variety of concrete benefits, ranging from jobs and exports to an independent expressive sector to cultural ‘solidarity goods’”. Also see Pollack’s (2001) meaning of “Progress” in the Copyright Clause.

Determining the extent of the deadweight loss is complex and difficult, even if one were to overlook the empirical problems of gathering data. Stan Liebowitz (see Liebowitz, 1986, and also the discussion in Gordon, 2002) has provided the best graphical depiction of the conceptual complexity;<sup>14</sup> at its center lies the perception that copyright produces pure social gain for those works that would not have arisen but for copyright's incentives. Deadweight loss arises only as to works that would have been produced in the absence of copyright, or would have been produced in the presence of a much shorter (or otherwise more limited) copyright. Much lively debate surrounds the question of what kind of fine-tuning copyright needs in order to ensure that social gain exceeds social loss.

One thing that has emerged from the debate is a clear recognition that although copyright can reduce the number of copies held by the public, it can also *aid* dissemination. This is a central point made early by Richard Watt's book (Watt, 2000) on copyright economics: that the so-called tension between incentives and access is overstated. Like any sort of property, copyright can, in the right circumstances, foster access and dissemination. The prospect of above-marginal-cost pricing entices publishers who might not otherwise take the risk to engage in distributing creative works to the public.

The pro-dissemination function of intellectual property law is highlighted by the Arrow information paradox. Arrow's story goes roughly like this: The creative person has an inventive idea which is potentially profitable; to find someone to disseminate the idea, the creative person must reveal the idea; in the absence of legal protections, a potential disseminator could walk off with the idea without paying; the prospect of losing the idea to the potential disseminator would keep the creative person silent; lacking information about the content of what he or she is expected to pay for, the potential disseminator would refuse to license or buy; and the idea would go undisseminated. Ergo (it is said), intellectual property rights (IPR's) are needed to give the parties a way to escape the paradox: IPR's enable the creative person to disclose the idea without fear that the potential disseminator will be able to refuse a deal yet walk away to profit from the creative's idea.

Needless to say, even if the Arrow paradox exists in some situations, it does not 'prove' a need for intellectual property. At most it proves the need for some kind of legal protection, and personal rights (arising out of *in personam* doctrines such as breach of confidential relations and quasi-contract) are often adequate to discourage disclosure after negotiations fail. Personal rights pose much less threat to public liberty than do *in rem* property rights such as patent and copyright. In addition, Michael Burstein (Burstein, 2013) and others show that legal protection

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<sup>14</sup>Liebowitz makes clear that deadweight loss isn't all-or-nothing. Deadweight loss will vary across a range of different works.



against uncompensated disclosure can even be rendered unnecessary by many non-legal devices (such as piecemeal disclosures during negotiations, or there being a high level of know-how required before an idea can be effectively exploited).

Moreover, the Arrow paradox has much more force when applied to inventorship (the domain of patent law) than when applied to authorship (the domain of copyright law). If we follow William Baumol's advice to this very forum (Baumol, 2005) and apply the Arrow paradox to authorial works, we find that the disclosure paradox has much less applicability than it did to inventions.

Inventions are typically inputs to other products, such as providing those products an improved method of manufacture. Inventions can, for example, reduce the cost of production (consider the cotton gin) or increase the quality of the output (consider the invention of coca cola's taste). Therefore an inventor who lacked post-disclosure protection for ideas might be able to avoid disclosure entirely. The inventor might instead use his or her invention behind closed factory doors to produce the ultimate product at a reduced price or improved quality, and not need to sell – or disclose – the invention itself.<sup>15</sup> So for inventions, legal protections such as patent can make the crucial difference in the decision whether or not to disclose the idea.

By contrast with inventors, authors typically have no option of using their ideas without disclosing them. If authors produce an input, e.g., a composer preparing a score for use in a movie soundtrack, the input is valuable only if is disclosed; the music must be heard when the movie plays. It's conceivable I suppose that novelists, painters and singers might sometimes produce concealable inputs (as do the writers of computer programs, who are generally seen to be an exception to the whole statutory scheme),<sup>16</sup> but usually what creative authors produce are either inputs meant to be expressed, like the score for a movie, or the ultimate products themselves – the novel, the graphic design, the symphony. The primary ways to profit from such things are to publish, distribute, or perform them – leaving the creator forced to disclose to the public if he or she is to profit at all.<sup>17</sup>

Having little ability to profit without disclosure, creative persons who lacked rights to control post-disclosure use would nevertheless be forced by economic necessity to disclose and take their chances.<sup>18</sup> Thus, applying the Arrow analysis to

<sup>15</sup>Trade secrecy law can be important in making the produce-it-yourself option practicable.

<sup>16</sup>In the U.S., computer programs receive copyright protection, albeit narrow protection, on the theory that computer programs are 'authored' works. In many ways, programs are unsuited for copyright, being atypical in many ways from traditional creative works – most obviously, in being functional components of machines. The classic source here is Samuelson et al., (1994).

<sup>17</sup>I suppose another route is to have the luck to find a *very* rich and eccentric individual collector.

<sup>18</sup>The same might apply to inventions that cannot be kept secret because, for example, they disclose their secrets on their face – consider the safety pin. As to such inventions, trade secrecy law is unavailable. In such cases, the inventor has as strong a desire for post-disclosure rights as does an author, and would feel the same pressure to disclose despite the absence of IPR's.

copyright-industry circumstances shows that a right to control post-disclosure dissemination of ideas tends to be more important for inventors (who will conceal if they cannot control disclosure) than it is for authors (who cannot afford to conceal). The analysis suggests that IPR's give society more when inventions are involved than IPR's give to society when the subject matter is authorial work.

Nevertheless, even for authorial works dissemination is sometimes assisted by copyright. Copyright increases the profit from selling authored works, and thus encourages publishers to take the risk of paying authors for permissions. Whether we still need as much encouragement to publishers as we used to need is an open question – copyright certainly seems less necessary for dissemination in a world of easy digitization and virtually free dissemination by internet. But investigating that question would take us too far away from my central thesis.

So: let's assume that copyright makes it easier for disseminators and authors to make deals, and that these deals are welfare-enhancing. How do they enhance welfare? Predominantly by encouraging publishers to pay authors, either for licenses or assignments. And the prospect of payment induces more creative activity. One might say that the primary claim that publishers have to payment via copyright is as an 'agent' of the author with whom they have made a contract.<sup>19</sup>

Later I will examine what other, subordinate claim publishers might have. But for now, just note the simple point: that it is only those publishers who pay authors who would face a prisoner's dilemma if copyright were lacking. In a world without post-disclosure legal rights, publishers who pay authors are the ones who face ruinous price competition at the hands nonpaying competitive copyists. Publishers who don't pay authors are already able to price at a low level.

In sum: dissemination is important to Progress. Copyright aids dissemination by inducing creation of the things to be disseminated and inducing disseminators to pay creators. The crucial fulcrum is the creative author. By themselves, dissemination industries need to prove why they need legal protection against imitation any more (and no less) than do other industries.

#### 4. PUBLISHER INVOLVEMENT IN COPYRIGHT: HISTORY AND EXPERIENCE

Publishers do profit from copyright. Given any gain to be reaped by cooperation, it is always possible for one or the other party to obtain a larger share because of factors such as bargaining strength, greater knowledge, negotiation skills, or uniqueness. Aside from 'star' authors, like movie stars<sup>20</sup> and best-selling novelists,

<sup>19</sup>I am indebted to Richard Watt for the 'agency' analogy.

<sup>20</sup>Actors are authors. Acting is a creative activity protected via the copyright in audio-visual works (17 USC §102(6)), the copyright in pantomimes (§102(4)), and the copyright in sound recordings (§102(7)). See also Kastenmeier et al. (1976) which explains the grant of copyright protection to "pantomimes and choreographic works", and *Mannion v. Coors*, 377 F.Supp.2d 444 (S.D.N.Y.

it is likely that more monetary gains from author-publisher deals accrue to the publishers than to the authors. But these real world facts say nothing about why copyright was created in the first instance, or about whether copyright would be justified today if it served solely to increase publisher revenues.

That disseminators profit from copyright explains their involvement in copyright lobbying. But when courts consider the sources of legitimacy for a challenged statute, no decision I have ever read lets its answer rest on ‘whose pressure produced the statute’. (Admittedly, it’s a short step from “who put pressure on” to “whom did Congress mean to benefit,” but if the Constitution picks a limited set of beneficiaries for a particular form of assistance, then Congress isn’t free to choose).

In short, it is no wonder that publishers have profited from copyright (and of course, some disseminators also profit from *absence* of copyright).<sup>21</sup> It is thus also no wonder than disseminators are involved in lobbying. Neither phenomenon suggests that copyright law should serve disseminator interests.

##### 5. THE PRESENCE OF DISSEMINATION AND PUBLICATION IN COPYRIGHT STATUTES AND DOCTRINES

A third reason for the Court’s error is the undeniable fact that dissemination has always had an important place in American copyright law. Most important for the *Golan* Court was the pre-1978 rule that subjected American copyright law to a great divide whose border was publication.<sup>22</sup> State copyright, termed ‘common-law copyright’,<sup>23</sup> governed a work prior to publication. After publication, federal statutory copyright law governed the work.

Publication definitionally involved distribution of copies; mere disclosure by oral communication would not be “publication” no matter how far an oral broadcast reached. In the days when common-law copyright was born, an oral communication would not reach far. Technologies like tape recording and electronic broadcasting were unknown, and exact note-taking difficult. So unpublished works were largely private works, or works only known to a limited group.

Also important to some defenders of the Court’s position might be the portion of the copyright statute that grants copyright owners a right to control the dissemination of copies. In the first US copyright statute of 1790, that was the exclusive right to “vend”; today it is the “exclusive right of distribution”.

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2005), which provides that an important basis for granting copyright protection in photographs is the creativity involved in “create[ing] the scene or subject to be photographed”.

<sup>21</sup>For example, photocopy machinery is more valuable the more works that can be copied free of legal restraint.

<sup>22</sup>The publication-based distinction between unpublished (state) and published (federal) copyright laws was abolished by the 1976 Copyright Act, whose provisions became effective January 1, 1978.

<sup>23</sup>The same terminology applied whether the state copyright law originated from caselaw or statute.

**5.1. Publication as a border between federal copyright and state common-law copyright.** The Court's reliance on the pre-1978 publication rule (that publication divided federal from state copyright) is puzzling. As mentioned, that rule evolved in old economies that lacked sound recording or broadcast technologies, and in such economies access to works was usually quite limited until an authorized general dissemination of copies occurred.<sup>24</sup> It would therefore have been hard for the public to gain access to an unpublished creative work without violating some kind of non-copyright law (Gordon, 1989). To make a copy, the potential copyist would have to violate trespass law to enter the author's home or office in order to see the original; violate conversion and theft prohibitions in order to take the document; or violate the contract or confidential relation under whose shelter he was given a copy. It thus makes sense that pre-dissemination, state law was allowed to create a right against copying to fill in whatever gaps in control that the established laws of trespass, conversion, theft and contract left open. Relatedly, common-law copyright lowered the incentive to fill the gaps by engaging in wasteful self-help.<sup>25</sup> State control over copying in such a context was not much of an additional incursion on liberty.

But after publication, the only way for an author to control dissemination would be through the long arm of special copyright laws. And at that point, public liberty would indeed be at stake, and significantly so. Recall that all the famous Anglo-American cases addressing whether copyright existed at common law, or whether instead copyright needed a statutory base, arose on the issue of whether copyright could exist without statute *after publication*.

Before publication, common-law copyright was uncontroversial. After publication, only nationwide rights to control copying and use made sense. It was consideration of factors such as potential threats to free speech, incursions on competition,

<sup>24</sup>A caveat: I must admit that some unpublished oral works, such as prominent sermons, speeches, and oral judicial opinions, were reported to the public in organs such as newspapers or commercial court reports. Some of these reports may have been verbatim (exact) transcripts of the texts delivered. To the extent they were 'unauthorized' distributions, such disseminations would not have robbed the speeches' authors of their common-law copyrights, even though the general public had some access to the texts. The reason for the oddity (that state law could continue to protect some texts that had entered the public discourse) probably lies with the harsh consequences that would have followed from treating unauthorized publications as divesting common-law copyright. As Arthur Leff taught us, no law exactly matches any rationale with exactitude. See Leff (1974) (and yes, I see the applicability of Leff's point to the whole quarrel over what copyright 'means').

<sup>25</sup>This is also how trade secret laws operate. Like common-law copyright, they are state-created gap fillers. Trade secrecy laws are known also to have a special virtue of preventing wasteful arms-races; see Friedman et al., (1991). I argue that copyright, too, prevents wasteful expenditure. Without copyright, publishers might resort to expensive self-help options that lead to arms races, like issuing the below-cost 'strike editions' mentioned by Breyer (1970). Copyright can also eliminate some of the incentive to develop and adopt physical restraints on copying such as digital encryption and 'digital rights management' (DRM), also known as 'digital restrictions management.' See "What is DRM?", [http://www.defectivebydesign.org/what\\_is\\_drm\\_digital\\_restrictions\\_management](http://www.defectivebydesign.org/what_is_drm_digital_restrictions_management)

and the scope of behavior that crossed state lines, that made federal intervention the only kind of intervention that made sense.

So no wonder federal law before 1978 usually premised federal copyright upon proof of publication.<sup>26</sup> Only after publication was federal protection (and federal limits on protection, such as limited duration<sup>27</sup>) needed. The jurisdictional decision to use publication to divide federal from state copyright law gives no evidence for the proposition that serving publishers' interests was among the goal of the Constitution's Framers. Nor is any such evidence provided by the decision to bring unpublished works into the federal realm once recording technologies had advanced. When tape recorders and broadcast technologies became ubiquitous, the notion that oral presentations could not 'publish' became absurd.

**5.2. The exclusive right over distribution.** The U.S. right of distribution reads as follows (17 USC §106(3)):

“Subject to [fair use and other limitations including the first sale doctrine],<sup>28</sup> the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

. . .

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;”

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<sup>26</sup>Even pre-1978, some kinds of works could obtain federal copyright by applying for it, and did not need to wait for publication. The 1976 Copyright Act, largely to avoid wrangles over what constituted 'publication', brought all other unpublished works within the federal umbrella so long as the works were written down, tape-recorded, or otherwise "fixed" under the authority of the copyright owner. The 1976 Act became effective in 1978.

One wrinkle arises from the fact that under common-law copyright, duration of unpublished works was perpetual. Once they were covered by federal law, however, their copyrights would last only for a finite number of years. A challenge for my perspective is how, when Congress drew all unpublished and 'fixed' works under the federal mantle, the new statute encouraged the publication of long-unpublished manuscripts, songs and other art works: Congress promised an extra term of years if they were published promptly (17 USC §303). While not 'proving' anything about what the Framers themselves intended, section 303 might suggest that the 1976 Congress took encouragement of dissemination as legitimately within copyright's purview.

<sup>27</sup>Common-law copyright (i.e., state copyright) was perpetual.

<sup>28</sup>As the statute notes, there are many limitations on the distribution right. Most important is the first sale doctrine, embodied in section 109(a), a principle also known as "exhaustion." Section 109(a) provides that, "Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." Note that the first sale doctrine by its terms only immunizes the resale of "lawfully made" copies. It has no applicability to unlawfully made copies, such as magazines containing plagiarized or otherwise unauthorized copyrighted text, or canvases bearing forged copies of copyrighted paintings.

The role of the distribution right is simple to explain, and has nothing to do with protecting publishers *per se*. Without a distribution right, copyright law's grant of rights to authors would be largely toothless.

Without the right over distribution, forgers and other copyists could sell their unlawful copies to unknowing retailers and then scamper, leaving the retailers (the only ones left on scene to sue) immune to judgment. Neither of the two established copyright doctrines of secondary liability, namely contributory liability and secondary liability, would reach them.<sup>29</sup> Or the copyists might not flee, but might spend their profits before they are caught. This would again leave retail sellers the only entities capable of paying a copyright judgment. Without the distribution right, again those unknowing retail sellers would be immune from suit. Moreover, without the 'distribution right' there might have been no basis on which to stop the retailers from selling the copies<sup>30</sup> and thereby increasing the harm the authors would suffer.

Admittedly, had there been no distribution right, the doctrines of secondary liability would certainly have evolved to make distributors liable and to enable authors to enjoin the distributor's sales of illegally-made copies. This kind of expansion of secondary-liability doctrine is precisely what happened in the *Grokster* case. There defendant peer-to-peer computer programs enabled unlawful copying by third parties. Essentially because the programs provided the most vulnerable "bottleneck" to stop the copying,<sup>31</sup> to snare them the Supreme Court added a new type of secondary liability ('inducement' liability) to the list of doctrines which could make a non-copyist liable.

But rather than twisting doctrines of secondary liability to fit, it makes more sense to cut the Gordian knot (may I now call it the Gordon knot?) and simply make

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<sup>29</sup>Under copyright law, vicarious liability requires proof that the defendant had some control over the violative act. If a retailer had no control over the copying, he would therefore not be liable under vicarious liability. An alternative theory of secondary liability is contributory liability. However, in copyright such liability will be imposed only if the proof shows the defendant had knowledge of the infringing activity. An unknowing retailer would thus not be subject to secondary liability.

<sup>30</sup>It is true that once a retailer knows a work was unlawfully made, he or she has knowledge, and knowledge is a component of contributory liability. But for contributory liability to attach, the knowledge must combine with some assistance (some contribution) to the infringing activity. If the infringing activity is only the copying – if distributing an unlawfully copied work is not by itself a direct infringement – then the retailer is not contributing to an infringement. Thus, under established secondary-liability law, and without the distribution right, copyright owners would have been unable to stop distribution of forged or plagiarized material even after the distributor learned the truth of the copies' origin.

<sup>31</sup>*MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). The defendant had provided software that enabled others to unlawfully download and upload copyrighted works to the internet. Wrote the majority: "When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability . . .".

all distributors of unlawful copies liable. Cutting the Gordian tangle of secondary-liability doctrines is what the distribution right accomplishes.

Because ignorance and good faith are not defenses to a civil copyright action, the distribution right puts the burden of inquiry and insurance on parties probably able to bear it. It further ensures that copyright owners can obtain from a retailer some share of the profits made knowingly or unknowingly from their work.

So yes, there is a right of distribution. But its function is to assist authors, not distributors. Once explained, the existence of a 106(3) right of distribution should stop confusing observers into thinking that distributors themselves are the subject of the statute's solicitude.

## 6. PUBLISHER CLAIMS BASED ON THEIR OWN EFFORTS

**6.1. Nature of the claims.** There are several arguments that proponents could raise in support of the more modest idea that distributors' interests are part of copyright's legitimate goals – or at least, the idea that their interest need some form of protection against copying. For instance, entirely apart from their investments in creators (such as the large advances commanded by successful authors), publishers could be said to invest in typesetting and typography; in the infrastructure of advertisement and distribution; or in the machinery of choice and the making of reputations.

### 6.2. Why the claims fail.

**6.2.1. In general.** Most of these claims run into difficulties fairly quickly. For instance, in the days of the Framers, typesetting was a labor-intensive and time-consuming process, and the lack of photocopy machines made it impossible to free-ride on typesetting: any duplicator would have to put in the same amount of effort. And typefaces are excluded from the sphere of copyright.<sup>32</sup> Moreover, manuscripts today are easily scanned and transformed into digital form, often using industry, and world-wide, standard typefaces, which means that *both* original publishers and purported free-riders might contribute little or nothing in the way of typesetting or typography.

As to investment in advertising or distribution infrastructure, such overhead costs accrue to any business with a wide market. Proof is needed if we are to believe they do not apply equally to book publishers, electronics, athletic brands, foods, and even service industries like airlines. It is difficult to see why publishers or other distributors should be able to claim special protections – in effect, special subsidies – for these common costs of doing business.

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<sup>32</sup>The Copyright Act does not extend copyright protection to typefaces. In its report, the House Judiciary Committee explicitly stated that it “[had] considered, but chosen to defer, the possibility of protecting the design of typefaces.” H.R. REP. NO. 94-1476 at 55 (1976).

Other arguments, such as pleas based on the high advances and royalties that distributors pay to ‘star’ creators (see Barnett, 2013, pg. 15),<sup>33</sup> are not truly arguments in favor of special solicitude for distributors. Rather, like traditional copyright justifications they turn on rewarding or incentivizing a creator. The only difference is that rather than the public directly paying the artist a high price for her work, the public pays the distributor, which in turn pays the artist for the right to exact that high price from the public. Thus, the crux of the justification is the claim of the artist, whose economic argument in turn is a purported need to incentivize creative activity.

6.2.2. *Evaluative judgments, cherry-picking, and the Price System.* The argument that holds the most water is, perhaps, that publishers make a unique and costly contribution by evaluating and choosing which works to publish. Further, it is sometimes argued, if a publisher publishes ten books, and only one of them is a hit, the publisher can still use the profits from that one to subsidize the other nine, thus increasing the overall choice available to the public and increasing the chances that the next, latent bestseller will get the exposure it needs to take off. However, the publisher’s argument might continue, if its profits are leached by cherry-picking competitors who are able to copy and publish only bestsellers, its business model would be destroyed.

This argument has been foundational to some pro-distributor views of copyright. Most notably, Jonathan Barnett consistently emphasizes the evaluative function that disseminators play. For example, he argues that (Barnett, 2013):

“[T]he intermediary-based case for copyright survives the advent of low-cost, high-quality digital technologies for cultural production and distribution . . . . The reason is simple but overlooked. Even dramatic reductions in copying and distribution costs borne by the producers of creative goods make little difference in, and actually exacerbate, the *search and evaluation costs* borne by consumers of those goods and hence, the marketing costs borne by the producers and distributors of those goods. Those costs leave in place the high risk and much of the capital intensity attendant to the production and consumption of mass-cultural goods and preserve a vital role for the large intermediary in cultural goods markets.” (Emphasis added).

Yet evaluation of opportunities is what every business does . . . and what every business shares with others, willingly or not, through price signals.

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<sup>33</sup>In fact, all arguments based on the ‘superstar’ phenomenon (such as those made by Barnett, 2103, pp. 16, 42-44) hinge on the role of the singer, actor, writer, or other creative person, all of whom are ‘authors’ in the legal sense.



Barnett’s analysis disregards the fact that signaling the competition about one’s success is an essential and inevitable part of a decentralized market system’s ability to allocate resources. Ordinarily the function is carried out by pricing. If there is a shortage of water in Austin, Texas, then the price of water will rise and out-of-state suppliers will be motivated to enter the market, increasing the supply and lowering the price. A place on the bestseller list is a similar signal of high demand. It tells competitors that there is a spot in the market that they should move in to exploit.

6.2.3. *Need for comparative institutional analysis.* Granted, in any market there needs to be some lead time of exclusivity, to allow innovators and first-movers to recoup their extra effort.<sup>34</sup> But this is true of everything from hybrid cars to cough medicine. This is not a new counterargument. Indeed, as Justice Breyer commented in his *Golan* dissent (*Golan*, 132 S.Ct. at 909-10), disseminators’ claims to need special protection “can be made by distributors [sic] of all sorts of goods, ranging from kiwifruit to Swedish furniture, [and] has little if anything to do with the nonrepeatable costs of initial creation, which is the special concern of copyright protection.” So the burden is still on the publishers to show why they require so vast a lead time as the life of the author plus an additional seventy years (which is what copyright gives), and simply cannot function with only the lead time that is natural to the market (that is, the time it takes for competitors to accurately identify and duplicate a success). This process cannot be instantaneous; copying ‘the hits’ requires taking the time to determine what really is a hit (as opposed to a flash in the pan), and the hit may reach its peak too quickly to match profitably. In fact, Barnett himself (Barnett, 2013, pg. 31) points out that the popularity of hits declines quickly: few become “‘classics’ for which demand persists beyond a single season.”

This raises another reason to doubt the strength of the disseminator argument. If big hits usually only remain popular for one season, then a few months or a year of exclusive protection should be sufficient to maintain the business model – hardly the author’s life and seventy years beyond. Moreover, copyright extends protection not only against exact duplicators but against all sorts of derivative and subsidiary acts; thus, even if an argument can be made for granting distributors protection against intra-industry competitors, Barnett fails to show why copyright’s sweeping scope of exclusions is the proper vehicle for that protection.

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<sup>34</sup>Lead time is the gap in time between when an initial distributor puts its product on the market and the first date thereafter that a competitor can put out a duplicate. Lead time may be a natural consequence of the market or may be the result of legal mechanisms, as in the case of copyright, which “extends natural lead-time effects during the statutory term of protection ...” (Frischmann and Moylan, 2000).

As Barnett’s arguments are interesting, let us take one more look at his approach. One of his core arguments seems to be that the non-authorial contributions of distributors “are far more capital-intensive than the initial act of creation, require[] skills, equipment, and infrastructure that are not always easily accessible, and are undertaken by [profit-motivated] entities.” (Barnett, 2013, pg. 8). Even if true, it is not clear what the claim proves without comparison to other industries and alternative modes of meeting disseminators’ capital needs.

## 7. CONCLUSIONS

The US Congress has enacted expansions of copyright which arguably impose high social costs and generate little incentives for authorial creativity. When the two most expansive statutes were challenged as unconstitutional, the US Supreme Court rebuffed the challenges, partly on the supposed ground that copyright law could legitimately seek to promote non-authorial interests; apparently, Congress could enact provisions aiming to support noncreative disseminative activities such as publishing, or restoring and distributing old film stock, even if authorial incentives were not served.

Such an error might have arisen because of three phenomena (in economics, history, and law, respectively) that might easily be misunderstood but which, when unpacked, no longer lead plausibly to a stand-alone embrace of disseminator interests. The present article comes to the following conclusions in regard each of these phenomena:

- The first deceptive phenomenon lies in the way that economic tools such as the Arrow paradox focus our attention on how dissemination must occur for social value to arise. This article admits that disseminators’ crucial role deserves appreciation – but argues that their role needs copyright only to the extent that authors need disseminators.
- The second deceptive phenomenon is the strong role that disseminators and related reprographic industries have historically played in the copyright legislative process. The present article points out that having a financial interest in legislation is not equivalent to being a proper beneficiary of the legislation, particularly when the enabling Constitutional language seems not to embrace such post-hoc scramblers for rent.
- The third potentially deceptive phenomenon is the way that publication plays a role in copyright law and doctrine: notably, before 1978 ‘publication’ divided state copyright from federal copyright, and today ‘publication’ is one of the copyright owner’s exclusive rights. (It is part of the right “to distribute”). Here we point out that the division of state copyright from federal was rooted not in the desire to encourage publication but rather

in the need for national regulation and limitation once a work could be accessed by the general population.

- As for the right “to distribute”, the article reveals the right as functioning essentially as kind of simplified secondary liability, that is, a convenient way for authors to enforce their rights against entities who have both ability to pay, and some ability to control the harm done by copyists.

Some commentators who defend the Court’s approach do so by pointing to costly evaluative search tasks undertaken by disseminators. This article points out that offering a ‘hit’ book or movie (the result of an evaluative process) signals success in much the same way as high prices signal success. Since the market system relies on competitors being able to free-ride on the price signals (and evaluation of opportunities) generated by others, a high burden of persuasion rests on any argument that would outlaw competitors from following success-signals.

Only a comparative institutional analysis can show whether disseminator industries need help that is more or different than other industries need, and whether, if such help is needed, copyright and its roughly 95 years of lead-time-advantage is really an appropriate tool.

The Supreme Court probably erred in singling out the interests of non-creative disseminators as being capable of providing legitimacy to controversial copyright statutes. Such an error is understandable. Copyright economic theory puts emphasis on dissemination; disseminators have long profited from copyright and have long been involved in lobbying for copyright; and several doctrines seem to put emphasis on publication. But once these phenomena are examined, it becomes clear that they do not support the Court’s recent interpretation. In my view it is improper to use the interests of noncreative disseminators to legitimate counter-productive provisions such as term extension or restoration of expired copyrights.

Challenges could be raised to my position. Most importantly, if only such dissemination as serves authorial interests is relevant, how do I justify my support for extending fair use to non-creative copying? (Gordon, 1982). And, if only authorial interests matter, does that invalidate seemingly sensible rules like the one that promotes public access to ancient unpublished works by giving their copyright owners an extended copyright term<sup>35</sup> if they publish by a certain date? These issues pose important challenges, and are grist for another day’s milling.

But what does not yet pose a significant challenge is the current scholarship arguing that disseminator industries benefit from copyright. That scholarship contains a valuable first step toward understanding what the economic effects would be of limiting copyright to the incentivizing of authors. But the steps *after* it are the

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<sup>35</sup>See footnote 20 above.

crucial ones, such as resolving whether disseminators need or deserve monopolies more than do other industries; whether disseminators could profit at less social cost by non-copyright modes of assistance; whether the benefits to disseminators from governmental intervention would be outweighed by the costs the intervention imposes on others (such as authors)<sup>36</sup>; and whether, if there were no need to pay the ‘creatives’ – the writers and actors and singers and composers – the disseminators would have much of a claim at all.<sup>37</sup>

The US Constitution speaks not only of a goal – Progress – but also of a means: grants of exclusive rights to authors and inventors. The British inaugural copyright statute may have originated through the pressure of the Stationers’ Company but it too granted rights only to authors. The burden of proof rests on those who would dislodge copyright from its traditional focus.

#### REFERENCES

- Akerlof, George.A. et al.(2003)**, “Amici Curiae in Support of Petitioners”, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618). 2002 WL 1041846.
- Barnett, Jonathan (2013)**, “Copyright Without Creators”, University of Southern California Gould School of Law, Center in Law, Economics, and Organization Research Papers Series, No. C13-7, 2013). Available at <http://ssrn.com/abstract=2245038>.
- Baumol, William J. (2005)**, “Intellectual Property: How the Right to Keep it to Yourself Promotes Dissemination”, *Review of Economic Research on Copyright Issues*, 2(2); 17-23.
- Breyer, Stephen (1970)**, “The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs”, *Harvard Law Review*, 84; 281-351.
- Burstein, Michael (2013)**, “Exchanging Information Without Intellectual Property”, *Texas Law Review*, 91; 227-82.
- Cohen,Julie E. (2007)**, “Creativity and Culture in Copyright Theory”, *University of California Davis Law Review*, 40; 1151-206.
- Friedman, David D., William M. Landes and Richard A. Posner (1991)**, “Some Economics of Trade Secret Law”, *Journal of Economic Perspectives*, 5; 61-72.
- Frischmann, Brett and Dan Moylan (2000)**, “The Evolving Common Law Doctrine of Copyright Misuse: A Unified Theory and Its Application to Software”, *Berkley Technology Law Journal*, 15; 865-915.
- Gordon, Wendy J. (1982)**, “Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors”, *Columbia Law Review*, 82; 1600-57.
- Gordon, Wendy J. (1989)**, “An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory”, *Stanford Law Review*, 41; 1343-469.

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<sup>36</sup>For example, copyright term extension and copyright recapture will prevent some authors who might otherwise have built new works upon old ones from doing so.

<sup>37</sup>In addition, of course, there is the legal question of whether the Constitution empowers Congress to subsidize the disseminating industries through copyright-like entitlements.

**Gordon, Wendy J. (2002)**, “Authors, Publishers and Public Goods: Trading Gold for Dross”, *Loyola Los Angeles Law Review*, 36; 159-98.

**Kastenmeier, R. et al. (1976)**, “Committee of the Judiciary, Copyright Law Revision”, House of Representatives Report No. 94-1476, 94th Congress, 2nd Session.

**Leff, Arthur A. (1974)**, “Economic Analysis of Law: Some Realism About Nominalism”, *Virginia. Law Review*, 60; 451-82.

**Liebowitz, Stanley J. (1986)**, “Copyright Law, Photocopying, and Price Discrimination”, *Research in Law and Economics*, 8; 181-200. Available at [http://www.utdallas.edu/~liebowit/knowledge\\_goods/rle/rle1986.html](http://www.utdallas.edu/~liebowit/knowledge_goods/rle/rle1986.html).

**Pollack, Malla (2001)**, “What is Congress Supposed to Promote?: Defining ‘Progress’ in Article I, Section 8, Clause 8 of the United Constitution, or Introducing the Progress Clause”, *Nebraska Law Review*, 80; 754-815.

**Samuelson, Pamela, Randall Davis, Michell D. Kapor and J.H. Reichman (1994)**, “Manifesto Concerning the Legal Protection of Computer Programs”, *Columbia Law Review*, 94; 2308-41.

**Seidenberg, Steven (2011)**, “A Trove of Jazz Recordings has Found a Home in Harlem, But You Can’t Hear Them”, *American Bar Association Journal*, 97 (5); 47-52. Available at [http://www.abajournal.com/magazine/article/a\\_trove\\_of\\_historic\\_jazz\\_recordings\\_has\\_found\\_a\\_home\\_in\\_harlem\\_but\\_you\\_cant/](http://www.abajournal.com/magazine/article/a_trove_of_historic_jazz_recordings_has_found_a_home_in_harlem_but_you_cant/)

**Watt, Richard (2000)**, *Copyright and Economic Theory: Friends or Foes?*, Cheltenham, UK and Northampton, MA: Edward Elgar.

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