

# ARTICLE

## THE CORE OF COPYRIGHT: AUTHORS, NOT PUBLISHERS

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### ABSTRACT

Copyright largely consists of alienable rights and correlative duties—rights of exclusion given to individuals, and correlative duties not-to-copy imposed on the public. This Article argues that such right/duty pairs arise out of authorial creation. A focus on creation is not very popular at the moment; a growing number of commentators take the position that copyright is “about” making publishing and other dissemination industries more efficient and stronger. The Article encourages the legal community instead to return to the focus that the Supreme Court articulated in *Feist Publications*, namely, that copyright must serve creative authorship rather than noncreative labor.

The Article explores history, legal doctrine, and economics to investigate whether Congress may, for the purpose of aiding publishers and other disseminator industries, impose on the public a set of duties-not-to-copy others’ speech. In *Eldred v. Ashcroft* and

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For comments the Author is particularly grateful to Kathy Bowrey, Lionel Bently, Oren Bracha, Jane Ginsburg, Barbara Lauriat, Jessica Litman, Malla Pollack, Eric Priest, Jessica Silbey, Rebecca Tushnet, and Richard Watt; I also thank participants at Boston University’s Faculty Workshop series, especially Stacey Dogan, Jim Fleming, Paul Gugliuzza, and Keith Hylton; participants at the 2012 Congress of the Society for Economic Research on Copyright Issues; participants at the University of Houston IPIL Symposium at Santa Fe; participants at the 2014 Intellectual Property Scholars’ Conference at Berkeley; and Henry Smith and other participants at the Private Law Workshop at Harvard.

Thanks for research assistance are owed to Alexandra Arvanitis, Justin Roshak, Melissa Rybacki, Kimberly Condoulis, and the amazing staff of the B.U. Law Library.

*Golan v. Holder*, the Court upheld expansions of copyright even in regard to already-created works, relying in part on the possibility that the legislative expansions might incentivize noncreative dissemination. In each case, the contested statutes eliminated what would otherwise have been a public domain status for the works involved. One argument seemed to be that publishers or entertainment companies might repair and reissue more of their stockpiled films, books, or sound recordings, if they owned or could purchase copyright in them, as compared to how many films, etc., the companies would repair and reissue if the works were in the public domain.

But there are far more old works in circulation than hidden in basement stockpiles. It may be plausible that statutorily restoring or extending copyrights might generate some additional dissemination of affected works. It is far less plausible, however, to imagine that the increase might ever be large enough to match the increased dissemination that would have resulted from the public having liberties to copy those works.

Of even more importance is the issue of relevance: much of the new provisions' supposed pro-dissemination impact should have been legally irrelevant to the Court. The Article contends that noncreative dissemination provides legitimate grounds for expanding copyright only when the dissemination assists authorial creativity. (So, for example, a new copyright provision might enhance disseminator profit in a manner that also raised the royalties that authors received. Constitutionally speaking, that provision's only relevant benefits should lie in its ability, if any, to encourage authorial productivity.) An approach that gives more importance than this to dissemination could lead to the one form of copyright ruled out by the Framers, namely, a copyright that lasts forever.

In the economic realm, the Article argues, *inter alia*, that the significance of Arrow's information paradox for the economics of authorship (as distinguished from its significance in the economics of inventorship) lies not in encouraging disclosure and dissemination but in encouraging creation of new work; that much of the pro-publisher economic argument either boils down to serving authorship or lacks persuasive power; and that the speech-restrictive powers that copyright confers are far less suitable tools for aiding disseminators than would be more conventional forms of Congressional aid.

On the doctrinal and historical side, the Article shows how the Court in *Golan* misunderstood the role that "publication" played in federal law prior to the 1976 Copyright Act; the Article presents a descriptive account of early common law copyright that offers a

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distinctive explanation for the role of publication in state law; and the Article examines the language of the Constitutional clause that empowers Congress to grant federal copyright in the first place. The Article also offers a new explanation of the so-called “distribution right” that empowers copyright owners to sue anyone who unknowingly sells unauthorized copies. All these phenomena are shown to support the view that creativity constitutes the core of federal copyright. Finally, the Article asks whether its creativity-centered viewpoint can be maintained without contradicting the doctrine (which I have long supported) that some acts of noncreative copying and dissemination legitimately deserve shelter under the “fair use” doctrine.

—WJ Gordon, with thanks to Michael Zimmer.

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I. INTRODUCTION AND SUMMARY

The Constitution empowered Congress to give authors exclusive rights to further “Progress.”<sup>1</sup> It was hoped that copyright would encourage authors to employ their intellectual and aesthetic faculties—not to mention their time—in creating new works. The instant Article contends that when copyright provisions are challenged on constitutional grounds, courts should look to the effect of those provisions on *authors’* productivity, and courts should not employ, as a justification for copyright provisions, any encouragement the contested provisions might offer to noncreative *dissemination* standing alone.<sup>2</sup>

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1. The Constitution 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.” U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

2. The Federalist Papers sought to persuade the public to adopt the newly proposed Constitution. The following is the Federalist Papers’ entire argument on behalf of the copyright power. Although no one source can be conclusive, it is interesting that this language shows no trace of concern for publishing per se:

The *fourth* class [of powers that the proposed Constitution would grant to the new federal legislature] comprises the following miscellaneous powers: 1. A power “to promote the progress of science and useful arts, by securing, for a limited time, to authors and inventors, the exclusive right to their respective writings and discoveries.”

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provisions for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.

THE FEDERALIST NO. 43, at 268 (James Madison) (Clinton Rossiter ed., 1961), available at <http://www.constitution.org/fed/federa43.htm>.

An exclusive right under copyright is a particular kind of legal tool. One person's exclusive right over reproduction creates in everyone else who might want to creatively reproduce portions of that speech a *prima facie* duty to obtain permission first.<sup>3</sup> That is, every grant of an "exclusive" right over speech creates duties in the public not to speak. That right and its correlative duties are not to be imposed lightly. I argue that under our constitutional scheme, Congress can give private individuals a power to restrain others' speech<sup>4</sup> only when that incentive is linked to encouraging the creation of new authorial works.<sup>5</sup> In other words, if Congress wants

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Whether Madison was right in his assessment that authors had copyright under British common law has been much debated. For a review of the scholarship, and a conclusion that gives some support to Madison's interpretation, see H. Tomás Gómez-Arostegui, *Copyright at Common Law in 1774*, 47 CONN. L. REV. 1 (2014).

3. Duties and rights are correlatives: Where an enforceable right exists, it exists against someone, and that someone is a duty holder. Walter W. Cook, *Hohfeld's Contributions to the Science of Law*, 28 YALE L.J. 721, 724 (1919). So when copyright law speaks of granting rights, it simultaneously and necessarily imposes duties.

Hohfeld's classification of legal relations among private parties is a canonical source for such analysis. Hohfeld meant by the category he termed "right" an ability to call on government to assist. Because most of the relations he discusses have been called "rights" at some time or another, it is common today to call this particular category a "claim right."

The conceptual structure Hohfeld introduced is straightforward. When one lacks freedom to act (because someone else has a claim right), the constrained person has a "duty." When one has a liberty to act, but no entitlement to call on the government for assistance, that person has a "liberty" (Hohfeld called it a "privilege"). Definitionally, where liberty governs, private persons have neither "duties" nor enforceable "claim rights" against each other. *Id.* For example, when someone strikes back at an assailant under the "privilege" of self-defense, she violates no duty, and the injured assailant has no valid "claim right" against her, so long as her self-defense actions remain within the privilege. Rights and duties are correlatives, in the sense that where one of them appears, so does the other. Liberty and no-rights are correlatives, too. *Id.* at 725.

A duty can be asserted not only against a private party but also against a sovereign. Thus, freedom from governmental interference ("liberties") can be backed by "claim rights." Notably, the Bill of Rights created many "claim rights" in the liberties it awarded, and the principle of judicial review requires courts (that is, the courts have a "duty") to strike down legislation inconsistent with the Constitutional liberties. *See infra* notes 72–82.

4. Many commentators argue that courts should explicitly use the First Amendment to limit the legal duties not-to-copy that copyright imposes on the public; usually the idea/expression dichotomy and the fair use doctrine are seen as the primary modes through which free speech interests emerge in copyright. *See infra* notes 72–82. On the connections between private censorship and duration issues, see, e.g., Wendy J. Gordon, *Do We Have a Right to Speak with Another's Language?* Eldred and the Duration of Copyright, in COPYRIGHT AND HUMAN RIGHTS 109–29 (Paul L.C. Torremans ed., Kluwer Publishing 2004).

5. The instant Article examines the scope of federal copyright's goals in regard to only one question: whether publishers have any claim to copyright's legitimate solicitude beyond the extent to which helping the publishers also helps authors. In this Article I do not reach other important questions, such as whether authors and audiences have claims in morality or natural right that federal copyright law should recognize. *See, e.g.*, Universal Declaration of Human Rights art. 27, G.A. Res. 217A (III), U.N. Doc. A/810

to foster other socially beneficial activities, those other activities must be encouraged by other means.<sup>6</sup>

It might be asked, why do I bother advancing this contention now? Hasn't the Supreme Court essentially rejected it both in *Eldred v. Ashcroft*<sup>7</sup> and in *Golan v. Holder*?<sup>8</sup> Those opinions upheld the constitutionality of copyright expansions with arguments that relied on the challenged provisions' providing advantages to *noncreative* activities like dissemination and physically restoring decayed movie stock.<sup>9</sup>

My contention still matters for at least two reasons. First, the Court's language hasn't fully cut off its line of retreat, and retreat

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(Dec. 10, 1948) (addressing in paragraph one the rights of the public to participate, share, and benefit in culture and science, and in paragraph two the rights of authors). For discussion indicating how I think the law should handle some of the areas where author and audience moral claims might intersect, see Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993) (arguing that the Lockean proviso guarantees extensive liberties of use to the public); Wendy J. Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship*, 57 U. CHI. L. REV. 1009 (1990) (highlighting symmetry between author and audience moral claims).

6. For a fascinating analysis that highlights the need to shape justificatory arguments to copyright's role in restraining speech, see Seana Shiffrin, *Lockean Arguments for Private Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 141 (Stephen R. Munzer ed., 2001).

7. *Eldred v. Ashcroft*, 537 U.S. 186, 218–22 (2003).

8. *Golan v. Holder*, 132 S. Ct. 873, 890–91 (2012).

9. *Id.* at 890–91; *Eldred*, 537 U.S. at 206–08, 220. The Court's apparent logic rests on the assumptions (1) that exclusive rights will generate more profits than will the public domain's nonexclusive liberties to publish; and (2) that with the lure of these greater profits, old works will be reissued more often than if the works had entered the public domain.

While the first assumption is plausible, the second is not.

The *Golan* Court's analysis seems to imagine a movie company that owns copyright in a long unseen film (its copyright ownership having been attained either by assignment of copyright or by the company having employed the creative people who made the movie). The movie company decides that saving and reissuing the old film will generate enough profit to warrant the effort *only* during the pendency of copyright and decides it will *not* reissue the movie if the copyright expires. What the imagined story omits is, *inter alia*, the likelihood that if the movie falls into the public domain, others will polish up the aging film stock and reissue the movie. See, e.g., Public Domain Movies, YOUTUBE, <https://www.youtube.com/user/BestPDMovies> (last visited Nov. 10, 2014).

Admittedly, a movie company may have unique physical control of some old films. But access to them can be purchased. Some public volunteers (such as the American Film Institute) have not-insubstantial budgets. See *About the American Film Institute*, AM. FILM INST., <http://www.afi.com/about/whatis.aspx> (last visited Nov. 10, 2014) (American Film Institute archive). Thus, as various scholars have noted, it is plausible that if the movie company did not reissue the movie, public volunteers with or without profit motive would do so. That is one of the things the public domain is *for*.

This Article is, however, not concerned with the resolving the factual debate over whether a greater increase in dissemination would result from extending copyright term or from limiting copyright term. Rather, I argue that dissemination concerns should be incapable of supporting a copyright provision against constitutional attack except to the extent that the dissemination helps incentivize authorship.

may be particularly necessary now; Congress might be pushed to enact ever-more-outrageous copyright statutes now that creativity has been decentered.

Second, our absurdly complex copyright statute needs an overhaul; policymakers might make good use of a gyroscope with some clear direction and simplicity. The common law is an excellent source from which to derive relevant insights: it draws policies from commonsense economics<sup>10</sup> and commonsense morality<sup>11</sup> in characteristic patterns that most lawyers can understand and deploy. These policy strains, and, in particular, their instantiation in tort and restitution case law, might provide helpful alignment for a copyright gyroscope.

Comparing our actual copyright law with the pattern that the common law might have generated<sup>12</sup> can highlight where our current statute may need special justification or need rethinking. And here is the crux, which leads to the instant Article: the common law logic works well only if creating an original work of authorship—not dissemination—is the touchstone.

My analyses of the implications that tort and restitution hold for copyright appear elsewhere;<sup>13</sup> few of those details appear here. Rather, this Article seeks to assess the obstacle that *Golan* puts in the way of doing a sensible common law analysis. Most common law causes of action begin with a volitional act. *Golan* raises doubts about whether the crucial volitional act for copyright is, or is not, authorial creation.

This Article evaluates *Golan* for the purpose of clearing the ground, as it were, in preparation for building the gyroscope.

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10. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (2010).

11. See, e.g., SHELLY KAGAN, *NORMATIVE ETHICS 77 & passim* (1998) (proposing that common-sense morality is a mixture of consequentialism and deontology).

12. For my initial attempt at such an experiment, see Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutory Impulse*, 78 VA. L. REV. 149 (1992) (arguing that the common law of restitution could have generated something like copyright, had legislation not been enacted to serve the relevant need, and setting out the elements of such a cause of action).

13. See generally Wendy J. Gordon, *The Concept of "Harm" in Copyright*, in *INTELLECTUAL PROPERTY AND THE COMMON LAW* 452 (Shyamkrishna Balganesch ed., 2013); Wendy J. Gordon, *Copyright as Tort Law's Mirror Image: "Harms," "Benefits," and the Uses and Limits of Analogy*, 34 MCGEORGE L. REV. 533 (2003); Wendy J. Gordon, *Harmless Use: Gleaning from Fields of Copyrighted Works*, 77 FORDHAM L. REV. 2411 (2009) (with introduction by Sonia Katyal); Wendy J. Gordon, *Trespass-Copyright Parallels and the Harm-Benefit Distinction*, 122 HARV. L. REV. F. 62 (2009). Restitution has a baseline rule that refuses to give volunteer creators of benefits any right to recover payment. For a discussion of how copyright would fare under that rule, see Wendy J. Gordon, *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*, 21 J. LEGAL STUD. 449, 449–82 (1992). See also Gordon, *On Owning Information*, *supra* note 12, at 149.

A brief side note: because the *Golan* opinion made questionable use of the historical artifact known as “common law copyright,” this Article also gives it attention.<sup>14</sup> But that is not the common law I have in mind as a reference-point for the needed gyroscope. In the United States, the only uncontroversial “common law copyright” historically was an entitlement given only to unpublished works; the right was notionally perpetual so long as the work remained unpublished.<sup>15</sup> If *this* was the common law guide I was looking for, I

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14. See discussion *infra* Part V, especially at Part V.D.

15. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 668 (1834). In that case, the U.S. Supreme Court held that there was no common law copyright in published works, and that upon publication an author had to obtain federal protection. Federal protection attached if the author “complied with the requisites prescribed by . . . act of congress.” *Id.* The Court contrasted authors’ pre- and post-publication positions:

That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy endeavours to realise a profit by its publication, cannot be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world.

*Id.* at 657.

The distinction between published and unpublished works lost most of its legal significance when the 1976 Copyright Act came into effect. That statute, which with its many amendments still governs, provides that federal copyright is exclusive for all “fixed” works (that is, works that are written down or otherwise recorded), whether published or unpublished. 17 U.S.C. § 301 (2012).

This Article does not enter the quagmired debate over issues such as whether a common law right in published works of authorship originally existed in Britain *but was extinguished* by statute, or whether a common law right over published works never existed at all. In the United States, our Supreme Court seems to have wavered a bit in its construal of early law, and itself over time changed the law of anticopying obligations arising under common law.

In 1834, the Supreme Court stated that common law rights in published works never existed. *Wheaton*, 33 U.S. (8 Pet.) at 661 (“That congress, in passing the [copyright] act of 1790, did not legislate in reference to existing rights, appears clear . . . Congress, then, by this act, instead of sanctioning an existing right, as contended for, created it.”). Yet in the famous, or infamous 1918 case of *International News Service v. Associated Press*, the Supreme Court itself created/recognized a common law right (pre-*Erie*) against what it called the “misappropriation” of published news. *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 240–41 (1918).

In addition, prior to the time that federal law gave musicians copyrights in their recorded performances, California and New York (and possibly other states) prohibited the unauthorized copying of disseminated sound recordings. The Supreme Court upheld one such law against a preemption challenge. *Goldstein v. California*, 412 U.S. 546 (1973). Although the case addressed a state criminal statute that prohibited copying, there is nothing in the logic that suggests the Court would give different treatment to a judge-made rule. *Id.*; see also *Ferris v. Frohman*, 223 U.S. 424, 435 (1912) (declaring and enforcing, for physically undistributed plays, a common law right of representation that was immune to divestment by public performance). On the evolution of the play right, I am much indebted to Jessica Litman, *The Invention of the Common Law Play Right*, 25 BERKELEY TECH. L.J. 1381, 1385–86 (2010).

In short, common law precedent has changed greatly over the years. Today one of the forces holding it back is the statutory preemptive effects of the copyright and patent statutes.



would have been disappointed. This right of first publication is so deeply rooted in the physical control of the manuscript, and in addressing the relations between the author and particular persons, that some scholars would not call it “copyright” at all.<sup>16</sup>

Historic common law copyright had rationales quite different from those underlying statutory copyright. Common law copyright functioned, I believe, largely as an adjunct to ordinary property rights in a manuscript, and as a prophylactic to reduce undesirable behavior by owners, their associates, and strangers<sup>17</sup> that might otherwise arise around the physical control of unpublished works.<sup>18</sup>

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When the new Copyright Act came into effect in 1978, it eliminated virtually all state copyright in written or otherwise recorded works. 17 U.S.C. § 301. One of the rare exceptions, incidentally, is for pre-1972 sound recordings; their state rights are safe from preemption until the year 2067. *Id.* § 301(c).

What is important for our purposes is that, within the last decade, the Supreme Court argumentation in *Golan* made strategic use of the fact that during much of America’s history, the dividing line between state and federal protection was often “publication.” My discussion below argues that the Court misunderstood the nature and purpose of that dividing line. *See infra* Part V.

16. Ronan Deazley views the common law right of first publication as a physical property right and, as such, distinct from “copyright.” Ronan Deazley, *Capitol Records v. Naxos of America (2005): Just Another Footnote in the History of Copyright?*, 53 J. COPYRIGHT SOC’Y U.S.A. 23, 41–43 (2005). Although I agree that the common law right centered on the physical manuscript, the right of first publication that attached to the manuscript differed from the rights attached to ordinary physical chattels; in my view the differences were large enough that I believe the eighteenth century right of first publication deserves the “copyright” label.

I do not think anything for instant purposes turns on the terminological difference between us; Professor Deazley and I agree on the essential point, that unlike current copyright, historical common law copyright focused on the author’s physical control.

17. Ownership of an object containing valuable secret information can give rise to undesirably extensive self-help by its owner; trade secrecy law and common law copyright both minimize wasteful defensive measures by buttressing less than perfect defenses. Similarly, a valuable manuscript may prompt strangers to engage in undesirable hard-to-prove acts (such as bribery or trespass) by persons wanting access to the secret. A law that prohibits copying the secret information or the manuscript discourages these unlawful acts. *See* David D. Friedman, William M. Landes & Richard A. Posner, *Some Economics of Trade Secret Law*, J. ECON., Winter 1991, at 61, 61–64, 69.

18. *See supra* note 15 and accompanying text; *see also* Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1453–54 (1989).

What I present here does not purport to offer a diagnosis of the full range of historical phenomena linked with common law copyright, even within the United States. Many distinct American doctrines have arguably hidden under the single label of common law copyright, and, conversely, some doctrines that deserve the “common law copyright” label pass under various other rubrics. Common law jurisdictions outside the United States have wrinkles of their own. I address only the aspects most relevant to the *Golan* position on dissemination.

Nevertheless the reader might find the following droplet of interest: The only time the U.S. Supreme Court evaluated a state common law right in unfixed performance, it ruled state protection acceptable *because the plaintiff sought not to stop the defendant’s activity but only to be paid*. *Zacchini v. Scripps-Howard*, 433 U.S. 562, 576–78 (1977) (performance by “human cannonball” was filmed and broadcast without his authorization;

That copyright in unpublished works was thought “perpetual” can be explained by the close link that existed between undisseminated works and control of a physical manuscript copy. The importance of controlling the perpetually-owned physical object led, I think, to a parasitical rule that the copyright in the manuscript should also be perpetual so long as physical control was maintained by lack of publication.<sup>19</sup>

If, as I argue further below, historical common law copyright in unpublished works served as an adjunct to physical control,<sup>20</sup> it more resembled trade secret law<sup>21</sup>—a cause of action granted largely to prevent innovators from overinvesting in self-help,<sup>22</sup> to discourage outsiders from violating existing contractual, relational, or real property rights, and perhaps, but not only to, preserve incentives—than it did a property right in an intangible.<sup>23</sup> As such, historical common law copyright is less relevant to formulating copyright policy today than are the policies of economics and moral judgment found in general patterns of tort and restitution law. As will appear, the historical artifact known as “common law copyright in unpublished works” therefore has a limited role in this Article: to help us assess whether the *Golan* opinion overstated or misstated the role that “publication” played in that doctrine.<sup>24</sup>

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the performer’s common law right, labeled “right of publicity,” was upheld against a First Amendment challenge). As I argue in the text accompanying *infra* note 69, copyright is most problematic when it is enforced through injunction.

19. Similarly, trade secret protection lasts only so long as the “owner” maintains protection for the secrecy. When the owner allows his or her physical fences to come down, so do his or her trade secret rights.

20. See discussion *infra* Parts IV.D, V.A–D.

21. Of course, I am hardly the first person to see parallels between common law copyright and trade secrecy. See, e.g., Note, *Necessity of Intent for Infringement of Common-Law Copyright*, 54 YALE L.J. 697, 699 n.5 (1945).

22. This view of trade secrecy as a means to prevent a self-help arms race (“Is my new wall higher than your new ladder?”) was probably first introduced by Friedman, Landes & Posner, *supra* note 17, at 61, 61–64, 69. The Arrow information paradox, discussed *infra* Part IV.D, indicates another linked reason for trade secrecy law: without legal protection, insecure inventors might be too fearful to find investors and collaborators.

Alternative views of trade secrecy—as a mode of incentivizing innovation, as found in *Kewanee Oil Co. v. Bicron Corp.*, or as a mode of enforcing commercial morality—have some merit as well. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 482, 491 (1973).

23. The pattern of words, colors, sounds or symbols that make up a “work of authorship” can be memorized and later duplicated and performed without the copyist ever touching the original embodiment of the work. (This was a linchpin in the plot of Ray Bradbury’s famous novel *Fahrenheit 451*: in a book-burning society, the rebels saved literature from being lost for all time by memorizing books.)

The ability to use the work without touching it leads to the work of authorship being called an “intangible.” The work itself is the intangible *pattern*; by way of contrast, a *copy* is the tangible embodiment of the pattern. See generally Wendy J. Gordon, *Intellectual Property*, in THE OXFORD HANDBOOK OF LEGAL STUDIES 617, 617–46 (Peter Cane & Mark Tushnet eds., 2003), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=413001](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=413001).

24. See *infra* note 158 and accompanying text.

Returning to the main argument:

Under the Constitution, Congress can grant a copyright (and impose its correlative duties) only for “limited Times.”<sup>25</sup> Common law economic and moral logic does indeed lead to duties that stop short well before perpetuity,<sup>26</sup> but that is true only so long as a particular act, such as creating a work of authorship, is put at the core. The view that noncreative dissemination standing alone can justify imposing on the public a duty not to copy would by contrast lead to a *permanent* duty not to copy, surviving eons after the person whose efforts gave birth to the duty is gone.<sup>27</sup>

If the rights for a work begin *once*, those rights will be limited in duration by the common law logic that we see in, for example, proximate cause. Proximate cause limits a plaintiff’s rights where intervening events, time, distance, or coincidence results in an injury being caused in an unforeseeable manner. Negligence law does not bother to impose liability for results that are unforeseeable largely because liability cannot encourage people to avert dangers that they do not perceive.<sup>28</sup> For proximate cause to be a meaningful concept, there must be an action from which to evaluate the effects caused. And because “limited Times” is a central feature of federal copyright, the rights attached to a creative work must have reference to a nonrecurring action.<sup>29</sup> Given copyright’s history, that nonrecurring behavior must be an act of creating a work.

For any particular version<sup>30</sup> of any particular expressive pattern, creation can happen only once; by contrast, dissemination of the same version can continually recur. If the rights can be

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25. U.S. CONST. art. I, § 8, cl. 8.

26. See *infra* Part III.

27. Perpetual land ownership is often traced back to some ancestral act of occupation, and it may be wondered why copyright should be treated differently. For example, Nozickian fans of historical justification do not see much problem with allowing ownership to be legitimized by long-ago acts. See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 174 (1974). But they are focusing on land and other tangibles, which may need “an owner” to be managed well; if “an owner” is needed (a question of course much debated), historical chains of title provide as good a source as many. Unlike tangibles, however, works of authorship need not be owned by any one person or entity to be used efficiently and well; often common ownership (“public domain” status) is the most productive status. Nozick himself seems to support term limits on patents. See *id.* at 228–30.

28. I am simplifying a bit. For example, although foreseeability is usually measured from a “reasonable man” perspective, tort case law often imposes on persons with “extra” knowledge a duty to avoid carelessness with regard to the dangers that they (and not the reasonable man) might see.

29. U.S. CONST. art. I, § 8, cl. 8.

30. A work need not be of fully independent origin to be copyrightable. As is recognized in the law of “derivative works,” a new version that copies and adapts prior works can be sufficiently creative to deserve a separate copyright of its own. Of course, the derivative work copyright does not give the person doing the reworking any rights over the material copied. 17 U.S.C. § 103(b) (2012).

restarted whenever a category of disseminator requires incentives, copyright could last forever.

Moreover, our cultural and business life has become endangered by a marked expansion in rights against copying. Over the past forty years there has emerged a remarkable tendency by courts in various areas of IP<sup>31</sup> to give plaintiffs enforceable rights over the benefits they generate and to demonize free riding by defendants.<sup>32</sup> Part of the problem arises from the nature of litigation:

Most applicable norms caution against the unrestrained impulse to reward creators for the benefits they generate. . . . Unfortunately, these other norms are difficult to articulate, whereas “reaping and sowing” comes neatly to the tongue. Further, litigation contains a structural bias against the articulation of a community interest in free access, for the community as such cannot be a litigant. Against an articulate plaintiff who is enunciating what sounds like a moral interest in reaping what she has sown often stands a commercially motivated defendant who may be an unsympathetic figure poorly situated to communicate what the community has at stake. Spokespersons for the community interest in *nonownership* exist, but, given the likely structure of the relevant litigation, their voices may go unheard.<sup>33</sup>

Yet the legislative branch, too, seems to have joined the misappropriation bandwagon. The legislative provisions ratified by *Eldred* and *Golan* are part of the “misappropriation explosion” that so threatens us; “the interdependence upon which our cultural life rests is on the verge of becoming a cash-and-carry operation.”<sup>34</sup>

The Founders did not authorize anticompetitive, property-like shelters for all activity that generates social benefits. To the contrary, they reserved narrowly cabined rights for a subcategory of

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31. See, e.g., Stacey L. Dogan & Mark A. Lemley, *Grounding Trademark Law Through Trademark Use*, 92 IOWA L. REV. 1669, 1670–71 (2007); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005).

32. To “free ride” is to benefit from another’s effort without doing harm. A change is “Pareto superior” when it helps at least one person without harming anyone else. See, e.g., Richard A. Markovits, *The Causes and Policy Significance of Pareto Resource Misallocation: A Checklist for Micro-Economic Policy Analysis*, 28 STAN. L. REV. 1 (1975). “Free riding” is thus an activity that the principle of pareto-superiority would recommend, at least if one assumes that the lack of short-term harm also leads to no long-term shortfalls. John Locke assumed that only the “the quarrelsome and contentious” would object to others reaping gains that caused no harm, at least as long as everyone had a sufficiency of resources. JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT*, ch. V, § 34 (1690).

33. Gordon, *On Owning Information*, *supra* note 12, at 278–79; see also *id.* at 149 *passim* (describing the misappropriation explosion).

34. *Id.* at 277.

activities, namely, work that involved the life of the mind.<sup>35</sup> Returning copyright to its pre-*Eldred*, traditional focus on creativity might prove a useful part of the effort to curb the promiscuous spread of intellectual property liability.

## II. BACKGROUND: PRIVATE EARTHQUAKES

In 1998, the U.S. Congress extended the nation's already long copyright term.<sup>36</sup> The term already ran for life of the author plus fifty years; it was extended by another twenty years.<sup>37</sup> Challengers to the statutory extension brought lawsuits claiming it was unconstitutional. In support of such a challenge, seventeen noted economists, including five Nobel laureates, signed a brief submitted to the Supreme Court. In this nearly unprecedented document, the economists jointly stated that the then-recent extension of copyright term in the United States could not appreciably increase incentives to authors.<sup>38</sup>

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

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35. Justice Breyer's dissent in *Golan* analogously argued that many activities can assist the Progress of knowledge, but the Constitutional Clause includes only some of those activities within its compass. In distinguishing creative activities from others, Justice Breyer focused not on the intellectual faculty that produces creative work (which is my immediate focus), but rather on economic structure. Works of authorship are goods that have a high initial cost (to "produce" the initial manuscript) but whose marginal cost (to "produce" an extra copy) can be remarkably low. He wrote:

The industry experts [on whom the majority relies] might mean that temporary extra profits will lead them to invest in the development of a market, say, by advertising. But this kind of argument, which can be made by distributors [sic] of all sorts of goods, ranging from kiwi fruit to Swedish furniture, has little if anything to do with the nonrepeatable costs of initial creation, which is the special concern of copyright protection.

*Golan v. Holder*, 132 S. Ct. 873, 909–10 (2012) (Breyer, J., dissenting).

The general point is of course a good one, but Justice Breyer might be misunderstood as suggesting that "nonrepeatable costs of initial creation" is a sufficient basis for copyright. To the contrary, such a cost pattern may be necessary to justify copyright, but could not be sufficient to do so. Noncreative activities, such as the databases covered by the *Feist* ruling, can also have "nonrepeatable costs of initial" production, yet they are properly denied copyright protection. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 364 (1990). The Framers decided that something more—namely, a link to the life of the mind—is necessary.

36. I adapted some of the material that follows from an earlier short article, Wendy J. Gordon, *Dissemination Must Serve Authors: How the U.S. Supreme Court Erred*, 10 REV. ECON. RES. ON COPYRIGHT ISSUES, no. 1, 2013, at 1., available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2305535](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2305535). I am grateful to that Review and its editors, especially Richard Watt.

37. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

38. Brief of George A. Akerlof et al. as Amici Curiae Supporting Petitioners at 2, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618), 2002 WL 1041846, at app. 1.

not to encourage new authorship; rather, the industry actors who stood to benefit were primarily companies which profit by exclusive control over the dissemination of authorial works created long ago, such as the copyrighted cartoon character “Mickey Mouse.” The statute in question, formally known as the Copyright Term Extension Act (CTEA), was jokingly referred to as the Mickey Mouse Protection Act. Mickey was “saved” from the public domain by the enactment of copyright term extension, and the owner of Mickey’s copyright, Disney, had been very active in lobbying for the extension.<sup>39</sup>

A majority opinion of the Supreme Court nevertheless upheld the CTEA.<sup>40</sup> In doing so, the Court exhibited some unease with the economists’ brief. The majority opinion deflected the impact of the brief by relegating it to irrelevance: the Court indicated that whether or not the challenged copyright extension aided authorial incentives, the extension might be valid if it encouraged noncreative behavior that helps knowledge and the arts to progress.<sup>41</sup> For an example, 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.<sup>42</sup>

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39. *Disney Lobbying for Copyright Extension No Mickey Mouse Effort: Congress OKs Bill Granting Creators 20 More Years*, CHI. TRIB., Oct. 17, 1998, § 1, at 22.

40. *Eldred*, 537 U.S. at 222.

41. 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. Set out at note 1 *supra*, it provides, “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.” For further parsing of the clause, see *infra* note 107 and accompanying text.

42. *Eldred*, 537 U.S. at 206–07. 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.” *Id.* at 207 (citing, *inter alia*, H.R. REP. NO. 105-452, at 4 (1998)).

Note the Court’s telling misuse of language. When speaking of creative works, possessive pronouns like “their” usually indicate authorial source, not copyright ownership. (As in, “The poets still felt connected to their poems.”) By contrast, copyright assignees are usually said to own “copyrights” not “works.” Thus, in the primary source the Court used for the just-quoted statement, namely H.R. REP. NO. 105-452, the phrase “their works” appears only in relation to authors. H.R. REP. NO. 105-452, at 4 (“Authors will be able to pass along to their children and grandchildren the financial benefits of their works.”). The Court turns usual usage on its head when it speaks of nonauthors doing something with “their” works. All the nonauthors have is “their” copyrights.

It’s as if the writer of the majority opinion views copyright ownership as bearing the most significant possible relationship to a work. In that rhetoric centered on ownership, being the person who created the work might mean little; being someone deeply influenced by the work (consider the locution, “they’re playing *our song*”) would mean even less.

But I admit, this is mere speculation; in analyzing how people use language, even Freud sometimes slipped.

This step in reasoning registered 6.5 on my personal Richter scale.

Only a few years earlier, in the famous *Feist* case, the same Court had decided that copyright could not extend to noncreative compilations.<sup>43</sup> In *Feist*, the Court had held that only *creative* works were within legitimate range of congressional concern under the Constitution's Copyright Clause.<sup>44</sup> Regardless of how greatly a potential database industry might need copyright protection to incentivize investment in data collection and regardless of how valuable such data might be to social progress, copyright could not inhere in noncreative works.<sup>45</sup> Now, a bare eleven years later, the Court was saying that even though *Feist* was rightly decided, Congress *could* use noncreative activity to justify rules about how creative works were handled.<sup>46</sup>

These 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>47</sup> Nevertheless, the holding of *Feist* seemed to me then, and seems to me now, to focus on authorial incentives in a manner totally opposed to *Eldred's* approach.

What was the result of the *Eldred* Court upholding the extension of copyright in already-created works for another twenty years? People who wanted to copy and adapt works published in 1923 and thereafter—who stood ready to post digital versions of those works via websites like Project Gutenberg, or to build new creative works out of the old materials as they attained public domain status—were burdened with a twenty-year obligation they would not otherwise have had.<sup>48</sup> This was also bad news for efforts like Google Books and the HathiTrust Digital Library (a university-consortium project), which seek to allow people to search entire libraries.<sup>49</sup> In order for the public to search via Internet, the books

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43. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 359–60 (1991) (“[O]riginality, not ‘sweat of the brow,’ is the touchstone of copyright protection in directories and other fact-based works.”).

44. *Id.* at 363 (holding 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”).

45. The Court's language extended to all noncreative databases; the creation of the actual database at issue—a white pages phone book—had no such need for copyright incentives. *Id.* at 363–64.

46. *Eldred*, 537 U.S. at 206–08 (explaining that encouraging noncreative “restoration and . . . distribution” was a valid purpose of the CTEA).

47. I am indebted to Jane Ginsburg for pressing me on this point.

48. See PROJECT GUTENBERG, <http://www.gutenberg.org/> (last visited Nov. 19, 2014).

49. See GOOGLE BOOKS, <http://www.books.google.com/> (last visited Nov. 19, 2014); HATHI TRUST DIGITAL LIBRARY, <http://www.hathitrust.org/> (last visited Nov. 19, 2014).

needed to be digitized: after term extension, thousands of additional old, about-to-be available books needed permissions—or the risky shelter of fair use—to be lawfully digitized.<sup>50</sup> Since many of these (dubbed “orphan works”) had copyright owners who could no longer be identified or located, it required a risk-tolerant or courageous actor to dare make copies of them. The situations of both Google<sup>51</sup> and HathiTrust<sup>52</sup> have been temporarily ameliorated by judgments of fair use, but both the Google and HathiTrust suits lie within the Second Circuit. Less sensitive judicial approaches than the Second Circuit’s exist.<sup>53</sup> And for many other people and institutions who want to use and post old works, but cannot afford either permission or litigation, *Eldred* reinforced a barrier that fair use won’t surmount.

In the *Eldred* opinion’s upholding of an extension of copyright term,<sup>54</sup> the Court discussed film stock restoration and other noncreative disseminative activities in a way that disturbingly hinted that such activities could justify a statute enacted pursuant to the Copyright Clause; but at least the discussion left a bit of doubt whether such activities standing alone could suffice.<sup>55</sup> I therefore still had some hope that the Court did not really mean that a copyright statute that prevented the public from freely using and disseminating old works could be upheld simply because it assisted noncreative activity.<sup>56</sup> More recently, the spindly support on which that hope rests became even more fragile.

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50. For 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. Letter from Ann Thornton, Andrew W. Mellon Dir., N.Y. Pub. Libraries, to Karyn Temple Claggett, Assoc. Register of Copyrights, U.S. Copyright Office (Mar. 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). The Library had the courage to digitize the material nevertheless.

51. Authors Guild, Inc. v. Google, Inc., 721 F.3d 132 (2d Cir. 2013).

52. Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 105 (2d Cir. 2014), *aff’g* 902 F. Supp. 2d 445 (S.D.N.Y. 2012).

53. See, e.g., Princeton Univ. Press v. Mich. Document Servs., 99 F.3d 1381, 1391–92 (6th Cir. 1996) (finding that the university copy shop’s preparation and sale of “coursepacks” without payment of royalties to the publishers that held copyright in the duplicated material was not fair use and thus violated copyright law).

54. *Eldred v. Ashcroft*, 537 U.S. 186, 208, 222 (2003).

55. *Id.* at 239–40.

56. In *Eldred*, the question in part involved whether noncreative activity could be a legitimate goal of congressional solicitude under the IP Clause of the Constitution. The Court hedged. In part of the opinion, the majority seemed to indicate that such activity could so serve; in others, the majority seemed to hesitate, as if noncreative activity could be relevant only as a partial justification. Compare *id.* at 206–07 (stating that Congress had a legitimate purpose in encouraging restoration), with *id.* at 227 (emphasizing the “overriding purpose of providing a reward for authors’ creative activity”).



In *Golan v. Holder*, decided in 2012, the Court addressed the question of whether Congress exceeded its power when it enacted a remarkable U.S. statute that gave U.S. copyright to some foreign works that had been in the U.S. public domain.<sup>57</sup> The statute was remarkable in part because prior case law took as a virtual article of faith that “matter once in the public domain must remain in the public domain.”<sup>58</sup>

The restoration statute, creating or reviving U.S. copyrights in works already created, was challenged on the ground, *inter alia*, that “federal legislation cannot serve the Clause’s aim unless the legislation ‘spur[s] the creation of . . . new works.’”<sup>59</sup> The challenge failed.<sup>60</sup>

In upholding the statute, the Supreme Court majority wrote, over a strong dissent, that “[t]he 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.’”<sup>61</sup> “Inducing dissemination” could also justify Congressional action.<sup>62</sup> While the opinion’s language leaves room to

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57. *Golan v. Holder*, 132 S. Ct. 873, 878, 881–83 (2012) (in upholding 17 U.S.C. § 104A (2012), the Court ruled that “[n]either the Copyright and Patent Clause nor the First Amendment . . . makes the public domain . . . a territory that works may never exit”). Section 104A had been adopted to further U.S. compliance with the Berne Convention, and its implementation in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). See U.S. COPYRIGHT OFF., <http://www.copyright.gov/circs/circ38b.pdf> (last visited Nov. 24, 2014).

Under the Berne Convention, 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. See 17 U.S.C. § 104A.

58. See *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 484 (1974).

59. *Golan*, 132 S. Ct. at 888 (citing Brief for Petitioners at 24, *Golan*, 132 S. Ct. 873 (No. 10-545)).

60. *Id.* at 878; see also *supra* note 57.

61. *Golan*, 132 S. Ct. at 889 (emphasis added). In addition to what I argue is a substantive error, note the institutional solecism of the language. Courts do not ordinary “hold” what a legislative purpose is, or “hold” any other particular rationale. Rather courts “hold” that given particular facts, a particular result should follow, e.g., that a piece of legislation is or is not valid.

In the common law system, at least practiced in the United States, consistency of results is more important than consistency of rationale. Therefore, the U.S. Supreme Court is less bound by this purported “holding” than may appear.

62. *Golan*, 132 S. Ct. at 888 (“Nothing in the text of the Copyright Clause confines the ‘Progress of Science’ exclusively to ‘incentives for creation.’ (quoting Shira Perlmutter, *Participation in the International Copyright System as a Means to Promote the Progress of Science and Useful Arts*, 36 LOY. L.A. L. REV. 323, 324 n.5 (2002)) Evidence from the founding, moreover, suggests that inducing dissemination—as opposed to creation—was viewed as an appropriate means to promote science.”).

quibble,<sup>63</sup> it seems that the Court believes that in carrying out the constitutional mandate to “promote the Progress of Science and useful Arts,” Congress can legitimately enact provisions extending copyright’s reach even if the statute’s intention and effect would be to aid *only* noncreative disseminators.<sup>64</sup>

The ground beneath me was rumbling; my personal Richter reading went up a point. The Framers’ special favor for the life of the mind was being turned into a mode of requiring readers and other users to pay the publishing industries a subsidy, as if nothing but money hung in the balance. This was (ahem) wrong.

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63. It is not fully clear that the Court meant to hold that a copyright statute could be valid if it contributed nothing to inducing creativity. For example, in speaking of the statute upheld in *Golan*, the Court states that “[a] well-functioning international copyright system would likely encourage the dissemination of existing and future works.” *Id.* at 889. The reference to “future” works may indicate the Court believed that the statute would encourage new creative works by increasing their prospect of dissemination and thus their prospect of financial reward. On the other hand, the sentence just quoted did not directly address support for inducing future works—only support for their increased “dissemination.”

Similarly ambiguous is the Court’s comment, already quoted in text, that, “[t]he provision of incentives for the creation of new works is surely an essential means to advance the spread of knowledge and learning.” *Id.* The word “essential” in legal contexts usually means “indispensable” or “necessary,” which are the word’s core meanings. Saying that inducing creativity is “essential” to a copyright statute therefore suggests that a copyright provision, which is void of any potential for inducing creativity, would be invalid.

However, in casual conversation the word “essential” can mean merely “important.” That lesser meaning seems to be all the Court meant by the word.

First, the Court’s comment about “essential” is followed by a “holding” that providing incentives for new work creation “is not the sole means Congress may use [t]o promote the Progress of Science.” *Id.*

Second, if the Court had meant that inducing creativity was “essential” in the sense of “indispensable,” it is hard to know what the Court accomplished by insisting that noncreative dissemination can be a legitimating purpose under the Copyright Clause. After all, if some effect on inducing creativity is indispensable, then, in any case where it could be shown that a particular copyright statute had even a small effect on inducing creativity, such a statute would presumably be valid—at least under nonstrict scrutiny—without any weight contributed by dissemination. So to take the Court’s language about “essentiality” seriously could make pointless its insistence on counting dissemination as a legitimate purpose.

We might, however, speculate on ways to square that insistence with the core meaning of “essential.” For example, conceivably the Court is thinking ahead to a time when stricter scrutiny would be used to examine copyright statutes. In such a setting, a tiny effect on inducing creativity might be insufficient for a statute to pass constitutional muster; in that situation, *Golan* might provide precedent for using noncreative dissemination to strengthen a doubtful copyright statute’s claim to legitimacy.

But speculation is speculation. The Court’s imprecision allows it room to back out, but it is probable the majority meant that the link to creativity was merely “important”—and dispensable if incentives to noncreative cultural activity were present.

Taking all this together, I think the *Golan* opinion is fairly read as indicating that, in the Court’s view, a copyright statute that did not induce creative activity could be valid if it encouraged noncreative restoration and dissemination of already-made work.

64. U.S. CONST. art. I, § 8, cl. 8. Regarding the verbal union of “Science and useful Arts,” see *infra* note 107 and accompanying text (explaining my reading of the Copyright Clause).

Admittedly, I lack the kind of conclusive evidence that would convince an originalist that the Court erred: the historians have reached no consensus on what constraints—other than “limited Times”—the Framers intended the Clause to impose on Congress’s copyright power.<sup>65</sup> Nor do I have a fleshed-out, nonoriginalist theory of constitutional interpretation to present today. Nevertheless, the logic of “limited Times” itself, coupled with the internal logic of the cause of action known as copyright infringement, lead me to believe that at the core of copyright lies creativity.

A legislative provision that encouraged noncreative disseminative activities, like film restoration, printing, or making physical connections among computers, might help knowledge to advance, and might be desirable if the provision gave a direct monetary subsidy, set up an archive, or provided similar assistance. But it would jar our traditions (and my common sense) if legislation were to expand copyright for such purposes.

Admittedly, in order for noncreative disseminators to benefit from copyright expansion, they would need to have employed creative people in a work-for-hire context, to hold assignments or licenses from authors, or to be acting as authors’ compensated agents.<sup>66</sup> Perhaps authorial activity is encouraged by such employment, agency, assignment, or licensing. If so, the statute might be justified. But any such justification should lie *vel non* with the authorial encouragement, not with serving the disseminators’ own needs. Should the disseminators’ noncreative activities fail to generate predictable revenues capable of encouraging new creative work, the disseminative activities should not be supported by copyright.

Also contributing to my sense that copyright should not serve disseminators (except on those admittedly frequent occasions when the dissemination in turn serves authorial incentives) is the lack of “fit” between dissemination and copyright’s key features. The most obvious lack of fit relates to the constitutional constraint of “limited Times.” Stand-alone dissemination activities like publishing may *continually* need copyright in order to stay in business and “induce

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65. See, e.g., Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1148–49 (“There is no record of any debate over the Intellectual Property Clause at the Constitutional Convention.”); Oren Bracha, *Owning Ideas: A History of Anglo-American Intellectual Property* 273–74 (June 2005) (unpublished Ph.D. dissertation, Harvard Law School) (“There was hardly any real reported debate or deliberation regarding the intellectual property clause. It was adopted in the constitutional convention without opposition or debate, and attracted almost no attention or reference during the ratification stage.”), available at <http://www.utexas.edu/law/faculty/obracha/dissertation/>.

66. See Wendy J. Gordon, *Authors, Publishers, and Public Goods: Trading Gold for Dross*, 36 LOY. L.A. L. REV. 159, 171–72, 191–92 (2003).

progress,” and any such recurring need could lead directly to perpetual copyright. Only protection linked to a single act—like production of a creative work—is logically linked to the time limitation.

I will say more about “limited Times” below.<sup>67</sup> Before turning to that discussion, note another feature of copyright: its remedies.

Destruction of infringing works has been part of a U.S. copyright owner’s remedies since the beginning,<sup>68</sup> and today the statute combines powers of destruction with other injunctive remedies<sup>69</sup> whose strength is only partly tempered by the *eBay* decision.<sup>70</sup> As a result of all this, federal law empowers copyright owners to stop others from speaking when those others mix their speech with borrowed expression.<sup>71</sup>

Vitally important speech has been muzzled by copyright claims.<sup>72</sup> Particularly infamous is the injunction that stopped Alan

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67. See *infra* notes 92–105 and accompanying text.

68. The power to destroy infringing speech appears in the Copyright Act of 1790, Act of May 31, 1790, ch. 15, 1 Stat. 124, 124.

69. 17 U.S.C. § 502 (2012). Also consider the “take down” provisions of the DMCA. *Id.* § 512.

70. See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 396–97 (2006) (cautioning against the automatic imposition of injunctions in patent cases).

71. See 17 U.S.C. §§ 502–506; Act of May 31, 1790, ch. 15, 1 Stat. at 124.

72. When we raise our voice in ordinary conversations, we usually are at “liberty” to do so, in the sense that our companions have “no right” to call the cops to make us quiet down (as long as our decibel level is reasonable) or force us to give someone else a chance to talk. The other folks present have a “liberty” to shout us down or ignore us should they want to do so, and we have “no right” against them. That is, we can’t sue for the annoyance or require the police to bring us microphones.

Our speech-related relations with the government are different. Should a governmental body not like the content of what we are saying, the Constitution’s First Amendment puts a “duty” on the government not force me to be silent. Against the government, therefore, I have not only a “liberty” to speak, but also a “claim right” against governmental attempts at suppression. Usually one exercises the claim right by seeking judicial intervention. If the legislature has enacted a statute or other provision that purports to impose censorship, we seek judicial redress to invalidate the unconstitutional provision; if the police arrest us for voicing protests, in circumstances where we haven’t done anything that “threatens public safety,” then after the fact we might bring lawsuits under 42 U.S.C. § 1983 (“Civil Action for Deprivation of Rights”).

In sum, we usually (1) have no “claim rights” against each other’s speech, even if our neighbors’ speech drowns us out, and we usually (2) *do* have “claim rights” against governmental suppression of our speech. Copyright imposes a hybrid into the free-speech mix.

Sometimes our speech involves copying speech authored by others. When I quote a columnist to refute her contentions, or when a parodist repeats portions of a song to poke fun at it, copying is involved. Whoever owns copyright in the quoted material has a rebuttable “claim right” to make us stop copying. Against a quotation in print or embedded in a recording, the copyright owner has exclusive rights of reproduction (17 U.S.C. § 106(1)) and distribution (§ 106(3)); against an oral quotation in a public speech or musical performance, the copyright owner has exclusive rights of public performance (§ 106(4)). In addition, the copyright owner has exclusive rights over variations that others might make on her work. See 17 U.S.C. § 106(2), the exclusive right to “prepare derivative works.”

Cranston from publishing an unexpurgated English translation of Adolf Hitler's *Mein Kampf*, a translation that could have given America an early warning of Hitler's true intentions.<sup>73</sup>

Most commentators probably believe that the Constitution,<sup>74</sup> the first Copyright Act,<sup>75</sup> and the First Amendment<sup>76</sup> were adopted closely enough in time that we should take the Act and the First Amendment as consistent.<sup>77</sup> By straining my inner eye, I can perhaps glimpse an arguable consistency: authorship is an ongoing process that contributes to democratic education and democratic dialogue, providing a degree of independence to individual speakers,<sup>78</sup> and protection for their expressive integrity, in ways that conceivably make copyright owners' powers to destroy and enjoin other's speech worth the cost.

But as I said, that concession results from straining my vision; as copyright expands beyond its 1790 restraints, it becomes increasingly difficult to accept as appropriate the dangers to free speech that inhere in copyright grants to authors.<sup>79</sup> It is harder still to see an appropriate "fit" between, on the one hand, expanding injunctively-enforced rights to exclude and, on the other, a putative goal of encouraging noncreative activities such as dissemination.<sup>80</sup>

Admittedly, contrary arguments could be made. The Supreme Court in *Harper & Row* called copyright an "engine of free

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We might be able to undo such presumptive claim rights with a showing of "fair use" or other limitation on the copyright, and thus restore our liberty. "Fair use," a judicial doctrine now recognized by statute, 17 U.S.C. § 107, supposedly embeds First Amendment protections.

Unfortunately, under fair use case law, it's not clear whether or not an appropriately strong "claim right" to free speech has found a home in copyright. Although the Constitution's First Amendment purportedly grants us a "claim right" against government action that suppresses speech, that right tends to be much harder to use against copyright owners who employ the government to silence us, than it is to use our First Amendment claim-right against government suppression that originates with the government itself.

73. William Patry, *Neil Netanel's Copyright's Paradox*, PATRY COPYRIGHT BLOG (Mar. 30, 2008, 8:43 PM), [http://williampatry.blogspot.com/2008\\_03\\_01\\_archive.html](http://williampatry.blogspot.com/2008_03_01_archive.html); see also NEIL WEINSTOCK NETANEL, *COPYRIGHT'S PARADOX* 14 (2008) (discussing the issue of Alan Cranston's *Mein Kampf* translation and infringement).

74. The Constitution, ratified in 1788, empowers Congress to grant "exclusive rights," but does not specify what remedies should accompany the rights. U.S. CONST. art. I, § 8, cl. 8.

75. The power to destroy infringing copies appears in the Copyright Act of 1790. Act of May 31, 1790, ch. 15, 1 Stat. at 124.

76. The First Amendment was adopted in 1791. U.S. CONST. amend. I.

77. See Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 3-4, 7-8 (2001) (exploring whether First Amendment values are protected by the statutory limitations on copyright).

78. See, e.g., Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 339-40 (1996).

79. See the panoply of remedies at 17 U.S.C. §§ 501-506 (2012).

80. For an analogous argument, see Shiffrin, *supra* note 6, at 141.

expression,” and further referred to copyright as providing “economic incentive to create *and disseminate* ideas.”<sup>81</sup> And it is undeniable that democracy is helped not only by new ideas but also by the spread of existing ones.<sup>82</sup>

But a multitude of activities and resources could also abet the spread of ideas and the ability to engage in debate—subsidizing universities or an Internet, for example. The Founders did not embrace all of them in copyright.<sup>83</sup>

After mentioning dissemination in the same breath as creativity, the *Harper & Row* Court then wisely went on to return to baseline: “[T]he talents of authors.”<sup>84</sup> This latter focus on authorial incentive is far more well-entrenched in our history than is solicitude for commercial disseminators.<sup>85</sup>

The Constitution and our initial and successive copyright statutes speak in terms of protecting authors.<sup>86</sup> A relevant number of the Federalist Papers similarly focused on the reasonable “claims of individual[]” “authors and inventors,” not disseminators.<sup>87</sup> Even the British Statute of Anne, which was probably enacted at the urging of disseminator interests (the Stationers’ Company), gives rights to authors.<sup>88</sup> Further, the

81. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558, 589 (1984) (emphasis added).

82. *See* Netanel, *supra* note 78, at 362.

83. For example, at one point the Founders considered, then rejected, giving Congress the power to fund federal universities. KERRY L. MORGAN, *THE CONSTITUTION AND FEDERAL JURISDICTION IN AMERICAN EDUCATION* 5 (2006), available at <http://www.lonang.com/foundation/5/f5E1c.htm>.

84. *Harper & Row*, 471 U.S. at 558 (quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954)).

85. Remember that the “limited Times” provision focuses on preserving the benefits of even noncommercial dissemination. The freedom for ideas (17 U.S.C. § 102(b)) similarly harnesses “volunteers” to spread concepts that authors generate, free of copyright restraints.

86. U.S. CONST. art. I, § 8, cl. 8.

87. THE FEDERALIST NO. 43, *supra* note 2, at 268.

88. Craig Joyce, Prologue, *The Statute of Anne: Yesterday and Today*, 47 HOUS. L. REV. 779, 783 (2010). Note, however, that if the author had already contracted with a bookseller, the Statute of Anne gave the right to the latter; also, assignees received protection:

That from and after the tenth day of April One thousand seven hundred and ten *the Author* of any Book or books already printed who hath not transferred to any other the copy or copies of such Book or Books share or shares thereof *or the Bookseller or Booksellers printer or printers or other person or persons who hath or have purchased or acquired the copy or copies of any Book or Books in order to print or reprint the same* shall have the sole right and liberty of printing such Book and Books for the term of One and twenty years to commence from the said tenth day of April and no longer. And that *the Author* of any Book or Books already composed and not printed and published or that shall hereafter be composed and his *assignee or assignees* shall have the sole liberty of printing and reprinting such Book and Books for the term of fourteen years to commence from the day of the first publishing the same, and no longer.

Statute of Anne, 1710, 8 Anne, c. 19, § 2.

implication in the Supreme Court's opinion in *Golan*, that dissemination standing alone can justify copyright expansion, is a sharp departure from centuries of understanding.<sup>89</sup> It is the traditional understanding—that copyright is for “authors”—to which I adhere.

In this view I am hardly alone,<sup>90</sup> but hardly unopposed.<sup>91</sup> In this Article I will investigate some possible explanations for why the Supreme Court and some of my scholarly colleagues might have stumbled into what I see as an error, and some of the reasons why I think their interpretation erroneous.

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89. *Golan v. Holder*, 132 S. Ct. 873, 889 (2012).

90. See, e.g., Michael H. Davis, *Extending Copyright and the Constitution: “Have I Stayed too Long?”*, 52 FLA. L. REV. 989, 999–1000 (2000) (arguing that “[t]here does not seem to be any constitutional power premised, however, on publication, as opposed to creation, of works nor upon quality of works”); Heald & Sherry, *supra* note 65, at 1170 (stating that the “exclusive right [of copyright should] be granted only as the purchase price for a new invention or writing”); L. Ray Patterson, *Eldred v. Reno: An Example of the Law of Unintended Consequences*, 8 J. INTELL. PROP. L. 223, 234 (2001) (stating there is “no language in the Copyright Clause that empowers Congress to grant a copyright for the preservation of works. Indeed, it has been understood from the beginning of statutory copyright that the creation of a new work is the unalterable condition for copyright”); Edward C. Walterscheid, *The Preambular Argument: The Dubious Premise of Eldred v. Ashcroft*, 44 IDEA J.L. & TECH. 331, 374 (2004) (stating, “the [Copyright] Clause was intended to provide an incentive for advances in science and the useful arts through encouragement of the intellectual efforts of writers and inventors”).

91. See, e.g., Jonathan M. Barnett, *Copyright Without Creators*, 9 REV. L. & ECON. 389, 390, 406 (2013) (arguing 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” (footnote omitted)); Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WIS. L. REV. 141, 143 (stating “the purpose of copyright is to enable the provision of capital and organization so that creative work may be exploited”); Orrin G. Hatch & Thomas R. Lee, “*To Promote the Progress of Science: The Copyright Clause and Congress’s Power to Extend Copyrights*,” 16 HARV. J.L. & TECH. 1, 11 (2002) (relying on Malla Pollock to claim that “Progress” in the Copyright Clause of the Constitution must refer to dissemination to avoid redundancy in the document’s text). See, e.g., Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1195 (2007) (concluding that a good copyright system must take into account goals other than encouraging creators, such as the “[c]ontrol 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’”); Malla Pollack, *What Is Congress Supposed to Promote? Defining “Progress” in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754, 804, 809 (2001) (arguing that term “Progress” in the Copyright Clause refers not to the “Enlightenment Idea of Progress” as “quality improvement over time” but rather to “Progress” as the *spreading* of ideas). The progenitor of this stance is probably Edmund Kitch, who argued that patent law can be best understood not as a mode of incentivizing new inventive effort, but rather as a means of organizing exploitation—much as granting a prospector ownership in a gold mine does not cause gold to exist in the earth, but encourages coordinated extraction and processing of the metal. See Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265, 266, 285–86 (1977).

## III. "LIMITED TIMES" AND THE NATURE OF A TORT

The Supreme Court has, at least for now, twice rejected the interpretation of the Clause that I offer. So why do I pursue the matter? There's no need to beat *two* dead horses. Now that *Eldred* and *Golan* are decided, it is hard to see what practical impact my general author-centric view of copyright might have. So why do I offer my view of copyright's core?

As mentioned above, my first reason for proceeding is to supply stimulus for reexamination should the Court ever return to the questions of durational or other forms of copyright expansion. There is room in both *Eldred* and *Golan* for the Court to backtrack in its constitutional interpretation.<sup>92</sup>

Second, I offer my view of the Clause because the overly complex statutory scheme we call "copyright" needs some kind of stabilizing central focus. As discussed earlier, one such stabilizing vision can be provided by utilizing analogies from the common law.<sup>93</sup> Those analogies make sense only if the core act of copyright is creating new works.

Abraham Drassinower has suggested that we need a view of copyright that is "interior" to the copyright infringement cause of action. He emphasizes a notion of corrective justice that connects copyright owner with putative infringer.<sup>94</sup> While I do not subscribe to Drassinower's particular concept of copyright's interior structure, his impulse to find an interior logic is a good one.

Copyright has criminal law and administrative law aspects, but its central mechanism is the infringement suit. Infringement is a tort.<sup>95</sup> And I believe our understanding of that tort can be profitably informed by common law tradition. So we might ask, what logic animates the structure of the

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92. See *supra* Part I.

93. In other works I have begun the project of spelling out what common law approaches might yield. See, e.g., Gordon, *On Owning Information*, *supra* note 12, at 156–57, 165–68, 222–23 (discussing forces behind the "common law trend toward granting new intellectual property rights" (footnote omitted)) and exploring what the common law of restitution might teach about the appropriate scope of right and limits; Gordon, *Copyright As Tort Law's Mirror Image*, *supra* note 13, at 533, 539–40 (comparing the common law of personal injury torts and copyright). At this juncture, however, I am interested only in specifying the starting point *from which* a common law logic might proceed.

94. See ABRAHAM DRASSINOWER, WHAT'S WRONG WITH COPYING? (forthcoming 2015); Abraham Drassinower, *A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law*, 16 CAN. J.L. & JURISPRUDENCE 3, 5, 18–19 (2003).

95. See, e.g., *Davis v. Blige*, 505 F.3d 90, 103 n.11 (2d Cir. 2007) ("Infringement has long been recognized as a tort." (citing *Ted Browne Music Co. v. Fowler*, 290 F. 751, 754 (2d Cir. 1923))).



copyright tort suit? How are the correlative roles of plaintiff and defendant linked?

In my view, what animates the tort duty is the creation of something beneficial and creative by the plaintiff, and what violates it is the unfair utilization of some of those benefits by the defendant.<sup>96</sup>

All torts involve a violation of duties, and it is the creation of the beneficial creative work that starts a potential copyright duty running.<sup>97</sup> Viewed from that perspective, most of copyright's primary features make sense, particularly the primary features laid out in the Copyright Clause: that rights are owned *by the authors*, and that the rights last for only "limited Times."<sup>98</sup>

The link to authorial right is obvious under my theory: the creative benefactor is the author, so any cause of action for use of the benefits created should initially inhere in the author. How this relates to "limited Times" may, however, need a bit of explanation.

It will be helpful to use an analogy: consider the negligence rule that requires injured plaintiffs to prove "proximate cause."<sup>99</sup>

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96. A growing body of commentary recognizes that copyright has long been misdescribed as a "strict liability tort." The strict liability label relates only to one aspect of the cause of action, namely, that ignorance does not excuse substantial copying. In other respects, however, copyright is a fault-based regime—particularly in its requirement that plaintiff prove "substantial similarity" and in the availability of the "fair use defense." See, e.g., Shyamkrishna Balganesh, *The Normativity of Copying in Copyright Law*, 62 DUKE L.J. 203, 215, 271–74 (2012) ("[T]he fair-use determination—at least as codified today—makes use of factors and variables that are legitimately examined as part of the substantial-similarity determination."); Shyamkrishna Balganesh, *The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying*, 125 HARV. L. REV. 1664, 1682–83 (2012) ("Strict liability is ordinarily thought to be either conduct-based or harm-based, depending on the law's choice of triggering event for liability. Copying, however, sits somewhat oddly in this scheme. . . . Its structure of wrongdoing is best described as one of result-through-conduct." (footnote omitted)); Gordon, *Trespass-Copyright Parallels and the Harm-Benefit Distinction*, *supra* note 13, at 62–65, 68–69 (discussing the "substantially similar" inquiry and "fair use defense"); Steven Hetcher, *The Immorality of Strict Liability in Copyright*, 17 MARQ. INTELL. PROP. L. REV. 1, 1, 5–7, 14 (2013) (challenging the conception that copyright infringement is a strict liability tort).

To call copyright a tort of "unfair use" is my way to briefly summarize this perspective.

97. I here present a simplified and normative picture. Speaking descriptively, some caveats are in order. Notably, in federal copyright law, what begins the copyright is creation plus fixation (physically recording the work by writing, audiotaping, filming, or other means). 17 U.S.C. § 102 (2012). Prior to fixation, in the United States creators must look primarily to state law for rights against copying, and the states vary in the protections offered.

98. U.S. CONST. art. I, § 8, cl. 8.

99. I have sketched elsewhere the many ways in which copyright operates like the mirror image of negligence law. Mirrors provide images that are identical but reversed. See, e.g., Wendy J. Gordon, *Copyright and Tort as Mirror Images: On Not*

In negligence law, intervening causes accumulate to cut off tort actions when the link between cause and effect ceases being proximate.<sup>100</sup> Causing an unforeseeable harm is not “proximate” causation, not only because it seems unfair to hold someone liable for what he could not foresee, but also because imposing liability in such cases would not affect behavior. People may know that carelessness causes injury, but they will not know how to avoid acting dangerously in regard to dangers of which they are ignorant. Thus, a finding of no proximate cause in ordinary tort cases is often based on a judicial perception that making the defendant pay will not diminish injuries of the sort that occurred.<sup>101</sup> Analogously, in copyright, the author’s rights cease as the effects of the beneficial creative act disperse over time.<sup>102</sup> As the promise of recompense for those distant effects ceases to have incentive power, the promise ceases to serve the public’s interest in new works of authorship.

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*Mistaking for the Right Hand What the Left Hand Is Doing*, in RESEARCH HANDBOOK ON COMPARATIVE LAW AND ECONOMICS (Giovanni B. Ramello & Theodore Eisenberg eds., forthcoming 2014) (manuscript at 5–6), available at <http://www.bu.edu/law/events/wipip/documents/MirrorTort.pdf>; Gordon, *supra* note 23, at 622–23; Gordon, *Copyright as Tort Law’s Mirror Image*, *supra* note 13, at 536.

To illustrate the mirror-like similarity and its reversals:

- Both negligence and copyright take incentives seriously. Whereas negligence law focuses its incentive effect on defendants, copyright focuses its incentive effect on plaintiffs. Gordon, *Copyright as Tort Law’s Mirror Image*, *supra* note 13, at 535–36.
- Both negligence and copyright take waste and its converse seriously. Whereas negligence law seeks to discourage wasteful behavior (carelessness), copyright law seeks to encourage productive behavior (creativity). *Id.*
- Both negligence and copyright tend to impose duties where incentives converge with nonconsequentialist notions of fault. Whereas various deontological moral theories view most negligent defendants as deserving to pay for harm done, most such moral theories would also view most acts of authorship as deserving to receive reward for benefit generated. *Id.* at 535.
- Both negligence and copyright value causation. Whereas negligence law asks “would the harm have occurred but for the defendant’s action” (the requirement that plaintiffs prove “cause in fact”), copyright asks “would the defendant have been able to do what he did but for borrowing from plaintiff’s work” (also a causation requirement, but known as the rule that most plaintiffs must prove “copying” in fact). *Id.* at 536–37.

100. Gordon, *Copyright as Tort Law’s Mirror Image*, *supra* note 13, at 539.

101. See Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1594–96 (2009).

102. For other discussions of proximate cause in copyright, see e.g., *id.* at 1594–96, 1603–25 (discussing proximate cause and foreseeability in tort and copyright); Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969, 973–74, 988–91 (2007) (comparing fair use delineation of scope in copyright liability to proximate cause delineation of scope in tort liability).

Thus, ending the copyright term after a number of years is based on a perception, *inter alia*, that making a user pay many years after the creative act will not incentivize benefits of the sort that the plaintiff created.<sup>103</sup> However imaginative or hopeful an author might be in visualizing future income, as the date of income receipt moves forward in time, its present value shrinks; as the prophet's hyperopic vision moves ever outward, at some point present value will dwindle sufficiently to leave even a most optimistic seer monetarily indifferent.<sup>104</sup>

This familiar logic works well if the beginning act is the act of creation. From that act, a cone of effects rays outward; as the effects spread outward, the cone's force becomes attenuated.<sup>105</sup> Eventually, the copyright term ends, and the law stops enabling the author's heirs or assignees to control the spread of beneficial effects.

Compare what would ensue if noncreative dissemination were also a key act. Instead of a cone of light gradually fading away, we would have a cylinder-shaped laser, one which is continually boosted as by a relay station and thus never fades: new actions could continually occur for which reward is demanded, and copyrights would last forever.

Therefore, to be faithful to the constitutional phrase, "limited Times," dissemination should not start the public's duty running, or extend the duty's duration once it has begun to run. While "limited Times" might have some other, more strained explication, to root copyright in the creative act provides the explanation that is most plausible, most linked to history, and most consistent with modern experience.

#### IV. DEFINING WHICH INCENTIVES COUNT

##### A. *Language of the Clause: "Science" and "Progress"*

First, a minor preliminary matter: you will note as we proceed that I speak of copyright as furthering the progress of science *and* the useful arts. In recent times, the courts have

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103. See, e.g., Gordon, *Copyright as Tort Law's Mirror Image*, *supra* note 13, at 538–39 ("Imposing a duty on a copyist to pay royalties two hundred years after a book or movie is created will have no impact on an author's willingness to work hard today.").

104. See Brief of George A. Akerlof et al. as Amici Curiae Supporting Petitioners, *supra* note 38, at 5–6 (giving economic examples of the future value of money).

105. Various scholars have suggested increasing the scope of fair use, or decreasing the copyright owner's scope of rights, as a copyrighted work ages. See, e.g., Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409 (2002); see also Justin Hughes, *Fair-Use Across Time*, 50 UCLA L. REV. 775, 780 (2003).

usually linked copyright only with the progress of “Science” (understood as knowledge).<sup>106</sup> That usage, however, overlooks the Framers’ use of the word “respective,” which by implication limits the application of parallelism in construing the Clause.<sup>107</sup> As a result, I suggest that both authors and inventors (as a group) are charged with furthering both science and the useful arts.

Now we turn to a more important linguistic issue: the role that the word “Progress” plays in the Clause. Malla Pollack has argued that the word “Progress” must have some special meaning<sup>108</sup>—something beyond “improvement in the knowledge base”<sup>109</sup>—to avoid being surplusage.

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106. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 187 (2003).

107. The Copyright Clause is embedded in the Copyright and Patent Clause, which bears repeating for purposes of examining some of its language:

“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.” U.S. CONST. art. I, § 8, cl. 8.

The word “Science” is usually taken as synonymous with knowledge, broadly conceived. Another potentially problematic word—almost universally ignored—is the word “respective,” which appears before “Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8.

Conventional interpretation utilizes the logic of parallelism to parse the Clause. For example, the Court in *Eldred v. Ashcroft*, makes that interpretative assumption. *Eldred v. Ashcroft*, 537 U.S. 186, 192–93 (2003). It splits the various “and” clauses and matches first half with first half, second half with second half: thus “Authors” is matched with “Science” and “Writings,” and presumably “Inventors” is matched with “useful Arts” and “Discoveries.” *Id.*; see also U.S. CONST. art. I, § 8, cl. 8.

However, note how the full constitutional clause uses the word “respective”: the word appears only near the end, before “Writings and Discoveries.” *Id.* The word “respective” is an adjective that means “belonging or relating separately to each of two or more people or things.” *Alleged Misuse of the Word “Respective”*, STACKEXCHANGE, <http://english.stackexchange.com/questions/84766/alleged-misuse-of-the-word-respective> (last visited Nov. 19, 2014).

“Respective” is inserted to make clear to the reader of the Constitution that “Writings” belong only to “Authors,” and “Discoveries” belong only to “Inventors.”

Had parallelism been intended throughout, it would have flowed naturally; there would have been no need for the word “respective.” The presence and placement of the indicator “respective” indicates that parallelism was not the overall scheme of the clause. It was only the scheme governing the last two pairs.

Therefore, the phrase “Science and useful Arts” was not to be split; it was to be taken as a unit. Promoting the Progress of both Science and useful Arts was the goal for authors’ rights and for inventors’ rights.

So construed, the Copyright Clause would read: “Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings.”

This interpretation (based on the Framers’ use of the word “respective” in the clause) does not impact my immediate argument. I include it simply to explain why I do not use the common formulation that limits “authors” to furthering “Science.”

108. Pollack, *supra* note 91, at, 755–57.

109. *Id.* Her argument is more complex than my summary.

After all, she points out, if an increase in substantive knowledge were the only goal, the Framers could have omitted “Progress” and simply said “to promote science and useful arts.”<sup>110</sup> She suggests that “Progress” must therefore mean something else. She argues it means “geographic spread.”<sup>111</sup>

The argument is intriguing. Later, Orrin Hatch and Thomas Lee essentially followed Professor Pollack’s linguistic approach in arguing that “Progress” must refer to dissemination because otherwise the Clause would be redundant.<sup>112</sup>

However, during the Enlightenment, “Progress” had several connotations that release the Constitution’s use of the word from charges of either redundancy or surplusage—and do so without reaching out to borderline meanings such as “spread” or “dissemination.” “Progress” connoted optimism and teleology, process and participation, ongoing interaction rather than arrival at a fixed state of being.<sup>113</sup> Thus, for example, James Madison used phrases like “reason in her progress towards perfection.”<sup>114</sup>

To sum up: “Progress” in knowledge connotes, among other things, a continual need to strive for enlightenment; the word need not refer to “geographic spread” or “dissemination” to avoid surplusage in the Clause. For these reasons, the word “Progress” does not support the *Eldred* and *Golan* approach to understanding copyright’s constitutional purpose.

### B. Illustration

Let me illustrate what it might mean to separate incentives to creativity from incentives to noncreative activity. Consider a thought experiment involving a record produced at a music recording session. A composer’s creativity has contributed to the end result, as has the instrumentalists’ creativity, the singers’ creativity, the arrangers’ creativity, and

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110. *Id.* at 788–89.

111. *Id.* at 801–02.

112. Hatch & Lee, *supra* note 91, at 11–12 (relying on Malla Pollock to claim that “Progress” in the Copyright Clause of the constitution must refer to dissemination to avoid redundancy in the document’s text).

113. See Pollack, *supra* note 91, at 773–74, 803–04 (“Mankind as a whole would ‘progress’ because of the large number of individuals who would have the opportunity to add onto what earlier individuals had learned.”).

114. James Madison, Address of the General Assembly to the People of the Commonwealth of Virginia (1799), reprinted in 6 THE WRITINGS OF JAMES MADISON 332, 337 (Gaillard Hunt ed., 1906).

the creativity of the sound recording engineer.<sup>115</sup> Today, all those persons might have a copyright claim,<sup>116</sup> but that is not necessary for the thought experiment.

Assume for the moment that the creative activities of *all* of these people were supported in a manner that needed no royalties or salary. Maybe they are supported by MacArthur grants, maybe by government, maybe by patrons, maybe by copyright law as it stands today; this is a thought experiment in which the source needn't be specified.

Now add to the mix a record company which specializes in manufacturing, advertising, and distributing records; assume it holds many copyrights by assignment from musicians. The company claims—and can prove—that it would thrive better if copyright were expanded. (Perhaps the company wants to expand section 106 to embrace rights over private as well as public performance or wants to reduce the scope of copyright law's exceptions for benefit performances.) Assume that the company's lobbying effort is triggered not by star performers' demands for royalties—the terms of the hypothesis specify that all performers are monetarily satisfied—but by the company's accurate perception that the requested increase in copyright strength would enable both an increase in dissemination and an increase in its profits.

Under my view, Congress would be exceeding its legitimate copyright powers to enact the copyright expansion desired by the record company. Certainly government could increase dissemination under other powers—interstate commerce for the federal government, general police power for the states—but not via grants of copyright. Under the terms of my thought experiment, the

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115. To any who doubt that creativity lies also in the role of the sound engineer, I recommend reading *This Is Your Brain on Music*. See DANIEL J. LEVITIN, *THIS IS YOUR BRAIN ON MUSIC* 105–06 (2006) (detailing the creativity of the sound engineer).

116. The composer would have a “musical work” copyright, and the others would have a joint “sound recording” copyright. 17 U.S.C. § 102 (2012). (Incidentally: if the people in the recording studio were employees working in the scope of their employment, the employer would possess the copyright; needless to say, fraudulent claims of “employer” status have often arisen.)

A “musical work” is essentially a set of instructions (sometimes embodied in sheet music) that tells performers what sounds to make. A musical work resembles a recipe that gives instructions on making a cake. A “sound recording” is the embodied performance—that is, the cake. Both activities—creating musical works and creating sound recordings—can involve immense creativity: consider both Bach the composer, and Glenn Gould as Bach's interpreter.

In addition, if the band's arrangement of the underlying music is sufficiently creative, and if they had an explicit license under 17 U.S.C. § 115(a)(2), the band could also have a “musical work” copyright in the way they arranged the notes.

Someone who copied the record without permission would be liable in copyright infringement to the musical-work copyright owner(s) *and* the owner(s) of copyright in the sound recording, since both works of authorship were copied when the record was duplicated.

music has sufficient incentive to be created and fixed in a tangible medium. So, *ex hypothesis*, the music exists. Once works are created, their copies and phonorecords are much like any other physical good. Distributors of valuable physical goods may need special assistance in special circumstances. But such assistance should not take the form of expanding copyright, for any such expansion also expands the ability of someone to forbid the use of expressive works.

C. *Noncreative Dissemination: Why Might Giving It Constitutional Status Have Seemed Plausible?*

Why might furthering noncreative dissemination appear plausible as a legitimate purpose of copyright? First, and most obviously: the Constitution speaks of “Progress,” copyright makes dissemination easier, and dissemination is often a requisite for Progress to occur.<sup>117</sup> Creativity concealed makes little contribution to the public weal.

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.<sup>118</sup> Perhaps Congress had their welfare in mind.

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, it is not surprising that the Supreme Court gave dissemination unwarranted justificatory significance. But when one looks more closely at the signposts that may have led the Court “down the garden path,” the signs will turn out to recommend quite a different road.

The Article will next address, first, the analytic issue of dissemination’s economic importance and its role in furthering Progress.<sup>119</sup> Second, it will comment on the history and experience of publisher involvement in copyright.<sup>120</sup> Third, provisions of statute and doctrine that seem to privilege or emphasize dissemination will be examined.<sup>121</sup>

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117. See Pollack, *supra* note 91, at 758–59 (“Correcting the reading of the Progress Clause by recognizing that ‘progress’ involves dissemination, as opposed to qualitative improvement of the knowledge base, has important results.”).

118. See e.g., *Disney Lobbying For Copyright Extension No Mickey Mouse Effort*, *supra* note 39, § 1, at 22 (documenting Disney’s lobbying efforts to extend copyright).

119. See *infra* Parts IV.D, VI.

120. See *infra* Part V.

121. See *infra* Part V.B–E.

It will become clear that disseminators are honored in copyright only for the purpose of assisting authorial incentives. When their interest does not serve authors too, the publisher interest should be irrelevant to a copyright statute's constitutionality.

*D. Incentives for Dissemination and Incentives for Creation:  
Insights from the Arrow Information Paradox*

Economic analysts sometimes describe copyright law's statutory provisions as aiming to achieve a beneficial compromise between copyright's positive effect of inducing initial creativity and copyright's negative effect of reducing dissemination.<sup>122</sup> Copyright's 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."<sup>123</sup>

Determining the extent of the deadweight loss is complex and difficult, even if one looks only to the benefits lost by the frustrated consumer and ignores the benefits which that person could have created for others had he or she possessed access to the work. Stan Liebowitz has provided the best graphical depiction of the complexity;<sup>124</sup> at its center lies the perception that every rule of copyright produces social gain for those works that would not have arisen but for that rule's incentives, but produces deadweight loss for every work that would have arisen

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122. See, e.g., William Landes & Richard Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326–29, 347–49 (1989); see also Stanley M. Besen & Leo J. Raskind, *An Introduction to the Law and Economics of Intellectual Property*, J. ECON. PERSP., Winter 1991, at 3, 6.

123. Deadweight loss also has a component of producer loss. See Oren Bracha & Talha Sayed, *Beyond the Incentive-Access Paradigm? Product Differentiation & Copyright Revisited*, 92 TEX. L. REV. 1841, 1843–46, 1872–75 (2014) (discussing how higher pricing and deadweight loss from copyright attracts market entrants offering close substitutes, pushing prices to a lower equilibrium); Stan J. Liebowitz, *Copyright Law, Photocopying, and Price Discrimination*, in 8 RESEARCH IN LAW & ECONOMICS 181 (John P. Palmer, Jr. & Richard O. Zerbe, eds., 1986) (diagramming the "decreased output of embodiments of those products which would have been produced without any remuneration to the creator of the product"), available at [http://www.utdallas.edu/~liebowit/knowledge\\_goods/rle/rle1986.html](http://www.utdallas.edu/~liebowit/knowledge_goods/rle/rle1986.html).

124. Liebowitz, *supra* note 123; see also Gordon, *supra* note 66, at 180–86, 195–96 (discussing Liebowitz's approach).



with a less expansive copyright.<sup>125</sup> 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 recognition that—although copyright constrains the number of copies held by the public because of the higher prices—copyright in appropriate circumstances can also *aid* dissemination.<sup>126</sup> This is a central point made by Richard Watt’s book on copyright economics: that the so-called tension between incentives and access is overstated.<sup>127</sup> The prospect of above-marginal-cost pricing entices some publishers who might not otherwise take the risk, to engage in distributing creative works to the public.<sup>128</sup>

What would be the impact on cases like *Eldred* and *Golan* if the dissemination effects of copyright could be empirically investigated, and if investigation proved that on the whole dissemination was more aided than repressed by copyright? Even if we had such proof (which we do not), it would not prove that copyright is an appropriate way to foster dissemination on those occasions when disseminator interests and author interests diverge.

Policy argument should honor the distinction between what “is” and what “ought” to be done (also known as the “fact/value” distinction).<sup>129</sup> That as a factual matter copyright *can* help disseminators does not indicate that copyright *should* do so. Among other things, tools exist for Congress to employ if it wants to help disseminators that are far more suitable and far less speech-repressive than copyright.

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125. Note that deadweight loss isn’t all-or-nothing. Deadweight loss will vary across a range of different works: for example, society might experience a great deal of loss from long copyrights given to those works that would have come into existence even with no copyright at all; society might experience a lesser loss from long copyrights given to those works that needed copyright to come into existence but did not need for their incentive a term as long as the term actually in force; and so on. See Liebowitz, *supra* note 123. A work that needed the precise incentives provided by law would not exist without the law; therefore, as Liebowitz points out, as to that work, the law has caused no loss deadweight or otherwise. A law that gives more protection than necessary produces deadweight loss to that extent. *Id.* Thus, 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.

126. Barnett, *supra* note 91, at 389.

127. RICHARD WATT, COPYRIGHT AND ECONOMIC THEORY 3–5 (2000).

128. See *id.* at 5–7.

129. A famous example of the fact/value distinction is this statement by Justice Holmes, disagreeing with the majority in *International News Service v. Associated Press* which had just created a common law right over facts: “Property, a creation of law, does not arise from value, although exchangeable—a matter of fact.” *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 246 (1918) (Holmes, J., concurring in part and dissenting in part).

An argument that sometimes seems to highlight the pro-dissemination function of intellectual property law is the information paradox articulated by Kenneth Arrow.<sup>130</sup> Thus, William Baumol recommended using the Arrow Information Paradox to explore ways in which copyright can better “promote dissemination.”<sup>131</sup> Yet Arrow’s paradox ultimately focuses not on dissemination but on creation.

This is how Arrow summarized his point: “[T]here is a fundamental paradox in the determination of demand for information: its value for the purchaser is not known until he has the information, but then he has in effect acquired it without cost.”<sup>132</sup> The underlying story would go roughly like this: Someone has a piece of information which is potentially profitable; to motivate someone else to buy or license the information, its possessor must reveal it; in the absence of legal protections, a potential disseminator could discuss purchase, decline, and then walk off with the information without paying. The prospect of losing the idea to the potential disseminator could keep the creative person silent; lacking information about what he or she is expected to buy, the potential buyer walks away; and the information goes undisclosed even if the frustrated participants wish otherwise. The situation is a kind of prisoner’s dilemma: the parties would gain from cooperation, but cooperation may not occur because high penalties attend those who cooperate when others defect.<sup>133</sup> If the law gives post-disclosure rights, however, the behavior changes: information can be disclosed, negotiated over, and disseminated.

Sometimes readers jump from Arrow’s observation to the conclusion that the paradox “proves” intellectual property rights are justified; from there they might infer a theory of justification

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130. Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS* 609, 615 (1962), available at <http://www.nber.org/chapters/c2144.pdf>. This paradox is distinct from Arrow’s more famous “impossibility theorem” on voting and social choice.

131. William J. Baumol, *Intellectual Property: How the Right to Keep It to Yourself Promotes Dissemination*, 2 *REV. ECON. RES. COPYRIGHT ISSUES*, no. 2, 2005, at 17 (using patent examples, and suggesting that the Arrow paradox be applied to improving copyright law).

132. Arrow, *supra* note 130, at 615.

133. For other prisoners’ dilemma situations arising in creative production, see, for example, Wendy J. Gordon, *Asymmetric Market Failure and Prisoner’s Dilemma in Intellectual Property*, 17 *U. DAYTON L. REV.* 853, 859–68 (1992) (“The prisoner’s dilemma, when present, arguably presents a set of powerful incentives *not* to create.”); Gordon, *Intellectual Property*, *supra* note 23, at 640–41 (“One can use the prisoner’s dilemma in another way, both to illuminate the case for giving exclusive rights over inexhaustible intangibles, and to illuminate the case for not giving such rights.”).

that emphasizes dissemination. But those conceptual steps would be unwarranted.

It is true that when Arrow introduced the “paradox” in his famous piece, he did so in a scenario where incentives to create or innovate were not at issue. That’s clear from the fact pattern with which the relevant section of his article begins: “Suppose in one part of the information system an observation has been made . . . .”<sup>134</sup> Arrow hypothesizes that the observation contains valuable information which its possessor may be frustrated in exploiting.

So Arrow does begin to explore the paradox in terms of pre-existing information. Yet the scenario involving allocation of already-existing information is quickly put to other use as Arrow turns to his primary topic, that is, incentives for *producing* rather than merely disseminating information.<sup>135</sup>

The paradox has obvious incentive implications: unless disclosure and publication are possible, the author or inventor gets no royalties.

Copyright and patent provide one of many potential solutions for the dilemma that Arrow describes. These federal laws enable an author or inventor to disclose a previously secret manuscript or invention with relatively little fear that the potential disseminator will be able to walk away and profit from the disclosure without paying. However, solutions exist for the stalemate other than creating new rights;<sup>136</sup> and if rights are needed, they can stop well short of “property” rights.<sup>137</sup>

Also, of course, the “is/ought” distinction recurs: that copyright sometimes aids dissemination (as a factual matter)

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134. Arrow, *supra* note 130, at 614.

135. *Id.* at 616. Arrow writes that the article will “now apply the discussion” of the paradox (along with a discussion of risk), to the issue of “Invention as the Production of Information.” *Id.*

136. Michael Burstein and others show that legal protection against uncompensated disclosure can even be rendered unnecessary by many nonlegal devices, such as piecemeal disclosures during negotiations. Michael Burstein, *Exchanging Information Without Intellectual Property*, 91 TEX. L. REV. 227, 247, 251–52 (2012). Another such device arises “naturally,” namely, from the high level of know-how that’s required before a disclosed invention can be effectively exploited. (Although I suspect patent-type information requires more know-how to utilize than typical copyright subject matters.) Other devices include physical barriers encryption. Especially when backed by the Digital Millennium Copyright Act (DMCA), encryption and digital water-marking may enlarge copyright owners’ physical abilities to control post-dissemination uses of their work. All devices have their own costs, however.

137. Personal rights (arising out of *in personam* doctrines such as breach of confidential relations and quasi-contract) are often adequate to discourage use or disclosure after negotiations fail. Personal rights pose much less threat to public liberty than do *in rem* property rights such as patent and copyright.

does not dictate what normative impact dissemination *should* have, whether in constitutional discussions or otherwise. Finally, as a matter of descriptive economics, it's worth repeating that it's an unsolved empirical issue whether any pro-dissemination contributions that copyright might make in solving the Arrow paradox do, or do not, outweigh the restraints on dissemination that copyright also causes.

As mentioned, William Baumol suggested applying the paradox to copyright. When we do so, we find that the need to "solve the paradox" regarding disclosure and dissemination has much more force when applied to inventorship (the domain of patent law) than when applied to authorship (the domain of copyright law).

This occurs because inventions often constitute inputs to other products; for example, an innovation can reduce the cost of producing a product, or increase its quality, and the inventor can make and sell the ultimate product. Therefore, an inventor who lacked post-disclosure protection for ideas might be able to profit from the reduced price or improved quality yet avoid disclosure entirely.<sup>138</sup> So long as the inventor can keep the secret within his or her own manufacturing plant, that inventor need not sell or disclose the invention.<sup>139</sup>

Note that an invention that is used but still secret is disseminated in some sense because its benefits, though embedded invisibly in products, are spread among the populace. But such an invention is not disseminated in the fuller sense that would allow the public to understand it, or downstream innovators to employ and build on it. Disclosure of the information itself is important, and for many inventions, legal protections can make the crucial difference in an inventor's decision whether or not to disclose. Moreover, patent law explicitly requires public disclosure as a condition of protection.<sup>140</sup>

By contrast with inventors, creative authors typically have no option of using their ideas without disclosing them; novelists,

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138. Even where the invention can be used as a secret input to a product, licensing might be desirable. "Use of the information by the original possessor . . . may not be of much use to the owner . . . Since he may not be able to exploit it as effectively as others." See Arrow, *supra* note 130, at 615.

139. Trade secrecy law can be important in making the produce-it-yourself option, though note that the doctrines of trade-secrecy are open to as many questions of justification (perhaps more) than are the doctrines of copyright and patent. See, e.g., Robert Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CALIF. L. REV. 241 (1998).

140. See U.S. PATENT & TRADEMARK OFF., [www.uspto.gov/web/offices/pac/mpep/s2164.html](http://www.uspto.gov/web/offices/pac/mpep/s2164.html) (last visited Nov. 16, 2014).

painters, and singers sometimes produce inputs (as do the writers of computer programs<sup>141</sup>), but usually what creative persons produce is the ultimate product—the novel, the graphic design, the music. The primary ways to profit from such things are to publish, distribute, or perform them—leaving their authors forced to disclose to the public if they are to profit at all.<sup>142</sup>

Lacking the 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>143</sup> Thus, for products like books that “bear their secrets on their face,” disclosure is inevitably bound up with the best route to reaping profit, and exclusive rights would usually be unnecessary for disclosure to happen. By contrast, for such information goods what *might* be facilitated by solving the Arrow paradox is obtaining capital and income:<sup>144</sup> as disclosure and dissemination become more profitable, authorial incentives may increase.

So for copyright, the Arrow paradox focuses our attention not on dissemination and disclosure, but primarily on initial incentives.

Ironically, although the dissemination perspective led to validating an expansive copyright in *Eldred* and *Golan*, copyright might have a particular vulnerability if conceived of as an adjunct to publication. The vulnerability might arise because technological change has drastically reduced the cost of dissemination for many works.<sup>145</sup>

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141. In the United States, computer programs receive copyright protection on the theory that computer programs are “authored” works. In many ways, programs are unsuited for copyright—most obviously, because they are functional components of machines. See, e.g., Lloyd Weinreb, *Copyright in Functional Expression*, 111 HARV. L. REV. 1149 (1998); see also Pamela Samuelson et al., *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2308 (1994).

142. I suppose another route is to have the luck to find a very rich and eccentric individual collector.

143. The same probably applies to inventions that cannot be kept secret because, for example, they disclose their secrets on their face—one example is the safety pin. See Burstein, *supra* note 136, at 249–50 (discussing the excludability of a patent when “[t]he value-creating characteristics of the invention are apparent on its face”). As to such inventions, trade secrecy law is unavailable. In such cases, the inventor may have as strong a desire for post-disclosure rights as does an author and would feel the same pressure as an author might to disclose whether or not she had devices to discourage uncontrolled post-disclosure use by strangers.

144. A publisher will be more likely to sign a contract to pay royalties if he or she can be secure from unauthorized copying. See *id.* at 241–43 (“[A]n inventor who seeks resources and skills for development must convince sources of financing or potential development partners that it is worth their effort to commit resources to the invention.”).

145. This is an assertion about what publishing costs, not about what it costs authors to produce new work.

Congress might nevertheless be concerned with disseminators' welfare: clearly disseminators have some costs (e.g., gatekeeper/sorting/quality-review) that remain high even in the presence of digitization, and satisfactory alternatives have not always been found for publisher business models stressed by digitization. But is copyright the route to help them, if help they need?

So, let us assume that copyright makes it easier for disseminators and authors to make deals, and that these deals are welfare enhancing. The publishers pay authors, either for licenses or assignments, and the prospect of receiving such 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>146</sup>

Later, I will examine other claims that publishers might assert. But for now, just note the simple point: that if copyright were lacking, only those publishers who pay authors would face ruinous price competition at the hands of nonpaying competitive copyists. Publishers who don't pay authors are already able to price their physical products at a low level.<sup>147</sup>

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.<sup>148</sup> The crucial fulcrum is the creative author.<sup>149</sup> Copyright may also foster the organization and functioning of publishing entities.<sup>150</sup> But that is a happy byproduct, not itself a reason to enact or expand copyright law.

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Remember this Article is not questioning copyright that serves artists (even if it serves artists indirectly, by increasing dissemination). The Article instead questions copyright that serves publishing without serving creativity.

The increased distribution that is made possible by the Internet and the ubiquity of digital-copying devices constitutes a form of increased productivity. If a novelist wants to quit her day job and write full-time, she may still require copyright to take advantage of the increased productivity. Cf. William J. Baumol & W.G. Bowen, *On the Performing Arts: The Anatomy of Their Economic Problems*, 55 AM. ECON. REV. 495, 499–500 (1965) (illustrating how stable-productivity inputs tend to be rewarded less than increasing-productivity inputs; where a performer can only sell his artistry "once," his wages will tend to be low).

146. I am indebted to Richard Watt for the "agency" analogy. WATT, *supra* note 127, at 91.

147. Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1610–13 (1982).

148. *Id.* at 1602; see also Barnett, *supra* note 91, 405–06.

149. Gordon, *supra* note 147, at 1610 (stating that without control over their works, creators would lack incentive thereby reducing the intellectual productions that appear in the market).

150. *Id.* at 1612–13.

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

Admittedly, publishers do profit from copyright.<sup>151</sup> Aside from deals with “star” authors, like movie stars<sup>152</sup> and best-selling novelists, it is even likely that more monetary gains from author-publisher deals accrue to the publishers than to the authors.<sup>153</sup> 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 disseminator involvement in copyright lobbying.<sup>154</sup> 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.”<sup>155</sup>

### A. *The Role of Dissemination and Publication in Copyright Statutes and Doctrines*

Another possible reason for the Court’s odd perspective on noncreative dissemination is the undeniably important role that dissemination has always had in American copyright law. The federal statutes from the beginning have included a right to control distribution.<sup>156</sup> Also, and more important for the *Golan*

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151. And of course, some disseminators also profit from absence of copyright. For example, photocopy shops, and those commercial websites or publishers that themselves own no significant copyrights, make more profit the more works they can copy free of legal restraint.

152. Acting is a creative activity protected via the copyright in audio-visual works, 17 U.S.C. § 102(a)(6) (2012), the copyright in pantomimes, *id.* § 102(a)(4), and the copyright in sound recordings, *id.* § 102(a)(7). See also H.R. REP. NO. 94-1476, at 53 (1976) (explaining grant of copyright protection to “pantomimes and choreographic works”). Although most performers may be involved in “joint works” with the other participants, the issue of whether an actor’s recorded performance can have its own separate copyright will shortly receive more explication, as the Ninth Circuit has granted an en banc rehearing in *Garcia v. Google, Inc.*, 766 F.3d 929 (9th Cir.), *reh’g granted*, No. 12-57302, 2014 WL 5840553 (9th Cir. Nov. 12, 2014).

153. 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.

154. See Gordon, *supra* note 66, at 171 n.40.

155. This sentence obviously over-simplifies; the issue of how to address lobbying influence is more complex question than I can explore here. One datum worth noting, though, is the unusually strong role lobbyists have played in developing the details of U.S. copyright law. See generally JESSICA LITMAN, DIGITAL COPYRIGHT (2006).

156. In the first U.S. statute, in 1790, copyright owners were given exclusive rights to “print, reprint, publish, or vend.” Act of May 31, 1790, ch. 15, 1 Stat. 124, 124. Today’s statutory distribution right goes beyond vending (to “vend” is to sell). Today’s copyright owners have the exclusive right “to do and to authorize” the “distribut[ion of] copies or

Court, was the pre-1978 rule that subjected authorial works to a fuzzy divide between federal and state rights, one of whose borders was called “publication.”<sup>157</sup>

Today both published and unpublished works are protected federally; prior to 1978, “published” works were subject to different rules than “unpublished” ones. In particular, only published works were required to bear a copyright notice. Further, upon publication with notice, a great variety of works could obtain federal protection, while for unpublished works, a smaller set of categories was eligible for federal copyright.

State copyright, termed “common law copyright,”<sup>158</sup> was available to protect a work prior to publication, even if the work was also eligible to seek federal registration. After publication, only federal statutory copyright law could protect the work from copying.

The *Golan* Court drew from these facts the following incorrect inference: “Until 1976, in fact, Congress made ‘federal copyright contingent on publication[,] [thereby] providing incentives not primarily for creation,’ but for dissemination.”<sup>159</sup> This statement by the *Golan* Court is simply unfounded. Not even the source that the Court cited (an article by Shira Perlmutter<sup>160</sup>) fully supports it.

To examine the fault lines in the Court’s reasoning one by one: First, publication is the mode through which *authors* receive most of the payoffs whose lure provided them monetary incentives to create. It is hard to imagine how the phenomenon could be twisted into a congressional goal of “providing incentives *not primarily for creation.*”<sup>161</sup>

Second, it is not correct that prior to the 1976 Act, federal copyright was “contingent on publication.”<sup>162</sup> To the contrary, a great many unpublished works were entitled to obtain federal

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phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.” 17 U.S.C. § 106(3).

157. See *Golan v. Holder*, 132 S. Ct. 873, 888–89 (2012); see also 17 U.S.C. § 301 historical and revision notes (Single Federal System). 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. 17 U.S.C. § 301.

158. The same terminology applied whether the state copyright law originated from case law or statute.

159. *Golan*, 132 S. Ct. at 889–89 (quoting Shira Perlmutter, *Participation in the International Copyright System as a Means to Promote the Progress of Science and Useful Arts*, 36 LOY. L.A. L. REV. 324, 324 n.5 (2002)).

160. See generally Perlmutter, *supra* note 159, as discussed further below.

161. *Id.* at 324 n.5 (emphasis added).

162. *Id.*



copyright by registering with the U.S. Copyright Office.<sup>163</sup> This was recognized even by the source upon which the Court relied.<sup>164</sup>

Third, as the Supreme Court has itself recognized in other contexts, the dividing line between state and federal protection was not dissemination per se, but rather the determination by Congress “that a particular category of ‘writing’ is worthy of national protection and the incidental expenses of federal administration.”<sup>165</sup> Indeed, in the past, the Court had rejected an invitation to find “publication” equivalent to “dissemination,” and, instead, dismissively viewed “publication” as “only” a “term of art.”<sup>166</sup>

In short, the pre-1976 Congress considered publication a good marker for the point at which most writings became of national interest rather than of “purely local concern.”<sup>167</sup> For the

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163. Sections 9 and 10 of the 1909 Act provided for federal copyright to arise when copies were “published” with proper notice and other requisites were fulfilled. The Act’s next section gave protection for *unpublished* works:

That copyright may also be had of the works of an author of *which copies are not reproduced for sale*, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic or musical composition; of a photographic print if the work be a photograph; or of a photograph or other identifying reproduction thereof, if it be a work of art or a plastic work or drawing. But the privilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from the deposit of copies, under sections twelve and thirteen of this Act where the work is later reproduced in copies for sale.

Act of Mar. 4, 1909, ch. 320, sec. 11, 35 Stat. 1075 (emphasis added). Through an amendment, this provision later became section 12, with slightly different language.

164. See *supra* note 159 and accompanying text (presenting the relied-upon Perlmutter sentence in full).

165. *Goldstein v. California*, 412 U.S. 546, 559 (1973). Until 1976, two such categories were (a) “published” works and (b) a designated group of “unpublished” ones; in 1976, Congress expanded the categories to cover a larger number of unpublished works. (We might note, incidentally, that the Congress decision to embrace in federal all fixed works, even the unpublished ones, copyright is hardly a move consistent with giving “publication” the role the *Golan* Court attributes to it.)

166. “For purposes of federal law, ‘publication’ serves only as a term of the art which defines the legal relationships which Congress has adopted under the federal copyright statutes.” *Goldstein*, 412 U.S. at 570 n.28.

167. *Id.* at 560 (allowing state copyright in sound recordings.) The Court in *Goldstein* recognized that Congress gave protection when it “determines that a particular category of ‘writing’ is worthy of national protection and the incidental expenses of federal administration.” *Id.* at 559. It is from publication (and performance) that most authors reap the royalties that constitute their incentives.

What is more interesting is why common law copyright *stopped* its protection at publication. I think the matter had more to do with state versus federal competencies than with preemption. Nevertheless, it is true that federal copyright in the 1909 Act saved only “unpublished” works from preemption. See Act of Mar. 4, 1909, ch. 320, sec. 2, 35 Stat. 1075. The 1909 Act as amended is available at [http://www.kasunic.com/1909\\_act.htm](http://www.kasunic.com/1909_act.htm). In its original form the 1909 Act can be found at <http://legisworks.org/congress/60/publaw-349.pdf>.

*Golan* Court to conclude otherwise is puzzling, particularly as its interpretation rested on nothing more than a bare statement in an article footnote<sup>168</sup>—a statement which the Court in fact had truncated. (The ellipses in the majority’s quotation referred to omitted language that, in the original footnote cited, had referred to the way that federal law pre-1976 had allowed registration *as well as* publication to trigger federal copyright protection. Federal law through registration protected many types of unpublished work,<sup>169</sup> albeit a narrower range of types than federal copyright would protect after publication with notice.) To fully appreciate the lack of foundation underlying the *Golan* Court’s assertion requires some discussion of history.

Let me examine the two features of federal copyright law relied upon by the *Golan* majority: the pre-1978 use of “publication” as a dividing line, and the federal law’s exclusive right of distribution. I begin with “publication,” and a brief recap of the rules over the last century.

### B. *Summing up the Role of “Publication” in Federal and State Copyright Law*

For most of America’s history, as described earlier, “publication” usually ended a state copyright.<sup>170</sup> By judicial definition, publication involved general distribution of copies. Works which were performed widely were not necessary “published,” and the federal statute explicitly preserved state rights over unpublished works from preemption.<sup>171</sup>

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168. The Court cited note 5 of Shira Perlmutter’s article written in support of the government’s position in *Eldred*. See *supra* note 159.

169. The Perlmutter footnote was quoted only in part. The language omitted by the Court made reference to the ability of pre-1976 authors to register their unpublished works with the U.S. Copyright Office and gain federal copyright thereby. In the following quotation from the quoted footnote, I have put into italics some of the language omitted by the Court:

Indeed, U.S. copyright law prior to 1976 made the enjoyment of federal copyright contingent on publication with notice *or on registration* (with unpublished and unregistered works being protected by state common law), providing incentives not primarily for creation but for the subsequent acts of publication *or registration*, both of which were perceived to benefit the public.

Perlmutter, *supra* note 159, at 324 n.5 (emphasis added) (citing Act of Mar. 4, 1909, ch. 320, sec. 12, 35 Stat. 1075). Section 12 of the 1909 Act, which she cites, is the section giving many categories of unpublished works a route to federal protection.

170. Sound recordings were an apparent exception to state self-restraint, in that a California statute gave rights over disseminated recordings. The rights were held not preempted in *Goldstein v. California*. Those California rights arose out of a state criminal statute.

The Supreme Court refused to rule on whether the dissemination of records amounted to publication. *Goldstein*, 412 U.S. at 568–71 & n.28.

171. The 1909 Act provided: “Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity,

Works within enumerated categories (generally, works likely to be performed publicly) were eligible for federal protection under the 1909 Copyright Act upon registration, even while unpublished.<sup>172</sup> Therefore, proprietors of works pre-publication often had a choice between state and federal protection. All works obtained federal copyright upon publication, so long as the published copies had the prescribed federal notice, and the proprietor complied with other formalities.

As mentioned, the states' preserve for unpublished works was explicitly honored in the 1909 Act.<sup>173</sup> Congress sharply curtailed the state power to grant copyright protection in the 1976 Copyright Act. That Act decreed an end to all state copyright in "fixed" works (that is, works written down or recorded), whether published or unpublished, effective in 1978.<sup>174</sup> From that time to the present, federal copyright subsists in works of authorship whether published or unpublished, from the moment that the works are written down or recorded.

Although the 1976 Act covered all unpublished and published works, it continued the old law's requirement that all copies of a published work bear copyright notice. Until March of 1989,<sup>175</sup> federal copyright could still be lost if published copies failed to bear a specified form of copyright notice, although the federal forfeiture rules were loosened somewhat between 1978 and 1989. On and after March 1, 1989, lack of notice or other formalities ceased to be fatal.<sup>176</sup>

At that point, "publication" became remarkably less important to copyright. Publication remained important to copyright primarily as a matter for title searches:<sup>177</sup> any work that had been published without requisite notice prior to March 1989 (1) lost its federal copyright because of the lack of notice; and (2) lost its state

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to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor." Act of Mar. 4, 1909, ch. 320, sec. 2, 35 Stat. 1075.

172. This was section 11 in the original version of the 1909 Act as enacted. Act of Mar. 4, 1909, ch. 320, sec. 2, 35 Stat. 1075, available at <http://copyright.gov/history/1909act.pdf>. With amendments, the provision became section 12. See Act of July 30, 1947, Pub. L. No. 80-281, § 12, 61 Stat. 652.

173. Act of Mar. 4, 1909, ch. 320, sec. 11, 35 Stat. 1075.

174. 17 U.S.C. § 301 (2012). Interestingly, Congress preserved state rights in sound recordings produced prior to the date that federal law granted copyright to sound recordings. 17 U.S.C. § 301(c).

175. This is the effective date of the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853, available at <http://copyright.gov/title17/92appk.html>.

176. *Id.*

177. The remnants of the old formality rules appear primarily at 17 U.S.C. §§ 401–406. Prior to the Berne Convention Implementation Act in 1989, lack of notice on a published work was fatal to federal rights, although some defects were curable.

copyright because of publication. Today that work can be safely used by anyone.

Let me revise that last statement: the work published without notice in 1988 can be used by anyone unless it's a foreign work that's subject to restoration. Restoration was, of course, the focus of the statute<sup>178</sup> upheld against constitutional challenge in *Golan*.

### C. Federal Law on the Effects of Publication

The *Golan* Court placed reliance on a purported pre-1978 "rule" that publication divided federal from state copyright. This overstatement was then used to explain why noncreative dissemination warranted congressional concern when enacting copyright law. The package is puzzling.

As noted, the real rule pre-1978 did not confine federal copyright exclusively to published works: under section 11, later section 12, of the 1909 Act, many unpublished works were allowed to obtain federal copyright without publication.<sup>179</sup> The 1909 Act was written so broadly that the authoritative Copyright Office Study on the subject noted that potentially *all* unpublished works could have gained federal protection by means of registration.<sup>180</sup> The statute was construed more narrowly in practice,<sup>181</sup> but the scope of unpublished works explicitly mentioned in the statute as entitled to registration and to federal copyright protection was nevertheless broad:

[S]tatutory [federal] copyright is available, through voluntary registration, for unpublished works in the classes of lectures, etc., prepared for oral delivery; dramatic, musical, or dramatico-musical compositions; photographs; motion pictures; works of art; and plastic works or drawings. In general, these are the classes of works that are commonly disseminated by performance or exhibition as distinguished from dissemination by the reproduction and sale of copies.<sup>182</sup>

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178. 17 U.S.C. § 104A.

179. See *supra* note 172 and accompanying text.

180. STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., COPYRIGHT LAW REVISION STUDY NO. 29 at 6–7 (Comm. Print 1961), available at <http://copyright.gov/history/studies/study29.pdf>.

The Study notes that although section 12 mentions a number of particular works that can be registered in unpublished form, the question of "[w]hether this enumeration is exclusive apparently has never been decided by any court." *Id.*

181. As a practical matter only the works listed in the section were treated as eligible for federal protection while still unpublished. *Id.*

182. *Id.* at 7.

As the Study points out, most works likely to become known through performance rather than distribution could, though “unpublished,”<sup>183</sup> obtain federal copyright by registering. Federal protection with its limits therefore seemed to apply when a work promised to become important enough that national protection, and national *limits* on protection,<sup>184</sup> became needed. Publication wasn’t the sole measure of that.

#### *D. State Law on the Effects of Publication*

State law doctrine generally extinguished state copyrights upon publication. To know the reasons for that state doctrine is not, strictly speaking, necessary to critique the *Golan* conception of federal law. But pre-1978 federal law stepped in when state protection ended, and the 1909 Copyright Act explicitly left state law in unpublished works free of preemption; such facts motivate some inquiry into the states’ reasons for usually extinguishing authorial rights after publication. Although many of those reasons reside in history, policies, institutional strictures, and procedural concerns beyond our current scope, some of the reasons are quite accessible through a functional analysis.

The common law rule evolved in older economies that lacked technologies for sound recording or broadcasting; in such economies, access to works would usually be quite limited until an authorized general dissemination of copies occurred, and states’ interest in local regulation made state involvement

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183. See *Ferris v. Frohman*, 223 U.S. 424, 435 (1912) (common law right was immune to divestment by public performance); see also discussion *supra* note 15 and accompanying text.

184. The Supreme Court has maintained that federal copyright requires more limitation than does state copyright. When a state law protecting sound recordings for a potentially infinite period was challenged on the ground that the Constitution only allowed copyright of “limited Times,” the Supreme Court rejected the argument, grounding its holding on the fact that laws with local impact might not need the same limitations as would be needed for laws of national scope:

[P]etitioners argue that the State has created a copyright of *unlimited* duration, in violation of that portion of Art. I, § 8, cl. 8, which provides that copyrights may only be granted “for limited Times.” . . . [I]t is not clear that the dangers to which this limitation was addressed apply with equal force to both the Federal Government and the States. When Congress grants an exclusive right or monopoly, its effects are pervasive; no citizen or State may escape its reach. As we have noted, however, the exclusive right granted by a State is confined to its borders. Consequently, even when the right is unlimited in duration, any tendency to inhibit further progress in science or the arts is narrowly circumscribed. The challenged statute cannot be voided for lack of a durational limitation.

*Goldstein v. California*, 412 U.S. 546, 560–61 (1973).

appropriate.<sup>185</sup> Publication made sense as the terminus point because after publication, the local concern would be attenuated.

Under early technology, it would have been hard for the public to gain access to an unpublished creative work without violating some kind of noncopyright law.<sup>186</sup> To make a copy, the potential copyist might have to violate trespass law to enter the author's home or office to see the original;<sup>187</sup> violate conversion and theft prohibitions in order to take the document;<sup>188</sup> bribe a servant or employee;<sup>189</sup> or violate the contract or confidential relation under whose shelter he had been given a copy.<sup>190</sup> It thus makes sense that state law evolved to create a right against the copying of unpublished works in order to fill whatever gaps of control were left open by the established laws of trespass, conversion, confidential relations, theft, and contract.<sup>191</sup> State control over prepublication copying in such a context was not much of an additional incursion on liberty.<sup>192</sup>

But after publication, the only way for an author to control dissemination would be through the long arm of special copyright laws.<sup>193</sup> And at that point, public liberty would indeed be at stake, and significantly so. Recall that most of the famous British and 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*. Some kind of *pre-publication* common law right was fairly uncontroversial.<sup>194</sup>

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185. Even the California law prohibiting "record piracy" was aimed at local concerns: the "production of new recordings, a large industry in California." *Goldstein*, 412 U.S. at 571. However, the recordings protected were disseminated, indicating a possible break with the usual state practice of protecting only unpublished works.

186. See generally Gordon, *supra* note 18.

187. *Id.* at 1400.

188. *Id.* at 1367–68.

189. *Id.* at 1419.

190. *Id.* at 1411.

191. This is also how trade secret laws operate. Like common law copyright, they are state-created gap fillers. Unlike copyright, though, trade secrecy laws have a special virtue of preventing destructive arms races. See Friedman, Landes & Posner, *supra* note 17, at 66–67 (discussing the relationship between trade secrets and military espionage).

192. States were free to grant copyrights for unpublished works prior to the Copyright Act of 1976. See Gordon, *supra* note 18, at 1365 n.97.

193. For example, if authors want to preserve the right to disseminate their own work after publication, they must make special agreements. See UNIV. OF CAL. BERKELEY, TAKING BACK CONTROL: MANAGING COPYRIGHT AND INTELLECTUAL PROPERTY (2005), available at <http://www.lib.berkeley.edu/scholarlypublishing/copyright.pdf>. See generally 17 U.S.C. §§ 106–112 (2012) (discussing the restrictions and limitations of copyright owners).

194. Thus, while *Wheaton v. Peters* held no common law copyright existed in published works, it noted that authors had a right over improper use of their manuscripts. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 658 (1834).

After publication, only nationwide rights to control copying and use would be effectual. Consideration of factors such as potential threats to free speech, incursions on competition, need for national uniformity, and the scope of behavior that crossed state lines made federal intervention the only kind of intervention that made sense.

Also, after publication, the “trade secrecy” rationales disappear and enforcement would range far beyond matters related to the original manuscript, exceeding a state’s normal concerns with physical property, privacy, personal relations, and safety.<sup>195</sup> After publication there would be need for federal protection. And with publication the work became more capable of affecting the public sphere; as such, there also arose a sharper need for placing federal limits on the copyright owner’s ability to curb others’ use of his speech. The Supreme Court has in fact found that state copyrights, limited to state borders, need limitations less strongly than does national copyright law.<sup>196</sup>

For all these reasons, the decision in pre-1978 copyright doctrine to use “publication” as one of the triggers that could separate federal from state copyright gives no evidence for the *Golan* position; it is hard to see in this history any support for the proposition that the Framers or early Congresses had a goal of serving publishers’ interests *as publishers*.<sup>197</sup> Instead, publication had functional significance in terms of limits on state competence and in terms of need for nationwide regulation.

Nor is any such evidence provided by Congress deciding in 1976 to bring unpublished works into the federal realm (effective in 1978, for all works “fixed in a tangible medium of expression”).<sup>198</sup> By the 1970s, reprographic and other technologies had advanced. When tape recorders and broadcast technologies became ubiquitous, the notion of an “unpublished” oral presentation became absurd.

As intimated, I see the old “common law copyright” as having existed in states’ classic realms—physical control and personal relations—and as having been extinguished when a work’s content spread beyond those close-held realms. Potential challenges to my functional view might however be posed by the

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195. See *supra* note 191.

196. See 17 U.S.C. § 303; H.R. REP. NO. 94-1476, at 139 (1976) (“[The] basic purpose is to substitute statutory for common law copyright for everything now protected at common law, and to substitute reasonable time limits for the perpetual protection now available.”).

197. Again, the decision was made by the 1976 Congress, effective January 1, 1978. See 17 U.S.C. §§ 102, 301.

198. 17 U.S.C. § 102(a).

impact of *performance* on the old common law copyright, and by the old common law copyright rule on *letters*.

Let me turn first to letters. The person sending a letter continued to own the common law copyright in it.<sup>199</sup> The physical copy was owned by the recipient.

Sending the letter severed the author from physical control of the paper. If common law copyright was really centered on physical control of the manuscript, then the rule allowing the author to retain common law copyright in a letter needs some explaining. One possibility lies in the likelihood that trust might exist between the recipient and the sender. It does not stretch credulity to imagine that both parties to a letter understood that the recipient was not to publish it verbatim. A long case law history on “limited publication” reinforces the notion that no divestment of common law copyright occurred when there was an understanding between the sending and receiving parties.<sup>200</sup>

Ronan Deazley argues that the first major case regarding copyright in letters marks the first steps toward a “divorce” beginning between “the physical letter” and its “metaphysical [intangible] context.” In that case, in 1741, a British court gave copyright to a letter-writer despite the fact the claimant had divested himself of physical possession; Professor Deazley says the decision constituted a “decision of crucial significance”<sup>201</sup> moving toward a right in intangibles. I agree as a conceptual matter, but the *context* of sending and receiving letters arguably remained sufficiently local and personal to fit state legislative and judicial competencies.

The instance of performance is a bit more difficult to understand in the functional terms I have proposed.

Some common law jurisdictions adopted a rule that common law copyright vanished upon public performance.<sup>202</sup> This makes functional sense; the old common law copyright functioned primarily as an adjunct to physical and personal control, and performance can temporarily or permanently free a text from its physical encasement and put knowledge of the contents into the minds of people who are strangers to the author.<sup>203</sup> When the

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199. Pope v. Curll, (1741) 26 Eng. Rep. 608; 2 Atk. 342.

200. See, e.g., King v. Trustees of Bos. Univ., 647 N.E.2d 1196, 1199–1200 (Mass. 1995) (reading a letter indicating the parties’ intentions); see also Kiernan v. Manhattan Quotation Tel. Co., 50 How. Pr. 194, 201 (N.Y. Sup. Ct. 1876) (“[T]he transmission by Mr. Kiernan of his foreign financial news to his customers was but a qualified publication, which did not forfeit his right of property therein.”).

201. RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY 74 (2004).

202. Litman, *supra* note 15, at 1400.

203. See *id.*



physical and personal control ends, so should a state-granted copyright whose rationale is based on such control.<sup>204</sup>

But through most of U.S. history, mere disclosure by oral communication did *not* constitute a “publication” that divested common law copyright.<sup>205</sup> Most U.S. courts—and in 1912 the U.S. Supreme Court—preserved the common law copyright no matter how far the effects of a performance reached.<sup>206</sup> This line of cases poses difficulties for my view that historical common law copyright was founded on personal relations and physical control of manuscripts. While performance does not *end* the author’s physical control—after all, the audience may be unable to remember many details after merely seeing and hearing a play or sermon—performance certainly does weaken it.<sup>207</sup> That federal copyright was available for most such unpublished works increases the difficulty of explaining why states kept their rights available to authors after public performances had made a work publicly known. Why bother stretching the concept of “unpublished” so far, if federal protection was available regardless for sermons and plays whether published or unpublished?

An explanation may lie in the gradual nature of technological change. The nature of performance was person-to-

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204. One might argue against my functional approach that state copyright was not lost because of states’ consciousness of their own limited competence, but because of federal preemption. That’s an intriguing question to which I cannot do full justice here.

205. For a significant period, U.S. law allowed plays and sermons to remain technically “unpublished”—and thus perpetually protectable by state law—even after they were performed, so long as copies were not generally available to the public. *Ferris v. Frohman*, 223 U.S. 424, 434–36 (1912). However, hints of my functional perspective appear even in the case law of performing plays. The most intriguing case, *Keene v. Wheatley*, involved unauthorized performance of the play “Our American Cousin.” *Keene v. Wheatley*, 14 F. Cas. 180 (C.C.E.D. Pa. 1861). The court not only indicated that public performance would indeed waive rights as to the audiences present at the performance; the court also made liability of an unlicensed performance hinge on how a defendant obtained the copy of the script that it used:

[T]he defendants, against [the] will [of the person holding common-law rights in the play], performed it repeatedly at their theatre, without having been, directly or secondarily, enabled so to do through its impression upon the memory of any of [the proprietor’s] audience. This was an infraction of a proprietary right retained by the complainant. . . . [T]he complainant’s own theatrical representations of it were not the means through which the defendants were fairly enabled to represent it.

*Id.* at 207–08.

The *Keene* court thus implicitly followed the logic I am urging: when an author or her assignee voluntarily takes an action (such as performance) that makes her lose physical control of her work, she loses (at least *pro tanto*) common law copyright in it. In *Keene*, although the authorized performance did not divest all common law rights, it did erode common law rights as to the persons present at the performance. *Id.*

However, this does not seem to be the route generally taken by our courts.

206. *Ferris*, 223 U.S. at 435–36.

207. *See id.*

person, performer-to-audience, in the early days, rather than performer-to-iPhone-video; it was still a realm where state law would have a fairly comfortable “fit.” Thus, for example, “implied contract” played a role in preserving common law copyright despite oral delivery.<sup>208</sup>

The verbatim expression contained in an oral communication would rarely reach far. Technologies like tape recording and electronic broadcasting were unknown, and exact note taking difficult. So even after performance, works that were not generally distributed in tangible form remained largely private or only known to a limited group. Physical control over manuscripts still had puissance—until technology changed.

This may be what the Supreme Court had in mind when it commented, in regard to understanding why states might want to give sound recordings exclusive rights against copying within their jurisdictions: “[I]n earlier times, a performing artist’s work was largely restricted to the stage; once performed, it remained ‘recorded’ only in the memory of those who had seen or heard it. Today, we can record that performance in precise detail and reproduce it again and again with utmost fidelity.”<sup>209</sup>

Some types of state copyright—such as state protection for widely disseminated sound recordings—trouble my description of state copyright as being focused on physical control and personal relations. Speeches or sermons that might become widely known, yet would be considered “unpublished” (and eligible for state

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208. See Litman, *supra* note 15, at 1383–84. Thus, Professor Deazley in *Capitol Records* cites early British cases that use an audience’s “understanding” of an “implied contract” to uphold a lecturer’s common law rights despite oral delivery. Deazley, *supra* note 16, at 51. Notably:

Lord Eldon, granting an injunction against the publication of lectures that had been delivered at St. Bartholomew’s Hospital, did so, not on copyright grounds, but on the understanding that “all the persons who attended these lectures were under an implied contract not to publish what they had heard, although they might take it down for their own instruction and use.” In the present case, Lord Watson conceded that while there was nothing “in the nature of a contract between the professor and his students,” nevertheless the students could not “with propriety be said to represent the general public; of course they are, each and all of them, members of the public; but they do not attend the professor’s lectures in that capacity.”

*Id.* at 51 (footnote omitted).

209. *Goldstein v. California*, 412 U.S. 546, 570–71 (1973) (emphasis added). When California, having a local sound recording industry, recognized this change in technology and gave sound recordings rights against copying some years before the federal government did, the Supreme Court in *Goldstein* upheld the state protection. Federal copyright came to sound recordings in 1972; even today, pre-1972 sound recordings are allowed their state-based rights. See 17 U.S.C. § 301(c) (2012) (preserving such rights from preemption until 2067).

copyright) because the author had not distributed copies<sup>210</sup> are also troubling. Oral presentations of sufficient interest to bring the attention of people with good memories—not to mention newspapers and stenographers<sup>211</sup>—point to some weakness in my identifying physical and relational control as the prime rationale of the rule of publication-based division between federal and common law copyright law. This is not fatal—no law exactly matches any rationale with exactitude<sup>212</sup>—yet it certainly poses a challenge.

But note: Although my notion of state copyright might have become too narrow to be fully descriptive as state copyright expanded to cover, e.g., letters, widely known performed work, and recorded music, such a discrepancy would say nothing about the purposes and scope of federal law, and it is federal law which concerns us. I do not see how the possible discrepancy could support the *Golan* Court's belief that the importance of "publication" to federal copyright law prior to the 1976 Act meant that Congress had a concern with the welfare of publishers as publishers.

I think this is true even if the state insistence on protecting works after performance rested on a foundation of "natural rights" theory. At various times, the U.S. courts were probably influenced by a natural rights view, and under some variants of natural right, the physical control that has been my focus would become arguably less central to state copyright jurisprudence.<sup>213</sup> Jessica Litman goes so far as to attribute the American common law rule on performance to the influence of treatise writer (and natural law righter) Eaton Drone.<sup>214</sup> But natural rights theory need not lead where Drone thought it did.<sup>215</sup>

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210. For example, in *Pope v. Curl*, the court discusses sermons that are unpublished but are known because the loose-leaf copies get distributed after the author's death. *Pope v. Curl*, (1741) 26 Eng. Rep. 608; 2 Atk. 342.

211. Some unpublished oral works were undoubtedly reported to the public in organs such as newspapers, and verbatim transcripts can be made by the hands of speedy stenographers. As "unauthorized" publications, such distributions would not have robbed the speeches' authors of their common law copyrights.

212. See Arthur Allen Leff, Commentary, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 482 (1974).

213. See Litman, *supra* note 15, at 1414–15 (discussing Drone's natural right perspective and its influence on the Court's decision in *Ferris*).

214. See *id.* at 1411–16 (discussing Eaton Drone's book, *A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States* and its influence on the spread of the natural rights view of common law copyright).

215. Gordon, *A Property Right in Self Expression*, *supra* note 5, at 1535–39 (arguing that the best natural-right view leads to strong limits on copyright and strong freedom of speech). I rely on many of the same materials as did Drone but reach different conclusions.

In particular, natural rights theory need not lead to noncreative disseminators having claims to copyright legitimacy separate from their relations with authors. Admittedly, disseminators are “laborers” who make social contributions. But most explicators of natural right or “moral desert” theories in the IP context link natural rights of ownership to authorship or inventorship, that is, to *creative* labor rather than to labor *per se*.

Purposeful effort or labor is a necessary but not sufficient condition for copyright or patent ownership: To have a right to control others’ speech would constitute a “fitting and proportional return”<sup>216</sup> only (if ever) under narrow conditions; only some kinds of labor (if any) will suit.<sup>217</sup>

Also, if natural right theory were linked to labor *per se* (as Drone attempted to do<sup>218</sup>), in federal law in the U.S. the theory would quickly butt heads with the language of the Constitution, which authorized Congress to grant rights to only two classes of deserving laborers, namely authors and inventors. This later became quite explicit in *Feist*, where the U.S. Supreme Court ruled that the products of socially beneficial labor could not earn copyright if they lacked creativity.<sup>219</sup>

Further, linking natural rights to *all* forms of effort quickly would become unintelligible (given conflicting claims) and could undo the competitive system altogether. Competition continually imposes undeserved harms and benefits on laboring, productive people. If laborers are to deserve reward, something—like a link to human intellectual capacity—must distinguish a *narrow* class of laborers from the rest, if the system is not to freeze in paralysis.

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216. Lawrence C. Becker, *Deserving to Own Intellectual Property*, 68 CHI.-KENT L. REV. 609, 620 (1993).

217. *Id.* This is not only true of “personality” based natural-right theories, but also of Lockean approaches such as Becker’s or mine: Gordon, *A Property Right in Self Expression*, *supra* note 5, at 1544–45 & n.68.

218. Drone explicitly refused to distinguish between products of the mind and other products of labor. In Chapter I, Drone writes:

Ownership, then, is created by production, and the producer becomes the owner.

This principle is general, and covers all productions, the whole field of labor. It cannot be applied to the produce of one kind of labor, and withheld from that of another. *It matters not whether the labor be of the body or of the mind.*

EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 5 (2d ed. 2001) (1879) (emphasis added). It is important to note that Drone was not trying to refute the proposition that activity of the mind might be *more* appropriately entitled to protection than other fields of endeavor; rather, his was a defensive argument, seeking to rebut positions that saw works of authorship as *less* capable of ownership than were physical objects. In particular, Drone sought to dispute the claim of Justice Yates that “nothing can be the object of property which has not a corporeal substance.” *Id.* at 32–33.

219. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345–46 (1991).

In short, my argument against *Golan* is left unimpaired by the American rule that common law rights in “unpublished” works survived performance. Let us now turn to examining the possibility that the *Golan* approach is supported by the continual presence of a distribution right in all U.S. copyright statutes.

*E. The Exclusive Right over Distribution*

The current U.S. right of distribution reads as follows:

Subject to [fair use and other limitations including the first sale doctrine], the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:<sup>220</sup>

. . . .

(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 . . . .<sup>221</sup>

Some see the role of the distribution right as indicating a concern with distributors. By contrast, I argue the right is instrumental and has nothing to do with protecting distributors per se. It has to do with authors.<sup>222</sup> Without a distribution right, copyright law’s grant of rights to authors would be largely toothless. Forgers and other copyists could sell their unlawful copies to unknowing retailers and then scamper. Without the right over distribution, the retailers (the only ones left on scene to sue) would be immune to judgment. Neither of the two established copyright doctrines of secondary liability, namely contributory liability and vicarious liability, might reach the retail sellers.<sup>223</sup> Or the copyists might not flee, but might spend

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220. 17 U.S.C. § 106(3) (2012). 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.” 17 U.S.C. § 109(a).

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. *Id.*

221. 17 U.S.C. § 106(3).

222. *Id.*

223. Under copyright law, vicarious liability requires proof that the defendant had some control over the violative act. *See generally* Perfect 10, Inc. v. Visa Int’l Serv. Ass’n, 494 F.3d 788, 806 (9th Cir. 2007) (That case is controversial on its facts but stated the basic rules accurately; it denied vicarious liability because the plaintiff failed to prove the credit card company had the right and ability to supervise the alleged infringing conduct). If a retailer had no control over the copying, he would therefore not be liable under

their profits before they are caught. This could again leave the people who have sold (distributed) the forgeries as the only entities capable of paying a copyright judgment. Without the distribution right, the retailers would be suable only upon proof of knowledge.<sup>224</sup>

Admittedly, had there been no distribution right, the doctrines of secondary liability would almost certainly have evolved to make unknowing distributors liable. This kind of expansion of secondary liability doctrine is what happened in the *Grokster* case. There, defendant peer-to-peer computer programs enabled unlawful copying by third parties. Essentially because the *Grokster* program provided the most vulnerable “bottleneck” to stop the copying, the Supreme Court added a new type of secondary liability (“inducement” liability) to the list of doctrines that could make a noncopyist liable.<sup>225</sup> The same kind of change to secondary liability law could have been invented to “catch” retailers of pirated print copies.

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 Gordian knot?) and simply make all distributors of unlawful copies liable. Cutting the Gordian tangle of secondary liability doctrines is what the distribution right accomplishes.

Violating the distribution right creates direct infringement. Because ignorance and good faith are not defenses to a civil copyright action for *direct* infringement, 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.<sup>226</sup>

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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. *Id.* at 795 (stating that a defendant may be found to be “a contributory infringer if it (1) has knowledge of a third party’s infringing activity, and (2) ‘induces, causes or materially contributes to the infringing conduct’” (quoting *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004))). An unknowing retailer would thus not be subject to secondary liability.

224. *Id.* (stating that in order for a retailer to be liable, knowledge of the third party’s infringing act must be shown).

225. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 940–41 (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, [so that] the only practical alternative [is] to go against the [device’s] distributor . . . for secondary liability . . .” *Id.* at 929–30.

226. *See Coleman v. Payne*, 698 F. Supp. 704, 708 (W.D. Mich. 1988) (stating that damages can be awarded despite the defendant’s knowledge).

So yes, there is a right of distribution. But its function is to assist authors, not distributors.<sup>227</sup> Once explained, the existence of a section 106(3) right of distribution should stop confusing observers into thinking that distributors themselves are the subject of the statute's solicitude.<sup>228</sup>

## VI. PUBLISHER CLAIMS BASED ON THEIR OWN EFFORTS

### A. *Nature of the Claims*

There are several arguments that proponents of the *Golan* view could raise in support of the idea that distributors' interests are part of copyright's legitimate goal—or at least, in support of the idea that the disseminators' interest need some form of protection against copying.<sup>229</sup> For instance, entirely apart from the publishers' investments in creators (such as paying 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.<sup>230</sup>

### B. *Why the Claims Fail*

1. *Typesetting, the Need to Pay Stars, and Other General Claims by Disseminators.* 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 set his own type.<sup>231</sup> So preventing physical free riding on set-up costs couldn't have been part of the Framers' goal.<sup>232</sup>

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227. See 17 U.S.C. § 106(3).

228. See *id.*

229. Please see the rest of the Article for said arguments. See *infra* Part VI.B.

230. Barnett, *supra* note 91, at 390 (explaining how copyright can be conceived as a way to incentivize investments).

231. Interestingly, typefaces, though artistic in their genesis, are excluded from the sphere of copyright. The CTEA 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).

232. Now manuscripts can be easily scanned and transformed into OCR digital form, often using industry- and world-wide standard typefaces. That means that *both* original publishers and purported free riders can succeed while investing little or nothing toward typesetting or typography, and “piracy” need lead to no great cost-saving on typesetting. See Chris Soghoian, *TV Torrents: When ‘Piracy’ Is Easier Than Legal Purchase*, CNET (Sept. 12, 2007, 10:35 PM), <http://www.cnet.com/news/tv-torrents-when-piracy-is-easier-than-legal-purchase/>.

As to investment in advertising or distribution infrastructure, such costs accrue to any business with a wide market. Proof is needed if we are to believe they apply in some special way to film distributors and book publishers, and not to electronics, athletic shoes, packaged 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.

Other arguments, such as pleas to expand IP rights based on the high premiums and advances that distributors pay to “star” creators (which constitute an expensive form of overhead for these distributors), are not truly arguments in favor of special solicitude for distributors.<sup>233</sup> Rather, like traditional copyright justifications, they turn on rewarding or incentivizing a creator. The only difference is that instead of the public directly paying the artist a high price for her work, the public pays the distributor, and the distributor in turn pays the artist for the right to exact that high price from the public.<sup>234</sup> Thus, the crux of any copyright justification is the claim of the artist, whose economic argument in turn is a purported need to incentivize creative activity.

## 2. *Evaluative Skills, Cherry-Picking, and the Price System.*

The pro-*Golan* argument that holds the most water is, perhaps, that publishers make a major contribution by evaluating and choosing which works to publish. Over time, the choices of successful publishers might also give rise to a reputation or brand image, upon which consumers come to rely. It is also argued that if a publisher publishes ten books, and only one of them is a hit, the publisher can use the profits from that one to subsidize the other nine, thus potentially 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. Therefore, the publisher might argue, if its profits are leached by cherry-picking competitors who are able to copy and publish only the bestsellers, its business model would be destroyed.<sup>235</sup>

This argument has been foundational to some views of copyright that give a central role to publishers and other disseminators and intermediaries. For example, Jonathan

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233. Barnett, *supra* note 91, at 400–05.

234. *See id.* at 400–02.

235. *See id.* at 391–92 (arguing that the cherry pickers are free riders who harm the dominant intermediaries).



Barnett recognizes that digitization makes reproduction and dissemination easy,<sup>236</sup> and that “popular views”<sup>237</sup> tend to see copyright (and publishers) as less important as a result. In the face of that digital challenge, Barnett emphasizes the evaluative role that some disseminators play as sponsors of content they find worthwhile:<sup>238</sup>

In a digital environment, consumers’ screening and evaluation burden rises given the abundance of content, which increases . . . Search and evaluation costs required to filter out low-value output would be infeasible for any individual user to bear. . . [L]ower entry costs for artists imply higher search and evaluation costs for users. . . Users’ increased cognitive burden in digitized content markets preserves and even expands the screening and persuasion function of cultural intermediaries. A

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236. Barnett writes,

It might be argued that the intermediary-based account only provides a historical account of the role played by copyright in a “pre-digital” period during which time it was costly to acquire the skills and equipment required to produce and distribute content on a mass scale. By implication, the intermediary-based case for copyright would appear to falter in an environment in which those costs have fallen and artists can often reach end-users without an intermediary.

*Id.* at 392.

One of Barnett’s responses is to point to the role intermediaries can play in evaluating and screening content, a role which he argues valuably reduces “consumers” search costs. This view I discuss in text.

Barnett’s other primary defense for intermediaries’ importance in a digital age is the following:

[T]he decline of copyright in digitized content markets . . . has resulted in . . . [a] shift[] from . . . intermediaries that specialize in the stand-alone delivery of priced content to intermediaries that specialize in the delivery of unpriced content that is bundled with a complementary asset—principally, hardware and advertising or other services . . . . That shift . . . imposes a potential social welfare loss . . . . Under strong copyright, all forms of intermediation—both bundled and unbundled—are available . . . ; by contrast, under weak or zero copyright, the set of intermediation options is limited to bundled mechanisms, which may not coincide with the most efficient mechanisms for the mass production and delivery of creative content.

*Id.*

This empirical claim strikes me as weak on its own, and also remarkably one-sided in its failure to notice that *strong* copyright might limit institutional alternatives just as weak copyright might. (In other words, it is wrong to assume that “all forms of intermediation” will be available in the presence of strong copyright.) Therefore, the empirical argument he makes would have to include not merely assessing the benefits of options *made possible by* strong copyright, but would also have to include the opportunity costs of losing the options such a legal environment would *foreclose*.

See the discussion of comparative institutional arrangements *infra* Part VIII. Obviously, evaluating the empirics of Barnett’s argument lies outside the scope of my current article.

237. Barnett, *supra* note 91, at 392.

238. *Id.* at 405–06 (explaining that authors will transfer most interests to disseminators who are best positioned to finance the projects).

sponsoring intermediary enjoys economies of scale and learning in filtering the undifferentiated mass of creative content. As such, it efficiently relieves the informational burden borne by uninformed consumers and therefore relieves the marketing burden borne by the unknown artist or even the known artist with respect to any new creative good. Far from being obsolete, the intermediary retains a critical function in digital content markets.<sup>239</sup>

Barnett's claims largely ignore the host of word-of-mouth, volunteer, and ad-based sources of evaluation, which abound in daily life and on the web. Even a commercial "favorites" site like "Pinterest" does not seem to base its business models on exclusion rights.<sup>240</sup>

Barnett's position is also questionable in that it implies a distrust of "regular folks" as effective intermediaries; the very language he uses, "consumers," ignores that many audiences are both cultural participants, avid sharers of opinion, and possessors of active minds. Concomitant with ignoring or understating the value of "consumer" evaluations, Barnett is silent about the possible inefficiencies and distortions generated by the "capital-intensive marketing infrastructure" that he admires.

Moreover, arguments for using expanded copyright law to help intermediaries<sup>241</sup> "screen" material for audiences rests on a number of factual and normative errors. The most obvious is Barnett's apparent assumption that choice is always a cost to consumers rather than a pleasurable and educative exercise. To the contrary, in my experience at least, many people are drawn to the Internet because of the opportunities it offers to find and share hidden sources of excellence.

A strict adherence to consumer sovereignty (that is, treating preferences as "given") would not ignore the benefits arising from

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239. *Id.* at 396, 419 (footnote omitted). Note that Barnett does not explicitly claim that copyright "is intended to" benefit publishers or other intermediaries.

240. Benjamin Spiegel, *Pinterest: The Social Search Goldmine*, *MARKETING LAND* (Nov. 19, 2014, 9:38 AM), <http://marketingland.com/pinterest-social-search-goldmine-107925>.

241. Barnett writes of the copyright-expanding effects of his arguments:

An intermediary-based view suggests that the expansion of the subject matter, term, assignability, divisibility and scope of copyright entitlements—developments that have been subject to repeated criticism from the legal academy—enhance intermediaries' incentives to invest in creative works that are costly and risky to identify, evaluate, produce, edit, market and distribute on a mass scale.

Barnett, *supra* note 91, at 391.

That a disseminator focus would lead to copyright expansion is an opinion Barnett and I share. Where we differ is on the question of whether or not this is a good thing.

choice and sharing that many people claim to enjoy. And more flexible views of value—for example, value judgments based not on expressed preference but on a notion of human flourishing—would be even less likely to ignore the benefits of making an individual making her own choices. Barnett’s perspective seems to assume that effort is always costly and to be avoided. To the contrary, the exercise of taste and judgment almost always has intrinsic benefits.

What Barnett calls “increased cognitive burden” many of us would call “fun.”

Finally, the argument based on publisher-as-evaluator fails when it is used to argue that copyright should be altered to give intermediaries strengths not given to other industries. Evaluation of opportunities is what every business does and what every business shares with others, willingly or not, through price signals.

#### VII. SOME COPYING IS ESSENTIAL TO ALL COMPETITION

Barnett seems to emphasize the publishers’ abilities to identify desirable works as a reason for anticopying rules.<sup>242</sup> Such an emphasis disregards the fact that signaling competitors about one’s success is an inevitable and essential part of a decentralized market system’s ability to allocate resources. Ordinarily, this function is carried out by pricing. High prices call attention to a need for more supply. The genius of the market system supposedly lies in the way that decentralized actors can share each other’s information via price signals.<sup>243</sup>

If there is a shortage of salt in a given community, then the price of salt will rise and additional suppliers, both local and out-of-state, will be motivated to enter the market, increasing the supply and lowering the price. The new market entrants are “copying” earlier salt-sellers’ good judgment about location and product. The rising price signaled them to imitate.

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. Of course, copyright law impedes other publishers’ ability to compete in this way, just as (in the old royalist days) a royal monopoly on the market for salt would impede productivity in that sphere. Copyright must be

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242. See *id.* at 404–05 (explaining publishers may also need these rules since they bear the risk that the creation will be a failure).

243. For a classic explanation of the pricing system, see generally ARMEN A. ALCHIAN & WILLIAM R. ALLEN, *EXCHANGE AND PRODUCTION THEORY IN USE* (1964) (discussing how price signals the supply and demand of the good in question).

sparingly used, particularly if, as Barnett suggests, the notion is to use monopoly to *preclude* people acting on the signals of desirable products upon which competition rests.<sup>244</sup>

The more a law mutes the power of signals to induce imitation, the less ably will markets serve the economy.

#### VIII. OTHER OBJECTIONS AND ISSUES

Granted, in any market it might be advisable for there to be some lead time where the first seller can be the only seller, to allow innovators and first movers to recoup their extra expenditures.<sup>245</sup> However, this is potentially true of everything from hybrid cars to cough medicine, as was emphasized by Justice Breyer's dissent in *Golan*.<sup>246</sup> The burden is still on the publishers to show, for example, why they cannot function with only the exclusivity that is natural to the market (that is, the time it takes for competitors to accurately identify what looks like a success, duplicate it, and persuade customers to accept their version as an adequate substitute for the original).<sup>247</sup>

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244. Barnett, *supra* note 91, at 424–25.

245. See generally J.H. Reichman, *Legal Hybrids Between the Patent and Copyright Paradigms*, 94 COLUM. L. REV. 2432, 2439 & n.25 (1994).

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, as when a software producer “has an advantage in developing derivative software to the extent that it understands its own technology . . . [while] a competitor . . . would need to reverse-engineer and spend time learning the technology before developing it.” Brett Frischmann & Dan Moylan, *The Evolving Common Law Doctrine of Copyright Misuse: A Unified Theory and Its Application to Software*, 15 BERKELEY TECH. L.J. 865, 916 (2000). Lead time may also be the result of legal mechanisms, as in the case of copyright, which “extends natural lead-time effects during the statutory term of protection by giving authors exclusive rights to produce derivative works.” *Id.* Whether and how much lead time is advisable in a given context is a difficult empirical question; the answer is unlikely to be the ninety-five or so years that copyright provides.

246. *Golan v. Holder*, 132 S. Ct. 873, 909–10 (2012) (Breyer, J., dissenting); see also Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 299–301 (1970) (discussing the concept of lead time).

247. In fact, Barnett himself points out that the popularity of hits declines quickly: few become “classics” for which demand persists beyond a single season.” Barnett, *supra* note 91, at 408 (footnote omitted). If publishers are subsidizing less successful works with the profits from a big hit—a questionable empirical proposition—and those big hits usually only remain popular for one season, then a few months or a year of exclusive protection should be sufficient to maintain their business model—hardly the author’s life and seventy years beyond.

Moreover, copyright gives power and not merely money; and copyright extends the copyright owner’s power not only against exact duplicators but against all sorts of derivative and subsidiary products. Even if an argument can be made for granting distributors some kind of help, that argument would not demonstrate that copyright’s sweeping scope of exclusions is the proper vehicle.

Barnett also contends that the nonauthorial contributions of distributors “are far more capital-intensive than the initial act of creation, demand skills, equipment and infrastructure that are not always easily accessible and are undertaken by [profit-motivated] entities.”<sup>248</sup> Even if true, it is not clear what the claim proves. All industries spend more than individuals do.

If an author spends five years writing a novel and living in his parents’ attic (I’m thinking here of novelist Steven Millhauser), his monetary investment is the opportunity cost of five years’ lost wages plus the monetary “value” he would place on avoiding the discomfort suffered; perhaps the lost wages and the compensation for discomfort totals \$500,000. Undoubtedly a corporation can spend more than \$500,000 on a project. That says nothing about which entity—author or company—has more need of the law’s aid.

A. *Can Fair Use Extend to Noncreative Dissemination?*

The reader may be wondering, if one holds that (1) Congress cannot give copyright extensions/restorations that solely further noncreative dissemination, does that position commit the holder to also believing that (2) Congress cannot limit copyright in order to encourage noncreative dissemination? The challenge could run, if only authorial interests matter, isn’t it inconsistent to support giving “fair use” to noncreative copying? The challenge is apt, for I am here championing authorship as the core of copyright, yet my articles since 1982 have argued that fair use *should* extend to rote and uncreative copying such as in-home taping of television programs for purposes of time-shifting, or photocopying textual material for research and class use.<sup>249</sup>

I think my two positions are consistent. That is, one can hold position (1), that noncreative dissemination cannot be legitimately used as a goal to expand copyright, and consistently hold position (1A), that noncreative dissemination can be legitimately used as a goal to restrict copyright. The steps of the argument are simple.

That creativity is uniquely important to the constitutional clause does not cast doubt on the importance of noncreative use for social policy and human welfare. Furthering noncreative use

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248. *Id.* at 395.

249. See generally Gordon, *supra* note 147, where I argued that the Ninth Circuit in the *Betamax* case was incorrect to limit fair use only to creative adaptations. On appeal, in *Sony Corp. of America v. Universal City Studios, Inc.*, the Supreme Court held that fair use *could* embrace noncreative copies. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984).

is one of many goals that Congress has some power to further . . . but not in the Copyright Clause.

The structure of the U.S. Constitution Article I, Section 8, Clause 8, is one sided. Congress has *power to* give exclusive rights solely to encourage writers and inventors,<sup>250</sup> but has no duty to do so. Congress is not obliged to use this power. Any consideration—including the value of creative or noncreative activity that would be induced by limiting a copyright owner's exclusive rights<sup>251</sup>—is therefore legitimate for Congress to take into account in deciding *not* to use its discretionary powers to create copyrights.

So, to take a fanciful example: if every new song caused a rash and every new novel induced psoriasis, Congress could legitimately decide to stop awarding copyrights in songs and books in the hope of thus protecting public health. The legitimacy of that decision wouldn't rest on whether the goal of protecting the public epidermis lay within the Copyright Clause.<sup>252</sup>

The case for the legitimacy of taking the public's dissemination interests into account when *limiting* copyright is even stronger than an argument for taking public health into account. That is because the Clause authorizes grants of rights for only "limited Times," an acknowledgement and command by the Framers that regard must be paid to the public's interest in access to creative works.<sup>253</sup> Such regard is to be paid not in terms of copyright expansion but in terms of copyright limits—the Clause tells us so, for it states that copyrights must *end*.<sup>254</sup>

### B. *Line-Drawing*

If the key to copyright is the creation of beneficial works of authorship, it might be asked, why should a right of suit not inhere in people who make *other* beneficial societal contributions

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250. See U.S. CONST. art. I, § 8, cl. 8 ("Congress shall have *Power . . . [t]o* promote the Progress of Science . . . by securing [to Authors] for limited Times . . . the exclusive Right to their . . . Writings" (emphasis added)).

251. In fact, one reason for the "limited Time" restraint on congressional power is precisely to further dissemination. This is further discussed in Part VIII.B.

252. See U.S. CONST. art. I, § 8, cl. 8. Confusion probably results from the fact that (unlike the furthering of healthy skin) furthering noncreative dissemination obviously can further the same goal as copyright does, namely, the furtherance of Progress in knowledge. But the Copyright Clause doesn't enable Congress to grant any rights it wants to in order to further Progress.

253. I first heard a variant of this point—that the Clause's reference to "limited Times" itself indicates that Congress must take into account public interest as well as author/inventor interest—made by James Boyd White.

I am in his debt.

254. U.S. CONST. art. I, § 8, cl. 8.

with high, one-time, up-front costs? Does my position commit me to a supporting a “misappropriation explosion” or a giant uptick in the scope of restitution?

The short answer is that the Framers chose a unique and limited set of benefit-generators, people who used their minds and artistry. Perhaps the Constitution should be amended to empower Congress to give rights against imitation for the purpose of incentivizing all sorts of new categories of effort; or perhaps states should expand restitution, and copyright preemption should squeeze itself out of the way of state law developments.<sup>255</sup> Those matters are separate from the issue of whether incentives for creativity play a unique role in copyright itself.<sup>256</sup> The “limited Times” provision gives us, I think, a positive answer to that latter issue. And the focus I urge on creativity—the plea that courts not justify copyright expansion with reference to noncreative dissemination—is one way to constrain a potentially explosive restitutionary logic.

Any incentive rationale has dangers. Giving all volunteers who generate benefits a prima facie right to sue, even if limited to volunteers whose initial efforts involve “nonrepeatable costs,”<sup>257</sup> might, *inter alia*, inhibit the formation of contracts, cause individuals significant harm by forcing them to pay for things they would not buy, and scotch beneficial voluntary gift exchange.<sup>258</sup> And for nonauthorial benefit-creators, a right to sue might not bring society the contributions to free discussion, self-development, and democratic exchange that copyright (we hope) might bring.

I have suggested elsewhere that copyright is a good exception to the rule in restitution doctrine that volunteers

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255. Incentivizing all sorts of efforts is of course already a big part of other aspects of American law, whether state law (e.g., property law), federal law (e.g., anti-discrimination law), and constitutional law (e.g., the role that the Takings Clause plays in keeping incentives active and avoiding a “demoralization” that would reduce productivity). See Frank Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1214 (1967).

256. Further, as I have argued,

Courts considering claims over intellectual products sometimes write as if “reaping and sowing” and “unjust enrichment” automatically give rise to absolute claims, trumping all other considerations. *Yet the judicial experience in the allied area of restitution* has suggested that economic and other norms should, and do, condition the implementation of the impulse to grant reward for labor expended.

Gordon, *On Owning Information*, *supra* note 12, at 281 (emphasis added).

257. *Golan v. Holder*, 132 S. Ct. 873, 900 (2012) (Breyer, J., dissenting).

258. See, e.g., Saul Levmore, *Explaining Restitution*, 71 VA. L. REV. 65, 102–04 (1985). The empirical validity of such arguments is as controversial as their normative aspect. See, for example, Paul Starr’s criticism of the classic study by Titmuss, *The Gift Relationship*. See DOUGLAS STARR, BLOOD 226–30 (1998) (criticism of the classic study by Titmuss, *The Gift Relationship*).

cannot sue beneficiaries for contribution.<sup>259</sup> But that argument depends, *inter alia*, on authorial creativity being the source of benefit.

It is possible that a slippery slope problem is arising. Many of us have observed a growing tendency for courts to penalize “free riding,” even though the reciprocal use of benefits that neighbors generate for each other is the essence of community.<sup>260</sup> That tendency to condemn free riding (especially when the benefit is reaped at no cost to the originator) is to be regretted.<sup>261</sup> One way to help turn the misappropriation tide might be to encourage the Justices next time to turn away from *Eldred* and *Golan*, and keep their eyes on creativity as the object of copyright incentive.

## IX. CONCLUSION

The Supreme Court erred in singling out the interests of noncreative disseminators as being capable of providing legitimacy to controversial extensions of the copyright statute. Such an error will be less likely in the future if we see why the Court might have been tempted by it: copyright economic theory puts emphasis on dissemination;<sup>262</sup> disseminators have long profited from copyright and have long been involved in lobbying for copyright;<sup>263</sup> and several doctrines seem to put emphasis on publication.<sup>264</sup> But once these phenomena are examined, it becomes clear that they do not support the Court’s recent interpretation.

For example, this Article offers a distinctive view of the role that “publication” played prior to 1978 in partly dividing federal law from states’ “common law copyright”; the Article shows that

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259. See, e.g., Gordon, *Of Harms and Benefits*, *supra* note 13, at 563–64 (“The varying fact patterns of different ‘volunteer’ cases may make it difficult for a court to generalize to classes of activities or to make predictions about categories of behavior.”); Gordon, *On Owning Information*, *supra* note 12, at 232–35 (“In the volunteer context, that party is the benefactor, at least where mistake and other exceptional situations are absent.”); see also Levmore, *supra* note 258, at 121 (denying restitution to volunteers stems from “the freedom from liability enjoyed by those who decline to volunteer”).

260. Lemley, *supra* note 31, at 1033.

261. SHELLY KAGAN, *THE GEOMETRY OF DESERT* 46–117 (2012) (offering some useful ways of illustrating, through graphs, various preferences for the distribution of resources). For example, some persons strongly disapprove of anyone receiving an “undeserved windfall” even when the windfall is costless to everyone.

262. Cf. *Golan*, 132 S. Ct. at 889 (“A well-functioning international copyright system would likely encourage the dissemination of existing and future works.”).

263. See, e.g., *Disney Lobbying for Copyright Extension No Mickey Mouse Effort*, *supra* note 39, § 1, at 22.

264. See, e.g., H.R. REP. NO. 94-1476, at 129–34 (1976) (showing common law copyright as one example).



the reason for ending common law copyright at “publication” had nothing to do with a goal of fostering publication per se. The Article also argues that the copyright owner’s exclusive right to control distribution, section 106(3), is in the statute not to “serve distributors,” but rather as a way to simplify the rules of liability to aid authors’ attempts at enforcement.

In my view, it is proper to use copyright to further the interests of disseminators to the extent this also has significant potential for furthering creative activity. It is, however, improper to use the interests of noncreative disseminators to legitimate provisions that have no plausible effect on incentivizing new creative work.

Challenges could be raised to my position. Some challenges have been discussed in this Article. Other challenges exist as well. For example, if only such dissemination as serves authorial interests is relevant, that might invalidate some seemingly sensible statutory rules—like the one that promotes public access to ancient, unpublished works by giving their copyright owners an extended copyright term if they publish by a certain date.<sup>265</sup> My position might indeed mean that those attractive rules are unconstitutional; however, that unfortunate possibility is grist for another day’s milling.

The U.S. Constitution speaks not only of a goal—Progress—but also of a means: grants of exclusive rights to authors and inventors.<sup>266</sup> The burden of persuasion rests on those who would dislodge copyright from its explicit and traditional focus.

Our nation’s first copyright statute, in 1790, empowered plaintiffs to destroy the texts printed by infringers.<sup>267</sup> Today injunctions and many other remedies fill out a copyright plaintiff’s quiver with additional potential tools for “book burning.”<sup>268</sup> Whether authors should have such powers to constrain speech is questioned by many scholars, even at the

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265. 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 by promising an extra term of years if they were published promptly:

Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the term provided by section 302. In no case, however, shall the term of copyright in such a work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2027.

17 U.S.C. § 303(a) (2012).

266. U.S. CONST. art. I, § 8, cl. 8.

267. Act of May 31, 1790, ch. 15, 1 Stat. 124, 124.

268. See 17 U.S.C. §§ 501–505 (providing remedies for infringement).

foundational level of Lockean theory.<sup>269</sup> *A fortiori*, I doubt that the Framers meant to give authors such extreme rights for the purpose of serving publisher interests; it's a poor fit. Publishers and film restorers, standing alone, might need and deserve some kind of assistance or subsidy. Many industries do. Copyright is not the appropriate instrument for providing that assistance.

Copyright imposes a duty not to copy. One route to evaluate how copyright law should evolve is to build conceptually on common law foundations. To use the common law, however, there must be an initial act to start the "duty" rolling. This Article has argued that for the tort of copyright infringement, the initial act is the author's creation of a work. That argument has potential consequences for building a new model for copyright statutes and for judging the constitutionality of those enacted.

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269. See, e.g., Shiffrin, *supra* note 6, at 141. The legal literature on copyright/First Amendment intersection is legion. See, e.g., Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970); see also Netanel, *supra* note 77.