

## *The Core of Copyright*

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The essay argues that copyright statutes can only be justified by reference to their ability to further Progress through incentivizing (or, perhaps, rewarding) the creation of new works of authorship. Therefore, a contested copyright provision should not be justifiable by reference to any encouragement the provision would offer to non-creative dissemination standing alone. It might be asked, why bother with this contention now? Haven't *Eldred and Golan v. Holder* rejected it fairly soundly? The contention still matters. First, the Court hasn't fully cut off its line of retreat, and retreat may be necessary because ever-more-outrageous statutes may enacted now that creativity has been de-centered. Second, our top-heavy, absurdly complex statute needs an overhaul; policy-makers might make good uses of a gyroscope with some clear direction and simplicity. Common law tort models are an option for providing such guidance. Common law models suggest that noncreative dissemination standing alone cannot justify imposing on the public a duty-not-to-copy. That is because of the requirement that a copyright (and its correlative duties) can last only for 'limited times.' If the rights for a work begin ONCE, those rights will be limited in duration by the common-law logic of proximate cause. Proximate cause in turn has links to an economic logic of decreasing incentives, and to a moral logic of attenuated responsibility. By contrast with creation, which for any particular version of any particular work can happen only once, dissemination can continually recur. If the rights can be re-started whenever a category of disseminator requires incentives, copyright could last forever. Because 'limited times' is a central feature of copyright, the rights attached to a creative work must have reference to a non-recurring behavior. Given copyright's history, that non-recurring behavior must be the act of creation. Moreover, the tendency to demonize free riding -- the 'misappropriation explosion' that one sees in the law of trademark, rights of publicity, and other areas -- arguably flows from a judicial misperception about the generalizability of 'property' notions. Returning copyright to its pre-Eldred, traditional conception of its core function, might prove a useful part of the effort to curb the promiscuous spread of IP liability.

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