

The Core of Copyright

by

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Introduction and summary

The essay argues that copyright statutes should only be justified by reference to their ability to further ‘Progress’ through incentivizing (or, perhaps, rewarding) the creation of new works of authorship. Therefore, I contend, a contested copyright provision should not be justifiable by reference to encouragement the provision would offer to non-creative dissemination standing alone.

It might be asked, why bother with this contention now? Hasn’t the Supreme Court rejected it in both *Eldred*¹ and *Golan*²? Those opinions upheld the constitutionality of copyright expansions with arguments that relied on the challenged provisions’ providing advantages to non-creative activities like dissemination and physically restoring decayed movie stock.

My contention -- that exclusive statutory rights must be linked to encouraging creativity - still matters. First, the Court hasn’t fully cut off its line of retreat, and retreat may be particularly necessary now; Congress might be pushed to enact ever-more-outrageous statutes now that creativity has been de-centered, both by the Court and by enthusiastic commentators.

Second, our top-heavy, absurdly complex copyright statute needs an overhaul; policy-makers might make good uses of a gyroscope with some clear direction and simplicity. The common law is a good source. It draws policies from common-sense economics and common-

² *Golan v. Holder*, 565 U.S. ___, 132 S. Ct. 873 (2012).

sense morality³ in characteristic patterns that most lawyers can understand and deploy. These policy strains, and their instantiation in common-law doctrines of tort and restitution, might provide structure for a copyright gyroscope. Comparing our actual copyright law with what the common law might have generated⁴ can highlight where our current statute may need special justification or need re-thinking. And the common law logic works well only if creating an original work of authorship is the touchstone.

No extensive analysis of tort or restitution appears here. This paper instead attempts to evaluate the distraction of *Golan* – clearing the ground, as it were, in preparation for building a gyroscope.

A brief side note: Later this paper gives some attention to the historical artifact known as common-law copyright. As a preliminary matter, I should note that historical ‘common-law copyright’ applied only to *unpublished* works, and was notionally perpetual. If *this* was the common-law guide I was looking for, it would hardly give any assistance to understanding what

³ See, e.g., Shelly Kagan, NORMATIVE ETHICS at __ (common-sense morality is a mixture of consequentialism and deontology).

⁴ For exploration of tort law, see my *Mirror Image* And *Harm* articles; for exploration of restitution, see primarily Wendy J Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L.REV. 149 (1992), which explores whether the common law of restitution could have generated something like copyright, had legislation not been enacted to serve the relevant need

The latter article was an “as-if” thought experiment; like the current project, it did not enter the quagmired debate over whether (a) a common law right in published works of authorship existed but was extinguished by statute, or whether (b) it never existed at all. The US Supreme Court seems to have wavered a bit: Although in 1834 it stated that common-law rights in published works never existed, in the infamous 1918 case of *INS v AP*, the Court created/recognized a common-law right in published news. Also compare *Wheaton v Peters*, 33 U.S. 591 (1834) (“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.” 33 U.S. 591, 662) with *Ferris v Frohman* 223 U. S. 436 (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, *Invention of the Common Law Play Right*, 25 BERKELEY TECH L J 1381 at __ (2010).

today's federal copyright law—which deal s mainly with published works and whose rights are time-limited by constitutional command—should look like.

Historic common-law copyright had rationales quite different from those underlying statutory copyright. Highly path dependent in its development,⁵ this doctrine functioned, I argue, largely as a gap-filler, and as a prophylactic to reduce undesirable behavior by owner and strangers⁶ that might otherwise arise around the physical control of unpublished works.⁷ That copyright in unpublished works was called “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 copy 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 publication⁸.

As I argue further below, historical common-law copyright in unpublished works served as an adjunct to physical control. It more resembled trade secret law— a cause of action granted

⁵ Among other things, common law copyright changed shape in response to federal developments; Litman, *supra* note __ at __.

⁶ 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.

⁷ See __, *infra*; also see Wendy J Gordon, *An Inquiry into the Merits of Copyright*, STANFORD L REV, at __.

What I present here falls short of being a diagnosis of the full range of historical phenomena linked with common-law copyright; I address the aspects most relevant to the *Golan* position on dissemination. I should, however, note that many distinguishable and discrete doctrines hide under the single label of common-law copyright. In addition, some unified doctrines pass under variegated labels.

While I leave analysis of such historical developments for another forum, I do note one droplet of interest: the only time the US 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*, at __ (performance by ‘human cannonball’; the common-law right, labeled ‘right of publicity’, was upheld against a First Amendment challenge). As I argue in text, *infra* at __, copyright is most problematic when it is enforced through injunction.

⁸ Similarly, trade secret protection lasts only so long as the ‘owner’ maintains protection for the secrecy. [cite] When the owner allows his or her physical fences to come down, so do his or her trade secret rights.

largely to prevent innovators from over-investing in self-help to guard private or valuable works,⁹ to discourage outsiders from violating existing contractual or real-property rights, and perhaps to preserve privacy— than it did an *in rem* property right.¹⁰ 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 primary relevance of the historical artifact known as “common-law copyright in unpublished works” is to help us understand the *subordinate* role that ‘publication’ played.¹¹

Returning to the main argument:

Under the Constitution, a copyright (and its correlative duties)¹² can last only for ‘limited times.’ Common-law economic and moral logic does indeed lead to a duty that is limited in

⁹ This view of trade secrecy as a means to prevent a self-help arms race was probably first introduced by David Friedman [cite]. The alternative views of trade secrecy - as a mode of incentivizing innovation, as found e.g. in *Kewanee v Bicon*, or as a mode of enforcing commercial morality - have some merit as well.

¹⁰ I am not the first person to see parallels between copyright and trade secrecy. In 1945, a Note in the Yale Law Journal argued that “The best analogy, though imperfect, to common-law copyright is the protection afforded trade-secrets.” Note, NECESSITY OF INTENT FOR INFRINGEMENT OF COMMON-LAW COPYRIGHT, 54 Yale L. J. 697, 698 at n.5 (1945).

¹¹ See __ infra.

¹² Students in tort classes find the notion of ‘right’ largely self-explanatory, but, oddly, are routinely confused by the notion of ‘duty’. Yet it’s generally agreed (pace some philosophic wrinkles) that the two concepts, right and duty, inhere in each other; they merely constitute different faces of one phenomenon. Where an enforceable right exists, it exists against someone, and that someone is a duty-holder.

So when copyright law speaks of granting rights, it simultaneously and necessarily imposes duties.

Hohfeld, in his classic discussion of legal relations among private parties, shows enforceable right and duty as correlatives; where one appears, so does the other. Where duty is absent, others have ‘no-rights’. Hohfeld at __. Hohfeld meant by the category he termed ‘right’ an ability to call on government to assist. Far different was the category of ‘liberty’ (or ‘privilege’). Definitionally, where liberty governs, private persons have neither duties nor enforceable ‘rights’ against each other. For example, when someone strikes back at an assailant under the ‘privilege’ of self-defense, she violates no duty – that is, she owes the injured assailant nothing under tort law-- so long as her actions remain within the privilege.

An extra layer of complication is added when a duty is asserted not against a private party but against a sovereign. In that context, ‘liberties’ can be enforceable, in that sense that law may require a governmental entity to strike down (or refuse to impose) purported but improper legal duties. There can be a (higher) duty to strike down (lower) duties. Thus the Supreme Court enforces liberties by striking down unconstitutional legal duties. For copyright, the First Amendment is the biggest source of potential liberty. Many commentators (with whom I’ve

time,¹³ but only so long as creativity is put at the core. The view that noncreative dissemination standing alone can justify imposing on the public a duty-not-to-copy would lead to a *permanent* duty not to copy, surviving eons after the person whose efforts gave birth to the duty is gone.¹⁴

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 has links to an economic logic of decreasing incentives, and to a moral logic where intervening events, time and distance can attenuate responsibility. 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 non-recurring action.

Given copyright's history, that non-recurring behavior must be the act of creation. For any particular version of any particular work, creation can happen only once; by contrast, dissemination can continually recur. If the rights can be re-started whenever a category of disseminator requires incentives, copyright could last forever.

Moreover, there's a 'misappropriation explosion' going on: a tendency by courts in trademark cases,¹⁵ rights of publicity cases, and other areas, to give enforceable rights in return

joined) argue that courts should explicitly use the Amendment to limit the legal duties-not-to-copy that copyright imposes on the public.

¹³ See discussion below, at ____.

¹⁴ 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*, at _____. 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 any. 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 ____.

¹⁵ See, e.g., Dogan & Lemley.

for benefits generated by the plaintiff, and to demonize free riding by the defendant.¹⁶ This development arguably flows from a judicial misperception about the generalizability of 'property' notions. The Founders did not authorize anti-competitive property-like shelters for all activity that generates social benefits; to the contrary, they reserved such extraordinary treatment for work that involved the life of the mind.¹⁷ Returning copyright to its pre-*Eldred*, traditional focus on creativity, might prove a useful part of the effort to curb the promiscuous spread of IP liability.

The essay begins by presenting the Supreme Court background out of which the issue arises.

Background: private earthquakes

In 1998, the United States Congress extended the nation's already long copyright term by another twenty years. 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.¹⁸ In this nearly unprecedented

¹⁶ To free ride is to benefit from another's effort without doing harm. As someone must have articulated already, 'free riding' is thus an activity that the principle of pareto-superiority would recommend.

¹⁷ Justice Breyer's dissent in *Golan* made an analogous point, but focused not on the intellectual faculty that produces creative work, but rather on economic structure. Works of authorship are goods that, once made, can have zero marginal cost of replication:

"The industry experts 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 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."

565 U. S. ____ (2012) (dissent by Breyer, J.) (Emphasis added.)

The general point is a good one, but Justice Breyer might be taken to suggest 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. The Framers decided that something more—namely, life of the mind—needs to be necessary.

¹⁸ Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618). 2002 WL 1041846.

document, the economists jointly stated that the then-recent extension of copyright term in the US could not appreciably increase incentives to authors.¹⁹

By implication, the economists' brief backed the common wisdom: that when the American Congress extended copyright from life of the author plus fifty years to life-plus-seventy, the goal was not to encourage new authorship; rather, the industry actors who stood to benefit were primarily companies that 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 even 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.²⁰)

A majority opinion of the Supreme Court nevertheless upheld the CTEA.²¹ In doing so, the Court exhibited some unease with the economists' brief. The majority opinion indicated that even if a statute doesn't help authorial incentives, it might be valid if it encourages noncreative behavior that helped knowledge and the arts to progress.²² For an example, the Court cited the

¹⁹ Id. at 2.

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

²¹ Eldred v. Ashcroft, 537 U.S. 186 (2003).

²² Federal power to enact copyright legislation is granted by U.S. Const. art. I, § 8, cl. 8, sometimes known as the Copyright and Patent Clause or the Intellectual Property Clause. It provides that "The Congress shall have Power To . . . promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." For further parsing of the clause, see n.____, *infra*.

way that term extension might encourage some companies to take old films out of mothballs and physically restore the film stock.²³

This step in reasoning registered 6.5 on my personal Richter scale. My scale is particularly sensitive to inconsistency.

Only a few years earlier, in the famous *Feist* case, the same Court had decided that copyright could not extend to noncreative compilations.²⁴ In *Feist* the Court had held that only *creative* works were within legitimate range of Congressional concern under the Constitution's copyright clause.²⁵ 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,²⁶ copyright could not inhere in noncreative works. Now, a bare eleven years later, the Court was saying that even although *Feist* was rightly decided, Congress *could* use noncreative activity to justify rules about how creative works were handled.²⁷

²³ Eldred, 537 U.S. at 206-7.

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” (emphasis added) (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 (1998), the phrase “their works” appears only in relation to authors. (“Authors will be able to pass along to their children and grandchildren the financial benefits of their works.” *Id.* at 4.) The Court turns usual usage on its head when it speaks of non-authors doing something with “their” works.

It's as if the writer of the majority opinion views copyright ownership as bearing a more significant relationship to a work than does authorship.

²⁴ *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 499 U.S. 340, 359-60 (“originality, not ‘sweat of the brow,’ is the touchstone of copyright protection in directories and other fact-based works.”)

²⁵ *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”).

²⁶ The Court's language extended to all noncreative databases; ironically, the creation of the actual database at issue—a white pages phone book—had no such need for copyright incentives.

²⁷ Eldred, 537 U.S. at 206-7 (explaining that encouraging noncreative “restoration and...distribution” was a valid purpose of the CTEA).

The two cases presented questions that weren't technically identical—*Feist* dealt with works that were noncreative in their inception, while *Eldred* dealt with works that were creative in their inception.²⁸ 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 made between 1924 and 1944— who stood ready to post digital versions of those works via websites like Project Gutenberg²⁹, or to build new creative works out of the old materials-- were burdened with an obligation they would not otherwise have had. 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. In order for the public to search via internet, the books 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.³⁰ 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 Google³¹ and Hathitrust³² have been temporarily ameliorated by judgments of

²⁸ I am indebted to Jane Ginsburg for insisting on this point.

²⁹ See <http://www.gutenberg.org/>

³⁰ 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 Director of the New York Public Libraries, to Karyn Temple Claggett, Associate Register of Copyrights, United States Copyright Office, re: Reply Comments to Orphan Works and Mass Digitization: Notice of Inquiry (77 F.R. 204) (Docket No. 2012-12) (March 6, 2013) (available at http://www.copyright.gov/orphan/comments/noi_11302012/New-York-Public-Library.pdf). The Library had the courage to digitize the material nevertheless, but the costly search would have been unnecessary but for the increased copyright term upheld in *Eldred*.

³¹ *Authors Guild, Inc. v. Google, Inc.*, 721 F.3d 132 (2d Cir.2013), on remand, 954 F.Supp.2d 282 (S.D.N.Y.2013), appeal docketed, No. 13–4829 (2d Cir. Dec. 23, 2013).

³² 2014 U.S. App. LEXIS 10803 (2d Cir. June 10, 2014), affirming, 902 F. Supp. 2d 445 (S.D.N.Y. 2012).

fair use, but both the Google and Hathitrust suits lie within the Second Circuit. Less sensitive judicial approaches than the Second Circuit's exist. And for many other people and institutions who want to use and post old works, but cannot afford either permissions or litigation, *Eldred* reinforced a barrier that fair use won't surmount.

In the *Eldred* opinion's upholding of an extension of copyright term,³³ 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. I therefore still had some hope that the Court didn't really mean that a copyright statute which prevented works from falling into the public domain could be upheld simply because it assisted noncreative activity.³⁴ More recently, that hope evaporated.

In *Golan v. Holder*, decided in 2012, the Court addressed the question of whether Congress exceeded its power when it enacted a remarkable US statute that gave US copyright to some foreign works that had been in the US public domain.³⁵ The statute was remarkable in part

³³ *Eldred*, 537 U.S. at 194.

³⁴ In *Eldred*, the question in part was about 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 Court seemed to hesitate, as if noncreative activity could be relevant only as a partial justification. Compare *id.* at 195 (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").

³⁵ *Golan v. Holder*, 565 U.S. ___, 132 S. Ct. 873, 878 (2012) (upholding 17 U.S.C. § 104A; 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 US compliance with the Berne Convention, which the US had recently joined. Under Berne, member nations cannot condition copyright ownership on compliance with formalities; yet under earlier U.S. law, many works over the years had entered the public domain because of a failure to comply with then-required U.S. formalities such as placing a prescribed form of copyright notice on all published copies of a work. Section 104A allowed restoration of copyright in some of the non-U.S. works that had lost copyright in this way.

because prior caselaw took as a virtual article of faith that “matter once in the public domain must remain in the public domain.”³⁶

This new statute, creating US 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.”³⁷ The challenge failed.³⁸

In upholding the statute, the Supreme Court majority wrote, over a strong dissent, that “The provision of incentives for the creation of new works is surely an essential means to advance the spread of knowledge and learning. We hold, however, that it is not the sole means Congress may use “[t]o promote the Progress of Science.”³⁹ “Inducing dissemination” could also justify Congressional action.⁴⁰ While the opinion’s language leaves room to quibble,⁴¹ it

³⁶ *Kewanee v Bicon*, 416 U.S. 470 at 484 (1974).

³⁷ *Golan* at 888.

³⁸ *Golan*, *supra*.

³⁹ *Golan* at 889.

In addition to what I argue is a substantive error, note the institutional solecism of the language. Courts do not ordinarily “hold” what a legislative purpose is, or “hold” any other particular rationale. Rather courts “hold” that a particular result should follow, e.g., that a piece of legislation is or is not valid.

In the common-law system, at least in practiced in the US, consistency of results is more important than consistency of rationale. Therefore, the US Supreme Court is less bound by this purported ‘holding’ than may appear.

⁴⁰ *Golan* at 888 (“Nothing in the text of the Copyright Clause confines the ‘Progress of Science’ exclusively to “incentives for creation...Evidence from the founding, moreover, suggests that inducing dissemination—as opposed to creation—was viewed as an appropriate means to promote science.”)

⁴¹ It is not fully clear that the Court meant to hold that a copyright statute could be valid if it contributed nothing to induce 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.” *Golan* 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, “The provision of incentives for the creation of new works is surely an essential means to advance the spread of knowledge and learning.” *Id.* at 899. 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.

seems that in Court believes that in carrying out the Constitutional mandate to “promote the Progress of Science” [and “useful Arts”],⁴² Congress can legitimately enact provisions extending copyright’s reach even if the statute’s intention and effect would be to aid *only* noncreative disseminators.

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 an ordinary industry subsidy, as if nothing but money hung in the balance. This was (ahem) wrong.

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

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 non-strict 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 non-creative 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.

⁴² Regarding the verbal union of “Science and useful Arts”, see the explanation of my reading of the Clause at __ supra. That interpretational explanation (based on the Framers’ use of the word “respective” in the clause) does not bear on my immediate argument; I include it simply to explain why I do not use the common formulation that limits “authors” to furthering “Science.”

‘limited times’ -- the Framers intended the Clause to impose on Congress’s copyright power.⁴³

Nor do I have a fleshed-out, non-originalist theory of constitutional interpretation to present today. Nevertheless, the logic of ‘limited times’ itself, and the internal logic of infringement suits, leads me to believe that at the core of copyright lies creativity.

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

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, or to hold assignments or licenses from authors, or to act themselves as authors’ compensated agents. Perhaps authorial activity is encouraged by that employment, agency, assignment or licensing. If so, the statute might be justified. But any such justification should lay *vel non* with the authorial encouragement, not with serving the disseminators’ own needs. Should the disseminators’ noncreative activities fail 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 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

⁴³ See, e.g., Oren Bracha, *Owning Ideas: A History of Anglo-American Intellectual Property*, Harvard Law School, 272 (2005) (“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.”) The Bracha dissertation is available at <http://www.utexas.edu/law/faculty/ob242/publications/>

Constitutional constraint of ‘limited times’. Stand-alone dissemination activities like publishing might *continually* need copyright in order to stay in business and ‘induce 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. Before turning to that discussion, note another feature of copyright: its remedies.

Destruction of infringing works has been part of an a US copyright owner’s remedies since the beginning⁴⁴, and today the statute combines powers of destruction with other injunctive remedies⁴⁵ whose strength is only partly mediated by the *EBay* decision.⁴⁶ Federal law empowers copyright owners to stop others from speaking, when those others mix their speech with borrowed expression.

Vitally important speech has been muzzled by copyright claims. Particularly infamous is the injunction that stopped Alan Cranston from publishing an unexpurgated English translation of Adolf Hitler’s *MEIN KAMPF*, a translation that could have given America an early warning.⁴⁷

Most commentators probably believe that the Constitution,⁴⁸ the first Copyright Act,⁴⁹ and the First Amendment⁵⁰ were adopted closely enough in time that we should take the Act and

⁴⁴ The power to destroy infringing speech appears in the Copyright Act of 1790 at sec.2; 1 Statutes At Large, 124.

⁴⁵ 17 USC 502 et seq. Also consider the ‘take down’ provisions of the DMCA.

⁴⁶ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) (cautioning against the automatic imposition of injunctions in patent cases.)

⁴⁷ http://williampatry.blogspot.com/2008_03_01_archive.html See the fuller discussion in NEIL W NETANEL, *COPYRIGHT’S PARADOX* (2008).

⁴⁸ The Constitution, ratified in 1788, empowers Congress to grant “exclusive rights,” but does not specify what remedies should accompany the rights.

⁴⁹ The power to destroy infringing speech appears in the Copyright Act of 1790 at sec.2; 1 Statutes At Large, 124.

the First Amendment as consistent. 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,⁵¹ 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; it is in fact difficult to accept the dangers to free speech that inhere in copyright grants to authors.⁵² It is harder still to see an appropriate 'fit' between, on the one hand, expanding injunctively-enforced rights to exclude and, on the other, encouraging non-creative activities such as dissemination.

Admittedly, a contrary argument could be made. When the Supreme Court in *Harper & Row* called copyright the "engine of free expression," it referred to copyright providing "economic incentive to create *and disseminate* ideas." (Emphasis added.) And it is undeniable that democracy is helped not only by new ideas, but also by the spread of existing ones.

But a multitude of activities and resources could also abet the spread of ideas and the ability to engage in debate— universities, the internet, a public health system, a minimum level of food and shelter that would allow even the poor to focus on issues of society's welfare. The Founders did not embrace all of them in copyright.⁵³

⁵⁰ The First Amendment was adopted in 1791.

⁵¹ See, e.g., Neil W. Netanel, Copyright and a Democratic Civil Society, 106 Yale Law Journal 283 (1996).

⁵² See the panoply of remedies at 17 USC sections 501 et seq.

⁵³ For example, at one point the Founders considered, then rejected, giving Congress the power to fund federal universities.

After mentioning dissemination in the same breath as creativity, the *Harper & Row* Court then wisely went on to return to baseline: “the talents of authors.”⁵⁴ This focus on authorial incentive is well entrenched in our history.

The constitution and our initial and successive copyright statutes speak in terms of protecting authors. The relevant number of the Federalist Papers similarly focused on the reasonable “claims of individual[]” “authors” and “inventors”, not disseminators.⁵⁵ Even the English Statute of Anne, which was probably enacted at the urging of disseminator interests (the Stationers’ Company), gives rights only to authors. Further, the Supreme Court’s apparent pronouncement in *Golan*, that dissemination standing alone can justify copyright expansion, is a sharp departure from centuries of understanding. It is the traditional understanding—that copyright is for “authors”—to which I adhere.

In this view I am hardly alone⁵⁶, but hardly unopposed.⁵⁷ In this essay I will investigate some possible explanations for why the Supreme Court and some of my scholarly colleagues⁵⁸

⁵⁴ 471 US at 558 (quoting *Mazer v Stein*).

⁵⁵ The text of Federalist 43 appears at <http://www.constitution.org/fed/federa43.htm>

⁵⁶ 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, 1170 (2000) (stating that the “exclusive right [of copyright] be granted only as the purchase price for a new invention or writing”); Michael H. Davis, Extending Copyright and the Constitution: “Have I stayed too Long?”, 52 Fla. L. Rev. 989, 1000 (2000) (arguing that “there does not seem to be any constitutional power premised, however, on publication, as opposed to creation, of works nor upon quality of works”); 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”); Joshua N. Mitchell, Promoting Progress with Fair Use, 6 Duke L.J. 1639, 1659 (2011) (stating that “progress” in the constitution must refer to both increasing the quantity of creative works and dissemination of those works because dissemination alone “does not expand the boundaries of knowledge is not progress promoting”); Edward C. Walterscheid, The Preambular Argument: The Dubious Premise of *Eldred v. Ashcroft*, 44 IDEA 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”); Jessica Talati, Copyrighting Stage Directions & the Constitutional Mandate to “Promote the Progress of Science”, 7 Nw. J. Tech. & Intell. Prop. 241, 253 (2009) (stating if a copyright grant would not stimulate new creation, it should fail as an illegitimate exercise of Congressional authority under the constitution”)

might have stumbled into what I see as an error, and some of the reasons why I think their interpretation erroneous.

“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?⁵⁹ 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?

My first reason for proceeding is to supply food for thought should the Court ever return to the questions of durational and other copyright expansion. There is room in both *Eldred* and *Golan* for the Court to back-track in its constitutional interpretation.⁶⁰

⁵⁷ See, e.g., Jonathan M. Barnett, Copyright without Creators, 9 Rev. of L. & Econ. 389, 406 (2014) ((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”); 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. Law & 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); Julie E. Cohen, Copyright as Property in the Post-Industrial Economy: A Research Agenda, 2011 Wis. L. Rev. 141, 143 (2011) (stating “the purpose of copyright is to enable the provision of capital and organization so that creative work may be exploited”). 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 ownership in a gold mine does not cause gold to exist in the earth, but encourages coordinated extraction and processing of the metal. See E. Kitch, “The Nature and Function of the Patent System,” 20 J.L. & Econ. 265 (1977).

⁵⁸ See, e.g., Jonathan Barnett, Copyright Without Creators, *supra*; 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 “control of copying, manipulation, and derivation” exercised by disseminators, which “enables the organization of entire sectors of economic activity in ways that produce a variety of concrete benefits, ranging from jobs and exports to an independent expressive sector to cultural ‘solidarity goods’”); Malla Pollack, What is Congress Supposed to Promote?: Defining “Progress” in Article I, Section 8, Clause 8 of the United Constitution, or Introducing the Progress Clause, 80 NEB. L.REV. 754, 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 the spreading of ideas).

⁵⁹ I thank Jane Ginsburg for pressing me on this point.

⁶⁰ See the discussion at n.____ *supra*.

Secondly, I offer my view of the Clause because the over-complex statutory schemes we call ‘copyright’ and ‘para-copyright’⁶¹ needs some kind of stabilizing central gyroscope. One such stabilizing vision can be provided by utilizing analogies from the common law.⁶² 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.⁶³ While I don’t 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. And I believe it can be profitably informed by common-law tradition. For quite a while the courts even imported common law remedies into the copyright cause of action created by statute.⁶⁴ So we might ask, what logic animates the structure of the copyright tort suit? How are the correlative roles of plaintiff and defendant linked?

⁶¹ ‘Para-copyright’ primarily refers to provisions in the copyright act that relate to encryption. The source of authority for enacting para-copyright is a matter for debate.

⁶² In other work I have begun the project of spelling out what common-law approaches might yield. See, e.g., *On Owning Information*, *Mirror Image*, the *Harm* chapter, and _____. At this juncture, however, I am interested only in specifying the starting point *from which* a common-law logic might proceed.

⁶³ ABRAHAM DRASSINOWER, WHAT’S WRONG WITH COPYING (HARVARD U PRESS 2015 forthcoming) [need to cite to his already published articles also]

⁶⁴ One of the early influences here was *Beckford v. Hood*, 101 Eng. Rep. 1164(1798) (House of Lords, England). Grose, J., went so far as to indicate that the Statute of Anne did not create copyright, but merely set the term of years during which the common-law right could be enjoyed. *Id.* at 1168. (I am indebted here and elsewhere to Oren Bracha.)

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.⁶⁵

All torts involve violation of duties, and it is the creation of the beneficial creative work that starts the copyright duty running.⁶⁶ 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."

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 inhere in the author. How this relates to 'limited times' may however need a bit of explanation.

It will helpful to use an analogy: consider the negligence rule that requires injured plaintiffs to prove "proximate cause."⁶⁷ In negligence law, intervening causes accumulate to cut

⁶⁵ 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., my prior work; Balganesch; Hetcher.

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

⁶⁶ 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). Prior to fixation, in the US creators must look primarily to state law for rights against copying, and the states vary in the protections offered.

⁶⁷ 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., WJ Gordon, Copyright and Tort as Mirror Images: On Not Mistaking for the Right Hand What the Left Hand is Doing, RESEARCH HANDBOOK ON COMPARATIVE LAW AND ECONOMICS (Giovanni B. Ramello & Theodore Eisenberg eds., Edward Elgar Publishing, forthcoming 2014); WJ Gordon, Intellectual Property Law, chapter in OXFORD HANDBOOK OF LEGAL STUDIES 617, at 622-23 (PETER CANE & MARK TUSHNET, EDS., Oxford University Press 2003), also available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=413001; WJ Gordon, Copyright as Tort Law's Mirror Image: "Harms," "Benefits," and the Uses and Limits of Analogy, 34 MCGEORGE LAW REVIEW 533-40 (2003).

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.

off tort actions when the link between cause and effect ceases being proximate. Analogously, in copyright, the author's rights cease as the effects of the beneficial creative act disperse over time.⁶⁸ Similarly, a finding of no proximate cause in ordinary tort cases is often based on a judicial perception that making the defendant pay will not disincentivize injuries of the sort that occurred. Ending the copyright term after a number of years is similarly based on a perception (inter alia) that making a user pay very many years after the creative act will not incentivize benefits of the sort that the plaintiff created. 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.⁶⁹

All this 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.⁷⁰ Eventually, the copyright term ends, and the law stops enabling the author's heirs or assigns to control the spread of beneficial effects.

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- 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).
 - Both negligence and copyright tend to impose duties where incentives converge with non-consequentialist notions of fault. Whereas various deontologic 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.
 - 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 "substantial similarity.")

⁶⁸ For other discussions of proximate cause in copyright, see e.g., Balganesch; Bohannan.

⁶⁹ See Brief of the economists, *supra* note ____.

⁷⁰ 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 Liu, *Copyright and Time*, 101 Mich. L. Rev. 409 (2002).

Compare what would ensue if noncreative dissemination were also a key act. Instead of a cone of light gradually fading away, we'd have a cylinder-shaped laser that never fades: New acts could continually occur for which reward is demanded, and copyrights would last forever.

Therefore, to be faithful to the Constitutional phrase, “limited times,” dissemination cannot start the tort duty running, or extend its duration once it’s 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.

More on the language of the Clause

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 usually linked copyright only with the progress of “science” (understood as ‘knowledge’). That usage, however, overlooks the Framers’ use of the word “respective”, which by implication limits the application of parallelism in construing the Clause.⁷¹ As a result, I suggest that both authors and inventors (as a group) are charged with furthering both science and the useful arts.

⁷¹ 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. (as set out above at n.5)

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.”

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 meaning⁷² -- something beyond ‘improvement in the knowledge base’⁷³-- to avoid being surplusage. 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.”⁷⁴ She suggests that ‘progress’ must therefore mean something else. She argues it means ‘geographic spread’.

Conventional interpretation utilizes the logic of parallelism to parse the Clause. For example, the Court in *Eldred v Ashcroft*, 537 U.S. 186, 192-93, makes that interpretative assumption. 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”, *Id.*, and presumably “Inventors” is matched with “useful Arts” and “Discoveries”.

However, note how the full constitutional clause uses the word “respective”: the word appears only near the end, before “Writings and Discoveries.” The word “respective” is an adjective that means “belonging or relating separately to each of two or more people or things.”

<http://english.stackexchange.com/questions/84766/alleged-misuse-of-the-word-respective>

“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.”

⁷² Malla Pollack, *What is Congress Supposed to Promote?: Defining "Progress" in Article I, Section 8, Clause 8 of the United Constitution, or Introducing the Progress Clause*, 80 NEB. L.REV. 754 (2001).

⁷³ Pollack, *supra* note __, at 754-55. Her argument is more complex than my summary.

⁷⁴ *Id.* at 809.

The argument is intriguing. Later Orrin Hatch and Thomas Lee essentially followed Pollack’s linguistic approach in arguing that “Progress” must refer to dissemination because otherwise the Clause would be redundant.⁷⁵

However, during the Enlightenment, ‘progress’ had several connotations that release the Framers’ use of the word from charges of either redundancy or surplusage—and does 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. Thus, for example, James Madison used phrases like “reason in her progress towards perfection.”⁷⁶

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.

Illustration

Let me illustrate what it might mean to separate incentives to creativity, from incentives to noncreative activity. Consider a thought experiment involving a music recording session. The composer’s creativity has contributed, as has the instrumentalists’ creativity, the singers’ creativity, the arrangers’ creativity, and the creativity of the sound recording engineer⁷⁷.

⁷⁵ 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. Law & 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).

⁷⁶ Madison, Address to the General Assembly of Virginia, 1799.

⁷⁷ To any who doubt that creativity lies also in the role of the sound engineer, I recommend reading *Your Brain On Music* (cite).

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 comes a record company to which musicians and composers have assigned copyrights. 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 distributor's lobbying effort is triggered not by star performers' demands for royalties – ex hypothesis all performers are monetarily satisfied – but by the distributor's accurate perception that the requested increase in copyright strength would enable an increase in both profits and dissemination.

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 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.*

The peculiar role of noncreative dissemination: why does it seem 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 a requisite for Progress to occur. 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. Perhaps this signals that 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, the Supreme Court’s error is not surprising. But when one looks more closely at the signposts that may have led the Court ‘down the garden path,’ they will turn out to recommend quite a different road.

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

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.

Economic analytics and 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. The negative effect arises because, once a work is created, copyright enables the work to be priced above marginal cost and thus reduces the number of copies disseminated. (If each copy were priced at marginal cost, by contrast, more people would buy copies than they buy at the higher, copyright price; every person who values a copy above marginal cost but below actual price does without. That consumer then shifts his or her purchase to a less-desired resource, giving rise to the social burden of 'deadweight loss'⁷⁸.)

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;⁷⁹ 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 with a

⁷⁸ Deadweight loss also has a component of producer loss (Explain)

⁷⁹ S. J. Liebowitz, *Copyright Law, Photocopying, and Price Discrimination*, 8 RES. L. & ECON. 181 (1986), available at http://www.utdallas.edu/~liebowit/knowledge_goods/rle/rle1986.html; also see the discussion of Liebowitz's approach in Wendy J. Gordon, *Authors, Publishers and Public Goods: Trading Gold for Dross*, 36 LOYOLA L A L REV 159-97 (2002), available at <http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=2341&context=llr>

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.

less expansive copyright.⁸⁰ Much lively debate surrounds the question of what kind of fine-tuning copyright needs in order to ensure that social gain exceeds social loss.

One thing that has emerged from the debate is a clear recognition that although copyright can reduce the number of copies held by the public, it can also *aid* dissemination. This is a central point made early by Richard Watt's book on copyright economics:⁸¹ that the so-called tension between incentives and access is overstated. Like any sort of property, copyright can, in the right circumstances, foster access and dissemination. The prospect of above-marginal-cost pricing entices publishers who might not otherwise take the risk to engage in distributing creative works to the public.

The pro-dissemination function of intellectual property law is highlighted by the Arrow information paradox. Arrow's story goes roughly like this: The creative person has an inventive idea which is potentially profitable; to find someone to disseminate the idea, the creative person must reveal the idea; in the absence of legal protections, a potential disseminator could walk off with the idea without paying; the prospect of losing the idea to the potential disseminator would keep the creative person silent; lacking information about what he or she is expected to buy, the potential buyer walks away; and the idea would go undisseminated even if the participants wish otherwise. The situation is a kind of prisoner's dilemma.⁸² Ergo (it is said), intellectual property rights (IPR's) are needed to give the parties a way to escape the paradox, to solve the dilemma:

⁸⁰ 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. 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.

⁸¹ Richard Watt, COPYRIGHT AND ECONOMIC THEORY, Introduction.

⁸² For other prisoners' dilemma situations arising in creative production, see, e.g., Gordon, *Asymmetric market failure and prisoner's dilemma* in Dayton L Rev; also Oxford chapter.

IPR's enable the creative person to disclose the idea without fear that the potential disseminator will be able to refuse a deal yet walk away to profit from the creative's idea.

Needless to say, even if the Arrow paradox exists in some situations, it does not 'prove' a need for intellectual property. At most it proves the need for some kind of legal protection, and personal rights (arising out of *in personam* doctrines such as breach of confidential relations and quasi-contract) are often adequate to discourage 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. In addition, Michael Burstein and others show that legal protection against uncompensated disclosure can even be rendered unnecessary by many non-legal devices (such as piecemeal disclosures during negotiations,⁸³ or there being a high level of know-how required before an idea can be effectively exploited).

Moreover, the Arrow paradox has much more force when applied to inventorship (the domain of patent law) than when applied to authorship (the domain of copyright law). If we follow William Baumol's advice and apply the Arrow paradox to authorial works,⁸⁴ we find that there the disclosure paradox has much less applicability than it does to inventions.

Inventions often constitute inputs to other products, such as providing those products an improved method of manufacture. Inventions can, for example, reduce the cost of production (consider the assembly line) or increase the quality of the output (consider the recipe for coca cola's taste). Therefore an inventor who lacked post-disclosure protection for ideas might be

⁸³ Michael Burstein, *Exchanging Information Without Intellectual Property*, 91 Tex. L.Rev. 227 (2013).

⁸⁴William J. Baumol, *Intellectual Property: How the Right to Keep it to Yourself Promotes Dissemination*, 2 REVIEW OF ECONOMIC RESEARCH ON COPYRIGHT ISSUES 17-23 (2005) (keynote address to SERCI Annual Congress).

able to profit yet avoid disclosure entirely. The inventor might instead use his or her invention to produce the ultimate product at a reduced price or improved quality; so long as the inventor can keep the secret within his or her own manufacturing plant, the inventor not need sell -- or disclose -- the invention on which the low price or high quality rest.⁸⁵ So for inventions, legal protections such as patent can make the crucial difference in the decision whether or not to disclose the idea.

By contrast with inventors, creative authors typically have no option of using their ideas without disclosing them; novelists, painters and singers sometimes produce inputs (as do the writers of computer programs)⁸⁶, 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 the creator forced to disclose to the public if he or she is to profit at all⁸⁷.

Lacking the ability to profit without disclosure, creative persons who lacked the rights to control post-disclosure use would nevertheless be forced by economic necessity to disclose and take their chances.⁸⁸ Thus, IPRS are not necessary for disclosure to happen. Applying the Arrow analysis to copyright-industry circumstances shows that a right to control post-disclosure dissemination of ideas tends to be more important for inventors (many of whom will conceal if

⁸⁵ Trade secrecy law can be important in making the produce-it-yourself option practicable.

⁸⁶ In the U.S., computer programs receive copyright protection, albeit narrow protection, on the theory that computer programs are ‘authored’ works. In many ways, programs are unsuited for copyright, being atypical in many ways from traditional creative works—most obviously, in being functional components of machines.

⁸⁷ I suppose another route is to have the luck to find a very rich and eccentric individual collector.

⁸⁸ The same might apply to inventions that cannot be kept secret because, for example, they disclose their secrets on their face—consider the safety pin. As to such inventions, trade secrecy law is unavailable. In such cases, the inventor has as strong a desire for post-disclosure rights as does an author, and would feel the same pressure to disclose despite the absence of IPR’s.

they cannot control disclosure, or will limit the scope of their beneficial invention to areas they *can* control) than it is for authors (who cannot afford to conceal and usually have no physical power to control)⁸⁹. The Arrow perspective therefore suggests that IPR's benefit society more when inventions are involved than when the subject matter is authorial work. For authors seeking monetary reward, disclosure and dissemination is virtually unavoidable.

Nevertheless, it must be recognized that even for authorial works dissemination is assisted by copyright. Copyright increases the profit from selling authored works, and thus encourages publishers to take the risk of paying authors for permissions. (Whether we still need to give as much encouragement to publishers *qua* publishers as we used to need is an open question. For many and probably most works, technological change has drastically reduced the cost of dissemination.⁹⁰ However, other costs (e.g., gatekeeper/sorting/quality-review) might remain high, and satisfactory alternatives have not always been found for publisher business models stressed by digitization).

So: let's 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 such payment induces more creative activity. One might say

⁸⁹ The DMCA, and the modes of digital/physical control it enforces, may change copyright owners' physical abilities to control post-dissemination uses of their work.

⁹⁰ This is an assertion about what publishing costs, not about what it costs authors to produce new work.

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 the internet makes possible is 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 and W.G Bowen, On the Performing Arts: The Anatomy of Their Economic Problems, 55 The American Economic Review 495 (1965) (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.)

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.⁹¹

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 a prisoner’s dilemma. In a world without post-disclosure legal rights, publishers who pay authors are the ones who face ruinous price competition at the hands nonpaying competitive copyists. Publishers who don’t pay authors are already able to price their physical products at a low level.

In sum: dissemination is important to Progress. Copyright aids dissemination by inducing creation of the things to be disseminated and inducing disseminators to pay creators. The crucial fulcrum is the creative author. Copyright may also foster the organization and functioning of publishing entities. But that is a happy by-product, not itself a reason to enact or expand copyright law.

Publisher involvement in copyright: history and experience

Admittedly, publishers do profit from copyright.⁹² Aside from ‘star’ authors, like movie stars⁹³ and best-selling novelists, it is likely that more monetary gains from author-publisher deals accrue to the publishers than to the authors. 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. But these real world

⁹¹ I am indebted to Richard Watt for the ‘agency’ analogy.

⁹² 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.

⁹³ Acting is a creative activity protected via the copyright in audio-visual works (17 USC §102(6)), the copyright in pantomimes (§102(4)), and the copyright in sound recordings. (§102(7)) . See also H.R.Rep. NO. 94-1476 (1976) (explaining grant of copyright protection to "pantomimes and choreographic works"); *Mannion v. Coors*, 377 F.Supp.2d 444 (S.D.N.Y. 2005) (an important basis for granting copyright protection in photographs is the creativity involved in "create[ing] the scene or subject to be photographed").

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. 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’.

The presence of dissemination and publication in copyright statutes and doctrines

A third possible reason for the Court’s disturbing focus on noncreative dissemination is the important role that dissemination has always had in American copyright law. The federal statutes from the beginning have included a right to control distribution.⁹⁴ Also, and more important for the *Golan* Court, was the pre-1978 rule that subjected American copyright law to a great divide whose border was publication.⁹⁵ State copyright, termed ‘common-law copyright’,⁹⁶ governed a work prior to publication. After publication, federal statutory copyright law governed the work. It might therefore look as if furthering publication was crucial to federal copyright.

Let me examine these two features of copyright law: the pre-1978 use of “publication” as a dividing line, and the federal law’s exclusive right of distribution.

⁹⁴ In the first US statute, in 1790, copyright owners were given exclusive rights to “print, reprint, and vend” (emphasis added). 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 phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.

⁹⁵ *Golan* at 888-89. 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.

⁹⁶ The same terminology applied whether the state copyright law originated from caselaw or statute.

Publication as a border between federal copyright and state common-law copyright

Definitionally, publication involved general distribution of copies, and published copies needed to bear a specified form of copyright notice or the work would lose federal protection. To publish, therefore, divested the author of his or her common-law copyright; to publish without notice left the work unprotected by both federal and state law because the lack of notice precluded obtaining federal copyright.

Interpreting the rule that publication destroyed common-law copyright

The *Golan* Court's reliance on the pre-1978 rule that publication divided federal from state copyright is puzzling. The 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. It would therefore have been hard for the public to gain access to an unpublished creative work without violating some kind of non-copyright law.⁹⁷ To make a copy, the potential copyist might have to violate trespass law to enter the author's home or office in order to see the original; violate conversion and theft prohibitions in order to take the document; bribe a servant or employee; or violate the contract or confidential relation under whose shelter he was given a copy. It thus makes sense that pre-dissemination, state law evolved to create a right against the copying of unpublished works in order to fill whatever gaps in control were left open by the established laws of trespass,

⁹⁷ See generally, Wendy J. Gordon, *An Inquiry into the Merits of Copyright, An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory*, 41 STAN. L. REV. 1343 (1989).

conversion, confidential relations, theft and contract.⁹⁸ State control over prepublication copying in such a context was not much of an additional incursion on liberty.

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

Before publication, common-law copyright was uncontroversial. After publication, only nationwide rights to control copying and use would be effectual. In addition, consideration of factors such as potential threats to free speech, incursions on competition, and the scope of behavior that crossed state lines, made federal intervention the only kind of intervention that made sense.

If this speculative functional analysis is correct, it is no wonder that federal law before 1978 usually premised federal copyright upon proof of publication, and that publication triggered a loss of state copyrights.⁹⁹ After publication, the ‘trade secrecy’ rationales disappear, and

⁹⁸ 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 David D. Friedman et al., *Some Economics of Trade Secret Law*, 5 J. Econ. Persp. 61 (1991).

⁹⁹ Even pre-1978, some kinds of works could obtain federal copyright by applying for it, and did not need to wait for publication.

The 1976 Copyright Act, largely to avoid wrangles over what constituted ‘publication’, also brought unpublished works within the federal umbrella. The 1976 Act became effective in 1978.

One wrinkle arose from the fact that under common-law copyright, duration of unpublished works was perpetual. Once they were covered by federal law, however, their copyrights would last only for a finite number of years.

A challenge for my perspective is how, when Congress drew all unpublished and ‘fixed’ works under the federal mantle, the new statute encouraged the publication of long-unpublished manuscripts, songs and other art works: Congress promised an extra term of years if they were published promptly. See the Conclusion, *infra*.

enforcement would range far beyond matters related to the original manuscript, exceeding a state's normal concerns with physical property and safety. After publication there would therefore be need for federal protection. And with publication there also arose a sharper need for federal limits on protection, such as limited duration. Therefore the jurisdictional decision in pre-1978 copyright doctrine to use 'publication' to divide federal from state copyright law¹⁰⁰ gives no evidence for the proposition that the Framers or early Congresses had a goal of serving publishers' interests *as publishers*.

Nor is any such evidence provided by Congress deciding in 1976¹⁰¹ to bring unpublished works into the federal realm (effective in 1978, for all works 'fixed in a tangible medium of expression'). By the 1970's, reprographic and other technologies had advanced. When tape recorders and broadcast technologies became ubiquitous, the notion of an 'unpublished' oral presentation became absurd.¹⁰² While courts might be reluctant to abandon a precedent when technology undermines its rationale, Congress is not so constrained.

As intimated, I see the old 'publication' rule as having hinged on physical control. One potential challenge to my view is posed by the impact of *performance* on the old common-law copyright. In England, public performance divested the common-law copyright. This makes

Section 303 provides: "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, 2047." 17 USC sec. 303(Emphasis added). While not 'proving' anything about what the Framers themselves intended, section 303 might suggest that the 1976 Congress took encouragement of dissemination as legitimately within copyright's purview.

¹⁰⁰ Again, the decision was made by the 1976 Congress, effective 1978. See 17 USC §§ 102; 301.

¹⁰¹ *Id.*

¹⁰² Jessica Litman suggests to the contrary that state copyright protections merely reflected federal developments. See, e.g., Litman, *Invention of the Common Law Play Right*, 25 Berk Tech L J 1381 at 1404 ("The first reported American cases claiming common law performance rights in plays followed the enactment of a statutory performance right....")

functional sense; the old common-law copyright functioned primarily as an adjunct to physical control, and performance can temporarily or permanently free a text from its physical encasement. When the physical control ends, so should a copyright whose rationale is based on physical control.

However, it might be argued that performance does not end all physical control—after all, the audience may not be able to remember many details after merely seeing and hearing a performance. That is true. But even if performance does not *end* an author’s physical ability to control her words’ spread as surely as does distribution of physical copies, performance does *weaken* it. So the English rule on performance seems, at least roughly, to support my perspective that common-law copyright was a gap-filling adjunct to physical ownership of the manuscript as tangible chattel.

More challenging to my perspective is the fact that US courts for most of the pre-1978 period took the opposite position from England’s. The US Supreme Court held that mere disclosure by oral communication would not constitute a divestitive “publication,”¹⁰³ apparently preserving the common-law copyright no matter how far the effects of a performance reached. This line of cases¹⁰⁴ poses difficulties for my view that in the US, historical common-law copyright was founded on physical control of manuscripts.

¹⁰³ *Ferris v Frohman*

¹⁰⁴ In urging such a close tie between physical control and common-law copyright, as noted in text above, a problem is posed for my view by the rule in the US that performance did not make a work “published”. For a significant period, US 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 US 424 at 435 (1912). However, hints of my functional perspective appear even in the caselaw of performing plays. The most intriguing case, *Keene v. Wheatley*, 14 F.Cas. 180, 4 Phila. 157, 9 Am. Law Reg. (1861) 33 (C.C.E.D. Pa. 1861), involved unauthorized performance of the play, “Our American Cousin.” 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:

But the difficulties do not persuade me that common-law copyright rested on something other than physical control. Nor do they persuade me to agree with *Golan* that the importance of ‘publication’ to early copyright meant that Congress had a legitimate concern with the welfare of publishers as publishers.

Let us return to the logic underlying the American rule that performance did not destroy common-law copyright. In the days when common-law copyright was born, an oral communication would not reach far. Technologies like tape recording and electronic broadcasting were unknown, and exact note-taking difficult. So even after performance, works which were not generally distributed in tangible form remained largely private, or only known to a limited group. Physical control still had puissance.

Admittedly, there were some troublesome cases of widely-known speeches or plays that were not deemed ‘published’ because copies had gone undistributed. Some unpublished oral works, such as prominent sermons and speeches, were undoubtedly reported to the public in organs such as newspapers. Some of these reports may have been verbatim (exact) transcripts of the texts delivered. As ‘unauthorized’ publications, such distributions would not have robbed the speeches’ authors of their common-law copyrights. Therefore, for those oral presentations of sufficient interest to bring the attention of newspapers and stenographers, there is some weakness in my identifying physical control as the prime rationale of the rule that publication-based

[The 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. [Id. At 194.]... [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 208 (emphases added).

The 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.

division between federal and common-law copyright law. Yet no law exactly matches any rationale with exactitude.¹⁰⁵ Moreover, and most importantly, I do not see how this discrepancy could aid supporters of *Golan*.

For some time after 1890, the US courts were probably influenced by a natural-rights view that premised common-law copyright not on physical control but rather on transcendent entitlement. Jessica Litman goes so far as to attribute the American rule on performance solely to the influence of treatise writer (and natural-law-righter) Eaton Drone.¹⁰⁶ But natural-rights theory need not lead where Drone thought it did.¹⁰⁷ In particular, natural-rights theory need not lead to noncreative disseminators having claims to copyright legitimacy separate from their relations with authors.

First, most explicators of natural right theory in the IP context link ‘natural rights’ of ownership or reward to authorship or inventorship, not to mere labor.¹⁰⁸ Second, if natural right theory is linked to labor per se (as Drone attempted to do¹⁰⁹), the theory would quickly butt heads

¹⁰⁵ See Arthur A. Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 *Va. L. Rev.* 451 (1974).

¹⁰⁶ Jessica Litman, *Invention of the Common Law Play Right*, 25 *Berk Tech L J* 1381 at __ (2010), discussing EATON S. DRONE, *TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES* (1879), available at https://openlibrary.org/works/OL7311611W/A_treatise_on_the_law_property_in_intellectual_productions_in_Great_Britain_and_the_United_States#about/about

¹⁰⁷ Gordon, *Property Right in Self Expression*, argues 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.

¹⁰⁸ This is particularly true of ‘personality’ based natural-right theories.

¹⁰⁹ 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

with *Feist*, where the Supreme Court ruled that socially-beneficial labor could not earn copyright without creativity.

Third, linking natural right to *all* forms of effort quickly would become unintelligible (given conflicting claims), and could undo the competitive system altogether. Competition continually imposes undeserved harms on laboring, productive people. If some laborers are to deserve reward, and the rest of the system is not to freeze in paralysis, something -- like a link to human intellectual capacity, cf., authors and inventors--must distinguish a narrow class of laborers so entitled.

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 US copyright statutes.

The exclusive right over distribution

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

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.*

Drone, *supra*, at 5 (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." DRONE at 32.

“Subject to [fair use and other limitations including the first sale doctrine],¹¹⁰ the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

...

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.”¹¹¹

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

Without the right over distribution, forgers and other copyists could sell their unlawful copies to unknowing retailers and then scamper, leaving the retailers (the only ones left on scene to sue) immune to judgment. Neither of the two established copyright doctrines of secondary liability, namely contributory liability and vicarious liability would reach them.¹¹² Or the copyists might not flee, but might spend their profits before they are caught. This would again leave retail sellers the only entities capable of paying a copyright judgment. Without the distribution right, again those unknowing retail sellers would be immune from suit, or would be suable only upon proof of knowledge.

¹¹⁰ As the statute notes, there are many limitations on the distribution right. Most important is the first sale doctrine, embodied in section 109 (a), a principle also known as “exhaustion.” Section 109(a) provides that, “Notwithstanding the provisions of section 106 (3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”

Note that the first sale doctrine by its terms only immunizes the resale of “lawfully made” copies. It has no applicability to unlawfully made copies, such as magazines containing plagiarized or otherwise unauthorized copyrighted text, or canvases bearing forged copies of copyrighted paintings.

¹¹¹ 17 USC §106(3).

¹¹² Under copyright law, vicarious liability requires proof that the defendant had some control over the violative act. If a retailer had no control over the copying, he would therefore not be liable under vicarious liability. An alternative theory of secondary liability is contributory liability. However, in copyright such liability will be imposed only if the proof shows the defendant had knowledge of the infringing activity. An unknowing retailer would thus not be subject to secondary liability.

Admittedly, had there been no distribution right, the doctrines of secondary liability would almost certainly have evolved to make the distributors liable. This kind of expansion of secondary-liability doctrine is precisely what happened in the *Grokster* case. There defendant peer-to-peer computer programs enabled unlawful copying by third parties. Essentially because the programs provided the most vulnerable “bottleneck” to stop the copying,¹¹³ to snare them the Supreme Court added a new type of secondary liability (‘inducement’ liability) to the list of doctrines which could make a non-copyist liable. The same kind of changes 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 Gordon knot?) and simply make all distributors of unlawful copies liable. Cutting the Gordian tangle of secondary-liability doctrines is what the distribution right accomplishes.

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

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

¹¹³ *MGM Studios, Inc. v. Grokster, Ltd.*, [545 U.S. 913](#) (2005). The defendant had provided software that enabled others to unlawfully download and upload copyrighted works to the internet. Wrote the majority: “When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability . . .” *Id.*

Publisher claims based on their own efforts

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 goals – or at least, in support of the idea that the disseminators' interest need some form of protection against copying. 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.

Why the claims fail

In general

Most of these claims run into difficulties fairly quickly. For instance, in the days of the Framers, typesetting was a labor-intensive and time-consuming process, and the lack of photocopy machines made it impossible to free-ride on typesetting: any duplicator would have to put in the same amount of effort, and set his own type.¹¹⁴ So preventing physical free riding on this kind of publisher effort couldn't have been part of the government goal. There may have been an intervening period where copying others' typesetting could produce a real savings, but that day, too, is past. 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

¹¹⁴ 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).

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.

As to investment in advertising or distribution infrastructure, such overhead costs accrue to any business with a wide market. Proof is needed if we are to believe they 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. 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. 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.

Evaluative judgments, 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 (despite some indications to the contrary)¹¹⁵, if a publisher

¹¹⁵ [need to find the empirical study that debunked the argument that publishers used hits to cross-subsidize less popular work.]

publishes ten books, and only one of them is a hit, the publisher will use the profits from that one to subsidize the other ten, thus increasing the overall choice available to the public and increasing the chances that the next, latent bestseller will get the exposure it needs to take off. However, the publisher might argue, if its profits are leached by cherry-picking competitors who are able to copy and publish only bestsellers, its entire business model would be destroyed.

This argument has been foundational to some views of copyright that give a central role to disseminators. Most notably, Jonathan Barnett consistently emphasizes the evaluative role that disseminators play. For example, he argues that:

[T]he intermediary-based case for copyright survives the advent of low-cost, high-quality digital technologies for cultural production and distribution The reason is simple but overlooked. Even dramatic reductions in copying and distribution costs borne by the producers of creative goods make little difference in, and actually exacerbate, *the search and evaluation costs* borne by consumers of those goods and hence, the marketing costs borne by the producers and distributors of those goods. Those costs leave in place the high risk and much of the capital intensity attendant to the production and consumption of mass-cultural goods and preserve a vital role for the large intermediary in cultural goods markets.¹¹⁶

Yet evaluation of opportunities is what every business does... and what every business shares with others, willingly or no, through price signals.

Prices always signal where to copy: information about which products are worth copying is essential to competition

Barnett seems to emphasize the publishers' abilities to identify desirable works as a reason for anti-copying rules. 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

¹¹⁶ Id. at 39 (emphasis added).[Need to update Barnett cites]

Note that Barnett does not explicitly claim that copyright 'is intended to' benefit publishers.

to allocate resources. Ordinarily the function is carried out by pricing.¹¹⁷ High prices call attention to a need for more supply.

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 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.

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

Need for comparative institutional analysis

Granted, in any market there might need to be some lead time where the first seller is the only seller, to allow innovators and first-movers to recoup their extra expenditures.¹¹⁸ However,

¹¹⁷ For a classic explanation of the pricing system, see Alchian & Allen at ____.

¹¹⁸ See generally Jerry Reichman [cites]

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." 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." Brett Frischmann and Dan Moylan, *The Evolving Common Law Doctrine of Copyright Misuse: A Unified Theory and Its Application to Software*, 15 Berk. Tech. L.J. 865, 915 (2000). Whether and how

this is potentially true of everything from hybrid cars to cough medicine, as was emphasized by Justice Breyer's dissent in *Golan*.¹¹⁹ 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.)¹²⁰ Barnett also contends that the non-authorial contributions of distributors "are far more capital-intensive than the initial act of creation, require[] skills, equipment, and infrastructure that are not always easily accessible, and are undertaken by [profit-motivated] entities."¹²¹ 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' basement (I'm thinking here of novelist S.M.), 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.

much lead time is advisable in a given context is a difficult empirical question; the answer is unlikely to be the 95 or so years that copyright provides.

¹¹⁹ Also see the discussion of lead time in Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L.REV. 281 (1970).

¹²⁰ In fact, Barnett himself points out that the popularity of hits declines quickly: few become "'classics' for which demand persists beyond a single season." (cite). 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 would not demonstrate that copyright's sweeping scope of exclusions is the proper vehicle.

¹²¹ Barnett, *supra*, at 8.

What about copyright rules that favor dissemination by limiting copyrights?

The reader may be wondering, is it compossible that (1) Congress cannot give copyright extensions/restorations that solely further noncreative dissemination while (2) Congress *can* 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 non-creative copying? I am here championing authorship as the core of copyright, yet I have exhausted a frightening number of print cartridges arguing that fair use *should* extend to rote copies¹²² such as taping programs from television broadcasts or photocopying textual material for research and class use.

I think my two positions are consistent. 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.

The steps of the argument are simple. Under Constitution cl 8, I believe, Congress has *power to* give exclusive rights solely to encourage writers and inventors. But Congress is not obliged to use this power. Unlike Congress's mandatory responsibilities under other parts of the constitution, the copyright and patent clause merely empowers Congress to act and does not require it. Any consideration—including the value of creative or noncreative activity that would be induced by limiting the exclusive rights—is therefore legitimate for Congress to take into account in deciding not to use its discretionary powers.

So, to take a fanciful example, if every new song caused a rash and every new book psoriasis, Congress could legitimately decide to stop awarding new copyrights in order to protect

¹²² Wendy J. Gordon, Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors, 82 COLUMBIA LAW REVIEW 1600 (1982) (arguing that making exact copies should, under specified circumstances, count as 'fair use'.)

public health. The legitimacy of that decision wouldn't rest on whether the goal of protecting the public's skin lay within the Copyright clause.

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.

The case for the legitimacy of taking the public's dissemination interests into account in *limiting* copyright is even stronger than would be 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 interest¹²³ in access to creative works. 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*.

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 with high, one-time, up-front costs? Does my position commit me to 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

¹²³ 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.

new categories of effort;¹²⁴ or perhaps states should expand restitution and copyright pre-emption should squeeze itself out of the way of state law developments. Those matters are separate from the issue of whether incentives for creativity play a unique role in copyright itself. The “limited times” provision gives us, I think, a positive answer to that latter issue. And the focus I urge on creativity—the refusal to include noncreative dissemination that I argue for—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,”¹²⁵ 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.¹²⁶ And for non-authorial 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.

Whether copyright is a good exception to the rule that volunteers cannot sue beneficiaries for contribution is a question I address elsewhere.¹²⁷ 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. That tendency to condemn free riding (especially when the benefit is reaped at no

¹²⁴ Incentivizing all sorts of effort is of course already a big part of other aspects of American law, whether state law (e.g., property), federal (anti-discrimination law), and constitutional law. See, e.g., the role that the Takings clause plays in keeping incentives active and avoiding a ‘demoralization’ that would reduce productivity. Frank Michelman [cites]

¹²⁵ The quoted phrase is from Justice Breyer’s dissent in *Golan*.

¹²⁶ See, e.g., Saul Levmore. The empirical validity of such arguments are as controversial as their normative aspect; see, for example, Paul Starr’s criticism of the classic study by Titmuss, *The Gift Relationship*. <http://www.nytimes.com/books/first/s/starr-blood.html>

¹²⁷ See, e.g., On Owning Information; Of Harms and Benefits; also see Levmore.

cost to the originator) is to be regretted.¹²⁸ One way to help turn the misappropriation tide might be to see *Eldred* and *Golan* as having erred when they ventured beyond creativity as the object of incentive.

Conclusion

The Supreme Court erred in singling out the interests of non-creative disseminators as being capable of providing legitimacy to controversial copyright statutes. 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; disseminators have long profited from copyright and have long been involved in lobbying for copyright; and several doctrines seem to put emphasis on publication. But once these phenomena are examined, it becomes clear that they do not support the Court's recent interpretation. For example, the paper offers a distinctive view of one of these phenomena, namely, the role that 'publication' played prior to 1978 in dividing federal law from state "common law copyright"; the paper shows that fostering publication *per se* was not the old doctrine's purpose.

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.

¹²⁸ Shelley Kagan in *The Geometry of Desert* (Oxford University Press, 2012) offers 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.

Challenges could be raised to my position. Some challenges have been discussed in the paper; others exist as well. For example, if only such dissemination as serves authorial interests is relevant, would that not 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 date¹²⁹? My position might indeed mean that those attractive rules are unconstitutional; however, that unfortunate possibility is grist for another day's milling.

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

Our first copyright statute, in 1790, empowered plaintiffs to destroy the texts printed by infringers.¹³⁰ Today injunctions and other remedies fill out a copyright plaintiff's quiver with additional potential tools for 'book burning'. Whether authors should have such powers to constrain speech is questioned by many scholars, even at the foundational level of Lockean theory.¹³¹ A fortiori, I doubt that the Framers meant to craft such extreme rights to serve 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 tool.

¹²⁹ See note 27, *supra*.

¹³⁰ Copyright Act of 1790 at sec.2; 1 Statutes At Large, 124, discussed above at ____.

¹³¹ Cf., Seana Shiffrin, Lockean Arguments for Private Intellectual Property, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 138 (edited by Stephen R. Munzer, Cambridge University Press, 2001).

To impose a duty not to copy on common-law foundations, there must be an initial act to start the ball rolling. This paper 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.