



Articles

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Constructing Copyright's Mythology

Thomas B. Nachbar

FROM 1782 THROUGH 1786, a small group of authors successfully lobbied twelve of the thirteen States to adopt America's first general copyright laws. An important member of that group was Noah Webster.¹

While Webster was active in matters of policy and government, his efforts on behalf of copyright were not those of a disinterested citizen. Webster was motivated by his desire to secure copyright protection for his three-volume text, the *Grammatical Institute*. In 1782, while working on revisions to the first volume, Webster visited Philadelphia and on the way planned to petition the legislatures of Pennsylvania and New Jersey to adopt general copyright laws. He followed up his trip by drafting

a memorial to the General Assembly of Connecticut with a proposal for a private bill granting him the copyright in his recently completed *The American Instructor*, the book that eventually became the first two volumes of the *Grammatical Institute*.² The request was presented too late in the session to be acted upon, and before he could submit a new petition, Webster's need for a private bill was superseded in 1783 by Connecticut's adoption, at the behest of others, of a general copyright statute.³ He made the same request of the New York Legislature in early 1783 (with the book now called the *American Spelling Book and Grammar*).⁴

By the end of 1783, six States had adopted

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- 1 Webster's efforts to obtain state copyright protection are charted in Noah Webster, *Origin of the Copy-right Laws in the United States*, in A COLLECTION OF PAPERS ON POLITICAL, LITERARY AND MORAL SUBJECTS at 174, 174-75 (Burt Franklin 1968) (1843). See also Emily Ellsworth Fowler Ford, 1 NOTES ON THE LIFE OF NOAH WEBSTER at 56-57, 90-171 (1912), which contains excerpts from both Webster's correspondence and diary from the period.
- 2 Memorial to The General Assembly of Connecticut (Oct. 24, 1782), in LETTERS OF NOAH WEBSTER at 1 (Harry R. Warfel, ed., 1953).
- 3 Webster, *Origin of the Copy-right Laws* at 174.
- 4 See Memorial to Legislature of New York (Jan. 18, 1783), in LETTERS OF NOAH WEBSTER at 5; Webster, *Origin of the Copy-right Laws* at 174.

general copyright laws.⁵ At the same time, another politically active author, Joel Barlow, obtained from the Continental Congress a resolution calling for the adoption of copyright legislation by each of the States.⁶ By the end of 1784, the number was up to eight. Although Webster's accomplishments were profound, it's not at all clear that the adoption of general copyright laws in these early States is among his achievements. Others were working toward the same end, several States adopted copyright in direct response to the congressional resolution (with which Webster was not involved), and the most comprehensive account we have of Webster's influence is from Webster himself, who was hardly bashful in his self-promotion.

Of the five copyright laggards – Delaware, Georgia, New York, North Carolina, and Virginia – four were in the southern half of the country. The *Grammatical Institute* was a success in the north, leading Webster to consider publishing it in the south.⁷ In 1785 and 1786, Webster toured the southern States, visiting state legislatures to make the argument for copyright in person.⁸ The trip was a success; by the end of 1786 twelve of the thirteen States had adopted general copyright laws, with Delaware the lone holdout. There is little doubt that, in these States, Webster's lobbying was critical.

Webster's approach was methodical; he went from State to State, gradually expanding the geographic reach of American copyright law and with it the geographic reach of the *Grammatical Institute's* publication. It was in this way that statutory copyright protection became part of the American legal landscape, so much so that a specific provision authorizing Congress to grant exclusive rights in writings was included in the Constitution,⁹ and, early in its tenure, Congress passed the first national copyright statute.¹⁰

But Webster's contribution to copyright law is not limited to the wide expansion of state copyright protection attributable to his much-fabled trek. Webster not only sowed the seeds of American statutory copyright law, he also started an American copyright tradition: seeking and obtaining from Congress extensions to the term of copyright.

The 1790 copyright act granted a fourteen-year initial copyright term with an additional fourteen-year renewal option.¹¹ Thirty-six years later, Webster sought the assistance of his cousin, Daniel Webster, in having the term of federal copyright extended to perpetuity.¹² Congressman Webster declined, perhaps recognizing the constitutional barrier to a perpetual grant.¹³ But five years after that,

5 See generally Thorvald Solberg, COPYRIGHT ENACTMENTS OF THE UNITED STATES 1793-1906 at 11-31 (1906), which reprints all twelve of the state copyright laws enacted prior to the Constitution.

6 Webster, *Origin of the Copy-right Laws* at 174; see 24 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789 at 326-27 (Gov't Printing Office 1922) (1783).

7 Letter from Noah Webster to George Washington (July 18, 1785), in LETTERS OF NOAH WEBSTER at 36.

8 On Webster's southern tour, see generally Ford, 1 NOTES ON THE LIFE OF NOAH WEBSTER at 90-171.

9 U.S. Const. art. I, § 8, cl. 8 ("Congress shall have the 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.").

10 Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1802).

11 *Id.*, § 1.

12 Letter from Noah Webster to Daniel Webster (Sept. 30, 1826), in LETTERS OF NOAH WEBSTER at 419.

13 Letter from Daniel Webster to Noah Webster (Oct. 14, 1826), reprinted in Webster, *Origin of the Copy-right Laws* at 176. Daniel Webster did not call Noah's attention to the constitutional requirement that copyright grants be for "limited Times". Rather, the Congressman merely explained that "I see objections to make it perpetual."

William Ellsworth, representative from Connecticut and Noah's son-in-law, reported an overhaul of the 1790 copyright act that included an extension of the initial term of copyright from fourteen to twenty-eight years. When the bill stalled in the House, Noah returned to his tried-and-true approach: He traveled to Washington and lobbied Congress himself.

When Webster arrived in Washington in the winter of 1830, he was a huge celebrity. His *Elementary Spelling Book* was in use in virtually all of the nation's classrooms and he had recently published his long-awaited *American Dictionary of the English Language* to wide acclaim. Although he lobbied for a general extension of the term of copyright, the point of Webster's appeal was clear: Copyright term extension was appropriate compensation for his contributions to education in America. As Webster described it to Harriet Fowler, his daughter:

I found members of both houses coming to me and saying they had learned from my books, they were glad to see me, and ready to do me any kindness in their power. They all seemed to think, also, that my great labors deserve some uncommon reward.¹⁴

Indeed, the problem, according to Webster, was harnessing that personal regard for him into a general extension to copyright:

Mr. Grundy has doubts about passing a *general* law for securing literary property, as long as the bill proposes, but he says he will grant *me* almost anything, 40 years perhaps, for my great labors. But most of the members of Congress seem not to have considered the subject, ☉ we shall know more of their

opinions when the [House] report is made ☉ published.¹⁵

We don't know whether the prospects for a general extension were as grim as Grundy made them out to be or whether the Tennessee senator was exaggerating in order to flatter the old scholar. But it is clear that Webster made an impression. Although there is no record of Webster testifying before Congress, he did give a lecture at the House of Representatives on the evening of January 3, 1831. An anonymous letter describing and lauding the address concluded by proclaiming that "[t]he Republic will not be ungrateful to a son who does her so much honor,"¹⁶ and ungrateful the Republic was not. The copyright bill was taken up and passed in the House four days after Webster's lecture.

Section 16 of the 1831 act made its fourteen-year term extension applicable not only to new works but also to previously published and copyrighted works, an allowance that drew objection on the bill's second reading in the House of Representatives. Michael Hoffman, representative from New York, argued that extending the protection to existing works would unfairly alter the balance of rights between copyright owners and the public:

There was an implied contract between [authors and publishers] and the public. They, in virtue of their copyright, sold their books to the latter at an exorbitant rate; and the latter, therefore, had the right to avail themselves of the work, when the copyright expired.¹⁷

Ellsworth, Jabez Huntington (also from Connecticut), and Gulian Verplanck (from New York) rose in defense of Section 16. As

14 Letter from Noah Webster to Harriet Webster Fowler (Dec. 29, 1830), reprinted in Harlow Giles Unger, *NOAH WEBSTER: THE LIFE AND TIMES OF AN AMERICAN PATRIOT* at 315 (1998).

15 Letter from Noah Webster to Rebecca Webster (Dec. 17, 1830), reprinted in Ford, 2 *NOTES ON THE LIFE OF NOAH WEBSTER* at 320.

16 Letter to the Editor, *NATL. INTELLIGENCER*, Jan. 8, 1831 at 2.

17 7 *REGISTER OF DEBATES IN CONGRESS* at 423 (Gales ☉ Seaton 1831).

Huntington explained, it would be unfair to grant the protection only to later works. Huntington

was in favor of the amendment, as no more than an act of pure justice; for why, he asked, should the author who had sold his copyright a week ago, be placed in a worse situation than the author who should sell his work the day after the passing of that act? He would cite a single case by way of illustration. Webster's Dictionary, for instance, that unrivalled work, that monument of the learning, industry, and genius of its author. What, he inquired, should that great work, the labor of a whole life, be secured to its author, under the existing law, only for the term allowed in the event of the passing of a bill extending the period of copyrights? No: all cases came within the spirit of the measure; and justice, policy, and equity alike forbade that any distinction should be made between them.¹⁸

Verplanck followed suit:

There was no contract; the work of an author was the result of his own labor. It was a right of property existing before the law of copyrights had been made. [The copyright act] did not give the right, it only secured it; it provided a legal remedy for the infringement of the right and that was the sum of it. It was, he repeated, merely a legal provision for the protection of a natural right.¹⁹

Hoffman had appealed to the idea of copyright as a contract – a *quid pro quo* – between the author and the public, and as such an arrangement in which both parties had an interest. The author's interest was for the period of the copyright; the public's interest was residual. By lengthening the copyright term of already published works, the public's

residual interest was being diminished. But Hoffman did not rest his argument solely on the public's residual interest. He continued:

Besides, it would be a breach of the contract with those booksellers who had purchased copyrights of authors heretofore, and whose rights would be infringed upon, should the privileges of the authors of works be extended by the proposed bill.²⁰

Breach of contract with the *booksellers*? Hoffman was referring to the interests of publishers, who at the time frequently benefited by the expiration of the copyright term. That may sound odd to us – today publishers like long copyright terms – but that was not necessarily the case in the 19th or early 20th centuries. Because the fixed costs of printing (specifically, the cost of fashioning stereotype printing plates) a book were high,²¹ and because the first publisher would have already recovered those fixed costs during the copyright term, the first publisher often retained a substantial cost advantage over rival printers after the copyright term expired. The only difference was that the printer no longer had to pay royalties to the author, which at the time were commonly a percentage of sales.²² Thus, in 1831, a short copyright term was seen as not only favoring the public over the author, it was seen as favoring *publishers* over the author.

In the event, the House squarely rejected both copyright-as-contract arguments and, after voting down Hoffman's proposed amendment to drop Section 16, approved the bill for a third reading by a vote of 81 to 31. The bill apparently sailed through the Senate without opposition and was signed by Andrew Jackson in February of 1831.²³

18 Id. at 423-24.

19 Id.

20 Id. at 423.

21 John Tebbel, 1 A HISTORY OF BOOK PUBLISHING IN THE UNITED STATES at 211-12 (1972).

22 Id. at 210.

23 Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (repealed 1909); Webster, *Origin of the Copy-right Laws* at 178. The *Register of Debates* makes no mention of debate over the bill in the Senate.



And so began a long tradition of authors asking Congress for extensions of the copyright term for their previously published works. In 1906, Mark Twain, among others, appeared before Congress to testify in favor of extending the then-forty-two-year copyright term to a term of life-plus-fifty years.²⁴ Twain got an extension, but not the one he wanted. Congress extended – to both new and existing works – the duration of the renewal term by an additional fourteen years, bringing the total term up to fifty-six years.²⁵ There it stood until 1962, when Congress started periodically granting short extensions in anticipation of copyright's overhaul in the 1976 Copyright Act. And it was in 1976 that, after receiving testimony from a number of authors and composers,²⁶ Congress finally granted Twain's request of a life-plus-fifty-year term, a term that was applied to both new and existing works.²⁷

Thus, Congress's hearings in 1995 on the twenty-year extension for both new and existing works that eventually became the Sonny Bono Copyright Term Extension Act of 1998 (CTEA)²⁸ were nothing new. They were the continuation of a tradition – started by the father of American copyright himself – of copyright holders seeking from Congress an increase to the duration of their existing copyrights.²⁹ When one considers Congress's long tradition of granting such extensions, some of the scholarly criticisms of the CTEA – for example that the CTEA is “a recent response to intense interest group pressure, which might have suppressed [Congress's] historic constitutional good sense in the intellectual property context”³⁰ – are likely as mistaken in their condemnation of modern Congresses as they are in their romanticization of past ones.

But the 1831, 1909, and 1976 extensions of the copyright term in existing works were never the subject of a Supreme Court case

24 *Arguments Before the Committees on Patents of the Senate and House of Representatives, Conjointly, on S. 6330 and H.R. 19853, 59th Cong. at 116-21 (1906)* (statement of Samuel L. Clemens). Clemens' testimony is worth a read, and not just for those interested in copyright. It is reprinted in its entirety in this issue of the *Green Bag*. See Samuel L. Clemens, *Copyright in Perpetuity*, 6 *GREEN BAG* 2D 109 (2002). During the hearings for the 1909 Act, the value to publishers of a shorter copyright term was also raised, although not by Clemens. See *Revision of Copyright Laws: Hearings Before the Committees on Patents of the Senate and House of Representatives on Pending Bills to Amend and Consolidate the Acts Respecting Copyright*, 60th Cong. at 17, 19 (1908) (statement of George Haven Putnam, Secretary of the American Publishers Copyright League) (emphasizing the importance of post-copyright publishing in recouping the publisher's up-front printing investment).

25 Act of Mar. 4, 1909, ch. 320, §§ 23-24, 35 Stat. 1075, 1080-81 (repealed 1947).

26 See generally *Copyright Law Revision: Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary on S. 597, 90th Cong. at 38 (1967)*, among others.

27 Copyright Act of 1976, Pub. L. No. 94-553, §§ 302-304, 90 Stat. 2541, 2572-76 (codified as amended at 17 U.S.C. §§ 302-304).

28 See Sonny Bono Copyright Term Extension Act § 102, 17 U.S.C. §§ 302, 304.

29 See, e.g., *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings Before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary on H.R. 989, H.R. 1248, and H.R. 1734, 104th Cong. at 52 (1995)* (statement of Jack Valenti, President & CEO, Motion Picture Association of America) (Because “a public domain work is an orphan,” the copyright term should be extended to ninety-plus years to assure that older works will be preserved and distributed.).

30 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, 1197. See also Suzanna Sherry, *Irresponsibility Breeds Contempt*, 6 *GREEN BAG* 2D 47 (2002).

challenging their constitutionality. On October 9, 2002, after this issue went to press but before its publication, the Supreme Court heard oral argument in *Eldred v. Ashcroft*, a case raising just such a challenge. In support of their various arguments, the petitioners in *Eldred* claim that an extension of the copyright term for an existing work cannot “promote the Progress of Science and useful Arts,” as is required by the language of the Copyright Clause.³¹ That contention reflects a theory that has become dominant over the last half of the 20th century: that the primary purpose of copyright is not to enrich authors but rather to give them an incentive to create works of authorship, which in turn increases society’s well-being.³² The ultimate goal of copyright under this theory is not to vindicate any natural right the author may have to compensation for the product of his labor but rather to further society’s interest in the creation of new works. Thus construed, copyright should be given only as a *quid pro quo* – an exchange for the author’s contribution to society. To grant exclusive rights without demanding something in return

would further the author’s interests, but not society’s. Any exclusive rights granted by Congress, the *Eldred* petitioners argue, “must promote ‘creative activity’ to satisfy the limits of the constitution.”³³

To further buttress their theories about the proper use of the copyright power, the *Eldred* petitioners have, following an increasingly popular trend, attempted to connect copyright to some *other* set of interests that are served by limiting Congress’s power to grant exclusive rights in writings.³⁴ Thus, the *Eldred* petitioners argue that the constitutional scope of copyright is driven in part by the Framers’ desire to prevent the concentration of power over speech in a small industry of publishers.

Through the late 17th century, publishing in England was controlled by the Stationers’ Company, which had a monopoly over the printing of books. The Stationers’ Company monopoly was not only used to enrich; it was used as a method of controlling the content of speech. Books that were critical of the government or its religious policies were denied publication, a form of control that worked much more effectively if all publishing

31 Brief of Petitioners at 19-23, *Eldred v. Ashcroft*, No. 01-618 (U.S. filed May 20, 2002).

32 See *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”).

33 Brief of Petitioners at 22 (quoting *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 429 (1984)). The *Eldred* petitioners have also advanced a First Amendment claim that makes essentially the same argument: By extending the term of protection for previously created works, Congress is giving something to authors without getting anything in return. It therefore violates the First Amendment by imposing a burden on speakers and listeners (those who would copy or make derivative works) without furthering an important government interest – the only recognized government interest supporting copyright protection being to “provid[e] incentives to authors to create original works.” An extension of rights to previously created works can never do so, and therefore must be unconstitutional. See Brief of Petitioners at 40.

34 See, e.g., Brief of Petitioners at 13 (Limits on the copyright power not only serve interests akin to federalism-motivated limits on Congress’s power but also “intersect with First Amendment liberties.”); Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 BERKELEY TECH. L.J. 535 (2000) (The Copyright Clause’s limits further the First Amendment’s commitment to personal autonomy.); Malla Pollack, *Purveyance and Power, or Over-Priced Free Lunch: The Intellectual Property Clause as an Ally of the Takings Clause in the Public’s Control of Government*, 30 SW. U. L. REV. 1 (2000).

was controlled by a centralized monopoly.³⁵ According to the *Eldred* petitioners, the limitations in the Copyright Clause, including the limitation on duration and the progress preamble, are founded in a desire to prevent the vesting in publishers of Stationers' Company-like centralized control over speech:

The Copyright Clause [and its limitations] is thus not so much "pro-author but rather anti-publisher." By securing to "Authors" who would never individually control the market generally, and by securing those rights for "limited Times," the Framers established a mechanism to stanch the concentration of power over speech in the hands of a historically suspect few.³⁶

If the Court fails to read the limits strictly, "publishers' retain a perpetual incentive to lobby Congress to extend existing terms. The incentives to decentralize control over speech intended by the Framers are thus erased."³⁷

There are many possible responses to the *Eldred* petitioners' arguments that the Court should strike the CTEA as a violation of the progress preamble. Perhaps the most obvious response is that Congress is in a much better position to decide what promotes progress than courts are. Indeed, it is virtually inconceivable that a world in which the Supreme Court decides what promotes the progress of knowledge would be better than a world in which Congress does.³⁸

But I would like to focus on another problem that I think is evidenced by the form of the arguments advanced by the *Eldred*

petitioners: It is the danger inherent in relying on broad assertions about the essential features of copyright and its central place in the Framers' vision of government, a problem readily demonstrated by returning to the two great copyright-related accomplishments of Noah Webster.



Webster's more famous lobbying effort, the pursuit of state copyright protection prior to the adoption of the Constitution, was motivated by the desire to obtain protection for a single work: his three-volume text, the *Grammatical Institute*. Volume I of the *Grammatical Institute*, a speller, was first offered for sale in Connecticut in October 1783; the second volume, a grammar, appeared in March 1784; and the third volume, a reader, was published in February 1785.³⁹ But Webster's quest for state copyright protection spanned a period of approximately four years, from the Fall of 1782 to the Spring of 1786. By October 1783, when the first volume of the *Institute* was published, only four States, Connecticut, Massachusetts, Maryland, and New Jersey, had copyright laws.⁴⁰ The rest of the twelve States to enact copyright laws did so gradually until New York, the last State to adopt a general copyright law, did so on April 29, 1786. If copyright may only be given as an incentive to *create*, how could Webster have received copyright protection for the first volume of the *Grammatical Institute* in the States that adopted copyright

35 Brief of Petitioners at 26. On the history of the Stationers' Company, see L. Ray Patterson, COPYRIGHT IN HISTORICAL PERSPECTIVE ch. 3 (1968).

36 Brief of Petitioners at 27 (quoting Marci Hamilton, *The Historical and Philosophical Underpinnings of the Copyright Clause*, 5 OCCASIONAL PAPERS INTELL. PROP. FROM BENJAMIN N. CARDOZO SCH. L., YESHIVA U. at 11 (1999)).

37 Brief of Petitioners at 27.

38 On the importance of affording Congress discretion to interpret the Copyright Clause, see Jane C. Ginsburg, No "Sweat"? *Copyright and Other Protection of Works of Information After Feist v. Rural Telephone*, 92 COLUM. L. REV. 338, 367-84 (1992).

39 John S. Morgan, NOAH WEBSTER at 48, 63, 65 (1975).

40 Solberg, COPYRIGHT ENACTMENTS at 11-17.

laws after October of 1783?

The answer is a simple one that any copyright lawyer who has been in practice for more than 26 years would immediately know: American copyright statutes, both state and federal, have traditionally based copyright not on a work's *creation* but rather on its *publication*.⁴¹ The place that publication has held in statutory copyright – beginning with the English precursor to American copyright, the Statute of Anne⁴² – is so strong that one commentator has even argued that the 1976 Act may be unconstitutional because it protects works upon their creation.⁴³

Thus Webster's post-creation odyssey to obtain copyright protection. The date of the creation of Webster's works was irrelevant to the early copyright statutes. In capital-strapped early America, it was publication, not creation, that drove both the economic and regulatory realities of copyright. The modern tendency to focus on creation as the object of copyright also ignores the high value the framing generation placed on books as focal points for an independent American culture; that value was served not so much by the creative content of any particular book as by the wide dissemination of American books of any kind.

Indeed, the state copyright laws being enacted at roughly the same time as the framing of Constitution call the ubiquity of the *quid*

pro quo theory of copyright – as an exchange for either creation or publication – into doubt. In the state acts, authors' natural rights are mentioned as frequently as society's benefit as the justification for protection.⁴⁴ We'll likely never know what model the Framers had in mind for copyright because neither view of copyright was exclusively or even dominantly held at the time of the framing.⁴⁵

But one thing is for certain: The scope of copyright protection existing at the time of the framing is inconsistent with claims that copyright "must promote 'creative activity'" in order to be valid. The requirement that a work even *be* creative was not settled until the 1990s.⁴⁶ Any attempt to locate with the Framers the proposition that copyright may be given only as a reward to creativity is an exercise in revisionist history; the central place that creativity occupies in copyright is a feature of modern copyright law.

Similarly, the *Eldred* petitioners have failed to grasp the modern basis of their arguments that the Framers designed the copyright power to prevent the concentration of control over speech in a small publishing industry.

The contention that the Copyright Clause's limits were designed to limit the power of publishers has some intuitive appeal today, in a world in which an increasingly concentrated industry of publishers routinely own the

41 See *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 657 (1834); H.R. Rep. No. 94-1476, at 129 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5745. It was possible to obtain copyright protection for an unpublished work prior to the 1976 Act by registering the work with the Register of Copyrights. 1909 Act, § 11, 35 Stat. at 1078. Thus, publication was the primary gateway to copyright protection, but it was not a requirement for obtaining copyright protection.

42 8 Anne, c. 19 (1709).

43 L. Ray Patterson, *Understanding the Copyright Clause*, 47 J. COPYRIGHT SOC'Y U.S.A. 365, 369-70 (2000). Under the 1976 Act, statutory copyright attaches at the moment that the work is fixed in tangible form. 17 U.S.C. § 102(a).

44 Solberg, COPYRIGHT ENACTMENTS at 11-31.

45 Compare THE FEDERALIST NO. 43 at 271 (James Madison) (Clinton Rossiter ed., 1961) (justifying the copyright power on the basis that "[t]he copyright of authors has been solemnly adjudged in Great Britain to be a right of common law") with U.S. Const. art. I, § 8, cl. 8 (giving Congress the power to "promote the Progress of Science" by granting exclusive rights in writings).

46 See *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

copyright for a work outright and therefore have an incentive to lobby for ever-expanding copyright terms. But when applied to the structure of the publishing industry in 18th- and 19th-century America, the veil of plausibility falls away.

As an initial matter, there was not even a rough analog to the Stationers' Company on the horizon at the time of the framing. Rather, in 1798 the fledgling republic had more than 200 publishers, printers, and booksellers spread through New York, Boston, Philadelphia, Baltimore, and Charleston, and they were intensely competitive. The few efforts actually undertaken to form trade organizations among publishers in the early 19th century failed almost as soon as they began.⁴⁷

Moreover, it is unlikely that even far-reaching copyright protection could have given American publishers any meaningful power over content. Content control was not a by-product of copyright protection in England in particular works, it was a direct product of the government-controlled monopoly over printing. Any form of copyright protection that did not create a monopoly in printing could not be used effectively to control the content of speech, regardless of the *duration* of the copyright term.

Nor did the early American market for copyrighted works operate to give publishers the incentive to seek ever-increasing copyright terms. Instead, as demonstrated by the concerns of Congressman Hoffman in 1831, publishers often had an incentive to reduce the duration of copyright. A slightly different set of incentives operated in the late 18th century, before stereotype printing was introduced (with its high-cost but reusable printing plates), but even then publishers would have

been wary of long copyright terms. At that time, there was little or no distinction between publishers and printers. Authors commonly self-published by paying the costs of printing, and thus "publishers" operated largely as printers, who were authorized to run an edition of a certain number of copies.⁴⁸ In order to push as much risk on the author as possible, publishers rarely bought copyrights from authors outright, which meant that they weren't interested in increasing the power to exclude that copyright carried with it. Indeed, the low value of copyright protection to publisher-printers in the late 17th and early 18th centuries is demonstrated by their frequent willingness to forgo its benefits by publishing pirated British works, for which they could not get the benefit of copyright protection, instead of American ones, for which they could.⁴⁹

Contrary to the *Eldred* petitioners' claims, the Framers did not write the Copyright Clause in order to prevent publishers from exercising control over speech.



Arguments attempting to constitutionally fix copyright in its 18th-century form are likely to mistakenly ignore the changes that have taken place in the markets for intellectual property since that time. One way to make that mistake is to assume that copyright is not contingent on markets for works of authorship – that copyright as it existed at the time of the framing is somehow a fundamentally more correct version of copyright than the version of copyright produced by the political economy of today's Congress. But another perhaps more insidious error is

47 Tebbel, I A HISTORY OF BOOK PUBLISHING at 55, 216.

48 Rollo G. Silver, THE AMERICAN PRINTER 1787-1825 at 97-98 (1967).

49 Tebbel, I A HISTORY OF BOOK PUBLISHING at 208-09; Bruce W. Bugbee, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW at 105-06 (1967).

to mistakenly find constitutional support for modern conceptions of copyright by assuming that the Framers faced the same copyright-related problems that we face today, as the *Eldred* petitioners have done. It is a natural impulse to fill gaps in our knowledge by attributing to the unknown features of the known. But we should resist the impulse to fill the many gaps in copyright as understood by the Framers – as both a policy and a market – with copyright policies and markets as we understand them today.

Given how profoundly the markets for intellectual property have changed since the time of the framing, we should be wary of historically based arguments that the Constitution speaks to the modern problems of

intellectual property law. That is not to say that markets have evolved to the point that a life-plus-seventy-year copyright term is sensible or that the CTEA is necessarily a valid exercise of the copyright power; it may very well not be for reasons that I have not considered here. But just as with claims that Congress has abandoned its historical restraint in controlling the reach of copyright, we should take with a hearty grain of salt claims that the Framers confronted and solved the problems presented by modern copyright. It would be nice if the Framers had possessed the super-human prescience and intelligence to do so, but we shouldn't rush to embrace myths that tell the story of how they did. *tb*