

3

The Constitution's Intellectual Property Clause

That 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

In an extraordinary gesture during the late summer of 1787, those gathered in Philadelphia at what later became known as the Constitutional Convention singled out “Science,” along with “the useful Arts,” as constitutionally vital to the future of the republic. To ensure that the people of the newly formed republic would be served by science and the useful arts, the framers of the Constitution granted Congress the power to issue otherwise dreaded monopolies (as royalist legacies) to authors and inventors over their writings and discoveries for “limited Times.” The fifty-five delegates did not show up at the Pennsylvania State House with this intent. They had come that summer to revise the Articles of Confederation, which had been ratified in 1781 on behalf of the thirteen colonies. Under the leadership of James Madison, however, those assembled were convinced to take on the ambitious framing of a new document that would stand as the Constitution of the United States of America.

The earlier Articles of Confederation made no reference to intellectual property. After this measure had been passed and between 1783 and 1786, twelve of the thirteen state legislatures passed their own copyright laws, which followed the example of English law.¹ In the case of Virginia,

1. Bruce W. Bugbee, *Genesis of American Patent and Copyright Law* (Washington, DC: Public Affairs Press, 1967), 2. Luther H. Evans summarizes the state laws (in their emulation of the UK’s Statute of Anne, see footnote 24 below): “Ten states used language directed towards encouragement of learning for the public benefit with provisions stressing the author’s interests; two states dealt only with protection of the author. Four states went much further and also had specific provisions as to adequacy of copies to serve the public

Madison had played a part in passing the state's copyright law in 1785, and yet only two years later, he determined that there was a need for "uniformity in the laws [on a national rather than state level] concerning . . . literary property," as he recorded in his notes.²

A few key figures at the convention had a high regard for science. To name just three, Benjamin Franklin was not only a fellow of the Royal Society of London for Improving Natural Knowledge and the Royal Academy of Sciences in Paris but also the founder of the American Philosophical Society in 1743 (as well as one-time president of the Pennsylvania Abolition Society).³ Alexander Hamilton was to apply his mathematical skills and interests to what was then known as the "science of government" to determine a fair method (which now bears his name) of allocating seats to the House of Representatives and was a fellow member of Pennsylvania Abolition Society. James Madison, who had studied Newtonian science at Princeton, made a point of drawing parallels between human affairs and the natural world while also collecting data on the size of animals in support of Jefferson's claims that local species were larger than their European counterparts to undermine a theory of New World degeneration.

and the reasonableness of the price, while a fifth state dealt only with the reasonable price"; Luther H. Evans, *Copyright and the Public Interest* (New York: New York Public Library, 1949), 9–10. Statutory licenses also figured in the statutes of Connecticut, Georgia, New York, and South Carolina between 1783 and 1786; Robert Stephen Lee, "An Economic Analysis of Compulsory Licensing in Copyright Law," *Western New England Law Review* 5, no. 2 (1982): 207n23, OA.

2. The American Philosophical Society started journal publishing in the United States beginning in 1771 with its *Transactions of the American Philosophical Society* (modeled on the similarly named publication of the Royal Society); Bugbee, *Genesis*, 97; Robert A. Rutland and William M. E. Rachal, eds., *The Papers of James Madison*, vol. 9, *9 April 1786–24 May 1787 with Supplement 1781–1784* (Chicago: University of Chicago Press, 1995), 345–358, quoted in "Vices of the Political System of the United States, April 1787," Founders Online, National Archives, Washington, DC, OA.

3. The references to Franklin's, Hamilton's, and Madison's association with science are gleaned from I. Bernard Cohen, *Science and the Founding Fathers: Science in the Political Thought of Jefferson, Franklin, Adams, and Madison* (New York: Norton, 1995), 14, 92, 20, 85, 130. Cohen sums up the regard for science as follows: "Science was esteemed as the highest expression of human reason, [and] the sciences served as a font of analogies and metaphors as well as a means of transferring to the realms of political discourse some reflections of the value system of the sciences" (11).

It was Madison who drafted an intellectual property clause for the Committee of Detail on August 18, 1787, setting out that among the ten powers Congress was to award, four were to be directed toward the advancement of knowledge and invention:

6. To secure to literary authors their copy rights for a limited time.
7. To secure to the inventors of useful machines and implements the benefits thereof for a limited time.
8. To establish a University.
9. To encourage by premiums and provisions, the advancement of useful knowledge and discoveries.⁴

That same day, South Carolina's C. C. Pinckney brought to the committee two further congressional powers for supporting science and the useful arts: "to establish seminaries for the promotion of literature and the arts & sciences" and "to establish public institutions, rewards and immunities, for the promotion of agriculture, commerce, trades, and manufactures."⁵ In sum, Madison and Pinckney would have Congress provide inventors and authors with limited-term monopolies, prizes ("provisions and premiums"), and institutions.⁶

If Madison's and Pinckney's institutional ambitions for learning did not survive the drafting process (perhaps in light of states' rights in education), a century later, their vision was realized on a federal scale with the Morrill Land-Grant Acts of 1862 and 1890.⁷ In addition, their support for premiums and provisions later found expression in a series of federal research agencies, such as the National Institutes of Health, which can trace its origins to a laboratory set up in the Marine Hospital Service in 1887. Among those federal provisions, the Defense Advanced Research Projects Agency (DARPA), which brought us the internet, was empowered by Congress in 2004 to offer premiums or prizes, much as Pinckney proposed, for autonomous vehicles and underground exploration

4. US Bureau of Rolls and Library, *Documentary History of the Constitution of the United States, 1787-1870*, vol. 3, pt. 2 (Ann Arbor, MI: University Microfilms International, 1894), 555, OA.

5. US Bureau of Rolls and Library, *Documentary History*.

6. Jeanne C. Fromer, "The Intellectual Property Clause's External Limitations," *Duke Law Journal* 61, no. 7 (2012): 1346.

7. With these acts, the federal government provided each state with a parcel of land to create an agricultural college that was to be established "without excluding other scientific and classical studies and including military tactics"; Morrill Land-Grant Acts of 1862 and 1890, 7 U.S.C. § 304 (1890).

inventions, to name two areas.⁸ These later realizations make clear the extent to which the congressional pursuit of knowledge's public benefits remains a work in progress for this country.

A little more than two weeks after Madison and Pinckney had submitted their initial drafts to the Committee of Detail, the overarching Committee of Eleven, without any record of discussion or debate, unanimously recommended that Congress be empowered to grant authors and inventors an exclusive right over their work for a limited time.⁹ The final draft of the whole document was approved by the convention on September 17, 1787. After ratification by eleven states in 1788, it became the Constitution of the United States of America.

If Thomas Jefferson had attended the convention rather than remaining in Paris at the behest of Congress during this period, the intellectual property clause might well have been the object of notable debate. Jefferson was a defender of the intellectual commons and was opposed to monopolies in all matters, not least of all with ideas.¹⁰ Still, when it came to the ratification vote for the Constitution, he wrote to Madison that he supported the limited-term monopoly, having accepted Madison's

8. See Joseph Stiglitz and Bruce Greenwald on the value of prizes over patents when the societal goal, such as health, conservation, and climate change, is well defined; Joseph Stiglitz and Bruce Greenwald, *Creating a Learning Society: A New Approach to Growth, Development, and Social Progress* (New York: Columbia University Press, 2014), 270–278.

9. That it passed without dissent or discussion has led Edward C. Walterscheid to judge it as something of an afterthought rather than an object of universal assent: “Nor was there anything in the early actions of the delegates to evidence any concern of this type. Rather, the Clause is an afterthought, introduced late in the game when the delegates were tired and wanted to complete their work and go home. As a result, they gave less thought to it than perhaps they should have”; Edward C. Walterscheid, “To Promote the Progress of Science and Useful Arts: The Anatomy of a Congressional Power,” *IDEA: The Journal of Law and Technology* 43, no. 1 (2003): 9.

10. Jefferson wrote to Madison that “it is better . . . to abolish . . . Monopolies, in all cases, than not to do it in any” (July 31, 1788), and Madison responded, “With regard to Monopolies, they are justly classed among the greatest nuisances in Government. But is it clear that as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced?” (October 1788); “To James Madison from Thomas Jefferson, 31 July 1788,” in *The Papers of James Madison*, vol. 11, 7 March 1788–1 March 1798, ed. Robert A. Rutland and Charles A. Hobson (Charlottesville: University Press of Virginia, 1977), 210–214, OA; “James Madison to Thomas Jefferson, October 17, 1788. Partly in Cipher,” Library of Congress, OA. Jefferson’s stance is discussed by Walterscheid, “To Promote the Progress of Science,” 5–7.

incentive (rather than ownership) argument for encouraging literary works and inventions.¹¹ In fact, Jefferson went on to serve as a patent examiner in his role as secretary of state, during which he noted that “the issuing of patents for new discoveries has given a spring to invention beyond my conception.”¹² But Jefferson also continued over the course of his life to point out how the ownership of ideas is contrary to natural law.¹³

It also cannot be left unsaid that Madison’s and Jefferson’s thinking about ideas and property took place during a time when these two Virginia slave owners were considering what it meant to possess a property in a person. Nearly a decade prior to the Convention, Jefferson had taken steps to restrict the importing of slaves into Virginia.¹⁴ And Madison has “Mr. Madison thought it wrong” among his highly edited notes from the convention, “to admit in the Constitution the idea that there could be property in men.”¹⁵ While slavery is not mentioned, as such, in the Constitution, it does include what later became known as the “fugitive slave clause” as well as a provision for proportional representation that counted slaves “three fifths of all other Persons,” following Madison’s 1783 suggestion in another context.¹⁶ Both clauses remain part of the Constitution as if to serve as reminders of a past that has by no means entirely passed. The Constitution was, of course, amended to abolish

11. “From Thomas Jefferson to James Madison, 28 August 1789,” in *The Papers of Thomas Jefferson*, ed. Julian P. Boyd (Princeton: Princeton University Press, 1950–1965), 15:364–369, OA.

12. “From Thomas Jefferson to Benjamin Vaughan, 27 June 1790,” in Boyd, *Papers*, 16:579, OA.

13. Jefferson famously held in 1813 “that ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature”; “Thomas Jefferson to Isaac McPherson, 13 August 1813,” in Boyd, *Papers*, 6:379–386, OA.

14. “A Bill Concerning Slaves, June 18, 1779,” in Boyd, *Papers*, 2:470–473.

15. “Journal of the Constitutional Convention of 1787, Part II, August 25, 1787,” in *The Writings of James Madison*, ed. Gaillard Hunt (New York: Putman, 1903), 4:306, OA.

16. The fugitive slave clause held that slaves who escaped to other states “shall be delivered up on claim of the party to whom such service or labor may be due,” and it appears in a section holding that “citizens of each state shall be entitled to all privileges and immunities of citizens in the several states” (art. 4, § 2, cl. 3). The three-fifths count is for the purposes of apportioning representatives and taxes (art. 1, § 2, cl. 3).

slavery and to guarantee “the equal protection of the laws” in 1865 and 1868, respectively. But in that formative moment, Madison and Jefferson ultimately made peace with the country’s support for slavery in a perverse undermining of the country’s newly established first principles. Benjamin Franklin, on the other hand, petitioned Congress to end slavery in 1790, thereby “removing the Inconsistency from the Character of the American People.”¹⁷ The extent to which the Constitution remains compromised by its part in what the freed slave and abolitionist Frederick Douglass called “the foul curse of slavery” is debated to this day.¹⁸

This legacy continues to bear on the use made of the Constitution, whether to reign in the powers of an errant president or to recommend legislative reform based on its intellectual property clause. In the case at hand, I am making an appeal that draws on the Enlightenment faith in science reflected in that constitutional clause. I do so not out of a fidelity or duty to what was written then but because I and many others value the promotion of scientific progress. This is in the spirit of Cass Sunstein’s cautious “many minds” interpretation of the Constitution’s continuing role in the legal life of this country.¹⁹ Sunstein contrasts Madison’s belief in a relatively fixed Constitution to Jefferson’s sense that each generation should rethink this foundational position while introducing his own middle-ground stance. He explores how “changes in constitutional arrangements and understandings have been a product of ordinary democratic processes, producing adjustments in constitutional understandings over time.”²⁰ In the case of copyright, what it means “to promote the progress of science” has changed over time, with those many minds representing a range of interests in scholarly publishing that agree, in this rare and present instance, on open access’s contribution to scientific progress.

17. “Benjamin Franklin’s Anti-slavery Petitions to Congress,” National Archives, Washington, DC, February 12, 1790, OA.

18. Frederick Douglass, “Henry Clay and Slavery, *The North Star*, February 8, 1850,” in *Frederick Douglass: Selected Speeches and Writings*, ed. Philip Foner and Yuval Taylor (Chicago: Lawrence Hills, 1999), 154. An excellent summary of the debate is found in Nicholas Guyatt, “How Proslavery Was the Constitution?,” *New York Review of Books*, June 6, 2019.

19. Cass R. Sunstein, *A Constitution of Many Minds: Why the Founding Document Doesn’t Mean What It Meant Before* (Princeton: Princeton University Press, 2009).

20. Sunstein, *Constitution*, 3.

To resume my early American history of copyright, on January 8, 1790, when George Washington delivered the first State of the Union address in Federal Hall, New York, the president of the United States spoke of both arming and disciplining a free people, pacifying “hostile tribes,” and other matters before turning to how “there is nothing, which can better deserve your patronage, than the promotion of Science and Literature.”²¹ Washington held that “knowledge is in every Country the surest basis of public happiness.” He refers to such promotion as “essential” and sees its role in “teaching the people themselves to know and to value their own rights.” He also asked that consideration be given to supporting existing “Seminaries of Learning” or possibly “a national University.”

Four months later, on April 10, Washington signed into law the Bill for the Promotion of the Useful Arts, better known as the Patent Act of 1790, with Thomas Jefferson serving among the first “Commissioners for the Promotion of Useful Arts,” entrusted to decide whether to “deem the invention or discovery sufficiently useful and important.”²² And then on May 31, 1790, Washington signed into law the Copyright Act of 1790, which is “an Act for the encouragement of learning, by securing the copies of Maps, Charts, and Books, to the Authors and Proprietors of such copies, during the times therein mentioned.”²³ The time mentioned was fourteen years, renewable once, during which the author “shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books.” The stated purpose of the Copyright Act bears a strong resemblance to Great Britain’s earlier Statute of Anne of 1710, “an act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned.”²⁴

21. George Washington, State of the Union address, January 8, 1790, Federal Hall, New York City, transcript, OA.

22. Patent Act of 1790, chap. 7, 1 Stat. 109-112 (1790), OA.

23. Copyright Act of 1790, Pub. L. No. 1-15, 1 Stat. 124 (1790), OA. See John Willinsky, “When the Law Advances Access to Learning: Locke and the Origins of Modern Copyright,” *KULA: Knowledge Creation, Dissemination, and Preservation Studies* 1, no. 1 (2017): 2, OA.

24. Statute of Anne, 8 Anne, c. 19 (1710), Avalon Project, Yale University, 2008, OA. Oren Bracha refers to the statute as the “doctrinal blueprint” for the American act, adding that “the statutory design copied from the Statute of Anne remained at the heart of American copyright law at least until 1870, and to an extent until the dawn of the twentieth century”; Oren Bracha, “The Statute of Anne: An American Mythology,” *Houston Law Review* 47, no. 4 (2010): 878.

In recounting these events, I would first note the different approaches that Congress took with patents and copyright in fulfilling the purpose of the intellectual property clause “To promote the Progress of Science and the useful Arts.”²⁵ While Congress granted authors and inventors limited-term monopolies, the clause “by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries” does not limit the type of writing or invention. When it came to legislation, however, the Patent Act of 1790 did restrict the granting of patents to those inventions and discoveries that were judged “sufficiently useful and important.”²⁶ The Copyright Act of 1790 specified “map, chart, or book or books” without restrictions on purpose or value.²⁷ And while navigational charts and maps more generally can be said to speak to the progress of science, the designation of “books” casts a wider net, reflecting a trust in the educational force of books.

Works of science, such as Benjamin Franklin’s *Experiments and Observations on Electricity* (1751), were to be protected, as were Jedediah Morse’s *The American Geography* (1789) and Nicholas Pike’s *A New and Complete System of Arithmetic* (1789). Yet the law offered the same right to J. Hector St. John de Crèvecoeur for his agrarian reflections in the fictional *Letters from an American Farmer* (1782), Mary Wollstonecraft for her *A Vindication of the Rights of Woman* (republished in the United States during the 1790s), and Susanna Rowson for her novel *Charlotte Temple* (1794). As Jane C. Ginsburg establishes, in reviewing the types of books published at the time, “works of information and instruction” dominated the lists.²⁸ In such a publishing culture,

25. U.S. Const. art. I, § 8, cl. 8. While some disagree that the clause works in this way, I side with Chief Justice Burger: “The clause thus describes both the objective which Congress may seek and the means to achieve it. The objective is to promote the progress of science and the arts”; *Goldstein v. California*, 412 U.S. 546 (June 18, 1973), Court Listener, OA. Compare this to I. Bernard Cohen, who finds the intellectual property clause “a curious hodgepodge”: “Let us observe, finally, that in the Constitution two very different ideas about science are being expressed. First, it said that the Congress (or ‘legislature’) shall have the power (and presumably the responsibility or obligation) to ‘promote the Progress of Science and useful Arts.’ A second power is to provide patents and copyrights”; Cohen, *Science and the Founding Fathers*, 238, 241.

26. Patent Act of 1790, chap. 7, 1 Stat. 109-112 (1790).

27. Copyright Act of 1790, Pub. L. No. 1-15, 1 Stat. 124 (1790).

28. Jane C. Ginsburg, “Tale of Two Copyrights: Literary Property in Revolutionary France and America,” *Tulane Law Review* 64, no. 5 (1989-1990): 1002, 1015. On the printing industry, Ginsburg cites John Tebbel: “In the post-Revolution textbook

“Congress [was] intent,” Ginsburg surmises, “to employ copyright as a means of furthering public education.”²⁹ I don’t want to exaggerate the place of science and (scholarly) learning within this far broader concern with public instruction during the early days of the republic nor minimize the role that the printing industry, deeply invested in such educational materials, played in ensuring the constitutional presence of an intellectual property copyright clause.³⁰

It is not just “Science” that is at issue in this constitutional context. It is no less important to consider what was intended by “progress” as well as “promote.”³¹ For example, Malla Pollack, an independent scholar and lawyer, demonstrates how the use of *progress* in eighteenth-century America often referred to more the spread and diffusion of science among

boom, the demand for primers, geographies and arithmetics, in both German and English, was high, as American books patriotically replaced the British texts that had been used before”; John Tebbel, *A History of Book Publishing in the United States*, vol. 1, *The Creation of an Industry, 1630–1865* (New York: Bowker, 1972), 142.

29. Ginsburg, “Tale of Two Copyrights,” 1001.

30. The Statute of Anne has been accused of highlighting “the encouragement of learning” in its title as a pretense for legitimating the reestablishment of printer and bookseller monopolies in the case of the British act—while extending copyright to all books that are registered; John Feather, “The Book Trade in Politics: The Making of the Copyright Act of 1710,” *Publishing History* 8 (1980): 19–44. In noting that “certain specific laws and regulations are contrary to the welfare of letters in America in 1930,” Ezra Pound similarly observed that “our copyright law [was] originally designed to favour the printing trade at the expense of the mental life of the country”; Ezra Pound, “Newspapers, History, Etc.,” *Hound and Horn* 3 (1930): 577.

31. In this, I disagree with Cohen, who takes “Science” to refer to “those theoretical or general principles of practice that are associated directly with useful inventions or that lead to economic benefits or financial rewards”; Cohen, *Science and the Founding Fathers*, 308. The framers’ use of the phrase “their *respective* Writings and Discoveries” (emphasis added) suggests to me an alignment of “Inventor,” “useful Arts,” and “Discoveries” (which might well be understood as “patentable inventions,” as Cohen assists us in appreciating). This sets “Science” apart from useful inventions and more a thing of basic research and scholarship. In this, I concur with Lawrence B. Solum, among others, that “the meaning of science that best coheres with the constitutional text and the original understanding can be glossed as systematic knowledge or learning of enduring value”; Lawrence B. Solum, “Congress’s Power to Promote the Progress of Science: *Eldred v. Ashcroft*,” *Loyola of Los Angeles Law Review* 36, no. 1 (2002): 3.

the people than the qualitative or quantitative advancement of science.³² In this sense, Congress has been granted the power to promote the dissemination of science by encouraging its publication and distribution among the people.³³ It “forces Congress to show,” as Pollack puts it, “that the additional rights to exclude create sufficient new access.”³⁴ It also ties copyright to the Enlightenment goals of universal education. Here she cites Madison, given his key role in this intellectual property clause: “A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance.”³⁵ The reforms that I recommend will facilitate the diffusion of science without interfering with the copyright incentives to create and distribute other types of educational materials concerned with learning as well as other types of publications.

The constitutional use of “to *promote*” is also worth noting as this aspirational phrasing appears in only one other place in the Constitution. The Constitution’s preamble refers to how this document has been

32. Malla Pollack, “What Is Congress Supposed to Promote? Defining Progress in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause,” *Nebraska Law Review* 80, no. 4 (2001): 754–815.

33. For example, Pollack assembles considerable linguistic evidence on the use of “progress” in the sense of spread (as in the progress of a fire) and notes that “eight of the twelve pre-U.S. Constitution copyright statutes officially endorse the spread of knowledge”; Pollack, “What Is Congress Supposed to Promote?,” 786. Literacy at that time ranged from as high as 80 percent among New England men (and 50 percent among women) to being strictly forbidden among slaves; Kenneth A. Lockridge, *Literacy in Colonial New England: An Enquiry into the Social Context of Literacy in the Early Modern West* (New York: Norton, 1975). As well, subversive literature, including that of the early abolitionists, was more likely found in newspapers and pamphlets, such as Thomas Paine’s abolitionist “African Slavery in America,” which appeared in the *Postscript to the Pennsylvania Journal and Weekly Advertiser*, March 8, 1775. Walterscheid sets out how, among the colonies, Connecticut, Georgia, New Jersey, New York, Pennsylvania, and Virginia included “pamphlets” in their copyright laws, while Maryland, Massachusetts, New Hampshire, North Carolina, and Rhode Island did not; Walterscheid, “To Promote the Progress of Science,” 34n273.

34. Pollack, “What Is Congress Supposed to Promote?,” 760. Note that Chief Justice Burger gave the terms a somewhat less expansive interpretation when observing that “the terms ‘to promote’ are synonymous with the words ‘to stimulate,’ ‘to encourage,’ or ‘to induce’” in *Goldstein v. California*.

35. “Letter of James Madison to W. T. Barry, August 4, 1822,” Library of Congress, OA.

created “in Order to . . . promote the general Welfare.”³⁶ This shared *promotion* might be said to connect the progress of science and the useful arts with the general and lasting welfare of the people in the pursuit of the “more perfect union” sought by those assembled at the Constitutional Convention. In the eighteenth century, the progress of science was made manifest in Franklin’s founding of the American Philosophical Society for the purpose of “promoting useful knowledge.”³⁷ It also found expression in the 1780 charter of the American Academy of Arts and Sciences—with John Adam, John Hancock, Benjamin Franklin, and Thomas Jefferson among its early members—as it sought to “cultivate every art and science which may tend to advance the interest, honor, dignity, and happiness of a free, independent, and virtuous people.”³⁸

When it comes to the extent to which my copyright reform contributes to the Constitution’s intended promotional aspects, I am prepared to meet the test posed by the lawyer Joshua N. Mitchell. A senior associate with King & Spalding, Mitchell raises three questions for ascertaining whether a law satisfies the “promote” and “progress” requirements of the Constitution’s intellectual property clause:

1. Is it reasonable to believe that the law will encourage an increase in the quality or quantity of knowledge?
2. Is it reasonable to believe that the law will encourage the dissemination of knowledge?
3. Is it reasonable to believe that the encouragement this law provides either to the increase of knowledge or to the dissemination of knowledge will be an improvement over the encouragement provided by existing laws?³⁹

36. U.S. Const., preamble.

37. “About the APS,” American Philosophical Society, Philadelphia, May 25, 2020, OA.

38. Charter of Incorporation of the American Academy, Legislature of Massachusetts, 1780, OA.

39. Joshua N. Mitchell, “Promoting Progress with Fair Use,” *Duke Law Journal* 60, no. 7 (2011): 1657. Mitchell holds with fair use being able to do more to promote progress if it were to have a fifth factor added to the four considerations that includes “the effect of the alleged infringer’s use on the promotion of the progress of science and useful arts, and whether that use better serves the progress-promoting purpose than does enforcement of the copyright holder’s rights over the copyrighted work” (1663). I have addressed the shortcoming of fair use as a means of promoting scientific progress in the digital era above.

It should be clear by this point in the book that the legal change I recommend, by providing publishers with fair compensation for creating immediate open access to research and scholarship, will result in “an increase in the quality or quantity of knowledge” and “encourage the dissemination of knowledge” and by doing so “will be an improvement over the encouragement provided by existing laws.” More than that, I’d also point out that, in what follows in this book, I address two additional and related questions that are specific to the current state of science:

4. Is it reasonable to believe that the law will serve as a check on pirated and predatory publications (see chapter 4)?
5. Is it reasonable to believe that the law will encourage the continuing quality of scholarly publishing by ensuring fair compensation to the publishers (see chapter 6)?

Let me offer a second constitutional test for my suggested copyright amendment, this one involving the Supreme Court 2003 ruling on *Eldred v. Ashcroft* (discussed in chapter 2). This was the case in which Lawrence Lessig contested the constitutionality of the Sonny Bono Copyright Term Extension Act (CTEA) of 1998, holding that the act—by extending the copyright term to 70 years after the death of the author and up to 120 years for corporate ownership of, say, Mickey Mouse—exceeded any reasonable bounds of Congress’s constitutional power to secure “for *limited Times* to Authors and Inventors the exclusive right.”⁴⁰ Lessig’s charge initially inspired in me a sense that Congress had similarly violated the intellectual property clause by failing to take the necessary steps “to promote the progress of Science” by ensuring that the Copyright Act supported open access. I ran into some serious headwind with this idea, for as Rachael G. Samberg, Berkeley scholarly communication librarian and former attorney, pointed out to me, while Congress is granted the power to take steps that will promote such progress, it is not in any way compelled by the intellectual property clause to maximize this progress by every available means.⁴¹

That said, I still view two of the points made by Justice Ruth Bader Ginsburg in the ruling on *Eldred v. Ashcroft* as posing a constitutional test for my copyright amendment. In the first of these, Justice Ginsburg states that “the CTEA is a rational exercise of the legislative authority

40. U.S. Const. art. I, § 8, cl. 8.

41. Rachael G. Samberg, personal communication, September 8, 2021.

conferred by the [Constitution's] Copyright Clause.”⁴² Congress had not exceeded the authority granted to it by the Constitution, as Lessig charged. In my case, the consensus that open access will “promote the progress of science” determines that Congress will be engaged in the rationale exercise of its constitutional authority by pursuing such copyright reform. When it comes to the particulars of the statutory licensing at issues in this reform, I am brought to the second objection that Justice Ginsburg raises to Lessig’s arguments that CTEA gives rise to profiteering. Justice Ginsburg counters that “copyright law serves public ends by providing individuals with an incentive to pursue private ones,” citing *American Geophysical Union v. Texaco Inc.* on how “the profit motive is the engine that ensures the progress of science.”⁴³ To turn to how things currently stand with scholarly publishing, as will be set out in chapter 4 in some detail, the profit motive today is acting as more of a roadblock than an engine of progress.

The publishers’ exercise of copyright-induced monopoly pricing is leading to library deficits, restricted research access, and lost research investment, even as the publishers are slowly and unevenly rolling out open access across the research literature while further restricting access in the process.⁴⁴ On the other hand, Congress has the legislative means and authority, which it has not hesitated to use with the music industry and other copyright enterprises, to provide publishers with an incentive to serve public ends. This was Justice Ginsburg’s point in *Eldred v. Ashcroft* that “it is for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.”⁴⁵ Congress can ensure, in this case, that publishers are fairly compensated for providing open access to research publications, with provisions for profits to invest in technology innovations and attract more authors and readers (see chapter 6).

42. *Eldred v. Ashcroft*, 537 U.S. 186 (2003), OA.

43. *Eldred v. Ashcroft*, at 212, citing *American Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 27 (SDNY 1992), *aff’d*, 60 F.3d 913 (CA2 1994).

44. This goes to Lessig’s point on the “common phenomenon in constitutional law” known as “technological inversion,” in which, in this case, digital technologies that could readily sustain “a tradition of balanced freedom that defined our past” are used by publishers to restrict access more effectively; Lessig, “Creative Commons,” 763, 766. Reichman and Okediji reinforce the point by calling out the use of digital rights management systems to curtail scholars’ “fair use” rights; Reichman and Okediji, “When Copyright Law and Science Collide,” 1362–1364.

45. *Eldred v. Ashcroft*, at 212.

In closing out this constitutional chapter, I'd also note that the 2020 appointment of Amy Coney Barrett to the Supreme Court strengthens its support for judicial *originalism*: “Originalism means that the constitutional text means what it did at the time it was ratified,” as Justice Barrett put it in a 2017 article, “and that this original public meaning is authoritative.”⁴⁶ This position, more or less reflected in a majority of the justices (with Barrett, Roberts, Thomas, Kavanaugh, and Gorsuch), can be expected to hold for some time in the court.⁴⁷ I raise this issue not because I envision pursuing this copyright reform through the courts on constitutional grounds but to emphasize this original reference point in intellectual property law. Congress is empowered to take steps that promote the progress of science. That this principle remains authoritative for the highest court in the land should make it that much more conducive for Congress to pursue copyright reforms aimed at advancing open access to research publications.

46. Amy Coney Barrett, “Originalism and Stare Decisis,” *Notre Dame Law Review* 92, no. 5 (2017), OA.

47. Noah Feldman, “The Battle over Scalia’s Legacy,” *New York Review of Books*, December 17, 2020.

This is a section of [doi:10.7551/mitpress/14201.001.0001](https://doi.org/10.7551/mitpress/14201.001.0001)

Copyright's Broken Promise

How to Restore the Law's Ability to Promote the Progress of Science

By: John Willinsky

Citation:

Copyright's Broken Promise: How to Restore the Law's Ability to Promote the Progress of Science

By: John Willinsky

DOI: 10.7551/mitpress/14201.001.0001

ISBN (electronic): 9780262371483

Publisher: The MIT Press

Published: 2022

The open access edition of this book was made possible by generous funding and support from the author, and MIT Press Direct to Open



The MIT Press

© 2023 Massachusetts Institute of Technology

This work is subject to a Creative Commons CC BY-NC-ND license.

Subject to such license, all rights are reserved.



The MIT Press would like to thank the anonymous peer reviewers who provided comments on drafts of this book. The generous work of academic experts is essential for establishing the authority and quality of our publications. We acknowledge with gratitude the contributions of these otherwise uncredited readers.

This book was set in Sabon by Scribe Inc. Printed and bound in the United States of America.

Library of Congress Cataloging-in-Publication Data

Names: Willinsky, John, 1950– author.

Title: Copyright’s broken promise : how the law now impedes the “progress of science” and how it can be fixed / John Willinsky.

Description: Cambridge, Massachusetts : Massachusetts Institute of Technology, [2023] | Includes bibliographical references and index. | Summary: “How US Copyright law should be reformed to ensure open access to research and scholarship”—Provided by publisher.

Identifiers: LCCN 2022003112 (print) | LCCN 2022003113 (ebook) | ISBN 9780262544412 (paperback) | ISBN 9780262371476 (epub) | ISBN 9780262371483 (pdf)

Subjects: LCSH: Copyright—United States. | Open access publishing.

Classification: LCC KF2994 .W55 2023 (print) | LCC KF2994 (ebook) | DDC 346.7304/82—dc23/eng/20220801

LC record available at <https://lcn.loc.gov/2022003112>

LC ebook record available at <https://lcn.loc.gov/2022003113>

10 9 8 7 6 5 4 3 2 1