Dissemination Must Serve Authors: How the U.S. Supreme Court Erred

Abstract

The US Congress has enacted expansions of copyright which arguably impose high social costs and generate little incentives for authorial creativity. When the two most expansive statutes were challenged as unconstitutional, the US Supreme Court rebuffed the challenges, partly on the supposed ground that copyright law could legitimately seek to promote non-authorial interests; apparently, Congress could enact provisions aiming to support noncreative disseminative activities such as publishing, or restoring and distributing old film stock, even if authorial incentives were not served.

Such an error might have arisen because of three phenomena (in economics, history, and law, respectively) that might easily be misunderstood but which, when unpacked, no longer lead plausibly to a stand-alone embrace of disseminator interests.

The first deceptive phenomenon lies in the way that economic tools such as the Arrow paradox focus our attention on how dissemination must occur for social value to arise. The instant article admits that disseminators’ crucial role deserves appreciation—but argues that their role needs copyright only to the extent that authors need disseminators. The second deceptive phenomenon is the strong role that disseminators and related reprographic industries have historically played in the copyright legislative process. The instant article points out that having a financial interest in legislation is not equivalent to being a proper beneficiary of the legislation, particularly when the enabling Constitutional language seems not to embrace such post-hoc scramblers for rent. The third potentially deceptive phenomenon is the way that publication plays a role in copyright law and doctrine: notably, before 1978 ‘publication’ divided state copyright from federal copyright, and today ‘publication’ is one of the copyright owner’s exclusive rights. (It is part of the right “to distribute”). The instant article points out that the division of state copyright from federal was rooted not in the desire to encourage publication but rather in the need for national regulation and limitation once a work could be accessed by the general population. As for the right “to distribute”, the article reveals the right as functioning essentially as kind of simplified secondary liability, that is, a convenient way for authors to enforce their rights against entities who have both ability to pay, and some ability to control the harm done by copyists.

Some commentators who defend the Court’s approach do so by pointing to costly evaluative search tasks undertaken by disseminators. The instant article points out that offering a ‘hit’ book or movie (the result of an evaluative process) signals success in much the same way as high prices signal success. Since the market system relies on competitors being able to free-ride on the price signals (and evaluation of opportunities) generated by others, a high burden of persuasion rests on any argument that would outlaw competitors from following success-signals.

Only a comparative institutional analysis can show whether disseminator industries need help that is more or different than other industries need, and whether, if such help is needed, copyright and its roughly 95 years of lead-time-advantage is really an appropriate tool.