Copyright and Commercialization: A Case Study in Scholarly Publishing

Adam Mossoff

Abstract

Today, copyright policy is framed solely in terms of a trade off between the benefits of incentivizing authors to create new works and the losses from restricting access to those works. This is a mistake that has distorted the policy and legal debates concerning the fundamental role of copyright within scholarly publishing, as the incentive-to-create conventional wisdom asserts that copyright is unnecessary for researchers who are motivated for non-pecuniary reasons. As a result, commentators and legal decision-makers dismiss the substantial investments and productive labors of scholarly publishers as irrelevant to copyright policy. Furthermore, widespread misinformation about the allegedly “zero cost” of digital publication exacerbates this policy distortion.

This paper fills a gap in the literature by providing the more complete policy, legal and economic context for evaluating scholarly publishing. It details for the first time the $100s of millions in ex ante investments in infrastructure, skilled labor, and other resources required to create, publish, distribute and maintain scholarly articles on the Internet and in other digital platforms. Based on interviews with representatives from scholarly publishers, it reveals publishers’ extensive and innovative development of digital distribution mechanisms since the advent of the World Wide Web in 1993. Even more important, this paper explains how these investments in private-ordering mechanisms reflect fundamental copyright policy, as copyright secures to both authors and publishers the fruits of their productive labors. In sum, copyright spurs both authors to invest in new works and publishers to invest in innovative, private-ordering mechanisms. Both of these fundamental copyright policies are as important today in our fast-changing digital world as they were in yesteryear’s world in which publishers distributed scholarly articles in dead-tree format.