March 2016

Threatening the Founding Ideal of a Republic of Letters: An Assessment of the Supreme Court's Copyright Decisions Over the First Decade of the Twenty-First Century

Susanna Frederick Fischer

Please take a moment to share how this work helps you through this survey. Your feedback will be important as we plan further development of our repository. Follow this and additional works at: http://ideaexchange.uakron.edu/akronintellectualproperty

Part of the Intellectual Property Law Commons

Recommended Citation
Available at: http://ideaexchange.uakron.edu/akronintellectualproperty/vol5/iss2/3

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Intellectual Property Journal by an authorized administrator of IdeaExchange@UAkron. For more information, please contact mjon@uakron.edu, uapress@uakron.edu.

Susanna Frederick Fischer*

I. Introduction ........................................................................................................... 205
II. The Founding Ideal of the Republic of Letters and the Copyright Clause ...................................................... 208
   A. The Republic of Letters and the Value of the Dissemination of Knowledge to the Public ................... 209
   B. How the Value of the Republic of Letters Shaped the Copyright Clause ............................................. 211
III. The Supreme Court’s Copyright Case Law Over the Past Ten Years ....................................................... 215
    A. New York Times v. Tasini ................................................................. 215
    B. Reed Elsevier v. Muchnick ......................................................... 218
    C. Eldred v. Ashcroft ................................................................. 222
    D. MGM Studios, Inc. v. Grokster, Ltd........................................ 226
IV. Conclusion ........................................................................................................... 229

I. INTRODUCTION

In 1789, Thomas Jefferson described himself as suffering an affliction that I suspect many law professors share. He wrote “I labour

* Susanna Frederick Fischer is Associate Professor of Law at Columbus School of Law, The Catholic University of America, Washington DC 20064. She would like to thank Jay Dratler, Jr., Goodyear Professor of Intellectual Property, Emeritus, The University of Akron, for organizing the Fourth Annual Professors Forum on Intellectual Property, where she presented a draft of this paper. She would also like to thank the participants at this event, A. Samuel Oddi, Jeffrey M. Samuels, Ryan Vacca, Thomas Folsom, Michael Landau, Liam O’Melinn, Elizabeth Reilly, Robert Reis, and Elizabeth Winston for helpful comments and suggestions.
grievously under the malady of Bibliomania.” Indeed he later went so far as to inform John Adams in 1815 that “I cannot live without books.” Jefferson indulged his hunger for books by collecting large numbers of them throughout his life. The Library of Congress ultimately benefited from Jefferson’s addiction to book collecting: in 1815, Jefferson sold to the government what he believed to be “the choicest collection of books” in the country, nearly 7000 volumes. But he still could not stop himself from collecting books and amassed a “retirement library” that amounted to another 1600 volumes at the time of his death in 1826.

Jefferson’s insatiable urge to collect books was founded in something more than mere avarice. His sale of his beloved library to the government for public use shows how his book collecting was inextricably bound to his Enlightenment belief that the widespread exchange of books and knowledge was vital to good government. Jefferson’s friend and correspondent of many years, James Madison, shared this conviction. Both Jefferson and Madison were active participants in the eighteenth century “Republic of Letters.” This was a vast global network of letter writers who sent each other books and exchanged ideas on a wide variety of topics. Participants viewed the Republic of Letters as unlimited by geography and open to any interested person, regardless of resources, gender, nationality, religion, or class. Actual participation in the eighteenth century Republic of Letters was limited to the relatively small percentage of the population

that was literate.⁹ Yet Jefferson and Madison hoped for widespread participation by citizens of the young republic. They believed that only an educated and informed citizenry could effectively govern a republic.¹⁰

Jefferson’s writings reveal his deeply held view that a copyright monopoly posed a threat to the dissemination of creative works and knowledge to the public,¹¹ although he also recognized that granting a copyright monopoly would incentivize the creation of copyrighted works.¹² Jefferson’s fears about the dangers of monopolies were shared by Madison, who was a driving force behind the inclusion of the Copyright Clause in the Constitution and was likely significantly responsible for its final wording.¹³ Madison thought it was vitally important to protect the value of the diffusion of knowledge by limiting the government’s power to grant a copyright monopoly.¹⁴ Madison and Jefferson both agreed that this protection was a necessary prerequisite for effective republican self-government.¹⁵

Disregard for the social value of a modern Republic of Letters like that so revered by Madison and Jefferson is a conspicuous hallmark of the Supreme Court’s recent copyright case law. The four decisions in which the Court has issued full opinions since 2001 (New York Times Co. v. Tasini (2001), Eldred v. Ashcroft (2003), MGM Studios, Inc. v. Grokster, Ltd. (2005), and Reed Elsevier, Inc. v. Muchnick (2010)) indicate that a majority of the Court does not share with Jefferson and Madison a belief in the civic importance of protecting widespread public access to creative works and knowledge.¹⁶ In these recent copyright

⁹. Id. See also Google and the Future of Books, supra note 6, at 4-5.
decisions, the Court has either ignored this value or has weighed it as less important than ensuring financial rewards for authors. Part II shows how the writings of Jefferson and Madison on the dissemination of knowledge and the Copyright Clause reveal how highly both men valued the ideal of public access to knowledge and creative works as a bulwark of republican government. Part III points out that the Court’s copyright decisions over the past decade have not shared Madison and Jefferson’s solicitude for the value of public access to knowledge and the Republic of Letters. Part IV concludes by warning that the Court’s disregard for the public interest in the dissemination of knowledge and creative works risks eroding respect for the rule of law.

II. THE FOUNDING IDEAL OF THE REPUBLIC OF LETTERS AND THE COPYRIGHT CLAUSE

Both Thomas Jefferson and James Madison were prolific writers and readers. Jefferson was so devoted to writing that he even designed his own portable lap desk with a clever adjustable book rest and locking drawer. 17 Jefferson and Madison exchanged 1250 letters over fifty years that discussed their ideas and ideals on the government of the new republic, as well as an enormous number of other subjects. 18 They also exchanged books. While working in Paris, Jefferson sent Madison hundreds of volumes. 19

There is convincing evidence in the writings of Jefferson and Madison that they both strongly valued the civic importance of the kind of dissemination of knowledge and creative works that occurred in their own correspondence and throughout the entire Republic of Letters. Although the precise origins of the Copyright Clause are shrouded in some mystery, Jefferson’s and Madison’s writings also show that the limits in the Copyright Clause were specifically designed to promote good governance by protecting the dissemination of knowledge and creative works to the public.

Ninth Circuit in a 4-4 split without an opinion. Because there was no opinion, I do not consider this case here.

19. SMITH, supra note 18, at 15.
A. The Republic of Letters and the Value of the Dissemination of Knowledge to the Public

The term “Republic of Letters” first appears in Pierre Bayle’s 1684 work, *Nouvelles de la Republique des Lettres*. Bayle used it to describe an ideal society that fostered egalitarian discourse on scientific matters. But something more than an ideal took hold over the course of the next century. The Republic of Letters became a global network of correspondence through which eighteenth-century people exchanged books, journals, and other published materials, as well as sharing and discussing ideas, including revolutionary political thought and scientific experiments. Jefferson and Madison shared the same conception of the Republic of Letters as modern historian Robert Darnton, who has written that “[w]riters formulated ideas, and readers judged them. Thanks to the power of the printed word, the judgments spread in widening circles, and the strongest argument won.” Although most of the eighteenth-century participants in the Republic of Letters were male and relatively privileged, Darnton has pointed out that it had the potential for being “an egalitarian world of knowledge open to everyone.”

For the American founding generation, identification with the Republic of Letters fostered a sense of national community. It served as “an expansive vision of learnedness, articulated especially during the Revolutionary period, as a means of advancing ‘liberty’ and thereby fulfilling the promise of a republican America.”

Jefferson’s writings make clear how greatly he esteemed the dissemination of knowledge to the general public, based on his conviction that only a public enlightened by knowledge was capable of good republican governance. In many of his writings, Jefferson called the dissemination of knowledge “diffusion,” implying that knowledge should travel from areas of relative high concentration to areas with lower levels. For example, Jefferson wrote to Richard Price in 1789 that “[w]henever the people are well informed, they can be trusted with their..."
own government." 25 Jefferson expressed a similar opinion in an 1816 letter to Dupont de Nemours:

Enlighten the people generally, and tyranny and oppressions of body and mind will vanish like evil spirit at the dawn of day . . . I believe it [human condition] susceptible of much improvement, and most of all, in matters of government and religion; and that the diffusion of knowledge among the people is to be the instrument by which it is effected. 26

In 1822, Jefferson reiterated these views in a letter to C.C. Blatchly:

I look to the diffusion of light and education as the resource to be relied on for ameliorating the condition, promoting the virtue, and advancing the happiness of man. 27

Madison's writings show that he shared Jefferson's belief in the importance of the Republic of Letters and the civic necessity of the dissemination of knowledge to the public as a means of fostering effective republican government. Like Jefferson, Madison used the word "diffusion." For example, Madison wrote in a letter to George Thomson in 1825: "The advancement and diffusion of knowledge is the only guardian of true liberty." 28 Another example of Madison's views is his statement in a letter to W.T. Barry in 1822:

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: And a people who mean to be their own governors, must arm themselves with the power to which knowledge gives." 29

This conviction that the public interest requires diffusion of knowledge to the people was vitally important to the scope of the Constitution's Copyright Clause in Article I, § 8, cl. 8, which provides that Congress has legislative power "[t]o 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

27. Letter from Thomas Jefferson to C.C. Blatchly, supra note 5, at 399.
28. Letter from James Madison to George Thomson (June 30, 1825), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 492 (1865).
29. Letter from James Madison to W.T. Barry, supra note 10, at 103.
Discoveries. Although there is relatively little surviving information as to the origins and drafting of this provision, the writings of Madison and Jefferson unequivocally support the view that the grant of the copyright monopoly was in the service of the Republic of Letters. The Copyright Clause was specifically designed to facilitate the dissemination of knowledge and creativity by both incentivizing authors to create works and also limiting the ability of copyright owners to withhold works from the public.

B. How the Value of the Republic of Letters Shaped the Copyright Clause

James Madison's notes of the Constitutional Convention state that Madison submitted one of two original written proposals for a clause giving Congress power to enact copyright legislation. Madison proposed giving Congress the power "To secure to literary authors their copy rights for a limited time." The second proposal, by Charles Pinckney, read "To secure to Authors exclusive rights for a certain time." Madison's notes also indicate that the final draft of the Copyright Clause was the work of the Committee of Eleven. It was adopted unanimously without debate. The final wording combines the Madison and Pinckney proposals.

The constitutional ratification debate virtually ignored the Copyright Clause. The longest discussion of it was by Madison in The Federalist No. 43. Here Madison commented:

The utility of this power will scarcely be questioned. The copy right of authors has been solemnly adjudged in Great Britain to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point by laws passed at the instance of Congress.

32. Id.
33. Id. at 478 (Aug. 18, 1787).
34. Id. at 580 (Sept. 5, 1787).
35. Id. at 581 (Sept. 5, 1787).
James Madison and Thomas Jefferson also referred to the Copyright Clause in their correspondence. Writing to Madison in December of 1787 to let him know what he disliked about the Constitution, Jefferson was especially critical of the lack of a bill of rights to protect against monopolies.\(^{37}\) Jefferson again raised similar concerns about the Copyright Clause in another letter written in July of 1788:

The saying that there shall be no monopolies lessens the incitements to ingenuity, which is spurred on by the hope of a monopoly for a limited time, as of 14 years; but the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression.\(^{38}\)

Madison responded to Jefferson in October of the same year:

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? Would it not suffice to reserve in all cases a right to the public to abolish the privilege at a price to be specified in the grant of it? Is there not also infinitely less danger of this abuse in our Governments than in most others? Monopolies are sacrifices of the many to the few. Where the power is in the few it is natural for them to sacrifice the many to their own partialities and corruptions. Where the power, as with us, is in the many not in the few, the danger can not be very great that the few will be thus favored. It is much more to be dreaded that the few will be unnecessarily sacrificed to the many.\(^{39}\)

Madison elaborated upon these views in a posthumously published manuscript. He stated:

Monopolies though in certain cases useful ought to be granted with caution, and guarded with strictness against abuse. The Constitution of the U.S. has limited them to two cases, the authors of Books, and of useful inventions, in both which they are considered as compensation for a benefit actually gained to the community as a purchase of property which the owner otherwise might withhold from public use. There can be no just objection to a temporary monopoly in these cases;


\(^{38}\) Letter from Thomas Jefferson to James Madison, supra note 11, at 442-43.

\(^{39}\) Letter from James Madison to Thomas Jefferson, supra note 14, at 21.
but it ought to be temporary, because under that limitation a sufficient recompense and encouragement may be given . . . .

In the same essay Madison also noted: "In all cases of monopoly, not excepting those in favor of authors and inventors, it would be well to reserve to the State, a right to extinguish the monopoly by paying a specified and reasonable sum." 41

In August of 1789 Jefferson sent Madison comments on a draft of the Bill of Rights, which included some concerns about the constitutional copyright monopoly. He stated:

[T]he following alternations and additions would have pleased me . . .

Art. 9. Monopolies may be allowed to persons for their own productions in literature . . . for a term not exceeding ___ years but .

for no longer term and for no other purpose. 42

From the writings set out above, it is clear that both Jefferson and Madison agreed that the grant of a copyright monopoly would not only incentivize the creation of creative works, but also their public dissemination. Only if there was both a steady supply of creative works and public circulation of them could a Republic of Letters thrive.

But the writings of both men show serious concerns about the danger to the public interest posed by all monopolies, including the copyright monopoly. Jefferson and Madison differed as to whether the limits in the Copyright Clause overcame these dangers. Madison initially took the view that the limited monopoly granted by the Copyright Clause was "coextensive with the public interest." 43 However, he later expressed some lingering qualms that the copyright monopoly could still be abused, as demonstrated by his repeated suggestion that, to fully protect the public, the public should have a reserved right to buy out the copyright owner and extinguish the monopoly right. Modern copyright historians Tyler Ochoa and Mark Rose have noted that Madison expressed these doubts within the context of the then very short (fourteen years) copyright term applicable in most states. 44 Jefferson's writings show that he had far greater concerns than Madison about the dangers to the public interest posed by the Copyright Clause. Although Jefferson eventually accepted that the incentive to

40. MADISON, WRITINGS, supra note 14, at 756.
41. Id. at 757.
43. THE FEDERALIST No. 43, at 204 (James Madison) (Ernest O'Dell ed., 2010).
create was a sufficient basis for a copyright monopoly, he never accepted that the Copyright Clause contained adequate limitations to protect the public from abuses.

To Jefferson and Madison, the primary social goal of the Copyright Clause was to achieve good government. The grant of copyright furthered this political goal by incentivizing and supporting the exchange of creativity carried out through the Republic of Letters. As Lewis Hyde has recently written in *Common as Air*, “When it came to the circulation of knowledge, three things mattered above all in what used to be called the Republic of Letters: laying the ground for democratic self-governance, encouraging creative community, and enabling citizens to become public actors, both civic and creative.”

Giving authors an incentive to produce more creative work was socially valuable not simply because the production of creative work was valuable in itself, but because the widespread dissemination of such works would equip the general public to successfully govern themselves. As Hyde has pointed out, to Jefferson and Madison, copyright was “[d]irected ultimately toward citizenship and public life” rather than primarily designed to create private wealth for authors. Creating private wealth through the grant of monopoly privileges was a necessary means to achieve the goal of successful republican self-government. To achieve this goal required more than simply encouraging the creation of copyrightable works; it also required that the government ensure their public dissemination. As Madison had written, the benefit of the copyright monopoly was a creative work which the owner “might otherwise withhold from public use.”

Works withheld from public circulation were lost to the Republic of Letters, and could not help to build a citizenry that was capable and active in republican self-governance.

Today, our society has developed digital networking technologies that facilitate a far more globally inclusive Republic of Letters than Madison or Jefferson likely ever imagined. Writings can be published to millions across the globe with the mere click of a mouse. Unlike the technology available to Madison and Jefferson, modern digital technologies allow us to communicate in real time with many people around the world. This technology holds the potential to foster active

46. Id. at 107.
47. MADISON, WRITINGS, supra note 14, at 756.
participation in democratic self-governance, not only in the United States but also across the globe.

To ensure that a Republic of Letters could thrive, Madison warned that the government should be vigilant in "guard[ing]" copyrights "against abuse." Has the Supreme Court heeded this advice over the past decade? To what extent have its opinions on copyright law shared Madison and Jefferson's concern with protecting the Republic of Letters by protecting the dissemination of knowledge? The next section considers these questions.

III. THE SUPREME COURT'S COPYRIGHT CASE LAW OVER THE PAST TEN YEARS

The Court's decisions over the past decade have shown little solicitude for the founding value of a Republic of Letters and the social importance of the dissemination of knowledge and creative works. Below, I show how the four copyright decisions handed down since 2001 have ignored or downplayed these values. I consider these decisions in chronological order except for Reed Elsevier v. Muchnick, which I discuss immediately after Tasini since both cases involved many of the same issues and parties.

A. New York Times v. Tasini

On first reading, the Tasini case may seem to be a dispute primarily centering on the competing interests of authors versus publishers, rather than involving the public interest in the dissemination of knowledge. Certainly, the majority opinion of Justice Ginsburg, joined by six of her brethren, framed the dispute as one between authors and publishers in ruling that publishers had interfered with authorial rights guaranteed by Congress. But as the dissent of Justice Stevens, joined by Justice Breyer, predicted, the Tasini decision has had a very serious adverse impact on the public's access to knowledge, a value whose importance Ginsburg significantly downplayed.

I will sketch only briefly the factual background and legal issues in Tasini. The plaintiffs were several freelance authors, who brought suit against three publishers of major print periodicals as well as the owners of electronic publishing businesses that stored electronic copies of news

48. Id.
There were various agreements in place between the print publishers and the electronic publishers authorizing reproduction of print articles in electronic form, but no agreements authorizing this between the freelance authors and the print publishing companies. The authors alleged that the republication of their articles in electronic form amounted to copyright infringement, specifically of the reproduction and public distribution rights.

The publishers did not assert fair use, basing their defense entirely on the assertion that the electronic republications were privileged as "revisions" of the original print publications pursuant to section 201(c) of the Copyright Act, which provides:

In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

The district court, in an opinion written by Sonia Sotomayor, had granted summary judgment to the publishers on the basis that the section 201(c) privilege applied. The Second Circuit reversed, and the Supreme Court granted certiorari to determine whether the electronic publications were privileged under section 201(c).

By a 7-2 majority, the Court found that, as a matter of statutory interpretation, the section 201(c) privilege did not shield the publishers from copyright infringement. According to Justice Ginsburg, finding for the publishers would "shrink authorial rights" that "Congress [has] established." The electronic versions of the articles did not fall into any of the three categories protected by Congress: (a) "that collective work" to which the freelancer had contributed the article; (b) "any revision of that collective work" or (c) "any later work in the same series." In Ginsburg's view, Congress had limited the publishers' privilege to only these three categories to ensure that the author would

50. Id. at 483.
51. Id.
52. Id.
53. Id. at 484.
54. Id.
55. Id. at 492-93.
56. Id. at 506.
57. Id.
be the one to benefit from a work later commanding a higher price than that for which the author had initially been able to negotiate. 59

The publishers had argued that the applicable category was “any revision of that collective work.” 60 Justice Ginsburg disagreed. She focused on how the electronic articles appeared to a user of the databases. When a user carried out a search of the databases, each article appeared separately within the results and also lacked certain material with which it had originally been published, such as graphics and formatting. 61 As a result, the electronic article could not fairly be said to be published “as part of” a “revision” of the print collective work in which it had originally been published. Ginsburg analogized to a 400-page novel quoting a sonnet in passing. 62 This would not, she asserted, amount to a “revision” of the work. Even if a user could, at least hypothetically, search the databases and generate all of the articles from a particular print periodical edition, this could not shield the database from infringement because it did not present the freelance author’s contribution as part of a revision of the collective work.

Justice Ginsburg was quite dismissive of the publishers’ concerns about the public interest. They had voiced concerns that a ruling for the authors would, as she put it “punch gaping holes in the electronic record of history.” 63 But Ginsburg took the view that such future harm was too speculative to trump author’s rights. 64 Moreover, she felt that this harm could be avoided through the order of appropriate remedies. 65 She pointed out that injunctive relief might not be appropriate and was certainly not required. 66 She suggested that agreements could be crafted that would protect the historical record, citing, for example, the blanket licensing used in music licensing and consent decrees governing their operation. 67

But the electronic record of history has in fact suffered unremedied harm. Starting almost immediately after the Supreme Court handed down its opinion in *Tasini*, there was an alarmingly negative impact on public access to freelance articles in the electronic databases. Electronic publishers removed a huge number of articles from their databases. The

60. Id. at 485.
61. Id.
62. Id. at 500.
63. Id. at 505.
64. Id. at 486.
65. Id.
66. Id.
67. Id.
New York Times swiftly removed 115,000 articles from its online database, amounting to about 8% of its content from 1980-1995.\(^6\) It offered authors the opportunity to restore them if they entered into waivers of past and future claims, but many authors were unwilling to agree.\(^6\) Gaping holes have indeed been punched in the historical record. Researchers who use the electronic databases can have no confidence that any search of a print publisher’s publications is complete.

Moreover, Justice Ginsburg’s solicitude for authors resulted only in a pyrrhic victory for them. Print publishers reacted to Tasini by requiring freelance authors to enter into contractual agreements to sign over electronic rights to their articles, generally without paying them anything additional for such undertakings.\(^7\) Most freelance authors were not in bargaining position to object to these additional agreements.

The remedies that Justice Ginsburg suggested could be crafted to protect the public’s ability to access the electronic versions of the articles have not materialized, because the case has not gone to trial. The parties and many other freelance authors whose class action claims were consolidated with theirs entered into a settlement agreement in March 2005.\(^7\)

Although the Supreme Court ruled on a jurisdictional challenge to this settlement in its most recent copyright decision, Reed Elsevier v. Muchnick, the settlement’s fairness remains in dispute.\(^7\) As explained in the next section, the Muchnick decision ignores the public interest in accessing knowledge and creative works that was an essential goal of the Copyright Clause.

B. Reed Elsevier v. Muchnick

In Reed Elsevier v. Muchnick, the Court considered a question of copyright formalities that arose in connection with the 2005 settlement that followed the Tasini decision. Negotiated between an unwieldy group of publishers, database services, freelance authors, and three


\(^7\) In re Literary Works in Electronic Databases Copyright Litigation, 509 F.3d 116, 119 (2d Cir. 2007), rev’d and remanded sub nom., Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237 (2010).

See Reed Elsevier, 130 S. Ct. 1237.
author professional associations (the National Writers Union, the American Society of Journalists and Authors, and the Authors Guild), the settlement limited payouts to between $10 million and $18 million, with agreed reductions for attorneys' fees and administrative costs. 73

Freelance authors would receive differing amounts under the settlement depending on a combination of factors. These include whether the authors own registered copyrights in their articles, the amount of the original fee paid for the article, the year of publication, and whether the writer has agreed to permit future use of articles in databases. 74 The payouts were designed to compensate for both past infringement (65% of the payout) and future electronic use (35% of the payout). 75 If an author did not agree to permit future use of the articles in the databases, he or she would only get 65% of the possible payout for the relevant category. 76 Authors in some categories, especially those who had never registered copyright or who failed to register copyright until more than three months after publication, might never receive any settlement payouts if the number of claims by authors who owned registered copyrights drained the capped settlement fund. The vast majority of potential claims (more than 99%) were by holders of unregistered copyrights. 77

The parties made a motion to the United States District Court for the Southern District of New York to certify a class for settlement and approve the settlement agreement. Ten freelance authors, led by Irvin Muchnick ("the Muchnick group"), objected to the settlement for various reasons. These included contentions that the settlement fund was too low, the individual claim awards were too low, the settlement set a dangerous and unfair precedent because of the distinct possibility that many infringed authors would receive no payouts, and the release of future claims was too broad and too vague. 78 Rejecting these objections, the district court certified a settlement class under Rule 23 of the Federal Rules of Civil Procedure and approved the settlement as fair, reasonable,

---

73. Settlement Agreement with Final Exhibits Attached, In re Literary Works in Electronic Databases Copyright Litigation, 509 F.3d 116 (2d Cir. 2007), MDL No. 1379. See also Corrected Brief for Plaintiffs-Appellees at 10, In re Literary Works in Electronic Databases Copyright Litigation, 509 F.3d 136 (2006) (No. 05-5943-CV(L)), 2006 WL 6362645.
74. In re Literary Works, 509 F.3d at 120.
75. Corrected Brief for Plaintiffs-Appellees, supra note 73, at 31.
76. Corrected Brief for Plaintiffs-Appellees, supra note 73, at 12.
77. Corrected Brief for Plaintiffs-Appellees, supra note 73, at 6.
and adequate under that Rule.\textsuperscript{79} The Muchnick group appealed to the Second Circuit.

None of the Muchnick group’s objections before the district court or on appeal had been based on the contention that the district court lacked subject matter jurisdiction. However, just before oral argument, the Second Circuit raised this issue sua sponte. It ordered briefing on the issue of whether the statutory registration provision in § 411(a) of the Copyright Act deprived federal courts of subject matter jurisdiction over infringement claims.\textsuperscript{80} Although all the parties agreed that the district court had subject matter jurisdiction to certify a class of claims arising from unregistered works or approve a settlement for such claims, the Second Circuit found that § 411(a) was jurisdictional in nature and ruled, 2-1, that the district court therefore lacked jurisdiction to approve the settlement.\textsuperscript{81}

The Supreme Court granted certiorari to determine whether § 411(a) was jurisdictional in nature.\textsuperscript{82} Since no party supported the ruling of the Court of Appeals, the Court invited Deborah Merritt, a former law clerk to Justice Ginsburg, to defend the Court of Appeals as amicus curiae.\textsuperscript{83} Merritt found herself fighting the typically uphill battle of a friend of the Court appointed in such circumstances. She failed to convince any of the Supreme Court justices that the Court of Appeals had ruled correctly, although she received praise for “ably discharg[ing] her assigned responsibilities.”\textsuperscript{84} Only eight justices participated; Justice Sotomayor recused herself, perhaps because she had been involved in the Second Circuit’s procedural deliberations as a judge on that court or possibly because she had authored the district court opinion in \textit{Tasini}.\textsuperscript{85}

Writing for a unanimous Court, Justice Thomas found that § 411(a) was not jurisdictional because it was not “clearly state[d] as such” by Congress.\textsuperscript{86} It imposed a non-jurisdictional precondition to suit.\textsuperscript{87} The Court reversed the judgment of the Court of Appeals and remanded the

\textsuperscript{79} In re Literary Works, 509 F. 3d at 118.
\textsuperscript{81} In re Literary Works, 509 F.3d at 121.
\textsuperscript{82} See Reed Elsevier v. Muchnick, 129 S. Ct. 1523 (2009).
\textsuperscript{83} Reed Elsevier, 130 S. Ct. at 1243 n.3.
\textsuperscript{84} Id.
\textsuperscript{86} Reed Elsevier, 130 S. Ct. at 1247.
\textsuperscript{87} Id.
case back to the Second Circuit to rule on the Muchnick group’s appeal of the district court’s approval of the 2005 settlement. 88

In his opinion in Muchnick, Justice Thomas did not discuss the public interest in the circulation of creative works or information. Nor did he expressly consider the likely effect of his ruling on the Republic of Letters so valued by Jefferson or Madison. This is so even though several of the briefs filed with the Court raised the issue of access to the articles. 89 For example, a brief filed on behalf of respondents Letty Cotton Pogrebin and others argued that

[w]ith no comprehensive settlement in place, the publishers and databases will have no choice but to search for and delete whole swaths of freelance works from their digital archives, or risk repetitive litigation over the same dispute the parties sought to settle in this case. Such gaps in the reading archive will compromise the interests of the reading public. 90

The Court-appointed amicus Deborah Merritt argued, in contrast, that

[n]one of the parties control our nation’s historical archives. The database defendants market commercial products that reproduce some potions of periodicals published during recent decades. For many publications, coverage dates back no further than 1990; even before this litigation, moreover, the defendants omitted tables, photographs, and other significant elements from included works. Most important, the defendants have never promised to preserve their records as a historical resource—or even to restore the works disputed in this controversy. 91

Neither of these arguments is fully convincing. Merritt ignored the problem that researchers who use the electronic databases can no longer assume they are a complete database of the textual parts of articles published in the print publications. This seriously reduces the value of the databases for scholarship. Pogrebin and her fellow respondents ignored the fact that the 2005 settlement does not require freelancers to plug the hole in the electronic record by agreeing to future use of their

---

88.  Id at 1249.
90.  Brief for Respondents Pogrebin et al., supra note 89, at 4.
91.  Brief for Court-Appointed Amicus Curiae, supra note 89, at 63.
articles in the electronic databases. They can instead choose to accept a lower payout (if one is even forthcoming, which would depend on their category, as explained above).

Justice Thomas's opinion was silent as to the effect of his ruling on public access to information and creative works. Madison would surely have been disappointed that Thomas did not even note the value of protecting the dissemination of knowledge and creative expression.

The Court more actively downplayed this value in its 2003 case on the constitutional validity of changes to the copyright term, *Eldred v. Ashcroft*. In *Eldred*, the Court assessed the value of public access to creative works as significantly less than the value of incentivizing authors to create such works. This is inconsistent with the goals underlying the copyright monopoly, as set out in Part II, above.

C. *Eldred v. Ashcroft*

In *Eldred v. Ashcroft*, the Supreme Court, 7-2, rejected a constitutional challenge to the Sonny Bono Copyright Term Extension Act of 1998 ("CTEA"). Justice Ginsburg's majority opinion in this case did not share the framers' conviction that the copyright monopoly should be limited to protect the social value of access to knowledge. She did not, apparently, endorse their ideal of a Republic of Letters as an agent of civic virtue.

The CTEA significantly increased the copyright monopoly by adding an additional twenty years to the term of existing copyrights. As a result, the basic term of copyright was now life plus seventy years. In combination, the CTEA and the 1976 Copyright Act had more than doubled the basic term of copyright in just twenty years, assuming that the author attained the age of 76.7 years, the average life expectancy in the United States in 1998.

The petitioners in the *Eldred* case were individuals and businesses whose livelihood relied on using creative works in the public domain. Their arguments to the Court emphasized the framers' fears of the social dangers of overly powerful monopolies, founded on the historical experience of the abuses of the sixteenth and seventeenth century English publishing monopolies granted by the Crown. They reminded

---

93. *Id.* at 195.
the justices that the framers had intentionally limited the Copyright
monopoly to protect against such abuses and to ensure the broad
dissemination of creative works on which others could build. 97

The petitioners claimed in Eldred that the CTEA’s retroactive term
extension violated the “limited Times” requirement in the Copyright
Clause as well as the First Amendment’s guarantee of free speech. 98
They argued that retroactive term extensions were not really limited
because Congress could make them perpetual by adding to them
incrementally. Moreover, retroactive extensions did not promote the
“Progress of Science,” as the Constitution required. The grant of a
copyright monopoly was at essence a bargain between the copyright
owner and the public; the monopoly was granted for a “limited Time[ ]”
in exchange for a “Writing” by an “Author.” 99 According to the
petitioners, the CTEA was not consistent with such a bargain, but was
simply a windfall monopoly for copyright owners. 100

Rejecting the petitioners’ contention that the CTEA violated the
Copyright Clause, Justice Ginsburg failed to give any real heed to
Madison’s exhortation that the government be vigilant against abuse of
the copyright monopoly. In finding that the CTEA survived
constitutional scrutiny as a rational exercise of congressional judgment,
Ginsburg was so deferential to Congress that she failed to independently
consider whether the CTEA’s retroactive term extension was consistent
with the framer’s conviction that the monopoly must not only benefit
authors but must also serve the public interest in accessing
information. 101 Ginsburg gave short shrift to petitioner’s argument that
heightened scrutiny applied.

Ginsburg’s application of rational basis scrutiny relied on several
stated reasons. 102 Congress sought to ensure consistency with the
copyright term required in the European Union so that American authors
would receive the same protection there as Europeans, and would also
have a greater incentive to create and disseminate their works in the
United States. 103 Moreover, Congress was responding to demographic
trends, such as increasing longevity. 104 Congress was also attempting to
ensure that the copyright term would better keep pace with the increased

97. Id. at 10.
98. Id. at 17-31, 34-48.
99. Id. at 23.
100. Id.
102. Id. at 205-08.
103. Id. at 205-06.
104. Id. at 206-07 & 207 n.14.
commercial life for many works as a result of the growth in communications media.\textsuperscript{105} Finally, Congress rationally "credited projections that longer terms would encourage copyright owners to invest in the restoration and public distribution of their works."\textsuperscript{106}

All the justifications accepted by Ginsburg as rational clearly benefit copyright owners at the expense of users of copyrighted works. Ensuring that U.S. authors get the longer copyright term enjoyed by their European Union counterparts is a benefit to authors but not users of copyrighted works since works that would have fallen into the public domain remain protected by copyright. The same is true for the rationale that longer-lived authors deserve to have longer copyright terms. The justification that works need to be protected for a longer time because technological advances have increased their commercial life also benefits authors at the expense of users. The only justification that could arguably benefit the users of copyrighted works would be the incentive to restore old works, but Ginsburg provides no evidence that restored works would be made available to users on affordable terms or at all. Indeed, as Lawrence Lessig has forcefully argued, the opposite is arguably the case. Lessig has pointed out that copyright protection has not in fact provided any actual incentive to restore the majority of old films lacking current commercial value, which are rapidly crumbling to dust in old film canisters.\textsuperscript{107} Those who could cheaply restore them by digitizing them cannot afford the costs of clearing the rights to them. Nowhere in Ginsburg's discussion of congressional justifications for CTEA does she express any real concern for the social importance of furthering free public access to creative works, unhindered by restrictions of cost. This is very much at odds with the framers' concern for fostering the Republic of Letters.

Ginsburg also rejected petitioners' argument that the CTEA violated the copyright bargain. She recognized that copyright was, at its essence, a bargain.\textsuperscript{108} But she saw it as a bargain with authors to encourage creation of works, rather than, as a quid pro quo to ensure public dissemination of creative works. Ginsburg's view is clear from her citation to Mazur v. Stein:

"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 support of her approach, Ginsburg contrasted patent law with copyright law. She stated that, for patents, "immediate disclosure is not the objective of, but is exacted from, the patentee. It is the price paid for the exclusivity secured [citation omitted]. In contrast, disclosure is the desired objective, not something exacted from the author in exchange for the copyright." But Ginsburg’s opinion is not supportive of a Republic of Letters. It is contrary to Madison’s statement that:

The Constitution of the U.S. has limited [monopolies] to two cases, the authors of Books, and of useful inventions, in both which they are considered as compensation for a benefit actually gained to the community as a purchase of property which the owner otherwise might withhold from public use.

Ginsburg gave significant interpretative weight to the historical practice of several retroactive term extensions for copyrights and patents, as well as nineteenth century precedent upholding prior retroactive patent extensions, although she noted that the Court had not previously considered the constitutional validity of retroactive copyright term extensions. But, as pointed out by Justice Stevens in dissent, history is not dispositive evidence of constitutional meaning, especially since the relevant historical practice only began in the mid-nineteenth century. By this time, the men of the founding generation, who could perhaps be said to best understand the true meaning of the Constitution, were no longer participating in the legislative process.

The dissents of Justice Stevens and Justice Breyer are both much more consistent with protecting a Republic of Letters. Both shared Madison’s view that the Copyright Clause served dual interests: encouraging the creation of creative works but also their public dissemination. Both dissenting justices criticized Ginsburg for being overly deferential to Congress. Stevens noted that Ginsburg’s approach made “Congress’s actions under the Copyright/Patent Clause

109. Id. (citing Mazer v. Stein, 347 U.S. 201, 219 (1954)).
110. Id. at 216.
111. MADISON, WRITINGS, supra note 14, at 756.
112. Eldred, 537 U.S. at 203.
113. Id. at 237 (Stevens, J., dissenting).
114. Id.
115. Id. at 223-27; id. at 244 (Breyer, J., dissenting).
116. Id. at 242 (Stevens, J., dissenting); id. at 264 (Breyer, J., dissenting).
He felt this was an abdication of the proper judicial role enunciated in Marbury v. Madison. Madison himself would likely have shared Stevens' concern that the Eldred majority had failed in its obligation to be sufficiently vigilant in guarding against abusive monopolies. Madison would also have almost certainly been disappointed, as was Justice Stevens, that the Eldred majority did not share his vision of copyright monopoly that the reward to the author was a means, not an end.

Vigilance for the protection of the public interest in accessing creative works and knowledge was also absent from the Court's 2005 decision in MGM Studios, Inc. v. Grokster, Ltd.

D. MGM Studios, Inc. v. Grokster, Ltd.

In MGM Studios, Inc. v. Grokster, Ltd., the Court had to rule on whether the makers of free P2P file sharing software could be sued for secondary copyright infringement by users downloading copyrighted content. Like the Tasini case, at first glance the Grokster dispute initially does not appear to concern the value of supporting a modern-day Republic of Letters by protecting public access to information or creative works. It may seem to be about the correct balance between the value of supporting creative works through copyright and that of promoting technological innovation. And indeed, the Court's majority opinion portrayed the case as exemplifying that issue. But in fact, the Grokster decision does have implications for the public's access to creative works and knowledge, which the majority ignored. Just as it had in the three other copyright cases decided over the past ten years, the Grokster Court did not display the founding value of concern for protecting a Republic of Letters.

In Grokster, the Court considered whether the lower courts should not have granted summary judgment dismissing a lawsuit for secondary copyright infringement against Grokster and StreamCast, the distributors of free P2P file sharing software. The plaintiffs were twenty-eight motion picture studios, music companies and other copyright owners.

All nine justices agreed that the lower courts had erred in granting summary judgment. Even though the software distributed by Grokster

117. Id. at 242 (Stevens, J., dissenting).
118. Id.
120. Id.
121. Id. at 920.
122. Id. at 934.
and StreamCast enabled users to communicate directly with each other without making use of any centralized server, all the justices agreed that there was substantial evidence that Grokster and StreamCast had induced copyright infringement in the course of marketing their software.\textsuperscript{123} Justice Souter, who wrote the opinion of the Court, stated:

We hold that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.\textsuperscript{124}

Souter found on the evidence that StreamCast and Grokster intended that the users of their software would use it to share copyrighted content.\textsuperscript{125} None of his brethren disagreed. The record revealed that StreamCast had aggressively marketed itself as “the next Napster.”\textsuperscript{126} When Napster was sued for secondary infringement, both StreamCast and Grokster actively positioned themselves to recruit Napster users after Napster ceased business.\textsuperscript{127} Additional evidence in support of this intent was the choice of Grokster and StreamCast to use a business model in which the revenue source was principally advertising.\textsuperscript{128} Because the companies received no revenue from users of their free software, they generated income by the sale of advertising space, and the amount of such income depended on the volume of users.\textsuperscript{129} They were more likely to build the number of users from those who were going to use their products to download new and trendy copyrighted works than older works in the public domain.\textsuperscript{130} Additionally, StreamCast and Grokster knew their software was being sued for illegal uses but took no steps to filter infringing content or block users who were sharing infringing content.\textsuperscript{131}

Though in accord as to the issue of inducement of copyright infringement, the justices did not agree about the applicability of the famous \textit{Sony} decision to peer-to-peer (“P2P”) technology. In \textit{Sony}, the Court had ruled that the makers of the Betamax VCR were not liable for secondary copyright infringement. Even though the VCR could be used

\begin{itemize}
\item \textsuperscript{123} \textit{Id.} at 916.
\item \textsuperscript{124} \textit{Id.} at 919.
\item \textsuperscript{125} \textit{Id.} at 940.
\item \textsuperscript{126} \textit{Id.} at 924.
\item \textsuperscript{127} \textit{Id.} at 924-25.
\item \textsuperscript{128} \textit{Id.} at 926.
\item \textsuperscript{129} \textit{Id.}
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} \textit{Id} at 938-39.
\end{itemize}
to infringe copyright, it was "capable of commercially significant noninfringing uses."\textsuperscript{132} In \textit{Grokster}, Justice Souter found that the Sony safe harbor was simply inapplicable where there was evidence of inducement of infringement, and refused to consider it further.\textsuperscript{133} A majority of his colleagues disagreed, taking the view that the Court should opine on whether the Sony safe harbor would apply to Grokster or StreamCast absent evidence of inducement.\textsuperscript{134} But because these six justices joined two very different concurring opinions, the Court reached no consensus on Sony's applicability to P2P technologies.

Justice Ginsburg, joined by Justice Kennedy and Chief Justice Rehnquist, argued that the Sony safe harbor would not have extended to Grokster and StreamCast even without direct evidence of inducement because, at least on the record in this case, their software was not a "staple article of commerce" that had "substantial noninfringing uses."\textsuperscript{135} The evidence showed that the software had overwhelmingly been used for infringement and there was no reasonable prospect that substantially noninfringing uses would be likely to develop over time.

But Justice Breyer, joined by Justice Kennedy and Chief Justice Rehnquist, disagreed, finding that, on the evidence, "Grokster passes Sony's test" and is "capable of commercially significant non-infringing uses."\textsuperscript{136} Breyer argued that "a strong demonstrated need for modifying Sony (or for interpreting Sony's standard more strictly) has not been shown," because "the nature of [. . .] lawfully swapped files is such that it is reasonable to infer quantities of current lawful use roughly approximate to those at issue in Sony."\textsuperscript{137}

A serious problem with the Grokster decision is that the Court has left too much uncertainty as to when a distributor of P2P technology will be liable for secondary infringement where there is no clear evidence of inducement. In such a case, when, if at all, will Sony's safe harbor apply? How substantial or real must the noninfringing uses of P2P technology be for Sony to protect the distributor of that technology? The Supreme Court provided no real guidance in Grokster, and thus has created a climate of uncertainty for the manufacturers and distributors of P2P technology.

\textsuperscript{133} Grokster, 545 U.S. at 933.
\textsuperscript{134} Id. at 942 (Ginsburg, J., concurring).
\textsuperscript{135} Id. at 945-48.
\textsuperscript{136} Id. at 952.
\textsuperscript{137} Id. at 953.
This climate of uncertainty raises concerns for the Republic of Letters. P2P software is technology that enables a swift and global sharing of creativity and ideas between many citizens of the world. As Justice Breyer noted, such technology “permits the exchange of any sort of digital file- whether that file does, or does not, contain copyrighted material.” 138 Too much uncertainty over when a P2P software distributor will be liable for secondary infringement may chill technological development of such software, and stunt the power of such technology to foster a twenty-first century Republic of Letters. The Court missed the opportunity in Grokster to craft a modern day Sony safe harbor that ensures that copyright protection serves the Madisonian and Jeffersonian vision of the importance of a Republic of Letters and the value of public dissemination of information and creative works.

IV. CONCLUSION

The Supreme Court’s recent disregard for the founding understanding of the copyright balance as designed to foster the Republic of Letters and the dissemination of ideas or creative works carries with it a grave risk for the rule of law.

Justice Stephen Breyer has recently warned in his book Making Our Democracy Work, the Court must be wary of its own fragility. 139 According to Breyer, the justices must focus greater attention on the importance of building public acceptance or risk a breakdown of the rule of law. Although Breyer did not discuss copyright in this book, he would no doubt agree that if the Court fails to adequately maintain the public’s trust in its copyright decisions when weighing the copyright balance, it risks alienating the public and fostering disrespect and disregard for the rule of copyright law. This has arguably already happened. In 2003, a Pew survey found that 67% of downloaders and 65% of file sharers did not care whether the music files they downloaded or shared were copyrighted. 140 A survey conducted by Digital Life America in 2006 reported that while 78% of Americans believed that taking a DVD from a store without payment was a “very serious

138. Id. at 954.
139. STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW, xii-xiii (2010).
offense," only 40% believed that downloading a copyrighted movie was a "very serious offense."\textsuperscript{141}

Where the rule of law is already eroding, the Court must be even more vigilant to maintain public confidence in its legitimacy as the interpreter of the Copyright Clause and the Copyright Act. The Court's recent disregard for the clear understanding of the framers that the copyright monopoly's rewards to authors was designed to promote a Republic of Letters seems unlikely to bolster public confidence that the Court truly has the public interest in mind.

\textsuperscript{141} Dawn Kawamoto, \textit{Study: Most Don't See Downloading Movies as 'Very Serious.'}, \textsc{CNET News} (Jan. 25, 2007), \url{http://news.cnet.com/Study-Most-dont-see-downloading-movies-as-very-serious/2100-1025_3-6153472.html}.