

**COPYRIGHT, CONTAINERS, AND THE COURT:
A REPLY TO PROFESSOR LEAFFER**

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I. INTRODUCTION

Professor Leaffer, a doyen of copyright law and well-known and prolific copyright scholar, has provided a masterly review of recent copyright decisions by the Supreme Court. It should not be surprising that I find much with which to agree in what he says. That said, there are a few points—and I will assert professorial privilege here—that I would add, and some that I view rather differently than he does.

As Professor Leaffer points out, it is challenging to find a unifying theme in the Court's recent copyright cases or indeed in its recent intellectual property cases more generally. I think Professor Leaffer and I agree that the closest thing to an underlying theme in the cases we are here discussing—*Eldred*,¹ *Tasini*,² and *Dastar*³—is the Court's remarkable deference to

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1. *Eldred v. Ashcroft*, 537 U.S. 186, 235 (2003) (Stevens, J., dissenting) (quoting *I.N.S. v. Chadha*, 462 U.S. 919, 967 (1983) (White, J. dissenting)).

2. *New York Times Co. v. Tasini*, 533 U.S. 483 (2001).

Congress. But perhaps unlike Professor Leaffer, I think it exceedingly odd that while in other areas this Court has not hesitated to rein in Congress's power (particularly its Commerce Clause power),⁴ it seems to treat the limits on Congress's power with regard to copyright as largely theoretical.

Now, this is not a "theme" in the sense that legal scholars often use the term. I think that no coherent vision of copyright is reflected in these cases, and the majority opinions seem to rest mostly on a foundation of extreme caution. Nevertheless, I think we can examine the decisions and discern the direction in which they point. Professor Leaffer and I might disagree on that direction, but perhaps that reflects mainly my inherent pessimism and his relative optimism.

I am concerned that the Court's deference is becoming an "invincible repose on the status quo."⁵ In copyright law, such deference means that the bargain among the content industries enacted as the Copyright Act of 1976 will be left untouched. Whether this is appropriate depends, of course, on the bargain. But once one realizes that the bargain encodes critical assumptions about the nature of copyright and copyrighted works, and that those assumptions are rapidly being washed away by the digital tide, merely maintaining the status quo is not only insufficient but sometimes impossible. In other words, the Constitution requires the Court, and in fact all of us, to reappraise the application of theory and doctrine to the world we actually live in. This is something the Court has often done⁶—but not in recent copyright cases.⁷

What are these critical assumptions? Let me attempt to answer this question before I delve further into the mystery of the Court's copyright direction.

3. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 123 S. Ct. 2041 (2003).

4. *See* *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

5. *Bates v. Dresser*, 251 U.S. 524, 530 (1920) (Holmes, J.).

6. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Kyllo v. United States*, 533 U.S. 27 (2001).

7. In the past the Court has recognized the need to adapt traditional copyright concepts to changing technology. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

II. THE NATURE OF AMERICAN COPYRIGHT LAW

A. *Content Industry Bargaining and Copyright Law*

Since 1909, copyright law—with only two exceptions,⁸ neither of which is relevant here—has been written by a group of affected industries.⁹ Chief among them is the content industry, but the group also comprises the consumer electronics industry, the computer industry, authors (to a limited extent), librarians, and others.¹⁰ This pattern developed in the early years of the twentieth century when attempts to revise the Copyright Act as it then stood failed because one industry or another would hold the proposed legislation hostage in order to secure new or different benefits for itself.¹¹ Eventually, Congress decided that the way to get copyright legislation passed was to let the affected industries write it.

Copyright law is not unique in that it is heavily affected by special interests. However, it may be unique in the degree of influence that special interests have over it. It is literally the case that Congress has for the most part delegated its lawmaking authority to the content industry.¹² This delegation has a number of possible consequences, not the least of which is that it could justify a bit less deference to legislation. Even a casual perusal of the Copyright Act reveals a statute that reads less like public policy and more like a very detailed contract made among numerous parties—which, in a sense, it is.

Another consequence is that, because Congress has largely abdicated its duty, the public is unrepresented in the making of copyright law. Here, as elsewhere, if you're not at the table, you don't get served. In the past, this was not especially troublesome, because copyright was rarely enforced against a member of the

8. The exceptions are: (i) the Computer Software Copyright Act of 1980, Pub. L. No. 96-517, sec. 10, § 117, 94 Stat. 3015, 3028 (1980), which revised § 117 upon the recommendation of the Commission on New Technological Uses of Copyrighted Works (CONTU), a committee of experts charged with recommending copyright treatment of computer programs; and (ii) the Fairness in Music Licensing Act of 1998, Sonny Bono Copyright Term Extension Act, Pub. L. 105-298, 112 Stat. 2827, which limited the number of institutions required to pay performance royalties for nondramatic musical works. *See* 17 U.S.C. § 110(5) (2004).

9. JESSICA LITMAN, *DIGITAL COPYRIGHT* 23, 135-63 (2001).

10. *Id.* at 126.

11. *Id.* at 26.

12. *Id.*

public. Today, however, headlines are full of copyright litigation conducted against members of the public. In addition, what the law hasn't taken away is taken by the licenses to which we are constantly asked to agree.

Finally, the making of law by industry suggests that perhaps the last protector of the public interest in copyright—and let us not forget that the public interest is the very *reason* for copyright—is the Supreme Court. This, too, would counsel more scrutiny, and less deference, by the Court.

The process by which copyright law is made suggests that extreme deference by the Court might not be appropriate. But that is not the only reason to be skeptical about the Court's recent decisions. The invalidation of at least one critical assumption underlying copyright also supports an approach less deferential than that adopted by the Court. Let us turn next to an examination of that assumption.

B. Content Unbound

We have already noted that copyrights are being increasingly enforced against the public. We might at this point ask, "why?" For most of the last 100 years, members of the public rarely were copyright defendants. What has changed? The answer is that for most of the past, content was inextricably bound up with a tangible container. This fact alone prevented a lot of conflict between the public and the content industry.

Historically, the dominant business model for the content industry was based on the distribution of content containers. For members of the public, both reproduction and distribution of analog containers were impractical, and this impracticality functioned as an adjunct to copyright, limiting infringement by practical, rather than legal, means. Reproduction of content containers was inherently limited by the expense of reproducing the containers, and by the degradation of analog copies. Distribution of content containers was limited mainly by its cost; large-scale distribution of physical goods is expensive. In other words, in a world where access to content depends on manufacturing and distributing physical containers, being a content player required a large capital investment. Most citizens couldn't muster the investment, and wouldn't care to if they could. Thus, there was, in the main, peace between consumers and the industry.

All this changed with the introduction of digital technology, which freed content from its container and thereby removed many of the barriers of entry into the content business. The result has not only been public competition, done without any profit motive (such as Napster and KaZaa), but also the creation of new kinds of publishing enterprises (such as Eric Eldred's, based on digitizing and distributing works in the public domain). The content distribution channels have been radically reconfigured so that today content can be distributed worldwide, twenty-four hours a day, seven days a week, with little more than a high-speed Internet connection.

Keeping this in mind, let us turn to the Supreme Court cases that are our focus.

III. ELDRED V. ASHCROFT

A. *Copyright Clause*

The result of the aforementioned developments is that the content industry has suddenly lost its former lock on control over distribution channels. This has provoked industry responses aimed at strengthening and extending the copyright monopoly to reconsolidate control over content. The copyright term extension was entirely consistent with this agenda. Like other copyright legislation, it was a consensus product of the content industry. Testimony before Congress was heavily dominated by industry representatives.¹³ Almost no one spoke for the public interest.

13. See S. REP. NO. 104-315, at 5 (1996):

The [Senate] Committee [on the Judiciary] held hearings on September 20, 1995. Bruce A. Lehman . . . and Marybeth Peters . . . testified on behalf of the Administration. The Committee also heard testimony from Jack Valenti, president and chief executive officer, Motion Picture Association of America; Alan Menken, composer, lyricist, and representative of AmSong; Patrick Alger, president, Nashville Songwriters Association; and Prof. Peter A. Jaszi, American University, Washington College of Law. In addition, written statements were received for the record from Senator Christopher J. Dodd, the American Society of Composers, Authors and Publishers (ASCAP), the National Music Publishing Association Inc. (NMPA), the Songwriters Guild of America, the Graphic Artists Guild, the National Writers Union, the Coalition of Creators and Copyright Owners, Author Services Inc., the Midwest Travel Writers Association, Donaldson Publishing Co., the American Library Association, the American Film Heritage Association, the Society for Cinema Studies, Lawrence

Naturally, as far as the record reveals, the industry representatives spoke neither of consolidating control over distribution nor of Mickey Mouse.¹⁴ Rather, great emphasis was laid on the European Union's recent commensurate extension of the copyright term, and of United States copyright owners being disadvantaged in Europe.¹⁵ That European copyright is not answerable to the Constitution and is not thereby bound to serve the interest of the public was evidently not considered important.

One of the striking things about the *Eldred* opinion is that it conveys no sense of change in the copyright landscape. The Court appears either unaware of, or uninterested in, the profound changes that are reshaping the reproduction and distribution of content. Rather, *Eldred* gives the impression that nothing at all is new, and that one can comfortably rely on Congress to protect the public interest in the matter of copyright, thereby converting the issue into a rather minor disagreement about the proper length of protection.

If one accepts that what is at stake is a mere question about what length of copyright optimizes the creation and distribution of new works, then *Eldred's* approach is undoubtedly correct. However, many do not accept that view and believe instead that the Court's deference to Congress seems unjustified. Were the Court to recognize that copyright law is not the product of a reasoned balance crafted by Congress, but rather the self-interested rent-seeking of an industry threatened with obsolescence, it might well have been willing to characterize the question as involving limits on

Technology, Bob Dylan Jr., Don Henley, Carlos Santana, Stephen Sondheim, Mike Stoller, E. Randol Schoenberg, Ginny Mancini, Lisa M. Brownlee, Prof. William Patry, and Prof. Dennis Karjala, writing on behalf of 45 intellectual property law professors.

To similar effect, see H.R. REP. NO. 105-452, at 5 (1998):

The [House Judiciary] Committee's Subcommittee on Courts and Intellectual Property held a hearing on the issue of copyright term extension on June 27, 1997. Testimony was received from Fritz Attaway representing the Motion Picture Association of America; George David Weiss, representing the Songwriters Guild of America; Frances Preston, representing Broadcast Music, Incorporated; and Professor Jerome Reichman of Vanderbilt Law School.

14. Larry Lessig, among others, has attributed the CTEA largely to efforts by the Walt Disney Co. to maintain copyright protection in effect for Mickey. See Lawrence Lessig, *How I Lost the Big One*, LEGAL AFFAIRS, Mar.-Apr. 2004, at 57, available at http://www.legalaffairs.org/issues/March-April-2004/story_lessig_marapr04.html (last visited July 8, 2004).

15. H.R. REP. NO. 105-452 (1998); S. REP. NO. 104-315 (1996).

congressional power rather than policies about term length. That is, the question was not whether Congress or the Court can better determine what is the optimal term of protection; rather, the question was whether the Court should read the Constitution to impose limits on congressional power to extend terms indefinitely. The Court could have viewed the issue in *Eldred* as whether a term that can be indefinitely extended is “limited.” Congress’s assertion that it can extend existing terms as it chooses would then be suspect as a question of congressional power, and not merely as a question of policy. The Court’s unwillingness to confront this directly is deeply troubling. After all, some might argue (as did Sonny Bono) that the best policy would be to have unlimited copyright terms. If all questions of term come down to mere questions of policy, then the constitutional requirement of a limited term is meaningless.

Unsurprisingly, the petitioner’s arguments in *Eldred* were directed largely to the question of congressional power. In cases dealing with federalism and the Commerce Clause,¹⁶ the Court has opined that the Constitution must be interpreted in a way that is consistent with limits on federal power. Surely, if this is true for the Commerce Clause it is also true for the Copyright Clause. But the *Eldred* majority did not even cite its earlier Commerce Clause cases, despite petitioner’s written and oral argument relying largely on them.¹⁷ If Congress (that is, the content industry) can simply extend existing terms as it sees fit, where is the limited term required by the Constitution? It should be quite apparent that this question is not at all the same as asking what the optimal term length is, but the Court addressed only the latter.

The Court also relied on history, but the weight of history in Supreme Court analysis depends entirely on the context. The Court has not hesitated to invalidate unconstitutional exercises of congressional power, even those supported by histories far more extensive than copyright and patent legislation. In *INS v. Chadha*,¹⁸ for example, the Court invalidated “ ‘nearly 200 other statutory provisions’ in which Congress had exercised a ‘legislative veto.’ ”¹⁹

16. *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

17. *See* Lessig, *supra* note 14, at 57.

18. 462 U.S. 919 (1983).

19. *Eldred v. Ashcroft*, 537 U.S. 186, 235 (2003) (Stevens, J., dissenting) (quoting *Chadha*, 462 U.S. at 967 (White, J. dissenting)).

Clearly, Congress's earlier unconstitutional exercise of legislative power cannot immunize it against a properly framed challenge, yet the Court *chose* to defer. It should be clear by now that the Court's deference was a choice, and not a necessity.

In short, I find it difficult to be as sanguine about the copyright clause analysis in *Eldred* as is Professor Leaffer. To me, the case demonstrates the Court's willingness to continue to indulge in fictions—that Congress legislates copyright with an eye on the public interest; that the copyright landscape is fundamentally unaltered—that will, if they continue, threaten the progress of science that copyright is supposed to promote. The sooner the Court can come to grips with copyright reality, the better off progress—and society—will be. In the meantime, I hope that Professor Leaffer's prediction that this will be the last extension of copyright²⁰ turns out to be correct. His prediction that further extensions would likely be upheld²¹ bodes ill because I suspect the content industry will continue to press for expansion as long as its ability to do so goes unchecked.

B. *First Amendment*

Likewise, I find little ground for optimism in *Eldred*'s First Amendment treatment. Professor Leaffer notes that the Court relied upon the idea/expression dichotomy and the fair use doctrine to accommodate the First Amendment, and sees in that reliance “real constraints on the scope of copyright law.”²² What I see is a rhetorical device that the Court used to avoid more meaningful analysis of the relationship between copyright and the First Amendment.

To begin with, the Court's—and indeed, copyright's—reliance on the idea/expression dichotomy as a bulwark of First Amendment protection assumes an ability to distinguish between idea and expression that is often, perhaps more often than not, absent. To the extent this supposed dichotomy has meaning, it is limited to ideas expressed in words, and even there, it can be devilishly tricky to sort out what is idea from what is expression.²³

20. Marshall Leaffer, *Life After Eldred: The Supreme Court and the Future of Copyright*, 30 WM. MITCHELL L. REV. 1597, 1603 (2004).

21. *Id.*

22. *Id.* at 1605.

23. See SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS 28-34 (New York University Press 2001). Compare *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675

And if we are talking about ideas expressed in other ways, such as music or images, the idea/expression dichotomy is an exercise in metaphysics that cannot be applied consistently. Notably, the *Eldred* Court was indeed confronted with claims by persons wishing to make use of musical works.²⁴ It is little consolation to them that their First Amendment rights are protected by the idea/expression dichotomy.

Of course, one might object that for works as to which the idea/expression dichotomy is inadequate, the fair use doctrine still exists. Unfortunately for the likes of Eric Eldred, deciding whether a particular use is fair is generally one of the last decisions made in the course of copyright litigation. Therefore, anyone relying on the fair use doctrine has to be willing to spend a great deal of money, often upward of \$100,000, to defend his or her right to speak. This chilling effect would not be tolerated in most speech contexts, but in copyright cases it seems not to concern the Court.

Now, I do agree with Professor Leaffer that *Eldred* leaves open a First Amendment argument—specifically, that a particular enactment “altered the traditional contours of copyright protection,”²⁵ which could necessitate “further First Amendment scrutiny.”²⁶ I, too, hope that this will someday lead to meaningful First Amendment review of property claims in speech. But, I believe such a review is unlikely, at least with the current composition of the Court.

C. Copyright Maintenance

Where Professor Leaffer and I find our strongest agreement is

(1st Cir. 1967) (idea for sweepstakes instructions merged with expression, therefore uncopyrightable) *with* Quality King Distrib. v. L'anza Research Int'l, 523 U.S. 135 (1998) (instructions for shampooing hair copyrightable).

24. United States Supreme Court Petitioner's Brief at 3-4, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618), *available at* 2002 WL 1041928.

Petitioners Luck's Music Library, Inc. and Edwin F. Kalmus & Co., Inc. specialize in selling and renting classical orchestral sheet music . . . Both sell to thousands of customers worldwide, including many community and scholastic orchestras . . . Both had made preparations to release new sheet music for work that was to pass into the public domain in 1998. This included the work of Bela Bartok, Maurice J. Ravel, [and] Richard Strauss . . . Those plans have been blocked for 20 years.

Id.

25. *Eldred*, 537 U.S. at 191.

26. *Id.*

with his proposed solution to the problem of term extension, namely the institution of a maintenance requirement for copyrights extended beyond fifty years after the author's death. For my part, I would rather the petitioners in *Eldred* had won, but, failing that, Professor Leaffer's proposed solution would help ameliorate the relentless expansion of copyright. A similar proposal has been made in Congress, in a bill titled the Public Domain Enhancement Act.²⁷ Such a requirement would not only enhance the public domain, but would also relieve some of the burden on speech that copyright imposes. The vast majority of copyrighted works have no economic life left fifty years after the author has died; the Berne Convention, TRIPS, and NAFTA require no more than life plus fifty years. So this step would, at least, not make things worse.

While it is a worthy proposal, its chances of passing are slim to none. After all, it is the content industry and not Congress that will evaluate the proposal. And given that the bill offers nothing to the industry, but simply takes away rights—even rights that have no value—the industry will not support it. The track record for copyright bills without content industry support leads me to conclude, regretfully, that the new term is life plus seventy years, and that the public domain will have to wait twenty more years to see any growth. That is, unless Congress extends copyright again, something that Professor Leaffer sees as unlikely but legal, and that I see as likely and, given the *Eldred* decision, probably legal as well.

IV. TASINI V. NEW YORK TIMES

Tasini was another case reaffirming the Court's view that when it comes to copyright, nothing has changed. Professor Leaffer has ably and accurately characterized the issues in the case, which turned upon the meaning of the word "revision" in § 201(c) of the Copyright Act, providing that unless expressly otherwise specified, the

owner of copyright in [a] 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

27. H.R. 2601, 108th Cong., (1st Sess. 2003). The bill is currently languishing in the House Committee on the Judiciary, Subcommittee on Courts, the Internet, and Intellectual Property. See <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:h.r.02601>: (last visited July 8, 2004).

any later collective work in the same series.

The defendant newspapers had authorized the inclusion of plaintiffs' contributions in electronic databases. The authors of the articles sued. The case raised the question whether an electronic database is a "revision" of a newspaper, so that the defendants had sufficient rights to authorize the inclusion of plaintiff's work in the databases. The court held that electronic databases are not privileged "revisions" of collective works.

Professor Leaffer argues that the outcome of *Tasini* is problematic, while the Court's reasoning is sound. I believe the opposite is true. To me, the outcome of the case—a victory for authors, and a defeat for publishers—is not only a good one, but, given the "pro-author basis of § 201,"²⁸ is probably the only outcome the Court could have achieved without doing violence to the Act and its legislative history. On the other hand, I find the reasoning in *Tasini* to be sadly lacking.

Let us begin with the outcome. This is a case that authors won against their publishers. As such it is quite rare, because in general publishers will take, by their publishing contracts, nearly every valuable right that the law gives the author. The alienability of copyright is the only reason that publishers support giving rights to authors; this much, at least, has not changed since the Statute of Anne.²⁹ So it is perhaps no surprise that even before *Tasini* was decided, publishers had begun to demand express transfers of the right to electronic reproduction and distribution. More surprising was the reaction of the publisher defendants after the decision was announced: Rather than bargaining with the authors in good faith, as the Court had suggested the publishers might do,³⁰ they removed all material contributed by the authors, expunging it from electronic databases. Surely this was not the Court's fault: § 201(c) was written with the protection of authors in mind, as the Court recognized.³¹ That the publishers would exploit their market power to extract the right of electronic publication from the authors is not something that the Court can control. In short, I think the Court reached the correct legal conclusion, notwithstanding the

28. Leaffer, *supra* note 20 at 1610.

29. 1710, 8 Ann., c. 19 (Eng.).

30. *Tasini*, 533 U.S. at 505 ("The parties (Authors and Publishers) may enter into an agreement allowing continued electronic reproduction of the Authors' works . . .").

31. *Id.* at 496 n.3.

publishers' bad behavior following the decision.

The reasoning of *Tasini*, on the other hand, I find troublesome. The case is far from media-neutral, in my view. Instead, the Court's reasoning focuses almost entirely on what the electronic database presentation looks like to a user.³² But as it turns out, the Court does not mean that the content of the sued-on works must look different. According to the Court, the difference that matters for copyright purposes is that the material extraneous to the article—the material appearing on pages unconnected with the article—is not reproduced and distributed when articles are distributed electronically.³³ In other words, the fact that you cannot see what is on the surrounding pages is what makes the publishers' actions infringing.

This triumph of container-centered reasoning deserves a special mention. The Court implies that the separation of content from container results in a new work. Certainly, as the publishers argued, the articles themselves are identical to those published in the newspapers. Proper attribution back to the newspaper was, apparently, always given. That the articles were taken out of their physical containers—and therefore the *other* content included in those containers was no longer present—was enough to persuade the Court that these presentations could not be “revisions” within § 201(c). Thus, the Court has effectively frozen § 201(c) in time, limiting it to the technology that existed at the time it was drafted.

32. *Id.* at 500-02 & n.11.

33. To understand this, one must understand that:

GPO [General Periodicals Online, one of the infringing electronic databases] contains articles from approximately 200 publications or sections of publications. Unlike NEXIS and NYTO [New York Times Online, another infringing database], GPO is an image-based, rather than a text-based, system. The Times has licensed GPO to provide a facsimile of the Times' Sunday Book Review and Magazine. UMI “burns” images of each page of these sections onto CD-ROMs. The CD-ROMs show each article exactly as it appeared on printed pages, complete with photographs, captions, advertisements, and other surrounding materials. UMI [University Microfilms International, another defendant] provides an index and abstracts of all the articles in GPO.

Tasini, 533 U.S. at 491. Further, “[i]n GPO, the article appears with the other materials published on the same page or pages, but without any material published on other pages of the original periodical.” *Id.* at 500. GPO was the most inclusive database among those mentioned. Nevertheless, including images of the entire pages on which the articles originally appeared was not enough. Missing were the pages on which the article did *not* appear. A better example of container-centered copyright reasoning would be hard to find.

Only container-centered technology, or complete reconstructions of container-centered technology, will result in a privileged “revision” of a collective work.

On the other hand, the publishers’ exploitation of the articles, and their exclusion of the authors from participation in the profits realized from that exploitation, is surely troubling. Is another analysis possible, one that does not anchor the Copyright Act to the technology of 1976? To begin, consider—as did the Court—how users actually interact with the electronic databases in issue. Generally, a user inputs a request for material, which is then displayed on the computer screen. This is a critical event: an article that can be summoned up for display by any member of the public who has paid, or is willing to pay, a fee is a “public” display. As such, it is a distinct form of exploitation of the article and, more to the point, one that is not covered by the limited privilege given publishers in § 201(c).

The Register of Copyrights made this argument to the Court in an amicus brief.³⁴ Here was an opportunity for the Court to take a step into copyright reality: In electronic media, public display is often what matters (and when it isn’t, public performance and public distribution stand ready). But the Court, resting on the status quo and assuming that content must be bound to a container (else it is a “new work”), decided not to address the Register’s argument. Instead, the Court decided the case on the ground that the absence of the surrounding content—which, from the user’s perspective, is merely surplusage—determines that the work is not a “revision.”

V. DASTAR CORP. V. TWENTIETH CENTURY FOX FILM CORP.

Finally, we come to *Dastar Corp. v. Twentieth Century Fox Film Corp.*,³⁵ and I am happy to say that at least with respect to this case, Professor Leaffer and I agree compl—well, almost completely. *Dastar* raised the question whether, after a work has passed into the public domain, later users must continue to credit the author of the work. Nothing in the Copyright Act requires such a result, and Justice Scalia, writing for a unanimous Court, held that nothing in the Lanham Act does, either.

The significance of *Dastar* is that what it means for a work to be

34. *Tasini*, 533 U.S. at 498 n.8.

35. 539 U.S. 23, 123 S. Ct. 2041 (2003).

in the public domain remains unchanged. The United States has not historically recognized the moral right of attribution (or “paternity”), and Justice Scalia’s opinion makes it clear that the Lanham Act is not the proper basis for such a right. To require attribution of works in the public domain would create a copyright-like right outside of the Copyright Act. Recognizing that purchasers of communicative products such as books and videos probably care more about the author of the content than they do about the producer of the physical item,³⁶ the Court nevertheless held that requiring attribution of works under the Lanham Act would conflict impermissibly with the Copyright Act.³⁷

In so holding, the Court nearly (but not quite) implies that the Commerce Clause power cannot be exercised in a way that conflicts with the Copyright Clause. Justice Scalia says “[t]o hold [that the Lanham Act requires attribution] would be akin to finding that § 43(a) created a species of perpetual patent and copyright, which Congress may not do.”³⁸ That is, Congress cannot do under the Lanham Act (based on the Commerce Clause) what it may not do under the Copyright Act. This is, of course, not the same as deciding the case on constitutional grounds, but we public domain advocates must settle for the crumbs we can get these days.

Professor Leaffer is very likely correct when he points out that the Court’s reading of the Lanham Act puts the United States out of compliance with its Berne Convention obligations.³⁹ Article 6*bis* of Berne requires signatory nations to grant authors the right to claim authorship of their work. After *Dastar*, however, it seems that in the United States no right of attribution exists once the work has passed into the public domain (at least for works not within the

36. *Dastar*, 123 S. Ct. at 2047-48.

37. *Id.* at 2048.

38. *Id.* at 2050.

39. It isn’t actually clear that the Berne Convention requires works in the public domain to be attributed to their authors. The language of the treaty addressing duration says merely, “The rights granted to the author . . . shall, after his death, be maintained, at least until the expiry of the economic rights.” Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, art. 6*bis*, S. Treaty Doc. No. 99-27. In this case, the author was corporate and “death” had no copyright significance. Perhaps, then, when the work has fallen into the public domain, the economic rights have expired and therefore the Berne Convention has nothing to say about attribution. Of course, it remains true that United States copyright law provides no right of attribution even *during* the work’s economic life, but this has been so for as long as the United States has had a copyright law and is not the result of the *Dastar* decision.

narrow classification of “works of visual art”⁴⁰). The Berne Convention compliance problem is a thorny one, but the Court is right not to interpret the Lanham Act with a view to ensuring compliance with Berne. Still, it is interesting that the Court was willing in this case to overlook international (Berne) issues, while in *Eldred*, the supposed “harmonization” with Europe provided part of the rational basis for Congress’s action in extending copyright.⁴¹

Like Professor Leaffer, I am not convinced that *Dastar* signals the Court’s views on whether legislation based on the Commerce Clause is permitted even when it would conflict with the Copyright Clause. To me, the most reassuring thing about *Dastar* is that the Court declined to create new copyright-like rights in public domain works. Given the trend of the Court’s recent cases, that is perhaps something for which one should be properly grateful.

VI. CONCLUSION

I find little with which to be pleased in the Court’s recent copyright cases. The Court seems to be fighting a holding action, fending off the future by resolutely gazing backward. While the Court has not itself enlarged copyright, it has not meaningfully evaluated Congress’s power to do so, and its decisions freeze copyright into a moment in time long past. Until copyright law recognizes that content is no longer container-bound, it will continue to flounder, desperately seeking analogies to the past and missing the significance of the technological changes all around us.

That said, I agree with Professor Leaffer that the future is not black but gray. I believe that there is still much that can be done about the expansion of copyright and its increasing concentration into the hands of a media oligopoly, beginning with an awakening of public concern with those vital rights that are eroded as copyright expands. As long as that can happen, there is hope. Sadly, if that does not happen, then I don’t think either Congress or the Court will save us from ourselves.

40. 17 U.S.C. § 101 (2004).

41. The harmonization accomplished by the CTEA is more apparent than real; United States copyright law is dramatically different in many important respects from its European counterparts, and the CTEA did little to change that, even with respect to the duration of copyright. *See* United States Supreme Court Petitioner’s Brief at 42-43, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618), *available at* 2002 WL 1041928.