Journal of Law and Policy

Volume 7 | Issue 1 Article 7

1998

New Battles Between Freelance Authors and Publishers in the Aftermath of *Tasini v. New York Times*

Laurie A. Santelli

NEW BATTLES BETWEEN FREELANCE AUTHORS AND PUBLISHERS IN THE AFTERMATH OF *TASINI v. NEW YORK TIMES*[*]

Laurie A. Santelli[**]

The debate over technology and the interests of authors is the very essence of copyright law.[1]

INTRODUCTION

Twenty years ago, a freelance author[2] wrote an article and decided to sell it to a daily newspaper. The freelancer met with a newspaper editor who, upon reading the article, decided that it was worthy of publication and arranged payment. A handshake between the two sealed the deal.[3] Today, the same author sells another article to the same newspaper and another handshake agreement ensues. In both scenarios, the freelance author has given up her copyright in the article in exchange for payment. Twenty years ago, the author's article would only be printed in a hard copy version of

---

[*] 972 F. Supp. 804 (S.D.N.Y.), *reconsideration denied*, 981 F. Supp. 841 (S.D.N.Y. 1997), *and appeal docketed*, No. 97-9181 (2d Cir. Sept. 23, 1997).

[**] Brooklyn Law School Class of 1999; B.A., State University of New York at Buffalo, 1995. The author dedicates this Comment to her parents. The author thanks her brothers, for their guidance, Kira Zevan, for her encouragement and Randall Cude, for his editorial talent. A special thanks to Christopher Grasso for his continual love and support.

[1] Marshall Leaffer, *Protecting Authors' Rights in a Digital Age*, 27 U. TOL. L. REV. 1, 12 (1995).

[2] The author uses the terms "freelance author(s)" and "freelancer(s)" interchangeably.

[3] *See* Sidney A. Rosenzweig, Comment, *Don't Put My Article Online!: Extending Copyright's New-Use Doctrine to the Electronic Publishing Media and Beyond*, 143 U. PA. L. REV. 899, 906 (1995) (recognizing that the publishing industry has been historically notorious for not using written contracts).

the newspaper. But today, with the advent of electronic technologies[4] such as LEXIS-NEXIS[5] and CD-ROMs,[6] her article is printed in hard copy and also reproduced in electronic databases. After *Tasini v. New York Times*,[7] the handshake transfers the freelance author's electronic copyright in her article to the newspaper without any additional "consent or compensation."[8]

---

[4] The author uses "electronic technologies" and "electronic media" interchangeably. The terms will refer to electronic databases that distribute information by means of computer-aided processes. The terms will not refer to electronic multimedia that combine text with sound and visual images.

[5] LEXIS-NEXIS is a computer-assisted research service. Frank J. Cavaliere, *Legal Research on the Web*, 42 PRAC. LAW. 63, 66 (1996). The LEXIS-NEXIS service was formerly owned by Mead Data Central Corp., and is currently owned and operated by Reed Elsevier Inc. of London. *Id.* NEXIS is an arm of LEXIS-NEXIS that retrieves articles from newspapers, newsletters, magazines and wire services, including the *New York Times*, *Newsday* and *Sports Illustrated* (defendant publications in *Tasini*). Tasini v. New York Times Co., 972 F. Supp. 804, 806 (S.D.N.Y.), *reconsideration denied*, 981 F. Supp. 841 (S.D.N.Y. 1997), *and appeal docketed*, No. 97-9181 (2d Cir. Sept. 23, 1997); Steve Lohr, *Freelancers Lose Test Case on Electronic Publishing*, N.Y. TIMES, Aug. 14, 1997, at D18 [hereinafter Lohr, *Freelancers Lose Test Case*]. In response to search requests by subscribers, the articles can be displayed on a computer monitor and/or printed. *Tasini*, 972 F. Supp. at 806.

[6] CD-ROMs are compact-discs with read-only memory. TONY HENDLEY, CD-ROM AND OPTICAL PUBLISHING SYSTEMS 5 (1987). *See infra* note 61 (describing the storage capacity and the production costs of CD-ROMs).

[7] 972 F. Supp. 804 (S.D.N.Y.), *reconsideration denied*, 981 F. Supp. 841 (S.D.N.Y. 1997), *and appeal docketed*, No. 97-9181 (2d Cir. Sept. 23, 1997).

[8] John Frees, Tech Watch, *Freelancers Lose Case on Cyberspace Rights*, BUS. FIRST-COLUMBUS, Aug. 29, 1997, at 31. The recent actions of *National Geographic* magazine illustrate the potential effects of the *Tasini* decision. In a plan to market *National Geographic* CD-ROMs, the magazine placed every article from the last 108 years onto compact-disc products. Claire Safran, *Whose Work is it Anyway?*, FOLIO, Sept. 15, 1997, at 51. The magazine sent letters to over 2,500 contributors informing them that they would not be paid for the project. *Id.* By relying on *Tasini*, the magazine may place the articles onto the CD-ROMs, absent any express agreement, without compensating the freelancers. *Id.* However, freelancers who had express written contracts with the magazine will be able to seek redress in court because *Tasini* does not apply to them. *Id.*

Tasini is a groundbreaking decision because it applied copyright law to electronic media for the first time.[9] More importantly to freelancers and publishers, *Tasini* provided a long-awaited determination regarding who owns the electronic rights in articles.[10] In the aftermath of *Tasini*, however, the battle between freelancers and publishers rages with new electronic rights disputes.[11] Issues involving electronic rights contracts and publication of articles onto the Internet[12] and the World Wide Web ("the Web")[13] have now

---

[9] Bill Alden, *Freelance Writers Lose 'On-Line' Suit*, N.Y.L.J., Aug. 14, 1997, at 1. After *Tasini* was decided, almost every major newspaper published an article recognizing the significance of the decision. *See, e.g.*, Rita Ciolli, *Writers Lose Decision on Electronic Publishing*, NEWSDAY, Aug. 14, 1997, at A57; Eric Convey, *Judge: Freelancers' OK Not Needed for Reprint*, BOSTON HERALD, Aug. 15, 1997, at O28; *Court Rules Against Free-lancers' Rights*, HOUSTON CHRON., Aug. 15, 1997, at 9; David Einstein, *Free-Lance Writers Vow to Fight for Electronic Rights*, S. F. CHRON., Aug. 15, 1997, at B1; *Federal Court Rules in Favor of Publishers on Electronic Rights*, 4 MEDIA DAILY, Aug. 14, 1997, at No. 5; *Federal Judge Turns Down Writers' Copyright Claim; Work in Databases May Be Republished Without Permission; Publishing*, BALTIMORE SUN, Aug. 15, 1997, at 3C [hereinafter *Federal Judge*]; *Freelancers Lose Bid in Electronic-Rights Suit*, L.A. TIMES, Aug. 14, 1997, at D3; Lohr, *Freelancers Lose Test Case*, *supra* note 5, at D18; Anne Marriott, *Free-lance Writers Outraged at Loss of Rights to 'Revisions,'* WASH. TIMES, Aug. 15, 1997, at B7; Frances A. McMorris, *Judge Rules Against Free-Lancers in Lawsuit Over Electronic Rights*, WALL ST. J., Aug. 14, 1997, at B9.

[10] *See* Ron Abramson, *Publishers Sigh with Relief After 'Tasini,'* N.Y.L.J., Sept. 26, 1997, at 5 (recognizing that the electronic rights issue between freelancers and publishers has existed for several years). Ron Abramson is an intellectual property and technology law partner with Hughes Hubbard & Reed LLP in New York City. *Id. See also* Deirdre Carmody, *Writers Fight for Electronic Rights*, N.Y. TIMES, Nov. 7, 1994, at B20 (characterizing the conflict over ownership of electronic rights as the "most bitter battle in years" for freelancers).

[11] After *Tasini*, both sides admitted that conflicts between freelancers and publishers were not over. *Federal Judge*, *supra* note 9, at 3C; Lohr, *Freelancers Lose Test Case*, *supra* note 5, at D18.

[12] The Internet or "the Net" is the world's largest computer network, connecting millions of computer networks and users worldwide. Cavaliere, *supra* note 5, at 64. *See infra* notes 66 & 67 and accompanying text (describing the increase in Internet users and the ease of Internet access).

[13] The World Wide Web, also known as WWW and W3, is the fastest growing and most user-friendly part of the Internet. Cris Shipley & Matthew

taken center stage.[14] At its heart, the battle is over money.[15] Freelancers seek adequate compensation for the publication of their creations onto electronic technologies while publishers seek control over copyrighted material to maximize profits from present and future technologies.[16] In addressing which side should be victorious, the interests of society must be considered.[17]

Part I of this Comment provides an overview of American copyright law and discusses the importance of the copyright industry. Additionally, Part I analyzes the relationship between freelancers and publishers. Part II reviews the factual background of *Tasini* and addresses the first issue raised by the court concerning the express transfer of electronic rights. Section A explains the court's analysis regarding the contracts used in *Tasini*. Section B introduces the latest dispute between freelancers and publishers surrounding electronic rights contracts. Section C proposes that, in light of *Tasini*, electronic rights contracts are necessary to provide adequate compensation to freelancers and supports a contract consistent with public policy considerations. Part III discusses the second issue in *Tasini* involving the interpretation of "revision" under section 201(c) of the Copyright Act of 1976 ("section

---

Fish, *Chapter 1: the Web and the Internet* (excerpt from *How the World Wide Web Works*), COMPUTER LIFE, Oct. 1, 1996, at 115. The Web is a "system that rides on top of the Internet." *Id.* It is a "system of protocols exchanged between a client ([a] computer) and a server (the host computer's application that delivers Web pages) in order that documents can be shared among computers on the network." *Id.*

[14] Abramson, *supra* note 10, at 5; *Federal Judge, supra* note 9, at 3C. *See infra* Parts II.B and II.C, addressing electronic rights contracts; Part III.C, addressing publication of articles onto the Internet and the Web.

[15] Christina Ianzito, *Who Owns that Online Story?*, COLUM. JOURNALISM REV., May 15, 1997, at 15.

[16] Richard Raysman & Peter Brown, *Electronic Data Bases and Rights of Freelancers*, N.Y.L.J., Sept. 9, 1997, at 3.

[17] The U.S. Constitution gives Congress the power to enact copyright law. U.S. CONST. art. I, § 8, cl. 8. The plain language of the Constitution indicates that the purpose of copyright law is to protect both the interests of authors and society while the interests of publishers is not mentioned. *See id.*; Safran, *supra* note 8, at 51.

201(c)").[18] Section A explains the court's thorough and detailed analysis of section 201(c). Section B argues that the *Tasini* court's analysis is flawed for two reasons. Lastly, Section C contends that publication of freelancers' articles onto electronic technologies such as the Internet and the Web constitutes more than a section 201(c) revision, and therefore, publishers should not have such rights.

I. THE RELATIONSHIP BETWEEN COPYRIGHT, FREELANCERS AND PUBLISHERS

In analyzing the battles between freelancers and publishers over electronic rights, it is imperative to consider their legal arena—the American copyright system.[19] In addition, it is necessary to explore the underlying motivation behind the freelancers' quest for electronic rights compensation and behind the publishers' quest for control over copyrighted material published on existing and future electronic technologies. It is of critical importance that freelancers and publishers have a sound relationship because of the economic and social value of our copyright industries.

A. The Advent and Significance of Copyright Law

The invention of the printing press, in 1476, originally created the need for copyright protection because authors' works could be mass produced and copied.[20] The first modern Anglo-Saxon

---

[18] Section 201(c) provides that:

> [C]opyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or 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.

17 U.S.C. § 201(c) (1994) (emphasis added).

[19] 17 U.S.C. §§ 101-1101 (1994).

[20] Leaffer, *supra* note 1, at 3; *see also* Douglas J. Masson, *Fixation on Fixation: Why Imposing Old Copyright Law on New Technology Will Not Work*, 71 IND. L.J. 1049, 1052 n.19 (1996) (citing Sony Corp. v. Universal Studios,

copyright statute was England's Statute of Anne, enacted in 1710.[21] The statute granted authors the exclusive right to copy their books for a limited term of fourteen years, with the copyright belonging to the public at the end of the term.[22] Thus, the Statute of Anne achieved a "balance between a creator's right to protect his [or her] literary creation and the public's right to access"[23] and provided the model for copyright law in the United States.[24]

The current copyright statute is the Copyright Act of 1976 ("the Act").[25] Congress passed the Act under its constitutional authority to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[26] A reading of this

---

Inc., 464 U.S. 417, 430-31 (1984)) (noting that "it was the invention of a new form of copying equipment—the printing press—that gave rise to the original need for copyright protection"). Before the invention of the printing press, copyright protection was not necessary because of the difficulty of copying and mass producing authors' works. Leaffer, *supra* note 1, at 3. But after William Caxton introduced the printing press in England, regulations were adopted in order to control all printing and publishing. Leaffer, *supra* note 1, at 3. The English Crown adopted such regulations because they feared literature "advocating religious heresy and political upheaval." Leaffer, *supra* note 1, at 3. For instance, the government instituted an order in 1534 prohibiting any publishing without a license and without official approval. Leaffer, *supra* note 1, at 3. Additionally, the English monarchy granted the Stationer's Company an exclusive publishing monopoly, allowing government censorship of the press. Leaffer, *supra* note 1, at 3. In 1695, the Stationer's Company's official license to publish expired and new companies entered the publishing business. Leaffer, *supra* note 1, at 3. After the Stationer's Company predicted economic disaster and anarchy from the publishing competition, the English parliament responded with the Statute of Anne. Leaffer, *supra* note 1, at 3.

[21] Statute of Anne, 1710, 8 Anne, ch. 19 (Eng.). *See* 8 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT app. 7-5 to 7-10 (1998) (providing the full text of the Statute of Anne).

[22] Leaffer, *supra* note 1, at 4. Thus, at the end of fourteen years, the work was considered part of the public domain and could be reproduced without the author's consent. Leaffer, *supra* note 1, at 4.

[23] Leaffer, *supra* note 1, at 4.

[24] Leaffer, *supra* note 1, at 4; L. Ray Patterson, *A Response to Mr. Y'Barbo's Reply*, 5 J. INTELL. PROP. L. 235, 239 (1997).

[25] 17 U.S.C. §§ 101-1101 (1994).

[26] U.S. CONST. art. I, § 8, cl. 8. This constitutional language provides the

statutory language suggests that the purpose of copyright law is to recognize both the interests of authors, by granting exclusive rights to their creations, and society, by promoting the progress of learning.[27] Thus, due to its constitutional mandate, American copyright law has always struck a balance between the interests of the writer and the interests of society.[28] It is of great debate whether the Act will sustain that balance in adapting to new electronic technologies. Some believe that copyright law will adapt as it has to other challenges in history.[29] For example, copyright has responded to the expressive mediums of photography, motion pictures, sound recordings, architecture and choreography.[30] However, others contend that the current Act will not adapt to future electronic technologies.[31]

---

congressional authority to enact both copyright and patent law. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.02, at 1-66.6 (1998).

[27] The language of the Constitution groups "science" with "authors" and "writings," and "useful arts" with "discoveries" and "inventors." William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 910 n.18 (1997) (citing Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 56 (1884) and Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 100 (2d Cir. 1951)).

Additionally, "science" should be interpreted according to its eighteenth century meaning and usage of "learning." *Id.* at 910. *See also* THE OXFORD ENGLISH DICTIONARY 221 (2d ed. 1933) (defining "science" as "knowledge acquired by study" and "acquaintance with or mastery of a department of learning").

[28] Masson, *supra* note 20, at 1063.

[29] *See, e.g.*, Thomas K. Landry, *Columbia-VLA Journal of Law & the Arts Roundtable on Electronic Rights*, 20 COLUM.-VLA J.L. & ARTS 605, 649 (1996) (statement of Stephen B. Davis, Esq., Vice President of Strategic & Legal Affairs for the Corbis Corporation, advocating that existing copyright law forms a sound legal framework for future electronic media).

[30] Leaffer, *supra* note 1, at 5, 12. Copyright law permits songwriters and composers to collect fees every time their songs are played in public. Landry, *supra* note 29, at 649 (statement of Jeffrey D. Smith, Executive Director of Contact Press Images). This law is often enforced by performance rights societies established to protect their members rights and litigate compliance if necessary. Landry, *supra* note 29, at 649.

[31] *See, e.g.*, Leaffer, *supra* note 1, at 9 (opining that current copyright law is inadequate and suggesting contractual arrangements, criminal sanctions or technological restrictions, such as encryption); Masson, *supra* note 20, at 1049

The intent of the Act was to grant rights to authors in order to "afford greater encouragement to the production of literary works of lasting benefit to the world."[32] The Act seeks to achieve this goal by protecting "original works of authorship fixed in any tangible medium of expression."[33] If the work is original, creative and fixed in a tangible medium of expression, then the creator is granted a number of exclusive rights including the right to reproduce, distribute copies, create derivative works, and publicly perform or display the work.[34] Consequently, the Act allows the

---

(recognizing the fatal effects of applying current copyright law to future digital systems).

[32] Rosenzweig, *supra* note 3, at 924 (citing Washingtonian Publ'g Co. v. Pearson, 306 U.S. 30, 36 (1939) (quoting Act of March 3, 1891, ch. 565, 26 Stat. 1106)).

[33] 17 U.S.C. § 102(a) (1994). In order to satisfy the originality requirement, the work must be an independent creation. *Id.* The copyright law originality requirement is less rigorous than the requirement in patent law which mandates an independent creation that is also "novel, not known or practiced previously." Masson, *supra* note 20, at 1053. An example of a work that is fixed in a tangible medium of expression occurs when an author writes her thoughts onto paper. Leaffer, *supra* note 1, at 4. The tangible fixation requirement "forces the author to place his [or her] work in a material form before . . . seek[ing] [copyright] protection." Leaffer, *supra* note 1, at 4. Some recognize that this requirement is problematic especially considering that most creative works are valuable because of their images and ideas, not the tangible medium. *See, e.g.*, Masson, *supra* note 20, at 1054 (opining that concentrating on physical manifestation, or the "fixation on fixation," leads to unfair results because creative and socially valuable works that are unrecorded will not be protected).

[34] 17 U.S.C. § 106. The purpose of the exclusive rights is to allow the copyright owner the ability to control the different uses of his or her work. Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547, 549 (1997). It is important to recognize that these exclusive rights are not absolute and are modified by certain exceptions, such as the "fair use" doctrine. *Id.* at 574. The fair use doctrine allows reproduction for purposes such as "criticism, comment, news reporting, teaching . . . scholarship, or research." 17 U.S.C. § 107 (fair use provision). Also, "library archival copying, and the right to publicly display a privately owned copy" are limits on authors' exclusive rights. Masson, *supra* note 20, at 1055.

The National Information Infrastructure, established by the Clinton Administration to report on intellectual property rights, has recommended adding the right to transmit works over a computer network as an additional exclusive right. Lemley, *supra* at 549.

creator of a work to control and license the work for economic gain.[35]

B. Freelancers

Upon completion of an article, freelance authors hold all the exclusive rights of a copyright owner. Thus, freelancers may "copy, modify, sell and publicly display or perform" their works.[36] Freelancers also retain movie, television and other adaptation rights.[37] In exercising their right to sell their creations, before the advent of electronic technologies, freelance authors typically agreed to a one-time print publishing[38] of their work in exchange for a flat fee, with additional fees for translations, reprints and other modifications of the work.[39] Freelancers, including the plaintiffs in *Tasini*, contend that by granting print rights to publishers, they do not also grant electronic rights to reproduce and distribute their work in electronic media.[40]

In analyzing the contentions of freelancers regarding electronic rights, it is imperative to recognize their working situation.

---

[35] *See* Masson, *supra* note 20, at 1055 (recognizing that the Constitution mandates an economic incentive for copyright holders to further science). The creator of a work can also transfer her copyright to others. 17 U.S.C. § 201(d)(1) (1997). More specifically, the "ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession." *Id.*

[36] John B. Kennedy & Shoshana R. Dweck, *Publishers, Authors Battle Over Electronic Rights: Debate Over Allocation of Rights and Money Sparks Lawsuits and Birth of the Authors' Registry*, NAT'L L.J., Oct. 28, 1996, at C17 (reciting 17 U.S.C §§ 106-120).

[37] *Id.*

[38] If there was a contract between an author and a publisher, the contract typically gave the publisher "first North American serial rights," which allowed the right to publish the work first. Rosenzweig, *supra* note 3, at 906 n.40. *See infra* note 94 and accompanying text (providing *Sports Illustrated*'s contract in *Tasini* that used the language "right to first publish").

[39] Kennedy & Dweck, *supra* note 36, at C17.

[40] 972 F. Supp. 804, 806 (S.D.N.Y.), *reconsideration denied*, 981 F. Supp. 841 (S.D.N.Y. 1997), *and appeal docketed*, No. 97-9181 (2d Cir. Sept. 23, 1997); Lohr, *Freelancers Lose Test Case*, *supra* note 5, at D18.

Freelancers are specialized writers in a particular subject or knowledge area,[41] and typically write for newspapers and magazines.[42] Acquiring work can be difficult for freelance authors because of the lack of available freelance jobs, the need for intense self-promotion and marketing.[43] Once working, many freelance authors consider themselves to be "modern day sweatshop workers."[44] Freelancers typically work long hours writing, editing and

---

[41] For example, some freelancers only write about financial, medical, political or legal issues. Telephone Interview with Jennifer Harris, a freelance author (Nov. 1, 1997).

[42] Magazines are the more favorable publication because newspapers typically pay poorly and late. Mary Voboril, *Writes and Wrongs: Freelancers Are Struggling Against Low Pay, Deadbeat Publishers and Ownership of Electric Rights*, NEWSDAY, Feb. 21, 1994, at 23. Most mainstream magazines pay freelancers from one to two dollars per word. *Id.* On the other hand, most daily newspapers pay per article regardless of the length. Telephone Interview with Jennifer Harris, a freelance author (Nov. 1, 1997). For example, the *USA Today* pays a freelancer about $500 per article. *Id.* A payment of less than one dollar per word, from any publisher, is considered "suckers' pay." Voboril, *supra*, at 23.

[43] Voboril, *supra* note 42, at 23. Freelancers are usually selected by publications based on a past relationship with an editor or through a query letter. Telephone Interview with Jennifer Harris, a freelance author (Nov. 1, 1997). A query letter is sent by a freelancer to one or more publications. Bharti Kirchner, *Up-front Opportunity: Read 'em and Eat*, WRITER'S DIG., Nov. 1, 1997, at 48. The letter is basically a sales pitch outlining the freelancer's writing history and previewing the article idea. *Id.* If the publication is interested in the freelancer's article, then the author is contacted to discuss editorial guidelines, payment and the suggested deadline for publication. Telephone Interview with Jennifer Harris, a freelance author (Nov. 1, 1997).

[44] Voboril, *supra* note 42, at 23 (quoting Jonathan Tasini, the named plaintiff in *Tasini*). Jonathan Tasini is the most vocal of the six plaintiffs in *Tasini* because of his role as President of the National Writers Union. Voboril, *supra* note 42, at 23. The National Writers Union is a New York-based trade and advocacy association seeking to improve the working conditions of freelancers. Doreen Carvajal, *In Book Publishing, The Whales are Eating the Whales*, N.Y. TIMES NEWS SERV., Oct. 19, 1998, *available in* 1998 WL-NYT 9829200600. The organization has approximately 4,600 members, including all of the plaintiffs in *Tasini*. Jeff Garigliano, *First Round in E-Rights Case Goes to Publishers*, FOLIO, Sept. 15, 1997, at 12. After *Tasini*, the National Writers Union has been attempting to increase its membership to 10,000 members by the year 2000. Jonathan Tasini, *Rights Fight Bounces Out of Court: Ruling Sends Call to*

researching an assignment without any support staff.[45] In fact, according to a recent study, freelancers earn only an average of $7,500 per year from their writing.[46] Additionally, many freelancers complain of waiting weeks, months and years to be paid; some are never paid if the publication goes out of business.[47] Also, freelancers do not enjoy any of the benefits of full-time employment such as paid vacation, pension plans, 401(k) plans or medical insurance.[48] In contrast, the advantages of freelancing include the freedom to choose assignments, not to have to answer to a supervisor or confront office politics.[49] This independence,

---

Organize, AM. WRITER (publication of the NWU) (Fall 1997), *available at* <http://www.lra-ny.com/workinglife>. The organization is also attempting to form global alliances with international writers' unions in order to track the activities of large multinational publishers. Carvajal, *supra*.

[45] Voboril, *supra* note 42, at 23.

[46] *You Better Work*, AM. WRITER, Spring 1995, at 4. In 1995, the National Writers Union conducted a national survey of the annual income of over 1,000 freelance authors. *Id. See also* Ianzito, *supra* note 15, at 15 (recognizing that freelancing is a "tough way to pay the mortgage and clothe the kids").

[47] Voboril, *supra* note 42, at 23; Lori D. Widmer, *Getting Publications to Pay*, WRITER'S DIG., Aug. 1, 1998, at 32.

[48] Voboril, *supra* note 42, at 23; Ianzito, *supra* note 15, at 15. In some contracts, a publisher will refer to a writer as an independent contractor to expressly avoid providing any full-time employment benefits. Landry, *supra* note 29, at 613 (statement of Dan Carlinsky, Vice President and Chair of the Contracts Committee for the American Society of Journalists and Authors). If, however, freelancers were considered full-time employees, then this dispute over electronic rights would not exist because the copyright to articles would be owned by the publications—even in the electronic media context. Raysman & Brown, *supra* note 16, at 3. Therefore, these new forms of electronic distribution have not been an area of dispute for full-time writers whose work product is considered "work made for hire." Raysman & Brown, *supra* note 16, at 3. "Work for hire" is work that is "prepared by an employee within the scope of his or her employment." 17 U.S.C. § 201(b) (1994). The copyright owner of this type of work is considered to be "the employer or other person for whom the work was prepared," that is, the magazine, newspaper or other publication. *Id.* In exchange for "work for hire," publishers provide writers with the benefits of full-time employment. Landry, *supra* note 29, at 613 (statement of Dan Carlinsky, Vice President and Chair of the Contracts Committee for the American Society of Journalists and Authors).

[49] *See, e.g.*, Ianzito, *supra* note 15, at 15 (stating that the perks of freelancing include "no commute, no boss, and no sticky office politics or stale

however, poses an unique problem for freelancers because it is difficult for authors to unite and organize to fight for their rights.[50]

In this battle over electronic rights, freelancers realize that they will profit only if they can control the copyright to their work.[51] Freelance authors do not want to grant all their rights, including their electronic rights, to publishers without receiving equitable compensation. Thus, freelancers want to protect their creative works from becoming the source of publishers' millions in the electronic age.[52] In addition, with the advent of publication of their articles onto the Internet and the Web, freelancers are interested in protecting the fruits of their labor from copyright infringement by anyone with the ability to enter a database, access their articles, and potentially alter, re-use or print them.[53]

C. Publishers

Publishers view their interests in the battle for electronic rights differently than freelancers. As electronic technology rapidly evolves, media conglomerates want to ensure that they own "whatever the next technological wave brings in."[54] Because it is

---

office coffee"); Voboril, *supra* note 42, at 23 (recognizing such freelancing perks as choosing your own assignments, avoiding editors and not wearing ties).

[50] Matt McAllester, *Life in Cyberspace: Contract Threatens Free-Lancers' Right to Resell Articles,* NEWSDAY, Mar. 30, 1997, at A43 (quoting Naomi Zauderer, eastern regional organizer for National Writers Union who stated that "organizing free-lancers is like trying to herd cats"). On the other hand, the publishing industry, with lobbyists and an industry association, is much more organized. Landry, *supra* note 29, at 630 (statement of Stephen B. Davis, Esq., Vice President of Strategic & Legal Affairs for the Corbis Corporation).

[51] *See* Landry, *supra* note 29, at 617 (characterizing this battle over electronic rights as the most serious fight facing freelancers).

[52] *See infra* notes 54-58 and accompanying text (explaining the plans of publishers to invest millions in future electronic media).

[53] *See infra* Part III.C, describing the potential alteration of a work on the Internet.

[54] Janine Jaquet, *Cornering Creativity*, THE NATION, Mar. 17, 1997, at 10. *See supra* notes 12 & 13 (explaining the Internet and the World Wide Web, respectively). Media conglomerates own many different industries, including cable television, telephone, computing, radio, magazines and newspapers.

difficult to determine which new technologies will be profitable, the strategy of media conglomerates is to procure as much copyrighted material as possible.[55] Today, the new investment is in intellectual property—"the twenty-first century's most valuable commodity."[56] Publishers are investing millions of dollars purchasing intellectual property[57] with the hopes of making billions in electronic media.[58]

At present, publishers contract with on-line content providers[59] to produce electronic editions of their books, newspapers and

---

Bethany M. Burns, *Reforming the Newspaper Industry: Achieving First Amendment Goals of Diversity Through Structural Regulation*, 5 COMM. LAW CONSPECTUS 61, 71 (1997). American media conglomerates include Time Warner, Walt Disney, Viacom and Metro-Goldwyn-Mayer. Scott Reeves, *Lights! Camera! IPO! Despite its Lustrous Past, MGM's Stock Offer May Disappoint,* BARRONS, Nov. 10, 1997, at 21. *See infra* note 166 (demonstrating the control of media conglomerates over many industries).

[55] Jaquet, *supra* note 54, at 10; Landry, *supra* note 29, at 633 (statement of Jeffrey Smith, Executive Director of Contact Press Images, opining that it is worthwhile for publishers to obtain all electronic rights as a strategic advantage).

[56] Jaquet, *supra* note 54, at 10.

[57] For example, the New York Times Co. invested an estimated $30 to $40 million from 1994 to 1997 in order to develop its CD-ROMs and on-line services. William Glaberson, *Times Company Plans Shift to More Electronic Media*, N.Y. TIMES, Dec. 7, 1994, at D1. The New York Times Co., with annual revenues over $2 billion, realized 90% of its profits from print and 10% of its profits from electronic products. *Id.* By increasing its reliance on electronic media, the company is hoping to realize 75% of its profits from print and 25% from electronic media. *Id.*

[58] For example, a publisher can make a profit by sublicensing a magazine to on-line databases. Julius J. Marke, *Protection of Electronic Publication Rights*, N.Y.L.J., Jan. 17, 1995, at 5. Users pay a fee to the on-line database each time they access an article. *Id.* If the user accesses an article contained in the publisher's magazine, then the publisher receives a royalty of up to 50% of the user's fees. *Id.*

[59] On-line content providers are companies that maintain databases and other services that may be accessed by subscribers using a personal computer and a modem. Ian C. Ballon, *Intellectual Property Protection and Related Third Party Liability*, 482 PLI/PAT. 559, 567 (1997). Examples include LEXIS-NEXIS, with its information and research database, America Online ("AOL") and Prodigy, with their on-line conferences, discussion groups, information services, entertainment and limited Internet access. *Id.*

magazines.[60] Today, most newspapers, technical journals and magazines are available on CD-ROM products.[61] The Internet[62] is one of the electronic technologies that publishers hope will also be profitable.[63] It is considered by many publishers to be a suitable medium for newspapers and magazines "because the data . . . can be supplemented with little or no turnaround time."[64] Also, on-line publications are continually current in comparison to

---

[60] Rosalind Resnick, *Writers, Data Bases Do Battle*, NAT'L L.J., Mar. 7, 1994, at 1. Publishers recognize the vast economic potential for on-line viewers as computers and modems become more inexpensive and user-friendly. *Id.*

[61] Rosenzweig, *supra* note 3, at 903. Publishers utilize CD-ROM systems because they provide users with complete copies of the publisher's periodicals. Rosenzweig, *supra* note 3, at 904. CD-ROM's have large storage capacity as "one disc can store 600 million characters of text, 250 thousand typewritten pages, or one nine-volume encyclopedia." Rosenzweig, *supra* note 3, at 905. CD-ROMs are also inexpensive to produce. Rosenzweig, *supra* note 3, at 905 n.25 (citing Steve Alexander, *Computing in Las Vegas*, STAR TRIB. (Minneapolis), Jan. 5, 1995, at 1D (one CD-ROM disc costs approximately one dollar to manufacture)). Yet, publishers have not earned impressive revenues from non-game CD-ROMs. Landry, *supra* note 29, at 632 (statement of Stephen B. Davis, Esq., Vice President of Strategic & Legal Affairs for the Corbis Corporation).

[62] The Internet or "Net" is the world's largest computer network, connecting millions of computer networks and users worldwide. Ballon, *supra* note 59, at 565. In 1966, the Internet was created by the U.S. government, particularly the U.S. Department of Defense's Advanced Research Project Agency and research universities, to connect computers so that research organizations could combine their resources. Ballon, *supra* note 59, at 565. In addition, a communication system was sought that could survive a nuclear war. Cavaliere, *supra* note 5, at 64. The Internet is a cooperative decentralized venture not owned by any single entity or government. Cavaliere, *supra* note 5, at 64. Many believe that this lack of centralization causes many of the problems facing the Internet era. Cavaliere, *supra* note 5, at 64 (quoting Gertrude Stein: "[t]here's no there, there"). The lack of centralization makes tracking down unauthorized reproduction of copyrighted works nearly impossible. Leaffer, *supra* note 1, at 7.

[63] There is the potential to make billions of dollars on the Internet as access "moves from academia and government to the mainstream." Landry, *supra* note 29, at 615 (statement of Sean McLaughlin, Vice President of Public Relations for *Harper's Magazine*); *see infra* note 66 (discussing the increase in the current number of Internet users).

[64] Rosenzweig, *supra* note 3, at 932 n.23 (citing HENDLEY, *supra* note 6, at 47).

CD-ROM products, which must be manufactured and distributed.[65] Moreover, the Internet is the largest computer network with millions of users and potential consumers.[66] Publishers recognize that users enjoy the ease of access[67] and the global nature of the Web, with its vast resources, information and entertainment.[68]

---

[65] Rosenzweig, *supra* note 3, at 932 n.23 (citing HENDLEY, *supra* note 6, at 47).

[66] As of March 1998, there were approximately 40 million people worldwide on the Internet. Caroline H. Little, *Welcome to the Web: Pointers for Setting Up a Site of Your Own*, BUS. L. TODAY, Mar.-Apr. 1998, at 15. By the year 2000, some estimates state that there will be more than 50 million users worldwide and other estimates predict more than 142 million worldwide users. Ballon, *supra* note 59, at 566 (recognizing that it is difficult for research firms to accurately estimate the number of users because of the Internet's decentralization).

People are subscribing to Internet access providers in increasing numbers. Steve Lohr, *Online Services Have Image Woes: More People Wired, But Not Pleased,* NEWS & OBSERVER, Sept. 14, 1997, at F8 [hereinafter Lohr, *Online Services*]. For example, in 1997, the percentage of American households on-line was approximately 18-19% compared to 13% in 1996 and 9% in 1995. *Id.*; *IDC Market Research: Web Has Reached Mass Market Proportions* (visited Aug. 13, 1998)<http://www.idc.com/F/HNR/17a.htm>[hereinafter*IDCMarketResearch*]. Also, the number of hours spent on-line is about 12.8 hours per week, which has significantly increased from 6.5 hours in 1996. Lohr, *Online Services*, *supra* at F8. There is a prediction that approximately 38% of U.S. households will subscribe to an on-line service by the year 2001. *IDC Market Research*, *supra*.

[67] *IDC Market Research*, *supra* note 66. In order to access the Internet, a computer user needs a modem, an Internet Access Provider and computer software called a Web browser. Cavaliere, *supra* note 5, at 64. There are a number of companies which provide Internet access such as AOL, the Microsoft Network, AT&T WorldNet and Internet MCI. Ballon, *supra* note 59, at 568; *IDC Market Research*, *supra* note 66. As of September 1998, the leading on-line service provider was AOL with over 13.5 million subscribers. Lawrence M. Fisher, *America Online Earnings Set Record in First Quarter*, N.Y. TIMES, Oct. 28, 1998, at D2. Microsoft Network is the second largest provider with over 1.7 million subscriptions. *Id.*

[68] *See supra* note 13 (defining the Web). The Web contains millions of Web sites, which are individually addressed electronic locations around the world containing text, graphics, visual images or sound. Ballon, *supra* note 59, at 566; Steve Lohr, *Internet Trek: Browser War Limits Access to the Web*, ORLANDO SENTINEL, Dec. 20, 1997, at E8 [hereinafter Lohr, *Browser War*]. Once connected to a site, information is transmitted electronically to the user's computer and appears on the computer screen. Ballon, *supra* note 59, at 566.

Also, users seeking journals, newspapers and magazines are more likely to gain electronic access through the Internet because it is much cheaper than access through other mediums such as LEXIS-NEXIS.[69]

Publishers realize that they should obtain all rights, including electronic rights,[70] from freelancers at the best possible price.[71] However, some publishers are concerned that, because these new electronic technologies are still in an experimental stage, it is hard to estimate their profit potential.[72] Even CD-ROMs, which have been available since the early 1980's, have not yielded substantial profit to date.[73] The fear that the new technologies may not be profitable makes payment to freelancers a troublesome investment. In addition, publishers contend that there are inherent difficulties in tracking down past authors to give them compensation.[74] Moreover, publishers argue that copyright cannot inhibit the progress of science or preclude new methods of distributing information.[75]

This transmitted information may be downloaded to a disk or hard drive or printed. Ballon, *supra* note 59, at 566.

[69] *See* Cavaliere, *supra* note 5, at 73 (predicting that legal research on the Web will increase in the upcoming months and years). On the other hand, legal researchers are more likely to stay with an on-line research service such as LEXIS-NEXIS or Westlaw, because they provide more complete and accurate information than the Internet. Cavaliere, *supra* note 5, at 72. The LEXIS-NEXIS and Westlaw research services are more authoritative and reliable than the Web; it is also difficult for legal researchers to cite to Web information because URL addresses can change or disappear. Cavaliere, *supra* note 5, at 73.

[70] Landry, *supra* note 29, at 617 (statement of Jeffrey D. Smith, Executive Director of Contact Press Images, opining that "[t]he need of publishers to acquire electronic rights is at fever pitch"); Safran, *supra* note 8, at 51 (recognizing that publishers are told to acquire all rights).

[71] Jaquet, *supra* note 54, at 10 (quoting Jonathan Tasini, stating that the publisher's trend is to "grab as much profit and give as little as possible in exchange").

[72] Kennedy & Dweck, *supra* note 36, at C17.

[73] Jaquet, *supra* note 54, at 10.

[74] *But see infra* note 143 (describing collective agencies that track down and pay participating authors for electronic usage).

[75] This position stems largely from an utilitarian viewpoint in that the wider dissemination of information is necessary for the development of new media for all. Rosenzweig, *supra* note 3, at 918. Further, the decision in *Tasini* may yield the encouragement of new media. Publishers may argue that new media can

Therefore, as the entities with the ability to spread information in new mediums, publishers assert that they should be allowed to control and disseminate freelancers' articles on any medium.[76]

A sound relationship between freelancers and publishers is of critical importance because of the economic and social value the copyright industry has to America. The industries governed by copyright law include publishing, recording, film making and video production.[77] The revenue generated by these industries is significant. Industries affected by copyright account for about six percent of America's gross national product.[78] In 1995, the foreign revenues of these industries exceeded more than thirty-six billion dollars.[79] These industries also create new jobs at three times the

---

improve the quality of society and facilitate society's flow of information. Rosenzweig, *supra* note 3, at 918. Thus, efforts to encourage new developments are in the best interest of the public. Rosenzweig, *supra* note 3, at 918.

[76] Rosenzweig, *supra* note 3, at 923. Publishers have the equipment and labor to produce and disseminate information with small transaction costs. Rosenzweig, *supra* note 3, at 923. In addition, publishers provide marketing and advertising for their products. Masson, *supra* note 20, at 1064. But, it is arguable that authors do not need publishers to disseminate their works to the public. For example, an author or a group of authors could establish their own Web site in order to display and market their creations. *See, e.g.*, Masson, *supra* note 20, at 1064 (arguing that new technologies make authors less dependent on publishers' money and resources).

[77] Edwin Wilson, *Authors' Rights in the Superhighway Era*, WALL ST. J., Jan. 25, 1995, at A14. These industries produce "pre-recorded music, movies, home videos, books, periodicals, newspapers and computer software." Leaffer, *supra* note 1, at 2.

[78] Wilson, *supra* note 77, at A14 (relying on information from the International Intellectual Property Alliance). One study in 1995 concluded that the copyright industries generate over 400 billion dollars per year in domestic revenues. Leaffer, *supra* note 1, at 2.

[79] Wilson, *supra* note 77, at A14 (relying on statistics from the International Intellectual Property Alliance). The foreign sales of the copyright industries are larger than those of paper, plastics, rubber, lumber, pharmaceuticals, textiles and telephone equipment combined. Wilson, *supra* note 77, at A14. Unfortunately, some revenues are never actualized because of piracy, expropriation abroad and inadequate copyright protection in foreign legal systems. Leaffer, *supra* note 1, at 3. For example, China was the leader in the export of pirated compact discs, video discs and CD-ROMs, costing the U.S. copyright industries over one billion dollars in 1995. *U.S. Trade Representative Announces Results of 1998 Review of*

national average rate.[80] Therefore, the battles between freelancers and publishers cannot impede these industries and their economic growth.[81] Also, because America is the leader in the production and distribution of copyrighted material, our legal standards must protect the copyright industries and their rules governing ownership.[82] America must also set an example for other nations to follow into the twenty-first century.[83]

II. *TASINI V. NEW YORK TIMES*

In *Tasini v. New York Times*,[84] the United States District Court for the Southern District of New York, examined for the first time the relationship between freelance authors, publishers and electronic technologies.[85] *Tasini* was commenced in 1993 by six freelance

---

World-Wide Protection of Rights of U.S. Intellectual Property Owners; Treatment of American Entertainment Industry in Other Countries is Detailed, 20 No. 3 ENT. L. REP. 18 (1998).

[80] Wilson, *supra* note 77, at A14. In 1995, the copyright industries employed over seven million people. Leaffer, *supra* note 1, at 2.

[81] *See* Landry, *supra* note 29, at 660-61 (statements of Jeffrey D. Smith, Executive Director of Contact Press Images and Gary F. Roth, Senior Legal Counsel for Broadcast Music Incorporated).

[82] Masson, *supra* note 20, at 1061 (stating that America is a leader and pioneer in intellectual property).

[83] Leaffer, *supra* note 1, at 11. In Japan, for example, the Digital Information Center oversees voluntary licenses to use copyright works in multimedia. Leaffer, *supra* note 1, at 11. This is important because one multimedia work can contain copyrights owned by hundreds of authors. Leaffer, *supra* note 1, at 11. To the dismay of freelancers, in 1995 the U.S. White Paper on International Property and the National Information Infrastructure did not recommend the creation of a government controlled voluntary license system like that used in Japan. Leaffer, *supra* note 1, at 11. Consequently, writers' associations have established their own licensing systems. *See infra* note 143 (discussing the Authors Registry).

[84] 972 F. Supp. 804 (S.D.N.Y.), *reconsideration denied*, 981 F. Supp. 841 (S.D.N.Y. 1997), *and appeal docketed*, No. 97-9181 (2d Cir. Sept. 23, 1997).

[85] *Tasini* was heard before Judge Sonia Sotomayor. After oral arguments, Judge Sotomayor told the parties that *Tasini* was a "fascinating case," and that she had "absolutely no idea how [she was] going to rule." *The Tortoise and the Hare*, Tasini v. The New York Times *Arguments Reveal a Contrast in Styles*, INFO. L. ALERT: AN IOMA REP., Nov. 8, 1996, *available in* 1996 WL 8913698

authors.[86] In the copyright infringement action, the freelancers named the New York Times Co., Newsday Inc., Time Inc., the Atlantic Monthly Co., Mead Data Central Corp. and University Microfilms Inc. as defendants.[87]

(quoting Judge Sotomayor in October 1996). On October 2, 1998, the U.S. Senate approved Judge Sotomayor's nomination to the Court of Appeals for the Second Circuit. Daniel Wise, *Sotomayor Confirmed by Senate: D'Amato's Intervention Clears the Way for Elevation to 2nd Circuit*, N.Y.L.J., Oct. 5, 1998, at 1. The Second Circuit will decide the *Tasini* appeal within the next year and Judge Sotomayor must recuse.

A grievance similar to *Tasini* was settled and resulted in a $1000 payment by the publisher to the author. *Playboy Settles with Author, NWU in E-Rights Dispute*, PUBLISHER'S WEEKLY, July 4, 1994, at 14. Lee Lockwood, a freelance author, and the National Writers Union sued Playboy Enterprises for distributing Lockwood's 1967 interview with Fidel Castro onto CD-ROM. *Id.*; *see also* Bruce Hartford, *Ensuring Cyberspace Copyrights*, S.F. EXAMINER, Nov. 27, 1994, at C5 (discussing the settlement between Lockwood and Playboy).

Another lawsuit filed in small claims court in Manhattan was temporarily withdrawn in June 1997. Chris Kincade, *Rights Ripoff? Writer Fights Back*, THE VILLAGE VOICE, June 24, 1997, at 30. This case involved a freelancer who sought compensation for a 1993 article she wrote for *Home Mechanics* that was later posted on the Internet by the magazine. *Id.* Judith Trotsky, the author, speculated that the Times Mirror Corp., the owner of the magazine, spent over $70,000 in legal fees defending the lawsuit. *Id.* The maximum Trotsky could have recovered in small claims court was $3,000. *Id.* The publishers, most likely, feared other lawsuits if they had to pay Trotsky. *Id.*

[86] Where appropriate, the author will refer to the six plaintiffs collectively as "the freelance authors" or "the freelancers." The plaintiffs in *Tasini* were Jonathan Tasini, Mary Kay Blakely, Barbara Garson, Margot Mifflin, Sonia Jaffe Robbins and David S. Whitford. The plaintiffs were not employees of the publications but rather wrote articles on a freelance basis. 972 F. Supp. at 806.

[87] Where appropriate, the author will refer to the *New York Times*, *Newsday* and *Sports Illustrated* collectively as "the publications" or "the publishers." The New York Times Co. and Newsday Inc. publish, respectively, the well-known daily newspapers the *New York Times* and *Newsday*. 972 F. Supp. at 806. Time Inc. publishes the popular weekly sports magazine *Sports Illustrated*. *Id.*

The Atlantic Monthly Co., which publishes the magazine *Atlantic Monthly*, settled a copyright infringement lawsuit filed by Rutgers University Professor H. Bruce Franklin, a freelance author, in 1993 for an undisclosed amount. Dan Carlinsky, *The Argument Over Electronic Rights is Settled*, NAT'L L.J., Dec. 9, 1996, at A16. *Atlantic Monthly* placed parts of Professor Franklin's book *M.I.A. or Mythmaking in America* onto LEXIS-NEXIS. *Atlantic Monthly Settles Infringement Suit with Author Over Electronic Republishing*, WEST'S LEGAL

From 1990 to 1993, the freelance authors sold to the *New York Times*, *Newsday* and *Sports Illustrated*, a total of twenty-one articles for publication on a pay-per-work basis.[88] The freelancers obtained different agreements from each of the three publications. There were no written agreements between the freelance authors and the *New York Times* and no negotiations for electronic rights.[89] *Newsday* did not use written agreements.[90] Instead, *Newsday* simply sent checks to authors following the publication of their articles with the following endorsement:

> Signature required. Check void if this endorsement altered. This check accepted as full payment for first-time publication rights (or all rights, if agreement is for all rights) to material described on face of check in all editions published by Newsday and for *the right to include such material in electronic library archives.*[91]

One freelancer, Jonathan Tasini, crossed out the notation before cashing any *Newsday* checks.[92] The other freelancers cashed the

---

NEWS, Apr. 1, 1996, *available in* 1996 WL 259486.

At the commencement of *Tasini*, Mead Data Central Corp. owned and operated LEXIS-NEXIS. 972 F. Supp. at 806. *See supra* note 5 (describing the LEXIS-NEXIS service). University Microfilms, Inc., a division of Bell & Howard, is now renamed UMI Company and has for many years provided the archives of the *New York Times* and other publications on CD-ROM products. 972 F. Supp. at 806; Lohr, *Freelancers Lose Test Case*, *supra* note 5, at D18.

[88] Pay-per-work basis occurs when the writer is not a salaried employee and thus receives a fee for the article when completed. *Tasini*, 972 F. Supp. at 806.

Twelve of the twenty-one articles, written by plaintiffs Tasini, Mifflin and Blakely, appeared in the *New York Times*; eight articles, written by plaintiffs Tasini, Garson, Whitford and Robbins, appeared in *Newsday* and one article, written by plaintiff Whitford, appeared in *Sports Illustrated*. *Id.*

[89] *Id.* at 807. After the commencement of *Tasini*, the New York Times Co. adopted a policy requiring written agreements with all freelancers. *Id.* at 807 n.2. Therefore, the publication will only accept articles from freelancers who sign agreements surrendering all rights, including electronic rights in their creations. *Id. See infra* notes 125-132 and accompanying text (describing "all rights" contracts that are currently being used by some publishers, including the New York Times Co.).

[90] 972 F. Supp. at 807.

[91] *Id.* (emphasis added).

[92] *Id.*

checks with the notation intact.[93] Freelance assignments for *Sports Illustrated* were awarded pursuant to a standard written agreement stating that the publication had "the exclusive right first to publish."[94] David Whitford, who submitted an article for publication in *Sports Illustrated*, was the only *Tasini* plaintiff with an express agreement.[95] Whitford claimed at trial that he did not intend to grant electronic rights in his article to *Sports Illustrated* when he signed the agreement.[96]

In addition to publishing the freelancers' articles in the hard copy versions of their newspapers and magazines, the defendant publications sold the articles to LEXIS-NEXIS.[97] The New York

---

[93] *Id.*

[94] *Id.* The written contract contained the topic and length of the article, the due date and the freelancer's fee. *Id.* The agreement also stated that Time Inc., as publisher of *Sports Illustrated*, had:

> (a) the *exclusive right first to publish* the Story in the Magazine: (b) the non-exclusive right to license the republication of the Story whether in translation, digest, or abridgment form or otherwise in other publications, provided that the Magazine shall pay to you fifty percent (50%) of all net proceeds it receives for such republication: and (c) the right to republish the Story or any portions thereof in or in connection with the Magazine or in other publications published by the Time Inc. Magazine Company, its parent, subsidiaries or affiliates, provided that you shall be paid the then prevailing rates of the publication in which the Story is republished.

Id. (emphasis added).

[95] *Id.*

[96] *Tasini*, 972 F. Supp. at 807. *See supra* note 94 (providing the exact language of the express agreement between Whitford and *Sports Illustrated*).

[97] *Id.* at 806. The selling of freelancers' articles was common practice for the defendant publications, which have made every edition of their respective periodicals available via LEXIS-NEXIS's computerized library since the 1980's. *Id.* at 807. *Sports Illustrated* has been available since 1982, the *New York Times* since 1983 and *Newsday* since 1988. *Id.* The *New York Times* and *Newsday* delivered or electronically transmitted the full text of all articles from every daily or weekly edition of their publications to LEXIS-NEXIS, and articles were available on-line within twenty-four hours after they appeared in print. *Id.* at 808. *Sports Illustrated* sent computer text files to LEXIS-NEXIS weekly, rather than daily, and articles were available on-line within forty-five days of the print publication. *Id.*

Times Co. also sold the freelance authors' articles to UMI Company for inclusion in CD-ROM products.[98]

The first issue before the court was whether the freelance authors expressly transferred the electronic rights to their works.[99] Newsday Inc. and Time Inc. moved for summary judgment, claiming that the freelancers entered into contracts authorizing the transfer of their electronic rights.[100] Specifically, Newsday Inc. argued that the writing on the back of their payment checks, stating that the publication could include articles in "electronic library archives," evidenced the transfer of electronic publication rights.[101] Likewise, Time Inc. claimed it had acquired electronic rights because of the written contract with Whitford.[102] Time Inc. argued that the right "first to publish" the article extended to

---

[98] *Id.* UMI Company produces a CD-ROM product called "the *New York Times* OnDisc." *Id.* at 806. The CD-ROM contains articles from each issue of the *New York Times* from 1981 to the present. *Id.* at 806-07. The *New York Times* OnDisc is created pursuant to a three-way agreement between the New York Times Co., UMI Company and LEXIS-NEXIS. *Id.* at 808. LEXIS-NEXIS creates magnetic tapes which contain the articles from the newspaper and then transfer the tapes to UMI Company. *Id.* Then, UMI Company transfers the tapes to CD-ROM discs. *Id.* Users of the CD-ROM access articles in the same manner as LEXIS-NEXIS users by entering search terms. *Id.*

Also, each weekly issue of the *New York Times Magazine* and the *New York Times Book Review* are available on a UMI Company product known as "General Periodicals OnDisc." *Id.* This image-based CD-ROM product is assembled by digitally scanning complete copies of periodicals. *Id.* Therefore, this product is different from the LEXIS-NEXIS service and the *New York Times* OnDisc because it is created by digital scanning. *Id.* Freelancers' articles are not individually inputed but entire periodicals are reproduced. *Id.* The digital scanning process captures the periodicals in the exact form that it appeared in print—photographs, captions and advertisements are included. *Id.*; *Inclusion of Articles in Electronic Database, CD-ROM Not Infringement, New York Court Rules*, 5 NO. 23 MEALEY'S LITIG. REP: INTELL. PROP. 3 (1997).

[99] *Tasini*, 972 F. Supp. at 810.

[100] *Id.* The New York Times Co. did not move for summary judgment on the express transfer of electronic rights issue because the publication did not use written contracts with the *Tasini* plaintiffs.

[101] *Id.* The court was not impressed with Newsday Inc.'s check argument, especially because the authors "had not yet received or cashed these checks" before their articles were sent to LEXIS-NEXIS. *Id.*

[102] *Id.* at 811.

publication in print and electronic media.[103] The court rejected both Newsday Inc.'s and Time Inc.'s arguments.[104]

A. No Express Transfer of Electronic Rights

The *Tasini* court held that Newsday Inc.'s right to publish was not so broad as to include a right in any other medium.[105] After an analysis of the check's language, the court concluded that it was ambiguous.[106] The court reasoned that if Newsday Inc. sought electronic rights, then the publication should have specifically referred to the electronic medium on which the articles would be placed.[107] The publication's choice of language granting

---

[103] *Id. See supra* note 94 (providing the text of Time Inc.'s contract that the publisher relied on to argue that Whitford "expressly transferred" electronic rights). Time Inc.'s argument relied on earlier cases involving motion pictures. *Tasini*, 972 F. Supp. at 811-12 (citing Bartsch v. Metro-Goldwyn-Mayer, Inc., 391 F.2d 150, 154-55 (2d Cir.), *cert. denied,* 393 U.S. 826 (1968) (holding that the right to "exhibit" a motion picture also included the right to exhibit the movie on television)). The court concluded that the publisher's reliance on such cases was "misplaced." *Id.* at 812. In *Bartsch*, there was no contract that imposed "specific temporal limitations" as in Time Inc.'s contract. *Id.* The court may have been affected by the historical approach of assigning rights later in the analysis of section 201(c). Since the medium of motion pictures, courts have used "the policy of favoring, rather than frustrating," the movement into new technologies by granting ownership of the new medium into one party who can quickly disseminate the information. Rosenzweig, *supra* note 3, at 911 n.57.

[104] *Tasini*, 972 F. Supp. at 810.

[105] *Id.* at 811.

[106] *Id.* The check legends "are ambiguous and cannot be taken to reflect an express transfer of electronic rights." *Id.* (citing Playboy Enterprises, Inc. v. Dumas, 53 F.3d 549, 564 (2d Cir.), *cert. denied*, 516 U.S. 1010 (1995) (stating that ambiguous check legends did not transfer copyright in certain paintings)).

[107] *Id.* at 810-11. The court relied on section 204(a) of the Act, which provides that a transfer of copyright ownership is not valid in the absence of a clear, signed writing. *Id.* at 810. Additionally, the court recognized that the "terms of any writing purporting to transfer copyright interests, even a one-line pro forma statement, must be clear." *Id.* (citing Papa's-June Music, Inc. v. McLean, 921 F. Supp. 1154, 1158-59 (S.D.N.Y. 1996)). *See also* Dale M. Cendali & Ramon E. Reyes, *Freelancers Reeling in Fight Over Online Rights. Unless Congress Takes Action, Authors May Be Denied Pay for Electronic Publishing Rights*, NAT'L L.J., Oct. 20, 1997, at C2 (recognizing that electronic

distribution on "electronic library archives" was not clear enough to warrant an express transfer of electronic rights.[108] In particular, the court noted that Newsday Inc. maintained its own non-commercial "electronic library archive," and therefore, it was possible for the freelancers to have concluded that the publication was referring to such an archive, and not a service such as LEXIS-NEXIS.[109] Thus, the court concluded that Newsday Inc.'s understanding of the transfer of electronic rights was not an understanding similarly held by the freelancers.[110]

Additionally, the court held that the contract between Whitford and Time Inc. regarding publication in *Sports Illustrated*, was not an express grant of electronic rights.[111] By using the temporally limited phrase "first to publish," Time Inc. could not use the contract to publish the article a second time in electronic media.[112] The *Tasini* court recognized that Whitford's article was "first" published in print and published again in electronic media 45 days after the print publication.[113] Therefore, the court concluded that the later electronic publication "cannot have been first."[114] Time Inc. was precluded by its contract's language from utilizing Whitford's electronic rights in his article.[115]

The *Tasini* court properly analyzed the contracts used by *Newsday* and *Sports Illustrated*. The freelancers, in their dealings with *Newsday* and *Sports Illustrated*, did not expressly transfer electronic rights to the publications.[116] The freelancers dealing with *Newsday* did not have the opportunity to evaluate the check's language and consent to the transfer of electronic rights, because

---

rights contracts should be clear as to which rights are being transferred).

[108] *Tasini*, 972 F. Supp. at 810-11.

[109] *Id.* at 811. More specifically, an "interpretation of 'electronic library archives' does not encompass" publication onto LEXIS-NEXIS. *Id.*

[110] *Id.* The court found no evidence that the authors "understood, or should have understood," that the language of the check legends intended rights extending as far as LEXIS-NEXIS publication. *Id.*

[111] *Id.* at 812.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

the publication already sent their articles to LEXIS-NEXIS by the time the authors received their checks.[117] Even if the freelance authors had reviewed the check endorsement, the plain language was too ambiguous to convey the transfer of electronic rights.[118] By applying this analysis to the *Sports Illustrated* contract, a clear reading of its language would lead an author to believe that the publication could publish her article only once, or more specifically "first," in the magazine.[119] By choosing a specific temporal limitation, the publisher limited its right to publish the freelancers' works in print, foreclosing all other mediums.

The *Tasini* court's analysis of these contracts illustrates that agreements purporting to transfer electronic rights must be clear, utilizing plain language identifying each transferred electronic right.[120] The contract drafter must also consider the potential future uses of the copyrighted material and then draft the contract broadly to cover such future uses.[121] Because the court held, absent an express agreement, that publishers may place articles only onto electronic databases, such as LEXIS-NEXIS and CD-ROMs,[122] precisely drawn contracts are necessary to address future publication in electronic technologies.[123] Consequently, it is imperative to outline the latest developments in contracting for electronic rights beyond on-line databases and CD-ROMs.

---

[117] *Id.* at 810; Cendali & Reyes, *supra* note 107, at C2.

[118] *See supra* text accompanying note 91 (providing the language of Newsday Inc.'s check endorsements).

[119] *See supra* note 94 (reciting the exact language of Time Inc's contract).

[120] The court determined that Newsday's check endorsement was unclear and ambiguous. *Tasini*, 972 F. Supp. at 811. Thus, in future contracts concerning electronic rights, publishers should use clear and unambiguous contracts that outline each electronic right to be transferred. *See also* Abramson, *supra* note 10, at 5 (advocating the use of clear and unambiguous contracts explicitly referring to which media is intended to be covered in the agreement).

[121] *See* Abramson, *supra* note 10, at 5.

[122] *Tasini*, 972 F. Supp. at 825.

[123] Abramson, *supra* note 10, at 5. In addition, publishers should continue to require express agreements covering electronic databases and CD-ROMs because *Tasini* could be reversed. Abramson, *supra* note 10, at 5.

B. Electronic Rights Contracts After Tasini

In the past, the publishing industry was notorious for not requiring written contracts with freelancers. But, the commencement of *Tasini* in 1993 compelled most publishers to replace their handshake agreements with contracts that explicitly addressed electronic rights.[124] In essence, market forces convinced publishers that electronic rights contracts are necessary regardless of the outcome of *Tasini*. Therefore, most publishers are now requiring one of three different types of electronic rights contracts.

Some publishers require "all-rights" contracts, which grant the publication the right to own all of freelancers' copyrights.[125] As the new target of freelancers in their battle against publishers,[126] these contracts are seen as an offensive attempt to "pre-empt the

---

[124] *See* McAllester, *supra* note 50, at A43 (noting the nationwide impact of *Tasini* as publications introduced contracts addressing electronic rights). Most publishers were advised by their counsel to use contracts which gave them the broadest rights possible, described as a grant of "all rights." Ianzito, *supra* note 15, at 15; *see infra* notes 125-132 and accompanying text (describing "all-rights" contracts).

[125] Kennedy & Dweck, *supra* note 36, at C17. After the commencement of *Tasini*, the New York Times Co. only accepts articles by freelancers on the written condition that the freelancer "surrender *all rights* in his or her creation." *Tasini*, 972 F. Supp. at 807 n.2 (emphasis added). Publishers that use "all-rights" contracts contend that it is difficult to place a precise value on electronic rights for many nonfiction works that appear in newspapers and magazines. Thus, by obtaining "all-rights" publishers do not have to predict values for each article contained in their publication. Landry, *supra* note 29, at 628 (statement of Sean McLaughlin, Vice President of Public Relations for *Harper's Magazine*). It is accepted that the potential economic value of a work is difficult to predict. In fact, this uncertainty is a reason that *Harper's Magazine* used a 50/50 royalty split, rather than paying authors a one-time fee. Landry, *supra* note 29, at 628 (statement of Sean McLaughlin, Vice President of Public Relations for *Harper's Magazine*). *See infra* notes 139-140 and accompanying text (describing *Harper's Magazine*'s electronic rights contract that compensates authors); *infra* Part II.C, supporting the use of payment contracts that share revenues, such as the one used by *Harper's Magazine*.

[126] *See* Lohr, *Freelancers Lose Test Case*, *supra* note 5, at D18 (quoting Jonathan Tasini, "[e]ven if we won [in *Tasini*] we would still be fighting [the use of] all-rights contracts").

on-line rights debate."[127] By using all-rights contracts, publishers obtain the greatest control over freelancers' creations at the lowest price.[128] For example, a *Boston Globe* all-rights contract reads: "The *Boston Globe* shall own *all rights*, including copyright, in your articles and may reuse them with no additional payment being made to you."[129] Other all-rights contracts are similarly pointed, with language granting publishers the right to use freelancers' articles "in any format or media whether now known or later devised."[130] Ultimately, freelancers must choose between signing the agreement and receiving a paycheck or asserting their rights and going hungry.[131] That these two choices sit at such extremes

---

[127] Lohr, *Freelancers Lose Test Case*, *supra* note 5, at D18. *See* Safran, *supra* note 8, at 51 (stating that Conde Nast's "all-rights" contract is "the contract from hell" because it demands virtually everything "except the freelancers' firstborn").

[128] Kennedy & Dweck, *supra* note 36, at C17; Landry, *supra* note 29, at 613 (statement of Dan Carlinsky, Vice President and Chair of the Contracts Committee for the American Society of Journalists and Authors) (recognizing that obtaining all electronic rights is most favorable to publishers for two reasons: "[n]o bookkeeping or follow-up is needed, and they get to keep all the proceeds").

[129] Ianzito, *supra* note 15, at 15 (emphasis added). Contracts with similar language are currently being used by the New York Times Co., Scholastic Inc., and some Hearst magazines. Ianzito, *supra* note 15, at 15.

[130] Kennedy & Dweck, *supra* note 36, at C17 (quoting Nan Levinson and Donna Demac, *The Cutting Edge: New Media Bring New Problems to Copyright Arena; Publishing: A Civil War is Brewing Over Compensation for Electronic Use of Print Material*, L.A. TIMES, Sept. 2, 1996, at D1). This contract language has been accepted by some courts. Other courts, however, have concluded that the "meeting of the minds" contract theory reflected in this language only conveys the future uses or technologies that the contracting parties contemplated at the time they entered the agreement. Landry, *supra* note 29, at 610 (statement of Stephen B. Davis, Esq., Vice President of Strategic & Legal Affairs for the Corbis Corporation). A few "all-rights" contracts use even broader language in granting to the publisher "full economic benefit of the work in perpetuity." Landry, *supra* note 29, at 617 (statement of Alex Alben, Esq., Director of Business Affairs and General Counsel of the Starwave Corporation).

[131] *See* Ianzito, *supra* note 15, at 15.

illustrates the freelancers' lack of contract bargaining power with publishers.[132]

Publishers also use "time period" contracts, which secure exclusive copyrights for a given period of time.[133] Under such contracts, the publication may reproduce a work on-line or in any other form, or sell it to a news service or electronic database, without paying the writer for these republications.[134] However, all rights to the article return to the writer after the specified time period.[135] For example, the *Village Voice* requires the use of a time period contract that grants the publication all-rights to the freelancer's work for a thirty-day period after publication.[136] Some *Village Voice* freelancers were displeased with this contract, but signed it knowing that this agreement was better than the all-rights contracts used by other publications.[137]

The last type of electronic rights contracts used by some publishers are "payment contracts," which grant freelancers compensation for past, present and future royalties from electronic uses.[138] The first magazine to use this type of contract and to pay

---

[132] Landry, *supra* note 29, at 615 (statement of Kenneth A. Richieri, Esq., Assistant General Counsel for the New York Times Co.) (recognizing that the bargaining power between publishers and authors can be widely disparate).

[133] McAllester, *supra* note 50, at A43.

[134] McAllester, *supra* note 50, at A43.

[135] McAllester, *supra* note 50, at A43.

[136] McAllester, *supra* note 50, at A43. The actual time period for the *Village Voice* contract is 37 days because the paper is dated a week in advance of its true publication date. McAllester, *supra* note 50, at A43.

[137] There were about 50 regular *Village Voice* freelancers who refused to sign the contract and thus sought work elsewhere. McAllester, *supra* note 50, at A43. Also, over 30 staff writers and editors signed a letter to the *Village Voice*'s Managing Editor to show their support for the freelancers. McAllester, *supra* note 50, at A43. But, some freelancers ultimately signed the contract. McAllester, *supra* note 50, at A43. For example, freelance author Laurie Stone stated that she felt "crummy" about signing the contract but had to because her livelihood hung in the balance. McAllester, *supra* note 50, at A43.

[138] Kennedy & Dweck, *supra* note 36, at C17. *See* Landry, *supra* note 29, at 613 (statement of Dan Carlinsky, Vice President and Chair of the Contracts Committee of the American Society of Journalists and Authors, predicting that there will be a trend towards paying freelancers for electronic rights).

freelancers a share of electronic revenues was *Harper's Magazine*.[139] The publication pays writers fifty percent of the revenues received from distributing the work on CD-ROMs, and on-line.[140] Other periodicals such as the *Nation*, *Science*, *MIT's Technology Review*, *American Health* and *Women's Day* have adopted similar payment contracts.[141] These contracts have received a great deal of acclaim from freelancers, their unions and trade organizations.[142]

C. *The Solution: Payment Contracts*

Payment contracts are the best solution in the battle over electronic rights because they serve the interests of freelancers, publishers and society.[143] By using payment contracts,

---

[139] Landry, *supra* note 29, at 607 (statement of Sean McLaughlin, Vice President of Public Relations for *Harper's Magazine*). *Harper's Magazine*'s original contract provided: "exclusive rights . . . to reproduce the Article, in whole or in part, by electronic, mechanical, or any other form of copying, now known or hereafter discovered." Landry, *supra* note 29, at 607. The contract did not refer to the sharing of electronic rights but the publication did share electronic revenues with freelancers. Landry, *supra* note 29, at 607. For the sake of clarity, the publication decided to modify the contract to explicitly address the sharing of electronic revenues. Landry, *supra* note 29, at 607.

The current *Harper's Magazine*'s contract reads: the publisher has "[n]on-exclusive rights, for the full term of the Article's copyright, to sublicense for use in electronic databases. We shall divide the proceeds therefrom equally with you, payable through the Authors Registry, Inc." Landry, *supra* note 29, at 607 n.3.

[140] Landry, *supra* note 29, at 607 (statement of Sean McLaughlin, Vice President of Public Relations for *Harper's Magazine*). As of 1996, *Harper's Magazine*'s revenues from electronic distribution have been extremely small, representing less annually than the publication receives from photocopying rights. Landry, *supra* note 29, at 635 (statement of Sean McLaughlin, Vice President of Public Relations for *Harper's Magazine*).

[141] Safran, *supra* note 8, at 51.

[142] Payment contracts are supported by the Authors Guild, the American Society of Journalists and Authors and the National Writers Union. Landry, *supra* note 29, at 615 (statement of Sean McLaughlin, Vice President of Public Relations for *Harper's Magazine*).

[143] If publishers choose to use payment contracts, then payment can be made to freelancers through the Authors Registry, Inc., a non-profit writers' organization that is endorsed by 30 writers' groups and 95 literary agencies and

publications will attract the best freelancers.[144] As more publications pay authors for electronic rights, other publications utilizing all-rights contracts will lose their best contributors and, as

---

has over 50,000 members. Landry, *supra* note 29, at 642 (statement of Dan Carlinsky, Vice President and Chair of the Contracts Committee of the American Society of Journalists and Authors); *see supra* note 139 (providing the language of *Harper's Magazine*'s payment contract which authorizes payment via the Authors Registry). Also available is the Publication Rights Clearinghouse established by NWU which collects and distributes fees for more than 60,000 writers. *Authors Registry Helps Publishers Distribute Electronic Usage Fees,* NEW MEDIA WEEK, Mar. 31, 1997, *available in* 1997 WL 7968678 [hereinafter *Authors Registry Helps Publishers*].

The Authors Registry was founded in 1995 by the American Society of Journalists & Authors, the Authors Guild, the Dramatist Guild and the Association of Authors Representatives, to act as a collection and distribution agent. *Id.* In order to participate in the free program, interested publishers simply send the organization a list of authors to be compensated and a lump sum of money to be split among the writers. *Id.* The organization uses their database of more than 50,000 registered authors and then mails checks to authors for electronic database usage and photocopying licensing fees. *Id.* By simplifying the distribution of electronic usage fees and taking care of the administrative work, the Authors Registry is hoping to entice more publishers to pay authors appropriate royalties and fees. *Id.* The Authors Registry handles the distribution of electronic royalties for *Harper's Magazine. Id.* According to Sean McLaughlin, Vice President of Public Relations for *Harper's Magazine*, the system has made revenue-sharing very feasible from an administrative point of view because the publisher does not have to cut hundreds of checks for small amounts itself. Landry, *supra* note 29, at 642 (statement of Sean McLaughlin, Vice President of Public Relations for *Harper's Magazine*). In fact, *Harper's Magazine* estimates that the Authors Registry has saved the publication approximately $15,000 to $20,000 per year. *Authors Registry Helps Publishers, supra.*

See Landry, *supra* note 29, at 643 (statement of Gary F. Roth, Senior Legal Counsel for Broadcast Music Inc., opining that collecting societies and licensing agencies will be extremely important in the electronic rights future); Landry, *supra* note 29, at 644 (statement of Stephen B. Davis, Esq., Vice President of Strategic & Legal Affairs for the Corbis Corporation, recognizing the increased use of collecting societies and licensing agencies as a positive development). *But see* Rosenzweig, *supra* note 3, at 922 & n.108 (predicting that licensing systems will increase transaction costs for publishers and then be passed on as higher costs to consumers).

[144] *See* Landry, *supra* note 29, at 615 (statement of Sean McLaughlin, Vice President of Public Relations for *Harper's Magazine*).

a result, their intrinsic value.[145] Soon, the most sought after freelancers will only write for the publications which pay for electronic rights.[146] In the end, the value of publications using all-rights and time period contracts will decrease as they publish articles from second-rate freelancers.[147] These market forces will convince publishers that good publishing is a collaboration between press owners and writers. Additionally, payment contracts are preferred by freelancers because they involve payment for and recognition of their electronic rights.[148] The use of such contracts may improve freelancers' morale and work product because they are less likely to feel exploited.[149] Therefore, it is in the best interest of publishers to adopt contracts which equitably compensate freelancers and promote good working relationships.[150]

The publishers' argument against payment contracts is not persuasive. Publishers contend that they are not making profits from electronic media, and thus, cannot pay freelancers.[151] But, publishers have always had to pay freelancers for print publication regardless of whether their print periodical was making money. As

---

[145] Safran, *supra* note 8, at 51. In fact, the quality of mainstream magazines has already deteriorated with shorter and less creative stories. *See* Voboril, *supra* note 42, at 23 (characterizing magazines as "dumbing down").

[146] *See* Safran, *supra* note 8, at 51 (recognizing that freelancers consider publishers to be more "writer-friendly" if they offer contracts that pay for electronic rights).

[147] Safran, *supra* note 8, at 51. This is particularly true because some publishers are paying freelancers for electronic rights and the best freelancers will seek such publications. *See supra* notes 138-142 and accompanying text (describing electronic rights contracts that compensate freelancers for publication onto electronic media).

[148] Landry, *supra* note 29, at 615.

[149] *See supra* text accompanying notes 43-48 (describing the current morale of freelancers and their circumstances as "modern day sweatshop workers").

[150] Landry, *supra* note 29, at 615 (statement of Sean McLaughlin, Vice President of Public Relations for *Harper's Magazine*, opining that taking electronic rights without compensation is "not worth the animosity and bad publicity").

[151] Landry, *supra* note 29, at 629 (statement of Dan Carlinsky, Vice President and Chair, Contracts Committee for American Society of Journalists and Authors).

with any investment, publishers have to spend money on the new electronic media ventures in order to make profits.[152]

The all-rights and time period contracts presently being used by publishers do not serve the best interests of freelancers, publishers or society. The contracts simply allow publishers the greatest possible control over freelancers' creative expression without equitable compensation.[153] On their face, time period contracts are no better than all-rights contracts.[154] The time period contract does not use harsh words like "all-rights," "work for hire," or "copyright."[155] But, the contract can have the same effect as if those words were contained in its provisions.[156] Practically speaking, within thirty days after publication, the publisher will sell its periodical, newspaper or magazine to electronic databases or other services because it wants its information available on-line as soon as possible.[157] After the contract's specified time period, freelance authors regain their rights and can sell their works.[158] But by this point the copyrights have been stripped of their economic value because any interested party can obtain the article via LEXIS-NEXIS, a Web site or other on-line service within and beyond the initial specified time period of the contract.[159] In the end, the freelance authors receive rights worth nothing.

---

[152] *See supra* notes 54-58 and accompanying text (detailing publishers' investment strategies).

[153] Freelancers are offended by such contracts which extract rights from them as if they were full-time employees, while providing the freelancer with none of the benefits of full-time employment. Landry, *supra* note 29, at 613 (statement of Dan Carlinsky, Vice President and Chair of the Contracts Committee of the American Society of Journalists and Authors); *see supra* text accompanying note 48 (describing freelancers' lack of benefits).

[154] McAllester, *supra* note 50, at A43.

[155] McAllester, *supra* note 50, at A43.

[156] McAllester, *supra* note 50, at A43.

[157] McAllester, *supra* note 50, at A43.

[158] McAllester, *supra* note 50, at A43.

[159] *See* Landry, *supra* note 29, at 628 (quoting Kenneth A. Richieri, counsel for the New York Times Co., that the first ninety days after publication yield the most economic value in a news article).

It is also in the best interest of society to adequately compensate freelancers for the electronic publication of their creations.[160] According to the United States Constitution, copyright must "promote the Progress of Science and useful Arts."[161] It will be difficult for society to "promote" science and the arts if the creators' creations are being exploited.[162] Without compensation, many freelance authors will no longer write.[163] Therefore, many of our nation's most talented writers' thoughts and ideas will never grace the pages of newspapers, journals and magazines. Freelancers are important to society because they provide readers with expert information and insight about particular topics that may not otherwise be provided by a periodicals' full-time staff.[164] As a result, all of society is deprived of freelancers' valuable creative and independent expression. This result certainly does not promote science or art. Therefore, protecting the creative works of freelance authors through the use of contracts providing for equitable compensation is socially imperative.

---

[160] Landry, *supra* note 29, at 660 (statement of Jeffrey D. Smith, Executive Director of Contact Press Images, recognizing that creativity must be respected and paid for because our tremendous copyright industry hangs in the balance).

[161] U.S. CONST. art. I, § 8, cl. 8. This argument assumes that journalism is a "useful art" under the definition of the United States Constitution. Ianzito, *supra* note 15, at 15.

[162] Ianzito, *supra* note 15, at 15 (stating that nonpayment for electronic rights may be characterized as a constitutional issue).

[163] *See* Landry, *supra* note 29, at 659 (statement of Dan Carlinsky, Vice President and Chair, Contracts Committee for American Society of Journalists and Authors, predicting that without economic incentive, writers will not write and much of what Americans read will not be written); Leaffer, *supra* note 1, at 5 (quoting Samuel Johnson that no person "but a blockhead would write except for money").

[164] *See* Landry, *supra* note 29, at 615 (statement of Sean McLaughlin, Vice President of Public Relations for *Harper's Magazine*, recognizing that freelance contributors are extremely important to large consumer publications); Voboril, *supra* note 42, at 23 (stating that freelancers are more specialized writers). Typically, freelance authors only write about their particular area of expertise. Telephone Interview with Jennifer Harris, a freelance author (Nov. 1, 1997). For example, a women's magazine may want an article on financial planning and obtain submissions from finance freelancers. Most staff writers are either general writers or have one particular specialized column. *Id.*

Additionally, if publishers, owned by media conglomerates, are granted all copyrights, then they will control creative expression and may only disseminate the articles when it is profitable or otherwise in their best interests to do so.[165] As a result, society will be injured as a few corporations ultimately decide what creations society reads, hears, watches and learns.[166] Yet, in order to fulfill its Constitutional purpose, "copyright law should strive to make the information contained in protected works of authorship freely available" to society.[167] It is widely accepted that the proper allocation of resources with regard to electronic media is one which promotes the public's wider access to the information, not limits it according to the strategies of media conglomerates.[168]

---

[165] Some have characterized this ownership and control of ideas by a few corporations as a civil liberties issue. Ianzito, *supra* note 15, at 15. More specifically, freelancers no longer have the freedom to decide how to use their work, to protect their work or to profit from it. Ianzito, *supra* note 15, at 15. *See also* Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217, 270 (1998) (characterizing media conglomerate control over copyrighted material as private censorship).

[166] This is especially important considering that cable, telephone, computing, entertainment, consumer electronics and publishing industries merge into a few conglomerates. Betsy Streisand and William Holstein, *It's a Divisive World After All. Under Attack, Disney Struggles to Preserve its Wholesome Image*, U.S. NEWS & WORLD REP., July 14, 1997, at 4546. For example, the Walt Disney empire owns the following businesses: Miramax Films, Touchstone Pictures, Buena Vista Home Video, Hollywood Records, Wonderland Music, *Los Angeles Magazine*, *Women's Wear Daily*, *Institutional Investor*, the *Kansas City Star*, Hyperion Press, ABC Entertainment, ESPN, Lifetime Channel, Disney Channel, Arts and Entertainment Network, KABC Radio, Anaheim Angels baseball team, Mighty Ducks hockey team, Celebration Real Estate Corp., UNOCO, Reedy Creek Energy Services, Vista Insurance Services and, of course, theme parks. *Id.* Viacom, Inc. is the owner of a large number of significant copyrights including Paramount's films, hundreds of television shows and approximately 400,000 books from Simon and Schuster. Jaquet, *supra* note 54, at 10.

[167] Rosenzweig, *supra* note 3, at 921 n.105 (quoting INFORMATION INFRASTRUCTURE TASK FORCE, U.S. DEP'T OF COMMERCE, PRELIMINARY DRAFT OF THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS § IV(5) (1994)).

[168] Conversely, economic theorists William Landes and Richard Posner advocate that copyright law must promote an efficient allocation of resources. Rosenzweig, *supra* note 3, at 921-23. Landes and Posner support vesting

Decisions about how and to what extent a creative work should be made available to the public, in whatever medium, should always remain with the creator.

III. *TASINI*: ANALYSIS OF COPYRIGHT ACT OF 1976

Tasini was a case of first impression for any court, addressing whether section 201(c) of the Act[169] allowed publishers to distribute freelancers' articles onto electronic media absent any express agreement.[170] The plaintiff freelancers contended that such electronic republication was not warranted under section 201(c), and therefore, the publishers infringed upon their copyright.[171] In response, the defendant publishers argued that section 201(c) allowed them the right to reproduce the freelancers' articles in electronic revisions of their newspapers and magazines which does not "usurp [freelancers'] rights in their individual articles."[172] Summary judgment was granted in favor of the publishers.[173]

---

electronic rights in those entities in the best position to develop new technologies with smaller transaction costs. Rosenzweig, *supra* note 3, at 921-23. Thus, they conclude that the publisher rather than the author should retain the copyright to promote electronic technologies efficiently. Rosenzweig, *supra* note 3, at 921-23.

[169] 17 U.S.C. § 201(c) (1994). *See supra* note 18 (providing the full text of section 201(c)).

[170] 972 F. Supp. 804, 812 (S.D.N.Y.), *reconsideration denied*, 981 F. Supp. 841 (S.D.N.Y. 1997), *and appeal docketed*, No. 97-9181 (2d Cir. Sept. 23, 1997). The court stated that there was "no case law parsing the terms of Section 201(c)" or "elucidating the relationship between that provision and modern electronic technologies." *Id. See also* Wendy R. Leibowitz, *Revising Copyrights and Wrongs: New Media as Copying Machines*, 20 NAT'L L.J., Sept. 1, 1997, at B9 (recognizing that *Tasini* was the first case to interpret section 201(c)).

[171] *Tasini*, 972 F. Supp. at 806. In a copyright infringement action, "two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991).

[172] *Tasini*, 972 F. Supp. at 809.

[173] *Id.* at 806.

A. Tasini's Analysis of Section 201(c)

Absent any express written agreement, section 201(c) grants certain privileges to the creator of a collective work.[174] A collective work consists of a number of original contributions, "each constituting separate and independent works in themselves," that are assembled into a collective whole.[175] The *Tasini* court recognized that the Act provides copyright protection for *both* the smaller independent original contributions and the larger work.[176] The *Tasini* court did not have to determine whether the publications constituted collective works because all of the parties were in agreement.[177]

Section 201(c) provides that the "[c]opyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution."[178] In interpreting this language, the *Tasini* court noted that if the section only contained this first sentence, the freelancers would prevail because the publishers would not be able to reuse the individual contributions in the new collective works.[179] The court focused on the second sentence of section 201(c) which extends certain privileges to the publishers.[180] Specifically, the second sentence provides for "the *privilege* of reproducing and distributing the contribution as part of that collective work, *any revision* of that collective work, and any later collective work in the same series."[181] The *Tasini* court recognized that the publishers were operating "within the scope of their *privilege* to 'reproduce' and 'distribute' plaintiffs' articles in 'revised' versions of [the publishers'] collective works, [and that]

---

[174] 17 U.S.C. § 201(c). *See supra* note 18 (reciting the text of section 201(c)).

[175] 17 U.S.C. § 101 (1994).

[176] *Tasini*, 972 F. Supp. at 812 (emphasis added).

[177] *Id.* at 809.

[178] 17 U.S.C. § 201(c).

[179] *Tasini*, 972 F. Supp. at 814.

[180] *Id.*

[181] *Id.* (quoting 17 U.S.C. § 201(c) (emphasis added)).

any incidental display of those individual contributions is permissible."[182]

Therefore, the determinative issue before the court, under section 201(c), was the scope of the revision privilege.[183] More specifically, the *Tasini* court had to determine whether the reproduction of publications onto electronic media was the same as the original publications or slightly revised versions of the originals.[184] If either situation exists, then the publishers have electronic reproduction rights.[185] The court held that reproduction onto electronic databases constituted slightly revised versions of the original publications, and thus, was within the publishers' section 201(c) revision privilege.[186]

The freelancers' contended that the publishers, as owners of the copyright in their collective work, committed infringement when authorizing LEXIS-NEXIS and UMI Company to revise their collective works.[187] In essence, it was claimed that the publishers exceeded their section 201(c) privilege and exploited the freelancers' individual articles.[188] The freelancers argued that reproduction and distribution privileges within section 201(c) only extend to the publishers' narrow nonexclusive and nontransferable licenses.[189] The freelance authors' understanding of privileges derives from a reading of section 201(c) in light of section 201(d).[190] Section 201(d)(2) provides that "[a]ny of the exclusive

---

[182] *Id.* (emphasis added).

[183] *Id.* at 814.

[184] Cendali & Reyes, *supra* note 107, at C2.

[185] Cendali & Reyes, *supra* note 107, at C2.

[186] *Tasini*, 972 F. Supp. at 825.

[187] *Id.* at 815.

[188] *Id.* at 809.

[189] *Id.*

[190] Section 201(d)(1) provides: "[t]he ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law." 17 U.S.C. § 201(d)(1) (1994).

Section 201(d)(2) provides:

> Any of the exclusive *rights* comprised in a copyright, including any *subdivision* of any of the *rights* . . . may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive *right* is entitled, to the extent of that *right*, to all of the protection and

rights comprised in a copyright, including any subdivision of any of the rights . . . may be transferred."[191] According to the freelancers, section 201(d)(2) provides only for the transfer of "rights" and not "privileges."[192] Thus, the publisher's reproduction and distribution privileges were not transferable to the electronic media defendants.[193]

In rejecting the freelancers' contention, the *Tasini* court concluded that section 201(c) privileges are transferable.[194] The court established its own interpretation of the relationship between sections 201(c) and 201(d).[195] According to the court, section 201(c) transferred the freelancers' copyrights, "in part," to the publications, permissibly under section 201(d)(1) which allows transfer by conveyance or by operation of law.[196] Consequently, under section 201(d)(2),[197] the publishers had full authority over the "subdivision" of rights they acquired.[198] The court then stated that the term "privilege" is used in section 201(c) to establish that the publishers have "only limited rights in the individual contributions making up their collective works."[199] Additionally, the court

---

remedies accorded to the copyright owner by this title.

17 U.S.C. § 201(d)(2) (1994) (emphasis added).

[191] 17 U.S.C. § 201(d)(2).

[192] *Tasini*, 972 F. Supp. at 815. *See supra* note 190 (reciting the language of section 201(d)(2) that speaks of "rights" not "privileges").

[193] *Tasini*, 972 F. Supp. at 815.

[194] *Id.*

[195] *Id.*

[196] *Id.* The first clause of section 201(d) reads, the "[t]he ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law." 17 U.S.C. § 201(d)(1) (1994).

[197] Section 201(d)(2) provides that:

> Any of the exclusive *rights* comprised in a copyright, including any *subdivision* of any of the *rights* specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive *right* is entitled, to the extent of that *right*, to all of the protection and remedies accorded to the copyright owner by this title.

17 U.S.C. § 201(d)(2) (emphasis added).

[198] *Tasini*, 972 F. Supp. at 815. The court noted that section 201(d)(2) refers to both "rights" and the "subdivision" of rights. *Id.*

[199] *Id.* at 816.

noted that a "privilege is transferable; a reproduction can occur in any medium; and 'any revision' might include a major revision."[200] Therefore, if the electronic reproductions constitute revisions under section 201(c), then the publishers were entitled to authorize LEXIS-NEXIS and UMI Company to create those revisions.[201]

The freelancers introduced several arguments in support of their proposition that the framers of section 201(c) intended to limit publishers to revising and reproducing their articles in the same medium in which those collective works first appeared.[202] First, section 201(c) does not provide an express grant allowing "display rights" among publishers' privileges.[203] The freelancers contended that because an electronic work cannot be reproduced unless it is displayed on a computer screen, section 201(c) was not intended for such actions.[204] In rejecting this argument, the court concluded that "reproduction" rights under section 201(c) include displaying the work on computers.[205] Second, the freelancers relied on legislative history which articulated examples of acceptable revisions, thereby showing congressional intent to limit revisions to the same medium.[206] The court rejected this argument and

---

[200] *Id.* at 820.

[201] *Id.* at 816.

[202] *Id.*

[203] *Id.*

[204] *Id.* The freelance authors relied on section 106 of the Copyright Act which lists five exclusive rights constituting a copyright, including the right to "reproduce the copyrighted work in copies or phonorecords" and the right to "display the copyrighted work publicly." 17 U.S.C. § 106(1) (1994). Section 201(c) explicitly refers to "reproduction" rights. 17 U.S.C. § 201(c). The authors argued that because section 201(c) does not refer to "display" rights the publishers are not entitled to such rights. *Tasini*, 972 F. Supp. at 816.

[205] *Tasini*, 972 F. Supp. at 816. The court noted that "reproduction" is not defined in the Act. *Id.* Section 106 states that reproductions result in copies which are defined in section 101 as "material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a *machine or device*." 17 U.S.C. § 101 (emphasis added); 17 U.S.C. § 106.

[206] Cendali & Reyes, *supra* note 107, at C2. The authors relied on legislative history showing the reluctance of Congress to delve into the realm of computer

concluded that legislative history supports a medium neutral Copyright Act that is presumed to "encompass all variety of developing technologies."[207] Lastly, the freelancers strongly argued that the "plain meaning" of the term "revision" is inconsistent with allowing works on different media.[208] According to the freelance authors, a "revision" must be "nearly identical to [the] original," and therefore, within the same medium.[209] In rejecting this argument, the court stated that section 201(c) allows a "revision" to "alter a preexisting work by a sufficient degree to give rise to a new original creation."[210]

However, the *Tasini* court did impose a limitation on publishers that only allowed reproduction of the freelancers' individual articles "'as part of' a revised version of 'that collective work' in which the article originally appeared."[211] In order to be characterized as a revision of "that collective work," the court stated that the new work must be a recognizable version of the original collective work.[212] Consequently, if the publisher maintains "some significant original aspect" of the original work, then a recognizable version has been created and section 201(c) is satisfied.[213] The *Tasini* court reasoned that Congress' intent was to prohibit publishers from altering the *contents* of individual articles, while permitting publishers the latitude to create "any revision" of their

---

technologies. *Tasini*, 972 F. Supp. at 817. This led to their assertion that section 201(c) was not intended to vest electronic (computer) rights in publishers. *Id.*

[207] *Tasini*, 972 F. Supp. at 818. The court relied on congressional hearing testimony showing that the Copyright Act was created with the goal of media neutrality. *Id.* (relying on *Copyright Law Revision: Hearing on H.R. 4347, 5680, 6831, 6835 Before Subcommittee No. 3 of the House Committee on the Judiciary*, 89th Cong., 57 (1965) (testimony of George D. Cary, Deputy Register of Copyrights)). This evidence showed that Congress adopted broad language so that the Act could adapt to advancing media technology, including computers. *Id.*

[208] *Id.* at 819.

[209] *Id.* The freelancers did not rely on case law to support their plain meaning argument. Instead, the freelance authors presumed such an interpretation. *Id.*

[210] *Id.* (citing 17 U.S.C. § 101).

[211] *Id.* at 820 (quoting 17 U.S.C. § 201(c)).

[212] *Id.* (quoting 17 U.S.C. § 201(c)).

[213] *Id.* at 821.

collective works.[214] Thus, a publisher could not revise an individual article in a collective work but could reproduce the article intact in any revision of the collective work.[215]

In order to determine whether the republication contains "some significant original aspect" of the original work, the court adopted a two-step analysis.[216] The first step is to identify the original distinguishing characteristics of the collective work.[217] The second step is to determine if these characteristics are preserved onto the electronic media.[218] If these characteristics are not preserved in the resulting work, then it cannot be considered a "revision" under section 201(c).[219] The court applied this two-step test to the publications in *Tasini* and found that a "defining" original characteristic of the publications was the selection of the articles to be included in the newspapers and magazines.[220] This characteristic was preserved in the electronic version, as the articles originally selected by the publications were placed on LEXIS-NEXIS and CD-ROMs.[221] Therefore, the republication onto the electronic technologies retained enough original characteristics from the print publication to be deemed "revisions."[222]

---

[214] *Id.* at 819 (emphasis added). The court noted that it was "possible to revise a collective work by changing the original whole of that work without altering the content of the individual contributions to that work." *Id.* at 820 (citing 17 U.S.C. § 201(b) (1994)).

[215] For example, according to the court, a publisher could not place a freelancer's article in "new anthologies" or in different magazines or newspapers. *Id.* at 821.

[216] Cendali & Reyes, *supra* note 107, at C2 (recognizing the court's analysis as two distinct steps). The court modeled their two step approach after the analysis commonly used in copyright infringement actions "brought by creators of factual compilations." *Tasini*, 972 F. Supp. at 821-22.

[217] *Tasini*, 972 F. Supp. at 821-22.

[218] *Id.*

[219] *Id.* at 822. The authors argued that the electronic versions "'remove[d] everything that constitute[d] the originality.'" *Id.* at 821.

[220] *Id.* The court concluded that the creators of the collective works (the publishers) demonstrated a high level of creativity in selecting and arranging the authors' articles. *Id.*

[221] *Id.* at 823 n.13.

[222] *Id.* at 824.

B. It Is More Than A Revision

Although the court was correct in its concern about the express transfer of electronic rights,[223] the court wrongly interpreted "revision" under section 201(c).[224] The republication onto electronic databases and CD-ROM products constitutes more than a revision. The court's reasoning is flawed for two reasons.

First, the *Tasini* court should have practically considered how electronic databases, like LEXIS-NEXIS and CD-ROMs, are used by their subscribers.[225] The subscriber enters a topic query in order to get information about some topic. The query search results in a number of "hits" or relevant articles about the topic. The subscriber knowingly accessed electronic databases in search of a list of articles pertaining to a certain topic; very rarely does the subscriber seek an entire collective work on the screen.[226] Also, LEXIS-NEXIS subscribers are generally researchers who are trying to get as much information as possible about a particular topic; they are not trying to get information on an entire publication.[227] Electronic database users then have the option to download[228] or

---

[223] *See supra* Part II.A, discussing the court's analysis of the contracts used in *Tasini*.

[224] Additionally, in the absence of contracts regarding future electronic media, courts should consider policy issues surrounding the fairness of granting such rights to one party. Rosenzweig, *supra* note 3, at 927. *See supra* notes 165-168 and accompanying text (analyzing the policy implications of granting electronic rights to the publishers).

[225] *See supra* note 5 (describing the LEXIS-NEXIS service).

[226] *See* Abramson, *supra* note 10, at 5 (stating that users search larger databases to retrieve individual articles); Leibowitz, *supra* note 170, at B9 (emphasizing that people usually enter electronic data bases to access individual articles).

[227] *See* Abramson, *supra* note 10, at 5 (stating that researchers seek individual articles, not entire publications); Cavaliere, *supra* note 5, at 66 (noting that many LEXIS-NEXIS subscribers are researchers).

[228] When a subscriber "downloads," information is transferred from the electronic data base to the subscriber's own computer. Ballon, *supra* note 59, at 568.

print information from the electronic database.[229] It is not cost effective for a subscriber to download or print an entire periodical because they are charged per line downloaded or printed.[230] Therefore, it is unlikely that a subscriber would use LEXIS-NEXIS or CD-ROM products to obtain full periodicals when the on-line cost is much greater than purchasing the print publication.[231]

In allowing the freelancers' articles to be placed onto electronic databases without their consent,[232] the *Tasini* court increased the probability that the works will be altered.[233] The court concluded that Congress enacted the Act to prevent publishers from altering the creations of authors.[234] This type of alteration, however, is the direct result of *Tasini*. By placing the freelancers' articles onto the electronic databases, the publishers have allowed subscribers to such databases to alter the authors' creations by downloading their articles, cutting and pasting their articles with other articles, graphics, sound or even the subscribers' own words.[235]

---

[229] Cavaliere, *supra* note 5, at 72; *see also supra* note 226 (recognizing that users print single articles).

[230] Cavaliere, *supra* note 5, at 72 (emphasizing the high cost of researching on LEXIS or Westlaw in comparison to the cost of researching on the Internet). There is an additional option to charge the subscriber based on the amount of time spent researching on-line. Cavaliere, *supra* note 5, at 72.

[231] Cavaliere, *supra* note 5, at 72.

[232] 972 F. Supp. 804, 825 (S.D.N.Y.), *reconsideration denied*, 981 F. Supp. 841 (S.D.N.Y. 1997), *and appeal docketed*, No. 97-9181 (2d Cir. Sept. 23, 1997).

[233] *But see supra* note 214 and accompanying text (noting the *Tasini* court's heed to the Act's intent to prevent authors' works from alteration).

[234] *Tasini*, 972 F. Supp. at 824. The *Tasini* court relied upon a law enacted in 1976 which is not current with the modern technological era. *Id.* at 827. The application of the Copyright Act to today's electronic information society raised doubts for the court. *Id.* Judge Sotomayor conceded that, in her opinion, current copyright law has not kept pace with today's technology. *Id.* The court stated that it "does not take lightly that its holding deprives plaintiffs of certain important economic benefits associated with their creations." *Id.* at 826. At the conclusion of the decision, Judge Sotomayor called for legislative action on the issue by noting that "Congress is of course free to revise that provision to achieve a more equitable result." *Id.*

[235] Leaffer, *supra* note 1, at 6 (recognizing that electronic users store, alter and transmit data); Leibowitz, *supra* note 170, at B9 (stating that electronic databases and CD-ROM products enable works to be "copied, circulated,

Ultimately, the court failed to protect the freelancers' individual articles from publishers who reproduce and distribute their articles onto media that so freely allow potential alteration.

Second, the *Tasini* court's analysis of section 201(c) fails because the revision of a collective work on an electronic database is not "a recognizable version of the original collective work."[236] It may be a recognizable version of individual articles, but not of the original magazine or newspaper.[237] The electronic databases in *Tasini* used a very distinct format from the formats used by the *New York Times*, *Newsday* and *Sports Illustrated*.[238] In fact, the electronic databases' format deleted a number of the original characteristics that make up the original collective work.[239] In this format, the freelancers' individual articles, with the exception of the General Periodicals CD-ROM created by electronic imaging,[240] are reduced to computer text files without the original print formatting.[241] Thus, the electronic databases do not contain any photographs, art, advertisements and other characteristics that readers associate with newspapers and magazines.[242] Also, data

---

plagiarized or infringed with little effort").

[236] *See supra* notes 211-222 and accompanying text (explaining the court's analysis of "revision" pursuant to section 201(c)).

[237] Leibowitz, *supra* note 170, at B9.

[238] Abramson, *supra* note 10, at 5 (explaining that the electronic databases strip the print formatting).

[239] Leibowitz, *supra* note 170, at B9 (noting that electronic versions do not contain photographs, art, graphics, advertisements and other characteristics contained in the original print publication).

[240] The General Periodicals OnDisc, which contains the *New York Times Sunday Magazine* and the *New York Times Book Review*, was created by electronic imaging. 972 F. Supp. 804, 808 (S.D.N.Y.), *reconsideration denied*, 981 F. Supp. 841 (S.D.N.Y. 1997), *and appeal docketed*, No. 97-9181 (2d Cir. Sept. 23, 1997). The General Periodicals OnDisc also contained other periodicals that were not involved in *Tasini*. *Id.* This disc was created by digital scanning and therefore the entire *Sunday Magazine* and *Book Review* appear precisely as they did in print with complete captions, photographs and advertisements. *Id.* at 808-09.

[241] *Tasini*, 972 F. Supp. at 808. *See* Abramson, *supra* note 10, at 5 (emphasizing that the publications were "stripped of their print formatting and any accompanying photos").

[242] Abramson, *supra* note 10, at 5.

identifying the freelance author, title and citation is inserted and appended to the text by the electronic database, not the collective work's creator.[243] All of the reformatting and selection of articles for the electronic databases are completed by the electronic media publishers, not the original print publishers.[244] Additionally, in most cases, the print publications are commingled within a larger database of other publications.[245] The selection of which publications are to be within a larger database is, again, decided by the creator of the electronic technology. This amounts to more than a slightly revised version of the original collective work. Therefore, under section 201(c), the publishers do not have the revision privilege to reproduce the freelancers' articles in electronic media.

C. *The Application of Tasini to the Internet*[246]

All parties in *Tasini* have agreed that the court's holding was narrow, and therefore, only applied to republication of freelancers' articles onto electronic databases, such as LEXIS-NEXIS and CD-ROMs.[247] But, new lawsuits may be brought to determine

---

[243] Abramson, *supra* note 10, at 5.

[244] Abramson, *supra* note 10, at 5 (recognizing that the reformatting and selection of articles for the electronic databases and CD-ROM products were done by LEXIS and UMI, not the *New York Times*, *Newsday* or *Sports Illustrated*).

[245] Abramson, *supra* note 10, at 5.

[246] *See supra* notes 12 & 62 (discussing the Internet).

[247] Freelancers stated after the trial that Judge Sotomayor supported them on an integral point by rejecting claims by publishers that freelancers had transferred all rights to their work, including the Web. *Frees*, *supra* note 8, at 31 (quoting Jonathan Tasini). After the decision was rendered, Bruce P. Keller, a lawyer representing the defendants, also admitted that the ruling did not determine copyright in all forms of electronic media. Lohr, *Freelancers Lose Test Case*, *supra* note 5, at D18. Yet, four days later, George Freeman, Assistant General Counsel for the New York Times Co., stated that he believed the court's decision extended to all electronic revisions, including publication onto the Web. *Court Decision Extends to Web:* N.Y. Times *Exec.*, MEDIA DAILY, Aug. 18, 1997, *available in* 1997 WL 7731327. It will be interesting to see if publishers, such as the New York Times Co., use *Tasini* as precedent in litigation involving republication onto the Web. Additionally, others have commented that the ruling in *Tasini* should not apply to the Internet because the suit was filed prior to the

whether section 201(c), absent freelance authors' consent, also allows republication onto other electronic technologies. Given the growing importance of on-line services for publications, electronic rights with respect to the Internet and the Web is the next likely controversy to arise between freelancers and publishers.[248] Revision rights under section 201(c) should not allow such electronic republication, just as they should not have been allowed by the court in *Tasini*.[249]

The publication of a periodical on the Internet or the Web does not constitute a "recognizable . . . version of [the] preexisting collective work" as required by the *Tasini* court to be a section 201(c) revision privilege.[250] Internet and Web versions of newspapers, magazines and periodicals are dramatically different than their original print publications, and thus, cannot be considered "revisions" of the original collective works. The electronic reproduction may be a recognizable version of the freelancers' individual articles but not of the original collective work.

---

development of the Internet as a commercial vehicle. *See, e.g.*, Garigliano, *supra* note 44, at 12.

[248] Since the commencement of *Tasini*, there has been a surge of electronic publishing and the biggest forum has been the Web. Therefore, it is imperative to address the issue of authors' copyright with respect to this medium. *See Judge Rules for Publishers in Free-lance Dispute*, Associated Press, Aug. 18, 1997, *available in* 1997 WL 4880074 [hereinafter *Judge Rules for Publishers*] (stating that increasing popularity of the Internet will create new conflicts between freelancers and publishers); *supra* note 247 (recognizing the possibility of Internet litigation in light of statements made by the legal counsel for the New York Times Co. after *Tasini*); *supra* notes 62-69 and accompanying text (discussing the potential economic value for publishers on the Internet and the Web).

Another possible Web controversy is whether a publisher can only reproduce selected articles of a collective work electronically—an issue whose resolution can impact many Web sites. Raysman & Brown, *supra* note 16, at 3.

[249] *See supra* Part III.B, explaining why publication onto electronic databases and CD-ROM products is more than a revision.

[250] 972 F. Supp. 804, 820 (S.D.N.Y.), *reconsideration denied*, 981 F. Supp. 841 (S.D.N.Y. 1997), *and appeal docketed*, No. 97-9181 (2d Cir. Sept. 23, 1997). *See supra* notes 211-222 and accompanying text (explaining the court's analysis of "revision," requiring that it be a recognizable version of the original collective work).

Depending on the Web producer, on-line versions of newspapers and magazines may include articles, pictures and advertisements not found in their original publications.[251] Additionally, Web versions may add sound and video to a newspaper or magazine that could not be part of an original print publication.[252] Thus, both the freelancers' individual articles and the publishers' original collective works evolve into new creations and assume new identities.[253]

The Internet and the Web also allow the user to transmit information as well. New modes of communications networking allow the user to transmit information to an infinite number of recipients anywhere.[254] Therefore, an article can be copied and sent, via a network communication system, across the country or the world.[255] The electronic media context provides a forum where "sounds, images, and words can be duplicated, rearranged, and disseminated" over many electronic networks.[256] The Internet is supposed to foster creative thinking, but even creativity needs to be respected and paid for.[257] The *Tasini* court should have concluded that reproduction onto electronic databases were not revisions within section 201(c)[258] and similarly, color, sound and picture enhanced Web versions cannot be considered revisions under the Act.[259]

---

[251] *Federal Judge, supra* note 9, at 3C; *Judge Rules for Publishers, supra* note 248.

[252] *Federal Judge, supra* note 9, at 3C; *Judge Rules for Publishers, supra* note 248.

[253] *See* Landry, *supra* note 29, at 624 (recognizing that an author may have to oversee her online creation and thus assume an editor-like role).

[254] Leaffer, *supra* note 1, at 6.

[255] *See* Landry, *supra* note 29, at 624 (statement of Laura Fillmore, opining that once an author's work is on the Internet it "no longer possesses boundaries").

[256] Leaffer, *supra* note 1, at 6.

[257] Landry, *supra* note 29, at 660. *See supra* Part II.C, advocating the use of contracts which address electronic rights and compensate authors for granting them.

[258] *See supra* Part III.B, concluding that republication onto electronic databases is more than a revision.

[259] Ironically, if a future court were to hold that publication on the Web constituted a "revision" under section 201(c), then the author of an individual

CONCLUSION

The *Tasini* court determined that, absent an express contract, publishers own electronic rights for use in electronic databases such as LEXIS-NEXIS and CD-ROMs.[260] This need not be the final word on electronic rights. Today, instead of handshake agreements, most publishers are requiring contracts that address electronic rights.[261] In such situations, the best solution is for freelancers and publishers to share electronic rights through the use of payment contracts.[262] By sharing electronic rights, the parties also share revenues from electronic distribution. The use of payment contracts serves society's interest in promoting and creating useful arts, freelancers' interest in profiting from their talent and publishers' interest in producing specialized and creative publications. Additionally, if freelancers and publishers can agree to fair contracts addressing electronic rights, then *Tasini* will not have precedential value. Otherwise, reliance on *Tasini*'s incorrect analysis of revision rights under section 201(c), will yield results inconsistent with public policy considerations. Freelancers and publishers have the power to avoid such results through the use of fair electronic rights contracts.

In the aftermath of *Tasini,* the latest battle between freelance authors and publishers concerns publication of articles onto the Internet and the Web. The best interests of freelancers, publishers and society are still at stake. Versions of the publications on these new technologies exist in a new revised form without most of the characteristics of the print publication. Thus, the reproduction constitutes more than a section 201(c) revision and publishers

---

article would not be able to place her own work onto her own Web site. Leibowitz, *supra* note 170, at B9. Thus, the article could only appear on Web sites selected by the publisher, not the creator. Leibowitz, *supra* note 170, at B9.

[260] 972 F. Supp. 804, 825 (S.D.N.Y.), *reconsideration denied*, 981 F. Supp. 841 (S.D.N.Y. 1997), *and appeal docketed*, No. 97-9181 (2d Cir. Sept. 23, 1997).

[261] *See supra* Part II.B, discussing the new types of electronic rights contracts.

[262] *See supra* Part II.C, advocating the use of payment contracts.

should not be granted such rights. Again, freelancers must protect their creations from potential exploitation and negotiate express agreements addressing existing and future electronic technologies.