

## **Pulling the Plug: Ignoring the Rights of the Public in Interpreting Copyright Law**

**[*New York Times Co., Inc. v. Tasini*, 533 U.S. 483, 121 S. Ct. 2381 (2001)]**

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### I. INTRODUCTION

The knowledge of the world's population doubles every four years.<sup>1</sup> The only faster process may be the frequency in which United States courts muddle the nation's copyright law. To be fair, the world is fast-paced with technological advancements and marketplace frenzies that may leave the slow process of judicial review in the dust.

Protection of the public's access to information has always been a factor in determining the rights and uses of copyrights.<sup>2</sup> Under U.S. copyright law, three main groups warrant protection – authors, publishers and the public.<sup>3</sup> While authors and publishers squared off in *New York Times Co. v. Tasini*,<sup>4</sup> the public sat on the sidelines.

The protection of public access went out the window in *Tasini* with serious consequences. Librarians, researchers and archivists were forced to remove thousands of newspaper and magazine freelance articles from public access after the decisions by the Second Circuit and United States Supreme Court.<sup>5</sup> Following the *Tasini* decision, LEXIS-NEXIS, a research service that features newspaper, magazine and academic articles through the Internet and libraries, pulled 215,000 *New York Times* articles alone.<sup>6</sup>

The United States Supreme Court's ruling in *Tasini* had a larger impact than the immediate disappearance of part of our nation's history. The Supreme Court likely resolved a split between two circuits

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1. Peter Leyden, *Education: Learning Will Become Interactive*, STAR-TRIBUNE (Minneapolis), June 25, 1995, at T2.

2. "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984) (quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)).

3. *See generally* 17 U.S.C. §§ 107, 201 (1994) (explaining that the public enjoys rights under the fair use provision in § 107 and publishers and employers receive consideration by capturing the copyrights in works made for hire and revisions of collective works).

4. *New York Times Co. v. Tasini*, 533 U.S. 483, 121 S. Ct. 2381 (2001) (*United States Reports* pagination not available at time of publication).

5. *See* Lisa Richardson, *Victory for Freelancers Leaves Library at a Loss*, L.A. TIMES, July 10, 2001, at E1.

6. *Id.*

over the proper way to construe grants of copyrights between authors (or other content creators) and publishers (and other media distributors).<sup>7</sup> By taking the side of authors, the Supreme Court rejected the policy of distribution efficiency and reached a narrow decision that ignored the broad harms to the authors, publishers and public.<sup>8</sup>

## II. CASE DESCRIPTION

In 1993, six authors brought suit for copyright infringement of twenty-one articles written between 1990 and 1993 for the New York Times Company, Inc., Newsday, Inc., and Time, Inc.<sup>9</sup> After running the stories in the daily paper or weekly magazine, these publishers sold the stories to the other defendants, University Microfilms International, and Mead Corporation (also known as LEXIS/NEXIS).<sup>10</sup> The two companies distributed the articles in the form of microfilm, CD-ROMs and internet research databases.<sup>11</sup> The agreements between the publishers and the distributors to upload the articles did not include the transfer of any rights under the authors' copyrights.<sup>12</sup>

Unlike employed newspaper and magazine reporters whose work the publisher owns, the freelancers claimed they never expressly transferred their copyright in the articles for electronic distribution.<sup>13</sup> Thus, the subsequent electronic publication of the articles violated the authors' copyright.<sup>14</sup> In response, the publishers claimed § 201(c) of the Copyright Act of 1976 covered the electronic distribution.<sup>15</sup> Accordingly, they asserted that § 201(c) allowed for subsequent publication of a "revision" of a collective work such as a magazine or newspaper in an electronic medium.<sup>16</sup>

The United States District Court for the Southern District of New York ruled in favor of the publishers' summary judgment motion after deciding the online articles were a "revision" under the statute.<sup>17</sup> The authors appealed to the Second Circuit, which reversed in their

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7. See generally Robert Meitus, *Interpreting the Copyright Act's Section 201(c) Revision Privilege with Respect to Electronic Media*, 52 FED. COMM. L.J. 749, 767-73 (2000). The Ninth Circuit had previously construed 201(c) narrowly in favor of authors while the Second Circuit had given publishers more rights under the section. *Id.* (discussing *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150 (2d Cir. 1968); *Ryan v. Carl Corp.*, 23 F. Supp. 2d 1146 (N.D. Cal. 1998)).

8. See generally *Tasini*, 121 S. Ct. 2381.

9. *Id.* at 2385.

10. *Tasini v. New York Times Co.*, 972 F. Supp. 804, 806 (S.D.N.Y. 1997).

11. *Id.*

12. *Tasini v. New York Times Co.*, 206 F.3d 161, 164-65 (2d Cir. 2000).

13. *Tasini*, 972 F. Supp. at 809.

14. *Id.* at 809-10.

15. *Id.* at 809.

16. *Id.*

17. *Id.* at 827. The court denied the plaintiffs' request for reconsideration. *Tasini v. New York Times Co.*, 981 F. Supp. 841, 851 (S.D.N.Y. 1997).

favor.<sup>18</sup> The publishers appealed and were granted a writ of certiorari to the United States Supreme Court.<sup>19</sup>

### III. BACKGROUND

The United States Constitution secured for authors and creators the “exclusive right to their respective writings and discoveries.”<sup>20</sup> This hardly gave authors a monopoly on their work.<sup>21</sup> The first federal copyright statute, enacted in 1790, limited protection to maps, charts and books.<sup>22</sup> Congress expanded the scope of copyright protections throughout the nineteenth century.<sup>23</sup>

#### A. *The Comparative Rights of Freelancers and Employees*

The first major copyright statute of the twentieth century was the 1909 Copyright Act.<sup>24</sup> That Act codified the idea of copyright indivisibility.<sup>25</sup> Under this theory, a person or company owned all rights to an article, sound recording or movie script.<sup>26</sup> These rights were not divisible.<sup>27</sup>

Indivisibility meant that reporters and freelancers who worked for newspapers or magazines gave up their rights once their article was published.<sup>28</sup> However, if a publisher inserted a copyright notice alongside the author’s name, the law gave the author a copyright in his individual work published in a collective work (a newspaper or magazine).<sup>29</sup> This practice was reserved only for the most important stories or authors. In all other cases, the doctrine of indivisibility forced the copyright to stay with the publisher.<sup>30</sup>

The Copyright Act of 1976 changed several aspects of copyright law. This included an allowance for divisibility in copyright ownership.<sup>31</sup> The ownership and transferability of these newly separated

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18. *Tasini*, 206 F.3d at 172.

19. *New York Times Co. v. Tasini*, 531 U.S. 978 (2000).

20. U.S. CONST. art. I, § 8, cl. 8.

21. *See Meitus, supra* note 7, at 753. The first federal act granted copyrights for fourteen years and administration of the copyrights was difficult. *Id.*

22. *Id.*

23. *See Goldstein v. California*, 412 U.S. 546, 562 n.17 (1973). Musical works gained protection in the Act of Feb. 3, 1831, c. 16, 4 Stat. 436. *Id.* Photographs were added in the Act of Mar. 3, 1865, c. 126, 13 Stat. 540. *Id.* Fine art, including statues and models, gained protection in the Act of July 8, 1870, c. 230, 16 Stat. 198. *Id.*

24. *See New York Times Co. v. Tasini*, 121 S. Ct. 2381, 2388 (2001).

25. *See id.*

26. *See id.*

27. *Id.*

28. *Id.* Indivisibility also meant that newspaper or magazine employees were not treated differently than independent freelance writers under the law. *Id.*

29. *Id.*

30. *See id.* (discussing COPYRIGHT LAW REVISION STUDIES NO. 11-13, prepared for the Senate Comm. on the Judiciary, 86th Cong. 18 (1960)).

31. WILLIAM F. PATRY, *LATMAN’S THE COPYRIGHT LAW* 14 (6th ed. 1986).

copyrights were codified in 17 U.S.C. § 201.<sup>32</sup> The codification of a work-for-hire doctrine and the creation of copyright protection for collective works changed the rules for authors and publishers.<sup>33</sup>

Section 201 vested all initial copyrights in the author, except for creations made under the work-for-hire doctrine, which allowed employers to own the entire copyright in materials created by employees.<sup>34</sup> The creation of this work-for-hire exception meant that employed writers, who constituted a majority of published writers, did not hold an ownership interest in their work.<sup>35</sup> This created a distinction between freelance authors, who sold individual articles to different publishers, and writers employed by a specific publisher.<sup>36</sup>

The 1976 Act empowered freelance authors as never before.<sup>37</sup> Traditionally, freelance writers made deals on handshakes or other informal arrangements.<sup>38</sup> This lack of expressed agreement allowed the freelance authors complete ownership of their work.<sup>39</sup>

The expansion of rights in the 1976 Act also applied to newspaper and magazine publishers.<sup>40</sup> The right in a collective work created a dual copyright system, which provided a freelance author an individual copyright formed at the moment of creation, yet granted a publisher the right to the article as part of a collective work.<sup>41</sup>

Section 201(c) of the 1976 Act spelled out the rights of publishers and authors in the context of "collective works."<sup>42</sup> This provision stated:

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32. 17 U.S.C. § 201 (1994).

Transfer of Ownership: (1) 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. (2) 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.

*Id.*

33. *See Tasini*, 121 S. Ct. at 2388-90.

34. *Id.* at 2389.

35. *Id.* at 2388.

36. *See* 17 U.S.C. § 201(b) (1994).

Works Made for Hire: In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all the rights comprised in the copyright.

*Id.*

37. *See Tasini*, 121 S. Ct. at 2389 n.3.

38. *See Tasini v. New York Times Co.*, 972 F. Supp. 804, 807 (S.D.N.Y. 1997). One defendant, *Newsday, Inc.*, stated on its payment checks that an endorsement of the check allowed the publisher to distribute the work in electronic databases. *Id.* at 810. The district court held this was not a clear and unambiguous transfer of rights as section 204(a) required. *Id.* at 811.

39. *See Tasini*, 121 S. Ct. at 2389 n.3.

40. *See* 17 U.S.C. § 201(c).

41. *See Tasini*, 121 S. Ct. at 2389.

42. 17 U.S.C. § 201(c).

Copyright 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 of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, *any revision of that collective work*, and any later collective work in the same series.<sup>43</sup>

This language provided authors with more rights than the old scheme.<sup>44</sup> Freelance authors, a group that traditionally had few copyright options, were now given the presumption that they maintained exclusive rights in their work unless expressly conveyed in writing.<sup>45</sup> These rights could be transferred outright or released to others in more limited ways, such as licensing.<sup>46</sup>

A compilation, as defined by the 1976 Act, was “formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”<sup>47</sup> Thus, a newspaper, as a group of pictures and stories, was covered as a collective work while individual pieces carried their own protection.<sup>48</sup>

### B. *Interpreting Ambiguous Licenses*

Before and after the 1976 Act, courts were often called upon to decide the scope of a copyright grant when parties disputed ambiguous language.<sup>49</sup> Frequently, ambiguity arose when the licensee, such as the publisher, wanted his grant to extend to a new media use not covered or anticipated in the agreement with the creator.<sup>50</sup> Two lines of thought evolved to deal with this situation. One allowed media distributors to use the rights in new media formats, and the other kept the rights in the hands of the creator unless they were clearly transferred.<sup>51</sup>

The Second Circuit adopted an approach that favored public access and economic efficiency.<sup>52</sup> In *Bartsch v. Metro-Goldwyn-Mayer, Inc.*,<sup>53</sup> the court extended copyright protection to the new media format unless the licensor could meet the burden of showing that the

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43. *Id.* (emphasis added).

44. *See Tasini*, 121 S. Ct. at 2389.

45. *See id.*

46. *See id.*

47. 17 U.S.C. § 101 (1994).

48. *See id.*

49. Meitus, *supra* note 7, at 770-73.

50. *Id.*

51. *Id.*

52. *See id.*

53. 391 F.2d 150 (2d Cir. 1968).

grant expressly excluded such a transfer.<sup>54</sup> It held that if the words of the grant were broad enough to include the foreseeable use, the licensee would prevail.<sup>55</sup>

Industry economics and the public's right to gain access to creative works supported the efficiency argument promoted by *Bartsch*.<sup>56</sup> As the *Bartsch* court stated:

A further reason favoring the broader view in case [sic] like this is that it provides a single person who can make the copyrighted work available to the public over the penumbral medium, whereas the narrower one involves the risk that *a deadlock between the grantor and the grantee might prevent the work's being shown over the new medium at all*.<sup>57</sup>

The court reasoned that the greater number of avenues for distribution would result in more work and money for creators in the future.<sup>58</sup>

The alternative approach in dealing with ambiguous agreements in new technology cases came from the Ninth Circuit.<sup>59</sup> In *Cohen v. Paramount Pictures Corp.*,<sup>60</sup> the court examined whether a song licensed for use in a movie for theaters and television could also be used in videocassette copies.<sup>61</sup> The *Cohen* court ruled in favor of the licensors (the song writers) and decided the language did not give a grant broad enough to cover this new use.<sup>62</sup> The court's rationale favored protecting an author's incentive to create the work; a broad license of a copyright would diminish that incentive.<sup>63</sup>

#### IV. ANALYSIS

In *New York Times Co. v. Tasini*, the United States Supreme Court faced the narrow but important question of whether § 201(c) allowed publishers to present articles in electronic databases without the expressed approval from the freelance authors.<sup>64</sup>

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54. Meitus, *supra* note 7, at 770-73 (discussing *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150 (2d Cir. 1968)). In *Bartsch*, the court determined whether "an assignee of motion picture rights to a musical play was entitled to authorize the telecasting of its copyrighted film." *Bartsch*, 391 F.2d at 151.

55. *Bartsch*, 391 F.2d at 155.

56. See Sidney A. Rosenzweig, *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, 920-24 (1995).

57. *Bartsch*, 391 F.2d at 155 (emphasis added).

58. See Rosenzweig, *supra* note 56, at 923-26.

59. *Id.*

60. 845 F.2d 851 (9th Cir. 1988).

61. *Cohen v. Paramount Pictures Corp.*, 845 F.2d 851, 852-53 (9th Cir. 1988).

62. *Id.* at 854.

63. *Id.*

64. *New York Times Co. v. Tasini*, 121 S. Ct. 2381 (2001).

### A. Parties' Arguments

The publishers presented several arguments to support a reversal of the Second Circuit decision, which would allow the articles to stay in the electronic databases. Their argument focused on the plain meaning of the statute and the legislative history behind its creation.<sup>65</sup> The critical language of § 201(c) stated that the owner of the copyright in a collective work had the privilege of producing any revision of that work.<sup>66</sup>

The publishers argued the phrase “any revision” was a broad statement, encompassing many different formats and changes.<sup>67</sup> Other language in the 1976 Act supported this broad interpretation, including 17 U.S.C. § 102, which stated that a work “may be fixed in any medium of expression now known or later developed.”<sup>68</sup> The publishers claimed medium neutrality in the 1976 Act allowed for revisions of a newspaper in formats ranging from CD-ROM to microfilm.<sup>69</sup>

The authors' argument was two-fold. First, the intention of the 1976 Act was for a writer's consent to be expressly given for every use of a work, except for the narrow exception regarding revisions under § 201(c).<sup>70</sup> The authors urged the Court to allow them to keep all exclusive rights not expressly assigned in writing, as had been done in interpreting other parts of the 1976 Act.<sup>71</sup>

As to the statutory definition of “revision,” the authors directed their argument to the change in media from printed pages to electronic files.<sup>72</sup> The authors focused on the individual transmission of articles to electronic databases, such as LEXIS/NEXIS.<sup>73</sup> The original versions of the newspapers or magazines were not wholly recognizable in these databases.<sup>74</sup> Rather, the end product was an “ever-changing database [that could never] be equated with an edition of an evening newspaper.”<sup>75</sup>

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65. See Brief for Petitioner at 15-19, *New York Times Co. v. Tasini*, 121 S. Ct. 2381 (2001) (No. 00-201).

66. See 17 U.S.C. § 201(c) (1994).

67. Petitioners' Brief at 15, *Tasini* (No. 00-201).

68. 17 U.S.C. § 102(a) (1994).

69. Petitioners' Brief at 15-16, *Tasini* (No. 00-201). The comparison to microfilm archives came up often in the arguments and final court decision because all parties agreed microfilm fell under the definition of “revision” in the 1976 Act. *Tasini v. New York Times Co.*, 972 F. Supp. 804, 816 (S.D.N.Y. 1997).

70. See generally Brief for Respondent at 15-18, *New York Times Co. v. Tasini*, 121 S. Ct. 2381 (2001) (No. 00-201).

71. See *id.* (discussing *Stewart v. Abend*, 495 U.S. 207 (1990)).

72. See Petitioners' Brief at 15, *Tasini* (No. 00-201).

73. Respondents' Brief at 5, *Tasini* (No. 00-201).

74. See *id.* The entire contents of a day's newspaper were never actually sent to offending databases. *Id.* Instead, individual stories and pictures were sent piecemeal, not collectively. *Id.*

75. *Id.* at 13.

### B. *Majority Opinion*

The majority of the Court approached the language of § 201(c) from the authors' perspective and focused on technology.<sup>76</sup> The databases displayed each article's text removed from any photographs, headlines, advertisements or other stories that appeared on the printed page.<sup>77</sup> Accordingly, the majority found that the articles on the screen were in no way recognizable as part of the original newspaper or magazine, but simply stood as individual articles.<sup>78</sup> Consequently, the individual works fell under the protection of § 201.<sup>79</sup>

The Court's reliance on these arguments led it to reject any similarities between the new research databases and the older, accepted stalwarts of the library, microfilm and microfiche systems.<sup>80</sup> The photographic reproductions, found in microfilm and microfiche, were considered "revisions" because of the exact replication of the parent magazine or newspaper.<sup>81</sup> Ultimately, the majority rejected the idea that electronic databases and microfilm shared enough common characteristics to both be considered revisions.<sup>82</sup>

### C. *Dissent*

Justice Stevens' dissent took aim at the majority opinion on several fronts.<sup>83</sup> First, the dissent questioned why electronic databases could not be revisions while older technology like microfilm was a revision, especially in light of the 1976 Act's medium neutrality.<sup>84</sup> Secondly, the dissent examined the 1976 Act's legislative history, which explicitly stated the twin goals of preserving a writer's copyright in published works and limiting the publisher's right to use material in a completely different magazine, newspaper or other collective work.<sup>85</sup> Finally, the dissent lamented the repercussions of the majority decision because if no agreement could be reached, the disputed articles would have to be pulled from the electronic databases.<sup>86</sup> Twenty years of historic archives would suffer in "efficiency, accuracy and comprehensiveness."<sup>87</sup>

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76. *See* New York Times Co. v. Tasini, 121 S. Ct. 2381, 2391 (2001).

77. *Id.*

78. *Id.* at 2391-92.

79. *Id.*

80. *See id.*

81. *Id.*

82. *See id.*

83. *See generally id.* at 2394-98 (Stevens, J., dissenting).

84. *Id.* (Stevens, J., dissenting).

85. *Id.* at 2397-99 (Stevens, J., dissenting).

86. *Id.* (Stevens, J., dissenting).

87. *Id.* at 2402 (Stevens, J., dissenting).

#### D. Commentary

The majority's ruling is flawed in several ways. The decision purports to use the plain meaning of § 201(c) to restore the rights of freelance authors, but this narrow approach ignores the wider implications of the decision.<sup>88</sup> The majority decision failed to consider the legislative history that could have solved this dispute. More importantly, the Court overlooked the far-reaching policy and economic arguments that could have protected the public, aided the publishers and subjected no harm to the authors.

##### 1. Plain Meaning

Before analyzing the policy rationale that shapes this issue, one must look at the plain words of the statute. Under § 201(c), publishers are allowed to use the author's work in "any revision" of the original compilation.<sup>89</sup> The word "any" is a significant signal that Congress considered and accepted a broad range of possible media.<sup>90</sup>

The language in 17 U.S.C. § 102(a) complements this definition of "any revision." It recognizes that the 1976 Act protects any medium "now known or later developed."<sup>91</sup> This "media neutrality" should have erased the distinctions upon which the majority so heavily relied: the technological differences between microfilm and the electronic text files.<sup>92</sup>

Congress included media-neutral language throughout the 1976 Act to make it "general in terms and broad enough to allow for adjustment to future changes in patterns of reproduction and other uses of authors' works."<sup>93</sup> This approach allowed the drafters to postpone some difficult questions relating to computer technology that would develop later in the twentieth century.<sup>94</sup> Thus, complications related to technological advances were left to the discretion of the judicial branch.

In his dissent, Justice Stevens correctly applied the concept of media neutrality when he questioned how certain reproductions of a

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88. See generally *id.* at 2401-02 (Stevens, J., dissenting) (discussing public harm if articles were no longer available).

89. 17 U.S.C. § 201(c) (1994).

90. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 589 (1980) (holding that the statute allowing federal court review of certain EPA decisions and "any other final action" should be construed with no limitations).

91. 17 U.S.C. § 102(a). Accordingly, any media could receive copyright protection. See *id.*

92. *Tasini*, 121 S. Ct. at 2391-92.

93. Brief for Petitioner at 35, *New York Times Co. v. Tasini*, 121 S. Ct. 2381 (2001) (No. 00-201). (discussing REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 89TH CONG., REPORT ON 1965 REVISION BILL, PART 6 (House Judiciary Comm. Print 1965)).

94. *Tasini*, 121 S. Ct. at 2401 (Stevens, J., dissenting).

newspaper can be a revision while others are not.<sup>95</sup> “No one doubts that the New York Times [had] the right to reprint its issues in Braille, in a foreign language, or in microfilm, even though such revisions might look and feel quite different from the original.”<sup>96</sup>

The importance given to headlines and photographs, so critical to the majority, made no difference in the dissent’s analysis, which followed the guidance of the entire statute.<sup>97</sup> Does this mean all the New York Times has to do is throw in a picture with every article it puts on CD-ROM? The majority’s resolution of the “plain meaning” of 201(c) created more questions than answers.

## 2. Legislative (and Industry) Intent

The legislative intent behind the 1976 Act developed in an unusual fashion.<sup>98</sup> Congress watched from the sidelines as industry representatives negotiated the 1976 Act and gave it shape.<sup>99</sup> Perhaps because of this abnormality and resulting confusion,<sup>100</sup> the *Tasini* majority made little reference to the history of the bill.<sup>101</sup>

The instances where the majority did reference legislative history focused on the 1976 Act as a whole.<sup>102</sup> It recognized that the 1976 Act meant to “clarify and improve [this] confused and frequently unfair legal situation” in which the publishers kept the entire “bundle” of rights from the author.<sup>103</sup> The Court found that one of the overriding goals of the legislation was to “reject the doctrine of indivisibility, recasting the copyright as a bundle of discrete exclusive rights.”<sup>104</sup>

The majority failed to recognize the intent of the authors and publishers (and Congress) with regard to § 201(c). This important consideration shows authors were concerned about the possibility of publishers altering the content of articles, and not about how or where

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95. *Id.* at 2398 (Stevens, J., dissenting).

96. *Id.* at 2397 (Stevens, J., dissenting).

97. *See id.* at 2397-98 (Stevens, J., dissenting). The courts seemed to focus on the neutrality rather than the media. In *Random House, Inc. v. Rosetta Books LLC*, 150 F. Supp. 2d 613 (S.D.N.Y. 2001), the court held that even though the story was the same, the words that appeared on a computer screen were not deemed to be the same work that appeared in a paper book. The court reasoned that the story was not the same in the two formats because computer versions allowed for substantive changes such as key word searches and variable fonts and displays. *Id.* at 622-23. Under this reasoning, transforming written work into binary computer code would make it a separate work because of the additional functions that could be performed with digital material.

98. Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 860-62 (1987).

99. *Id.* at 861.

100. *See id.* at 860-61. “The history is, at the very least, a troublesome aid in determining the statute’s meaning. The congressional sponsors may have given almost no thought to the meaning of the provision.” *Id.* at 861.

101. *See generally Tasini*, 121 S. Ct. 2381.

102. *Id.* at 2388-89.

103. *Id.*

104. *Id.* at 2388.

the articles were displayed.<sup>105</sup> Because newspaper writers had been given bold new copyright protections through the elimination of the indivisibility doctrine, the idea of “changing the contributions, or their order, or including different contributions [was something to which] the writers would not object.”<sup>106</sup>

Thus, at the time of the statute’s creation, the conflict surrounding § 201(c) dealt with changing the content, not with altering the presentation of text in different formats.<sup>107</sup> Indeed, newspaper archives, including those on computer disk, were not unknown to the parties negotiating in the 1960s and 1970s.<sup>108</sup> The negotiations that led up to the passage of the 1976 Act suggest that new electronic newspaper archives were entirely acceptable to the writers at the time the statute was written.<sup>109</sup> This history calls into question the majority’s conclusion that modern electronic databases harm authors.

### 3. *Ignored Policy Considerations and the End of the Bartsch Approach*

In *Tasini*, authors and publishers were fighting over who could display the freelance articles to the public. The resulting publicity over the case ignored the consequences to publishers and centered on the authors.<sup>110</sup> The public, more specifically students, teachers, attorneys and researchers, suffered a tangible loss when the articles were removed from public databases.<sup>111</sup> In this battle between authors and publishers, the public’s loss should matter.

Copyright law has never favored decisions that negatively impacted the public.<sup>112</sup> In *Tasini*, where a statute was vague and the damages to the authors seeking relief were minimal, the narrow view taken by the majority ignored the most pressing concern of all, the effect on society as a whole.

The better approach to deciding *Tasini* would have been to weigh the public’s rights along with the rights of the authors and publishers, as was done in *Bartsch*. When the rights of the publisher or distributor were unclear, the *Bartsch* court allowed a publisher to extend the copyright agreement into a new medium that was foreseeable when

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105. Brief for Petitioner at 30-31, *New York Times Co. v. Tasini*, 121 S. Ct. 2381 (2001) (No. 00-201) (discussing REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 89TH CONG., REPORT ON 1965 REVISION BILL, PART 6 (House Judiciary Comm. Print 1965)).

106. *Id.* at 31.

107. *Id.* at 30-31.

108. *Id.* at 34-35.

109. *Id.*

110. *See generally* Richardson, *supra* note 5, at E1.

111. *See id.*

112. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

the license was made.<sup>113</sup> This rationale is preferable. Disagreements between authors and publishers, which would restrict distribution through new media outlets, would be circumvented.<sup>114</sup>

The *Tasini* Court could have considered an economic analysis, supported by the *Bartsch* reasoning, to protect the public. By having access to articles, publishers would be able to channel content into the growing internet market. It is more efficient to allow publishers to keep the rights to authors' works because publishers are in a better position to protect and promote the work.<sup>115</sup> The economic efficiency of allowing publishers to distribute articles supports the growth of new media.<sup>116</sup> However, as a result of *Tasini*, publishers will now have to negotiate with hundreds, maybe thousands, of authors to get permission to repost their articles in the public forum.<sup>117</sup>

Recent trends also show that publishers are in a better position to protect copyrights. For example, Napster and online books have demonstrated that copyright protection requires greater resources compared to past media. Recently, *A&M Records, Inc. v. Napster, Inc.*<sup>118</sup> provided music labels a brief respite before other software made downloading and distributing music easier.<sup>119</sup> As one music industry executive said: "I fear we're getting into a game of whack-a-mole, where we sue Napster, then we sue Aimster and so on and so on."<sup>120</sup> Copyright protection is not an area for amateurs.

A ruling for the publishers in *Tasini* would not diminish the incentive of authors to create new works. New media formats, such as internet databases, were not considered as income sources when the disputed articles were written. The incentive for writing these articles, if financial, came primarily from the immediate income gained from the newspaper or magazine publication. Potential income from new

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113. Meitus, *supra* note 7, at 771.

114. *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150, 155 (2d Cir. 1968).

115. See William M. Landes & Richard Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 355 (1989).

116. See generally *id.* at 325, 353-55 (discussing the case for giving the owner of a copyrighted work complete control over derivative works as well).

117. Richardson, *supra* note 5, at E1. The National Writers' Union had more than 7,000 members in 2001. *Id.*

118. 239 F.3d 1004 (9th Cir. 2001).

119. Noah Shachtman, *What If Napster Was The Answer?*, <http://www.wired.com/news/mp3/0,1285,45234,00.html> (last visited Jan. 10, 2002).

120. *Id.* The idea that authors may need help protecting their copyrights is clear considering publishers themselves are barely keeping up. In early 2000, Stephen King made a copy of his latest novella available for purchase online. Margaret Kane, *Stephen King E-book Pirated* (Mar. 29, 2000), available at <http://www.zdnet.com/intweek/stories/news/0,4164,2487101,00.html> (last visited Jan. 10, 2002). Readers could download the story, which was protected by sophisticated encryption technology, for about two dollars. *Id.* The result: the encryption was promptly hacked and files containing the story were available for free on several sites. *Id.* The president of one e-book company said that a copy protection system online was impractical. *Id.* Other attempts to get readers to pay for online content have met with similar fates. See Michael Kinsley, *Slate Goes Free* (Feb. 14, 1999), available at <http://slate.msn.com/default.aspx?id=19300> (last visited Jan. 10, 2002) (discussing end of paid subscriptions).

databases created a debate about rights to the income. Opponents have said publishers should not receive the windfall from these new income sources.<sup>121</sup> However, this income is just as much of a windfall for the writer who fifteen years ago could have had no real expectation that his article would produce income from an internet or CD-ROM database. When income is not earned or reasonably expected by an author, the windfall should be given to publishers or distributors to encourage greater availability of works to the public.

The *Bartsch* analysis highlighted the other underlying purpose of copyright law: to protect the public and the author.<sup>122</sup> Congress strengthened this policy by codifying the fair use provision in the 1976 Act.<sup>123</sup> “Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”<sup>124</sup> The fair use doctrine promotes the use of otherwise protected materials for education and research.<sup>125</sup> Commercial enterprises cannot usually hide behind the fair use doctrine, although the United States Supreme Court has allowed profit-seeking entities to benefit from the provision.<sup>126</sup> However, the publishers in *Tasini* did not raise a fair use argument and lost the opportunity to analyze the facts under 17 U.S.C. § 107.<sup>127</sup> Despite this, the policy of protecting the public is still a fundamental part of copyright law.

The *Tasini* majority failed to frame the issues in a manner that would have allowed the public to benefit from the thousands of articles at issue.<sup>128</sup> The benefits gained by authors fall short of the importance of other societal policies.

The majority and other commentators suggest that authors will benefit from the formation of a new print licensing system, similar to the American Society of Composers, Authors and Publishers (ASCAP) or Broadcast Music, Inc. (BMI).<sup>129</sup> Such a system could exploit

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121. See generally *Cohen v. Paramount Pictures Corp.*, 845 F.2d 851 (9th Cir. 1988). In *Cohen*, the court steered away from the *Bartsch* approach, which had stated licensees should be allowed to use the work in any media format foreseeable when the license was granted. *Id.* at 854-55. The *Cohen* court decided that if the new media use was not foreseeable or did not exist, the creator of the work retained control to publish or distribute the work in the new media format. *Id.*

122. *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150, 155 (2d Cir. 1968).

123. See 17 U.S.C. § 107 (1994).

124. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

125. 17 U.S.C. § 107.

126. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). The Court allowed a rap group to use a copyrighted song for purposes of parody in a commercial recording. *Id.*

127. See *New York Times Co. v. Tasini*, 121 S. Ct. 2381, 2390 (2001).

128. See Richardson, *supra* note 5, at E1.

129. See *Tasini* 121 S. Ct. at 2393-94 (Stevens, J., dissenting). The methods of ASCAP and BMI, which handle music licenses, do not appear suited for distribution of print materials. ASCAP and BMI set up blanket licenses, which allow use of all recordings in the company's library for a set fee (ranges depend on whether the use is in a small business or over national airwaves). Meitus, *supra* note 7, at 773-75. ASCAP and BMI then pay the performers for usage of their

the rights recaptured by authors after *Tasini*. As a result, authors may directly upload their works for public use via electronic databases and receive related income. The drawbacks of such a system are many, especially in light of the public's slow response to any system that requires payment for online viewing.<sup>130</sup>

After *Tasini*, authors will possess less bargaining power. Publishers will be cautious of buying stories in which they have only limited rights since new technology for information distribution constantly develops. Publishers will likely ask for a prospective author to sign all of his rights away, leaving him with the same amount of rights enjoyed in the early part of the last century: none.

## V. CONCLUSION

The United States Supreme Court closed its eyes when it interpreted the portion of the copyright statute that allows publishers the right to make revisions of their newspapers and magazines. The Court conveniently ignored the interests of the public and reached an unconvincing conclusion that returned the rights to thousands of articles to the authors. The real problem is that those articles in the hands of the authors are worth very little, but the cost of losing this information is high indeed.

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songs estimated through random sampling and data provided by broadcasters. *Id.* Printed materials, however, are not enjoyed by groups of people, but one user at a time; this makes enforcement much more difficult. In addition, because schools and libraries would comprise the majority of subscribers, the blanket fees would have to be minimal due to limited resources. Conversely, dividing royalties based on use may be easier to calculate using the number of downloads obtained from a central computer database.

130. *See supra* note 120.