

Is the *Tasini* Decision in Need of a “Revision”? *New York Times Co. v. Tasini*

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I. INTRODUCTION

Imagine for a moment that instead of writing this Note for a law school journal, I am a freelance author composing an article for publication in a nationally renowned periodical such as *Time* magazine. Under the current copyright law, most of my rights as an author will be protected regardless of whether I place the article in a magazine, newspaper, or collective work.<sup>1</sup> Prior to 1976, however, authors did not always retain their rights when they placed their material in a collective work.<sup>2</sup>

Specifically, under the 1909 Copyright Act, an author was presumed to convey all rights in their article to the publisher of the periodical absent any signed agreement.<sup>3</sup> Problems often arose when authors transferred valuable rights, such as sequelization, screenplay, or merchandise rights to publishers unintentionally.<sup>4</sup> As a result, Congress enacted § 201(c) “to clarify and improve [this] confused and frequently unfair legal situation with respect to rights in contributions.”<sup>5</sup> The focus of this Note is the scope and application of § 201(c) as it relates to electronic databases and the articles contained therein.

Jonathan Tasini and respondents (Authors) are freelance authors who contributed articles (Articles) to the New York Times Company, Newsday, Inc., and Time, Inc. (Print Publishers).<sup>6</sup> The Authors registered copyrights in all of their Articles while the Print Publishers registered

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1. See 17 U.S.C. § 201(c) (1994).  
2. See Copyright Act of 1909.  
3. *Alexander v. Irving Trust Co.*, 132 F. Supp. 364, 369 (S.D.N.Y. 1955).  
4. Brief for Petitioners at 29, *N.Y. Times Co. v. Tasini*, 121 S. Ct. 2381 (2001) (No. 00-201).  
5. *N.Y. Times Co. v. Tasini*, 121 S. Ct. 2381, 2388 (2001).  
6. *Id.* at 2385. A total of twelve articles were contributed to the *New York Times*, a daily newspaper published by the New York Times Company. *Id.* Eight articles were written for *Newsday*, petitioner Newsday Inc.’s daily New York paper. *Id.* One article was written for *Sports Illustrated*, a weekly magazine published by Time, Inc. *Id.*

collective work copyrights for their periodicals containing the Articles.<sup>7</sup> The Authors brought this suit when petitioners LEXIS/NEXIS and University Microfilms International (UMI) (Electronic Publishers) included the Articles in their electronic databases pursuant to licensing agreements with the Print Publishers.<sup>8</sup>

The district court (*Tasini I*) held the electronic databases were privileged under § 201(c) and accordingly granted summary judgment in favor of the Print and Electronic Publishers.<sup>9</sup> In analyzing the plain language, the court construed the “any revision” language in § 201(c) broadly to include the electronic databases in question.<sup>10</sup> Also, the court found that because the Print Publishers’ original selection (of articles) remained in the electronic databases, they satisfied the requirement that some significant aspect of the original collective work be preserved in a revision.<sup>11</sup>

The Second Circuit (*Tasini II*) put aside the district court’s “substantial similarity” test, focused on the lack of certain characteristics in the revision, and granted summary judgment to the appellant Authors.<sup>12</sup> In so holding, the *Tasini II* court also relied on the method by which users of the database access articles. Specifically, the court found that the fact that readers retrieve *individual articles* rather than *periodicals as a whole*, was significant.<sup>13</sup>

The United States Supreme Court (*Tasini III*) held that the Electronic Publishers and Print Publishers infringed the Authors’ copyrights, and affirmed the Second Circuit’s decision. *New York Times Co. v. Tasini*, 121 S. Ct. 2381 (2001).

## II. BACKGROUND

The United States Constitution empowered Congress to establish a copyright and patent system “[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”<sup>14</sup> Congress

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7. *Id.*

8. LEXIS/NEXIS produces the NEXIS database, which contains articles from many periodicals stored in a text-only format. UMI produces two CD-ROM products, the *New York Times OnDisc* (N.Y.TO), a text-based system, and *General Periodicals OnDisc* (GPO), a graphic-based system. *Id.* at 2385-86.

9. *Tasini v. N.Y. Times Co.*, 972 F. Supp. 804, 827 (S.D.N.Y. 1997).

10. *Id.* at 819.

11. *Id.* at 821.

12. *Tasini v. N.Y. Times Co.*, 206 F.3d 161 (2d Cir. 2000).

13. *See id.* at 168.

14. U.S. CONST. art. I, § 8, cl. 8.

took advantage of this power and enacted the first federal Copyright Act in 1790.<sup>15</sup> Since the 1790 Act, several amendments have been made,<sup>16</sup> before arriving at the current version.<sup>17</sup> Except for a few modifications, the 1976 Act governs most of today's works.<sup>18</sup>

Section 102(a) of the Copyright Act lists the threshold requirements for a work to be protected. These requirements include fixation and originality.<sup>19</sup> A work is considered "fixed in a tangible medium of expression when its embodiment in a copy or phonorecord . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."<sup>20</sup> Interestingly, the Act contains no definition of originality.<sup>21</sup> Case law has nevertheless interpreted originality to require "independent creation" and possess "at least some minimal degree of creativity."<sup>22</sup>

In addition to establishing the basic requirements for copyright protection, § 102(a) also provides a nonexclusive list of copyrightable subject matter of eight categories, including literary works, musical works, and dramatic works.<sup>23</sup> Section 102(b) limits the scope of copyright by not granting protection to an author's ideas.<sup>24</sup>

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15. Robert Meitus, *Interpreting the Copyright Act's Section 201(c) Revision Privilege with Respect to Electronic Media*, 52 FED. COMM. L.J. 749, 753 (2000) (discussing the historical foundation of copyright law).

16. *See id.*

17. 17 U.S.C. (1994).

18.

The 1976 Act was modified in 1980 to expressly incorporate computer programs into the Copyright Act. . . . It was modified again in 1988, when the United States finally ratified the Berne Convention. . . . In 1992, Congress passed the Audio Home Recording Act. . . . In 1998, Congress enacted the Sonny Bono Copyright Term Extension Act and the Digital Millennium Copyright Act.

ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 348 (Richard A. Epstein et al. eds., Aspen Law & Business 2d ed. 2000).

19. "Copyright protection subsists . . . in *original* works of authorship *fixed* in any tangible medium of expression, now known or later developed. . . ." 17 U.S.C. § 102(a) (1994) (emphasis added).

20. 17 U.S.C. § 101.

21. *See id.*

22. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

23. 17 U.S.C. § 102(a).

24. 17 U.S.C. § 102(b). This section codified the "idea-expression" dichotomy developed in *Baker v. Selden*. Justice Bradley explained:

The *description* of [an] art in a book, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself. The object of the one is explanation; the object of the other is use. The former may be secured by copyright. The latter can only be secured . . . by [patent].

*See Baker v. Selden*, 101 U.S. 99, 105 (1879) (emphasis added).

Periodicals, such as those discussed in *Tasini*, are considered “collective works.”<sup>25</sup> Collective works may be protected under § 103.<sup>26</sup> Section 103(a) expressly includes compilations and derivative works as copyrightable subject matter specified in § 102.<sup>27</sup> Compilations include collective works (periodicals) and are defined as “work[s] 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>28</sup> Thus, through this chain of analysis, the Act grants copyright protection to periodicals, independent of the articles contained therein.

For purposes of this Note, it is essential to understand that copyright protection in a collective work only extends “to the material contributed by the author of such work.”<sup>29</sup> In other words, “the holder of a copyright in a collective work is forbidden from altering the contributions to that work.”<sup>30</sup> The ability to modify contributing articles is guaranteed to the author of the article by § 106’s exclusive right to prepare derivative works.<sup>31</sup>

In addition to the right to prepare derivative works, § 106 grants copyright owners five other exclusive rights, including reproduction rights and distribution rights.<sup>32</sup> The author may undertake these rights himself, or authorize others to do so without losing his copyright.<sup>33</sup>

It is also important to note that there is a difference between *authorizing* another to reproduce a work and *transferring* the right to reproduce a work. In the former, a nonexclusive license is granted; in the latter, a transfer of an exclusive right occurs. Nonexclusive licenses can be granted orally or can be implied,<sup>34</sup> but transfers of exclusive rights must be in writing.<sup>35</sup> An owner by transfer is entitled “to all the protection and remedies accorded to the copyright owner by this title.”<sup>36</sup>

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25. “A ‘collective work’ is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.” 17 U.S.C. § 101 (1994).

26. *See id.* § 103.

27. *Id.* § 103(a).

28. *Id.* § 101.

29. *Id.* § 103(b).

30. *See Meitus, supra* note 15, at 756.

31. 17 U.S.C. § 106(2) (1994).

32. *Id.* § 106.

33. *See id.*

34. *Graham v. James*, 144 F.3d 229, 235 (2d Cir. 1998) (citing 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT 10.03[A][7], at 10-43 (1989)); *see also* *Effects Assoc., Inc. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990).

35. 17 U.S.C. § 204(a) (1994).

36. *Id.* § 201(d)(2).

Prior to the 1976 Act, authors who placed articles in a collective work risked losing their rights unless that article was published with a copyright notice in the author's name.<sup>37</sup> Furthermore, the doctrine of "copyright indivisibility"<sup>38</sup> prevented authors from assigning only the right of publication in a periodical to a publisher.<sup>39</sup> As a result of this unfair legal situation, Congress adopted § 201(c) in the Act's 1976 revision.<sup>40</sup>

The first thing to note about § 201 is that it rejects the doctrine of indivisibility and allows each of the exclusive rights to be "transferred and owned separately."<sup>41</sup> Secondly, § 201(c) makes clear that a copyright in a collective work is distinct from the copyrights in the individually contributed articles. Copyright in such articles "vests initially in the author."<sup>42</sup> Thus, together with § 404(a), § 201(c) "preserve[s] the author's copyright in a contribution even if the contribution does not bear a separate notice in the author's name, and without requiring any unqualified transfer of rights to the owner of the collective work."<sup>43</sup>

Section 201(c) also sets forth the "privilege" a publisher acquires with respect to contributed articles in a collective work.

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>44</sup>

The Authors in *Tasini* argue that the electronic databases in question are not intended to fall within the "any revision" language of § 201(c), and accordingly, their copyrights were infringed.<sup>45</sup> While Congress does not explicitly define "revision," the House Report offers examples of both permissible and impermissible revisions.<sup>46</sup> In light of this House Report, the *Tasini III* Court would ultimately determine the scope of § 201(c).

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37. N.Y. Times Co. v. Tasini, 121 S. Ct. 2381, 2388 (2001).

38. Hirshon v. United Artists Corp., 243 F.2d 640, 643 n.3 (D.C. Cir. 1957) ("[A] copyright is an indivisible thing, and cannot be split up and partially assigned either as to time, place, or particular rights or privileges, less than the sum of all the rights comprehended in the copyright.").

39. *Tasini III*, 121 S. Ct. at 2388.

40. *Id.*

41. See 17 U.S.C. § 201(d)(2).

42. *Id.* § 201(c).

43. H.R. REP. NO. 94-1476, at 122 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5738.

44. 17 U.S.C. § 201(c) (1994) (emphasis added).

45. See *Tasini v. N.Y. Times Co.*, 972 F. Supp. 804 (S.D.N.Y. 1997).

46. For example, under

## III. THE COURT'S DECISION

In the noted case, the Supreme Court analyzed whether electronic databases fit § 201(c)'s "as part of . . . any revision" language by focusing on the manner in which articles are presented and perceived by users.<sup>47</sup> All three electronic databases (NEXIS, N.Y.TO, and GPO) display articles clear of the context in which they were originally published, and accordingly do not constitute "revisions."<sup>48</sup> As the infringing publishers relied solely on the unavailable § 201(c) privilege, the Court affirmed summary judgment to the respondent Authors, without deciding the appropriate remedy.<sup>49</sup>

Before beginning their analysis, the Supreme Court reiterated that the Authors own the copyrights in the articles.<sup>50</sup> In addition, the Court stated that both the Print and Electronic Publishers exercised some exclusive rights reserved to the Authors under § 106.<sup>51</sup> Thus, they found the Publishers infringed based on these findings, and the only remaining question was whether their actions were privileged under § 201(c).

The Court explains that a user's presentation and perceptibility of the Articles will determine whether the Articles exist "as part of" a "revision" of the original collective work.<sup>52</sup> In other words, an article presented out of its original context is an indication that the article does not exist "as part of" a "revision," and therefore the database is not privileged under § 201(c).<sup>53</sup>

Included in its analysis, the Supreme Court looked at the method by which users search databases. When users first access a database, they perform a search of its entire contents for articles containing user-specified criteria.<sup>54</sup> The database generates a list of articles, possibly

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the language of this clause, a publishing company could reprint a contribution from one issue in a later issue of its magazine, and could reprint an article from a 1980 edition of an encyclopedia in a 1990 revision of it; the publisher could not revise the contribution itself or include it in a new anthology or an entirely different magazine or other collective work.

H.R. REP. NO. 94-1476, *supra* note 43.

47. *See* N.Y. Times Co. v. Tasini, 121 S. Ct. 2381, 2389 (2001).

48. *Id.* at 2390-91.

49. *See id.* at 2390, 2394.

50. *Id.* at 2390. Copyright initially vests in the author of the contributing article. 17 U.S.C. § 201(c) (1994).

51. *Tasini*, 121 S. Ct. at 2390.

52. *Id.*

53. *See id.*

54. *See id.* at 2386.

from many different periodicals,<sup>55</sup> listed individually, “without any visible link to the other stories originally published in the same newspaper or magazine edition.”<sup>56</sup> The Court believes this is one indication that the articles are presented out of context.

Furthermore, the N.Y.TO and NEXIS databases only display an article’s text, disregarding the formatting and graphics that were included in the print version.<sup>57</sup> Despite the GPO database producing articles with original formatting and graphics, the Court stresses the fact that articles appear without any material printed on other pages of the periodical.<sup>58</sup> Thus, the Supreme Court believes that none of the three databases perceptibly reproduce and distribute an article “as part of” a “revision.”<sup>59</sup>

Equally unpersuasive to the court is the fact that users have the ability to manipulate the databases to obtain the entire content of a given periodical.<sup>60</sup> Under § 201(c), the Court reiterates, the issue is the perceptibility to the user, not whether the database is capable of generating a legitimate revision.<sup>61</sup>

The court devoted a portion of the opinion to a comparison between electronic databases and microfilm/microfiche (microform).<sup>62</sup> The Publishers argued that the two are essentially the same and that the electronic databases should be considered “revisions” just like microform.<sup>63</sup> In finding the analogy wanting, the Supreme Court states that microform presents articles in exactly the same position they appeared in the periodical and also that they are photographs of the actual periodical.<sup>64</sup> Therefore, microform presents articles in their original context.<sup>65</sup>

In a dissenting opinion, Justices Stevens and Breyer took a more “incremental approach” to conclude that no violation of the Authors’ copyrights occurred.<sup>66</sup> They first inquired whether an electronic version of a periodical constituted a “revision” of a single edition of that

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55. The N.Y.TO database only contains articles that were published in the *New York Times* newspaper. Consequently, a search will only yield articles published in that particular periodical. NEXIS and GPO, however, are comprised of articles from many periodicals. *Id.*

56. *Id.* at 2385.

57. *Id.* at 2385-86.

58. *Id.* at 2391.

59. *Id.*

60. *Id.* at 2393.

61. *Id.*

62. *Id.* at 2391-92.

63. *See id.* at 2391.

64. *Id.*

65. *See id.* at 2392.

66. *See id.* at 2397 (Stevens, J., dissenting).

periodical.<sup>67</sup> After determining that it does, they asked whether any actions taken with respect to that electronic version would strip it of its “revision” status.<sup>68</sup> Despite aggregating many editions of the same or different periodicals into one database, the dissent believes the “revision” status remains intact.<sup>69</sup>

In answering the first question, Justice Stevens narrows his focus to whether an article within an electronic version exists “as part of . . . any revision.” It is pointed out that such versions include features that identify the context in which the article was originally published.<sup>70</sup> Invoking the concept of media neutrality, the dissent argues that although the electronic version does not retain the exact formatting characteristics of the original, it is the electronic medium that mandates the new format.<sup>71</sup> Furthermore, the foundation for a collective work copyright, the editorial selection, is preserved in an electronic revision.<sup>72</sup> Thus, the dissent concludes that an electronic version of an article is a “part of . . . any revision” of that periodical provided that, (1) the article refers to the original work, and (2) the rest of the collective work is accessible by the user.<sup>73</sup>

Regarding its second inquiry, the dissent notes that nothing done by the electronic publishers regarding the transmitted data strips it of its “revision” status.<sup>74</sup> The fact that the electronic publishers include other editions and other periodicals in their databases is no more significant than the fact that the entire editorial content of each collective work is accessible.<sup>75</sup> Furthermore, they point out that microfilm often includes many editions of a periodical on a single roll without raising a “revision” question.<sup>76</sup> Lastly, the fact that articles appear individually and are capable of being downloaded or printed should not strip the “revision” status; users of microform only view one article at a time and can print

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67. *Id.* A finding that an electronic version does constitute a “revision,” the Print Publishers would be able to *distribute* that electronic version to the Electronic Publishers under § 201(c) authority.

68. *Id.* at 2399. The “actions” that are alluded to include the processing of the electronic data by the electronic publishers, the method of storing the data in the databases, and the way the data is made available to the users of the databases.

69. *Id.* at 2394.

70. These identifying features are the article’s headline, byline, and title, and the section of the newspaper and page number in which the article first appeared. *Id.* at 2397.

71. The dissent compares the changes in appearance to similar changes made when articles are converted to other allowable forms, such as Braille. *See id.*

72. *Id.* at 2399.

73. *Id.* at 2398.

74. *Id.* at 2399.

75. *See id.* at 2400.

76. *Id.*



that article individually as well.<sup>77</sup> Therefore, given that articles exist as “part of” a “revision” of a collective work, without regard to the electronic publishers’ actions, the dissent would hold for the publishers.

#### IV. ANALYSIS

In this case of first impression, the Supreme Court and district court took opposite approaches when analyzing the context of the electronic articles with respect to their original publication.<sup>78</sup> The district court focused on elements that were *preserved* from the original, while the Supreme Court relied on the *absence* of certain features from the “revision.”<sup>79</sup>

Interestingly, the majority of justices did not address the fact that the electronic databases retain the Publisher’s editorial selection.<sup>80</sup> The dissent correctly points out that it is the “selection” process that is the most important creative element publishers contribute to a collective work.<sup>81</sup> As this element is preserved in the electronic databases, a broad reading of “revision,” so as to include these databases, would be consistent with current law.

The Publishers pressed the Court to interpret § 201(c) broadly for a few reasons. First, the plain language of § 201(c) states that copyright owners of collective works have the privilege of reproducing and distributing the contributions “as part of . . . any revision.”<sup>82</sup> “Any” is a word noted by the Supreme Court in past cases for its breadth.<sup>83</sup> Using “any” as a modifier of “revision” suggests that Congress intended a broad meaning.

Second, it was not Congress’s intention to prevent publishers from reproducing and distributing revisions of their periodicals when they enacted § 201(c) in 1976.<sup>84</sup> They wanted to encourage the further development of electronic databases so the general public would have an

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77. *Id.*

78. See Wendy J. Gordon, *Fine Tuning Tasini: Privileges of the Electronic Distribution and Reproduction*, 66 BROOK. L. REV. 473, 482-84 (2000) (comparing the District Court’s view of “revision” to the Second Circuit’s view). The Supreme Court, like the Second Circuit, focused on the lack of formatting characteristics and graphics. See *Tasini III*, 121 S. Ct. at 2391.

79. See Gordon, *supra* note 78, at 482.

80. See *Tasini*, 121 S. Ct. 2381.

81. See *id.* at 2399 (Stevens, J., dissenting).

82. 17 U.S.C. § 201(c) (1994) (emphasis added).

83. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 589 (1980) (arguing that the use of “any” in the phrase “any other final action” “offers no indication whatever that Congress intended [a] limiting construction”).

84. Brief for Petitioners at 3, 121 S. Ct. 2381 (2001) (No. 00-201).

easier time accessing copyrighted works.<sup>85</sup> A narrow reading of “revision” will impede the development of electronic databases, burdening, rather than benefiting, the public.

Lastly, the Copyright Act was written using media neutral terms. Accordingly, collective works may be fixed in any medium “now known or later developed,”<sup>86</sup> which suggests that the collective works are the same regardless if they are fixed in microform, paper, CD-ROM, or stored on a computer server.<sup>87</sup> Thus, the use of the word “any,” Congress’s intention to confer benefits on the public, and the careful drafting of the Act in media neutral terms all suggest that a broad interpretation should be given to § 201(c).

Section § 201(c) provides the privilege of reproducing and distributing contributing articles, (1) “as part of *that collective work*” or (2) “as part of . . . *any revision* of that collective work.”<sup>88</sup> “Collective works,” by definition, consist of a collection of individually copyrightable works.<sup>89</sup> As discussed earlier, the owners of copyrights in collective works are prohibited from changing the content of the contributed articles.<sup>90</sup> Considering this fact, how is it possible to “revise” a collective work without changing the content of the contributions?

Under the narrow reading of “revision” proclaimed by the majority, it appears that a “revision” is nothing more than the original collective work transferred to a different medium.<sup>91</sup> If that were so, then the “as part of that collective work” language would suffice to allow publishers to reproduce and distribute their collective work in the new medium—all of the elements present in the original collective work, i.e., formatting and graphics, would be included in the new medium. The “as part of . . . any revision” language would therefore be unnecessary. The majority overlooks that it is precisely the changes in formatting and graphics that make the electronic databases a “revision . . . of the collective work.”<sup>92</sup>

In finding infringement, the Supreme Court relied largely on the fact that the NEXIS and N.Y.TO databases reproduce only the text of the articles in finding infringement.<sup>93</sup> It is puzzling why the GPO database does not satisfy the very definition used to invalidate N.Y.TO and

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85. *See id.*

86. U.S.C. § 102(a) (1994).

87. Brief for Petitioners at 15-16, 121 S. Ct. 2381 (2001) (No. 00-201).

88. 17 U.S.C. § 201(c) (1994) (emphasis added).

89. 17 U.S.C. § 101 (1994).

90. *See id.* at § 201(c).

91. *See* Tasini v. N.Y. Times Co., 972 F. Supp. 804, 820-21 (S.D.N.Y. 1997).

92. *See* Brief for Petitioners at 10, 121 S. Ct. 2381 (2001) (No. 00-201).

93. *See* N.Y. Times Co. v. Tasini, 121 S. Ct. 2381 (2001).

NEXIS. The GPO database is image-based, containing photographs of the Articles' pages, and similar to microform. The Court could have found the GPO database constituted a revision while still reaching the same result: infringement.<sup>94</sup> The GPO infringed an author's "distribution" right by making individual articles available for downloading.<sup>95</sup>

The effect of the Supreme Court's decision in *Tasini III* remains uncertain. The Publishers were concerned with the "devastating" consequences a ruling against them would have.<sup>96</sup> The court responded by stating that an injunction, barring the continued use of the Articles (and all freelance articles for that matter), may not best serve the goals of the Copyright Act.<sup>97</sup> Consequently, although holding the Publishers liable, the Supreme Court left the remedial issue to the district court.<sup>98</sup>

Richard Galofaro

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94. See Gordon, *supra* note 78, at 487.

95. See *id.*

96. See *Tasini III*, 121 S. Ct. at 2393.

97. *Id.*

98. *Id.* at 2394.