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COPYRIGHT TENSIONS IN A DIGITAL AGE

by

John D. Shuff & Geoffrey T. Holtz*

I. INTRODUCTION

The rapid and exponential expansion of our ability to duplicate and disseminate information by digital means has rejuvenated inherent tensions in the law pertaining to copyright and has created some new ones. Not since the advent of radio in the early 1900s have such tensions come so squarely into focus. Even though courts are rarely, if ever, called upon to address certain of these tensions since the passage of the Copyright Act of 1976, they are being called upon to do so now.

II. COPYRIGHT – THE INHERENT TENSIONS

A. The Constitutional Mandate “To Promote the Progress of Science and Useful Arts” and the Tension between Authors and the Public

In the United States, copyright is considered primarily, though not exclusively, in economic terms. The owner of a copyright receives a monopoly to reproduce and distribute – in other words, to sell – his or her work. Other nations, notably those in Europe, imbue copyright with stronger principles of “moral rights,” such as the notion that creators of works should also be able to prevent their works from being imperfectly copied, displayed, or reformatted, and a right of attribution. In the United States, for better or worse, copyright law is much more explicitly about dollars and cents.

Of course, copyright receives billing in the Constitution itself, which in Article I, Section 8, Clause 8, grants Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹ In any copyright dispute, it becomes readily apparent that the Copyright Clause creates

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¹ U.S. CONST. art. I, § 8, cl. 8.

an inherent tension. From the face of the clause, it is clear that the purpose of copyright protection is “[t]o promote the Progress of Science and useful Arts.”² The plaintiff, generally the author of the work at issue, will argue that this purpose can only be realized by conferring strong rights upon the author in order to foster an economic incentive to create copyrightable works in the first place. An individual creator, writer, photographer, artist, musician, filmmaker – will also assert that the clause reflects the Framers’ understanding of the author’s need to earn a living at his or her craft. By contrast, the defendant, generally the alleged infringer who has copied, distributed, or otherwise made use of the copyrighted work in some way, will argue that science and the arts are promoted by the most widespread public dissemination of works and that the rights attaching to a copyright should be as narrow as possible so that the creator cannot defeat this purpose by withholding the work. Almost any party in a copyright lawsuit will, at some point, cite this clause and embrace it triumphantly as his or her own.

The various copyright statutes enacted by Congress over the last 210 years have attempted to equalize the tension by providing a sufficient incentive to ensure that new works are created while allowing for the broadest public consumption of those works. It is a delicate balance, and one which has shifted over the years to offer greater or lesser protections under the various statutes. Nonetheless, the basic goals have remained the same.

B. The Role of the Publisher and the Added Tensions

Although the tensions between authors and the public long have been thoroughly discussed and debated in the literature and case law, there is another interested party in the copyright realm whose role has added or at least highlighted a new tension. That is the publisher, whose interests have grown exponentially in recent years, concurrently with the growth of the Internet. A publisher is one who reproduces and distributes copyrighted works to the public. Of course, it is very common for the publisher to also be the owner of the copyright in the works it reproduces and distributes, through work for hire arrangements or outright purchase of the copyrights. However, this article addresses the term as publisher qua publisher, one who disseminates works created by freelance artists through a licensing arrangement, but does not own them.

² See *id.*

The publisher's interests are in some ways aligned with and in other ways adverse to, both the author's and the public's. Like the author, the publisher seeks to profit from the sale of the copyrighted works, and thus seeks to limit the means by which the public may consume these works without paying a price. However, like the public, the publisher does not want the author's rights to be so broad that the publisher's ability to reproduce and distribute copyrighted works – and therefore its profit-earning capability – is hindered. In a legal dispute, a publisher, whether print or electronic, will thus note the constitutional rationalization of the profit motive, but if the author's and the publisher's interests collide, the latter will likely throw in a “value-added” theory of economic analysis that emphasizes dissemination over creation of works and justifies occasionally stepping on the author's toes in the name of efficient distribution of the fruits of “Science and Useful Arts.”

The World Wide Web heralds an advance in publishing that is second perhaps only to Gutenberg's printing press. With an astonishingly low threshold of capitalization and technical expertise, an individual can disseminate his message to the world at the stroke of a key. The Internet is a megaphone to the world, unparalleled in human history, with millions of websites, or micro-publishers, offering content not just commercial in nature, but also political, cultural, personal, spiritual, and fanciful.

But that is just one side of the story; for the Web, with its obvious and sometimes not-so-obvious commercial opportunities, has also triggered remarkable consolidation in the media industry. Indeed, the conventionally defined media industry is now best thought of as the cross-pollination of several integrated industries: publishing, entertainment, and data, to be sure, but also computers and telecommunications. Content and the delivery platform for that content have become intertwined. Nothing illustrates this new paradigm and its new amalgams better than the proposed AOL and Time Warner merger. It is this added tension, created by the growing and evolving participation of publishers in the copyright scheme, that has occasioned the intervention of the courts.

III. SECTION 201(C) AS A DEFAULT ALLOCATION OF RIGHTS BETWEEN AUTHOR AND PUBLISHER

Periodicals, magazines, newspapers, and journals, have long relied on contributions from freelance writers and photographers as well as from staff talent.³ Staff contributors to periodicals make a living from the salary or wages the periodical publisher pays them. However, freelance artists rely on per-article payments from publishers. Secondary publication, the sale of an article to one or more additional periodicals after initial publication, provides a welcome, and even necessary, source of additional income to writers trying to make a living in this low-paying field. In a typical author-publisher agreement of the period during which the 1976 Copyright Act was debated and passed, the writer licensed to the periodical publisher only “First North American Serial Rights,” that is the right to print publication of the freelance contribution one time only on this continent. After that edition of the periodical passed through the store racks and the subscription cycle, the author was free to sell his article elsewhere, whether syndicating it to newspapers, having it published in an anthology, expanding it into a book, or licensing a reprint to *Reader’s Digest*. The publisher, for its part, retained the right to reprint the article in subsequent issues of its own periodical without further permission from or payment to the author. The 1976 Act codified this arrangement in Section 201(c), which reads:

Contributions to Collective Works. – 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 the copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of the collective work, any revision of that collective work, and any later collective work in the same series.⁴

³ Throughout this paper, the term “article” is used interchangeably with the term “contribution,” which refers to any separately copyrighted work that has been included in a collective work. *See* 17 U.S.C. § 101 (1994) (providing the definition of “collective work”). A “contribution” could be an article, a photograph, a poem, an illustration, or any other copyrightable work.

⁴ 17 U.S.C. § 201(c) (1994). Note that a major impetus for codifying the rights between author and publisher in this section was to repudiate the consequences of the “indivisibility doctrine,” which under the 1909 Copyright Act deemed that a person either owned the entire bundle of rights in a copyrighted work or none at all. *See generally* Copyright Act of July 1, 1909, ch. 320, § 1, 3, 9, 10, 35 Stat. 1075, 1075-76 (repealed 1976); *Hirshon v. United Artists Corp.*, 243 F.2d 640, 643 (D.C. Cir. 1957). Under the 1909 Act, this doctrine created an undesirable result because of the strict formalities required to meet the copyright notice requirements. If the notice requirements were not met, the

This section of the Copyright Act has been seldom litigated in the quarter century since the Act was passed, likely because of technical and economic constraints as much as anything else. Until recently, it was simply not feasible to market and sell individual copies of articles on a wide-scale basis because the cost to reproduce and distribute the article would make the selling price prohibitively high. Only by inclusion in a collective work, which was distributed as a whole, could an individual article be economically sold. Thus, publishers were content to print the article once and permit the author to later sell the article for republication in another periodical.

However, modern technology, specifically the Internet, has dramatically altered the economic stakes. Beginning with massive databases such as Nexis and Westlaw, consumers now have access to hundreds of thousands of individual articles. Publishers provide these databases with the complete digital text of each article in each periodical issue, and the databases then allow their customers to search through these articles in a variety of ways and print or download those articles which satisfy their criteria. The databases charge their customers a fee for this service, and the print publishers in turn charge the databases. However, the authors of these articles are left with nothing, except perhaps a shrunken market for secondary sales of their articles as their works become otherwise widely available to the public.

The critical link in this supply chain is the print publisher's furnishing copies of the thousands of individual articles to the databases. But doesn't Section 201(c) by its terms state that the publishers acquire only three narrow privileges – to reproduce and distribute the contribution as part of the collective work, any revision of that collective work, and any later collective work in the same series?⁵ If so, a publisher's sale of an individual contribution to a database, and then to a consumer, would not seem to fall within any of these privileges.

work would become part of the public domain. *See Geisel v. Poynter Prods., Inc.*, 295 F. Supp. 331, 337 (S.D.N.Y. 1968). A collective work such as a periodical typically does not include a separate copyright notice as to each individual article, but only a single notice for the collective work as a whole. Because an individual article in a collective work lacked the separate copyright notice, under the 1909 Act it would fall into the public domain. *See id.* at 337. However, in order to avoid this result, courts looked to the indivisibility doctrine. *See id.* Reasoning that the article did not become part of the public domain if the publisher acquired the copyright (because the publisher provided copyright notice for the collective work), and a publisher can only own the copyright in the individual article if it owns all rights in the article (because of the indivisibility doctrine), the courts determined that the publisher must have acquired all rights to the article absent an express agreement between the author and publisher to the contrary. *See id.* Section 201(c) repudiated this strained analysis by spelling out the various rights and privileges of the author and publisher. *See* 17 U.S.C. § 201(c) (1994).

⁵ *See* 17 U.S.C. 201(c) (1994).

A. *Tasini v. New York Times Co. – Article Copying Via a Centralized Database of Individual Articles*

In the first major action invoking Section 201(c), the plaintiffs, freelance authors, argued that the distribution of articles described above fell outside the statute and constituted copyright infringement. *Tasini v. New York Times Co.*,⁶ was an action by six freelance authors against a number of periodical publishers and article database services.⁷ Three of the defendants, *The New York Times*, *Newsday*, and *Sports Illustrated*, are print publications in which the plaintiffs' articles first appeared under a "first publication" license.⁸ The other three defendants offered electronic versions of material previously published in the print publications for purchase or downloading by subscribers.⁹ Two of the electronic defendants, Nexis and *The New York Times OnDisc*, were provided "with a complete copy of computer text files which the publishers use during the process of producing the hard copy versions of their [collective works]."¹⁰ From those files, they created products containing the text of all articles contained in each issue, but omitting photographs, advertisements, and the column format of the periodicals.¹¹ The third electronic defendant, *General Periodicals on Disc*, scanned the printed publications and sold products that included "complete images of these periodicals."¹²

The plaintiff-authors claimed that the print defendants infringed their copyrights by selling their works to the electronic defendants, and that the electronic defendants infringed by selling their works to database subscribers.¹³ The issue in *Tasini* was whether these particular uses of the collective works as authorized by the print publishers were allowable under Section 201(c) without permission from the

⁶ *Tasini v. New York Times Co.*, 972 F. Supp. 804, 807 (S.D.N.Y. 1997), *rev'd* 206 F.3d 161 (2d Cir. 2000), *cert. granted*, 69 U.S.L.W. 3312 (U.S. Nov. 6, 2000) (No. 00-201).

⁷ *Id.* at 806.

⁸ *See id.* at 807.

⁹ *See id.* at 807-08.

¹⁰ *Id.* at 808.

¹¹ *Id.*

¹² *Tasini*, 972 F. Supp. at 808-09.

¹³ *Id.* at 809.

freelance authors.¹⁴ The district court in *Tasini* held on cross-motions for summary judgment that such a use was allowed because the databases “carr[ie]d recognizable versions of the publisher Defendants’ newspapers and magazines,” and thus were mere “revisions” of those collective works,” which fell within the second of the three Section 201(c) privileges.¹⁵

The Second Circuit reversed, and ordered judgment in favor of the authors.¹⁶ The appellate court first observed that under the Section 201(c) framework, “the *author* of an individual contribution to a collective work owns the copyright to that contribution, absent an express agreement setting other terms.”¹⁷ The Court then explained how the three Section 201(c) privileges function together:

The first clause sets the floor, so to speak, of the privilege: the collective-work author is permitted to reproduce and distribute individual contributions as part of “that particular collective work.” In this context, “that particular collective work” means a specific edition or issue of a periodical. *See* 17 U.S.C. § 201(c). The second clause expands on this, to permit the reproduction and distribution of the individual contribution as part of a “revision” of “that collective work,” *i.e.*, a revision of a particular edition of a specific periodical. Finally, the third clause sets the outer limit or ceiling on what the Publisher may do; it permits the reproduction and distribution of the individual contribution as part of a “later collective work in the same series,” such as a new edition of a dictionary or encyclopedia.¹⁸

With this framework in mind, the Second Circuit next observed that the natural reading of the “‘revision’ of ‘that collective work’ clause is that Section 201(c) protects only later editions of a particular issue of a periodical, such as the final edition of a newspaper,” but would not “permit the inclusion of previously published freelance contributions ‘in a new anthology or an entirely different magazine or other collective work,’ *i.e.*, in later collective works not in the same series.”¹⁹ What the *Tasini* defendants were arguing, in effect, was that the databases “comprising thousands or millions of individually retrievable articles taken from hundreds or thousands of periodicals” were a “revision” of

¹⁴ *See id.* at 809.

¹⁵ *Id.* at 825.

¹⁶ *Tasini v. New York Times Co.*, 206 F.3d 161, 163 (2d Cir. 2000).

¹⁷ *Id.* at 166 (emphasis added).

¹⁸ *Id.* at 167.

¹⁹ *Id.* (quoting H.R. Rep. No. 94-1476, at 122-23 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5738).

each edition of every periodical in the databases.²⁰ The Court rightly rejected this argument, recognizing that the databases are not akin to a final edition of the original periodical, but are in fact “new anthologies” of articles that do not fall within the narrow Section 201(c) privileges.²¹ The defendants therefore had no authorization to sell the individual copies of the plaintiffs articles and were liable for copyright infringement.²²

The *Tasini* Defendants petitioned the United States Supreme Court for certiorari to review the Second Circuit’s ruling, and the Court recently granted the petition.²³ Presumably, therefore, the Court will provide the final word on this issue. However, the allocation of rights between author and publisher under Section 201(c) appears to be clearly defined, and a reversal of the Second Circuit would appear to run counter to the plain language of the statute.

B. Ryan v. CARL Corp. – *Article Copying via a Decentralized Internet Model*

Within the last several years, technological innovations have again drastically changed the economics in this area. The Internet, fast modems, and inexpensive hard drive space have now made it economically feasible to make articles available for sale not only from vast centrally-located databases, like those employed by the defendants in *Tasini*, but on an individual basis from any computer. An article that appears in an online version of a periodical, for example, may now be quickly copied, downloaded, or e-mailed onto another website or another user’s computer with a few mouse clicks. Millions of copies of an article may be made and sent quickly and inexpensively.

While these technological innovations offer tremendous opportunities, they also create additional challenges for the copyright laws. Online articles, photographs, or graphics, as creative works, are copyrighted forms of expression. Anyone can now be a publisher. But while the reproduction and distribution of copyrighted works is becoming the easiest thing in the world to accomplish, some type of protection for these works must be guaranteed to maintain the incentive to create such works in the first place, as the Copyright Clause in the Constitution recognizes. In fact, as is made clear by the consolidation of technology companies and media companies, most notably AOL’s planned merger with

²⁰ See *id.*

²¹ See *id.* at 169.

²² See *Tasini*, 206 F.3d at 171-72.

²³ See *Tasini v. New York Times Co.*, 69 U.S.L.W. 3312 (U.S. Nov. 6, 2000) (No. 00-201).

Time Warner, to succeed on the Internet is going to require not only the means to distribute information and entertainment, but also the production of content that the public wishes to view and to pay for. When he was asked what will determine which of the many available paths to the Internet consumers will choose in the future, Jerry Yang, co-founder of Yahoo, explained, “Great content will win over time.”²⁴ Another case that recently worked its way through the federal courts, *Ryan v. CARL Corp.*,²⁵ has touched on these very issues.

Even the defendants in *Tasini* appear to have conceded that Section 201(c) did not permit a publisher to sell an individual copy of a contribution, and thus they were compelled to attempt to squeeze their article sales into the “revision” privilege of the statute. However, the defendants in the next major action interpreting Section 201(c), *Ryan v. CARL Corp.*, argued that Section 201(c) does, in fact, confer upon the publisher the right to sell individual articles.²⁶

In *Ryan*, a class action brought on behalf of freelance authors, the defendants operated a service called UnCover, which sold copies of individual articles to consumers.²⁷ UnCover maintained an Internet database available to the public that contained the titles, but not the text, of approximately eight million separate articles from about 17,000 periodicals.²⁸ It purported to obtain permission to sell copies of articles from the periodical publishers, but it admitted that it never sought nor obtained permission from the authors.²⁹ When a customer ordered an article, an UnCover employee working at a contributing library that has the periodical in its collection photocopied the individual article with a scanner, which transmitted a copy of the article’s image to a computer at UnCover’s offices.³⁰ UnCover sent a copy of the article to the customer by facsimile and retained an image of every article sold on a permanent computer disk so that later orders for the same article could be filled without a return trip to the source library.³¹

²⁴ Barnaby J. Feder, *Yahoo and Murdoch Said to Be in Talks*, N.Y. TIMES, Feb. 28, 2000, at A15.

²⁵ *Ryan v. CARL Corp.*, 23 F. Supp. 2d 1146 (N.D. Cal. 1998).

²⁶ *See id.*

²⁷ *See id.* at 1147.

²⁸ *See id.*

²⁹ *See id.*

³⁰ *See id.*

³¹ *Ryan*, 23 F. Supp. 2d at 1147.

While the *Ryan* defendants offered a relatively low-tech service – scanning hard copies of articles and faxing or e-mailing the images to a paying customer – the facts of this case apply equally to the Internet. To illustrate, a website containing a variety of articles, photographs, or other creative works would fall within the definition of a “collective work” under the Copyright Act, in the same vein as the original print publications in *Ryan*.³² Many websites include contributions from freelance artists and writers for which the site owners pay the authors a fee. However, what if one wishes to use these articles for a secondary purpose, such as inclusion in a private web page or newsletter, or to organize into a searchable index and sell to others, or simply to keep a copy for personal use? Section 201(c) determines who owns the right to grant permission and collect fees from any such additional uses.³³

The *Ryan* defendants argued that their article sales fell within the first Section 201(c) privilege that they were selling each article “as part of the collective work.”³⁴ The defendants asserted that this first privilege applied because the copies they sold were facsimiles of the articles as they appeared in the original print publication, and thus retained the formatting aspects such as page numbers, margins, and font type.³⁵ This situation raises the identical concerns of a user simply cutting and pasting an article appearing on the web into another forum. Therefore, the issue before the *Ryan* Court was whether the first Section 201(c) privilege permits the publisher only to sell an individual article *in* the collective work or if it also allows individual sales separate and apart from the collective work as long as all of these formatting characteristics are retained.³⁶

Noting the plain language of the statute and the fact that Section 201(c) was enacted to expand the rights of freelance authors, the *Ryan* Court held that “the privilege of reproducing and distributing the contribution as part of the collective work” does not extend to sales of individual articles, only to sales of articles “as part of,” or “in” the collective work.³⁷ The Court expressed some reluctance about this

³² 17 U.S.C. § 101 provides, in pertinent part that, “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(a) (1994).

³³ See 17 U.S.C. § 201(c) (1994).

³⁴ See *Ryan*, 23 F. Supp. 2d at 1149.

³⁵ See *id.*

³⁶ See *id.* at 1149-50.

³⁷ *Id.*

interpretation because, in the judge's mind, such a reading would result in less efficiency given the requirement of obtaining permission from each author before his or her article could be copied and sold rather from the publishers whose numbers are far fewer and are more easily located.³⁸ However, the Court also recognized that Congress had clearly defined the allocation of rights between author and publisher, and the Court had no authority to rewrite the plain language of the statute.³⁹

Although the *Ryan* defendants appealed this ruling to the Ninth Circuit Court of Appeals, the parties have since negotiated a settlement of the action that was approved by the Court on November 8, 2000. The defendants agreed to pay a total of \$7.25 million, up to \$30,000 per author, to each freelance author who retained the copyright in his or her article and whose article was delivered by UnCover between October 22, 1994 and July 12, 2000.⁴⁰

A number of additional copyright infringement lawsuits have been filed in the wake of *Tasini* and *Ryan* against companies that sell large numbers of individual articles, and all allege that the authors retained all rights for such secondary individual article sales under Section 201(c). For example, the Authors Guild, the largest advocacy and trade group in the United States representing professional writers, has filed a class action in a New York federal court alleging copyright infringement against, among others, Reed-Elsevier and the Thomson Corporation, the parent companies of the Lexis-Nexis and Westlaw databases.⁴¹ A number of writers have also filed a copyright class action in federal court in San Francisco against Thomson, Northern Light Technology Corporation, and a division of the Bell & Howell Company.⁴² These cases seek injunctive relief and large monetary damages, and may force distributors of individual articles to rethink their copyright compliance and business procedures.

The *Tasini* and *Ryan* decisions thus affirm what it appears all interested parties openly recognized, accepted, and utilized, until advances in technology created new economic opportunities. Simply put, technology has been the genesis of publisher realization that the now modest cost of duplication and distribution creates the opportunity to reap additional profits from the individual articles

³⁸ *Id.* at 1150.

³⁹ *Id.* at 1151.

⁴⁰ See *UnCover Class Action Settlement* (visited Oct. 17, 2000) <<http://www.uncoversettlement.com>> (providing the complete terms of the settlement and claims process).

⁴¹ See *Authors Guild Brings Lawsuit Against Major Electronic Database Providers for Massive Electronic Infringement* (visited Oct. 17, 2000) <<http://www.authorsguild.org/prdatabaselawsuit.html>>.

⁴² See Jess Bravin, *Free-Lance Writers Sue Publishers on the Web*, WALL ST. J., Aug. 15, 2000, at A4.

that freelance authors supplied for their publications. Yet, the author is presumed to retain all rights in his or her article unless there is an express transfer of the copyright or of any rights under it, and the publisher obtains merely a narrow privilege to use the article in three distinct ways: in the original published collective work, in a revision such as the later edition of a newspaper, or in a later collective work in the same series such as a new edition of an encyclopedia. For any other use, the publisher must first obtain permission from the author. Thus, in these two cases, it was held that the publishers had no right to reproduce and distribute the individual articles, and therefore they did not have the right to authorize the electronic databases to do so in *Tasini* or to license UnCover to do the same in *Ryan*. Any individual sale must first be approved by the authors of the articles.

IV. ALLEVIATING THE TENSIONS AMONG AUTHOR, PUBLISHER, AND THE PUBLIC

A. *The “All-Rights” Contract – A Problematic Solution*

The question remains of how best to ensure that the vast library of individual articles that have been published remains available to the public while the rights of the authors of these articles is respected. After all, if distribution of these articles is halted altogether, the authors will enjoy no benefit, and the public will certainly suffer. Is requiring prior permission from each author feasible? As Judge Smith observed in *Ryan*, the UnCover defendants sold thousands of individual article copies a week, and it would be difficult, arguably impossible, to track down the authors of each of these articles, obtain permission, and negotiate a licensing and fee agreement. The transaction costs of obtaining such rights could outweigh the technological advances that have allowed the millions of such articles to be made available and economically sold on an individual basis in the first place. Particularly with articles appearing on the Internet, this requirement may be regarded as a waste of the awesome technical advantages of that medium for distributing multiple copies of an article. Thus, the tension between ensuring that new works are created and allowing for the broadest public consumption of those works reemerges.

One mechanism for reducing the number of parties from whom permission would be needed has already become an increasingly prevalent practice. Publishers may require an author to expressly transfer all rights in an article before it publishes it in the original collective work, whether that be in a print publication or website. *Tasini* and *Ryan* affirm, however, that these rights are a valuable resource, and simple economics would presume that obtaining these additional rights would also necessitate

paying an increased fee to the author. For that reason alone, these two cases have dramatically increased the bargaining power of the lone author against the monolithic media company.

“All-rights” contracts bring with them a host of new problems, however, not the least of which is an upsetting of the symbiotic relationship between authors and publishers. Each of these groups clearly needs the other, and the balance that has served both groups well is disturbed if an author is forced to give up all rights every time he or she wishes to publish an article. For example, because an author would thus be prohibited from including the article in a later-published collection of short stories or articles, or developing the story into a movie, or using the work he or she created in a limitless number of additional ways – unless he or she perversely obtained permission from the original publishers to do so – the author might simply choose not to publish the individual work at all. Even without these concerns, the widespread use of such “all-rights” contracts does not completely alleviate the problem at hand. One who wishes to obtain an individual copy must still locate the publisher and negotiate a fee. The number of publishers is much smaller than the number of authors, but there are still tens of thousands of them to sift through – millions when one considers that each website operator is a “publisher.” While the large databases such as Nexis and Westlaw have made that process simpler by serving as clearinghouses for large numbers of publishers, they still deal with only a tiny fraction of all publishers. And, as *Tasini* has affirmed, they cannot distribute those articles for which an express transfer of rights has not been made.

B. The ASCAP and BMI Model – The Need for an Analogous System for Other Works

Then how can the rights for these millions of articles be managed in such a way that does not defeat the very technological advances that have now made such an enormous catalog of information available to the public at reasonable cost? Fortunately, there is an historical precedent for precisely this situation.

In the 1910s, with the advent of recording equipment and radio, composers and performers in the music industry faced the same problem writers face today: how to account for the use of copyrighted material in a new medium designed for easy reproduction and distribution. Recordings and radio made it possible for the first time for a musical composition to be reproduced and performed millions of times across the country in theaters, nightclubs, dance halls, restaurants, and homes. While this was very profitable for the record publishers and the radio stations, the composers and performers – those who owned the copyrights in the musical pieces – found themselves shut out. Necessity being

the mother of invention, two organizations were formed to serve as clearinghouses for musical compositions. The first was ASCAP (the American Society of Composers, Authors and Publishers), and the second, BMI (Broadcast Music, Inc.), was formed a few decades later.

The composer, or whoever owns the rights to a musical composition, need only register the work with ASCAP or BMI, in effect, granting the organizations a non-exclusive license and thereby making the work available to the hundreds of thousands of radio stations, nightclub owners, and others, who have negotiated one of the many types of blanket licenses to play the registered compositions. ASCAP and BMI track the frequency in which the compositions are played through a variety of tracking and surveying techniques, and they handle payment to the copyright owners so that each licensee does not have to negotiate separately with the thousands of individual composers, performers, and publishers.

Similar nascent efforts to manage the sale and distribution of written works are already taking place, such as the Publication Rights Clearinghouse, started by the National Writers Union, and the Authors Registry, begun by the Authors Guild in concert with the American Society of Journalists and Authors, the Association of Authors' Representatives and the Dramatists' Guild. These new clearinghouses promise a kinder, gentler ASCAP because it is unrealistic and contrary to the spirit of the Internet to expect that rights holders will be able to collect for every bit and byte or for every cut-and-pasted bit of text. On the other hand, the commercial defendants involved in *Ryan v. CARL Corp.* and *Tasini v. New York Times Co.* are not office colleagues passing poems around the electronic water cooler; they are international corporations in the specific business of marketing copyrighted works, and they should be held accountable to the creators of the works they sell. The Publication Rights Clearinghouse has negotiated an agreement with one supplier of individual articles over the Internet, Contentville.com, whereby any author who registers with the group will receive a royalty for each article sold from the website.⁴³ While Contentville.com continues to place the burden on the author of an article it offers for sale to affirmatively object or seek payment for such sales, contradictory to the presumptions under Section 201(c) of the Copyright Act, this agreement is at least a small step toward copyright compliance and respect for authors' rights in their creative works.⁴⁴

⁴³ See Felicity Barringer, *Online Agreement Near for Writers' Group*, N.Y. TIMES, Aug. 3, 2000, at C6.

⁴⁴ Of course, there will always be those who have no interest at all in respecting authors' rights. For those who choose to infringe rather than comply with the copyright laws, enforcement must come from the stiff civil remedies and criminal penalties under the Copyright Act. See 17 U.S.C. §§ 501-06 (1994) (providing copyright infringements and remedies).

There are a limitless number of potential mechanisms for taking care of these secondary rights to ensure that authors are fairly compensated for the use of their creative works, that publishers are fairly compensated for getting these works to the public, and that the public is not denied the freest possible access to the works. An organization might develop a credible census of web use analogous to the surveys performed by ASCAP to break down the radio air play of musical works. Because computers are so well-suited for tracking functions, sophisticated meters might be built into software. As has already been developed for Web-based distribution of music, identification tags or other copy protection mechanisms might be embedded directly into digital works to thwart unlawful copying or to track use. A clearinghouse of individual works for which secondary rights are available might be developed which would include the terms under which a work could be redistributed as well as automatic billing and collection of licensing fees to be paid to the author. Whatever the mechanism, the need for a means of obtaining permission from and compensating the individual authors who created the works being distributed is here. The preferred route is for publishers and authors to work together to create one or more such mechanisms before a court imposes such a system or real damage is done to the incentives for creating and distributing creative works.

V. CONCLUSION

While technology now permits the reproduction and distribution of information more quickly and efficiently than ever before, it also threatens to upset the delicate balance the Framers of the Constitution recognized with the Copyright Clause. If no system for compensating musical composers and performers had ever been developed, it is not hard to imagine that the quality and quantity of musical works being created would be far less than is available today. Just as recording and radio technologies upset the copyright balance until ASCAP and BMI came about to restore the equilibrium, new technologies being developed today centering on the Internet threaten again to upset the balance among authors, publishers, and the public. It is in the best interest of each of these players to put together one or more similar means of managing the legal rights arising out of copyright to ensure that creative works continue to be produced in the tremendous qualities and quantities that have fueled this unprecedented technology boom on so many levels.