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Article

**FAULKNER V. NATIONAL GEOGRAPHIC ENTERPRISES, INC.: DRIVING A TRUCK THROUGH THE EYE
OF A NEEDLE**

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***64 I. Introduction**

In its March 2005 *Faulkner v. National Geographic Enterprises* decision,¹ the U.S. Court of Appeals for the Second Circuit

affirmed a district court's summary judgment dismissal² of the freelance authors' copyright infringement claims.³ The plaintiffs' claims stemmed from defendants' inclusion of the freelancers' works in The Complete National Geographic (CNG), a collection of CD-ROM and DVD products produced, marketed, and sold by the defendants.⁴ The CNG consists of searchable digital replicas of over one-hundred years of printed National Geographic magazines (Magazines) together with opening and closing multimedia sequences,⁵ and a "computer program that serves as the storage repository and retrieval system for the images."⁶

Analyzing Faulkner under the tortured lens of § 201(c) of the 1976 Copyright Act,⁷ which defines the basis for a publisher's revision privilege,⁸ the Second Circuit affirmed the district court's embrace of the defendants' § 201(c) defense and held that "because the original context of the Magazines is omnipresent in the CNG, and because it is a new version of the Magazine, the CNG is a privileged revision."⁹ The Second Circuit distinguished the CNG from the databases *65 containing the freelance writers' articles that it and the Supreme Court both deemed infringing in *Tasini v. New York Times*.¹⁰ Both courts held that the databases were not privileged revisions under § 201(c) analysis.¹¹

In its March 2001 *Greenberg v. National Geographic Society* decision,¹² a freelance photographer's suit against essentially the same defendants and under virtually identical facts to the Faulkner actions,¹³ the U.S. Court of Appeals for the Eleventh Circuit reached exactly the opposite result,¹⁴ reversing a Florida district court's granting of summary judgment for the defendants under the § 201(c) revision privilege.¹⁵ The Eleventh Circuit held that the defendants' publication of freelance photographer Greenberg's photographs in the CNG CD-ROM and DVD products constituted copyright infringement, because it was not a permissible revision and therefore not privileged under § 201(c).¹⁶ In October 2001, less than four months after its landmark June 2001 *Tasini* decision, the Supreme Court denied the Greenberg defendants' petition for a writ of certiorari.¹⁷

Against this backdrop of a sharp circuit split resulting from the Second Circuit's Faulkner ruling, the Faulkner, Psihoyos and Ward plaintiffs in *Faulkner* also sought a writ of certiorari from the Supreme Court in October 2005.¹⁸ The Supreme Court denied the Faulkner plaintiffs' petitions for a writ of certiorari in December 2005.¹⁹

This Note argues that the Supreme Court should have granted the writs of certiorari requested by the Faulkner plaintiffs. Because Congress failed to clearly define the scope of the § 201(c) revision privilege,²⁰ the judicial branch should *66 clarify how the holding and analysis in *N.Y. Times Co. v. Tasini*,²¹ the Supreme Court's landmark 2001 interpretation of the scope of § 201(c), should be applied to the facts of *Faulkner* and *Greenberg*.²² Further, the Supreme Court should have reversed the Second Circuit's *Faulkner* decision because it: (1) substantially deviates from the essential analysis and interpretation of § 201(c) in *Tasini*; (2) concludes that the § 201(c) revision privilege is freely transferable; (3) eviscerates the core public-interest design of the Copyright Clause and Congress's legitimate and unambiguous purpose in enacting the 1976 Copyright Act; and (4) creates uncertainty for authors and publishers that will lessen incentives for the production and distribution of new works, thereby decreasing public access to such works.

It is essential to first summarize the *Faulkner*, *Greenberg*, and *Tasini* cases with particular emphasis on the juxtaposed § 201(c) analyses of the divided circuit courts in *Faulkner* and *Greenberg* regarding the allegedly infringing CNG products.

II. Summary of *Faulkner*

Starting in 1997, defendants republished photographs and articles originally published in print as part of individual collective-work National Geographic magazines (Magazines) in various iterations of CD-ROM and DVD anthologies entitled The Complete National Geographic (CNG).²³ Each iteration of the CNG collected over 100 years of the individual collective-work print Magazines into a single digital anthology.²⁴ Each issue of the individual Magazines comprising the CNG was scanned two pages at a time such that CNG users may view scanned images of pages on a computer screen essentially as they appeared in the printed version, including the original magazines' text, graphics, advertisements, credits, *67 attributions, graphics, page numbers, and the "gutter" running between the pages.²⁵

Although each issue of the Magazine may be viewed chronologically on the CNG, stories may also be accessed either through each individual Magazine's table of contents page or with an included, separately-copyrighted, electronic search engine which takes a viewer directly to stories, words, phrases, descriptions of articles (by title, contributor, date, or subject), cover and page images, advertisements, and page maps.²⁶ PicTools, a copyrighted image compression and decompression tool, saves images onto the CD-ROM discs in compressed form to save space.²⁷ Although it adds no creative elements to the

Magazines, the program facilitates viewing of the scanned images.²⁸ Each iteration of the CNG also includes an opening and exiting multimedia sequence that lists credits for the CNG's producers.²⁹ In 1997, defendant National Geographic Society (Society) registered the first version of the CNG with the copyright office as a derivative work using Copyright Office form VA.³⁰ Consumers may use the CNG to print and digitally clip the individual stories and photographs contained in the anthologies and, in fact, were encouraged to do so in defendants' marketing scheme for the CNG.³¹

The central issues on appeal to the Second Circuit were judgments by the district court in the substantially similar *Faulkner*, *Ward*, *Hiser*, and *Psihoyos* actions granting summary judgment against all plaintiffs and holding that the CNG was not infringing because it was a privileged revision under § 201(c).³²

Writing for the Second Circuit, Judge Winter affirmed the district court's summary judgment dismissal of the plaintiffs' infringement claims under § 201(c) *68 analysis, holding that "because the original context of the Magazines is omnipresent in the CNG, and because it is a new version of the Magazine, the CNG is a privileged revision."³³ The court further held that defendant Society's § 201(c) revision privilege is analogous to the core § 106 exclusive rights granted to authors under the 1976 Copyright Act³⁴ and thus is transferable.³⁵

Setting forth the rationale for its § 201(c) revision privilege holding, the Second Circuit explained:

The CNG presents the underlying works to users in the same context as they were presented to the users in the original versions of the Magazine. The CNG uses the almost identical 'selection, coordination, and arrangement' of the underlying works as used in the original collective works. *Tasini*, 206 F.3d at 168. The CNG presents an electronic replica of the pages of the Magazine. Pages are presented two at a time, with the gutter (that is, the Magazine fold) in the middle, and with the page numbers in the lower outside corners, just as they are presented in the written format. In addition, the contents of the CNG, including the authors' contributions, are in the same positions relative to the other contributions in the Magazine. To be sure, a CNG user can focus on particular pages or parts of pages. However, a user of a microfilm of a collective work can do the same thing, see *Tasini*, 533 U.S. at 501, as, indeed can a reader of an original magazine by opening to a particular page. In contrast, the databases at issue in *Tasini* precluded readers from viewing the underlying works in their original context.³⁶ Setting forth the rationale with respect to its holding on the transferability of the § 201(c) revision privilege, the Second Circuit cited to § 201(d) of the 1976 Copyright Act, which provides that "[t]he owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to *69 the copyright owner by this title."³⁷ The court also cited language from the legislative history of the 1976 Copyright Act as evidence that the drafters intended to do "nothing to change the rights of the owner of a copyright in a collective work."³⁸ Thus, the court reasoned that "publishers may transfer any subdivision of a copyright that they acquire. See *Tasini*, 972 F. Supp. 804, 815-16 (S.D.N.Y. 1997) (holding subdivisions of copyrights transferable), rev'd on other grounds, 206 F.3d 161 (2d Cir. 2000). This result in no way undermines Section 201(c)'s goal of remedying the unfairness of indivisibility. It simply recognizes the quite natural implications of divisibility."³⁹

III. Summary of *Tasini v. New York Times Co.*, the Essential Backdrop, and the Intervening *Greenberg v. National Geographic Eleventh Circuit Decision*

A. The Second Circuit's February 2000 *Tasini v. New York Times Co.* Opinion

Six freelance authors alleged copyright infringement by three defendant print publishers and two database operators for contracting between themselves to include the authors' contributions to the print publication collective works in three computer databases without the authors' consent.⁴⁰ On cross-motions for summary judgment, then district court Judge Sotomayor⁴¹ ruled for the defendants, holding that the provision of the authors' works to the database defendants and the subsequent publication of those works were protected as privileged revisions of collective works under § 201(c).⁴² The Second Circuit reversed and remanded with instructions to enter judgment for the authors,⁴³ and the United States Supreme Court (Ginsburg, J.) affirmed, 7 to 2, in June 2001.⁴⁴

Judge Winter, writing the Second Circuit's reversal of the district court, explained that "[t]he crux of the dispute is . . . whether one or more of the pertinent electronic databases may be considered a 'revision' of the individual periodical *70 issues from which the articles were taken."⁴⁵ The court held, "Section 201(c) does not permit the [p]ublishers to license individually copyrighted works for inclusion in the electronic databases."⁴⁶ The court recognized that "the electronic

databases are neither the original collective work--the particular edition of the periodical--in which the [a]uthors' articles were published nor a later collective work in the same series⁷⁴⁷ and rejected defendants' contention "that each database constitutes a 'revision' of the particular collective work in which each [a]uthor's individual contribution first appeared."⁷⁴⁸ Interpreting the meaning of the crucial last clause of § 201(c), the Second Circuit explained, "The most 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."⁷⁴⁹

Bolstering this textual analysis of § 201(c) and crucial to understanding how radically the Second Circuit deviated from this analysis five years later in *Faulkner*, Judge Winter also interpreted the legislative history surrounding the introduction of § 201 into the 1976 Copyright Act to mean, "[T]he 'revision' clause in Section 201(c) was not intended to 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."⁷⁵⁰ Judge Winter noted that permissible uses under § 201(c) "are an exception to the general rule that copyright vests initially in the author of the individual contribution"; Judge Winter warned that "[w]ere the permissible uses under Section 201(c) as broad and as transferable as [defendants] contend, it is not clear that the rights retained by the [a]uthors could be considered 'exclusive' in any meaningful sense."⁷⁵¹ The court also remarked in a footnote, "Section 201(c) grants collective works authors 'only' a 'privilege,' rather than a 'right.' Each of these terms connotes specialized legal meanings, and they were juxtaposed by Congress in the same sentence of Section 201(c)."⁷⁵²

*71 The court proceeded to apply its interpretation to each of the three factually distinguishable, allegedly-infringing database uses of the authors' works that were at issue. With respect to uses of the plaintiffs' works in the NEXIS database (NEXIS), the court found that "it is significant that neither the [p]ublishers nor NEXIS evince[d] any intent to compel, or even to permit, an end user to retrieve an individual work only in connection with other works from the edition in which it ran."⁷⁵³ To the contrary, the court found that "The New York Times actually forbids NEXIS from producing 'facsimile reproductions' of particular editions."⁷⁵⁴ Thus, the court readily found that the NEXIS database uses were outside the ambit of the § 201(c) privilege.⁷⁵⁵

Finding uses of the authors' works in the NYTO database (NYTO) similar to the NEXIS database uses, the court observed that NYTO "contains many articles that may be retrieved according to criteria unrelated to the particular edition in which the articles first appeared," and that "[i]n every respect save its being limited to The New York Times, then, NYTO is essentially the same as NEXIS."⁷⁵⁶ In stark contrast to its 2005 *Faulkner* decision, the Second Circuit emphasized in *Tasini II*, "If the republication is a 'new anthology' or a different collective work, it is not within Section 201(c)."⁷⁵⁷ Furthermore, [b]ecause NYTO is for present purposes at best a new anthology of innumerable editions of the Times, and at worst a new anthology of innumerable articles from these editions, it cannot be said to be a "revision" of any (or all) particular editions or to be a "later collective work in the same series."⁷⁵⁸ Thus, despite being limited to articles from one title, the court found that the defendants' publications of the authors' works in NYTO fell outside the permissible ambit of the § 201(c) revision privilege because NYTO was "a new anthology."⁷⁵⁹

With respect to the defendants' uses of the authors' works in the GPO database, the court explained, "Although this database contains scanned photo-images of editions of The New York Times Sunday book review and magazine, it also contains articles from numerous other periodicals."⁷⁶⁰ Thus, like its finding with respect to NYTO, the court found GPO similar to the NEXIS database in that it *72 "is at best a new anthology."⁷⁶¹ Judge Winter concluded by carefully circumscribing the scope of the court's holding and by emphasizing that its analysis merely provided the presumptive framework around which authors and publishers are free to contract.⁷⁶²

B. The Intervening March 2001 Eleventh Circuit *Greenberg v. National Geographic* Opinion

The CNG products held to be infringing by the Eleventh Circuit in *Greenberg* were the same as those later found not to be infringing by the Second Circuit in *Faulkner*.⁶³ *Greenberg* sued in the Northern District of Florida in 1997 after four of his photographs were included in CNG.⁶⁴ In 1998, the district court granted summary judgment to the defendants on the pertinent counts⁶⁵ relying on the § 201(c) analysis from the subsequently-reversed 1997 S.D.N.Y. district court's *Tasini* opinion.⁶⁶ On appeal, the Eleventh Circuit reversed and remanded.⁶⁷ On remand, a jury awarded *Greenberg* the maximum available willful statutory damages of \$100,000⁶⁸ for each of four infringements.⁶⁹ The district *73 court affirmed the award in September 2005, from which the defendants have hinted they will appeal.⁷⁰

Emphasizing that the Copyright Clause⁷¹ is the essential context for review of defendants' § 201(c) privilege claim, the Eleventh Circuit held that the CNG constitutes "a new collective work that lies beyond the scope of § 201(c)" and "that the unauthorized use of the Greenberg photographs in the CNG compiled and authored by the Society constitutes copyright infringement that is not excused by the privilege afforded the Society under § 201(c)."⁷² The court's analysis divided the CNG into three component parts: "(1) the moving covers sequence ('Sequence'); (2) the digitally reproduced issues of the Magazine themselves ('Replica'); and (3) the computer program that serves as the storage repository and retrieval system for the images ('Program')."⁷³

Like the Second Circuit in *Tasini*, the Eleventh Circuit's interpretation of § 201(c) emphasized the distinction between the § 201(c) revision privilege and a copyright owner's exclusive rights under § 106:

In the context of this case, Greenberg is "the author of the contribution" (here each photograph is a contribution) and the Society is "the owner of copyright in the collective work" (here the Magazine). Note that the statute grants to the Society "only a privilege," not a right. Thus, the statute's language contrasts the contributor's "copyright" and "any rights under it" with the publisher's "privilege." This is an important distinction that militates in favor of narrowly construing the publisher's privilege when balancing it against the constitutionally-secured rights of the author/contributor.⁷⁴ Viewing the CNG product in its entirety, the Eleventh Circuit determined:

[T]he CNG is an "other collective work" composed of the Sequence, the Replica, and the Program. However, common-sense copyright analysis compels the conclusion that the Society, in collaboration with Mindscape, has created a new product ("an original work of authorship"), in a new medium, for a new market that far transcends any privilege of revision or other mere reproduction envisioned in § 201(c).⁷⁵ Qualifying its analysis in a footnote, the court added, "Because this case involves not only the incorporation of a new computer program, but also the combination *74 of the Sequence and the Replica, we need not decide in this case whether the addition of only the Program would result in the creation of a new collective work."⁷⁶ Finally, the court noted that Society's copyright registration of the CNG bolstered its conclusion that the CNG did not fall under the § 201(c) privilege because on the registration form:

[E]ven the Society admitted that the registered work, the CNG, was a compilation. Recall that a collective work is included in the definition of compilation and embraces those works wherein its separate components are each themselves copyrightable--as are the Sequence, Replica, and Program. . . . Accordingly, in the words of the legislative report, 'the publisher [the Society] could not . . . include the contribution (the photographs) in a new anthology . . . or other collective work [the CNG].' Thus in creating a new work the Society forfeited any privilege that it might have enjoyed with respect to only one component thereof, the Replica.⁷⁷ Obviously, the Eleventh Circuit did not have the omniscience to foretell the precise language that the Supreme Court would use three months later in its landmark *Tasini* decision; namely, the Supreme Court "focus[es] on the Articles as presented to, and perceptible by, the user."⁷⁸ The Eleventh Circuit left no doubt, however, that its own "common-sense" perception was that the CNG was "a new collective work," a new anthology "that far transcends any privilege of revision or other mere reproduction envisioned in § 201(c)."⁷⁹ Moreover, coming just a year after the Second Circuit's tour-de-force *Tasini* decision, it was entirely unsurprising that the Eleventh Circuit in *Greenberg* found that the CNG fell beyond the scope of the publisher's § 201(c) revision privilege. In sum, the Eleventh Circuit's conclusion was scrupulously consistent with the Second Circuit's findings in *Tasini* that both the NYTO and GPO databases therefore outside the ambit of § 201(c).⁸⁰

As explained in Section III.C below, the Supreme Court's affirmation of *Tasini* not only failed to diminish the force of the respective circuit courts' analyses of how new anthologies ("other collective works") are beyond the scope of the § 201(c) privilege but, in fact, unequivocally fortified those analyses.

C. The Supreme Court's June 2001 *New York Times Co. v. Tasini* Opinion

Three months after the Eleventh Circuit's *Greenberg* decision, the Supreme Court affirmed the Second Circuit in *Tasini*.⁸¹ The Supreme Court held that §201(c) *75 did not provide any privilege for the copying made by the publisher and database defendants:⁸²

because the databases reproduce and distribute articles standing alone and not in context, not "as part of that particular collective work" to which the author contributed, "as part of . . . any revision" thereof, or "as part of . . . any later collective work in the same series" Both the print publishers and the electronic publishers, we rule, have infringed the copyrights of the freelance authors. . . . We further conclude that the [p]rint [p]ublishers infringed the [a]uthors' copyrights by

authorizing the [e]lectronic [p]ublishers to place the [a]rticles in the [d]atabases and by aiding the [e]lectronic [p]ublishers in that endeavor.⁸³ Placing the 1976 Copyright Act in historical context, as the Second Circuit did in its own *Tasini* opinion,⁸⁴ the Supreme Court reiterated that Congress's intent in adopting the 1976 Copyright Act was to ameliorate the unfairness of the 1909 Act's indivisibility provisions.⁸⁵ The Court also emphasized that the changes enacted in the 1976 Copyright Act were within Congress's powers and noted:

The intent to enhance the author's position vis-a-vis the patron is also evident in the 1976 Act's work-for-hire provisions. Congress' adjustment of the author/publisher balance is a permissible expression of the economic philosophy behind the Copyright Clause, i.e., the conviction that encouragement of individual effort motivated by personal gain is the best way to advance public welfare.⁸⁶ More forcefully than the Second Circuit, and with a clear eye to preserving authors' exclusive §106 rights as a matter of congressionally ordered copyright policy, the Supreme Court explained that:

[Section] 201(c) adjusts a publisher's copyright in its collective work to accommodate a freelancer's copyright in her contribution. If there is demand for a freelance article standing alone or in a new collection, the Copyright Act allows the freelancer to benefit from that demand; after authorizing initial publication, the freelancer may also sell the article to others.⁸⁷

*76 The Court left no doubt that a significant component of the underlying policy rationale for finding that the publisher and database operator defendants did not enjoy any § 201(c) privilege was that "[i]t would scarcely 'preserve the author's copyright in a contribution' as contemplated by Congress, H. R. Rep. 122, if a newspaper or magazine publisher were permitted to reproduce or distribute copies of the author's contribution in isolation or within new collective works."⁸⁸

Moreover, like the Second Circuit decision below, the Supreme Court emphasized the inherent copyright policy imperative to protecting authors' rights by noting, "The [p]ublishers' encompassing construction of the § 201(c) privilege is unacceptable, we conclude, for it would diminish the [a]uthors' exclusive rights in the [a]rticles."⁸⁹ The Second Circuit's later omission in *Faulkner* of any discussion whatsoever of the underlying historical copyright policy is particularly glaring when contrasted with the central role policy concerns play both in its *Faulkner* decision and in the Supreme Court's *Tasini* decisions.

Against this historical copyright policy backdrop, the Court turned to the actual test to be applied "[i]n determining whether the [a]rticles have been reproduced and distributed as part of a revision of the collective works in issue," and the Court stated that it "focus[es] on the [a]rticles as presented to, and perceptible by, the user of the [d]atabases."⁹⁰ Most significantly, the Court noted that under this analytical approach:

One might view the articles as parts of a new compendium--namely, the entirety of works in the [d]atabase. In that compendium, each edition of each periodical represents only a miniscule fraction of the ever-expanding [d]atabase. The [d]atabase no more constitutes a revision of each constituent edition than a 400-page novel quoting a sonnet in passing would represent a revision of that poem. Revision denotes a new version, and a version is, in this setting, a distinct form of something regarded by its creators or others as one work. The massive whole of the [d]atabase is not recognizable as a new version of its every small part.⁹¹

*77 The databases at issue, the Court concluded, "simply cannot bear characterization as a 'revision' of any one periodical edition."⁹²

IV. How the Court in *Faulkner* Got It Wrong

Sections IV.A and IV.B below analyze two faults in the Second Circuit's § 201(c) *Faulkner* analysis and holding. Section IV.C argues that the contrary *Tasini* and *Greenberg* rationales and holdings more faithfully serve the design of the Copyright Clause, Congress's purpose in enacting the Copyright Act of 1976, and the traditional copyright policy of balancing authorial and publisher interests with the consuming public's interests. Finally, this Note concludes by arguing that the Second Circuit's *Faulkner* decision and the Supreme Court's denial of the *Faulkner* plaintiffs' petitions for a writ of certiorari will be detrimental to the interests of authors, publishers and the public at large.

A. The Second Circuit Incompletely Applied the § 201(c) Analysis Prescribed by the *Tasini* Decisions

1. The Scope of the § 201(c) Revision Privilege and What Constitutes a Later Collective Work, New Anthology, or

Compendium

The much-debated last sentence of § 201(c), “Contributions to collective works,” provides:

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.⁹³ The crucial word “revision” in the last clause of this sentence is left undefined in the Copyright Act. Thus, the Supreme Court and Second Circuit in their *Tasini* opinions, as well as the Eleventh Circuit in *Greenberg*, each cite to a House Judiciary Committee Report (House Report)⁹⁴ for interpretation of the last clause of § 201(c), the meaning of “revision,” and the definition of its scope.⁹⁵ The House Report confirms the common-sense delineation of the *78 § 201(c) revision privilege reached by the Supreme Court and Second Circuit in their *Tasini* opinions,⁹⁶ as well as the Eleventh Circuit in *Greenberg*.⁹⁷ The relevant House Report passage, cited in part in each of the three opinions,⁹⁸ explains:

The basic presumption of section 201(c) is fully consistent with present law and practice, and represents a fair balancing of equities. At the same time, the last clause of the subsection, under which the privilege of republishing the contribution under certain limited circumstances would be presumed, is an essential counterpart of the basic presumption. Under 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.⁹⁹ Thus, from a plain meaning point of view, and as both circuit courts and the Supreme Court concluded was intended by Congress,¹⁰⁰ § 201(c) does not extend protection for a publisher to include a contribution to a collective work in a new compendium¹⁰¹ or anthology¹⁰² (a “later collective work” in § 201(c) parlance).¹⁰³ *79 The Second Circuit in *Faulkner* dutifully recites from the same House Report, yet avoids undertaking in full the Supreme Court’s, or even its own, *Tasini* analysis.¹⁰⁴ Instead, the court applies just one narrow part of the balancing analysis prescribed by the Supreme Court in *Tasini*¹⁰⁵ to the CNG facts, thus confining the analytical inquiry to an artificially constrained scope: “In determining whether the [underlying works] have been reproduced and distributed ‘as part of’ a ‘revision’ of the collective works in issue, we focus on the [underlying works] as presented to, and perceptible by, the user of the [CNG].”¹⁰⁶ From within this truncated analytical prism, the Court in *Faulkner* proceeds to rest its analysis less than persuasively upon dicta in the *Tasini* Supreme Court opinion that, it suggests, “gave tacit approval to microfilm and microfiche as permissible Section 201(c) revisions, by contrasting that method of reproduction with the databases.”¹⁰⁷ The court then analogizes the CNG to microfilm and swiftly concludes that the CNG is therefore a § 201(c) privileged revision.¹⁰⁸ By hiding behind this attenuated microfilm analogy,¹⁰⁹ however, the Court never addresses how the prohibition on *80 including contributions to collective works in new compendiums, anthologies, or “later collective works” should actually be applied to the facts presented by the CNG products at issue.

The closest the *Faulkner* court comes to even acknowledging the obvious factual distinction between microfilm and the CNG is a vague concession that the CNG “contains additional elements such as, among other things, the Moving Cover Sequence.”¹¹⁰ The court in *Greenberg*, on the other hand, carefully explained these “additional elements” in its own CNG analysis.¹¹¹ Because it addressed the unavoidable factual reality presented by the CNG products and fully framed its analysis in line with the Constitution’s Copyright Clause, congressional intent in enacting the 1976 Copyright Act, the plain language of § 201(c), and the Second Circuit’s *Tasini* decision, the Eleventh Circuit rightly concluded that the CNG was “a new product (‘an original work of authorship’), in a new medium, for a new market that far transcends any privilege of revision or other mere reproduction envisioned in § 201(c).”¹¹²

2. The Supreme Court’s *Tasini* Decision Did Not Render *Greenberg* Irrelevant

Finding that “the *Tasini* approach so substantially departs from the *Greenberg* analysis that it represents an intervening change in law rendering application of collateral estoppel inappropriate,”¹¹³ the Second Circuit distinguished *Greenberg* without discussing whether the Eleventh Circuit’s finding that the CNG was a new anthology was valid or in any way inconsistent with the Supreme Court’s *Tasini* holding and analysis. That questionable collateral estoppel conclusion notwithstanding, the court’s more serious error was its failure to apply the remainder of the balancing analysis required under *Tasini*. Had the court in *Faulkner* looked beyond its attenuated microform analogy and remained true to the Supreme Court’s, and its own, *Tasini* interpretations of congressional design in adopting the 1976 Copyright Act, it would have reached the opposite result—entirely consistent with the Eleventh Circuit in *Greenberg*.

The district court in *Faulkner* predetermined the outcome of its analysis by posing the wrong question: “What then

distinguishes a ‘revision’ from an ‘entirely *81 different’ work?’¹¹⁴ The correct inquiry if one reads the plain text of § 201(c) is, “[W]hat distinguishes a revision from an other collective work,” which the House Report defines not solely as an “entirely different work,” as Judge Kaplan framed the district court inquiry, but as a “new anthology or an entirely different magazine or other collective work.”¹¹⁵ By subtly shifting the framing of the analytical inquiry, Judge Kaplan cleared an unfortunate path for the Second Circuit to drive the proverbial (CNG) truck through the eye of the (§ 201(c) exception) needle, Tasini precedents, long-standing copyright policy considerations, authorial incentives, and the clear constitutional design of the Copyright Clause notwithstanding.¹¹⁶

Thus, the Second Circuit in *Faulkner* not only fails to directly address whether the CNG constitutes a new compendium or anthology, but by its circumscribed application of the Tasini analysis, it also avoids reaching the core issue of whether finding the CNG a privileged § 201(c) revision serves what both courts in *Tasini II* and *III* as well as the court in *Greenberg* determined were compelling--and congressionally mandated--authorial incentives policies.¹¹⁷ Stated differently, by analytical omission and attenuated extension from dicta in the Supreme Court’s *Tasini* opinion, the Second Circuit in *Faulkner* deftly avoided any possibility of reaching the obvious alternative conclusion: that the CNG is a new compendium, anthology, or “later collective work,” and not a permissible revision under § 201(c).¹¹⁸

In conclusion, the Second Circuit created a fiction by holding that the CNG-- consisting of over 1,200 separate collective work magazines published *82 over the span of more than 100 years, a computer and search program, and an opening sequence--“is a new version of the Magazine” and thus a privileged revision.¹¹⁹ Instead of conferring such an exceptional windfall upon the publishing industry, one wonders why the court did not conclude that the CNG “simply cannot bear characterization as a ‘revision’ of any one periodical edition.”¹²⁰ Similarly, one also wonders why the Second Circuit did not admonish the *Faulkner* defendants to secure by contract the rights they sought for additional uses, as both the higher courts in *Tasini* pointedly noted was a publisher’s prerogative.¹²¹

3. Media Neutrality, *Tasini*, and *Greenberg*

Copyright law has long recognized the principle of media neutrality, and Congress specifically adopted the concept in the Copyright Act of 1976.¹²² A recent article applying the media neutrality doctrine to new technologies defines “media neutrality” to mean that a “copyright owner’s rights should be the same regardless of the form, whether analog or digital, in which the work may be embodied or fixed.”¹²³

*83 Media neutrality is inextricably linked to the requirement of originality, “the touchstone of copyright protection.”¹²⁴ Thus, a copyrightable work reproduced in a new medium but lacking sufficient indicia of originality, i.e. a mere “trivial variation” in a new medium,¹²⁵ does not qualify for protection as new copyrightable material.¹²⁶ A work possessing sufficient indicia of originality, on the other hand, whether or not created for a new medium, may qualify for independent copyright protection as an original work of authorship.¹²⁷

In *Tasini*, Justice Ginsburg rejected the defendants’ “medium driven necessity” arguments, finding that “the transfer of articles to the [d]atabases does not represent a mere conversion of intact periodicals (or revisions of periodicals) from one medium to another[,] [because] [t]he [d]atabases offer users individual articles, not intact periodicals.”¹²⁸ As explained in Section III.C above, however, the Supreme Court in *Tasini* also described two of the databases at issue as “compendiums”¹²⁹ that “simply cannot bear characterization as a ‘revision’ of any one periodical edition.”¹³⁰

Because the Second Circuit in *Faulkner* held that the CNG was a permissible revision, it raised the issue of media neutrality only in passing and only in the context of whether the plaintiffs’ contracts explicitly forbade the challenged CNG uses.¹³¹ As explained in Section IV.A.1 above, the Second Circuit dodged the *84 central issue of whether the CNG was a “other later collective work” or anthology by declaring microform and microfiche a permissible revision and then analogizing the CNG to microform. In *Greenberg*, on the other hand, the Eleventh Circuit undertook the required analysis, determined that the CNG possessed substantial indicia of originality, and emphasized that the Society had admitted as much by registering it with the copyright office as a new compilation.¹³² It then correctly, and consistently with the Second Circuit and Supreme Court *Tasini* decisions, concluded that the CNG was “a new product (‘an original work of authorship’), in a new medium.”¹³³

B. Should a Publisher’s § 201(c) Revision Privilege Be Freely Transferable?

The court’s conclusion in *Faulkner* that the § 201(c) revision privilege is freely transferable defies the plain language of §

201(d)¹³⁴ and thus incorrectly eliminates the distinction between the § 201(c) revision privilege and the § 106 exclusive rights. In holding that a publisher's § 201(c) revision privilege is freely transferable, akin to any exclusive right in the § 106 bundle of exclusive copyright rights, the Second Circuit vastly expanded the § 201(c) privilege and equated it with a § 106 exclusive right rather than with non-exclusive copyright *85 rights, which may not be transferred.¹³⁵ This part of the Faulkner decision, standing by itself, is an extraordinary augmentation of the scope of the modest § 201(c) revision privilege, and a holding that invests the revision privilege with virtual fungibility. While such an expansion is arguably inconsistent with a reasonable statutory construction of § 201, and clearly acts to further the publishers' windfall, it remains a difficult question to determine to what extent authors should be able to impede the alienability of collective works to which they contribute.¹³⁶

An elegant solution posed by Professor Gordon that is consistent with the 1976 Copyright Act, yet not as expansive as the Second Circuit's Faulkner mandate, is to accord transferability of the privilege only to the owner of the relevant § 106 exclusive distribution or reproduction rights.¹³⁷ The essential point is that if the publishers' § 201(c) revision privilege is construed as the narrow exception to the rule that it should be, there will be no revision privilege to transfer.¹³⁸

In sum, by vesting an expansively drawn § 201(c) revision privilege with unqualified alienability, the Second Circuit exacerbated the already deleterious adverse impact of its Faulkner decision on authorial incentives and further tilted the playing field in favor of publishers. This part of the Faulkner holding calls into serious question the Second Circuit's continued belief in its own prescient Tasini warning, that were the revision privilege held to be "as broad and as transferable *86 as [the publishers] contend, it is not clear that the rights retained by the [a]uthors could be considered 'exclusive' in any meaningful sense."¹³⁹

C. Traditional Copyright Policy: Incentives, the Public Interest, and the Constitution

"There is clearly a correlation between copyright and creativity," The New York Times boldly proclaimed in its editorial page in October 2002, fifteen months after its resounding loss before the Supreme Court in Tasini.¹⁴⁰ Seemingly oblivious to the irony, the paper continued, "No one but a blockhead writes except for money, Samuel Johnson said, and those who subscribe to that view would be unlikely to write if, the minute they completed their work, others could copy it with impunity."¹⁴¹ Statements of the traditional view of the Constitution's Copyright Clause premised both Justice Ginsburg's opinion for the Supreme Court majority in Tasini and Judge Birch's opinion for the Eleventh Circuit in Greenberg II.¹⁴² While neither jurist expressed the incentive concept quite as trenchantly as the inimitable Dr. Johnson, both jurists nevertheless unequivocally reaffirmed the traditional incentive view enshrined in the Constitution. This constitutionally- and historically-steeped deference to the preservation of economic incentives for authors¹⁴³ was, in fact, the essential contextual grounding for both the Tasini courts' and the Greenberg II court's analyses. Without question, all *87 three courts either implicitly or explicitly recognized the imperative of preventing the § 201(c) exception from swallowing the § 106 exclusive rights rule.¹⁴⁴ Indeed, both Justice Ginsburg and Judge Winter specifically and eloquently warned in their respective Tasini opinions of the deleterious consequences likely to result if the judicial branch failed to limit the scope of the § 201(c) revision privilege.¹⁴⁵ In stark contrast, Judge Winter's Faulkner II opinion stands out for failing to emphasize the longstanding, axiomatic and, indeed, constitutionally mandated authorial incentive copyright policy so strongly emphasized in both Tasini opinions. This contrast is especially glaring when Faulkner II is juxtaposed with Greenberg II where, on the same facts, the Eleventh Circuit unhesitatingly tethered its rationale to a traditional understanding of copyright policy and the Copyright Clause, and where it chastised the defendants' infringing conduct with a discernible hint of indignation.

V. Conclusion: Windfall for Publishers and Detrimental Uncertainty

The Second Circuit's Faulkner II decision and the Supreme Court's denial of the Faulkner plaintiffs' petitions for a writ of certiorari¹⁴⁶ will likely work to the detriment of authors' and the public's best interests. Because the decision provides a potentially enormous windfall to publishers by eviscerating residual income streams that have been crucial for the survival of numerous freelance journalists--and freelance photojournalists in particular¹⁴⁷--experienced freelance journalists are likely to be seriously disincentivized, and hence the proliferation of new creative works by these freelancers is likely to diminish.

The oldest photographers' trade organization in the nation, the American Society of Media Photographers (ASMP),¹⁴⁸ eloquently supported the plaintiffs in the Faulkner actions as an *amici curiae*. ASMP explained that the CNG and similar products¹⁴⁹ will diminish, if not destroy altogether, the substantial residual licensing *88 value of freelance images included in the CNG by the National Geographic Society without the authors' consent, license, or payment.¹⁵⁰ In its decision against the

authors in *Faulkner*, the Second Circuit has shown that it can, and will, unpredictably curtail the ability of the authors to reap residual income from their works-- the very reward copyright law is designed to protect and the very reward that has allowed countless freelance authors to survive, however meagerly, to shoot or write another day.¹⁵¹

Moreover, the split between the Second and Eleventh Circuits in the *Faulkner* and *Greenberg* actions at the very least has created tremendous uncertainty that is likely to chill the creation of new works by freelance authors because they can no longer rely on being able to reap the residual income that their works have historically generated.¹⁵² When creators, especially the most experienced segment, cease creating, it is inevitable that the public will reap a quantitatively and qualitatively diminished creative harvest.

***89** Ironically, even the National Geographic Society as the primary prevailing defendant in *Faulkner*, which claims to have spent “millions of dollars” fighting for the right to publish the CNG without the consent of, or any payment to, its freelance contributors, has vowed not to put the CNG back on the market until the circuit split is decided.¹⁵³ This disincentive to distribution is surely also to the public’s detriment and is a direct result of the Supreme Court’s decision to allow this gaping circuit split to stand.

The judicial branch, and especially the Supreme Court, as the ultimate national judicial authority, should keep close sight of the journalistic context of the *Tasini*, *Greenberg*, and *Faulkner* § 201(c) litigations and the special ramifications that flow from that context. Independent authors have been an essential creative force in journalism throughout American history.¹⁵⁴ Disincentivizing America’s best and brightest from engaging in independent journalism bodes ill for the continued lively exchange of views that provide the lifeblood of our democracy.¹⁵⁵ Thus, had it granted a writ of certiorari to hear the *Faulkner* case, the Supreme Court would have seized a chance to serve the best interests not just of authors, publishers, and the consuming public but, most importantly, the wider national interest.

The Supreme Court, the ultimate guardian of our proud democratic tradition, is likely to face again the issue of the scope of a publisher’s § 201(c) revision privilege. One hopes that the Court will seize such an opportunity to take an appropriately strong step forward in keeping with its landmark *Tasini* decision, and that the Court will also thus undo the Second Circuit in *Faulkner*’s unfortunate two steps back. By settling the § 201(c) issue at the heart of the *Greenberg* and *Faulkner* circuit split at the earliest possible opportunity, the Supreme Court will at least clarify what route is the way forward, no matter how it holds. This much-needed clarity will hasten the orderly unleashing of new technologies within appropriately transparent licensing agreements and will serve the best interests of publishers, authors, and thus, the public.

***90** Most importantly, settling the *Faulkner*-*Greenberg* circuit split on the side of the authors, as this Note has argued the Second Circuit should have done in *Faulkner*, will help to resurrect strong and sustained incentives for our most serious and experienced independent journalists to ply their sometimes unpopular and dangerous trade. Arguably, maximizing such incentives for independent journalists should be a national priority.

Footnotes

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¹ *Faulkner v. Nat’l Geographic Enters., Inc. (Faulkner II)*, 409 F.3d 26 (2d Cir. 2005), cert. denied, 126 S. Ct. 833 (2005).

² *Faulkner v. Nat’l Geographic Soc’y (Faulkner I)*, 294 F. Supp. 2d 523, 549 (S.D.N.Y. 2003), aff’d in part, rev’d in part, 409 F.3d 26 (Fed. Cir. 2005).

³ *Faulkner II*, 409 F.3d at 38. The court reversed and remanded only with respect to seven photographs by plaintiffs Psihoyos and Rickman for which express licenses either specifically forbade electronic use or granted only “one time reproduction rights.” *Id.* at 40, 41 & n.9.

4 Id. at 30-34.

5 Id. at 31; *Greenberg v. Nat'l Geographic Soc'y* (*Greenberg II*), 244 F.3d 1267, 1269 (11th Cir. 2001).

6 *Greenberg II*, 244 F.3d at 1269.

7 1976 Copyright Act, 17 U.S.C. §§ 101-810 (2000).

8 17 U.S.C. § 201(c).

9 *Faulkner II*, 409 F.3d at 38.

10 Compare *id.*, with *N.Y. Times Co. v. Tasini* (*Tasini III*), 533 U.S. 483, 493 (2001), *aff'g* 206 F.3d 161 (2d Cir. 1999).

11 *Tasini v. N.Y. Times Co.* (*Tasini II*), 206 F.3d 161, 165 (2d Cir. 1999), *aff'd*, *Tasini III*, 533 U.S. 483 (2001).

12 *Greenberg II*, 244 F.3d 1268 (11th Cir. 2001).

13 Compare *id.* at 1268-71, with *Faulkner II*, 409 F.3d at 30-32.

14 *Greenberg II*, 244 F.3d at 1275.

15 See *id.* at 1268, *rev'g* 1998 U.S. Dist. LEXIS 18060, at *9-10 (S.D. Fla. May 14, 1998).

16 *Greenberg II*, 244 F.3d at 1275.

17 *Nat'l Geographic Soc'y v. Greenberg* (*Greenberg III*), 534 U.S. 951 (2001).

18 Petition for Writ of Certiorari, *Faulkner v. Nat'l Geographic Soc'y*, 126 S. Ct. 833 (2005) (No. 05-506), 2005 WL 2708402; Petition for Writ of Certiorari, *Psihoyos v. Mindscape, Inc.*, 126 S. Ct. 833 (2005) (No. 05-490), 2005 WL 2661823; Petition for Writ of Certiorari, *Ward v. Nat'l Geographic Enters., Inc.*, 126 S. Ct. 833 (2005) (No. 05-504), 2005 WL 2672021.

19 *Faulkner v. Nat'l Geographic Soc'y*, 126 S. Ct. 833 (2005).

20 See *Faulkner I*, 294 F. Supp. 2d 523, 538 (S.D.N.Y. 2003) ("Section 201(c) creates a privilege in the publisher of a collective work for 'reproduction' of 'that particular collective work, any revision of that collective work, and any later collective work in the same series' but does not define any of those terms. The phrase 'that particular collective work' obviously includes 'a specific edition or issue of a periodical.' The meaning of the remaining terms, however, is far from self evident."), *aff'd in part, rev'd in part*, 409 F.3d 26 (Fed. Cir. 2005).

21 *Tasini III*, 533 U.S. 483, 483 (2001).

- 22 Even the prevailing defendants in *Faulkner* supported plaintiffs' petitions for a writ of certiorari, albeit to address a more narrow question: "[w]hether the Second Circuit correctly held, in direct conflict with the Eleventh Circuit, that 17 U.S.C. § 201(c) presumptively authorizes a publisher's exact, image-based reproduction of a collective work in CD-ROM format even if new copyrightable materials (such as an introductory sequence and a computer program) are added." Response to Petitions for Writ of Certiorari, *Psihoyos v. National Geographic Enters., Inc.*, 126 S. Ct. 833 (2005) (Nos. 05-490, 05-504, 05-506), 2005 WL 2985713; see also *Amir A. Naini, New York Times Co. v. Tasini*, 17 BERKELEY TECH. L.J. 9, 22 (2002) (conceding the difficulty of the issue raised in *Faulkner*: "A more difficult question is whether navigational aids which help, but do not force, the user to follow an article through nonconsecutive pages would satisfy the [Supreme] Court's context requirements.").
- 23 *Faulkner II*, 409 F.3d 26, 30-31 (2d Cir. 2005), cert. denied, 126 S. Ct. 833 (2005); see *Greenberg II*, 244 F.3d 1267, 1269-70 (11th Cir. 2001).
- 24 See cases cited supra note 23.
- 25 See cases cited supra note 23.
- 26 See cases cited supra note 23.
- 27 See cases cited supra note 23.
- 28 See cases cited supra note 23.
- 29 *Faulkner II*, 409 F.3d 26, 30-31 (2d Cir. 2005), cert. denied, 126 S. Ct. 833 (2005).
- 30 *Id.* at 32; see *Greenberg II*, 244 F.3d 1267, 1269-70 (11th Cir. 2001).
- 31 Petition for Writ of Certiorari, *Ward v. Nat'l Geographic Enters., Inc.*, 126 S. Ct. 833 (2005) (No. 05-504), 2005 WL 2672021, at *6, *11, *17, *21-22 (at *11: "The [Second Circuit] further noted that Encore [one of NGS's manufacturers and distributors] promoted infringement by assuring consumers that they 'are free to use, modify and publish the Images as [they] wish and incorporate any Image(s) in [their] own original work and publish, display and distribute [their] work in any media.'"); see also Petition for Writ of Certiorari, *Psihoyos v. Mindscape, Inc.*, 126 S. Ct. 833 (2005) (No. 05-490), 2005 WL 2661823, at *13-14; Petition for Writ of Certiorari, *Faulkner v. Nat'l Geographic Soc'y*, 126 S. Ct. 833 (2005) (No. 05-506), 2005 WL 2708402, at *5.
- 32 See *Faulkner I*, 294 F. Supp. 2d 523, 543 (S.D.N.Y. 2003), aff'd in part, rev'd in part, 409 F.3d 26 (Fed. Cir. 2005).
- 33 *Faulkner II*, 409 F.3d at 38 (emphasis added). The court reversed and remanded only with respect to seven photographs, by plaintiffs *Psihoyos* and *Rickman*, for which express licenses either specifically forbade electronic use or granted only "one time reproduction rights." *Id.* at 40-41, 41 n.9.
- 34 A copyright owner is granted the exclusive rights to do and to authorize any of the following:
- (1) to reproduce the copyrighted work in copies or phonorecords;
 - (2) to prepare derivative works based upon the copyrighted work;
 - (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
 - (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
 - (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
 - (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106 (2000).

35 Faulkner II, 409 F.3d at 39.

36 Id. at 38.

37 17 U.S.C. § 201(d)(2) (2000).

38 Faulkner II, 409 F.3d at 39.

39 Id. (emphasis added).

40 Tasini III, 533 U.S. 483, 487-89 (2001).

41 Judge Sotomayor was elevated to the Second Circuit Court of Appeals by President Clinton in 1998. United States Court of Appeals for the Second Circuit Home Page, <http://www.ca2.uscourts.gov> (last visited May 16, 2006).

42 Tasini v. N.Y. Times Co. (Tasini I), 972 F. Supp. 804, 826-27 (S.D.N.Y. 1997), rev'd, 206 F.3d 161 (2d Cir. 1999), aff'd, 533 U.S. 483 (2001).

43 Tasini II, 206 F.3d 161, 163 (2d Cir. 1999), aff'd, 533 U.S. 483 (2001).

44 Tasini III, 533 U.S. at 486-88.

45 Tasini II, 206 F.3d at 165.

46 Id.

47 Id. at 166.

48 Id.

49 Id. at 167 (emphasis added).

50 Id. (emphasis added) (citing H.R. Rep. No. 94-176, at 122-23 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5738).

51 Tasini II, 206 F.3d at 168.

52 Id. at 168 n.3; see Wendy Gordon, Fine-Tuning Tasini: Privileges of Electronic Distribution and Reproduction, 66 BROOK. L. REV. 473, 480 n.35 (2000) ("The Second Circuit withdrew its first Tasini opinion to substitute a slightly-amended version, which changed most of the references to 'privilege' to 'presumptive privilege.' Apparently, this was to emphasize that the privilege was not a mandatory privilege and that it could be eliminated by the parties' agreement.").

53 Tasini II, 206 F.3d at 169.

54 Id. (emphasis omitted).

55 Id.

56 Id. (noting that such a limitation “is not material” for its holding).

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

58 Id. (emphasis added).

59 Tasini II, 206 F.3d at 169.

60 Id. at 170.

61 Id.

62 Id. (“We emphasize that the only issue we address is whether, in the absence of a transfer of copyright or any rights thereunder, collective-work authors may re-license individual works in which they own no rights. Because there has by definition been no express transfer of rights in such cases, our decision turns entirely on the default allocation and presumption of rights provided by the Act. Publishers and authors are free to contract around the statutory framework. Indeed, both the [p]ublishers and [database owner] Mead were aware of the fact that Section 201(c) might not protect their licensing agreements, and at least one of the [p]ublishers has already instituted a policy of expressly contracting for electronic re-licensing rights.” (emphasis added)).

63 Compare Greenberg II, 244 F.3d 1267, 1268-71 (11th Cir. 2001), with Faulkner II, 409 F.3d 26, 30-32 (2d Cir. 2005), cert. denied, 126 S. Ct. 833 (2005).

64 Greenberg v. Nat’l Geographic Soc’y (Greenberg I), 1998 U.S. Dist. LEXIS 18060, at *3 (S.D. Fla. May 14, 1998), rev’d, 244 F.3d 1267 (11th Cir. 2001); see also Greenberg II, 244 F.3d at 1270 (The National Geographic Society “dispatched a letter to each person who had contributed to the Magazine. This letter informed the contributors about the CNG product and stated the Society’s position that it would not provide the contributors with any additional compensation for the digital republication and use of their works. Greenberg contends that he responded to this notice through counsel and objected to the Society’s use of his photographs in the CNG, but he received no response from the Society.”).

65 The district court dismissed counts I and II of the action at the parties’ joint request. Greenberg II, 244 F.3d at 1271; see Greenberg I, 1999 U.S. Dist. LEXIS 13874, at *34. Neither count is relevant to the § 201(c) analysis here.

66 See Greenberg II, 244 F.3d at 1270-71 (“The district court, relying on the district court opinion in Tasini ... held that the CNG constituted a ‘revision’ of the paper copies of the Magazine that was within the Society’s privilege under § 201(c)”); see also Tasini I, 972 F. Supp. 804, 804 (S.D.N.Y. 1997), rev’d, 206 F.3d 161 (2d Cir. 1999), aff’d, 533 U.S. 483 (2001).

67 Greenberg II, 244 F.3d at 1275.

68 Maximum available willful statutory damages per infringed work under the Copyright Act's remedy section, 17 U.S.C. § 504, increased to \$150,000 in 1999. See H.R. 3456, 106th Cong. § 2 (1999).

69 David Walker, Court Upholds Judgment Against National Geographic, PDN Online Photo District News, Oct. 5, 2005, http://www.pdnonline.com/pdn/search/article_display.jsp?vnu_content_id=1001260330.

70 Id.

71 U.S. Const. art. I, § 8, cl. 8 (empowering Congress "[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").

72 Greenberg II, 244 F.3d at 1268, 1275.

73 Id. at 1269.

74 Id. at 1272 (emphasis added).

75 Id. at 1273.

76 Id. at 1273 n.12.

77 Id. at 1273-74.

78 Tasini III, 533 U.S. 483, 499 (2001).

79 Greenberg II, 244 F.3d at 1273 & n.12.

80 See Tasini II, 206 F.3d 161, 169 (2d Cir. 1999), *aff'd*, 533 U.S. 483 (2001).

81 Tasini III, 533 U.S. at 493.

82 Id. at 488.

83 Id. at 505-06.

84 See *supra* Section III.A.

85 Tasini III, 533 U.S. at 495.

86 Id. at 496 (emphasis added and internal citations and quotations omitted); see *The Future of Electronic Publishing: A Panel Discussion*, 25 *COLUM. J.L. & ARTS* 91, 104 (2002) (Professor Jane Ginsburg, daughter of Supreme Court Justice Ginsburg, commented that "the decision may be of longer standing importance because the Supreme Court perceived that the 1976 Copyright

Act effected an important shift from publishers to authors with respect to the articulation and retention of rights.”).

87 Id. at 497 (emphasis added and internal citations omitted).

88 Id. (internal citations altered from original).

89 Id. at 499; see *Tasini II*, 206 F.3d 161, 168 (2d Cir. 1999) (“Were the permissible uses under Section 201(c) as broad and as transferable as appellees contend, it is not clear that the rights retained by the [a]uthors could be considered ‘exclusive’ in any meaningful sense.”), *aff’d*, 533 U.S. 483 (2001).

90 *Tasini III*, 533 U.S. at 499 (internal quotation marks omitted); see Alice Haemmerli, Case Comment: *New York Times v. Tasini*, 25 *COLUM. J.L. & ARTS* 57, 62 (2001) [hereinafter *Haemmerli II*] (noting the similar focus presented in the Second Circuit’s analysis in *Matthew Bender & Co., Inc. v. West Publishing Co.*, 158 F.3d 693, 702 (2d Cir. 1998), a database infringement case, and commenting that “[i]n both cases ... the manner in which the work is perceived is crucial. The work (i.e., the copy or revision) must be objectively perceptible as such to the viewer; only in this way can the Copyright Act’s focus on fixed works be satisfied.”).

91 *Tasini III*, 533 U.S. at 500 (emphasis added and internal citations and quotation marks omitted).

92 Id. at 501.

93 17 U.S.C. § 201(c) (2000) (emphasis added).

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

95 *Tasini III*, 533 U.S. at 497, 509-510 (“Congress intended this limitation on what the author is presumed to give away primarily to keep publishers from ‘revising the contribution itself or including it in a new anthology or an entirely different magazine or other collective work.’” (citing H.R. Rep. No. 94-1476, at 122-23)); *Tasini II*, 206 F.3d 161, 167 (2d Cir. 1999), *aff’d*, 533 U.S. 483 (2001); *Greenberg II*, 244 F.3d 1267, 1272-73 (11th Cir. 2001).

96 *Tasini III*, 533 U.S. at 499 (“Each discrete edition of the periodicals in which the [a]rticles appeared is a ‘collective work,’ the [p]ublishers agree. They contend, however, that reproduction and distribution of each [a]rticle by the [d]atabases lie within the ‘privilege of reproducing and distributing the [articles] as part of ... [a] revision of that collective work,’ § 201(c). The [p]ublishers’ encompassing construction of the § 201(c) privilege is unacceptable, we conclude, for it would diminish the [a]uthors’ exclusive rights in the [a]rticles.”); *Tasini II*, 206 F.3d at 168 (“Reading ‘revision of that collective work’ as broadly as appellees suggest would cause the exception to swallow the rule.”).

97 *Greenberg II*, 244 F.3d at 1272 (“The Society argues that its use of *Greenberg*’s photographs constitutes a revision of the Magazine ..., referring to the CNG as the compendium of over 1,200 independent back issues; in copyright terms, a collective work of separate and distinct collective works, arranged in chronological order. Assuming *arguendo*, but expressly not deciding, that 201(c)’s revision privilege embraces the entirety of the Replica portion of the CNG (the 1,200 issues, as opposed to each separate issue of the Magazine), we are unable to stretch the phrase ‘that particular collective work’ to encompass the Sequence and Program elements as well. In layman’s terms, the instant product is in no sense a ‘revision.’ In this case we do not need to consult dictionaries or colloquial meanings to understand what is permitted under § 201(c).” (emphasis omitted)).

98 See cases cited *supra* note 95.

99 H.R. Rep. No. 94-1476, at 122-23 (emphasis added).

100 See cases cited supra note 96.

101 As the Supreme Court explained, “One might view the articles as parts of a new compendium--namely, the entirety of works in the Database.” Tasini III, 533 U.S. at 500. “The massive whole of the [d]atabase is not recognizable as a new version of its every small part.” Id. These compendiums (including the image-based GPO database, which “show[s] each article [from the Times’ Sunday Book Review and Magazine] exactly as it appeared on printed pages, complete with photographs, captions, advertisements, and other surrounding materials,” id. at 491) “simply cannot bear characterization as a ‘revision’ of any one periodical edition.” Id. at 501.

102 H.R. Rep. No. 94-1476, at 122-23 (“[T]he publisher could not revise the contribution itself or include it in a new anthology or other collective work”); Tasini II, 206 F.3d at 169; Tasini III, 533 U.S. at 496-97.

103 See Haemmerli II, supra note 90, at 66 (“[T]he court [in Greenberg II] focused on the product’s inclusion of the audiovisual sequence, which infringed the plaintiff’s exclusive derivative work rights by using his work in new ways. Thus, the court had a relatively easy time in arriving at the conclusion that more than a mere ‘revision’ was involved in the compendium.”); id. at 70 n.47 (“To the question ‘if the publishers can publish revisions issue by issue, then why can’t they put all the issues together?’ the answer would be that the resulting compilation is a new anthology, rather than a revision of ‘that collective work.’”).

104 See Faulkner II, 409 F.3d 26, 34-37 (2d Cir. 2005), cert. denied, 126 S. Ct. 833 (2005).

105 One commentator suggests that the “[Supreme] Court’s focus on the user’s perspective is perhaps the most informative aspect of its opinion.” Naini, supra note 22, at 18-19. While it is possible to so narrowly construe Tasini, such a narrow reading is hardly the balancing analysis prescribed by the Supreme Court in Tasini. A more nuanced and complete view of the Court’s analysis is that “[a]s construed by the Supreme Court, the 201(c) revision privilege exists to allow for the revising and updating of a collective work while preserving the commercial market for further publication of the individual contributions therein.... [E]xact digital replicas can be disqualified from 201(c) revision status on the same market impact grounds as the content-altered digital re-publications at issue in Tasini.” Lateef Mtima, Tasini and Its Progeny: The New Exclusive Right or Fair Use on the Electronic Publishing Frontier?, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 369, 425 (2004).

106 Faulkner II, 409 F.3d at 38 (citing Tasini III, 533 U.S. at 499).

107 Id. at 35.

108 Id. at 38. Although the court concedes that “a CNG user can focus on particular pages or parts of pages,” it argues that “a user of a microfilm of a collective work can do the same thing ... as, indeed can a reader of an original magazine by opening to a particular page. In contrast, the databases at issue in Tasini precluded readers from viewing the underlying works in their original context.” Id.

109 See Mtima, supra note 105, at 424 (“[E]ach of the Tasini and Greenberg tribunals which compared the various defendants’ digital re-publications to microfilm seemed to take for granted that microfilm versions would qualify as revisions within § 201(c) and also in the ordinary sense of the term.... None of the courts explain, however, the basis for this assumption.... In the present author’s view, the characterization of full-image microfilm reproductions as § 201(c) revisions is incorrect. Full-image microfilm reproductions are merely copies made for archival purposes, i.e., archive versions or archive copies.”).

110 Faulkner II, 409 F.3d at 38.

111 Greenberg II, 244 F.3d 1267, 1272-74 (11th Cir. 2001).

112 Id. at 1273.

- 113 Faulkner II, 409 F.3d at 37.
- 114 Faulkner I, 294 F. Supp. 2d 523, 539 (S.D.N.Y. 2003), *aff'd* in part, *rev'd* in part, 409 F.3d 26 (Fed. Cir. 2005).
- 115 H.R. Rep. No. 94-176, at 122-23 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5738 (emphasis added).
- 116 It is especially telling that rather than rely upon the district court's interpretation of the legislative history, the Second Circuit in Faulkner II completely disregards the district court's questionable analysis of the legislative history and instead recites from H.R. Rep. No. 94-1476, but nonetheless fails to apply to the CNG facts to HR 94-1476's description of what constitutes a new anthology. As discussed in detail in Sections III.A and III.B above, this omitted analysis in Faulkner II is directly contrary to Tasini. Compare, e.g., Faulkner II, 409 F.3d at 34, with Tasini II, 206 F.3d 161, 167-68 (2d Cir. 1999) (“[T]he publishers’ contention that the electronic databases are revised, digital copies of collective works cannot be squared with basic canons of statutory construction. First, if the contents of an electronic database are merely a ‘revision’ of a particular ‘collective work,’ e.g., the August 16, 1999 edition of The New York Times, then the third clause of Section 201(c)--permitting the reproduction and distribution of an individually copyrighted work as part of ‘a later collective work in the same series’--would be superfluous.... To view the contents of databases as revisions would eliminate any need for a privilege for ‘a later collective work in the same series.’”), *aff'd*, 533 U.S. 483 (2001).
- 117 See *supra* Sections III.A and III.C.
- 118 See 17 U.S.C. § 201(c) (2000); H.R. Rep. No. 94-176, at 122-23. Moreover, the Second Circuit thereby also inexplicably avoided undertaking the comprehensive § 201(c) analysis it applied in its own Tasini opinion. Tasini II, 206 F.3d at 167-68; see *supra* Section III.A.
- 119 Faulkner II, 409 F.3d at 38. It is not only facially and factually unclear, but also grammatically unclear how an anthology of 1,200 magazines (plural) can be “a new version of the [singular] Magazine.” *Id.* (emphasis added).
- 120 Tasini III, 533 U.S. 483, 501 n.9 (2001); see Deborah Tussey, Technology Matters: The Courts, Media Neutrality, and New Technologies, 12 J. INTELL. PROP. L. 427, 484-85 (2005) (suggesting the Supreme Court in Tasini could have clarified whether “an accumulation of multiple issues [like NYTO] was permissible” and criticizing the Faulkner district court’s decision for failing to abide by “Congress’ intent to equalize the balance of power between individual authors and publishers”).
- 121 Tasini III, 533 U.S. at 502 n.11 (“Publishers and all others can protect their interests by private contractual arrangement.”); Tasini II, 206 F.3d at 170 (“Publishers and authors are free to contract around the statutory framework.”).
- 122 See I. Trotter Hardy, The Internet and the Law: Copyright and “New Use” Technologies, 23 NOVA L. REV. 659, 663-65 (1999); see 17 U.S.C. § 101 (2000) (“‘Copies’ are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”); see 17 U.S.C. § 102(a) (2000) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”); 3-12A MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12A.16[B] (2006 Supp.) (“The various provisions of the Copyright Act, on the one hand creating rights for proprietors but on the other hand delineating the scope of those rights, have as a unifying theme the fact that they are ‘technology neutral.’”); L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 489-91 (2d Cir. 1976) (en banc) (“[T]o support a copyright there must be at least some substantial variation, not merely a trivial variation such as might occur in the translation to a different medium.”); Medallie Art Co. v. Wash. Mint, L.L.C., No. 99-9064, 2000 U.S. App. LEXIS 4488, at *6-8 (2d Cir. March 21, 2000).
- 123 Tussey, *supra* note 120, at 428.

- ¹²⁴ Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346-47 (1991); see *Matthew Bender & Co., Inc. v. West Publ'g Co.*, 158 F.3d 674, 681-82 (2d Cir. 1998); 1-1 NIMMER & NIMMER, supra note 122, § 1.06[A]-[B] (“The requirement of originality is a statutory, as well as a constitutional, requirement.”).
- ¹²⁵ *L. Batlin & Son*, 536 F.2d at 491.
- ¹²⁶ See, e.g., *ATC Distribution Group, Inc. v. Whatever It Takes Transmissions & Parts, Inc.*, 402 F.3d 700, 712-13 (6th Cir. 2005) (finding plaintiff’s catalog lacked sufficient originality for copyright protection where it was almost identical to another catalog upon which it was based); *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 910-11 (2d Cir. 1980) (holding plaintiff had no cause of action for copyright infringement where its plastic toy figures lacked “even a modest degree of originality” and thus were not subject to protection).
- ¹²⁷ See, e.g., *Greenberg II*, 244 F.3d 1267, 1273 & n.12 (11th Cir. 2001) (finding that combination of multiple preexisting collective-work magazines, a multi-media cover sequence, and computer search program into a single new digital collective work constitutes a new original work of authorship and holding that the resulting new digital collective work is not a media neutral transformation).
- ¹²⁸ *Tasini III*, 533 U.S. 483, 502 (2001). Notably, the Court emphasizes here that “[p]ublishers and all others can protect their interests by private contractual arrangement.” *Id.*
- ¹²⁹ *Id.* at 500 (“One might view the articles as parts of a new compendium--namely, the entirety of works in the [d]atabase.... The massive whole of the [d]atabase is not recognizable as a new version of its every small part.”).
- ¹³⁰ *Id.* at 501 n.9.
- ¹³¹ See *Faulkner II*, 409 F.3d 26, 40 (2d Cir. 2005) (“[E]ven if the Faulkner appellants harbored an intent to limit publication rights to a non-digital format, their failure to negotiate for pertinent contractual provisions or even to communicate these intentions to NGS is fatal to their claim. Accordingly, the contracts in question do not bar defendants from exercising their Section 201(c) privilege.”), cert. denied, 126 S. Ct. 833 (2005).
- ¹³² *Greenberg II*, 244 F.3d at 1273-74.
- ¹³³ *Id.* at 1273 (emphasis added). *Mtima* characterizes the analytical frameworks used by the courts in *Tasini II* and *III* and *Greenberg II* as following the “*Tasini* market impact rule.” *Mtima*, supra note 105, at 425-26, 427 n.202 (“The content-altered digital re-publications in *Tasini* and *Greenberg* were held to virtually extinguish any secondary market for the contributory works contained therein, because once available online, there would be little need for alternative access to the works. An exact digital replica of a collective work, particularly when disbursed into an online commercial database, would likely have the same effect. Accordingly, exact digital replicas can be disqualified from § 201(c) revision status on the same market impact grounds as the content-altered digital re-publications at issue in *Tasini*.” (internal footnotes omitted)). Also, *Livingston* asserts that the Eleventh Circuit in *Greenberg* “assumed that any degree of added originality transforms a ‘revision’ into a new collective work outside of the 201(c) privilege.” *Jennifer L. Livingston, Digital “Revision”: Greenberg v. National Geographic Society*, 70 U. Cin. L. Rev. 1419, 1429 (2002). This sweeping characterization of the changes made by the Society as “modest” is unsupported by an attentive reading of the Eleventh Circuit’s *Greenberg* opinion. The author never explains her failure to apply the *Tasini* analysis of “other collective work[s]” or anthologies to the facts of the *CNG*--as the Court in *Greenberg* very carefully did. See *id.* at 1437.
- ¹³⁴ 17 U.S.C. § 201(d) (2000) provides:
(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 [and] (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.

¹³⁵ See id. § 101 (2000) (“A ‘transfer of copyright ownership’ is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.”); Alice Haemmerli, Commentary: *Tasini v. New York Times Co.*, 22 COLUM.-VLA J.L. & ARTS 129, 137-38 (1998) (“[U]se of the term ‘privilege’ in contradistinction to an express transfer militates rather strongly in favor of an equation of the privilege with a nonexclusive license.... [G]iven the doctrinal history of copyright indivisibility and similar doctrine in the adjacent patent field, as well as the revisions to the concept of copyright transfers that were occurring at the same time as the drafting of Section 201(c), it is more plausible to equate the privilege with a nonexclusive (and therefore non-transferable) license than to view it as a transfer.”).

¹³⁶ See Gordon, *supra* note 52, at 491-92 (“To hold the [§ 201(c)] privilege inalienable would be overbroad. Inalienability would mean that any time a publishing company is sold, no § 201(c) privilege adheres to the collective works that are sold with it. Similarly, publishers often buy and sell entire collective-work copyrights. Indeed, it is hardly remarkable for one publisher to sell all her rights in a particular encyclopedia to another publisher. When that occurs, the privilege to reprint the entire set is expected to accompany the sale. However, if the § 201(c) privilege were not transferable, the buyer of an encyclopedia title could not do new press runs of the encyclopedia because it would be an infringing reproduction. Such a result would be absurd.” (footnote omitted)).

¹³⁷ Gordon, *supra* note 52, at 492 (“[T]he Copyright Act itself offers a compromise position between the inalienability ... and the full transferability.... According to the statute, the privilege inheres in ‘the owner of copyright in the collective work.’ This phrase can be interpreted as referencing a status rather than an individual. If so, when there is a change in the identity of the owner of the collective-work copyright, the holder of the privilege would change as well. The privilege could and would attach to the new owner, appurtenant to the ownership of copyright in the entire collective work.” (footnote omitted)).

¹³⁸ Gordon, *supra* note 52, at 493.

¹³⁹ *Tasini II*, 206 F.3d 161, 168 (2d Cir. 1999), *aff’d*, 533 U.S. 483 (2001).

¹⁴⁰ Editorial Desk, *An Abuse of Copyright*, N.Y. Times, Oct. 11, 2002, at A32.

¹⁴¹ Id.; see James Boswell, *Boswell’s Life of Johnson*, (Charles Grosvenor Osgood ed., Project Gutenberg 1998) (1917), available at <http://www.gutenberg.org/etext/1564> (download the “Plain text” version of the 1.20 MB article; then perform a search for “No man but a blockhead ever wrote, except for money.”).

¹⁴² *Tasini III*, 533 U.S. 483, 496 n.3 (2001) (“Congress’ adjustment of the author/publisher balance is a permissible expression of the economic philosophy behind the Copyright Clause, i.e., the conviction that encouragement of individual effort motivated by personal gain is the best way to advance public welfare.” (internal citations and quotation marks omitted)); *Greenberg II*, 244 F.3d 1267, 1271 (11th Cir. 2001) (“In all cases involving copyright law, we understand that any interpretation and application of the statutory law must be consistent with the copyright clause of the United States Constitution.... That clause is a limitation, as well as a grant, of the copyright power. The copyright clause, consisting of twenty-four words crafted by our founding fathers, is the Rosetta Stone for all statutory interpretation and analysis. Accordingly, it is upon that predicate that we examine § 201(c) in the context of this case.”).

¹⁴³ Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1156-59 (2000) (tracking the Supreme Court’s historically consistent “utilitarian rationale for the Copyright Clause” and concluding that by the time of the *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991), decision, “the foundational principles of copyright that inhere in the Intellectual Property Clause [were] ... so evident and well-established that they no longer require justification by reference to historical disquisition”); see Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L.J. 283, 289 (1996) (“In adopting the Constitution’s Copyright Clause and enacting the federal copyright statute, the Framers were animated by the belief that copyright’s support for the diffusion of knowledge is ‘essential to the preservation of the Constitution.’”).

144 See cases cited supra notes 95-96.

145 See cases cited supra notes 95-96.

146 Petition for Writ of Certiorari, *Faulkner v. Nat'l Geographic Soc'y*, 126 S. Ct. 833 (2005) (No. 05-506), 2005 WL 2708402.

147 Although statistical data on the issue is not known to have been compiled, the author's own experience as a freelance photojournalist for more than ten years, as well as that of numerous colleagues, has been that the onslaught of uncompensated digitized exploitation of their creative work has decimated residual income streams for images that have been digitized or published online. As one industry commentator recently wrote in a trade publication, "The stock photography business isn't funding photographers as it used to (I've spoken to active photographers whose stock income has dropped by 80 percent and more in the past five years)." Greg Smith, *Photojournalism: A Love Story*, *The Digital Journalist*, Dec. 2002, <http://www.digitaljournalist.org/issue0212/editorial.html> (last visited May 16, 2006).

148 See About the American Society of Media Photographers, <http://asmp.org/about/> (last visited May 16, 2006).

149 Emulating the CNG, and fast on the heels of the Second Circuit's *Faulkner II* decision, Conde Nast, publisher of *The New Yorker* magazine, released *The Complete New Yorker: Eighty Years of the Nation's Greatest Magazine (TCNY)* in September 2005. The eight DVD collection is currently available for \$63.00 at Amazon.com. Amazon.com Home Page, <http://www.amazon.com> (search for "The Complete New Yorker"; then follow "The Complete New Yorker: Eighty Years of the Nation's Greatest Magazine (Book & 8 DVD-ROMs)" hyperlink at the top of the page) (last visited May 16, 2006). None of the freelance authors of any of the included works have consented to these republications of their works or received any compensation. Edward Klaris, *The New Yorker's* General Counsel, recently explained to a reporter for the *Boston Globe* (wholly owned by *The New York Times Co.*) that Conde Nast is relying on the *Faulkner II* decision as the legal basis for its production and distribution of TCNY. "'They [National Geographic] were sued,' Klaris says, 'and the Second Circuit held that an image-based compilation in context, like theirs, was protected' by the Copyright Act. 'As long as you maintain the integrity of your collected work, you can publish it in any medium. We have a copyright on that package.'" Alex Beam, *It's a Case of Who Owns the Words*, *The Boston Globe*, Oct. 4, 2005, at F1.

150 ASMP.com, *ASMP Urges High Court Review of Faulkner Case*, http://asmp.org/commerce/legal_article_012.php (last visited May 16, 2006) ("If the decision in *Faulkner* is upheld, the value of freelance authors' copyrights in their contributions to many thousands of collective works published after January 1, 1978, will be severely impaired and in many cases effectively destroyed. It is doubtful, for example, whether famous photographs first published in *Sports Illustrated* will command the same, or in fact any, license fee if they are widely available to the public through electronic media. Once the valuable works of freelance authors enter the world of electronic commerce without their consent and without any payment to them, the licensing value of those works is irretrievably lost.... [I]t is precisely the creative talents of freelancers such as the members of ASMP that the copyright laws are intended to nurture and sustain. The U.S. Court of Appeals for the Eleventh Circuit wisely recognized this in upholding the rights of ASMP member Jerry Greenberg in a very similar case against National Geographic. The decision in *Faulkner II*, if allowed to stand, grants publishers the right to reuse freelancers' valuable copyrighted works without permission or payment. Publishers are therefore free under the Second Circuit's decision to dump thousands of creative works owned by freelance authors into CD-ROMS, distribute and sell access to such works throughout the world, and collect all of the resulting profits. Publishers now have the green light under *Faulkner II* to exploit new markets for their own exclusive benefit and thereby eviscerate whatever residual market that may be left for photographers to explore. Freelancers get nothing in return.").

151 See *id.*; sources cited supra note 143.

152 See supra note 147.

153 Beam, supra note 149; see Response to Petitions for Writ of Certiorari, *Faulkner v. National Geographic Enters., Inc.*, 126 S. Ct. 833 (2005) (Nos. 05-490, 05-504, 05-506), 2005 WL 2985713, at *10-11 ("In light of the circuit conflict, respondents and other owners of copyrights in collective works cannot know the scope of their rights, and hence are necessarily chilled from exercising them.... This situation, of course, undermines 'Congress' paramount goal in revising the 1976 [Copyright] Act': to enhance

'predictability and certainty of copyright ownership.' *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989). And even more fundamentally, clarification of the law in this area is vital to the preservation and diffusion of collective works in an era of rapid technological change.... At issue here, in short, is the future of public access to digital information depositories.”)

¹⁵⁴ See Netanel, *supra* note 143, at 354-58.

¹⁵⁵ See, e.g., Netanel, *supra* note 143, at 359 (“[W]hile our copyright market may encompass a wealth and diversity of expression not contemplated by the Framers, the basic principle is the same: To systematically subject authors expression to the stifling grip of patronage would be inimical to a ‘free Constitution.’”).