

# A COMMENT ON *NEW YORK TIMES V. TASINI*

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My thanks to Craig Nard for including me in this gathering. I am grateful to be among my colleagues and friends who are here today, and to have this opportunity to share my views on *New York Times v. Tasini*<sup>1</sup> with the members of this audience.

I want to talk about *Tasini* from a perspective that is actually at some remove from the perspectives that have been presented thus far. On the one hand, we have considered the interests of publishers and their allies in the publishing industry; and we have extended no less attention to the interests of freelance writers and photographers for whom the Court's decision no doubt will have many ramifications and implications. The observations of the speakers who have preceded me are valuable and sensible, and I agree with (or at least can see the sense in) much of what has been said on all sides.

But for my own part I would like to talk a bit about the copyright system at large, and in particular about alternative ways of looking at copyright issues – alternatives not entirely like the ones that we have heard this morning.

Let me begin with this framing insight: We could, in fact, live without copyright altogether.

I confess that even for me a world without copyright would take some getting used to. I have just completed a term as a Trustee of the Copyright Society of the United States. I number copyright professionals and high protectionists among my dearest colleagues and friends and think well of many people in the copyright industries. However, I do not agree with many aspects of copyright doctrine. I do not think copyright repugnant. But I am at least a skeptic about the utility in copyright and about its costs. Perhaps, when push comes to shove, I am even more than a skeptic. Let us say that the views I want to share with you today are the perspectives of a copyright iconoclast.

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<sup>1</sup> 533 U.S. 483 (2001).

I think that copyright could be dispensed with. There would be some fitful lurches and starts as the world's economies adjusted to its absence, but in the end I suggest that productivity in the things we count on copyright to encourage would in fact be increased, both in quality and in quantity. Copyright does have its uses. But (as one protectionist practitioner observed privately to me recently) copyright also is very often just an excuse for preserving outmoded business plans in industries that might profitably benefit from change.

But in fact time is short – and certainly a conclusory allegation as to the disutility in copyright is not more tendentious than most of what is said in its defense. So I shall content myself here with merely anecdotal evidence in support of my position.

The sainted Jerry Garcia (of the Grateful Dead) used to say, "Once we've played it, it's yours." Copyright was never at the center of the Deadhead's experience. Indeed, when you entered the sacred precincts of the venue, you found the choicest seats reserved for those who came to tape the concert and to carry it away in a primitive early exercise in file sharing. There was even a glorious moment in the evolution of the experience the Dead provided when, if you wanted to, you could actually plug your recording equipment directly into the Dead's own sound system in order to avoid degradation of quality in the resultant product – namely, the tape of the concert you intended to take away with you to share with others. And yet the Grateful Dead was the highest grossing rock band of all time (more so in their day even than the Beatles or the Stones). And what was the reason for this success? It was that what you got when you went to a Dead concert was the authentic experience itself. What you paid for was access to authenticity, immediate and direct, a business model still worthy of emulation and consideration even in our time.

I repeat, then: the Dead made money hand over fist, and they made it largely without concern for the copyright in their performances. And I mean to suggest that it is possible generally for good musicians to be productive artists and to make money without having a copyright.

Now, in contrast, I want to bring to your attention the experience of another industry: the movie industry. I want to tell you about how that industry works within the framework of contemporary copyright. Thanks to the omnipresent influence of lawyers and of copyright, and the constant evolution of all the rights that have been secured by the guilds, we encounter here an industry in which, in the main, good people do not work at all.

I have friends who consider themselves to be (and whom I myself regard as being) serious screen writers – but who have not sold a screenplay in twenty five years. And far from being unusual, theirs is the typical experience of the creative artist in the motion picture industry. If you have in mind working in the movie business, then have in mind working at something else that you can make a living from, because the likelihood that you will do it in the film industry is very close to zero. The simple, central truth about the motion picture industry is that copyright sustains a production habitat in the industry that is fundamentally antithetical to the success of individual creativity.

We could dispense with copyright, and the barriers to entry in the motion picture industry would be swept away within the passing of a generation. Movies would continue to be produced, and in greater numbers, with no necessary diminution in quality. Good people would find work to do. The market would determine the success or failure of their products without the impediments inevitably posed by a system of monopolies. New and better business plans would follow. Dare I say it? The world would be a better place.

Of course I do not expect that this will come to pass.

But it is certainly possible to imagine that copyright might be very substantially reformed. And there are aspects of the Court's opinion in *Tasini* that I do think encourage us to look in the direction of reform.

Particularly, I have in mind the Part IV of Justice Ginsberg's opinion, in which she said (almost as though it were a thought in passing) that nothing in *Tasini* need portend any loss from the perspective of the public: We do not have to worry about the possibility that the public domain will somehow be cheated of all these works that are the subject of our ruling here. That is not something we need to worry about at all. Why, if we need to, we can just withhold injunctive relief. We have done that before – we have done it in well-known cases, including *Cambell v. Acuff-Rose Music, Inc.*<sup>2</sup> – and we can do it again if we want to.<sup>3</sup>

The implications in this passage (I have paraphrased it here, but it is no less pointed in the original) are really quite remarkable, even stunning. In the few moments remaining to me, I want to suggest what this might mean in practice.

Were we really to pay attention to Part IV of Justice Ginsberg's opinion, we would effectively convert copyright from a

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<sup>2</sup> 510 U.S. 569 (1994).

<sup>3</sup> *Tasini*, 533 U.S. at 505-06.

property regime into what my colleagues in the academy like to call “a liability regime.” In effect, we would convert copyright into a regime in which anyone could appropriate copyrighted work as, when, and where he or she pleased, against an understanding that after the taking the question would be, not whether they were entitled to appropriate the work, but rather how much they would be obliged to pay for it having done so. It is possible to imagine compensating an author for the author’s investment in the actual production of a work and some reasonable return on that investment – and to pay no more than just that. I think this is the essence of what Dennis Karjala has been proposing for many years, and it may be time for all of us to recognize the merit in his ideas.

Another way of looking at such a regime is to see it as having the effect of converting fair use into a new and broader affirmative right than fair use is now conventionally thought to be, a fair use which is given paramountcy under the Copyright Act *vis a vis* the exclusive rights of authors. In my view (and I believe in the view of some of my colleagues in the academy, as well as Judge Birch in his opinion in *Suntrust Bank v. Houghton Mifflin Co.*<sup>4</sup> – the so-called Wind Done Gone case) this would work a less revolutionary change than many other students and practitioners of copyright might suppose. Indeed I would argue that this is actually what the text of section 107 already suggests. When section 107 is read in conjunction with section 106, it seems perfectly clear from the texts that fair use is an entitlement superior to the exclusive rights in copyright, and not the other way around. Of course, under conventional fair use doctrine, the defendant who wins a fair use claim pays nothing for its appropriation. But there is no reason why that must be so. Suggestions are beginning to be made quite generally to the effect that the fair use claimant might be obliged to pay some reasonable amount for the appropriation, or perhaps to apportion some of whatever it realizes from further exploitation of the antecedent work.

I do not have time to explore these ideas fully here or to acknowledge those who have already advanced them in one form or another. But in offering them in this summary fashion I hope to have suggested more generally how one might move usefully from Justice Ginsburg’s opinion in *Tasini* to a view of copyright at large in which the proprietary nature of rights under that regime would be displaced by a system in which appropriation, rather than proprietorship, would become the central norm.

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<sup>4</sup> 268 F.3d 1257 (2001).

This would carry us well beyond the narrow outcome in *Tasini*, to be sure. But it would be a movement altogether consistent with an increasing role for the public domain. And in my view, reimagining the public domain is the principal challenge that lies ahead of all of us who are interested in developments in the law of copyright.

I thank Craig Nard again for inviting me to comment on today's subject matter and applaud the speakers who have preceded me on the excellence of their presentations.

