LESSONS FROM THE ANTI-COMMONS: 
THE ECONOMICS OF TASINI V. NEW YORK TIMES

I. FRAGMENTATION AND INTELLECTUAL PROPERTY: AN ANALYSIS OF 
TASINI V. NEW YORK TIMES.

A. Introduction

The case of *Tasini v. New York Times Co.*, which the Supreme Court decided in June 2001, attracted media attention and involved celebrities such as film maker Ken Burns because it appeared to pit the rights of authors to protect their creative works against the nation’s need to preserve its historical record. The plaintiffs, a group of freelance writers, argued that the *New York Times*, and other defendants, were violating their copyright privileges by selling their works to electronic database services. The defendants responded that finding for the plaintiffs would necessitate a wholesale purging of the electronic records, leaving holes in the nation’s historical record that would be impossible to fill.

The three courts that heard the case each responded to this dilemma differently. The U.S. District Court for the Southern District of New York labored mightily to avoid having to retroactively remove all unauthorized material from electronic databases, a complex and expensive undertaking, but did so by producing an opinion that required a less than intuitive interpretation of
the statute. The U.S. Court of Appeals for the Second Circuit, opting for a more straightforward reading of the 1976 Copyright Act, reversed the lower court decision. In doing so, it placed a premium on statutory construction, raising the real possibility that the publishers wanting the copyright will be essentially be unable to acquire it due to the difficulties of retroactive negotiation with a large group of freelance writers. The Supreme Court followed the Appeals Court reasoning, playing down the negative ramifications in the hopes that the two competing concerns—author’s rights and accessibility to information—could be reconciled through the remedy, which the Court remanded to the District Court to determine.

The specific situation in *Tasini* is somewhat limited, as the case only affects freelancers who wrote articles between the 1990 and 1993, when publishers started including electronic rights in contracts with freelancers. Nevertheless, it usefully illustrates concepts familiar to those in the field of law and economics because the underlying tension between the publishers and freelancers replicates itself in a variety of circumstances. In fact, *Tasini* is, from the law and economic perspective, a classic anti-commons situation in which asymmetric transaction costs are complicating the implementation of the easiest solution: some form of retroactive compensation to the authors for use of their work. This paper will review the *Tasini* case, explain some basic concepts in law and

---
4For instance, the court compares Sections 201(d)(1), 201 (d)(2) and Section 201(c) to point out that, working “in tandem” the three sections create a subdivision of rights that leaves publishers with “full authority” over the subdivisions they acquire. (Tasini, 972 F.Supp. at 812.)
517 U.S.C. § 101 et seq.
7*Tasini*, 206 F.3d at 167 (citing canons of statutory construction to reject the lower court’s reading of Section 201 (c) on the grounds that would render superfluous another provision of the Act.
9One Amicus Brief supporting affirmance of the Second Circuit decision estimated that the case affected .0036% of the 2.8 billion documents available on NEXIS. Amicus Brief, *New York Times v. Tasini*, No. 00-201, WL177048 at 11 (U.S. Feb. 16, 2001). It should be noted, however, that this amounts to copyright questions concerning some ten million articles.
economics, describing some of the emerging economic theories of property fragmentation and how they apply to this case. After an in-depth consideration of the Supreme Court decision, the economic model of the anti-commons will be explained and applied to this case. A discussion illustrating how the principles of law and economics can provide guidance on how to craft an effective remedy for *Tasini*, which is still an open question, will lead into the final section: a consideration of the doctrine of Fair Use, which could have provided a solution to the anti-commons dilemma in this case.

**B. Background of the Case**

1. **District Court**

   The underlying facts of the case are relatively simple. A group of freelance writers sued the *New York Times* and a few other prominent publishers for selling their works to various electronic databases, such as NEXIS, which then marketed them to the public at a significant cost. The authors claimed that this practice violates their copyright rights and thus accordingly demanded that the publishers first acquire their permission before passing the material onto the electronic databases, thereby allowing the writers to share in the profits.

   The District Court found in favor of the publishers. Section 201 of the 1976 Copyright Act allows compilers of collections of articles (such as a newspaper or magazine) to use the commissioned works in revisions of the original collection (e.g. a second edition of the newspaper), or in subsequent issues of the same series (such as a later edition of an encyclopedia).\(^\text{10}\) The judge ruled that the redistribution of the articles through electronic databases constituted an allowable revision of the original work, rather than an impermissible alteration or independent use, because

---

\(^{10}\)17 U.S.C. § 201(c)
the databases preserve the creative element of the publishers’ compilation of an interesting publication each day.\textsuperscript{11} The court acknowledged that the database version does not have any of the initial formatting, photographs, captions, and that the juxtaposition to other articles that ran in the original edition is completely lost, and yet found that it could still be considered a revision.\textsuperscript{12} In balancing the various elements, therefore, the court decided that the intellectual effort of putting together a publication, an effort readily recognized as deserving copyright protection, survived the process of putting the work in an electronic database.

By downplaying the formatting and presentation differences between a newspaper or magazine and an electronic database, the District Court was able to find that licensing articles to an electronic database was simply an allowable revision of the original work. This avoided the practical difficulties that would ensue if publishers had to find all their freelancers and obtain licenses to include their works on electronic database services. The publishers would have continued to license material to electronic database services without further compensation to the freelancers. The result would have been a net zero increase of transaction costs for the publishers, but effective denial to the writers of a share in the substantial profits derived from selling access to commercial databases.\textsuperscript{13} The District Court recognized this inequity, but argued that the problem lay with advances in technology which had rendered revisions right, which in 1976 were seen as being of limited value, suddenly “precious” in the context of electronic dissemination.\textsuperscript{14} The ultimate solution therefore was within the purview of Congress, rather than the courts.

\textsuperscript{11}\textit{Tasini}, 972 F.Supp. at 823 (noting that “selecting materials to be included in a newspaper or magazine is a highly creative endeavor . . . Identifying “all the news that’s fit to print” is not nearly as mechanical (or noncontroversial) as task as gathering all of the phone numbers for a particular region”).

\textsuperscript{12}\textit{Tasini}, 972 F.Supp. at 824.

\textsuperscript{13}\textit{Tasini}, 972 F. Supp. at 825.

\textsuperscript{14}\textit{Tasini}, 972 F. Supp. at 826.
2. **Appeals Court**

The Second Circuit reversed the District Court, however, holding that Section 201(c) does not allow publishers to license individual copyrighted works for inclusion in electronic databases. The court rejected the argument that placement in a database constituted a revision, finding that it was not reasonable to find that a database, which holds tens of thousands of articles from a variety of publications, could be considered a revised version of each original publication. The Court explained its reasoning by applying rules of statutory construction, claiming that the three clauses of 201(c) set the floor, middle ground and ceiling of allowable uses of material acquired for a collective work. The natural reading of the “revisions” provision was to allow later editions of a newspaper, which are “somewhat altered” from the original output. If the understanding of the term revision were stretched to allow inclusions in databases, the final clause-- permission for inclusion in later works-- would be superfluous, an interpretation that could not be “squared with basic canons of statutory construction.” Allowing electronic dissemination would have the additional, incongruous result that publishers could not sell individual hard copies of freelance articles, but they could achieve the same end indirectly by selling copies electronically with a print-out function. Accordingly, the Second Circuit found in favor of the freelancers, prompting an appeal the U.S. Supreme Court.

---

15 *Tasini v. New York Times*, 206 F.3d 161, 164 (2d Cir. 1999), hereafter Tasini II.
16 *Tasini II*, 206 F.3d at 167; the court noted that neither side was trying to argue that a database could be considered an original collective work or a later collective work in the same series, the other two permissible later uses of materials acquired for a collective work under 201 (c). *Id.* at 166.
17 *Tasini II*, 206 F.3d at 167.
18 *Tasini II*, 206 F.3d at 167.
19 *Tasini II*, 206 F.3d at 168.
C. The Prism of Law and Economics

Before considering the Supreme Court decision, this paper will outline some economic models of fragmented property that will facilitate understanding of this case. The gravamen of *Tasini* is the extent to which the freelancers seconded their rights to the *New York Times* to disseminate their work. In short, the writers created a concurrent “subright” in their copyright. The traditional structure of a property right, in which owners enjoy a “bundle of rights,” breaks down when they sell off some of their rights, while retaining others. This is easily understood in terms of real property: for instance, a tract of land with an easement is subjected to the rights of two parties. The difficulties begin when one party wants to reunify the rights associated with that piece of property. This paper reviews the analytic models for understanding this situation: the Coase Theorem, the various ramifications of asymmetric transaction costs, and the increasing difficulties that ensue when fragmented property rights are held by multiple owners: veto power over the reunification, or joint use, of a resource; persistent fragmentation; and underutilization of the property (anti-commons situation). Although these models were developed for consideration of real property, they facilitate understanding of the *Tasini* case as well.

---

*Tasini I*, 972 F.Supp. at 815.

21 In a recent paper, Francesco Parisi, *Entropy in Property*, __AMERICAN JOURNAL OF COMPARATIVE LAW__ (forthcoming) introduced the analogy of entropy in property law, suggesting that legal systems develop a kind of gravitational force that counteracts a natural tendency towards property fragmentation (i.e., entropy), thereby preventing property rights from becoming so splintered that use of the land is no longer economically viable.
1. Coase Theorem

Law and economics is increasingly seen as a valuable practical tool in the courtroom. In this case, the conflict between the freelancers and the New York Times and NEXIS fits several standard law and economics models. For instance, the core of the problem is that the New York Times does not have an easy way to track down the freelancers who contributed to the paper over the last ten to fifteen years and renegotiate the terms of the article with each of them. The Coase theorem states that if all rights are freely transferable and transaction costs are zero, an inefficient initial partitioning of property rights will not prevent an efficient final use of the resources. Simply put, property owners would have unlimited opportunities either to fragment or to reunify fragmented property, achieving the most efficient use of their rights. In the current case, the freelancers and New York Times would simply renegotiate the terms of their original deal to allow the current practice to continue.

Once the ideal conditions of the positive Coase theorem are relaxed, however, the efficiency of the final allocation depends on the initial division of resources. In a world of rational actors with full information, accurate estimation of the optimal final allocation and knowledge of the relative magnitude of discounted costs and benefits of property reallocation over time will determine

---

22 For instance, a concurring opinion in a recent remand by the Mississippi Supreme Court expressly recommended Hand’s formula to determine a coal company’s liability, if any, for coal dust that settled on a rice shipment, rendering it unusable. Comet Delta, Inc. v. Pate Stevedore Co., 521 So.2d 857 (Miss. 1988)(Robertson, J., concurring). Similarly, the Coase Theorem has also informed some judicial thinking. For example, In re Stotler & Co., 144 B.R. 385 (Bankr. N.D. Ill. 1992)

23 In a world of zero transaction costs, an efficient allocation of resources occurs regardless of 1) the initial allocation, or degree of fragmentation, of the legal entitlement and 2) the choice of remedies to protect the resources in question. Ronald H. Coase, The Problem of Social Cost, 3 JOURNAL OF LAW & ECONOMICS 1,10 (1960).
best initial allocation.\textsuperscript{24} The ex ante choice of the owners will ultimately prove efficient, thereby minimizing the undesirable effects of the positive transaction costs that would be associated with correcting a suboptimal initial allocation.\textsuperscript{25} This is reflected in the fact that the New York Times, and other publishers, have come to understand the monetary value and public benefit of electronic rights, and so now routinely include permission to resell freelance articles to electronic database services in their contracts with freelancers.\textsuperscript{26} With this complete understanding of the technology and its implications, the problem of who controls the electronic rights has been negotiated out of existence. We are rather dealing with the lingering effects of an earlier, uninformed, choices by both parties.

Uncertainty regarding the final optimal allocation of a given property right means that the efficiency of the initial distribution of rights depends on (a) the likelihood it will that coincide with what turns out to be the optimal final allocation, and (b) the directional costs of reallocating rights in the event of an initial mistake. If transaction costs are endogenous (i.e., they depend on the legal system, contracting parties, or the social planner), the issue of fragmentation becomes a relevant economic, and ultimately legal, problem.

\textbf{2. Origins of Property Fragmentation}

\textbf{Ontological Sources.} It is not surprising that economic theories of fragmented property are germane to the Tasini case. Persistent property fragmentation results from two scenarios, both of
which apply to this situation. First, human creative efforts often involve property rights over various material and are therefore by definition ontologically fragmented. Because the creation of intellectual property is by its nature decentralized, initial ownership of the various parts of a creative work is dispersed, be it in the components of a computer game (programming, graphics, music), major Hollywood film (story, script, music, special effects), or newspaper (articles, photographs, illustrations, op-ed pieces). In such cases, the scattered ownership of ideas and inventions is not the result of inefficient or irrational human choices, but is rather inherent to the decentralized process of human creation in a market economy. In short, it is natural that a publication that purports to deliver “all the news that’s fit to print” should avail itself of the creative talents of various professionals, and that the arrangements that it has with its various contributors should not be uniform.

Subsequent voluntary exchange is a weak weapon for fighting the ontological dispersion of property rights because the various property owners must contend with a range of factors that impede the unification of fragmented rights. Although the forgone synergies among the various property fragments may be obvious, multiple dispersed owners may not be able to cooperate, resulting in the monopoly pricing of the various inputs. In short, it may be quite costly to unify dispersed property, making it impossible to avoid final property allocations that are less than optimal.

Rational Choice. Property fragmentation may also result from deliberate human choice. Recent law and economics literature\(^\text{27}\) points out that the initially rational choices that led to property fragmentation may not be reversed, even if the arrangement is no longer desirable, because of the

strategic impediments to reunification. In economic terms, the process of property fragmentation is characterized by asymmetric transaction costs.\(^{28}\) A single owner faces no strategic costs when deciding how to partition his property and may subdivide his parcel, or grant easements, because giving several different parties rights to what was exclusively his land appears economically desirable at that point in time. But unlike ordinary transfers of rights from one individual to another, reunifying fragmented property rights usually involves transaction and strategic costs higher than those incurred in the original deal\(^{29}\) and which will plague any subsequent attempt to reunify the fragmented property.\(^{30}\) Even reversing a simple property transaction can result in monopoly pricing by the buyer-turned-seller who is trying to extract as much profit from the transaction as possible, knowing full well the value of the property to the other party. Reunifying property that has been split among multiple parties, whether from its creation or at a later time, engenders even higher costs given the increased difficulty of coordination among the parties.\(^{31}\)

These reunification costs increase monotonically depending on both (a) the extent of fragmentation; and (b) the synergies and complementarities between the owners of the property fragments. Control by a group of non-conforming owners leads to strategic considerations, that

\(^{28}\)For example the original owner will be at a disadvantage in reunifying his rights into a fee simple because he will have to deal with various parties who have acquired some rights pertaining to the original parcel. This kind of difficulty arises often when closely associated property rights, such as the right to use land and exclude others from it, are separated. Non conformity between use and exclusion rights (and more generally, between any two complementary elements of a property right) often give rise to asymmetric transaction and strategic costs.

\(^{29}\)FRANCESCO PARISI, NORBERT SCHULTZ, BEN DEPOORTER, DUALITY IN PROPERTY: COMMONS AND ANTICOMMONS, (Univ. of Virginia L. and Econ. Working Paper No.00-08, 2000).

\(^{30}\)Directional costs will be high when multiple non-conforming co-owners are faced with a range of strategic problems, stemming from difficulties in coordinating their decisions vis a vis the party who wants to reunify the property. FRANCESCO PARISI, NORBERT SCHULTZ, BEN DEPOORTER, DUALITY IN PROPERTY: COMMONS AND ANTICOMMONS, (Univ. of Virginia L. and Econ. Working Paper No.00-08, 2000).

\(^{31}\)See for example Egidii v. Town of Libertyville, 251 N.E. 2d 615 (Ill. App. 1993) (remanding the case after an appeal and previous remand to get more information concerning the possible intent of one of the involved parties to abandon an easement).

-10-
increase the transaction costs of any attempted reunification of the original property, and, in their most extreme form, can eventually make the economically more efficient use impossible to arrange, foreclosing the possibility of taking advantage of the resource at all.

3. Entropy

The fundamental law of entropy in property creates a one-directional bias towards increasing fragmentation. This term refers to the second law of thermodynamics, according to which every process that can occur spontaneously will go in one direction only and will result in a release of energy that cannot be recaptured, so that the amount of entropy, or lost energy, in the universe will continually increase. Entropy can only be avoided in the purely abstract world of zero transaction costs, where parties could without cost negotiate to the most efficient allocation of resources. The economic forces that induce entropy in property were considered above: property division creates a one-directional inertia: unlike ordinary transfers of rights from one individual to another, reunifying fragmented property rights usually involves transaction and strategic costs higher than those incurred in the original deal. As in the physical world, where it takes considerable additional energy to roll a rock back up a hill, after it has rolled down on its own, it takes considerable financial and legal effort to unite property rights that are diffusely owned or which had been previously split. Often, especially in the presence of asymmetric transaction costs, or a situation in which multiple owners

33Heller cites the nursery rhyme of Humpty Dumpty to illustrate his point. When Humpty Dumpty is shattered into pieces even all the king’s horses and all the king’s men can’t re-assemble him, which stands in contrast to the ease with which he broke into pieces in the first place. See also Michael Heller, The Boundaries of Private Property, 108 YALE L.J. 1163 (1999) at 1169.
34Parisi-Schulz-Depoorter (2001) observe that even reversing a simple property transaction can result in monopoly pricing by the buyer-turned-seller; reunifying property that has been split among multiple parties engenders even higher costs given the increased difficulty of coordination among the parties.
can prevent use of the land, or in this case electronic publication of articles, that reunification will never take place. To continue our physical analogy, the foregone efficient use is analogous to the expenditure of energy in thermodynamics, which will also never be recouped.

4. Application to Tasini

Here the New York Times is reluctant to reunify the de facto property rights it had in each edition of the paper, which were split by the Supreme Court ruling, because of the large transaction costs it would face in doing so. Tracking down, and negotiating with, the hundreds of freelancers that contributed material during the period in question is a potentially daunting task. Estimates of the amount it would cost the Times to compensate and/or pay damages for the freelancers’ material range from $640,000 to billions of dollars.\(^{35}\) The paper understandably prefers to threaten to purge the electronic databases of the freelancers’ material. Whether this strategy will be effective remains to be seen: Tasini has filed another lawsuit against the New York Times and other defendants to block this approach, insisting that the companies provide compensation for their work.\(^{36}\)

Managing property fragmentation was a major consideration in Tasini because the 1976 Copyright Act created the possibility of subdividing copyright rights for the express purpose of facilitating the licensing for collective works.\(^{37}\) The 1906 Copyright Act only allowed copyright to vest in one party at a time; anyone who allowed their work to be used in a collection would lose the copyright completely.\(^{38}\) In an effort to correct this inequity, the 1976 Copyright Act rejected the concept of unitary copyright, allowing authors to cede part of their rights to third parties for specific


\(^{37}\)Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution [pending an express transfer]. 17 U.S.C. § 201(c)

\(^{38}\)See discussion in Tasini, 972 F. Supp. at 815. The provisions of the 1976 Copyright Act were designed to avoid that outcome.
purposes under limited conditions. All the courts who considered the case agreed that the original authors retained the right to their creative work and all agreed that the publishers did not obtain right to that work. Rather, the authors who allowed their work to be published yielded a “subright” to the publisher, the scope of which is very limited. At the same time, however, the publishers created their own copyright in the creative process of putting together the collective work. The gravamen of Tasini is therefore determining whether the distribution of authors’ works electronically fits within the narrow confine of the exceptions in the 1976 Act and how the electronic format impacts the collective nature of the work, if at all. Having decided that copyright can be split into constituent parts, the courts are now working to avoid the problems associated with fragmentation of physical property, as outlined above. They are doing this by interpreting the ceded rights very narrowly; some dispute arises when 1) narrow construction could be seen as taking away the publishers’ rights and 2) creating a new cost (negative externality), in this case the reduction of accessibility to information.

II. THE SUPREME COURT DECISION

A. Opinion

The Supreme Court wrestled with the objective outlined in this paper-- forestalling property fragmentation--and determined by a 7-2 margin that the authors’ rights must be paramount. The Supreme Court explained that the case turned around two distinct copyrights on the same material:

39 The relevant section of the Copyright Act reads: “Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.” 17 U.S.C. § 201(c).

40 The determinative issue here, then, is the precise scope of these “privileges.” Tasini, 972 F. Supp. at 814.
the rights of the authors in the work itself and the rights of the publishers to the collective work, a
product of the creative work of assembling the different pieces into one publication. The Majority
decided however, that the conversion to database format reduces the articles to individual works,
rather than as contributions to a collective whole, so that to allow the publishers further control over
the articles in the medium would “invade the core of the Author’s exclusive rights.”

The Court noted that the case could not deal with a unity right, as indivisible copyright had
been abolished in the 1976 Copyright Act, and catalogued the injustices that had led to that
legislative decision. Specifically, if an author allowed his work to be used in a collective work
before 1976, he lost the copyright because it passed to the publisher or would fall into the public
domain. The Copyright Act was drafted to compensate for this inequity, striving to preserve the
author’s copyright and forestalling the “unqualified transfer” of rights to the owner of the collective
work. The objective was to strengthen the economic incentive to produce creative work and ensure
that if the collective work increased demand for the article, that the author would benefit. Therefore, absent an express agreement, the owner of the collective work acquired only the
“privilege of reproducing and distributing the contribution as part of the collective work, a revision
of that collective work, and any later work of the same series.”

The Court refused to construe the Statute in such a way as to diminish an author’s exclusive
rights to his material, so that only if the databases constituted a clear revision of the original

41 Tasini, 121 S. Ct. at 2387.
42 Tasini, 121 S. Ct. at 2391.
43 Tasini, 121 S. Ct. at 2388.
44 Tasini, 121 S. Ct. at 2389.
45 Tasini, 121 S. Ct. at 2389.
46 Tasini, 121 S. Ct. at 2389.
collective work, could the District Court decision be upheld.\textsuperscript{47} The Court was concerned that the articles in the database appear out of context and that users are generally prompted to search for information by category rather than by date or publication, the aspects that would tie the article to the original collective work. In addition, NEXIS removes all formatting, graphics, advertising etc., other characteristics that would hearken back to the original version. The Court therefore concluded that the database is no more a revision of an article than a 400 page novel is a revision of a sonnet that might be quoted in the book.\textsuperscript{48} By distributing articles singly, the databases violate the Authors’ exclusive rights.\textsuperscript{49}

The Court considered whether the creative effort of putting together the collective work was sufficiently preserved once each edition of the paper was converted into electronic format. In concluding that it wasn’t, the majority found that the collective aspect was sufficiently diluted that the copyright in the original work paramount could trump the one in the creative process of assembling “all the news that’s fit to print.” Accordingly, The Supreme Court upheld the decision of the Second Circuit, holding that the publishers were not covered by 201(c) because articles in databases could be retrieved individually, completely divorced from the collective work in which they were published. Therefore the databases could not be considered “revisions,” and the publishers had infringed the copyrights of the writers.\textsuperscript{50} The Court rejected the District Court’s finding that the coding and electronic tags were sufficient to preserve the essence of the collective work, and therefore the publishers could claim copyrights under the “revision” section of 201c.\textsuperscript{54} Rather, the

\textsuperscript{47} Tasini, 121 S. Ct. at 2390.
\textsuperscript{48} Tasini, 121 S. Ct. at 2391.
\textsuperscript{49} Tasini, 121 S. Ct. at 2391.
\textsuperscript{54} Tasini, 121 S. Ct. at 2386.
Appeals Court argument that the database collections constituted entirely new anthologies proved more persuasive.\textsuperscript{55}

In sum, the Court minimized fragmenting the right to the material, by declaring that the authors’ rights remained intact regardless of the narrow rights that publishers acquired to include the material in a collective work. Once the publishers acted to remove their copyright from the narrow zone of protection offered by the 1976 Act, the authors’ right to the material was effectively the only one remaining.

**B. Dissent**

The dissent follows the lead of the District Court, delving into legislative history to support a reading of the Copyright Act that avoids the problem of restricting access to the freelancers’ works, rather than speculating that it simply will not arise, as does the majority. The dissent breaks the question down into two issues: are the electronic versions of the collective works “revisions” within the meaning of 201c (yes)\textsuperscript{56} and, if so, does the electronic medium of the database “change the equation” (no).\textsuperscript{57} Finally the dissent echoes the logic of the District Court by concluding that this reading of the statute may not be the only possible interpretation, but it is nevertheless plausible and

\textsuperscript{55} Id. at 2387.

\textsuperscript{56} After a close examination of copyright law before 1976, the dissent quotes the legislative record to demonstrate that the primary purpose of the Act was to preserve the authors’ rights to their contributions in collective works to preclude the publishers from either 1) changing the text itself or 2) including it in an entirely different publication. Publishing the freelancers’ work in databases therefore falls within the parameters of what Congress was trying to protect, namely the preservation of the legal claim of the original authors to their work. The dissent also did not see how format could be dispositive in determining whether something was a revision or not, otherwise publishing the collective work in Braille would also have to be unacceptable, clearly not the case. The mere act of converting a document into ASCII and thereby giving up page formatting could not be the source of the problem. See \textit{Tasini}, 121 S. Ct. at 2394, 2397, and 2399.

\textsuperscript{57} The majority found that documents in a database could not be a revision of the original work because \textit{New York Times} articles from October 31, 2000 would be co-mingled with those from the March 21\textsuperscript{st} edition. The dissent however, did not see how this juxtaposition would be any different than making the two edition available in a library or storing several editions of a paper on a single spool of microfilm. The legislation is simply silent on the extent to which the material can be manipulated and still be considered a revision. \textit{Tasini}, 121 S. Ct. at 2400 and 2401.
“entirely faithful to the statute’s purposes”\textsuperscript{58} and is much more sound from a policy perspective. Copyright is essentially an attempt to capture the benefit that the public derives from a creative literary work (in economic terms an externality) and to return that benefit to the author as a way to maintain an incentive for people to make cultural contributions.\textsuperscript{59} It is not designed to guarantee the highest remuneration to authors but is rather a mechanism for balancing between the need for broad public availability of art, literature and music and finding a way to create incentives for people to produce those goods.\textsuperscript{60}

In calculating the costs to the freelancers, Breyer argues that the majority’s opinion fails to take into account the oversetting benefits that freelancers, who may be less well known, will accrue from the increased exposure their works will get from being available electronically, which could even include enhancing the value of the copyright they still hold in the work itself. Put against the obvious cost of having databases that are no longer comprehensive,\textsuperscript{61} Breyer argues that the majority is improperly ignoring the underlying object of copyright law, as enshrined in the Constitution: maintenance of a balance between authorial and public rights. In this case the public interest has been dismissed.\textsuperscript{62}

In his dissent, Justice Breyer dwelt at length on the problem of publishers purging their databases, thereby limiting access to an important segment of the nation’s historical record. The economic model for the situation in which a group of people, who cannot coordinate, limits access to an important resource is known as the Tragedy of the Anti-commons and is described below.

\textsuperscript{58} Tasini, 121 S. Ct. at 2401.
\textsuperscript{59} Tasini, 121 S. Ct. at 2401.
\textsuperscript{60} Tasini, 121 S. Ct. at 2401.
\textsuperscript{61} Tasini, 121 S. Ct. at 2403.
\textsuperscript{62} Tasini, 121 S. Ct. at 2389.
C. The Tragedy of the Anti-Commons

The problem of the Commons is well known: all members of a group have unrestricted access to a resource and cannot coordinate to manage it efficiently. The inverse, the tragedy of the anti-commons, is a result of property fragmentation. In anti-commons situation, multiple owners have veto powers over the use of a resource, thereby increasing the chances that it will not be used.\textsuperscript{63} Competition among the owners prompts exercise of exclusion rights, even if one party could use the resource to create social benefits. Just as users do not fully bear all the costs associated with using the resource in the commons situation, in the anti-commons model, multiple owners do not fully internalize the cost created by the enforcement of their right to exclude others. This compresses the co-owners’ right of use, potentially even eliminating it. The commons and anticommons deviate from norm in symmetric directions. In commons situations, the right to use stretches beyond the effective right (or power) to exclude others. Conversely, in anti-commons situations, the co-owners’ right of use is compressed, and potentially eliminated, by an overshadowing right of exclusion held by other co-owners.\textsuperscript{64} Put in another way, in both commons and anti-commons cases, rights of use and rights of exclusion have non-conforming boundaries, which causes a welfare loss from the foregone synergies between those complementary features of a unified property right.\textsuperscript{65}

\textsuperscript{63}Heller ... James Buchanan & Yong J. Yoon, Symmetric Tragedies: Commons and Anticommons Property, 43 J. LAW & ECON. 1 (2000) and Francesco Parisi, Norbert Schultz, Ben Depoorter, Duality in Property: Commons and Anticommons, (Univ. of Virginia L. and Econ. Working Paper No.00-08, 2000). at 4.

\textsuperscript{64}Parisi, Schultz & Depoorter, Francesco Parisi, Norbert Schultz, Ben Depoorter, Duality in Property: Commons and Anti-commons, (Univ. of Virginia L. and Econ. Working Paper No.00-08, 2000) at 5.

\textsuperscript{65}For a public policy example of anti-commons, consider efforts at environmental protection through assestion of rights. The Seventh Circuit reversed a potential anti-commons situation in River Road Alliance Inc. v. Corps of Eng’s of the U.S. Army, 764 F.2d 445 (7th Cir. 1985), in which the Court lifted an injunction preventing the Army Corps of Engineers from creating a fleeting facility—essentially a parking lot for barges—in a pristine area along the banks of the Mississippi. In his decision, Judge Richard Posner determined that the detrimental effect on the area would be purely aesthetic and therefore not significant enough to warrant a full environmental impact statement (EIS) by the Army Corps of Engineers (at 451), which would be a long and expensive undertaking (at 449). The majority was not willing to allow the River Alliance, which was joined in the suit by the State of Illinois, to exert anti-commons type exclusion rights.
The anti-commons application in *Tasini* is clear: each one of the authors now controls control over the copyright to the work that was published in the *New York Times*. The paper is currently either unwilling, or unable, to negotiate with each one of these writers for the rights, so that the information they have provided will no longer be readily available in electronic format. An important resource, therefore, will be underutilized, given the growing reliance that people are placing on immediate electronic access to information. The extent of the underutilization is a matter of dispute, as the availability of the information in hardcopy or microfilm is disputed. The practical result of the *Tasini* decision necessitates, in theory, that the publishers track down every freelance author since 1976 and negotiate usage rights. Not only does this in itself threaten to engender huge costs, but it would lead to asymmetric transaction costs, as the authors could certainly hold out for higher licensing fees. A database’s worth (and justification of high access charges) lies in the fact that it is comprehensive. Writers would know this and therefore demand premium licensing compensation, knowing that electronic database services, such as the defendant NEXIS, would have

by insisting on full implementation of the range of federal regulations and enjoining the construction of the fleeting facility in the meantime. By attempting to assert the right to a full environmental impact statement, the plaintiffs were delaying use of the resource; had the defendant had fewer legal resources at its disposal that the U.S. Government, that action might have been sufficient to block the construction of the barge facility. Recent legislation has given individuals the capacity to sue to prevent environmental damage, however, effectively creating a situation in which multiple parties with ownership-type rights can prevent economic use of the resource. See for example, Clean Water Act, 33 U.S.C.S. §1365; Endangered Species Act, 16 U.S.C.S. §1531 et seq. (Supp. V 1988). Although the question of standing remains an issue for interested parties, the Supreme Court has upheld the much lowered bar established by Congress in recent environmental protection legislation. For instance, in *Friends of the Earth v. Laidlaw*, 528 U.S. 167 (2000), the Supreme Court granted standing to *Friends of the Earth*, finding that the Plaintiff’s voluntary avoidance of the river, because it might have been polluted by the defendant’s actions, was sufficient injury to establish standing (at 182). Although granting standing does not guarantee that the Plaintiff will prevail in court, the liberalized standard in environmental cases increases the likelihood of anti-commons outcomes because 1) private citizens concerned about the environment will be encouraged to sue and 2) smaller developers may be more apt to abandon a project than risk expensive and time-consuming litigation, and further damage payments, even if they may ultimately prevail. Therefore new standing rules in environmental cases may well provide a range of examples of the anti-commons model in the coming years.

66 For a complete discussion, compare the Burns and ALA amicus briefs submitted to the Supreme Court in this case.
to comply in order to maintain their market value. The publishers have reacted swiftly to this new reality: they claim that they will be forced to delete all freelance materials from their electronic databases in order to avoid liability for lawsuits. As stated in their brief, the results could be far-reaching and devastating:

Petitioners and those similarly situated will have no alternative but to destroy any CD-ROMs that contain freelance articles and remove all freelance contributions from electronic libraries, because they obviously cannot locate and negotiate with thousands of freelance authors, their heirs and/or assigns, in the face of the “tidal wave” of lawsuits respondent Tasini has threatened and has now begun to deliver. Cert. Pet. 12-13. In fact, publishers across the nation already have assembled instructions for their electronic copy licensees to begin the deletion process; but for the stay granted below and this Court’s having granted certiorari, the nation’s electronic archives would already have been rendered egregiously incomplete.

This stand-off could result in a stark anti-commons problem, namely that the multiple ownership rights will prevent the general public from being able to access easily the information stored within the work of free-lance journalists. If these resources are only available in hard copies in libraries, while similar works are available on-line, the collective information and analysis of thousands of freelance writers, including stringers, writers of Op-ed pieces, and other voluntary contributors, will be underutilized. Because the authors have no way to coordinate an optimal price for the rights to their work or negotiate in tandem with publishers, thereby creating a cost-effective mechanism for solving this problem, it is likely that the availability of such resources will be limited.

---

70 Indeed, a search for author (Tasini) on Lexis at the time of this writing does not produce any “hits.”
Nor does this appear to be a fanciful argument. An array of publishing organizations submitted amicus briefs to the Supreme Court in this case, portraying the drastic results if the Appeals Court decision were allowed to stand. For example, a brief from 23 publishers, including the Washington Post, the Newspapers Association of America, Knight-Ridder, and Gannett, warned that:

If the Second Circuit’s decision stands, existing comprehensive archives will fall, and historians, researchers, scholars, journalists and society at large will no longer have meaningful access to the rough draft of the nation’s history contained in back issues of the nation’s newspapers and magazines. A generation of journalists, students and researchers will have to re-learn the old method of traveling to a brick- and-mortar library, if they are lucky enough to live near one that still retains paper archives of the magazines and newspapers they want to review.\footnote{Amicus Brief, \textit{New York Times v.Tasini}, No. 00-201, 2001 WL 22914 at 4 (U.S. Jan. 4, 2001).}

This analysis was seconded in another brief submitted by distinguished film maker Ken Burns, historians Doris Kearns Goodwin, David McCullough, and others who fear that libraries will not have the funds to maintain both electronic and paper copies of important resources. These \textit{amici} also fear that it may already be too late to reconstruct paper copies of some of the material that seemingly will have to be deleted from electronic databases, since the Supreme Court did not adopt the District Court’s approach to this issue.\footnote{Amicus Brief, \textit{New York Times v.Tasini}, No. 00-201, 2001 WL 23641 at 13-14 (U.S. Jan. 5, 2001).}

The counter-argument, as represented in amicus briefs to the Court and in its actual opinion, maintains that although the Second Circuit’s ruling presents a challenge, careful crafting of judicial remedies, including making any relief prospective, or assigning damages instead of an injunction, would satisfy both the letter of the Copyright Act and preserve the nation’s historical record.\footnote{Amicus Brief, \textit{New York Times v.Tasini}, No. 00-201, 2001 WL 173550 at 2 (U.S. Nov. 6, 2000).} The
extent of “damage” to the historical record is also a matter of debate, with another group of historians, led by Ellen Schrecker of Yeshiva University, arguing that researchers rely on primary sources, rather than electronic databases, which only go back about 20 years.\footnote{Amicus Brief, \textit{New York Times v. Tasini}, No. 00-201, 2001 WL 177048 at 10 (U.S. Feb. 16, 2001).}

All parties would agree that the Supreme Court decision did not solve the problem. We are left with a situation in which asymmetric transaction costs have created an anti-commons situation which is preventing the most efficiency use of the property. The consequences of allowing the impediments to reunification to remain in place seem very steep. Indeed, the Court itself appears to be relying on the remedy to resolve the situation. Noting that an injunction was not mandatory, it “remedial issues open for initial airing and decision in the District Court.”\footnote{Tasini, 121 S. Ct. at 2394.} Law and economics theory stipulates that the district court will gravitate toward the most efficient remedy at hand. It would therefore be instructive to consider how other courts have addressed anti-commons problems in other contexts.

Because the Appeals Court reading of the statute was more straightforward, the Court fulfilled by a 7-2 margin predictions that it would to uphold the Appeals Court.\footnote{John D. Shuff & Geoffrey T. Holtz, \textit{Copyright Tensions in the Digital Age}, 34 Akron L. Rev. 555, 562 (2001).} Although acknowledging some of the difficulties that may flow from this decision, the Court tried to avoid fulfillment of the catastrophic scenarios presented by the newspapers by remanding the case for further consideration of a remedy. The Court also remarked pointedly that injunction of use of the freelancers’ material would not be the lower court’s only recourse. Given that the concerns about availability of information is at least plausible, it is useful to apply the economic concepts describing
earlier in this paper to the *Tasini* context in order to understand more fully the implications of the
decision and how some of the more costly results might be avoided.

**III. REMEDIES AND ENDOGENOUS TRANSACTION COSTS**

Economic efficiency is explicitly cited as a basis for judicial creativity in determining the
most appropriate remedies.\(^77\) According to a well-known formulation of the normative Coase
theorem, in the presence of transaction costs, the choice of remedial protection will have an impact
on the final use of rights and resources and will influence the extent of economic deadweight losses.
Most notably, Calabresi and Melamed point out that, in the presence of positive transaction costs,
the choice between property-type and liability-type remedies has important efficiency
consequences.\(^78\)

\(^77\)See, for example, *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970) (opting to award damages
rather than an injunction to plaintiffs complaining about pollution caused by a local cement factory).

\(^78\)Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of
the Cathedral*, 85 HARV. L. REV. 1089 (1972) at 1092 outline a scheme with three kinds of entitlements: property,
liability, and inalienable rights. The owner of a property type entitlement can sell it at will for whatever price the market
will bear; a property-type remedy, such as an order for specific performance or an injunction, can only be transferred
with the owner’s consent, at the price he demands. Liability-type remedies, such as damages, place control in the hands
of the actor wanting the right, who can act against the will of the person who holds the entitlement, so long as he is
willing to pay the price in the form of damages that are set by the state through the courts. Calabresi & Melamed, at 1094.
Finally, certain entitlements, such as personal liberty, cannot be transferred or sold, even if the holder would want to do
so. These well-known considerations have provided the basis for much of the common wisdom during the last twenty-five
years in the law and economics profession. Over the same period, however, several scholars have challenged the validity
of the Calabresi-Melamed framework, pointing to the limitations of liability-type protection. Calabresi & Melamed, at
1093. These critiques have led to various refinements of the original Calabresi-Melamed (1972) framework, which shall
be taken into consideration in the present analysis. In spite of such challenges the gist of the original proposition remains
standing, however.
A. Remedies and Asymmetric Transaction Costs

1. Theory

In the realm of entropy and property fragmentation, positive transaction costs often generate a one-directional stickiness in the transfer of legal entitlements. As discussed above, pricing externalities and holdouts are two major impediments to transfers, which are directly related to each other in the anti-commons setting. The optimal legal remedy should aim at minimizing the net social cost of such externality and holdout costs in any particular institutional setting. Quite interestingly, the asymmetry may justify the selective use of different remedies for the same entitlement or relationship, as this hybrid approach is a potential instrument for correcting the asymmetric frictions encountered in the transfer of such rights. In this setting, legal rules may offer different remedial protection in two legal situations that first appear equivalent because the asymmetric strategic and transactional impediments to the transfer of such rights justify the differing treatment of apparently identical legal positions.\(^79\) The Supreme Court in Tasini underlined this point by quoting language in \textit{Campbell v. Acuff-Rose Music, Inc.} to the effect that “goals of copyright law are ‘not always best served by automatically granting injunctive relief.’”\(^80\)

This paper posits that courts and legislators, consciously or unconsciously, take the asymmetric effects of property fragmentation into account when considering the best legal rules to apply in a given situation.\(^81\) This efficiency hypothesis further predicts the emergence of a dual

---


\(^80\)\textit{Tasini}, 121 S. Ct. at 2394.

\(^81\)This same instinct can be seen in a different setting in which the Court of Appeals for Florida’s Fifth District reversed a lower court decision against a landowner who complained that he had not received sufficient notice of an issuance of a tax deed for the subsurface property rights of his land. The court construed the statute to show a “preference” for reunification of the fee and subsurface rights and thereby giving the fee owner “preferential treatment” in purchasing the tax certificate. The court found that just because subsurface rights could be taxed separately, that did
regime of remedies to compensate for the one-directional stickiness in the parties' exchanges in several situations related to contract and property law. When transaction costs are asymmetric, legal systems should take into consideration their “direction” (i.e., the relative cost of reallocating entitlements from one party to the other), rather than the total transaction costs faced by all the parties.\textsuperscript{82} This is done in order to minimize the welfare losses occasioned by such asymmetric stickiness, thus preventing the effects of entropy and persistent property fragmentation. \textsuperscript{83}

2. Practice: Penn Central and Calumet Bank

The approach of Indiana legislature seemed to be guided by unequal transaction costs when it passed a statute that allowed property owners to file an affidavit to reclaim land that had been used by railroads for its tracks, once the Interstate Commerce Commission (ICC) certified the railroad was no longer in operation.\textsuperscript{84} The idea was to avoid a situation characterized by classic asymmetric transaction costs: multiple landowners trying to reunify their property from one buyer, the railroad, now turned seller. Although the latter held many essentially unusable strips of land, they were nonetheless highly desired by the property owners abutting the defunct railroad tracks.

\textsuperscript{82} In a companion case to the railroad abandonment decisions described above, the Supreme Court of Indiana decided in \textit{Consolidated Rail Corp. v. Lewellen} that any language in a deed limiting, or describing the purpose of the transfer, meant that a right of way (easement) rather than a fee simple was transferred. In an effort to promote the unification of property, the court found that the railroad had been responsible for drafting the original deeds, so that the documents would be interpreted in favor of the grantors, i.e. presuming a right of way, which would be extinguished with the railroad, rather than a fee simple, which would not.

\textsuperscript{83}For instance, in \textit{Calumet Nat'l Bank v. Am. Tel. & Tel. Co.}, 682 N.E.2d 785 (Ind. 1997), described in greater detail below, the court interpreted the common law to mandate that property owners abutting abandoned rail lines automatically recovered a fee simple from the mid-point of the railway to their property line, absent a deed stipulating that the railway had received a fee simple at the time of the original transfer of interest, thus expediting the reunification of property rights.

\textsuperscript{84}Ind. Code § 8-4-35-4 (1987).
The Seventh Circuit, in *Penn Central Corp. v. U.S. Railroad Vest Corp.*, struck down the statute, but based on procedures for its implementation, not its underlying purpose. The court clearly stated that it did not “disparage the statute’s objectives, acknowledging “it is desirable to eliminate clouds on title and divided ownership,” but held that six months was insufficient time for Penn Central to defend against owners who were trying to take land which the railroad might actually own, as opposed to those for which it had merely secured a right of way. In its opinion striking down the law, the Seventh Circuit nevertheless denounced the risk of entropy and persistent fragmentation observing: “If the railroad holds title in fee simple to a multitude of skinny strips of land now usable only by the owner of the surrounding or adjacent land, then before the strips can be put to their best use there must be expensive and time-consuming negotiation between the railroad and its neighbor--that or the gradual extinction of the railroad's interest through the operation of adverse possession.”

The 7th Circuit therefore showed where it drew the line between facilitating the unification of property and correcting the asymmetry in transaction costs and undermining basic ownership rights. It issued an injunction against further filing of affidavits, choosing a property-type remedy that reaffirmed Penn Central’s possible entitlement to the land, which it could then sell to the highest bidder. The court assumed that the majority of the deeds in question were in fact rights of way, which would dissolve upon the abandonment of the railroad, making it easier to opt to defend ownership rights at the risk of high transaction costs caused by the asymmetry between the railroad and the landowners.

---

85 *Penn Central*, 955 F.2d at 1158.  
86 *Penn Central*, 955 F.2d at 1163.  
87 *Penn Central Corp. v. U.S. Railroad Vest Corp.*, 955 F.2d 1158, 1160 (7th Cir. 1992).
The Court indicated, however, that the legislature had not stepped far over that line, noting that it would be “simple enough” for the state to devise a “quick and cheap” procedure, namely some kind of predeprivation hearing, that would allow the railroad to document acquisition of title to the property, rather than just a right of way. With this protection, the statutory mechanism could function fairly and constitutionally, while achieving its objective of eliminating the transaction costs that otherwise might hinder this socially beneficial property reunification. The court therefore paved the way for another property-type remedy, naming vesting presumption of title in the owners of the abutting property rather than the railroad.

Another abandoned railroad case, involving AT&T and the Calumet National Bank, had a similar fact pattern, yet the Supreme Court of Indiana resolved the case using a more conventional, damages-type remedy approach. In that instance, Calumet Bank, acting in its capacity as a trustee for property owners, sued AT&T for trespass when it set up fiber optic cables along the railroad line that had been abandoned by Conrail. Although Conrail had purported to transfer its right of way to AT&T, its privilege to use the land had ended two years earlier, when the ICC authorized it to abandon the railroad. As AT&T had already set up the cable and demonstrated the public need for it, the Court found that damages were the proper remedy. Unburdened by considerations about asymmetric transaction costs and the ensuing one-dimensional stickiness in reunifying property rights, the Court was able to resolve the dispute using a more efficient liability-type remedy. These

88Penn Central, 955 F.2d at 1163.
90Calumet, 682 N.E.2d at 791.
91Calumet, 682 N.E.2d at 787.
92Calumet, 682 N.E.2d at 792.
two cases therefore provide an illustration of the hypothesis that courts will treat cases stemming from similar contexts differently depending on the direction of the transaction costs involved.

3. Practice: Tasini

These two cases also provide interesting guidance for the district court. The situation in Tasini echoes the Calumet case in important ways: the New York Times transferred a right that it did not have to a third party, who then used it in such a way that contributed to the public good, in addition to its own profitability. This parallels Conrails transfer to AT&T of property rights that it did not have. The Supreme Court of Indiana found that damages were an appropriate way of compensating the true owners, yet allowing the benefit to the public, the cable lines, to remain accessible.

In the Pennsylvania case, the basic framework is the inverse of Tasini: multiple owners who are at risk of not being able to reunify their property rights. Nevertheless, the basic message of the court, the importance of reunifying property rights in an efficient manner, resonates here. The Seventh Circuit issued an injunction, but noted that a mechanism for the adjudication of each claim would be a sufficient solution to the problem. A similar solution has been suggested in the Tasini case, namely the creation of a clearinghouse which would be responsible for identifying, and enforcing, the rights of the scattered freelance writers. In sort, the district court would seem to have some roadmaps out of this dilemma at its disposal.

\[93\] See the ALA Amicus Brief for a full consideration of the profit motive in this case. Amicus Brief, New York Times v. Tasini, No. 00-201, 2001 WL 173550 at 10 (U.S. Feb. 16, 2001).

IV. TRANSACTION COST AND ANTI-COMMONS ANALYSIS: FAIR USE AND THE SCOPE OF THE SOLUTION

A. Introduction

Both sides to the *Tasini* controversy agree that finding a way to reconcile the copyright interests of the freelance authors and preserve the integrity of the nation’s electronic historical record is an important challenge. The decision and dissent reveal, however, the limitations of relying solely on statutory construction to resolve the question. That approach offers the choice of a strained reading of the statute to avoid complications in preserving the country’s historical record, or a straightforward reading that could well have unfortunate repercussions. A more creative approach, hinted at during oral argument, might have provided a better solution.

In questioning during oral argument, one Justice brought up the possibility of the fair use doctrine as a possible response to solution what that person referred to as the Petitioners’ “Chinese Cultural Revolution” argument. The Justice wanted to know what the difference would be between downloading an article from an electronic database and photocopying it in the library, essentially querying whether it would be an option to place the onus of respecting the author’s copyright on the user, subject to the exceptions enunciated by the Fair Use Doctrine. Justice Breyer then made this point in his dissent, stating that the user can print out certain frames of a microfilm, just as he can download certain pages from an article; ultimately the person must be responsible for not infringing
copyright; any violation cannot be attributed to the medium, be it paper, microfilm, or electronic database.\textsuperscript{98} The Majority brushed over this line of legal reasoning, stating that a database is a commercial venture and therefore not entitled to the exceptions given to libraries under Fair Use.\textsuperscript{99} Furthermore, the publishers did not assert a Fair Use defense, an oversight as will be discussed below.\textsuperscript{100} Justice Breyer in his dissent echoed the Fair Use rationale, namely that the user and purpose ultimately must be the determining factors. Just as someone can print out certain frames of a microfilm, he can download certain pages from an article in an electronic database; both contain various editions of publications juxtaposed together. Ultimately the person must be responsible for not infringing copyright; violation cannot be attributed to the medium, be it paper, microfilm, or electronic database.\textsuperscript{101}

**B. The Relevance of the Fair Use Doctrine to \textit{Tasini}**

The doctrine of Fair Use, codified in 17 U.S.C. § 107, allows ‘fair’ use and reproduction of copyrighted works for purposes such as criticism, comment, news reporting, teaching, scholarship and research\textsuperscript{102}. A ‘fair’ use, although technically forbidden by copyright law, will not be considered

\begin{flushright}
\textsuperscript{98} \textit{Tasini}, 121 S. Ct. at 2400.
\textsuperscript{99} \textit{Tasini}, 121 S. Ct. at 2392.
\textsuperscript{100} \textit{Tasini}, 121 S. Ct. at 2390.
\textsuperscript{101} \textit{Tasini}, 121 S. Ct. at 2400. The majority was not convinced by this line of argument, noting that just because a third party \textit{could} print out the New York Times by date, thereby preserving the collective nature of the work (a noninfringing document), did not mean that the database was not infringing. \textit{Tasini}, 121 S. Ct. at 2393.
\textsuperscript{102} Some authors consider the applicability of the doctrine of fair use as the defining characteristic of intellectual property, as compared to other property rights on tangible resources. See Dane S. Ciolino, \textit{Rethinking the Computability of Moral Rights and Fair Use}, 54 WASH & LEE L. REV. 33, 56-57 (1997). See also Loren, Lydia Pallas Loren, \textit{Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems}, 5 J. INT’L PROP. L. 13, 22-24 (1997) (considering it to be critical to copyright’s fundamental purpose of promoting the progress of knowledge and learning: “[fair use is] one of the most important counterbalances to the rights granted to copyright owners”; Michael G. Anderson & Paul F. Brown, \textit{The Economics Behind Copyright Fair Use: A Principled and Predictable Body of Law}, 24 LOY. U. CHI. L. J., 143, 158 (1996) (noting that “[fair use is] a necessary part of copyright law, the observance of which is essential to achieve the goals of that law”).
\end{flushright}
as copyright infringement. Other legal systems contain comparable legal rules limiting the scope of copyright protection, such as the French ‘droit de citation’ and the British right of ‘parody.’

The Statute provides limited guidance on what constitutes ‘fair use’, providing only an open-ended, non-determinative list of precedential factors: (1) the purpose and character of the use, including whether it is commercial for non-profit educational purposes; (2) the nature of the copyrighted work itself; (3) whether the section used constitutes a substantial portion of the work as a whole; and (4) the effect of the use upon the potential market for, and value of, the copyrighted work (17 U.S.C. § 107 (1976). The Statute does not provide express instructions for weighing each of the elements, but rather relies on courts to develop further the substance of the doctrine, as judges did prior to the 1976 codification.

Bringing up Fair Use in the *Tasini* context is interesting because, as a rule, when new technological advances in the dissemination of information conflict with the precepts of standard copyright law, the doctrine of fair use, which delineates limited circumstances under which the work may be used without the author’s permission, is called upon to reconcile the two. Although there is agreement that Fair Use is an potential tool, proponents of new technology and copyright holders generally favor narrowing the scope of the fair use defense.

---

103 The doctrine of fair use shares with mandatory licencing, reverse engineering, and prohibition of copyright misuse the common purpose of striking a balance between the veto right of the intellectual property rights holder and the public interest of dissemination of the work.

104 See, H.R. Rep. No. 1476, reprinted in 1976 U.S.C.C.A.N. 5675-80, (“[T]he endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the statute”). *Id.* at 5681-83. “…the courts must be free to adapt the doctrine to particular situations on a case-by-case basis”. For an overview of the manner which courts weighed the various individual factors up to 1982, see Gordon, *supra* note 6, at 1604 n.

105 Generally, the key role of fair use in resolving tension between new technology and traditional copyright is well appreciated. See J. Adrienne Marsh, *Fair Use and New Technology: The Appropriate Standards to Apply*, 5 Cardozo L. Rev. 635, 635-36 (“Successful resolution of the resulting tension between products of the new technologies and copyright law will depend largely on the doctrine of fair use.”).
Ironically, at the same time that Fair Use is seen as a way to reconcile technology and copyright issues, the mass popularization of the Internet and continued technological advances in information dissemination has produced a new argument that fair use will become obsolete in a world where one-click technology provides instantaneous communication between copyright holders and users\(^\text{106}\). Universally accessible Internet gateways will allegedly provide copyright holders the opportunity to charge users of their works licensing fees in quasi-automatic fashion, eliminating the transaction-cost argument that provides one of the main pragmatic justifications of fair use. In turn – the argument goes – the traditional rationales for the existence of fair use doctrines will lose their persuasive power.

C. Fair Use and the Anti-commons Dilemma

It appears, however, that the fair use doctrine might have further economic justification that has not been captured by one-dimensional arguments that the economic rationale for fair use doctrines has been lost.\(^\text{107}\) The Tragedy of the Anti-commons demonstrates that fair use remains

\(^{106}\) See Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, N.C. L. REV. (1998) (Arguing that fair use will, to a large extent, be replaced by ‘fared use’, where automated rights management (ARM) will become the dominant instrument for copyright transfer); Edmund W. Kitch, *Can the Internet Shrink Fair Use*, (University of Virginia, Working Paper, 2000) (examining the potential effect of both a structural approach [denying fair use treatment when the copyright owner could have established Internet permission] and a transactional one [fair use falters only in situations that Internet permissions are easily available] in leading to a reduced scope of fair use); Robert P. Merges, *The End of Friction? Property Rights and the Contract in the “Newtonian” World of On-Line Commerce*, 12 BERKELEY TECH. L.J. 115 (1997) (pondering the reduced role of fair use, while proposing a new, subsidy-oriented, foundation for the fair use doctrine that would better emphasize the doctrine’s redistributational concerns); David Post, *Battle or Dance?* 116 AM. LAW., Jan./Feb. (1996) (arguing that automated rights management techniques drastically reduce transaction costs of negotiating licence fees, thereby calling into question the role of fair use). But see, Jonathan Dowell, *Bytes and Pieces: Fragmented Copies, Licensing, and Fair Use in A Digital World*, 86 CAL. L. REV. 843 (1998) (examining the prospect of fair use in the context of fragmented literal copying of small chunks of content, concluding that the cost-minimization function of automated licensing does not take into consideration the public benefit purpose of fair use).

\(^{107}\) The briefs in preparation for the Supreme Court oral arguments do not mention Fair Use, but the Amicus Briefs do draw on the concept, as discussed below.

-32-
valuable even in the digital context of automated rights management. As Buchanan and Yoon suggest, the anti-commons is a useful metaphor for understanding why potential economic value may “disappear into the black-hole of resource underutilization.” In light of the anti-commons insight, fair use doctrines retain a valid efficiency justification even in a zero transaction cost environment. Fair use defenses can be regarded as justifiable and instrumental in minimizing the welfare losses occasioned by the strategic behavior of the copyright holders. Even if copyright licenses can be transferred at no cost (for instance, in a "click and pay" frictionless computer world), the strategic behavior of the copyright holders would still create possible deadweight losses that the fair use doctrine can mitigate.

Copyright owners, such as the freelancers in *Tasini*, will have complete control over their work, leading to veto power over its use. If substitute works are available, namely similar articles which convey the same information and point of view, the authors will simply be opting out of a market in which price is set at the competitive equilibrium. If, however, the authors holds control over a work which is complementary to others, namely that their contribution enhances that of others, then they can block access to the article, causing deadweight loss. Because they do not have any way to coordinate with other copyright owners, absent some sort of copyright clearinghouse, this could well lead to an anti-commons situation.

In order to assess the extent of the anti-commons problem, it is important to know whether the works of the free lance writers which are in question are strictly complementary to each other,

---

108See James Buchanan & Yong J. Yoon, *Symmetric Tragedies: Commons and Anti-commons Property*, 43 J. LAW & ECON. 1 (2000). Parisi, Schulz and Depoorter have explored the extent of such underutilization in different anti-commons cases. FRANCESCO PARISI, NORBERT SCHULTZ, BEN DEPOORTER, DUALITY IN PROPERTY: COMMONS AND ANTI-COMMONS, (Univ. of Virginia L. and Econ. Working Paper No.00-08, 2000).
or if it is possible to get substitutes for them. The unitary basis of the problem can be understood when thinking of the traditional structure of a property right, in which owners enjoy a “bundle of rights” which include, among other things, the right to use their property and the right to exclude others from it. In such a framework, the owner's dual rights are exercised over the same domain and are complementary. Whenever property is created or otherwise partitioned in such a way as to place complementary components of the property in the hands of different individuals, inefficiency may result and the discrepancy between the rights of use and the rights of exclusion held by the various owners is likely to produce welfare losses.109

Ultimately it is the readers and researchers of the future who will determine the extent of the anti-commons problem in the *Tasini* case. For instance, Jonathan Tasini writes about labor disputes. If someone is content to know the basics about labor unions, it is likely that it will be possible to get the information in Mr. Tasini’s articles elsewhere, thereby dissipate Mr. Tasini’s bargaining power to secure additional copyright revenue from his work, as NEXIS would simply decline to include his pieces in its electronic collection. If however, Mr. Tasini’s work complements general information about labor unions, as it provides more in-depth analysis or specialized information, then Mr. Tasini has more bargaining power. Unfortunately, however, if the copyrights are in a relationship of complementarity in the production of a derivative work, namely desired in-depth elaboration of

---

109 Furthermore, it has been suggested that problems of inefficient fragmentation (be them cases of insufficient fragmentation, such as the commons, or excessive fragmentation, such as the anti-commons) are not confined to situations of insufficient or excessive fragmentation of real assets, but can more generally result from the dismemberment - and resulting non conformity - between the internal entitlements of the property right. The qualitative results of these models represent limit points along a continuum, each characterized by different levels of discrepancy between use and exclusion rights, with welfare losses varying accordingly. 

general current events, it would lead to anti-commons pricing, making both society and the individual copyright sellers worse off.\textsuperscript{110}

E. Fair Use and the Selective Use of Remedies in Copyright Protection

In most legal systems, Copyright law provides a copyright holder a vast choice of remedies against infringement of his work, including property-type remedies (e.g., injunction to restrain the infringer from violating his rights or even the impoundment and destruction of the unauthorized reproductions of his work) and liability-type remedies (e.g., actions to recover the actual damages and to disgorge the additional profits realized by copyright infringer or to collect statutory damages). In the U.S. all the above choices of remedies are made available by the Copyright Act, which also provides that, in a civil action for copyright infringement, a court may grant temporary and final injunctions to prevent or restrain infringement of a copyright.\textsuperscript{111} It is this range of choice that those supporting the respondents turn in order to find a solution to the present dilemma.

The results of this paper suggest that a selective use of remedies may be appropriate to minimize the effect of fragmentation and strategic pricing. As a matter of ideal theory, anti-commons losses will result from the imposition of property-type (i.e., injunction) remedies. If copyright owners are given only a damage remedy for the infringement of their work, there is no

\textsuperscript{110}The anti-commons equilibrium pricing is in fact the outcome of a prisoner's dilemma problem that the individual copyright sellers face when pricing their copyrights independently from one another. As in a traditional prisoner’s dilemma game, the inability of copyright holders to coordinate prices produces a result that is both privately and socially inefficient. Quite strikingly, in this case the competitive outcome is socially inefficient, even if compared to the alternative monopoly equilibrium. Competitive pricing of the complementary goods generates a substantially larger social loss than the monopolistic equilibrium.

If the copyrights are substitutes in the production function of the derivative work, the inability of the copyright sellers to coordinate their prices will also be detrimental for them. Unlike the complementarity case considered above, however, the competition among copyright sellers would be beneficial for society at large. In this case, in fact, the substitutability of the copyrights as inputs of production leads to the usual negative price effect. The resulting equilibrium – albeit Pareto inferior for all the players – is socially preferable to the alternative monopoly outcome.

\textsuperscript{111}Irwin J. Schrifffes, Copyright & Literacy Property, 18 AM. JUR. 2d § 221.
opportunity for strategic pricing and thus no anti-commons deadweight loss. If liability-type remedies are limited, the infringer’s has considerable leverage with the copyright owner because he always has the option to use without permission and pay damages. Under a liability rule, the prospective buyer of a copyright license could not be induced to pay more than the cost of his expected liability for copyright infringement. At the limit, a copyright holder can obtain a judicial declaration of his rights, but the defendant can persist in the violation simply by paying damages. In contrast, in the case of property-type (i.e., injunction) protection, a copyright license can be obtained only if the current owner agrees to sell it at the price he demands. Absent such agreement, upon proof of a valid copyright an owner could obtain an injunction to enforce his rights. Under such a regime, strategic pricing of multiple complementary copyrights could lead to substantial dissipation of value.

In fact, opting for a liability-type remedy is precisely the kind of solution suggested by the American Library Association in its Amicus Brief to the Court. Recognizing that providing an injunction would cause complications in terms of negotiating use with each author, the Association argues that the “courts and/or the parties can devise and administer a system of monetary relief to compensate freelance authors for past acts of copying and distribution of their works and pay them continuing royalties for future use of their works.” 112 As a justification for this approach, the ALA cited Campbell v. Acuff-Rose Music, Inc., 113 in which the Court awarded damages, rather than injunctive, relief because the defendant’s defense that his parody was protected by Fair Use was not so unreasonable as to warrant an injunction. In that case the Court recognized a public interest in

---

maintaining access to the defendant’s work and so allowed its continued distribution but with a surcharge in the form of damages.\textsuperscript{114} The ALA argued that the same rationale should be used in \textit{Tasini}. Presumably because electronic databases meet some of the Fair Use criteria (e.g. educational purpose), the appropriate solution would be to attach a price to the use of the material rather than prevent access to it altogether. The majority picked up on the argument, citing \textit{Campbell} when remanding the case, a hint that it would provide appropriate guidance in crafting the ultimate remedy.\textsuperscript{115}

The lesson to be drawn, therefore, is that legal systems should not change the scope of the fair use defense, or the choice of remedy in case of infringement, even with decreasing transaction costs in an increasingly electronic marketplace. Rather the doctrine of Fair Use should be a bridge between traditional copyright enforcement and protection in the Digital Age. Leaving both the scope of fair use and the arsenal of copyright remedies unchanged could minimize anti-commons losses; conversely, a reduction in the scope of fair use defenses might have the effect of increasing them. In such case, the use of liability-type remedies in the new domains of copyright protection would help contain the deadweight losses from strategic pricing.\textsuperscript{116} As \textit{Tasini} demonstrates, this scenario is far from theoretical.

\textsuperscript{115}\textit{Tasini}, 121 S. Ct. at 2393.
\textsuperscript{116} The above prediction is consistent with the observation of remedies in real property, where the limited protection given to atypical (or innominate) rights still characterizes the modern-day law of remedies in both common law and civil law jurisdictions (Parisi, 2001). Professors of property law often cite this fact as one of the many unexplained puzzles of their field, assuming that availability of liability-type remedies for certain categories of real rights is merely coincidental. In a popular textbook on property, Dwyer and Menell (1998, p. 760) observe that “because of one of the many historical accidents that plague property law, real covenants are enforced by a damages remedy only.” We suggest that these anomalies are not merely happenstance, given the existence of strategic impediments in the reunification of fragmented rights. In the intellectual property contexts, these strategic impediments are most pervasive in cases of production or consumption complementarities.
V. CONCLUSION

Viewing property law through the lens of economic analysis highlights the difficulties associated with balancing economic efficiency with the realities of high transaction costs and other situations in which the various actors involved are precluded from reaching an efficient agreement. Understanding the tendency towards entropy and the characteristics of an anti-commons situations sheds light on why the common law has developed certain rules and how these norms, which may be initially puzzling, are in fact effective responses to potentially difficult questions. Courts are beginning to use these concepts as practical tools in resolving cases. As demonstrated by the *Tasini* case, anti-commons analysis in particular illuminates the way to crafting a judicial remedy that will both be faithful to the letter of the Copyright Act and avoid collateral damage in terms of restricting access to a vast and important store of information. In particular, anti-commons theory demonstrates that the doctrine of Fair Use, far from being close to obsolete, has promise an important bridge between traditional and digital copyright protection.