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BROADENING THE SCOPE OF ELECTRONIC REPRODUCTIONS: THE INTERPRETATION OF SECTION 201(C) IN FAULKNER V. NATIONAL GEOGRAPHIC ENTERPRISES INC.

By Shan Sivalingam¹

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Abstract

This Article analyzes the implications of the recent decision of the United States Court of Appeals for the Second Circuit in *Faulkner v. National Geographic Enterprises Inc.* The court interpreted § 201(c) of the federal Copyright Act to permit National Geographic to compile print issues of its magazine into a CD-ROM digital archive without explicit permission from freelance authors who contributed to the print issues. The court's decision has raised concern among freelance journalists and photographers who contribute works to newspapers and other periodicals that compile copyrighted works. This Article outlines significant features of the *Faulkner* decision and analyzes it within a larger framework of cases that have dealt with electronic reproductions of collective works. The Article concludes that while the *Faulkner* decision is in accord with the interpretation of § 201(c) that the United States Supreme Court set forth in *New York Times Co. v. Tasini*, the decision weakens the control of freelance contributors over their copyrighted works.

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INTRODUCTION

<1> In *Faulkner v. National Geographic Enterprises Inc.*, the United States Court of Appeals for the Second Circuit attempted to balance the intellectual property rights of two competing groups: publishers and freelance periodical contributors.² The issue before the court was whether a publisher's electronic compilation³ of its magazine issues into a CD-ROM archive was an authorized revision of the original magazine issues under § 201(c) of the Copyright Act.⁴ The court held that National Geographic's digital archive of its print publications was a privileged revision of its previously copyrighted compilations and therefore did not constitute infringement.⁵

<2> The *Faulkner* case represents a significant development in copyright law. Under *Faulkner*, publishers are allowed to compile information in digital media—a media that did not exist when Congress amended the Copyright Act in 1976.⁶ The *Faulkner* court's recognition of electronic reproductions under § 201(c) expanded the rights of publishers to compile information and limited the rights of periodical contributors to have greater control over the use of their works. This holding represents the first direct application of the "original context" rule for electronic reproductions under § 201(c) that the United States Supreme Court established in *New York Times Co. v. Tasini*.⁷ This application of the § 201(c) rule raises serious questions about the ability of freelance authors to protect their works from reproductions not contemplated by their original copyright licenses.

THE COPYRIGHT ACT AND COLLECTIVE WORKS

<3> It is useful to examine the law that governs the transfer of copyright ownership from the original author to the author of a compilation in order to better understand the genesis of the issue in *Faulkner*. The Copyright Act (the "Act") generally protects "original works of authorship fixed in any tangible medium of expression."⁸ The Act defines a "compilation" as an original work formed by selecting, coordinating, and arranging preexisting materials.⁹ A compilation also includes collective works, "such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole."¹⁰

<4> Traditionally, original authors had little control over publication of their works after allowing them to be included in a collective work. Before 1976, federal copyright law recognized a freelance author's copyright in a published work only when the author's work appeared with a copyright notice printed next to the author's name. An author risked losing all future rights in his article if he contributed an article to a collective work without affixing a copyright notice.¹¹

<5> In 1976, Congress completed a major revision of the Act. One result of this revision was to guarantee the rights of contributors to collective works. Specifically, the Act distinguishes "copyright in each separate contribution to a collective work" from "copyright in the collective work as a whole."¹² The former "vests initially in the author of the contribution," whereas "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."¹³ This rule grants the owner of a collective work a privilege to revise the collective work.¹⁴

<6> Congress stated that these revisions were intended to preserve the original author's copyright in a contribution "without requiring any unqualified transfer of rights to the owner of the collective work."¹⁵ But in 1976, Congress had not anticipated the advent of new digital technologies that have dramatically enhanced the ability to store, distribute, and display information. Consequently, the revised Act is ambiguous as to whether an electronic compilation of print publication issues falls within § 201(c)'s protection for "revision[s]" of a collective work.¹⁶ The Second Circuit confronted this ambiguity in *Faulkner*.

THE FAULKNER OPINION

<7> Douglas Faulkner and his co-plaintiffs are freelance photographers and authors whose photographs and articles appeared in print issues of *National Geographic Magazine*.¹⁷ National Geographic subsequently compiled the *Magazine* issues into a CD-ROM archive (the *Complete National Geographic* or "CNG").¹⁸ The plaintiffs argued that the digital archive violated their copyrights in the original works by exceeding the scope of the original licenses granted to National Geographic.¹⁹

<8> The Second Circuit held that the digital archive maintained

the original context of the print articles and thus constituted a privileged revision under § 201(c).²⁰ The court noted that the digital archive used the “almost identical ‘selection, coordination, and arrangement’ of the underlying works as used in the original collective works.”²¹ The digital archive contained electronic replicas of the *Magazine* pages presented two at a time with the fold in the middle and the page numbers in the lower outside corners—just like the print editions.²² Moreover, the articles and pictures were located in the same relative positions that they were in the print editions.²³ Users of the digital archive had the same ability to focus on particular pages or portions of pages as they would with a copy of the print edition.²⁴ The court stated that “because the original context of the Magazines is omnipresent in the CNG and because it is a new version of the Magazine, the CNG is a privileged revision of a collective work.”²⁵

<9> The court’s decision in *Faulkner* is noteworthy because it allows for the addition of new, independently-copyrightable material to a work without destroying that work’s revision status. The digital replica portion, by itself, would be analogous to a microfilm copy of the *Magazine*. Microfilm reproduction has long been protected.²⁶ Under *Faulkner*, publishers have the ability to add features like an introductory animation sequence—making creative changes to independent submissions and taking them out of the original print context—and still have a protected revision.²⁷

THE EFFECT OF FAULKNER

<10> The ruling in *Faulkner* arguably runs counter to Congress’ intent in enacting the 1976 revision of the Act. The shift from pre-1976 copyright law to the present Act is simple: The Act allows the freelancer to benefit from demand for his or her freelance article standing alone or in a new collection after having authorized initial publication.²⁸ Response among interested groups has varied as to whether the Second Circuit’s interpretation of § 201(c) in *Faulkner* is in accord with the Act’s purpose.

<11> Some freelance writers and photographers criticized the court’s broad reading of what constitutes a § 201(c) revision because it limited the benefit conferred by Congress.²⁹ Freelancers want the ability “to participate in new markets for the reuse of their previously published works in new media to secure new sources of income.”³⁰ The freelancers argue that if the print publishers have the right to make digital reproductions

under § 201(c), the digital market will not be lucrative for original authors.

<12> Print publishers often express a different perspective on the *Faulkner* court's decision. The American Library Association argued that the "public's right to a free and open information society" trumps the rights of original freelance authors and that original authors are free to contract for the exclusive right of republication.³¹ The publishers believe that the *Faulkner* court properly ignored the fact that the revision was created in a different medium than the original print magazines.

IS FAULKNER CONSISTENT WITH EARLIER CASES?

<13> The Second Circuit's holding in *Faulkner* was the third key case to interpret § 201(c) and must be viewed in light of two previous cases. The first was *Greenberg v. National Geographic Society*, a case filed by a freelance photographer against National Geographic in the United States District Court for the Southern District of Florida at the same time that the *Faulkner* plaintiffs brought suit in the Southern District of New York.³² Plaintiff Greenberg had contributed several photographs for publication in National Geographic issues.³³ National Geographic reproduced these photographs in the *CNG* (the *CNG* also included one of Greenberg's photographs in the opening animation sequence of the CD-ROM).³⁴ Greenberg subsequently filed an infringement action against National Geographic. The district court granted National Geographic's Motion for Summary Judgment on the grounds that the *CNG* was a privileged revision under § 201(c).³⁵ The plaintiff appealed the district court's ruling to the United States Court of Appeals for the Eleventh Circuit.³⁶

<14> The Eleventh Circuit broke down the *CNG* into three discrete components: (1) the opening animation sequence, (2) a digital replica of the print edition issues, and (3) a search feature that allows users to search for and retrieve images in the digital archive.³⁷ Next, the Eleventh Circuit noted that the animation sequence and search-feature were independently copyrightable additions to the digital replica of *Magazine* issues.³⁸ The court held that even if § 201(c)'s revision privilege could be extended to the digital replica, the court would be "unable to stretch the phrase 'that particular collective work' to encompass the [opening animation] Sequence and Program [search feature] elements as well."³⁹ The court concluded that the entire *CNG* was not a revision of the original print issues, but rather a new product that transcended the

scope of § 201(c)'s revision privilege.⁴⁰ Thus, under facts virtually identical to those in *Faulkner*, the Eleventh Circuit reached the opposite conclusion regarding whether § 201(c) protected the *CNG*—primarily because the U.S. Supreme Court had not yet laid down its original context rule.

<15> A few months after the Eleventh Circuit decided *Greenberg*, the U.S. Supreme Court decided a case that clarified the meaning of a "revision" under § 201(c) and set out a simple rule for courts to follow. In *New York Times Co. v. Tasini*, six freelance authors sued print publishers (i.e., *The New York Times*, *Sports Illustrated*, and *Newsday*) to whom they had submitted work for copyright infringement.⁴¹ Some time after the original print publications, the publishers allowed LEXIS/NEXIS, the owner and operator of an Internet database, to copy the freelance works.⁴² At the time of the original submissions, the publishers had agreements with LEXIS licensing the text of articles appearing in the periodicals for copy and sale.⁴³ As with the *CNG*, the print publishers were electronically reproducing freelance submissions to their publications. The freelancers alleged that the database reproductions of their original submissions exceeded the scope of their contracts with the print publications.⁴⁴ The print publishers contended that, as copyright owners of the collective works (i.e., the original print publications), they had validly exercised their privilege under § 201(c) to reproduce and distribute revisions of the collective whole to which the freelancers had originally submitted their work.⁴⁵

<16> In affirming the Second Circuit's finding below that § 201(c) did not protect the copying at issue, the U.S. Supreme Court announced a new rule. In order to be a privileged revision under § 201(c), the new collective work must maintain the "original context" of the original publication.⁴⁶ LEXIS' databases reproduced and distributed articles standing alone and not in context as part of the collective work to which the author contributed or as part of a revision of that collective work.⁴⁷

<17> The U.S. Supreme Court had little difficulty distinguishing between the appearance of the print source and the databases.⁴⁸ The Court pointed out that each database article appeared as a "separate, isolated 'story'" without any visible link to the other stories originally published in the same newspaper or magazine.⁴⁹ The LEXIS reproduction also lost formatting features such as page placement and headline size.⁵⁰ In short, the LEXIS databases presented articles to users "clear of the context provided either by the original periodical editions or by

any revision of those editions” as required by § 201(c).

<18> Since the rulings in *Tasini* and *Faulkner*, legal commentators have argued that *Greenberg* is old law. One commentator asserts, for example, that the *Greenberg* analysis “is hard to reconcile” with the U.S. Supreme Court’s reasoning in *Tasini*.⁵² The reason is that the Eleventh Circuit in *Greenberg* arguably placed undue emphasis on the presence of additional features in the *CNG* that were added to the digital archive of *Magazine* issues.⁵³ When extended, this logic would find that the addition of an index to a print archive would prevent a work from being a privileged revision of the original.⁵⁴ The search feature of the *CNG* could be viewed simply as an electronic analog of a print volume’s index; such an addition would not make a lay observer think that an entirely new work has been created.⁵⁵

<19> Despite scholarly criticism, *Greenberg* has not been formally rejected by a federal appellate court. However, as the court in *Faulkner* observed, the “*Tasini* approach . . . so substantially departs from the *Greenberg* analysis that [*Tasini*] represents an intervening change in law”⁵⁶ Moreover, the U.S. Supreme Court refused to grant petitions for certiorari in both *Greenberg* and *Faulkner*.⁵⁷ The Supreme Court has stated that denial of certiorari “imports no expression of opinion upon the merits” of any given case.⁵⁸ However, it is plausible that the Court believes that *Faulkner* was correctly decided in light of the Court’s interpretation of § 201(c) in *Tasini* and, thus, no true split exists among the Circuits.⁵⁹

<20> The *Faulkner* court clearly rejected the approach used in *Greenberg* and applied the new “original context” rule of *Tasini*.⁶⁰ The court held that “because the original context of the [National Geographic] Magazines is omnipresent in the *CNG* and because it is a new version of the Magazine, the *CNG* is a privileged revision.”⁶¹ Whereas the LEXIS databases in *Tasini* did not allow readers to view the underlying works in their original context, the *CNG* maintained the same page ordering, page placement, and gutter position (i.e., the magazine fold) as the print edition.⁶² Moreover, an authorized revision may contain elements not present in the original—“for example, a collection of bound volumes of past issues with a copyrightable index to the entire collection.”⁶³ Under the original context rule, changes to the original *Magazine* issues did not remove the *CNG* from the scope of § 201(c)’s revision privilege—unlike the changes made in *Greenberg*.

<21> It is significant to note that the *Greenberg* plaintiff had

contributed photographs, not articles, to *National Geographic Magazine*.⁶⁴ Accordingly, the Eleventh Circuit focused on how his photographs were used in an independently-copyrightable animation sequence in the *CNG*.⁶⁵ Had Greenberg been a print contributor, his case may have been less compelling because articles appeared in the *CNG* without alteration from the print issues. Under such circumstances, the court might have analogized the search feature to a print index and held the *CNG* to be a privileged revision. The *Faulkner* decision would then be more of an evolution of *Greenberg* rather than a divergence from it and the Eleventh Circuit's decision might have greater persuasive authority.

ELECTRONIC REPRODUCTION SPECTRUM

<22> *Faulkner* and *Tasini* give lawyers a framework upon which to analyze whether a particular alteration of a collective work constitutes a privileged revision under § 201(c). These cases offer a set of rules that a court can apply to a spectrum of factual instances wherein contributing authors and publishers of collective works have not negotiated what specific reproductions will be permitted in the future. The spectrum may also be instructive for compilers and contributors as they negotiate licensing terms.

<23> Identical copies of the collective works are at one end of the spectrum, clearly protected by the Copyright Act. Archives of collective works may also be copied into a different medium.⁶⁶ An electronic copy such as the one in *Tasini* is at the opposite end of the spectrum. Under *Tasini*, a searchable database that compiles individual articles in no particular order will not be protected from infringement suits, absent explicit authorization in the copyright license. National Geographic's *CNG* occupies a place in the continuum between the identical copy and the randomly-ordered, searchable database.

<24> The Second Circuit's reasoning in *Faulkner* suggests that the *CNG*, with its various alterations from the original print editions, is analogous to an archive of a collective work that is copied into a different medium.⁶⁷ The collective work compiler may add independently copyrightable features to a collective work revision without moving it to a point on the spectrum that falls outside of § 201(c). For example, a 1990 revision of a 1980 encyclopedia can still be a protected revision when it includes independently copyrightable articles, photographs, or drawings related to events that occurred since publication of the 1980 revision. Current precedent provides a framework of default rules for contracting parties to examine in determining

compensation for licensing rights.

CONCLUSION

<25> The *Faulkner* decision is a significant development in the law of copyright because it allows a great deal of flexibility for collective work authors to electronically reproduce works that are created by freelancers. The decision seems to override the intent of Congress in passing the 1976 Copyright Act to protect freelance contributors.⁶⁸ The plaintiffs in *Faulkner* argue that the Second Circuit's decision will prevent freelance authors from realizing maximum profits from their original works. But neither compilers nor contributing authors know what the full extent of the *Faulkner* decision will be. Accordingly, authors of contributions and collective works must analyze their work in light of the reasoning of *Faulkner* and *Tasini* to identify and preempt potential issues that may arise in the context of electronic reproduction. Given the uncertainty that is created by constant changes in electronic reproduction technology, the wisest course for compilers and contributing authors is to negotiate electronic reproduction issues in thorough detail before signing a licensing agreement.

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Footnotes

1. Shan Sivalingam, University of Washington School of Law, Class of 2007. Thank you to Professor Anita Ramasastry, Lawrence Rozsnyai, and Jonathan Franklin, Associate Law Librarian at the Gallagher Law Library, University of Washington School of Law for the invaluable assistance they provided during the writing of this article.
2. *Faulkner v. Nat'l Geographic Enters. Inc.*, 409 F.3d 26 (2d Cir. 2005), *cert. denied sub nom. Faulkner v. Nat'l Geographic Soc'y*, 126 S. Ct. 833 (2005), *and cert. denied sub nom. Ward v. Nat'l Geographic Enters.*, 126 S. Ct. 833 (2005), *and cert. denied sub nom. Psihoyos v. Nat'l Geographic Enters.*, 126 S. Ct. 833 (2005).
3. I.e., a compilation created in an electronic or digital medium, such as CD-ROM.
4. *Faulkner*, 409 F.3d at 30.
5. *Id.*

6. 17 U.S.C. §§ 101-1332 (2000).
7. *New York Times Co. v. Tasini*, 533 U.S. 483 (2001).
8. 17 U.S.C. § 102(a).
9. *Id.* § 101.
10. *Id.*
11. *Tasini*, 533 U.S. at 494-95.
12. 17 U.S.C. § 201(c) (2000).
13. *Id.*
14. *See id.*
15. H.R. Rep. No. 94-1476, at 122 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5738.
16. 17 U.S.C. § 201(c).
17. *Faulkner v. Nat'l Geographic Enters. Inc.*, 409 F.3d 26, 29 (2d Cir. 2005).
18. *Id.*
19. *Id.*
20. *Id.* at 38.
21. *Id.* (quoting *Tasini v. New York Times Co.*, 206 F.3d 161, 168 (2d Cir. 2000), *aff'd*, 533 U.S. 483 (2001)).
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *See New York Times Co. v. Tasini*, 533 U.S. 483, 501-02 (2001).
27. *Faulkner v. Nat'l Geographic Enters. Inc.*, 409 F.3d 26, 38 (2d Cir. 2005); *Greenberg v. Nat'l Geographic Soc'y*, 244 F.3d 1267, 1269 (11th Cir. 2001).
28. 3 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 10.02[D] (2004).
29. The American Society of Media Photographers urged the Supreme Court to review *Faulkner*, warning that if the decision is upheld, "the value of freelance authors' copyrights in their contributions to many

thousands of collective works . . . will be severely impaired." AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, ASMP URGES HIGH COURT REVIEW OF FAULKNER CASE, http://www.asmp.org/commerce/legal_article_012.php (last visited July 17, 2006). Other freelancers filed an amicus curiae brief with the U.S. Supreme Court, arguing that the *Faulkner* holding prevents freelancers from sharing in the future economic exploitation of their works. Brief of Amici Curiae Johnny Autery et al. in Support of the Petitions for Certiorari, *Faulkner v. Nat'l Geographic Soc'y*, 126 S. Ct. 833 (2005) (No. 05-506), 2005 WL 3156821.

30. Brief of Amici Curiae Johnny Autery et al., *supra* note 28.
31. The American Library Association argued that the result in *Faulkner* prevents § 201(c) from "being frozen in time, exclusively applying to older, non-digital technology to the detriment of research, scholarship and learning." See Brief Amici Curiae of the American Library Association et al. in Support of Petitioners, *Nat'l Geographic Soc'y v. Greenberg*, 534 U.S. 951 (2001) (No. 01-186), 2001 WL 34116569.
32. *Greenberg* was decided well before *Faulkner* because the latter case involved the joinder of numerous plaintiffs and several motions for dismissal and for summary judgment. *Faulkner*, 409 F.3d at 32-33; *Greenberg*, 244 F.3d 1267 (2001).
33. *Greenberg*, 244 F.3d at 1269.
34. *Id.*
35. *Id.* at 1270-71.
36. *Id.* at 1271.
37. *Id.* at 1269.
38. *Id.* at 1273.
39. 17 U.S.C. § 201(c) (2000).
40. See *Greenberg*, 244 F.3d at 1272.
41. *New York Times Co. v. Tasini*, 533 U.S. 483, 487 (2001).
42. *Id.*
43. *Id.* at 489.

44. *Id.*
45. *Id.* at 488.
46. *See id.* at 499.
47. *Id.* at 499-500.
48. *Id.* at 490.
49. *Id.*
50. *Id.*
51. *Id.* at 499.
52. 1 ALEXANDER LINDEY & MICHAEL LANDAU, LINDEY ON ENTERTAINMENT, PUBL. & THE ARTS §1.33 (3d ed. 2005).
53. *Id.*
54. *Id.*
55. *Id.*
56. *Faulkner v. Nat'l Geographic Enters. Inc.*, 409 F.3d 26, 37-38 (2d Cir. 2005); *see* Gabe Bloch, *Transformation in Publishing: Modeling The Effect of New Media*, 20 BERKELEY TECH. L.J. 647, 653 (2005) ("The majority holding [in *Tasini*] seemed to overrule *Greenberg*, a question that was resolved in [*Faulkner*]"); *see also* Marshall Leaffer, *Life After Eldred: The Supreme Court and the Future of Copyright*, 30 WM. MITCHELL L. REV. 1597, 1610-11 (2004) (noting that the U.S. Supreme Court's decision in *Tasini* changed the interpretation of § 201(c) and that *Faulkner* takes account of this development).
57. *Greenberg v. Nat'l Geographic Soc'y*, 244 F.3d 1267, 1269 (11th Cir. 2001), *cert. denied*, 534 U.S. 951 (2001); *Faulkner v. Nat'l Geographic Enters. Inc.*, 409 F.3d 26 (2d Cir. 2005), *cert. denied sub nom. Faulkner v. Nat'l Geographic Soc'y*, 126 S. Ct. 833 (2005), *and cert. denied sub nom. Ward v. Nat'l Geographic Enters.*, 126 S. Ct. 833 (2005), *and cert. denied sub nom. Psihoyos v. Nat'l Geographic Enters.*, 126 S. Ct. 833 (2005).
58. *Faulkner*, 409 F.3d at 37-38 (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923)).
59. Since *Tasini*, the Second Circuit has been the only federal appellate court to have the opportunity to

consider the Eleventh Circuit's interpretation of § 201(c) in *Greenberg*.

60. *Faulkner*, 409 F.3d at 37-38.
61. *Id.* at 38.
62. *Id.*
63. *Id.*
64. *Greenberg v. Nat'l Geographic Soc'y*, 244 F.3d 1267, 1269 (11th Cir. 2001).
65. *Id.* at 1273.
66. The U.S. Supreme Court has stated in dicta that microfilm and microfiche perceptibly reproduce articles as part of the collective work to which the author contributed or as part of any "revision" thereof. See *New York Times Co., Inc. v. Tasini*, 533 U.S. 483, 501-02 (2001).
67. See *Faulkner v. Nat'l Geographic Enters. Inc.*, 409 F.3d 26, 38 (2d Cir. 2005).
68. Although, the Second Circuit was constrained by binding precedent of the U.S. Supreme Court interpreting § 201(c) in *Tasini*, 533 U.S. 483.

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