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Who Owns (What We Characterize as) the News?

Laura A. Heymann

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Abstract

Will Slauter's *Who Owns the News?* (2019) is subtitled *A History of Copyright*, but it could just as easily have been subtitled *A History of Journalism*. Slauter's thoughtful and detailed story of the battle among newspaper publishers to secure legal and other protection for their work product is inseparable from questions about what it means for something to be "news" in the first place—and, indeed, whether "journalism" is something different from "news." Developments subsequent to Slauter's history—the emergence of the journalist as a literary figure, the heightened need to see news publishing as an economic (and profitable) enterprise, and the expectations of the audience as to what requires payment and what should be freely available and shareable—both reinforce and extend his narrative.

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On September 28, 1980, the *Washington Post* published a story about an eight-year-old third-generation heroin addict. "He nestles in a large, beige reclining chair in the living room of his comfortably furnished home in Southeast Washington," the second paragraph describes. "There is an almost cherubic expression on his small, round face as he talks about life—clothes, money, the Baltimore Orioles and heroin. He has been an addict since the age of 5."[1] Titled "Jimmy's World" and bearing the byline of the reporter Janet Cooke, the story gained national renown. Local authorities marshaled efforts to locate the boy, and concerned individuals contacted the paper asking about his safety. On April 13, 1981, it was announced that the article had been selected to receive that year's Pulitzer Prize for feature writing.

Less than a week later, suspicions within the *Post* newsroom gave rise to an investigation about the veracity of the story, and Cooke ultimately admitted that it was a fabrication.[2] Cooke resigned, and the *Post* withdrew the story from Pulitzer consideration. (The prize was later awarded to another writer.) Bill Green, the ombudsperson for the *Washington Post*, noted that Cooke's editor had promised her that she did not have to disclose her sources; as a result, "[t]he jugular of journalism lay exposed—the faith an editor has to

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[1] Janet Cooke, Jimmy's World, Wash. Post., Sept. 28, 1980.

[2] The version of the story posted at on the *Washington Post*'s website contains the following prefatory note: "The following article is not factually correct and is a fabrication by the author." (https://www.washingtonpost.com/archive/politics/1980/09/28/jimmys-world/605f237a-7330-4a69-8433-b6da4c519120/).

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place in a reporter."[3] Competition among reporters for favored placement also played a role. As Green wrote, "The competition to get on page one is so strong that [its] effects probably cannot be understood even by the top editors. It is one source, if not the central source, of newsroom pressures. To have a story selected for page one is good strokes, an ego trip."[4]

"Jimmy's World" is, of course, an anomaly. While publications regularly publish corrections, the kind of wholesale fabrication in which Cooke engaged is, thankfully, rare,[5] although more subtle blending of fact and fiction in the same era drew more equivocal reactions.[6] But we might say that the story—and the initial reaction to it, pre-reveal—would likely not have been possible without a shift a decade or so earlier in the nature of journalism, at least in the United States. Readers didn't read "Jimmy's World" for a basic conveyance of the facts of the event; they read it as a narrative, a story with compelling characters that drew the reader in. Cooke was not simply the dispassionate, anonymous reporter of events—she was, ostensibly, there to be our eyes and ears, to describe the minute details of Jimmy's home, the color of his reclining chair. It is now commonplace, too, to identify a piece of journalism with the reporter who wrote it in addition to the media outlet that published it. The *New York Times* trademark once stood on its own as a collective brand for reliable reportage, reflected in its slogan "All the News That's Fit to Print." Today, aided by Twitter and other forms of social media, many individual reporters are now well known to their readers and are frequently engaged in direct conversations with their audiences about the articles they've published.

This engagement rests side-by-side, however, with a renewed emphasis by publishers on journalism as a commercial enterprise, constantly on the search for revenue in an age when many online readers expect to be able to obtain the product for free. So even if it is true that, as one writer suggests, post-*Jimmy's World*, "journalism has become more homogenized and standardized, more corporate, more rule-driven" from the publishers' perspective, due in part to economics,[7] it has also become more personality-driven, more individualized, and more literary from the reporters' perspective. Add to this the question about who qualifies as a journalist—whether the term now encompasses individuals who

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[3] Bill Green, It Wasn't a Game, Wash. Post., Apr. 19, 1981.

[4] Id.

[5] Other infamous, and more recent, examples include Stephen Glass of the *New Republic* and Jayson Blair of the *New York Times*. See, e.g., Hanna Rosin, Hello, My Name is Stephen Glass, and I'm Sorry, New Republic, Nov. 10, 2014; Correcting the Record: Times Reporter Who Resigned Leaves Long Trail of Deception, N.Y. Times, May 11, 2003.

[6] The admission by *New Yorker* writer Alastair Reid in a 1984 interview that his nonfiction work included composites, altered timelines, and nonexistent characters in service of a "larger reality" engendered both shock and some shoulder-shrugging. Maureen Dowd, A Writer for the *New Yorke*r Says He Created Composites in Reports, N.Y. Times, June 19, 1984. Thanks to Mike Madison for suggesting this example.

[7] Mike Sager, The Fabulist Who Changed Journalism, Colum. Journalism Rev., Spring 2016, at 52 (https://www.cjr.org/the_feature/the_fabulist_who_changed_journalism.php). Sager notes in his article that he once had a relationship with Cooke and is still in touch with her. Id.

tweet, blog, or otherwise communicate information to the world about current events without the traditional editorial, curatorial, or gatekeeping functions that a traditional publisher would provide—and it becomes clear that we have come some distance from, and yet in some ways not at all far from, a world in which broadsheets were distributed in the streets. Will Slauter's *Who Owns the News?* (2019) is subtitled *A History of Copyright*, but it could just as easily have been subtitled *A History of Journalism*. Slauter's thoughtful and detailed narrative of the battle among newspaper publishers to secure legal and other protection for their work product is inseparable from questions about what it means for something to be "news" in the first place—and, indeed, whether "journalism" is something different from "news." One might say that to call something "news" implicitly suggest the presence of a narrator or reporter; as one writer has commented, " 'news' is not an event but rather an account of the event. . . . News *becomes* news by reporters portraying it as such."[8] Slauter seems to concur when he writes that "news is not what happened but stories about what happened" (12). But one might just as easily characterize "news" as reportage—the classic who/what/when/where/why questions—and "journalism" as an attempt to tell a larger story, to analyze trends, to synthesize reactions. Slauter's carefully researched history doesn't put this question at its center, but it is certainly an undercurrent.

Part of that story is the way in which publishers' views on the means of protecting their work product likely depended on their views of what elements of that work product were valuable. As a general matter, according to Michael Arlen, "standard newspaper journalism remained a considerably constricted branch of writing, both in England and America, well into the nineteen twenties."[9] Despite the prose stylings of English journalism that inserted the author-as-observer into the text, "English journalism was for the most part as inhibited, and official, and focused as was the society, which paid for it and read it."[10] The American press at the time was much the same, "rest[ing] its weight upon the simple declarative sentence. The no-nonsense approach. Who-What-Where-When."[11] This was the result, Ralph Hanson writes, of a more diversified audience for news reporting that consequently required a more anonymous, objective voice.[12] "Prior to the 1830s," he writes, by contrast, "the journalist was writing to a homogeneous audience of business elites who were able to afford the comparatively expensive (six cents a day) subscriptions,"[13] and so the writer could afford to take more of an authorial stance in how the news was presented.

As a result of this utilitarian view of the value of a news report, as Slauter describes, publishers put forward what we would now see as a classic utilitarian justification for its

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[8] Ralph E. Hanson, Objectivity and Narrative in Contemporary Reporting: A Formal Analysis, 20 Symbolic Interaction 385 (1997) (citing Ken Metzler, Newsgathering (1979)).

[9] Michael J. Arlen, Notes on the New Journalism, Atlantic Monthly, May 1972, at 43.

[10] Id.

[11] Id.

[12] Hanson, supra note 8, at 387.

[13] Id.

protection. Absent any legal protection for their work, early publishers of the news in England and Europe "had to figure out how to distribute their publications fast enough to make a profit before rival publications appeared" (15). Because there was no stylistic or other reason to prefer one source of facts over another, one report was easily substitutable for another from the audience's point of view; because unrestricted copying and distribution of the news, priced to recoup the cost of reproduction, impeded the ability to recoup one's costs of production, such copying would arguably create a disincentive to engage in news-gathering activity in the first place (3).

This focus on news as an economic, rather than literary, product likely framed the consideration of legal protection for news in two ways. One was whether news had to be, or even could be, characterized in a way that aligned it with the types of works that copyright was thought to protect. Despite the reality that the U.S. Copyright Act of 1790 specifically covered—in addition to books—maps and charts, some no doubt felt that nonliterary works were unworthy of the protection conferred by copyright law. Slauter quotes MP John Phillimore, for example, as characterizing the newspaper in 1855 as "an ephemeris—an insect of the day—which, having performed all its functions, in a few hours disappeared. It could not for a moment be put on the footing of great works—such as those of poets, orators, and historians" (162). This view, as Slauter aptly notes, was part of a long tradition of viewing news as "collected rather than written by authors" dating back to the 1700s (160). This is why the major publishers—not only *The Times* of London in the mid-1800s but also the Associated Press in its case against the International News Service in the early 1900s, which closes Slauter's book—focused less on authorship as a justification for protection and more on the costs of production. As Slauter contends, "It was possible to agree that news did not rise to the level of literary authorship while also seeing copying as theft" (205). The theory of protection is what mattered.

The second likely effect on framing was on the role played by attribution. Slauter writes that, for example, in Britain in the eighteenth century, "[a]nonymity was widespread" in news reporting, including "anonymous and pseudonymous letters submitted by readers and reports attributed to unnamed but 'honorable' individuals," such as military officers and merchants (65). Slauter attributes this trend to the desire to avoid prosecution for seditious libel or otherwise to dissociate the writer from the newspaper article, but it may be that it mattered less in any event. In the Shakespearean era, for example, authorship of manuscripts was not infrequently obscured so as to recognize the production of the manuscript as a collaborative exercise; in the 1700s and early 1800s, scholars suggest, readers "did not often expect authorial attribution on the work itself, either because such attribution was deemed unimportant or unseemly or because the author was well known and so needed no explicit mention."[14] So the practices around attribution in the eighteenth century that

[14] Laura A. Heymann, The Birth of the Authornym: Authorship, Pseudonymity, and Trademark Law, 80 Notre Dame L. Rev. 1377, 1386 (2005); see also Marcy L. North, Rehearsing the Absent Name: Reading Shakespeare's Sonnets Through Anonymity, in The Faces of Anonymity: Anonymous and Pseudonymous Publication from the Sixteenth to the Twentieth Century 19, 23 (Robert J. Griffin ed., 2003).

Slauter appropriately identifies—concealing sources "in order to make a piece appear original" or identifying the source of the information as a distant place "when in fact it had been produced locally" (71)—may be less a matter of deception and more a matter of joint expectations. In short, lack of attribution to individual writers benefited publishers, because it meant that publishers could more easily copy and reuse works, communicating about them to their readers in a way that served them both best.[15]

This didn't mean that newspaper publishers in this time period didn't recognize the value of attribution as a means of building reputation; indeed, as is true for some authors today, they valued attribution over restriction of copying. Slauter writes, "Editors [in the 1800s] sought to establish shared protocols of citation and acknowledgment in . . . the circulation of their writings. They did not want to end the exchange system [of sharing and copying articles]; they wanted it to continue on specific terms" and so were generally uninterested in traditional legal means of achieving their ends" (114; footnote omitted).[16] In part, this is because the news moved quickly, and "existing procedures for obtaining an injunction were too slow. By the time a suit could be considered by a judge, the news would already be too old to be worth protecting" (148). Attribution for news, as Slauter describes, was therefore less about credit in a Romantic authorial sense and more about establishing primacy: "Bylines that gave the full names of contributors rather than using initials or pseudonyms could be found in newspapers and magazines by the 1840s but were largely reserved for fiction, poetry, and the occasional piece of history or biography" (109).

Slauter's narrative ends with a rich analysis of the 1918 U.S. Supreme Court case between the Associated Press and the International News Service and its legal legacy.[17] (A brief epilogue is titled "The View from the Digital Age.") The AP claimed that INS had been in the practice of copying AP stories from New York newspapers and transmitting them to INS-affiliated papers on the West Coast, which enabled them to compete with AP-affiliated papers, a practice that the AP, unsurprisingly, did not condone. The way the case was framed by the Associated Press (and ultimately by the Court) was the natural result of the historical groundwork that Slauter carefully establishes: rather than attempting to characterize its product as a literary work and thus subject to copyright protection, the AP characterized its work as the uncovering, development, and transmission of facts, subject

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[15] Meredith L. McGill, How Does Copyright Matter?, Public Books, Aug. 5, 2019 (https://www.publicbooks.org/how-does-copyright-matter/) ("[T]he practice of news-gathering and reporting has always been a collaborative venture. Both the cutting and pasting that gave 19th-century newspapers their breadth of coverage and the sourcing practices required by modern journalism fit badly with author-centered rationales for intellectual property.").

[16] For an additional description of the exchange system, see Robert Brauneis, The Transformation of Originality in the Progressive-Era Debate over Copyright in News, 27 Cardozo Arts & Ent. L.J. 321, 339-42 (2009).

[17] Int'l News Svc. v. Associated Press, 248 U.S. 215 (1918). As Slauter notes, this legacy was curtailed given the elimination of federal common law with Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). The most notable misappropriation/"hot news" case post-*INS v. AP* is National Basketball Ass'n v. Motorola, 105 F.3d 841 (2d Cir. 1997). For a critical take on the case and some of the ways in which it has been interpreted, see Shyamkrishna Balganesh, Hot News: The Enduring Myth of Property in News, 111 Colum. L. Rev. 419 (2011).

to a more general common law property (or, at least, quasi-property) right rooted in Lockean labor theory and in utilitarian justifications. F.W. Lehmann, arguing before the Court in favor of the Associated Press, conceded that facts were unprotectable—but they were unprotectable, he argued, because facts alone were not news:

> The report of facts and events is news, and before the fact can be reported, it must be ascertained, and for the ascertainment of facts and events, men are necessary, men of intelligence . . . men of judgment who can appreciate the value as news of a fact or event, and men of daring, who will go out upon the path of adventure to get the news . . . and there must be large expenditures of money to sustain these men in their efforts and in their endeavors. . . . [W]e say the news report is property because it is the product of human labor and belongs to him whose labor produced it . . . .[18]

Indeed, as an organization producing stories that would be selected and distributed by local outlets throughout the country, the AP intentionally did not produce its stories with any recognizable authorial voice "that might make the report less acceptable to newspaper readers in various parts of the country" (244). News was a business, not a craft, and the theft of its work product was an economic harm, not an authorial one.

Although Slauter's story largely, and understandably, ends here, one might be tempted to continue the narrative. Post-*INS v. AP*, the view of journalism as the business of uncovering and conveying facts as opposed to embedding those facts in a narrative began to shift (at least in the U.S.) in the 1930s and 1940s. Journalists were thought of as writers, providing the reader with a broader view of events and of subjects who had "a journalistic existence on either side of the event."[19] This mode of news reporting took flight in the 1960s with the development of New Journalism. The author Tom Wolfe, one of New Journalism's most recognized names, described the development of this mode of writing as focusing on four devices, derived from the novelist's craft: "scene-by-scene construction," rather than "sheer historical narrative"; "realistic dialogue"; a "third-person point of view," rather than telling the story in the journalist's own voice; and "the recording of everyday gestures, habits, manners, customs . . . and other symbolic details that might exist within a scene."[20] Here, the reporter unapologetically became part of the story rather than an invisible eye, more likely to be seen as an author of the story being conveyed rather than simply a conduit for existing facts.

In about the same era, the investigative journalist captured both public attention and public imagination, as exemplified by the *Washington Post*'s Bob Woodward and Carl Bernstein. Their June 18, 1972 article on the Watergate break-in, the first of many stories, and the chain of events their reporting set in motion established "Woodward and Bernstein" as a shorthand for political investigative journalism, amplified in the audience's consciousness by the 1976 film *All the President's Men*. The two reporters were not, of course,

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[18] Transcript of Oral Argument at 787-88, May 2, 1918, INS v. AP, 248 U.S. 215 (1918).

[19] Arlen, supra note 9.

[20] Tom Wolfe, Why They Aren't Writing the Great American Novel Anymore, Esquire, Dec. 1972. The form had its contemporary critics, most famously Dwight Macdonald. See Dwight Macdonald, Parajournalism, or Tom Wolfe & His Magic Writing Machine, N.Y. Rev. Books, Aug. 26, 1965.

the first to engage in this kind of long-form reportage—Nellie Bly and Upton Sinclair are but two of the most notable—but conventional wisdom identifies them as the genesis of the modern characterization of the "celebrity journalist."[21] Concomitantly, the twentieth century saw a rise in the use of bylines to identify individual journalists as the origin of a news story, a phenomenon that one scholar characterizes as having had "an enormous impact on the positioning and aura of news," shifting "the iconic figure of the newspaper industry from the printer to the editor and publisher before conferring this honor on the news reporter."[22] None of this means, of course, that the voiceless mode of reporting represented by the Associated Press and similar outlets has now ceased to exist. But it does suggest that if we use Slauter's narrative as the basis for future considerations of whether and how news should be protected, we should have a nuanced view of what "news" is today and who is thought by audiences to convey it.

Parallel to this development was a change in the legal framework that recalibrated the power imbalance between contributing writers and the periodicals in which they published. I'll mention two cases here. The first is the U.S. Supreme Court's 2001 opinion in *New York Times Co. v. Tasini*.[23] Under the Copyright Act of 1909, the predecessor statutory scheme to the current Copyright Act of 1976 in the United States, copyright was deemed indivisible. Authors could not assign only certain rights to publishers while retaining others; they had to assign all or none. This, coupled with the requirement that copyright would be forfeited if the work were not published with the proper notice in the name of the author, could leave authors publishing in periodicals in a precarious position. If the publishers refused to publish the article with copyright notice in the author's name, upon publication the work could fall into the public domain; if the author assigned copyright to the work to the publisher in order to facilitate notice, the author could lose the rights to the work in the end. Some of the authors in the latter group attempted to include a provision requiring the transfer of the copyright back after publication, but enforcing that agreement would, not surprisingly, prove difficult.[24]

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[21] Alicia C. Shepherd, Celebrity Journalists, Am. Journalism Rev, Sept. 1997, at 26. Shepherd quotes several commentators on whether the advent of the celebrity journalist has been a favorable or unfavorable development. Thanks again to Mike Madison for a helpful exchange on this phenomenon.

[22] Zvi Reich, Constrained Authors: Bylines and Authorship in News Reporting, 11 Journalism 707, 708 (2010); id. at 710 (observing that "[w]hereas at the beginning of the century none of the bylines [in the *New York Times*] carried the names of specific reporters, by the end of the millennium every story credited the responsible journalists or news agencies"). Reich also suggests, id. at 718, that British newspapers were slower to adopt the norm of bylining, perhaps due to a different perception of the nature of news reporting. I should note that the attribution, through a byline, of a story to one or more reporters necessarily obscures the roles of editors, researchers, and other individuals who make the process of news reporting a collaborative one.

[23] New York Times Co., Inc. v. Tasini, 533 U.S. 483 (2001).

[24] See, e.g., Goodis v. United Artists Television, Inc., 425 F.2d 397 (2d Cir. 1970) (resolving this dilemma by deeming the publisher who received rights under such an arrangement to hold copyright in trust for the author).

The 1976 Act "represented 'a break with the two-hundred-year-old tradition'" that "'identified copyright more closely with the publisher than with the author'"[25] and was intended to "enhance the author's position vis-à-vis the patron."[26] In particular, it responded to the dilemma identified above by disaggregating the author's rights under copyright, allowing the author to transfer rights individually if he or she so desired; providing that a copyright notice as to a collective work was sufficient to preserve the rights of individual contributors; and stating that copyright in a collective work was distinct from copyright in each contribution to that collective work.[27] This means that, under current law, unless there is an express assignment from the author to the publisher of the copyright to the individual work, a publisher of a 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."[28]

This last provision was the subject of the Supreme Court's opinion in *Tasini*. *Tasini* was a case brought by six freelance authors who had written articles for two newspapers and one magazine (the *New York Times*, *Newsday*, and *Time*).[29] The authors held registered copyrights in each of their articles, and the periodical publishers held collective work registrations for the edition in which each work appeared.[30] The publishers then contracted with LEXIS/NEXIS and other providers to license the text of the articles for inclusion in the providers' respective databases. The publishers' agreement with the authors was silent on whether this licensing was authorized. When challenged, the publishers claimed that because a database was merely a "revision" of the periodical, section 201 authorized inclusion in the databases without specific permission from the writers.[31]

The Court rejected the publishers' argument, noting that section 201(c) "adjusts a publisher's copyright in its collective work to accommodate a freelancer's copyright in her contribution. If there is demand for a freelance article standing alone or in a new collection, the Copyright Act allows the freelancer to benefit from that demand; after authorizing initial publication, the freelancer may also sell the article to others."[32] As a result, the Court concluded that because the articles were retrievable and readable distinct from the surrounding

[25] New York Times Co. v. Tasini, 533 U.S. 483, 495 n.3 (2001) (quoting Letter from M. Peters to Rep. McGovern, reprinted in 147 Cong. Rec. 182 (Feb. 14, 2011)).

[26] Id.

[27] 17 U.S.C. § 404(a); id. § 201(c).

[28] 17 U.S.C. § 201(c).

[29] New York Times Co., Inc. v. Tasini, 533 U.S. 483, 488-89 (2001).

[30] Id. at 489.

[31] Id.

[32] Id. at 497.

material in the original publication, the database could not be deemed a "revision" of the periodical.[33]

The second relevant case, although not specifically about news, is *Dastar Corp. v. Twentieth Century Fox Film Corp.*[34] In 1948, General Dwight D. Eisenhower wrote *Crusade in Europe*, his account of the Allied campaign in Europe during World War II. Twentieth Century Fox Film Corporation (Fox) acquired the rights to produce a television series based on the book; the series was first broadcast in 1949. Under the 1909 Copyright Act, in effect at the time, the copyright in the series had to be renewed after the first term had expired in order to retain copyright. Fox failed to do so, which rendered the television series to the public domain after the copyright expired in 1977. In 1988, Fox reacquired the television rights in Eisenhower's book and reissued the series on videotape through a licensee, New Line Home Video.

In the meantime, Dastar Corporation, seeking to capitalize on the 50th anniversary of the end of World War II, purchased the tapes for the original, public-domain version of the series. After some edits and reorganization, and the addition of new prefatory and summary material, Dastar released a videotape collection for a substantially lower price than the version Fox was offering through New Line. Dastar's version did not reference the original Fox series or the Eisenhower book on which it was based. Fox, along with its coproducers, filed suit against Dastar, alleging, among other things, that Dastar's sale of the videos "without proper credit" to the Crusade television series constituted "reverse passing off" in violation of section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)—in other words, that Dastar was passing off Fox's product as its own.

Justice Scalia, writing for a unanimous Court (save for Justice Breyer, who was recused), rejected Fox's claims on two grounds. First, the court noted that the harm that section 43(a) addresses is a false designation likely to cause confusion as to the "origin" of the defendant's "goods," and the "most natural understanding" of those terms was "the producer of the tangible product sold in the marketplace."[35] Because Dastar was the producer of the physical videotapes, and accurately labeled its product in that regard, there was no violation of the statute.

Second, the Court held that even assuming that consumers of intellectual products care little about the source of the physical copy in which the product is instantiated but rather are concerned with the source of the content—in other words, the author rather than the publisher—recognition of this fact (what the Court characterized as "according special

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[33] Id. at 500. Justice Stevens, joined in dissent by Justice Breyer, concluded otherwise, asserting that the conversion to electronic form represented merely a change in medium that preserved the editorial selection of the original, comparable to a Braille edition of the periodical. Id. at 512-13 (Stevens, J., dissenting).

[34] Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003).

[35] Id. at 31.

treatment to communicative products"[36]) would pose an irreconcilable conflict with copyright law. Because the work at issue was in the public domain, Dastar had the right not only to copy it but "to copy without attribution."[37] Thus, the Court concluded, even if Dastar was deemed to have misrepresented that it was the author of the creative work on the videos, "allowing a cause of action under § 43(a) for that representation would create a species of mutant copyright law" that would encroach on the public's rights.[38]

Taken together, the two cases might be seen as bringing Slauter's story full circle—a story of publisher control of the news but control that ultimately takes place outside of intellectual property law. While *Dastar* was not directly responsive to *INS v. AP*, it does call into question the strategy of using an alternative legal theory to afford protection to an informational product that copyright law doesn't reach. And while *Tasini* might have seemed on its face as a win for the authors—not only a reinforcement of the types of journalism that can be protected (the publishers did not argue before the district court that the articles in question were not copyrightable) but also a resistance to the historical trend of locating rights in publishers rather than individuals—it was, not surprisingly, a hollow victory. In the aftermath of the case, publishers began deleting from databases those works for which it did not have explicit assignments and extracting additional concessions from both existing and future authors that allowed for database inclusion.[39]

The cases thus extend three primary threads of Slauter's work. The first is the question of what we now include under the umbrella of "news." In a post-New Journalism/Woodward and Bernstein world, some of the most compelling journalism takes on literary qualities and is recognized (and shared) by audiences precisely for this reason—the fiction of a "Jimmy's World" perhaps the inevitable collateral damage. The idea that news reporting is wholly incompatible with copyright law's subject matter is no longer supportable, as the Court's decision in *Harper & Row, Publishers, Inc. v. Nation Enterprises* also indicates.[40] The second is the continuing irrelevance of the argument for protection based on copyright law, as contract and digital rights management take the place of alternative legal theories. The third is how these two perspectives intersect. Publishers necessarily have to consider revenue, whether from readers or advertisers; readers may have shifting expectations as to what requires payment and what should be available for free. Publishers may

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[36] Id. at 33. The assumption seems uncontroversial; presumably readers of the *New York Times* choose that paper because "New York Times" represents for them a certain quality of journalism, not a certain quality of newsprint.

[37] Id.

[38] Id. at 34.

[39] See Amy Terry, Note, *Tasini* Aftermath: The Consequences of the Freelancers' Victory, 14 DePaul J. Art, Tech. & Intell. Prop. L. 231 (2004).

[40] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985). The Court held that *The Nation*'s publication of an excerpt from President Ford's then-forthcoming memoir was not a fair use, and therefore copyright infringement, when *The Nation* acquired the unpublished manuscript without authorization. The publication by *The Nation* caused *Time* magazine, to whom the publisher had sold first serial rights, to cancel part of its payment to the publisher.

think about distribution in terms of control; readers may think about news as something to be experienced and shared.

Slauter concludes his book by writing, "But from the perspective of publishers and news agencies, the economic model of using news to attract advertising revenue helps to explain why the copyright law designed to protect other literary, artistic, and scientific works never seemed like a good fit for news" (269). To fully engage with this conclusion would require another book—an opportunity to reconsider not only what we mean by "news" but also what we intend to accomplish through copyright law. Slauter's thoughtful history provides us with the inspiration to ponder both.