

TRANSFORMATION IN PUBLISHING: MODELING THE EFFECT OF NEW MEDIA

By Gabe Bloch

The publishing world is experiencing a puzzling phenomenon. Although courts have recently ruled that publishers may not sell freelance works to Internet databases without the author's permission,¹ the position of freelance authors has not changed: authors continue to go to the same publishers and accept essentially the same terms in their contracts. Conversely, in scientific, technical, and medical (STM) publishing, absent any court decisions or grant of rights, authors are increasingly submitting their works to nontraditional publishers on entirely different terms. For example, under "open access" publishing terms, STM authors pay the journal for the right to be published, and the journal then gives the public free access to the article.

In both the commercial news and STM publishing contexts, the emergence of the Internet has created new options for the display of content. The Internet's lower costs of production and distribution allow would-be publishers to enter the market with greater ease and established publishers to find new ways to circulate their content. Yet while it is clear that the Internet is a key catalyst, it is unclear why this catalyst is only sometimes effective. This Note seeks to explain why the Internet causes transformation in some settings and not others.

To do so, the Note will draw on recent court decisions, news sources, and other related materials in order to construct a model to describe how the Internet has affected publishing. The model offers four factors which are useful for analyzing whether a new medium will cause significant change, positing that while some factors are more important than others, change of the sort seen in STM publishing will not be possible without the presence of most of the four. The four factors are: (1) a changed rights structure; (2) sufficient bargaining power to reject unsatisfactory contract terms; (3) opportunities for competition generated by new media; and (4) the ability of new competitors to become prestigious.

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1. *N.Y. Times Co. v. Tasini*, 533 U.S. 483 (2001); *Faulkner v. Nat'l Geographic Soc'y*, Nos. 04-0263-cv(L), 04-0388-cv(CON), 04-0265-cv(CON), 04-0475-cv(CON), 04-0318-cv(CON), 04-0481-cv(CON), 2005 U.S. App. LEXIS 3642 (2d Cir. Mar. 4, 2005).

After examining the legal background of copyright and new media in Part I, the Note will briefly describe the business of commercial publishing in Part II. Then, the four factors will each be applied to commercial and STM publishing in Part III. That analysis establishes that changed rights are present in commercial but not STM publishing; bargaining power is present for STM publishing but not for mainstream commercial news; opportunity for competition is present in both areas of publishing; and it remains an unresolved question as to whether the new competitors can attain a sufficient level of prestige to seriously rival established print-based publishers. The Note concludes that transformation in publishing is more related to bargaining power and prestige than to changes in the rights structure.

I. LEGAL BACKGROUND

The United States Constitution grants Congress the power to “promote the Progress of . . . useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings”² Copyright law’s central purpose is not to protect authorial profit per se, but rather to promote progress through incentivizing creative works.³ When authors are rewarded with legal rights such as a copyright, they and others like them are encouraged to create more works. In the publishing context, these rights are complicated by two factors: the concept of “collective works” and the difference between freelance work and “work for hire.”

A. Collective Works

The multiple columns found in most magazines, newspapers, and journals are typically the product of multiple authors, whereas books normally have just one author. The Copyright Act refers to a work with multiple contributions as a “collective work,”⁴ which is defined as “a work, 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.”⁵ Thus, most magazines and newspapers are collective works.

Ownership of a collective work operates at two levels: first, the authors of individual photographs, articles, and other individual works each

2. U.S. CONST. art. I, § 8, cl. 8.

3. *See, e.g.*, *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

4. *See generally* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 3.02 (2004).

5. 17 U.S.C. § 101 (2000).

retain their own copyright to their contribution.⁶ Second, the author of the work as a whole, by virtue of his creative arrangement, retains a copyright in the collective work. This second author retains only a copyright in what he adds by creating the whole, and has no rights in the individual works, aside from a right to “revision.” Section 201(c) of the Copyright Act governs ownership of copyright with respect to contributions to collective works:

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.⁷

For example, the copyright in a freelance newspaper article is owned by its author, while the copyright in the newspaper as a whole is owned by the paper itself. The newspaper cannot reprint the article without permission, except in a revision or collection of newspapers.

B. Freelance Work and “Work for Hire”

A “work for hire” is a copyrighted work created pursuant to an employment relationship.⁸ Works for hire are always owned by the employer. Thus, copyrights in contributions to collective works, when pursuant to an employment relationship, default to the owner of the collective work. Because of this rule, many major newspapers employ full time staff writers, all of whose works will automatically become property of the newspaper. By contrast, freelancers are not “employees,” and therefore retain their copyrights when they contribute to the newspaper. Freelancers write their works on a contract-to-contract basis, sometimes writing works on their own volition and then selling them, other times signing up for a specific contract with an established publisher.

C. Collective Work Ownership and New Media Law

The Internet may be the latest installment, but unanticipated new media technologies have created rights ownership problems from the dawn of copyright protection. Past new media technologies have included “silent

6. *Id.* § 201(c).

7. *Id.* (emphasis added). The significance of “revision” is discussed below.

8. 17 U.S.C. § 201(b). See generally 1 NIMMER & NIMMER, *supra* note 4, § 5.03.

motion pictures, 'talking' motion pictures, television, and videocassettes."⁹ Problems arise from the fact that a given work may have multiple copyrightable parts. For example, a book may consist of copyrightable material in the original pages on which it was written, in the reproductions of the book which are sold to the public, and in motion picture rights as well.¹⁰ Indeed, "'copyright' is now a label for a collection of diverse property rights each of which is separately marketable."¹¹ After acquiring one of these property rights, it is often unclear where the property line is drawn. For example, do reproduction rights in a book extend to publication as an "e-book"?

Although contracts have often overlooked the issue, when there is a new media contract provision it is usually either an "all media" clause or a "future technology clause."¹² A typical "all media" clause grants the right to perform "perpetually and throughout the world . . . in and by all media and means whatever," which courts have construed to include new media.¹³ A "future technology" clause typically grants "[a]ll rights in the Work now existing, or which may hereafter come into existence, not specifically herein granted."¹⁴ This too is usually construed to encompass new media that may not have been in existence at the time of the contract.¹⁵

In the publishing context, freelance journalists have normally granted "first North American serial rights," which granted the publisher the right to "put out the work first and to use it exclusively for some period of time, 60 or 90 days, traditionally in print form."¹⁶ Often the contracts were the classic "napkin agreements" which were written with little regard to future legal problems.¹⁷ Publishers and authors are now more careful in their contracting, probably because of *New York Times v. Tasini*¹⁸ and the asso-

9. Sidney A. Rosenzweig, Comment, *Don't Put My Article Online!: Extending Copyright's New-Use Doctrine to the Electronic Publishing Media and Beyond*, 143 U. PA. L. REV. 899, 908-10 (1995).

10. See 3 NIMMER & NIMMER, *supra* note 4, § 10.01.

11. *Id.*

12. Carolina Saez, *Enforcing Copyrights in the Age of Multimedia*, 21 RUTGERS COMPUTER & TECH. L.J. 351, 369-71 (1995).

13. *Id.* at 369 (citation and internal quotation marks omitted).

14. *Id.* at 370 (quoting MACMILLAN PUBLISHING CO., STANDARD BOOK PUBLISHING CONTRACT 2 (1985)).

15. *Id.*

16. June Besek & Jane C. Ginsburg, *The Future of Electronic Publishing: A Panel Discussion*, 25 COLUM. J.L. & ARTS 91, 101 (2002).

17. See Rod Dixon, *Profits in Cyberspace: Should Newspaper and Magazine Publishers Pay Freelance Writers for Digital Content?*, 4 MICH. TELECOMM. & TECH. L. REV. 127, 149-50 (1998).

18. 533 U.S. 483 (2001).

ciated cases *Greenberg v. National Geographic Society*¹⁹ and *Faulkner v. National Geographic Society*,²⁰ non-digital rights cases that clarified the rights structure for writers and publishers. These cases, detailed below, are important because they establish the importance of Factors One (Changed Rights Structure) and Two (Sufficient Bargaining Power to Reject Unsatisfactory Contract Terms).

1. *Greenberg v. National Geographic Society*

In *Greenberg*, Jerry Greenberg, a freelance photographer, sued the National Geographic Society (NGS) over its use of his copyrighted photographs in a CD-ROM compendium of all *National Geographic* magazines published from 1888 to 1996.²¹ The NGS was undisputedly the holder of the right to publish the copyrighted works, in this case photographs from four different assignments over the course of about thirty years, at least once in the original print editions of its *National Geographic* magazine.²² After it decided to market a compendium of its magazines on CD-ROM, NGS entered into various agreements with software developers and sponsors, ultimately scanning every page of every magazine, dating from 1888 up to 1996, and entitling the finished product the "Complete National Geographic" (CNG).²³ Users of the CD-ROM first see a series of ten magazine covers that automatically plays when the CD-ROM is activated, and then either go through the archived magazines one by one or search for specific articles in the archive.²⁴ Greenberg sued for copyright infringement, arguing that the magazine was not entitled to use his works in the compendium without permission.²⁵

The court held that what it deemed were independently copyrightable elements such as the magazine cover introduction and software with search capability pushed the archive past "revision" into nonrevisional original authorship. In other words, the CD-ROM was an "entirely different magazine or other collective work" as opposed to a mere revision or reproduction.²⁶ In reaching this decision, the court cited legislative history

19. 244 F.3d 1267 (11th Cir. 2001).

20. 533 U.S. 483 (2001); 244 F.3d 1267 (11th Cir. 2001); *Faulkner v. Nat'l Geographic Soc'y*, Nos. 04-0263-cv(L), 04-0388-cv(CON), 04-0265-cv(CON), 04-0475-cv(CON), 04-0318-cv(CON), 04-0481-cv(CON), 2005 U.S. App. LEXIS 3642 (2d Cir. Mar. 4, 2005).

21. *Greenberg*, 244 F.3d at 1268-70.

22. *Id.* at 1269.

23. *Id.*

24. *Id.*

25. *Id.* at 1270.

26. *Id.* at 1273.

in which Congress raised the example of an encyclopedia: the "revision" rule would allow for reprinting an old entry or updating it in a new encyclopedia, but forbids revising the entry itself or "includ[ing] it in a new anthology or an entirely different magazine or other collective work."²⁷

2. New York Times Co. v. Tasini

In *Tasini*, six freelance authors of *New York Times*, *Newsday*, *Sports Illustrated*, and *Time* articles sued their publishers for copyright infringement, claiming the latter had sold their articles to online database LEXIS/NEXIS and two other databases, violating their copyrights.²⁸ The databases contained articles from hundreds of newspapers and magazines that had been collected over many years.²⁹ LEXIS/NEXIS acquired the articles at issue through licensing agreements with the *New York Times* and other defendant publishers.³⁰ These agreements authorized the databases to copy and sell any portion of the texts. Once in the database, a reader could search for and retrieve each article, then read it "in isolation, clear of the context the original print publication presented."³¹ The defendants claimed that their use was a Section 201(c) "revision."³²

The Supreme Court did not agree with the defendants. The majority was most concerned with whether the articles were being cut out of their original context and placed in an entirely different one, holding that because "the databases reproduce and distribute articles standing alone and not in context," rather than as "part of that particular collective work" in the same series, there was no Section 201(c) protection.³³ For comparison, the court analogized to microfiche, explaining that that format was acceptable because "articles appear . . . writ very small, in precisely the position in which the articles appeared in the newspaper," whereas LEXIS/NEXIS does not "perceptibly reproduce articles as part of the collective work to which the author contributed or as part of any 'revision' thereof."³⁴ The *Tasini* rule is therefore very clear: publishers who want to sell freelance authors' work without permission will be able to do so only if the purchaser places the work in exactly the same context as it originally appeared, including advertisements, other articles, and photographs. In other

27. *Id.* (citing H.R. REP. NO. 94-1476, at 122-23 (1976)).

28. *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 490 (2001).

29. *Id.* at 489.

30. *Id.*

31. *Id.* at 487.

32. *Id.* at 487-88.

33. *Id.* at 488.

34. *Id.* at 501-02.

words, the work must be reproduced in precisely the same environment as that in which it originally appeared.

In line with some of the majority's reasoning, Justice Stevens argued in his dissent that Congress, in revising the Copyright Act to allow authors to retain some rights in a contribution to a collective work "even if the contribution does not bear a separate notice in the author's name," had evidenced an intent to protect authors' rights.³⁵ Moreover, Congress intended to further limit what authors "give away" by eliminating the old collective works rule, which "had the effect of encouraging an author to transfer her entire copyright to the publisher of a collective work," and replacing it with the new rule that the publisher receives the limited bundle of rights enumerated in Section 201(c).³⁶ However, Justice Stevens believed this legislative intent was undermined by the majority's decision because publishers would naturally begin demanding a complete transfer of rights in order to continue selling individual works to databases.³⁷ He argued that while translating articles into ASCII files was admittedly different from translating the newspaper into microform, those differences were "necessitated by the electronic medium," and that the majority, in ruling against defendants, was violating the "principles of media neutrality" by ostensibly allowing one format and not another.³⁸ Finally, while the articles were viewed individually, the rest of the newspaper in which the article appeared was available on the databases, allowing Justice Stevens to conclude that the databases' use was a "revision."³⁹ Commingling the article with articles from other collective works would be no different than putting different collective works on one microfiche.⁴⁰

The majority replied that it did not share "the dissent's confidence that the current form of the Databases is entirely attributable to the nature of the electronic media,"⁴¹ implying that there are indeed ways to electronically display the collective works in precisely the way they originally appeared, as was the case with the archived *National Geographic* magazines in *Greenberg*. The majority holding seemed to overrule *Greenberg*, a question that was resolved in the next case.

35. *Id.* at 507-09 (Stevens, J., dissenting).

36. *Id.* at 508-09 (Stevens, J., dissenting).

37. *Id.* at 520 n.17 (Stevens, J., dissenting).

38. *Id.* at 513-14 (Stevens, J., dissenting).

39. *Id.* at 514-15 (Stevens, J., dissenting).

40. *Id.* at 517 (Stevens, J., dissenting).

41. *Id.* at 502.

3. Faulkner v. National Geographic Society

Faulkner applied the *Tasini* ruling to facts very similar to those in *Greenberg*.⁴² The same CD-ROM was at issue, including the introductory sequence of photographs and replicated issues from NGS's 108-year history.⁴³ Plaintiffs again sued for copyright infringement, arguing that the magazine was not entitled to use their works in the compendium without permission.⁴⁴ Relying on *Greenberg*, the authors claimed that NGS should be collaterally estopped from arguing that the archive was a revision, since the Eleventh Circuit had already ruled in their favor on that issue in *Greenberg*.⁴⁵ The district court disagreed and granted summary judgment for the defendants.⁴⁶

On appeal, the appellate court upheld the district court's determination. The appellate court held that the legal landscape had been sufficiently changed by *Tasini*'s revision rule, and thus the case could be heard on the merits.⁴⁷ The court then applied *Tasini*'s revision rule, that a "revision denotes a new version . . . [that is] a distinct form of something regarded by its creator or others as one work,"⁴⁸ and found that "[t]he CNG present[ed] the underlying works to users in the same context as they were presented to users in the original versions of the Magazine."⁴⁹ Indeed, the court found such a presentation was a contrast to the databases in *Tasini*, which precluded readers from viewing the underlying works in their original context.⁵⁰ The CNG was therefore a revision, and the freelance authors were not entitled to additional payment.

Although the holding in *Faulkner* contradicted the holding in *Greenberg*, the core issue is no longer controversial: authors cannot expect extra payment for use of their works in compendiums and anthologies, but they may demand payment when their publisher sells works to online databases that do not retain the "original context" in which the work first appeared.

42. See *Faulkner v. Nat'l Geographic Soc'y*, Nos. 04-0263-cv(L), 04-0388-cv(CON), 04-0265-cv(CON), 04-0475-cv(CON), 04-0318-cv(CON), 04-0481-cv(CON), 2005 U.S. App. LEXIS 3642 (2d Cir. Mar. 4, 2005).

43. *Id.* at *4-*9.

44. *Id.* at *2-*3.

45. *Id.* at *24-*25.

46. *Id.* at *12-*13; see also *Faulkner v. Nat'l Geographic Soc'y*, 294 F. Supp. 2d 523 (S.D.N.Y. 2003).

47. *Faulkner*, 2004 U.S. App. LEXIS 3642, at *27 ("In our view, the *Tasini* approach so substantially departs from the *Greenberg* analysis that it represents an intervening change in law rendering application of collateral estoppel inappropriate.")

48. *Id.* *28 (citation and internal citations omitted).

49. *Id.*

50. *Id.* at *29.

This outcome was seen as a victory by freelance authors, but as will be discussed later, contractual variation and bargaining power limitations will significantly limit the scope and impact of this “victory.”⁵¹

II. THE BUSINESS OF PUBLISHING

This Part briefly describes the commercial news and STM industries, and how the Internet and new media have influenced these industries.

A. The Commercial News Industry

Newspapers have been around in some form since news sheets were publicly posted in ancient Rome,⁵² but the newspaper as we know it—with its wide circulation, illustrations, and bold headlines—did not appear until the 1890s.⁵³ Modern newspaper economics are driven by subscriptions and advertising: the advertising-to-subscription income ratio of American newspapers stands at 70:30,⁵⁴ and two-thirds of all daily newspaper pages are taken up by advertising.⁵⁵ In 2000, there were about 1,500 daily newspapers in circulation, with *USA Today* having the largest circulation.⁵⁶ There were also 7,600 weekly newspapers in circulation.⁵⁷ As for magazines, the earliest news periodicals appeared in Europe during the seventeenth century.⁵⁸ In the nineteenth century, Congress passed laws allowing for cheaper mailing rates, and the business model became increasingly driven by advertising.⁵⁹

Commercial news contracts used to be fairly informal.⁶⁰ After *Tasini* and cases like it began winding their way through the courts in the mid-

51. See, e.g., Nat'l Writer's Union, Victory for Creators: A Guide to the Supreme Court, at <http://www.nwu.org> (last visited Mar. 19, 2005). To retrieve the exact webpage of this citation, go to the National Writer's Union homepage at <http://www.nwu.org>, select the “Tasini vs NY Times” link in the left frame, then select the “Supreme Court Victory, June 25, 2001” link under the “Current” heading.

52. See *Newspaper*, MSN® ENCARTA® ONLINE ENCYCLOPEDIA (2005), at http://encarta.msn.com/encyclopedia_761564853/Newspaper.html.

53. See Phil Barber, *A Brief History of Newspapers*, at <http://www.historicpages.com/nprhist.htm> (last updated Dec. 31, 2004).

54. PATRICK HENDRIKS, *NEWSPAPERS: A LOST CAUSE?* 11 (1999).

55. See *Newspaper*, *supra* note 52.

56. *Id.* Circulation was at 2.3 million people in 2000.

57. *Id.*

58. See *Periodicals*, MSN® ENCARTA® ONLINE ENCYCLOPEDIA (2005), at http://encarta.msn.com/encyclopedia_761567699/Periodicals.html#p13.

59. *Id.*

60. Indeed, even the contracts in *Greenberg* were “set out in a series of relatively informal letters.” *Greenberg v. Nat'l Geographic Soc'y*, 244 F.3d 1267, 1269 (11th Cir. 2001).

1990s, major newspapers and magazines began to add specific contract provisions that addressed the digital rights problem.⁶¹ Therefore, only works published until around 1995 are likely to lack (or have ambiguous) new media clauses.

All freelancers who signed contracts with ambiguous new rights clauses (or contracts lacking new media clauses) could be eligible for royalties under *Tasini/Faulkner*. Publishers are faced with three options. First, publishers can get digital rights from each freelancer for each article.⁶² At a minimum this entails high transaction costs for the publisher, as it requires tracking down authors and bargaining with them. Publishers' second option is to simply delete the articles from their databases, and because they can threaten authors with this possibility, they benefit from superior bargaining power in any transactions that occur.⁶³ Some publishers have utilized a third option, asking freelancers to convey rights retroactively.⁶⁴

Post-1995 contracts have taken three basic forms. "All-rights contracts" grant publishers all rights in a given work.⁶⁵ Condé Nast, Boston Globe, New York Times Co., Scholastic, and some Hearst publications have adopted all-rights contracts.⁶⁶ These contracts are natural choices for publications with superior bargaining power, and indeed many "freelancers must choose between signing the agreement and receiving a paycheck or asserting their rights and going hungry."⁶⁷

61. *Id.*; see also Saez, *supra* note 12, at 351 ("[P]roducers and content providers are starting to provide explicit language in their contracts regarding the issue of electronic rights' ownership."); Rosenzweig, *supra* note 9, at 930 ("Since *Tasini* . . . rose to national prominence in December 1993, the publishing industry has begun explicitly to address future technology issues."); Laurie A. Santelli, Notes and Comments, *New Battles Between Freelance Authors and Publishers in the Aftermath of Tasini v. New York Times*, 7 J.L. & POL'Y 253, 274 (1998) ("[T]he commencement of *Tasini* in 1993 compelled most publishers to replace their handshake agreements with contracts that explicitly addressed electronic rights.").

62. Mark B. Radefeld, Note, *The Medium Is the Message: Copyright Law Confronts the Information Age in New York Times v. Tasini*, 36 AKRON L. REV. 545, 575 (2003).

63. See Michael A. Forhan, Note, *Tasini v. New York Times: The Write Stuff for Copyright Law?*, 27 CAP. U. L. REV. 863, 884 (1999) ("[M]ost writers will 'bargain' away their rights out of necessity in order to be published (and paid).").

64. Radefeld, *supra* note 62, at 577.

65. Santelli, *supra* note 61, at 278.

66. *Id.* at 279 nn.127 & 129.

67. *Id.* at 279.

“Time period contracts” grant exclusive rights for a set period of time.⁶⁸ For example, the *Village Voice* asks freelancers to grant exclusive rights for 37 days.⁶⁹ After that, the rights revert to the authors.⁷⁰

“Payment contracts” grant set compensation (typically 50%) to freelancers for all royalties derived from electronic uses.⁷¹ *Harpers*, *Science*, *MIT Technology Review*, *American Health*, and *Women’s Day* use payment contracts. *Harpers* states that it is paying 50% royalties because of the “uncertainty in the future market for electronic content.”⁷² This model is unlikely to gain in popularity because of the transaction costs involved in tabulating royalties.

B. The Scientific, Technological, and Medical Publishing Industry

STM journal publishing is a surprisingly big business, generating as much as \$2.1 billion for publishers like Elsevier-Reed, the world’s largest STM publisher, with revenue growth from 2001-2002 at 39.8%.⁷³ In total, there are over 2,000 publishers in the STM industry, and they “publish 1.2 million articles a year in about 16,000 journals.”⁷⁴ In a study conducted in the United Kingdom in 2003, 85% of STM journal income came from subscriptions, and in stark contrast to commercial news only 5% came from advertising.⁷⁵ Production accounts for 58% of typical costs, with postage and distribution accounting for another 8%, leaving 34% in gross margins.⁷⁶ An important feature of STM publishing is the peer review process, in which authors submit their manuscripts to an editorial board, which then sends the paper out to a panel of peers in the field who assess the paper’s quality and methods.⁷⁷ If they are satisfied, the paper will be

68. *Id.* at 280.

69. *Id.*

70. *Id.*

71. *Id.* at 280-81.

72. Thomas K. Landry, *Columbia-VLA Journal of Law & the Arts Roundtable on Electronic Rights*, 20 COLUM.-VLA J.L. & ARTS 605, 628 (1996).

73. See STM and Elsevier Publishing Information, California Digital Library (Sept. 22, 2203), at http://www.law.berkeley.edu/faculty/rubinfeidd/Ac.%20Jour.%20Publishing/Academic%20Journal%20Project/CA%20digital%20library_STM%20and%20Elsevier.pdf.

74. See *Access All Areas*, ECONOMIST, Aug. 5, 2004, available at http://www.economist.com/science/PrinterFriendly.cgm?Story_ID=3061258.

75. ECONOMIC ANALYSIS OF SCIENTIFIC RESEARCH PUBLISHING 13 (Wellcome Trust ed., 2003), at <http://www.wellcome.ac.uk/assets/wtd003182.pdf>.

76. *Id.*

77. See *Science*, MSN® ENCARTA® ONLINE ENCYCLOPEDIA (2005), at http://encarta.msn.com/encyclopedia_761557105/Science.html#p27.

published; if not, the author is faced with revisions or outright rejection.⁷⁸ A final difference is that unlike commercial news sources, which may have millions of purchasers, STM journals are normally purchased by a relatively small number of libraries for much higher individual prices.⁷⁹

C. The Internet and New Media

By the end of the 1990s, more than a thousand North American newspapers were offering their content online.⁸⁰ Online publishing is attractive because it cuts down on distribution costs (no physical delivery is needed) and production costs (nor is paper).⁸¹ From a reader's point of view, accessing the Internet is relatively inexpensive. The Internet also allows any individual with the proper technical knowledge the opportunity to "publish" whatever they like on their own website, as the thousands of web-loggers across the country can confirm. The lower costs mean more opportunity for new entrants, and this is how Factor Three (Opportunities for Competition Generated by New Media) was derived. However, it is sometimes difficult for new entrants to be taken seriously, a problem discussed in Factor Four (The Ability of New Competitors to Become Prestigious).

Large commercial news and STM publishers have been able to use the Internet in three basic ways. First, publishers have put their content online and charged users subscription fees. For example, the *Wall Street Journal*,⁸² *The Economist*,⁸³ and *The Lancet Neurology*⁸⁴ operate on this model. Second, publishers have put their content online, allowed users to view the content for free, and then sold advertising space around the content. *The New York Times*⁸⁵ and the *New England Journal of Medicine*⁸⁶ operate this way. Third, publishers have sold works in their possession to online databases like LEXIS/NEXIS. This is common for many publishers.⁸⁷ As previously discussed, the rights structure has evolved such that any of these

78. *Id.*

79. See ECONOMIC ANALYSIS OF SCIENTIFIC RESEARCH PUBLISHING, *supra* note 75, at 14.

80. See *Electronic Newspaper*, MSN® ENCARTA® ONLINE ENCYCLOPEDIA (2005), at http://encarta.msn.com/media_461550796/Electronic_Newspaper.html.

81. *Id.*

82. See <http://online.wsj.com/public/us> (last visited Mar. 9, 2005).

83. See <http://www.economist.com> (last visited Mar. 9, 2005).

84. See <http://neurology.thelancet.com> (last visited Mar. 9, 2005).

85. See <http://www.nytimes.com> (last visited Mar. 9, 2005).

86. See <http://content.nejm.org> (last visited Mar. 9, 2005). Articles are available after six months of publication.

87. See Peter S. Menell, *Can Our Current Conception of Copyright Law Survive the Internet Age?*, 46 N.Y.L. SCH. L. REV. 63, 127 (2002-2003).

uses require the author's permission if the author is a freelancer and the work is placed out of its original context.

An important development in STM publishing is "open access publishing," a new business model in which STM journals charge authors a fee for placement in the journal and then offer their articles free online.⁸⁸ Open access journals now account for 5% of all international scientific publications,⁸⁹ a total of about 1,200 journals.⁹⁰

III. ANALYSIS: MODELING CHANGE IN TWO AREAS OF PUBLISHING

Large publishers have entered into a discomfited dance with the Internet, with persistent threats from new entrants and powerful bargaining realities pulling in opposite directions. In commercial publishing, the legal allocation of digital rights has changed, but their real-world allocation for the most part has not. In the world of STM publishing, however, vigorous academic and political support has given open access competitors sufficient strength to allow for a continual increase in the number of open access journal titles.

How can the open access publishing movement's success in transforming STM publishing be explained when commercial authors have been unable to change their situation? This Note suggests that four factors are useful in answering this question: (1) a changed rights structure; (2) sufficient bargaining power to reject unsatisfactory contract terms; (3) opportunities for competition generated by new media; and (4) the ability of new competitors to become prestigious.

A. Factor One: Changed Rights Structure

Media contracts have not always precisely assigned the copyrights in the event that a new medium becomes relevant to the agreement.⁹¹ One of the ways in which new media historically have caused change is by forcing courts to allocate rights to parties in such situations. For example,

88. See *Open Access Publishing*, PubMed Central, <http://www.pubmedcentral.org/about/openaccess.html> (last updated Jan. 7, 2005), for a complete definition written by several high profile promoters of open access publishing.

89. Sophie Morris, *Pay-to-Publish Could Make Journals More Accessible*, AUSTRALIAN FIN. REV., July 26, 2004, available at 2004 WL 79462428.

90. Dan Vergano, *Scientists Want Research Papers Freely Available*, USA TODAY, Aug. 30, 2004, available at 2004 WLNR 6670693. In 1992, there were only five open access journals. *Id.*

91. See, e.g., *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150, 154 (2d Cir. 1968) (a leading case dealing with this issue).

when publishers began to sell individual contributions to their collective works to online databases like LEXIS/NEXIS, freelance authors of the individual works sued for copyright infringement. Courts had difficulty determining whether the freelancer or the publisher was entitled to the digital rights. The issue ultimately was decided by the Supreme Court in *Tasini*, which held that the rights belonged to the authors of the individual works—in other words, to the freelancers.⁹² In this way, rights allocation becomes part of the calculus of new media transformation, although as is discussed below, it appears for various reasons that this factor is not as important as one might expect.

1. *Commercial News*

Recent digital rights controversies have involved publishers who used individual works in one of two ways: some added the individual works to anthologies or compendiums that reproduced the original work in the same context as it originally appeared, while others sold the copyrighted work to online databases. In both situations the copyright is firmly in the hands of the author, so the only issue is whether the grantee's uses are new uses or merely "revisions" of old uses. It was not clear what constituted a "revision" until the issue was litigated in *Greenberg*, *Tasini*, and later *Faulkner*.⁹³ These cases established the rule that publishers may not sell individual pieces of a collective work to online databases like LEXIS/NEXIS without the individual copyright, but may generally issue compendiums and anthologies as "revisions."

The new allocation of rights in commercial news represents a change in the balance of power between authors and publishers, and since the former have reason to seek change, our expectation that transformation will occur thereby increases. Factor One therefore weighs in favor of transformation in the commercial news setting. However, the current absence of transformation in commercial news leads to the conclusion that this factor is not sufficient on its own to cause the sort of change seen in STM publishing, and that other factors are more important.

2. *STM Publishing*

STM publishing has no counterpart to *Tasini*, and yet it has seen significant changes. It is thus interesting to note that although the redistribution of legal rights seems important in some intuitive sense, rights redistribution is only present in the context in which change has not occurred. This makes Factor One the most dispensable of the four, and indicates that

92. See *N.Y. Times v. Tasini*, 533 U.S. 483, 501-02 (2001).

93. See *supra* Part I.C.

change in the publishing market is far more related to the economics of bargaining power than to the distribution of legal rights. Although the factor does not prove much in and of itself, it is a useful means of establishing the importance of economic influences.

B. Factor Two: Sufficient Bargaining Power to Reject Unsatisfactory Contract Terms

Changes in the rights structure may be one way for new media transformation to occur. However, when taken alone, that sort of change is not sufficient or perhaps even necessary. More significant is the ability of authors to choose publishers and contracts that are to their satisfaction, based on strong bargaining power.

1. Commercial News

Some observers of the *Tasini* litigation feared that a decision in favor of the authors would “tip the scales in favor of authorial rights, to the detriment of society at large.”⁹⁴ The fear was that large holes would develop in electronic databases when bargaining broke down between authors and publishers. Incomplete databases would mean inferior research tools, a problem for society at large. Indeed, the Supreme Court dissent had this concern,⁹⁵ and some freelancers have complained that their work has suffered from a *Tasini* “backlash.”⁹⁶ For example, one freelancer complained that “my previous work, like that of other freelancers, has been expunged by newspapers so they don’t need to comply with the conditions of the *Tasini* ruling.”⁹⁷

However, the observers who predicted that “*Tasini* will have little practical effect on future contributions to collective works” appear to have been much closer to the mark.⁹⁸ This is because most publishers use one of the contracts described previously to specifically deal with electronic rights, with the result usually being the conveyance of the rights to the publisher. These contracts are made possible by an imbalance in bargaining power.

94. Jennifer L. Livingston, Note, *Digital “Revision”*: Greenberg v. National Geographic Society, 70 U. CIN. L. REV. 1419, 1435 (2002).

95. *Tasini*, 533 U.S. at 520 (Stevens, J., dissenting).

96. Wendy A. Hoke, *We Hear You—and We Like What You’re Saying: Response from SPJ Freelancers Has Been Overwhelming*, QUILL, May 1, 2004 at 38-39.

97. *Id.*

98. Josh J. May, Note, *Tasini v. New York Times Co.*, 16 BERKELEY TECH. L.J. 13, 28 (2001).

It is no secret that authors have traditionally lacked bargaining power in contractual transactions with publishers.⁹⁹ The question that remains is whether cases like *Tasini* and *Faulkner* have improved freelance news authors' relative bargaining power. At a minimum, publishers now have no choice but to bargain with authors over the terms of digital rights.¹⁰⁰ In this sense, authors' bargaining power is improved by the decisions because they may not have been aware of the issue and will now encounter it in their contracts. Contact Press Images, a group of about twenty well-known photojournalists based in New York, responded to Time Warner contracts featuring all-rights clauses by refusing to sign that portion of the contract.¹⁰¹ Further, Contact refused projects from "a major U.S. news weekly" who made all-rights contracts a condition of the assignment.¹⁰² The *New York Times* Assistant Counsel has also stated that "[w]ith respect to more entrepreneurial nonfiction works, works authored by 'name' authors (who have in essence established their own brand) and fiction works, the arrangements will probably be different"—in other words, the bargaining power will be more evenly spread between the two parties.¹⁰³

However, as Contact's Executive Director admits, "for every author/artist fighting to reserve or establish fees for electronic or ancillary rights, there are perhaps five to ten others that would sign now without precondition. The power of the publisher is undeniable."¹⁰⁴ As the *Tasini* dissent pointed out, that decision may have the ironic effect of increasing the number of wholesale rights transfers whenever a publisher's bargaining power is sufficiently superior.¹⁰⁵ Thus, aside from organized groups of well-known freelancers like Contact, the bargaining landscape will continue to be driven by the reality that commercial publishing is a buyer's market, and despite voluntary payments from some publishers like *Harp-*

99. Santelli, *supra* note 61, at 280.

100. See Wendy J. Gordon, Essay, *Fine-Tuning Tasini: Privileges of Electronic Distribution and Reproduction*, 66 BROOK. L. REV. 473, 497-98 (2000) ("*Tasini* . . . provide[s] a mechanism for alerting the less informed freelancer that there is something to contract about, thereby mitigating the informational asymmetry.").

101. Landry, *supra* note 72, at 616. Time Warner offered "a higher day rate (\$100 more than their standard \$400) in order to acquire 'unrestricted,' nonexclusive electronic rights for all the photographs taken on assignment." Contact and "a select group of [their] colleagues" refused to sign. *Id.*

102. *Id.*

103. *Id.* at 615.

104. *Id.* at 617.

105. *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 520 n.17 (2001) (Stevens, J., dissenting).

ers, there does not appear to be any legal reason for a publisher not to demand electronic rights whenever possible.¹⁰⁶

An important aspect of bargaining power is the nature of the work itself, and in particular its time value. Articles published in the *New York Times* have far less individual value on average than any given STM journal article. As New York Times Co.'s Assistant General Counsel has pointed out, individual news articles lose value quickly as time passes, and often will not be very valuable a few months after publication.¹⁰⁷ The result is that "publishers of collective works comprising relatively short articles presenting news and information (e.g., newspapers and news magazines) will acquire broad (if not all) electronic rights at the same time print rights are acquired for the payment of a one-time fee."¹⁰⁸ In other words, the value of each electronic right will be fixed by contract, on the New York Times' terms, due to the weak position of short-lived news pieces. Authors with name recognition or some other form of bargaining chip will stand a better chance of negotiating higher payments for their electronic rights. It may be advisable for freelance authors to shift their focus to whatever extent possible towards "entrepreneurial nonfiction works" and fiction works, because these, as compared with news pieces that become worth little after a few months, retain their value and may garner higher payments or better terms.¹⁰⁹

2. STM Publishing

The typical STM author is paid not by her publisher but rather by her employer, usually a university. The absence of any pecuniary relationship immediately bolsters the academic author's bargaining position because there is less at stake when the author decides to try something new or stand on principle and reject a flawed contract. This is not to say that academic authors can drive hard bargains with impunity—their careers are often at stake (a point demonstrated below in Factor Four). However, they

106. In the words of one freelancer,
I signed a particularly bad and odious contract with *Playboy* last year You spend an enormous amount of time establishing contact with an editor. Then he sends you the contract and all that he can say is, "This is what my boss or my lawyer is telling me to do."

Christina Ianzito, *Who Owns That Online Story?*, COLUM. JOURNALISM REV., May 15, 1997, at 15. It is also interesting to note that freelancers average \$7500 of income a year from their writing. Santelli, *supra* note 61, at 260.

107. Landry, *supra* note 72, at 628.

108. *Id.* at 614.

109. *Id.* at 615.

are in a relatively stronger position because they do not rely on their publisher directly in order to put food on the table.

A second dynamic working in academic authors' favor is the mounting pressure on traditional STM publishers from libraries and other institutional discontents. As new competitors enter the market in response to this discontent, authors find themselves presented with a greater range of alternatives. As the Factor Four analysis will suggest, there are still plenty of reasons for them not to join the open access movement, but the changes taking place in STM publishing are indisputably in part due to the institutional support of authors.

A third area in which STM articles naturally possess greater bargaining power is in their time value and specialized nature. Unlike normal news articles, STM works continue to be useful so long as other researchers turn to them. Many articles may not be much more than a small part of a large archive, but even so the Internet makes even the largest archive searchable, and therefore there is some value retained in the possibility of a future citation.

Thus, the nonpecuniary nature of the relationship, the pressures on the STM industry, and the stronger individual value of each article all contribute to greater bargaining power for authors in the STM industry. This contrasts with the bargaining power of commercial news authors, and helps explain why only the STM industry has seen transformation.

C. Factor Three: Opportunities for Competition Generated by New Media

The emergence of new media allows more competitors to enter the market, but can make the market too competitive for established companies because of the number of entrants. Yet, it is not uncommon for new media to also improve the lot of all competitors in the market. In the case of videotaping, for example, new ways to copy television broadcasts and movies seemed at the outset to be a boon for consumers but an unmitigated catastrophe for Hollywood. As it turned out, VHS sales and rentals turned out to be a major source of revenue for studios.¹¹⁰ The DVD format has likewise become an important source of revenue, accounting for 71% of total rental spending in the United States.¹¹¹

110. *Id.*

111. Judith McCourt & Judith Saccone, *DVD Juggernaut Can't Offset Double-Digit Rental Drop*, VIDEO STORE, May 16, 2004, at 27.

1. *Commercial News*

Courts have recognized that once a work is put into an individualized digital format, a separate market is created in which authors could again sell their works that have already been sold in print.¹¹² This conceivably created the opportunity for freelancers to bargain for a second round of payments from their publisher, or to shop around for a new place to publish their work in its electronic form. For example, a freelancer who sold a news dispatch to the *New York Times* might wish to sell the electronic version of her work to a different news organization. This potential opportunity has been nullified by form contracts that require freelancers to sign over all their rights, a situation made possible by stronger bargaining power in the hands of commercial publishers.

2. *STM Publishing*

Competition in the STM world would not exist but for the Internet, because the costs of “acquiring, selecting, editing, presenting (in print or electronic form), marketing, and selling content” are dramatically lower for online publishers.¹¹³ The availability of Internet-based peer review, archiving, and discussion have also made publishing more accessible than ever before in the STM world.¹¹⁴ Further, the Internet removes several traditional barriers to new entrants. First, a new paper journal “can be successful only if it is able to displace an existing journal” because of limited library funds.¹¹⁵ Internet-based journals do not have this problem: they can co-exist with competing journals because from the library’s point of view it costs nothing to give the newcomer a try. Second, readers are hesitant to try new paper journals because they “cannot know in any level of detail what benefit they will receive from an article”¹¹⁶ Yet here too, because readers can peruse the online journal for free, they *can know in detail* what benefits they will receive from an article, and they will return if they derive sufficient benefit. Despite publishers’ arguments that going online can eliminate only 20-30% of the cost of a paper journal, these are obvious advantages and they demonstrate the opportunity that the Internet provides would-be competitors.¹¹⁷

112. *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 488 (2001).

113. ECONOMIC ANALYSIS OF SCIENTIFIC RESEARCH PUBLISHING, *supra* note 75, at 12.

114. *Id.* at 9.

115. *Id.* at 14.

116. *Id.* at 15.

117. *Id.* at 7.

This opportunity is being seized largely due to dissatisfaction with the nature of the STM publishing business: universities and governments around the world have examined journal prices and availability and concluded that there is a problem. Cornell University noted with disapproval in a recent study that its library budget has increased by 149% from 1986 to 2001, while the number of periodicals purchased grew by only 5%.¹¹⁸ The UK House of Commons Science and Technology Committee in an August 2004 report said that research journal pricing was “unsatisfactory,”¹¹⁹ and the Scottish Confederation of University and Research Libraries together with the National Library of Scotland issued a declaration that “the traditional way of disseminating research through subscription-based journals ‘severely restricts access to leading edge research’” and that “[t]he kind of profit that is being made by some of the very large commercial publishers is inappropriate in that it is predicated on publicly funded research.”¹²⁰

Currently, the most common business model is open access publishing, where authors pay a fee to place their articles in journals, which are then distributed online (and sometimes in print) for free.¹²¹ The most high-profile organization using this format is likely the Public Library of Science (PLoS), founded in 2000 by former National Institutes of Health Director and Nobel Prize winner Harold Varmus¹²² and UC Berkeley Lawrence Lab scientist Michael Eisen,¹²³ among others. PLoS publishes two journals under its open access model, *PLoS Biology* and *PLoS Medicine*.¹²⁴ The journals are taking direct aim at “gold standard”¹²⁵ journals *Nature*, *Science*, and *The Lancet*.¹²⁶

118. See *Access All Areas*, *supra* note 74.

119. Emma Dorey, *Open Access Needs Public Strategy*, CHEMISTRY & INDUS., Aug. 2, 2004, at 7.

120. Richard Wray, *Commercial Publishers Face Scottish Open Access Challenge*, GUARDIAN CITY PAGES, Aug. 20, 2004, at 6.

121. Saeed Shah, *US Public Library of Science Launches Rival to ‘The Lancet’*, INDEPENDENT (London), Oct. 20, 2004, 2004 WLNR 10791665.

122. ‘Open Access’ Medical Journal Provides New Model for Publishing Original, Peer-Reviewed Research, PR NEWSWIRE, Oct. 20, 2004, available at <http://sev.pnews.wire.com/health-care-hospitals/20041021/DCW07720102004-1.html>.

123. Will Harper, *Publisher For the People*, E. BAY EXPRESS (Alameda and Contra Costa Counties, California), Sep. 29, 2004, available at <http://www.eastbayexpress.com/issues/2004-09-29/feature.html>.

124. See PLoS Public Library of Science, at <http://www.plos.org> (last visited Mar. 14, 2005).

125. Harper, *supra* note 123.

126. Shah, *supra* note 121.

BioMed Central (BMC), which calls itself an “Open Access Publisher,” has established a similar model.¹²⁷ Under its model, institutional members, such as the University of California, pay a flat rate based on institutional size in order to become a member.¹²⁸ Researchers at member institutions do not pay any fee to have their articles published online.¹²⁹ Currently BMC publishes 110 web-only journals in biology and medicine, all of which are offered for free online immediately.¹³⁰

There is no shortage of support in the global academic community for open access publishing. OhioLINK, Ohio’s higher educational library system, announced in July 2004 that it would fund half of all fees for faculty and researchers wishing to publish articles with PLoS.¹³¹ The world’s largest medical research charity, the Wellcome Trust, has strongly supported open access.¹³² And the German government awarded \$4.2 million to two German publishers to develop “web-based collaborative scientific work and self-publishing.”¹³³

Most significantly, the United States House of Representatives Appropriations Committee recently approved a provision in the 2005 appropriations bill that would provide free online access to any research articles funded by the National Institutes of Health (NIH) six months after publication. NIH spends \$24.6 billion annually on basic research that produces approximately sixty thousand research articles,¹³⁴ which accounts for a quarter of the world’s “quality” medical research according to conservative estimates.¹³⁵ The NIH proposal makes all research that it funds available on a “comprehensive, searchable electronic archive of NIH-funded

127. Andrew Albanese, *UK Report Calls for Publicly Available STM Research*, LIBR. J., Aug. 15, 2004, at 16, available at <http://www.libraryjournal.com/article/CA443930?display=NewsNews&industry=News&industryid=1986&verticalid=151>.

128. “Very large institutions” like the University of California pay \$8,625 a year in membership fees. *BioMed Central Institutional Membership*, at <http://www.biomed-central.com/info/about/instmembership> (last visited Mar. 9, 2005).

129. *Id.*

130. Richard Poynder, *Ten Years After; Poynder on Point*, INFO. TODAY, Oct. 1, 2004.

131. Andrew Albanese, *OhioLINK to Support PLoS*, LIBR. J., July 15, 2004, available at <http://print.google.com/print/doc?articleid=qO3WGC81sEL>. The fee is \$1500. *Id.*

132. See Richard Wray, *Science for All*, GUARDIAN, Oct. 25, 2004, at 4. Wellcome’s director says “[r]esearch findings need to be freely and widely available” *Id.*

133. Bobby Pickering, *German Government Funds OA Initiative*, INFO. WORLD REV., Oct. 1, 2004, available at <http://www.accountancyage.com/news/it/1158510>. Other interesting examples include George Soros’s Open Society Institute, which provided \$3 million to fund the Budapest Open Access Initiative. Poynder, *supra* note 130.

134. Harper, *supra* note 123.

135. Barbara Quint, *NIH Requires Open Access for Its Funded Medical Research*, INFO. TODAY, Sept. 13, 2004, at <http://www.infotoday.com/newsbreaks/nb0409131.shtml>.

research publications, providing publicly available access to all."¹³⁶ The archive would operate out of the already-existing pubmedcentral.nih.gov (PubMed Central) site operated by the National Library of Medicine, which is an NIH institute.¹³⁷ NIH-funded articles would be published in a nongovernmental journal just as they always have, and then posted on the NIH site six months after original publication.¹³⁸ Proposals similar to the NIH's are being considered in Canada, Scotland, Australia, India, and Norway.¹³⁹

Thus, the Internet has created opportunities for competition in both commercial and STM publishing, but those opportunities have been less useful in the commercial publishing context because of other factors.

D. Factor Four: The Ability of New Competitors to Become Prestigious

The emergence of the Internet has created opportunities for new publishers, but not all Internet publishers are considered equal. There is a perception that Internet-based publishing may not be as credible as print-based publishing.¹⁴⁰ As will be shown, authors are reluctant to submit their works to publications that lack prestige. The ability of Internet-based challengers to become prestigious is hence an important factor in determining whether transformation is possible in a given publishing area.

1. Commercial News

Factor Four considers the prestige of "new competitors," but we concluded above that from a freelance author's point of view, there has not been any transformation in commercial news publishing. It is worth noting, however, that although the business model for commercial news publishing is quite different from that used in STM publishing, authors in both areas are compelled by similar forces to cooperate with the most powerful publishers. For commercial authors, the competition to get paid for their freelance work is too fierce for most to have much power at the bargaining table.¹⁴¹ These authors contend with a situation where they attempt to pay

136. NAT'L INST. OF HEALTH, QUESTIONS AND ANSWERS: NIH PUBLIC ACCESS POLICY (n.d.), available at <http://www.nih.gov/about/publicaccess/022405QA.pdf>.

137. Quint, *supra* note 135.

138. *NIH Public Access: Questions and Answers*, *supra* note 136.

139. Poynder, *supra* note 130.

140. "The quality of electronic versions of paper journals is taken for granted. Journals issued purely electronically are viewed with some suspicion by the academic community but this appears to be decreasing." ECONOMIC ANALYSIS OF SCIENTIFIC RESEARCH PUBLISHING, *supra* note 75, at 22.

141. See Landry, *supra* note 72, at 616.

the bills as best they can.¹⁴² Within these constraints, it is likely that these authors will try to maximize prestige in the hopes of higher pay now and greater bargaining power in the future. Therefore, if transformation were to occur at some point in commercial news, it would be important for the new competitors to garner prestige.

2. *STM Publishing*

Likewise, while academic authors may not be seeking money, the largest publishers have another bargaining chip at their disposal: prestige. STM open access publishers like to claim that traditional publishers no longer add value,¹⁴³ but it appears that in the eyes of academic authors there is no substitute for being associated with a journal of high status.

Academic publishers traditionally added value by featuring eminent scholars on an editorial board and by conducting peer review.¹⁴⁴ The process of review can be expensive, and this is primarily how the journals justify their high prices.¹⁴⁵ The major publishers claim that it is risky for an author to publish with the open access groups because the lack of good review diminishes the value of the journal and the articles that appear in it.¹⁴⁶ However, the leading open journals also conduct peer review: PLoS's board has several Nobel Prize winners and other eminent scientists,¹⁴⁷ and is said to "undertake rigorous peer-review and high editorial standards."¹⁴⁸ Thus, the value added by traditional academic publishers in the form of peer review appears feasible in the open access context.

Yet open access publishers may still lack that which is most important to prospective authors: authoritative prestige. PLoS's cofounder Michael

142. Ianzito, *supra* note 106.

143. See *STM Open Access: Point-counterpoint*, Data Conversion Library, Oct. 26, 2004, at http://www.dclab.com/open_access_interviews.asp.

144. *Id.*

145. Harper, *supra* note 123 ("It costs us more money to reject an article than to publish an article.").

146. Michael T. Clarke, *When Information is Free, What Will it be Worth?*, CHRON. HIGHER EDUC., Oct. 15, 2004, at 55.

147. Harper, *supra* note 123. The PLoS Biology board includes Lee Hartwell and Richard Roberts, both Nobel Prize winners for medicine, while Joseph Goldstein, another Prize winner, is on the PLoS Medicine board. *Id.* They have lured editors from other prestigious publications to take managerial spots at PLoS, including former editors at *Cell* and *Nature Genetics*, both "top shelf" publications. *Id.* But see Richard Wray, *Open-Access Editor Defects Back to Lancet*, GUARDIAN, Oct. 30, 2004, at 29 (describing the defection of one of PLoS Medicine's four editors back to *The Lancet Neurology*, from whence he had been snatched earlier by the open access group).

148. ECONOMIC ANALYSIS OF SCIENTIFIC RESEARCH PUBLISHING, *supra* note 75, at 25.

Eisen may scoff at competitor BioMed Central for lacking “the kind of rep that [gets] you tenure at Harvard,”¹⁴⁹ but that is precisely the problem his journal faces as well, at least relative to journals like *Science* and *Nature*. No matter in what format their work is presented, all authors know that “the standard by which major universities have long measured their faculty” has been “[p]ublish or perish,” and the prestige of the journal in which an author appears has much to do with the prestige of the university at which they eventually land a position.¹⁵⁰ The bottom line here is that academic authors who derive benefits from publishing their work in well-regarded, widely distributed journals may be unwilling to jeopardize their chances for career advancement in academia for the sake of taking a stand against monopoly rents or maximizing their legal rights.¹⁵¹

Intensifying this bias towards prestige is the position of libraries. Libraries are the main purchasers of journals and are thus a powerful buying block. One might therefore expect that given their concerns with current prices, they would throw their weight behind open access publishing.¹⁵² Yet libraries are a “relatively passive group . . . who find it difficult to coordinate and assert their market power.”¹⁵³ Because they must supply the most prestigious journals first, libraries have recently begun canceling “less-desirable journals” due to budget constraints.¹⁵⁴ Libraries may also have doubts about the viability of electronic information, which is seen as “fleeting.”¹⁵⁵

149. Harper, *supra* note 123.

150. Robert Samuel, *Researchers Shed Light on Academic Press*, DUKE U. (Durham, N.C.), Oct. 20, 2004, LEXIS, Nexis Library, University Wire; see also ECONOMIC ANALYSIS OF SCIENTIFIC RESEARCH PUBLISHING, *supra* note 75 at 16 (“Academic authors seek to place their articles in journals which are widely read and highly acclaimed The career path of authors and their opportunity to acquire research funds is partly determined by the journals in which they publish. In such circumstances *authors are primarily concerned with achieving publication in the highest quality journal they can reach.*”) (emphasis added.).

151. This is well illustrated by PLoS cofounder Michael Eisen’s difficulty convincing his own brother to submit his much sought-after article to PLoS instead of *Nature* or *Science*. See Harper, *supra* note 123. Eisen eventually prevailed upon his brother to choose PLoS. *Id.*

152. ECONOMIC ANALYSIS OF SCIENTIFIC RESEARCH PUBLISHING, *supra* note 75, at 15.

153. *Id.* at 20.

154. Harper, *supra* note 123.

155. Katie Hafner, *Digital Memories, Piling Up, May Prove Fleeting*, N.Y. TIMES, Nov. 10, 2004, at A1 (“To save a digital file for, let’s say, a hundred years is going to take a lot of work.”).

The future of open access publishing therefore remains uncertain, chiefly because it is unclear if it can marshal the degree of prestige necessary for it to truly rival established journals.

IV. CONCLUSION

This Note proposes that via the four factors presented above we can track potential new media transformations, understanding their incidence and degree of success. In the case of publishing, the first factor, a changed rights structure, is present, but only in commercial news publishing, which has not seen transformation. In STM publishing, there have been no significant legal developments, and yet transformation is occurring, allowing us to conclude that this factor is relatively unimportant. The second factor, sufficient bargaining power to reject unsatisfactory contract terms, is perhaps the one factor in which STM and commercial news publishing most differ: commercial news freelancers lack bargaining power, whereas STM authors are freer to challenge the status quo. We can conclude that this factor is relatively important in the overall analysis. The third factor, opportunities for competition generated by new media, is obviously indispensable and is present in the Internet. The fourth factor, the ability of new competitors to become prestigious, likewise is very important and remains the most unsettled of the four. In sum, the analysis suggests that when a new medium generates opportunities for competition, authors with bargaining power and new publishers that can attain a certain measure of prestige will be able to cause significant changes in the status quo, irrespective of how courts arrange individual rights.

The significance of the Internet cannot be disputed, but precisely what effects it is having on publishing remains an open question. The factors illustrated here may help analyze the climate, but only the passage of time will illuminate how much transformation the publishing industry will undergo.

