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Legally Speaking-Contract Wars-The Heated Battle Over Electronic Publishing Rights

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Legally Speaking

Electronic Publishing Rights

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Contract Wars— The Heated Battle Over Electronic Publishing Rights

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The literary battle over electronic publishing rights exploded last July when the powerful *New York Times* announced in an internal memo that it would be requiring freelance writers to give up future rights to anything they published in the newspaper.¹ The new policy shocked and then angered freelance writers who have sold articles to the *Times*. If the *Times* acquired all rights to an article, freelancers complained, they would receive no additional payment if something they wrote for the newspaper is published electronically or in other forms.²

"Our new policy will give us flexibility in the still uncharted waters of electronic media and is crucial if the *Times* is to be a leader in electronic journalism," a *Times* memo explained.³ The *Times* also gave a warning: if freelance writers did not sign over their rights they would not get published in the *Times*. The writing community screamed "highway robbery!"⁴ "Contracts like those pose a threat to the possibility of being a freelancer in this country," freelance writer Russell Miller told the *Christian Science Monitor*.⁵

Miller was not the only writer to complain about the *Times* policy. Three writer's groups, the Author's Guild, the National Writer's Union, and the American Society of Journalists and Authors, which have a combined membership of about 12,200, attacked the *Times* new rights policy. "We protest the proposed contract as unfair, unnecessary, and harmful to the livelihood of freelance writers," said a statement signed by such literary luminaries as Garrison Keillor, Ken Follett, and Alvin Toffler.⁶

Their statement got at the heart of the issue, as far as freelance writers see it: "This (*New York Times*) policy represents a profound break with publishing tradition by attempting to seize all rights to the creative work of its freelance writers. Unlike staff writers, freelance writers have historically retained the copyright in their works. Yet the *Times* offers writers no additional compensation for the extra rights it would take and no share in the extra revenues their works will continue to earn for the *Times*. Its justification for this drastic action — that it needs to fully control all of the words on its pages to be a leader in electronic publishing — is specious. Addi-

tional rights may be acquired and paid for by normal contract means."⁷

Librarians who are aware of the controversy expressed sympathy with the writers' position. "Electronic publishing rights represent an important issue for writers and I can understand why they expect to be compensated adequately," Gens Holley, Head of Resource Sharing and Copier Services at Clemson University, said. "From what I've read and heard, I'm sure writers are getting less than what they are entitled to."⁸

Writers worry that the rights policy change by the enormously influential *New York Times* will accelerate the trend that has been developing in publishing. "These kinds of rights grabs have been going on since the copyright law of 1978 [was passed], but it has never been a publisher like the *New York Times*," said Dan Carlinsky, chairman of the Contracts Committee of the American Society of Journalists and Authors. "It is usually a bargain basement publisher. But the *Times* is the one all the others are looking to as a model. As the *Times* goes, so probably will the rest of the industry. That we cannot allow to happen."⁹

But other newspapers are following the *Times* lead. Here are some examples:

- In late 1995, the *Chicago Tribune* issued a new contract to freelance writers in which the scope of publication rights had been significantly enlarged to encompass online services and CD-ROMs. The *Tribune* can put the writer's story online and the creators will not receive a cent in return.¹⁰

- The travel editor at the *Los Angeles Times* tells prospective contributors in a cover letter, "Please do not alter the agreement in any way."¹¹ In effect, take the allrights contract or leave it.

- The *San Francisco Examiner's* tough new contract wants all electronic rights for free, but claimed through an editor that "we don't make money at this. Not one penny changes hands."¹²

But money does change hands and the amount is increasing as electronic publishing grows. Last January, one *Times* official revealed to *Forbes* magazine that his newspaper would make more than \$80 million in electronic sales during the next five years. None of that money, however, will go to freelance writers.¹³

The reasons why publishers are bullish on the electronic publishing market is that databases like Nexis and Lexis have greatly lengthened the shelf life of many articles. Today, a researcher can search one of these databases by either subject or author and pay for each article separately. The companies operating

the databases then record what and how much had been used and periodically

send a royalty check to the publisher. If a publisher persuades — or intimidates — a freelance writer to sign a contract in which he gives up his electronic rights, none of these royalties have to be shared. And then there are commercial online operators like *America Online* and *CompuServe* and newspapers like the *Chicago Tribune*, which run their own online service. The *Chicago Tribune's Tribune Online* costs 1.25 a minute to access, and any freelance writer's story purchased by the *Tribune* can be called up by researcher, but the freelance gets no compensation.¹⁴

More is at stake than just money, say many freelance writers. Nicholson Baker, the best-selling author of such novels as *Vox* and *Fermata*, told *Against the Grain* that many writers worry "that their creative work might become subject to secondary fiddling." Baker explained, "I'm concerned about not being paid for distribution, but I'm more concerned about the form in which my works are presented. Writers lose control over their work. Captions or illustrations, for example, might be adjusted and only a portion of the article represented."¹⁵

But it's money that is driving the electronic rights issue. More than 3,000 print publications are now on electronic databases, including many magazines and newspapers, and the number is growing rapidly.¹⁶ Given the trend, it won't be long before most publications in circulation will be accessed electronically. The issue of who should control electronic rights is also getting hotter in the book publishing industry as publishers move into multimedia. The *Wall Street Journal* reported that the powerful William Morris Agency, a prominent talent agency, has put *Random House* low on its submission list for books because it will not give agents and authors greater control over multimedia rights.¹⁷

Holley believes the situation in book publishing will get more complicated. "I'm concerned about the future when authors start publishing works on the Internet. The cost of establishing accounts and the paperwork involved is going to be enormous."¹⁸

To protect the writer's copyright in the Information Age, the National Writer's Union (NWU) launched a landmark lawsuit against one database operator (Mead Data

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Central Corporation, the owner of Nexis) and four media companies (The New York Times Company; Newsday, a subsidiary of Times-Mirror; Times, Inc. Magazine Company, a subsidiary of Time Warner; and University Microfilms International, a division of Bell and Howell).¹⁹

In its press release announcing the lawsuit, the NWU noted that "the current copyright act was drafted in the 1970s, when electronic databases did not exist. Nevertheless, 'the 'Historical Note' to section 106 (of the Copyright Act) specifically noted that display rights would include the transmission of an image by electronic or other means. This provision, however, is routinely ignored."²⁰

While the lawsuit, which is known as *Tasini* versus the *Times*, remains in the courts, writers' organizations have moved to ensure that freelance writers receive their fair share of electronic publishing profits. As part of its Operation Magazine Index (OMI) campaign, the NWU has started the Publication Rights Clearinghouse, a collective-licensing agency that has established a royalty system it hopes will do what organizations like the American Society of Authors and Publishers (ASCAP) have long done for artists in the music industry. UnCover, which the media giant Knight Ridder recently purchased, was the first company to respond to the OMI campaign.²¹

UnCover provides faxes of articles called up from its online index, which includes 17,000 magazines and academic journals. UnCover has agreed that every time it faxes an article to a customer, it will add a "copyright fee" to its own price, to be set aside for the rights-holder.²² The agreed upon copyright fee is thirty percent of UnCover's delivery price. Before the copyright fee is credited to a writer's account, the Publishing Rights Clearinghouse deducts an administrative charge, which is twenty percent of the copyright fee for NWU members and twenty-five percent for non-members.²³

"Before the ink was dry on the agreement (with UnCover), we were busy organizing our members and the writing community at large over the *New York Times* decision to blacklist any freelancer who refuses to sign away all rights," The NWU explained in its newsletter.²⁴ "The union's members, many of whom make their living writing for magazines, are fighting this punitive all-rights contract. Having articles available through UnCover won't mean anything if the original print publisher owns the electronic rights. Of course, we expect the PRC option to leverage these rights for many writers and create the conditions for better deals. In the end, we don't care how writers get paid for extra uses of their works — by a publisher in a lump sum or by royalties from electronic distribution — just as long as they get paid."²⁵

The American Society of Journalists and

Authors (ASJA) has spearheaded a drive that has established an Author's Registry, a coalition of thirty writers' groups and ninety-five literary agencies, which is compiling a master referral list of writers and their works, and plans to parlay it into electronic rights deals. Muchnick (of NWU) said that while both PRC and the Author Registry have taken different approaches to "skinning this e-rights cat... both approaches have value." He explained, "If you look at the historical analogies in the music industry, you find there are literally dozens of companies involved in subsidiary rights at various levels; indeed, there are no fewer than five kinds of collective licensing organizations."²⁶

But so far, few publications have been willing to split past and future revenues for news-media and online sources with writers who create the material. One of them is *Harper's magazine*, which announced last January that it will use the Author's Registry to keep track of and disburse royalty payments. The magazine showed its good faith by sending checks totaling \$1,629.34 to literary agents Andrew Wylie and Lynn Nesbit. *Harper's* also said it planned to distribute \$2,500 in back payments by the end of this past February. These checks are for royalties for CD-ROM databases containing *Harper's* articles.²⁷ Sean McLaughlin, Vice-President at *Harper's* told *Publisher's Weekly* that "Our publisher is an author and cares about writers.

It's a business decision. If we support writers, we'll get the best writers."²⁸

In an interview with *Publishers Weekly*, Jonathan Tasini said that *Harper's* move was "a good but minor step," and explained, "Rick McArthur (*Harper's* publisher) is not the problem; he's on the board of the Author's Guild. We have to be realistic. We have to change the majority of big publishers."²⁹

Harper's move did encourage at least one magazine to change course. *Publishers Weekly* announced that it plans to use the Author's Registry to pay writers' back pay for the use of their material and that the magazine planned to establish a policy to pay royalties for the future use of articles in digitized form.³⁰

K-III, the publisher that owns *Seventeen*, *Automobile Magazine*, *New Women*, and *New York magazine*, among others, announced that it would pay \$30,000 retroactively to freelancers whose articles were downloaded online through IAC (Information Access Company) and UMI databases during 1993.³¹ The publisher terminated its contract with IAC and UMI in 1995. Craig Reynolds, K-III's circulation director, explained, "[A] number of our freelance writers have taken the position that such distribution did not show good faith towards writers. K-III has decided to pay in connection with IAC's online distribution of K-III magazines, and will follow suit for stories accessed via UMI."³²

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And so what does the war over electronic publishing rights mean for libraries? Jeri Van Goethem, head of the Acquisitions and Serials Department at the William R. Perkins Library, **Duke University**, who has followed the controversy, said, "All writers are entitled to financial return for their work, but unfortunately more dollars tend to go to intermediaries than to writers. Anything published in print and re-published electronically should provide the kinds of revenues for writers as would be obtained for any reprint, or second printing."³³ But she added, "If PRC is successful in obtaining copyright fees, the result for libraries will no doubt be higher charges for access and with additional surcharges added in for the publisher/vendor."³⁴

Some librarians don't expect the cost to go up tremendously. "Currently, the fees for electronic services are already so high a few more dollars won't hurt if writers are successful in getting electronic rights agreements," Holley explained.³⁵

Librarians interviewed by *Against the Grain* are also concerned that the increasing cost of repaying copyright holders is creating a trend detrimental to the interests of libraries: electronic access is becoming a license to view but not to keep. As Van Goethem explained, "We are paying large charges but have no rights for future control of the information. In databases of electronic journals, titles frequently disappear — as recently happened with *Science* in the UMI ProQuest databases. The backfile can no longer be accessed, even though we paid for the right to the entire file. So this is an unreliable method of providing information to the university community. I think we would be willing to pay copyright charges if we could then 'own' the data."³⁶

Ron Chepesiuk is Professor and Head of Special Collections, Dacus Library, Winthrop University, Rock Hill, SC. He is a contributing editor to *American Libraries* and Editor-In-Chief of *International Leads*, the international arm of ALA. His latest book is *Sixties Radicals, Then and Now: Candid Conversations with Those Who Moved an Era* (McFarland, 1995).

Linda P. Albright is Assistant Professor and Head of Acquisitions at the Dacus Library, Winthrop University.

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