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## Cases of Note -- Copyright: Technology Trumps Tasini

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now receive 95 years of copyright protection, so the society would need to seek permission of authors to place those articles online. For issues published between 1964 and 1977, renewal of copyright was automatic, and instead of 28 years, the renewal term is 67 years for a total of 95 years of protection. So permission is needed for these articles too. Based on the *Tasini* decision (*New York Times v. Tasini*, 533 U.S. 483 (2001)), any transfer to the publisher would have to have specifically transferred the electronic rights to the publisher for the publisher to own those rights. Thus, contacting the authors for permission is important. The difficulty, of course, is that many of them from the earlier years in this range probably are deceased or are very difficult to locate.

The best advice for the society is to try to locate the authors, post a notice on the society Website asking for authors to contact the publishing staff. Each article placed online for which the author has not been located should be noted along with a plea for anyone reading the article to help locate him or her.

**QUESTION:** *The E-learning division of a for-profit educational institution wants to use images of some standard workplace notifications such as one would see in a company cafeteria (dealing with workplace safety,*

*mandatory lunch breaks, etc.). The images would be used as a part of an instructional program. Is there a problem with using them if they came from an Equal Employment Opportunity Commission (EEOC) Website?*

**ANSWER:** While materials produced by the federal government are not eligible for copyright protection, government Websites also include copyrighted studies, etc., that were commissioned by the agency with outside contractors. If the photographs were taken by government employees within the scope of their employment, then they are copyright free. Although copyright notice is not required on works, often those commissioned studies and other works that appear on a government Website do contain a copyright notice, so this would be the first thing to check. If in doubt about the copyright status, the educational institution should contact the EEOC Webmaster and seek permission to use the photographs.

**QUESTION:** (1) *May a teacher scan and display a short story or poem in its entirety for students enrolled in a course in a nonprofit educational institution to read prior to an upcoming class session?* (2) *May that material — or any material posted in the course management system for*

*the course — be accessed at any time during the duration of the course other than during scheduled class sessions, i.e., can students review the material at any time prior to the end of the course?*

**ANSWER:** (1) Yes, if it is typically the amount of material that would be displayed to a class in a face-to-face situation. (The old put it on transparencies or slides idea). So, a book length poem, probably not, but a two page poem, yes. The same is true for a brief short story. If it is more than a few pages though, it likely would not be permissible under the *TEACH Act* but would be covered by section 107 fair use and should follow the *Guidelines on Multiple Copying for Classroom Use*. (2) Text materials placed in the course management system under fair use can be

accessed at any time, but performances and displays under the *TEACH Act*, no. For text materials such as articles, may remain in the course management system for only one semester, but there is no limit on downloading or retention. For performances and displays, there is no one semester limit, but student access must be limited to the “class session” and may not be downloaded. 



## Cases of Note — Copyright: Technology Trumps *Tasini*

by **Bruce Strauch** (The Citadel) <strauchb@citadel.edu>

*Jerry Greenburg v. National Geographic Society*, United States Court of Appeal for the Eleventh Circuit, 533 F.3d 1244; 2008 U.S. App. LEXIS 13832 (2008)

**National Geographic** is that colorful magazine lying in stacks in your grandmother’s attic that no one can ever bear to throw out. It’s been around since 1888 and the non-profit society now produces TV, computer software and other educational stuff.

In days of yore when I was in public school, bound volumes of it lined the shelves of the library, or if your school were really up to date, it was on microfiche. Now **The Complete National Geographic (CNG)** is on a thirty-disc CD-ROM set.

**Greenburg** is a freelance photographer irritated that he hadn’t been paid more money when his pictures were shifted to CD-ROM format. He sued, lost at the district court, appealed and got a new trial and a \$400,000 jury verdict. **Nat Geo** appealed again based on the intervening *Tasini* decision. *Tasini v. NY Times*, 533 U.S. 483 (2001).



### The Second Appeal

Before the *1976 Copyright Act*, free-lancers risked losing copyright if they assigned a publisher the right to include them in a collective work without a printed copyright notice in their names. Copyright was indivisible, and everything went to the publisher.

The *1976 Amendment* treated copyright as a bundle of exclusive rights. § 201(c) recognized copyright in the artistic creator and a separate copyright in the collected work extending only to the extent of the publisher’s creativity and not to “the preexisting material employed in the work.” *Tasini*, 533 U.S. at 493-94.

The publisher could reproduce free-lance photos (a) as part of the collective work, (2) in a revision of the collective work, or (3) a later collective work in the same series. *Id.* at 496. This of course is in the event the publisher did not oblige the artist to give over all rights including for any future invented format which is the post-*Tasini* standard.

**Greenburg** naturally saw the CNG CD-ROM as a new collective work, and **Nat Geo** saw it as either a revision or a later work in the same series.

### New or Revision?

A “collective work” is 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.” 17 U.S.C. § 101. It is an original work of authorship to the extent the publisher throws in some creativity in selection, coordination and arrangement of the materials. *Id.*

In *Tasini*, the *NY Times*, *Newsday* and *Sports Illustrated* put their articles in computer data bases owned by **LEXIS-NEXIS** and **UMI** without the consent of freelance authors one of whom was named **Tasini**.

The Supreme Court focused on whether the articles were pulled out of their original context and displayed in an isolated manner. *Tasini*, at 489. And indeed, the articles were not viewed as they originally were on the printed page. Pictures and ads were excised and the print formatting was lost. *Id.* at 490.

With individual articles removed from “the context provided either by the original periodical editions or by any revision of those editions,” the freelance work was not “part of” the original compilation or a “revision” of it. *Id.* at 499-500.

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A revision must necessarily have some element of newness, but the context of the new presentation must be looked at to see if it goes beyond what is allowed under § 201(c).

*So it can be revised, but not too much.*

Microforms contain a continuous reproduction of the original work miniaturized on film. The article is there; it's just tiny. The user working that dreadful machine can focus on only one article and ignore ads and other stuff, but it's still all there. *Id.* at 501-02.

### What About CNG?

CNG is analogous to microfilm and microfiche. The original page is right there on the CD-ROM. You look at two pages at a time with the fold right in the middle and page numbers at the lower outside corners. And of course it's in the same glorious color. The **Greenburg** photos are still embedded in the original context.

In the **Tasini** databases, a user could search for an article in an index, but once found, he could not flip to the next article. In **CNG**, you are browsing the original magazine.

Clutching at straws, **Greenburg** argued that new stuff had been added. Too much new stuff.

The Eleventh Circuit said the twenty-five second introductory montage does not wreck the original context of 1,200 precisely reproduced issues of the magazine. They analogized to putting a new cover on an encyclopedia and leaving the articles intact. If a new index, table of contents or foreword made it into a new work, there would be no such thing as a revision.

Likewise, a search function and zoom capacity are well within § 201(c)'s permissive area. A search function is a new version of the traditional index. Rather than look through the index for "global warming" and the list of pages strung out afterwards, the user hits "global warming" and the program retrieves it for him. And zooming in is no different from using a magnifying glass.

The doctrine of media neutrality is found in the **Copyright Act** with broad language allowing you to copyright anything fixed in a tangible medium of expression, "now known or later developed." 17 U.S.C. § 102(a). Thus, an exact digital reproduction of a print magazine cannot be a new collective work. A publisher can reprint in Braille or a foreign language and fall within the revision provision. One creates a new work by adding too much new material.

The issue will always turn on contextual fidelity to the original print publication. 🌲



## The AEA is launching four new peer-reviewed journals in 2009:

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## Rumors from page 44

After a century of continuous publication, **The Christian Science Monitor** will abandon its weekday print edition and appear online only. The paper is currently published Monday through Friday, and will move to online only in April, although it will also introduce a weekend magazine. **John Yemma**, **The Monitor's** editor, said that moving to a Web focus will mean it can keep its eight foreign bureaus open. Despite its reputation, the **Monitor's** circulation had slipped to 52,000

from 220,000 in 1970. Under the new system, reporters will file stories to the Web and update them several times a day plus write longer pieces for the weekend magazine. "We certainly know that newsmagazines are cratering," **Mr. Yemma** says. "We're under no illusions about it being a growth vehicle." See "Christian Science Paper to End Daily Print Edition," by **Stephanie Clifford**, **The New York Times**, October 29, 2008. [www.against-the-grain.com/rumors](http://www.against-the-grain.com/rumors)  
<http://www.nytimes.com/2008/10/29/business/media/29paper.html?hp>

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