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The Impact of Tasini: Foreword

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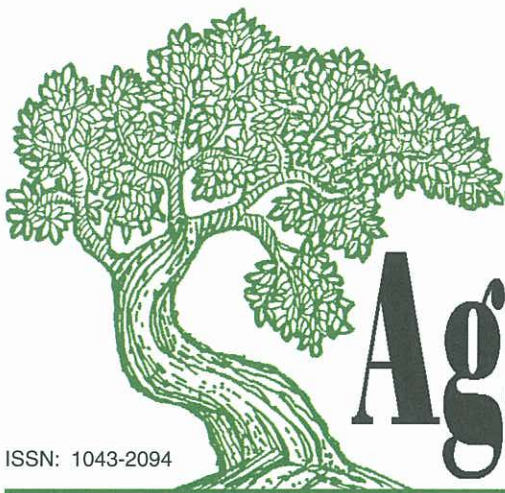
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Against the Grain

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TM

FEBRUARY 2002

Against the Grain

“Linking Publishers, Vendors and Librarians”

ATG Special Report — The Tasini Case

The Impact of Tasini: Foreword

by **Kent Mulliner** (Collection Development Coordinator, Ohio University Libraries, Athens, OH 45701-2978; Phone: 740-593-2707; Fax: 740-593-2708) <mulliner@ohio.edu>
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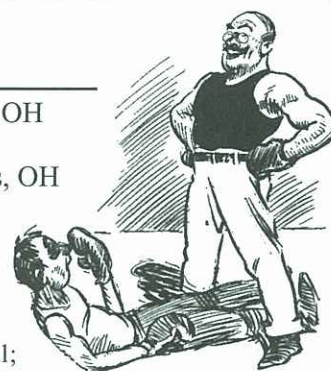
“Content is king,” was a mantra of the 1990s but only in the first year of this century did we begin to understand what that means, with the *Tasini et al.* decision. In brief, the court said that absent other factors, such as work-for-hire, content belongs to the creator. But the court also remanded the case back to the Federal District Court to decide remedial issues. For authors, publishers/distributors, and librarians, we have a landmark case that has yet to run its course.

Even in this interim situation, we sought to explore what the case may mean for cre-

ators of content, distributors, and, most importantly from our perspective, users. While it is premature to form firm conclusions, we sought a variety of perspectives on our fundamental question, “what is the impact of *Tasini*?” Those willing to venture “where angels fear to tread” include **Laura Gasaway**, every librarian’s favorite guru of copyright from the University of North Carolina; **Prue Adler** and **Miriam M. Nisbet** of ARL and ALA, organizations that combined in submitting an *amicus curiae* to the Supreme Court; **Mike Bradley**, a member of the National Writ-

ers Union and an officer of an NWU local;

Rick Anderson, Director of Resource Acquisition at the University of Nevada Reno Library, with a sympathetic yet cynical librarian’s view as one who will be dealing with fallout from the case for years to come; and **Ward Shaw**, who found



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If Rumors Were Horses

I begin with an apology. The *Against the Grain* renewal invoice which went out this year (and last, so I have to double apologize) said: “We are concerned that you had a subscription to *Against the Grain* last year and have yet to renew for 2002. Was this an oversight?” This implies that you had already received one invoice and this was your second. That was not the case. Mea culpa. Sometimes here at *ATG World Headquarters* the help runs amok. That’s my story and I’m sticking to it. Sorry. Sorry. Sorry.

Another apology. **Michael Young** <youngm@albany.edu> writes that in his haste to get out the piece about the **Charleston Conference** for January 2002 *ATG*, he overlooked an error, viz., he described NERL as the “New England Research Libraries consortium” when in fact it is the **Northeast Research Libraries consortium**. When your

slack editor didn’t fix this, **Ann Okerson** called us on it! Whew! Thanks, Ann!

I remember when I first moved to Charleston, a **Citadel** group of women had a murder mystery night which was great fun. Well, a few weeks ago, **Barbara** and **Norm Desmarais** <normd@providence.edu> went to a murder mystery at the library! The other week, there was an article about it “Who Done It?” in the *Providence Journal* (Providence, R.I.) (Blackstone Valley Edition), Jan 31, 2002 by **Patricia A. Russell** with a picture of Norm and other participants on the front page of the local news section. **Melanie Zanella** (electronic resource librarian at the **Lincoln Public Library**)



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The Impact of *Tasini*: Forward from page 1

himself the reluctant forerunner and defendant in *Ryan vs. Carl Corp.* His conclusion, that the “case will provide little, if any, benefit to either authors or readers” provides a suitably cautionary note to the ongoing process. We also sought a submission from LexisNexis; the fruit of our labor is found in the interview with the Corporate Counsel that appears elsewhere in this issue, see p.30.

One ramification of the legal process in *Tasini* is that it creates a subclass of inverse notch authors.* Since *Tasini* was filed in 1993, large and knowledgeable publishers have included electronic reproduction rights as standard contract language. Therefore, the primary beneficiaries of the settlement or decision will be articles published between 1978, when the copyright law was revised to extend authors’ rights, and circa 1993. It also makes freelanced articles published during that period as most endangered in the future electronic record (removal being one strategy for publishers or aggregators). For example, the *LexisNexis Academic Universe* reports that articles from *San Diego Union-Tribune*

prior to January 1, 2000, were removed temporarily at the publisher’s request. If and when earlier issues are returned, likely sans freelance articles covered by *Tasini*, our knowledge base will have diminished.

As the various litigants wait to see how the lower Federal courts will handle the issues remanded to it, librarians (who have largely been on the sidelines in the case) have their own set of issues to ponder. For example, in the wake of *Tasini*, many of us are concerned with the impact on such basic library functions as the preparation of course reserves and the loaning of materials through interlibrary loan, to say nothing of digitization projects. A key consideration is whether or not materials copied or loaned or digitized are part of an existing collective work, such as the work of various photographers or an essay from a work with several contributors. If so, then it likely falls within the parameters of *Tasini*, and the librarian handling the materials may well have to deal

with two separate copyright holders unless, of course, the materials do not otherwise fall within the public domain or provisions for fair use. As a practical matter, publishers and aggregators will likely still serve as intermediaries, as it were, for copyright issues, but the products those publishers offer for library use may well change over time.

This brings us to the major concerns of librarians in the wake of *Tasini*. What sort of products can we look forward to from database vendors in the future? And what will they cost? In *Tasini*, the Supreme Court urged the parties to enter into agreements that allowed for the continuation of electronic publication of freelance work. If these types of agreements become reality, we may expect increased prices for online products. Database vendors will argue that royalties paid under a post-*Tasini* framework increase the costs of maintaining and distributing their products, with a subsequent need to pass on the cost to their customers. Will librarians pay these increased costs? Or, alternatively, will *Tasini* result in the flowering of competition, as new online providers sense the presence of freelance writers eager to continue the publication of copyrighted works in alterna-

tive venues? Readers can use past experience to gauge the likely outcome.

And remember that *Tasini* is not the only decision. Justice Ginsburg’s majority opinion, emphasized that the fact that the articles were individually stored and retrievable (rather than as complete page[s]) was crucial, yet in October, the Court declined to hear *Greenburg v. National Geographic* (see below). In that case, the 11th Circuit Court of Appeals ruled in favor of the photographer Greenburg even though the National Geographic CD-ROM did consist largely of page images, keeping each page complete and in context. That ruling made much of the fact that the National Geographic CD-ROM included software that was in itself copyrightable. Interestingly, National Geographic made an animated montage (including a Greenburg photograph) to spice up the CD-ROM, and the Court cited this as proving that the CD-ROM was not simply a revision of the original collected work. Also intriguing is the July 2001 Federal District Court decision refusing an injunction sought by Random House against Rosetta Books. Here the court reasoned that contracts in which an author conveys the rights to “print, publish and sell the work[s] in book form” does not cover e-books—thus opening new sales opportunities for authors and publishers (and raising question about existing e-book activities by publishers and aggregators). While *Tasini* continues to reverberate and equally explosive decisions are on the horizon, we can be happy that we live in interesting times. 🐼

Citations and Further Reading

*After the social security “notch babies,” for those born between 1917 and 1926 who receive lower payments, because of the way the law was written, than if they had been born earlier or later.

New York Times Co., Inc., et al. v. Tasini et al. Alternative archive source for *Tasini* decision <http://supct.law.cornell.edu/supct/html/00-201.ZO.html>.

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