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TASINI: Did Authors Win?

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When the United States Supreme Court handed down its decision in *New York Times v. Tasini*¹ on June 25, 2001, it ended more than eight years of litigation. Six freelance writers had sued the *New York Times*, *Time Warner* and other publishers over the electronic rights to their articles that had originally been published in printed newspapers and magazines. Publishers made these articles available through various online databases such as **LexisNexis** and **New York Times Online** and on **General Periodicals OnDisc** and other similar CD-ROM products.

When freelance writers signed agreements with publishers to include their articles in print journals and newspapers, republication of the articles in an electronic database was not mentioned in the agreements. Full-text databases of journal articles were not envisioned at the time, so it is not unusual that copyright transfers were silent about electronic rights.

The district court held for the publishers² and the writers appealed to the Second Circuit Court of Appeals.³ The Second Circuit reversed, upholding the writers' claims. Publishers then appealed to the U.S. Supreme Court. In a seven-two decision the Supreme Court agreed with the Second Circuit and held for the writers.

Under the 1976 Copyright Act, copyright belongs to the author. The author may transfer the entire copyright to a publisher or only certain of the exclusive rights. In order for a publisher to publish an article, at a minimum, the author must transfer the reproduction and distribution rights to include the work in the journal or newspaper issue. Since 1995, newspaper and magazine publishers have required that all transfers of reproduction and distribution rights also include the electronic rights. Thus, the case dealt only with freelance articles published in print publications before 1995 and later incorporated into online databases by the publishers.

Newspapers and journals are collective works in which separately copyrighted articles are published as a collection. Two copyrights are involved, the first in the individual article, and in *Tasini*, the authors had registered the copyrights in their individual articles before the rights were trans-

ferred. The second copyright is in the collective works such as the journal issue, and that copyright is held by the publisher. According to the Supreme Court, any right not specifically transferred to a publisher now belongs to the author which means that the electronic rights remain with the author since they were not mentioned in the transfer agreement.

The issue on appeal was whether incorporation of articles by freelance authors into online databases, i.e., reproducing them into the database, constituted a permissible revision under § 201(c) of the Copyright Act. The statute states that in the absence of an express transfer of copyright or one of the rights under it, the owner of the copyright in the collective work is "presumed to have acquired only the privilege of reproducing and distributing the contribution as a part of that particular collective work, any revision of that collective work, and any later collective work in the same series." Publishers maintained that the inclusion in a database of these articles that had appeared in print issues was such a permissible revision. The Court's majority disagreed stating that such an encompassing construction of this section of the Act would diminish the authors' exclusive rights in their articles.

Publishers argued that microform reproductions of journals were privileged revisions and that electronic databases were no different. They believed that "revisions" should be media neutral, and thus a database was the same as a microform version of a printed journal. The Court accepted the classification of microform reproductions as privileged because they look just like the printed editions, including all advertising, headlines, etc., and articles appear in the same order. The majority did not agree, however, that databases were the equivalent of microforms since the articles do not appear as an "issue." It found that a database is an entirely new compendium. The fact that users of the databases can via a search generate a "revision" was not persuasive; instead, the Court framed the issue as whether the database itself presents the author's contribution as part of a revision of the collective work.

Justice Stevens authored a strong dissent joined by **Justice Bryer**. The dissent basically disagreed with the majority. Under the theory of media neutrality, when a publisher reproduces a collection of articles

as ASCII files, it should be treated as a revision of the original text as long as each article refers to the original collection such as the volume, page number and date of the publication, according to the dissent. True, page placement, column width and other such superficial features are lost but the important editorial selection is wholly preserved. Further, the dissent found that nothing the database does to the files transmitted from the publisher strips it of its status as a revision. More importantly, Justice Stevens indicated that the policies underlying copyright and the reasons for its existence make it wrong for the majority to reject this reading of the statute.

Publishers alleged that if the case were decided in favor of the freelance writers, they would be forced to excise these articles from their databases. The majority stated that although this was possible, "speculation about future harms is no basis ... to shrink authorial rights" The dissent noted, however, that this decision, which seems to favor authors, could actually result in publishers requiring complete transfer of the entire copyright before it would accept freelance articles for publication, and that would put authors back in the same undesirable place they had been before passage of the 1976 Act.

Concern over deletion of articles from full-text databases has been warranted. Immediately following the decision in favor of freelance writers, the *New York Times*, announced that it would delete 115,000 freelance works, dated from 1980-95, from its own and other databases. The *Times* ran newspaper ads and created a Website for freelancers which contained the information that their works would be removed. If, however, the author would agree to forfeit all "past, present and future copyright infringement claims" against the *Times*, it would restore the freelance works to the database. This would constitute a waiver of the writers' rights to compensation for inclusion of their articles in the database.

In response to the *Times*' actions, on July 3, 2001, the **Authors Guild** filed a class action suit on behalf of 15,000 writers alleging that the *Times* violated the rights of freelance writers as determined in *Tasini* and asked for damages and injunctive relief. Other suits were filed against **Dow Jones Reuters**, **LexisNexis**, **Westlaw**, **DIALOG** and **ProQuest** accusing them of system-

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atic copyright infringement for failure to compensate freelance writers for their articles that were included in the publishers' databases from 1978-95. *Tasini*, of the National Writers Union, estimated that writers would be owed billions of dollars, but attorneys for the databases stated that damages would be minimal. In a more conciliatory statement, *Tasini* also called for negotiations toward a settlement and a licensing system now that liability has been established.

On July 27 the Authors Guild reached agreement with the *Times* regarding its planned removal of articles by freelance authors from its databases unless such authors waived their rights to compensation. The *Times* has agreed to cease its advertising campaign and to provide information to freelancers about the class action lawsuit on its Webpage and in written materi-

als that are being mailed. In return, attorneys for the Authors Guild agreed to withhold a motion for a temporary restraining order requiring the *Times* to cease its advertising campaign and remove the website. Members of the Guild stated that this was an important first step to an overall settlement of the claims of freelance authors against database publishers. It also recognized the importance of ensuring that the database remains complete while authors receive fair fees for electronic uses of those articles.

Additional settlement of claims will depend on the class action suit or on subsequent negotiations between publishers and freelance writers. Although the American Library Association and the Association of Research Libraries filed an amicus curiae brief on the side of authors, librarians clearly have an interest in the completeness of databases of magazine and newspaper articles.⁴ If the result of *Tasini* is that articles by freelance writers are ultimately removed from electronic databases, then

the public and libraries will be seriously disadvantaged. If settlement proves too complicated or difficult to achieve, then the quality of the databases on which librarians and library users depend will be compromised since articles by freelance writers prior to 1995 will be excised. Libraries that eliminated back runs of printed journals and newspapers in reliance on electronic access may find that this decision comes back to haunt them and their users. 🐼

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Endnotes

1. 121 S. Ct. 2381 (2001).
2. 972 F. Supp. 804 (S.D.N.Y. 1997).
3. 192 F.3d 356 (2d Cir. 1999).
4. SLA and several other library associations elected not to join in this brief but to remain neutral. SLA specifically hoped for a settlement among the parties.

The Politics of Librarianship and the Tasini Case

by **Rick Anderson** (Director of Resource Acquisition, University of Nevada, Reno Libraries, Reno, Nevada) <rickand@unr.edu>

From the time **Jonathan Tasini** and the **National Writers Union** filed their case against the *New York Times* et al., I have watched both the case itself and the library profession's reaction to it with great interest. Not only did the case present interesting legal questions and problems of its own, but it also placed librarians in a difficult philosophical and political position.

The difficulty of that position arises from the fact that where the library profession speaks with a unified voice – mainly in pronouncements by the American Library Association (ALA) and, to a somewhat lesser degree, in the editorial pages of *Library Journal* and *American Libraries* – it has generally done so from a well-defined, politically liberal position. A quick glance at the ALA's official list of "Interests and Activities" (www.ala.org/work/) reveals an organization devoted to the pursuit of a distinctly left-leaning agenda: diversity, "lifelong learning for all people," equity of access, intellectual freedom and "21st century literacy" are all fundamental planks of the liberal political platform.

Now, most librarians don't acknowledge this political bias out loud. But most of us will, when pressed, agree that it is a good

thing, and my purpose here is not to dispute that; a tendency towards political liberalism is, frankly, as inevitable in librarianship as it is in the free press and in public education, both of which share with librarianship the essential goal of educating and informing the masses, a goal that is central to modern liberalism. I point out this tendency only to demonstrate the difficulty librarians faced in choosing a public position on the *Tasini* case.

A generally liberal stance doesn't usually pose knotty philosophical problems for librarians. For most of the issues we face, the politically appropriate response is fairly clear. When faced with questions about Internet filtering or with demands that controversial books be removed from our collections, our course is obvious: we join with those who champion intellectual freedom for all (regardless of age) and stand against those who would limit the free inquiry of our users. When a journal publisher imposes unreasonable price increases (boosting corporate profits at the public's expense), we make our voices heard, and we know just what to say. Taking these positions and sticking to them may be hard work, but figuring out what our position ought to be is not.

Tasini, however, placed librarians in a real quandary. In this case, two basic liberal positions came into conflict. First of all, in a dispute between little guys and big guys (especially corporate big guys), we usually take the side of the little guys. Second, where tension exists between the right of the public to have access to information and the right of some corporate or governmental body to restrict that access, we're generally supposed to take the side of the public. In the case of *Tasini*, you can't have it both ways: either you side with the little guys who want to restrict access to their work (or get paid more for it, which ends up amounting to the same thing) or you side with the big guys who want to be able to republish that work in a new, easily-distributed format without having to pay extra.

For the ALA, which acts as the public face and the lobbying body of the library profession, this meant a difficult choice when the *Tasini* case was filed. Would librarians take the side of freelance writers (most of whom are little guys – low-wage laborers who depend on corporate monoliths for their livelihoods) or would they take the side of the general public (which benefits when corporate monoliths are free

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