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The Politics of Librarianship and the Tasini Case

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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. 🐼

Laura N. Gasaway © 2001

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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to include freelancers' material in their online offerings)? If the trump card is access, then librarians should unite against *Tasini* and the National Writers' Union — no reasonable argument could hold that a *Tasini* victory would mean greater public access to information. If the trump card is workers' rights, then librarians should unite against the *New York Times*.

What to do? The ALA's Washington office reports that while the suit was being heard in the lower courts, "having interests on both sides of the case, and having been approached by the lawyers of each side, ALA and ARL [Association of Research Libraries] chose to remain neutral."¹ But when the case found its way to the Supreme Court, neutrality was no longer feasible; given the potentially significant impact of a ruling in either direction, the library profession needed to make its voice heard. "After much discussion," says the ALA, "both [the ALA and ARL] boards decided that support for the freelance writers was consonant with association principles and positions."²

This position is worth examining. A decision in favor of *Tasini* would almost certainly have the ultimate effect of reducing the amount of information available to the public, as newspapers and online databases scrambled to ensure compliance. It also represents a strengthening of authors' rights under copyright law — not a goal that is generally at the top of the ALA's legislative agenda. Recognizing this paradox, ALA explains this way:

The library community believes that copyright exists for the public good. Its fundamental purpose, according to the ARL Statement of Principles on Intellectual Property, "is to serve the public interest by encouraging the advancement of knowledge through a system of exclusive but limited rights for authors and copyrights owners." ARL and ALA support the right of an author to decide whether to retain, modify, or assign copyright on a piece that he or she has created. Libraries also recognize and respect the public interest in having access to the work produced by the freelancers.³

In other words, the ALA sided with *Tasini* on the grounds that it is an author's right to decide whether or not to reassign copyright in his or her work. But this statement ignores the basic premise of the *Tasini* case — the legal question was not whether an author has the right to reassign copyright in his own work (that right is clearly established in current law and precedent).

The question was whether, having sold to a publisher the right to publish a particular work in a print newspaper or magazine, the author retains the exclusive right to republish that work in an online database. The publishers argued that online publication amounted to an allowable "revision," while the writers argued that the version in a database constituted a "derivative work." For the Supreme Court justices, the argument seemed to hinge on the question of which work was being replicated in the database — the individual article or the newspaper or magazine.⁴

A decision in either direction would have been understandable. On the one hand, an article reproduced exactly in electronic format is clearly not a "derivative work," any more than a typed transcription of a magazine article is. Rather, it's the same work presented in a different format. On the other hand, a database of *New York Times* articles is equally clearly not just a re-creation of the *New York Times*. Rather, it's a database of articles, and is essentially granular in nature; the articles are presented as individual pieces of writing, completely divorced from the context of the specific newspaper issue in which they originally appeared. So the Court's 7-2 decision in favor of *Tasini*, while not uncontroversial, is also by no

means scandalous or especially surprising.

What remains to be seen now is whether the doomsday scenarios of the publishers will come to pass. At this writing, in November of 2001, there are scattered reports of content suddenly disappearing from online products, but nothing like the catastrophic outbreak of database leprosy that was predicted in some quarters. To a large degree, future problems have been circumvented by publishers' quick adoption (as soon as the *Tasini* suit was filed) of copyright agreements that require authors to assign all publication rights in all conceivable formats to the publisher in perpetuity.

As both a freelance writer and a librarian, I find myself neither thrilled nor especially dismayed by the verdict. The Supreme Court may have made its decision, but for me, the jury in the *Tasini* case is still out.

Endnotes

1. ALA Washington Office, "Libraries and the *Tasini* Case." <http://www.ala.org/washoff/tasinisupport.html>.
2. Ibid.
3. Ibid.
4. Reid, Calvin. *Publishers Weekly* v. 248 no14 (Apr. 2 2001) p. 10.

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