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Libraries Continue to Take on Copyright Challenges

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Filing *Tasini* Was the Signal Event

by **Mike Bradley** (Technical Writer and Member, Union Grievance Officer and Contract Advisor of National Writers Union Local 3, Oakland, California) <mbradley@techpubs.com>

That writers had to file *Tasini* may say more about the lawsuit than winning it does. It signaled, to those who hadn't already realized it, that publishers are no longer our friends. The defendants infringed the works of all writers alike, from amateurs and rookies to seasoned Pulitzer journalists and celebrities. No matter how wonderful our relationships with our editors and publishers, we became grist for their mill.

Winning the lawsuit won't make us friends again, but it will restore some balance to the relationship and encourage us to be more vigilant in our dealings with publishers. More vigilant than we really want to be. All of us want to believe in our publishers, mainly, I suppose, because handing over our writing to them is such an act of vulnerability that thinking otherwise is painful. You see it in new writers' eyes and hear it in their voices—the sometimes desperate, always hopeful, belief that the men and women who want to publish us are good-acting, thoughtful, reliable people.

The necessity of *Tasini* shows that not to be the case. Officers and members of the Writers Union and other writers' organizations had tried for years to make our case with the major publishers: "Pay us for using our work. We're more than willing to share in the risks of publishing in the new electronic media, just so long as we can share in the rewards." But in the offices of the huge corporations that dominate the publishing industry, the small pay-

ments that sharing would have required were seen as too great. In a decade of record profits, the leaders of the industry preferred to nickel-and-dime us to death. As in other industries, upper management's earnings increased exponentially while earnings on our level nose-dived. We've fallen so far behind the rate of inflation we've slipped into an alternate universe. Twenty years ago a \$10,000 advance on an average book was a good advance; it still is. A dollar/word is still a good rate, though it was considered a good rate twenty years ago, too. Simply put, freelance writing has become a lousy way to make a living.

The lesson of *Tasini* is that, while writing may still be a vocation, publishing is an industry, driven by the same relentless pursuit of profits that characterize so many of our industries. Did *Tasini* hasten the use of all-rights contracts at the *NY Times* and *Time Warner*? Maybe. By a month or two. Did *Tasini* drive a wedge between publishers and writers? Of course not. The publishers did.

Some years ago, I handled a grievance against Simon & Schuster involving a writer who'd been granted an extension on his book by his editor but failed to get it in writing. His contract required that all changes be in writing, so when the original deadline came and went, his book was cancelled and he was made to return the advance which, of course, he'd already

spent in order to work on the book. Who drove the wedge between this writer and his publisher? The writer? No. Did *Tasini* have anything to do with it? No. Did *Tasini* help heal the breach? No. Then what good is it?

This week I reviewed a contract for a Web site that calls itself an article broker but is really just a temp agency for freelancers. The agency takes all rights, gives the writer no control over subsequent sales of her articles or derivative works created from them, requires the writer to indemnify the agency for all costs of all actual or potential legal actions against the agency while limiting its own liability to the writer to what the writer earns for the article, and allows the agency to sell the contract to another agency while prohibiting the writer from doing the same. Who drove the wedge here? The writer? No. Did *Tasini* have anything to do with it? No. Did *Tasini* help heal the breach? No. Then what good is it?

What good is it that half a dozen writers or an entire class of writers may be paid for ten years' illegal use of their works?

For those writers, *Tasini* is simple justice. In the scale of things, especially after September 11, it's not world-shaking, but simple justice for simple wrongs isn't a bad thing. For other writers, especially periodi-

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"Change happens quite slowly, and events like *Tasini* mark our progress."

and **Miriam M. Nisbet** (Legislative Counsel, American Library Association, 1301 Pennsylvania Avenue NW, Suite 403, Washington, DC 20004; Phone: 202-628-8410; Fax: 202-628-8419) <mnnisbet@alawash.org>

Libraries Continue to Take on Copyright Challenges

by **Prudence S. Adler** (Associate Executive Director, Association of Research Libraries, 21 Dupont Circle, Suite 800, Washington, DC 20036; Phone: 202-296-2296; Fax: 202-872-0884) <prue@arl.org>

Over the last decade, the library community has been intensely focused on understanding the technological, economic, and social impacts of copyright and intellectual property issues in the networked environment. Driving the need for better understanding of copyright and intellectual property in the digital age, were legislative

initiatives such as the **Digital Millennium Copyright Act (DMCA)**, international activities such as World Intellectual Property Organization draft treaties on copyright and database protection, state-based efforts such as the **Uniform Commercial Information Transactions Act (UCITA)**, and a numerous court cases. These have domi-

nated the library community's policy agenda. Why? Because who owns content and what terms and conditions will control access to that content, determines in large part, the nature of library services in the years ahead.

Increasingly, library associations have

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participated through amicus briefs in a growing number of court cases concerning copyright and intellectual property to ensure that library interests are represented before the Court. For example, within the last year, the **Association of Research Libraries (ARL)** and the **American Library Association (ALA)** participated in amicus briefs regarding fair use, First Amendment issues, copyright term extension, public domain concerns, and the ability of educational institutions, libraries, and publishers to take advantage of new technologies under the Copyright Act.

One case, *The New York Times Inc. v. Tasini*, presented a challenge regarding how to balance competing interests within the library community. The case involved questions of fairness, equity, and a recognition of an author's rights to retain, modify, or assign copyright on a work he or she has created. Thus for the library associations, a critical objective of any discussion swirling around this contentious case was the need to balance the needs of long-term preservation, the nature and cost of access to information in commercial electronic databases, and the fairness of compensating an author for his or her work.

During the years the *Tasini* case was heard in the lower courts, **ARL** and **ALA** considered carefully what position each association should take. Having interests on both sides of the case, and having been approached by the lawyers of each side,

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cals writers, it means their work has value beyond the first sale. We've always said as much, but *Tasini* proves it, flat out, with the stamp of approval of the United States Supreme Court. While freelancers' rates won't shoot up overnight, writers' awareness of their value has been nourished. And that is *Tasini's* supreme value.

The lawsuit has been controversial. It was seen as being irrelevant in the face of all-rights contracts. Even within the union there were critics, and we have found, as the environmental movement has, that you can't organize around a lawsuit. But change doesn't happen quickly, even though it may seem to when we study history in school. Change happens quite slowly, and events like *Tasini* mark our progress. A decade or two from now we'll see *Tasini* as a step towards writers having achieved parity with other creative workers in being paid for every use of their work. The only thing standing in the way is our publishers.

ALA and **ARL** chose to remain neutral. Given this stance, key questions for many are why the library associations became engaged in the case before the U.S. Supreme Court and secondly, why did the Associations support the position of the freelance authors? In some respects, the need to present the library community perspective became abundantly clear after reading several of the filings by publishing interests. It was important to not only address key library issues in the case but to also correct inaccurate information contained in numerous briefs. A number of other organizations and individuals also weighed in; many in support of publishers, some in support of freelance authors. For example, an amicus brief filed by **Kenneth Burns** and others presented one perspective in support of the *New York Times* whereas another amicus brief filed by other historians including **Stanley Katz** refuted the *Burns et al.* brief and supported the freelance authors.

After much discussion, it was decided that support for the freelance writers was consonant with the Associations' principles and positions. **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. The "friend of the court" brief presented the library perspective to the U.S. Supreme Court concerning the practical effects of the issues at stake in the case. The brief refuted a number of inaccurate claims and offered constructive ways to balance the rights of freelance authors, commercial electronic database producers, publishers, and the public.

The library community believes that copyright exists for the public good. Copyright's 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 copyright owners." This principle, constitutionally-based and developed over the last two hundred years, provides the framework for libraries and educational institutions to create and disseminate knowledge and information.

On June 25, 2001, the U.S. Supreme Court issued its decision in the case of *The New York Times v. Tasini*. In a decisive 7-2 ruling, the Justices upheld an appeals court ruling that the reuse of a freelance author's work on CD-ROMs and in commercial electronic databases without the author's permission constituted copyright infringement.

The Supreme Court rejected the publishers' argument that a ruling for the authors would have "devastating" consequences. In arguing the case, the publishers claimed that they would be forced to de-

lete articles by freelance writers in their databases, and that it would not be feasible to remunerate the authors due to the large number of works involved as well as the expense of locating these contributors. Unfortunately, some of the publishers are continuing to take this position in the wake of the Court's decision. It should be noted, however, that there are financial implications for the publishers regardless of whether they choose to track and delete articles by freelancers or if they decide to locate and reimburse these authors.

The Supreme Court explicitly noted in its opinion that deletion of the freelance writers' articles was not necessarily the only outcome and that publishers could explore other alternatives. The Justices pointed out that there are "numerous models for distributing copyrighted works and remunerating authors for their distribution" such as the system of blanket performance licenses for musical compositions.

The impact of the Court's ruling will be primarily on older works that currently reside in commercial electronic databases such as LexisNexis. Publications such as *The New York Times* now require permission for electronic republication of works by freelance authors, but this was not standard industry practice until fairly recently.

Implicit in the Supreme Court's decision was the recognition that the nation's libraries and archives continue to provide access to the historical record of periodicals and newspapers. The Court's ruling recognized that certain archival media, such as microfilm and microfiche, do not infringe freelance authors' copyrights. There is no getting around that such media do not offer the ease and convenience of searching that electronic databases provide. However, the historical record will continue to be available to researchers and the public, an overriding concern of **ARL** and **ALA**.

In a related case, **ARL** and **ALA**, with the **American Association of Law Libraries (AALL)**, and the **Medical Library Association (MLA)**, jointly filed an amicus brief in a related case, *Greenberg v. National Geographic Society*. The library associations filed an amicus brief before the Supreme Court due to concerns that a decision of the Eleventh Circuit could hinder the use of digital technologies. The Eleventh Circuit appeals court held that **National Geographic** was not permitted to reproduce and distribute, through a CD-ROM compilation, the copyrighted photographs of freelance photographers that had appeared in the original issues of the magazine. The Copyright Act is "media-neutral," and libraries believe that it should allow publishers to take advantage of new technologies to preserve and distribute creative works to the public.

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ALA, ARL, AALL, and MLA view the CD-ROM of the *National Geographic* magazine as no different than if a microfilm version of the magazine had been made. Copyright protection extends to works in any tangible medium of expression. The original collective works that are reproduced in digital facsimiles constitute a permissible revision and are not themselves changed by the transformation from paper to the CD-ROM version. In this case, the photographs at issue appear in the CD-ROM version in the exact positions (along with text and advertising) in which they appeared in the original print version of the magazine.

Libraries support the right of scholars and researchers to combine pre-existing works with the necessary software to provide a searching capability. Under the Eleventh Circuit's decision, CD-ROMs or digital technologies that require the addition of such software could arguably not qualify as a permissible revision. Unfortunately, the Court declined to hear the case.

The library associations will continue to participate in copyright and intellectual property debates in multiple venues to ensure that library interests are represented and importantly, to promote balanced intellectual property regimes that support research and education as well as the interests of the owners of intellectual property.

Tasini v. New York Times

by Ward Shaw <wshaw@carl.org>

Effects and Predictions

Predicting the future is a dangerous undertaking. There are too many ways to go wrong, and only one to go right. Predictions can be wrong in substance, timing, effect, attribution, and any number of other ways, and people who believe otherwise from the predictor will always be available in numbers to point them out. I do not believe I have ever been right in past predictions, so the reader should keep that in mind. It is particularly difficult to look forward in an area as confused as copyright, publishing, information technology, law, economics, and human

behavior. But, those are the subjects directly affected by the Supreme Court's decision in *Tasini v. NYT*.

The decision, when taken together with several other cases recently tried, settled, or still in progress, suggests that the courts are generally sympathetic with the rights of authors when they conflict with those of publishers, and also and more problematically, when they conflict with the rights and desires of readers. This derives, properly, from the careful reading and interpretation of the various copyright laws, and is probably reasonable given those laws. One thing that is very clear is that we amateurs (authors, readers, publishers, librarians, etc.) are not competent to say what copyright is or does, and do so at our peril. During the early *Ryan v. Carl* hearings, a Federal Judge told me emphatically "You don't know what copyright is until I tell you what it is!" – and believe me, in the formal and powerful atmosphere of a Federal Court, I got the message.

There are some things we can observe with certainty, because they are already

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