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Legally Speaking-Copyright, Tasini and our new realtiy

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the two years still runs from when the first one hit the shelves of Barnes & Noble.

Forged Signature

Remember that in 1992 Cusano was no longer in the band but co-authored three songs for "Revenge." He claimed his old buddies attached a photocopy of his signature to an assignment to them.

The district court had a forensic examiner go over the assignment agreement and ordered Cusano to get a handwriting analysis from a neutral examiner. Cusano didn't get around to doing this, so the district court dismissed this claim. Then Cusano came up with an unsigned "Revenge" agreement completely different from the one with his signature. But no handwriting analysis report.

The appellate court agreed that Cusano inexcusably neglected to comply with a scheduling order — the method by which courts move the suits along and get to a conclusion. Otherwise there would be endless foot-dragging and delay by both lawyers and clients.

Rock On

And KISS rocks on. At *frankkiss.com*, you can buy boxer shorts, art, books, 'zines, a "love gun", and 3D action figures. A KISS camera modeled on Gene's face with a tongue that flicked when you snapped a photo — much to our regret — never made it into production.

Legally Speaking — Copyright, Tasini, and our new reality

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Back in April, I wrote about the *Tasini* case,¹ which was being heard by the U.S. Supreme Court.² Since that time, the Supreme Court has ruled in favor of the authors, and many of us are asking what this really means for the library world. Now that we have had a few months of experience with the new reality of *Tasini*, I thought that it was time to revisit the issue.

The 7-2 decision in the case of *New York Times v. Tasini* was delivered by Justice Ginsburg. The dissent came from Justice Stevens, who was joined by Justice Breyer. According to the majority opinion, inclusion of a work within a database does not constitute a medium-neutral compilation, but rather a re-publication of the work. In order to decide how databases fall under the law, the justices took a look at how the end user sees the information.

The case of the publishers rested in part on a provision in the copyright law that states that copyright in original works does not depend on the format of the works.³ The analogy which was used by the publishers was that of microfilm and microfiche, which have been popular methods of preserving newspapers and magazines since the 1930s.⁴ The Court did not buy this argument.

According to the decision:

We find the analogy wanting. Microforms typically contain continuous photographic reproductions of a periodical in the medium of

miniaturized film. Accordingly, articles appear on the microforms, written very small, in precisely the position in which the articles appeared in the newspaper. The *Times*, for example, printed the beginning of *Blakely's* "Remembering Jane" article on page 26 of the *Maga-*

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zine in the September 23, 1990, edition; the microfilm version of the *Times* reproduces that same article on film in the very same position, within a film reproduction of the entire *Magazine*, in turn within a reproduction of the entire September 23, 1990, edition. True, the microfilm roll contains multiple editions, and the microfilm user can adjust the machine lens to focus only on the article, to the exclusion of surrounding material. Nonetheless, the user first encounters the article in context. In the databases, by contrast, the articles appear disconnected from their original context. In NEXIS and NYTO, the user sees the Jane article apart even from the remainder of page 26. In GPO, the user sees the article within the context of page 26, but clear of the context of page 25 or page 27, the rest of the *Magazine*, or the remainder of the day's newspaper. In short, unlike microforms, the databases do not perceptibly reproduce articles as part of the collective work to which the author contributed or as part of any revision thereof.⁵

The court went on to compare the databases to an imaginary library.⁶ In this library, "[r]ather than maintaining intact editions of periodicals, the library would contain separate copies of each article. . . . The library would store the folders containing the articles in a file room, indexed based on diverse criteria, and containing articles from vast numbers of editions. In response to patron requests, an inhumanly speedy librarian would search the room and provide copies of the articles matching patron-specified criteria."⁷ According to the Court:

Viewing this strange library, one could not, consistent with ordinary English usage, characterize the articles as part of a revision of the editions in which the articles first appeared. In substance, however, the databases differ from the file room only to the extent they aggregate articles in electronic packages (the LEXIS/NEXIS central discs or UMI CD-ROMs), while the file room stores articles in spatially separate files. The crucial fact is that the databases, like the hypothetical library, store and retrieve articles separately within a vast domain of diverse texts. Such a storage and retrieval system effectively overrides the Authors' exclusive right to control the individual reproduction and distribution of each article, 17 U.S.C. 106(1), (3). Cf. *Ryan v. Carl Corp.*, 23 F.Supp. 2d 1146 (ND Cal. 1998) (holding copy shop in violation of 201(c)).

The Court effectively found that when the works were entered into a database, they were taken out of the context of their original publication and constituted unauthorized copies. The fact that one criteria of retrieval was the name of the publication was found not to be relevant.⁸

So now that the authors have won their case, what happens? Are we left with gaping holes in the electronic history of time, as the

publishers have suggested?⁹ According to the Amicus brief filed by **Advance Publications, Inc.**, this decision will have devastating effects, causing publishers to remove freelance articles from their databases.¹⁰ **Advance Publications** also noted that "The modest phrase 'freelance contributions,' moreover, covers a large territory: for newspapers, for example, it extends past such traditional 'freelance' works as travel pieces and book reviews to news stories sent in by stringers, letters to the editor, Op-ed pieces and other articles sent in 'over the transom' by political officials and public spirited citizens, among others."¹¹

On the other hand, the **American Library Association** and the **Association of Research Libraries** stated that the publisher's claims of harm to our historical record were overblown.¹² The **ALA/ALL** brief states that:

"As applied to Petitioners' products, the terms 'electronic libraries' and 'electronic archives' are misnomers. Despite the utility and wide availability of commercial electronic databases, they are collections of information designed to meet particular market demands and do not fulfill the traditional roles of libraries and archives. Further, access restrictions and licensing practices of many commercial electronic database publishers are designed to limit access to digital copies of works. These restrictions perpetuate a system of payment by end-users of ongoing subscription fees and/or 'pay per use' fees to obtain access to works, often to the detriment of legitimate fair use and archival concerns."¹³

So now we have had several months of that "Brave New World." Has the earth shifted, history disappeared, and the past been deleted? Not really.

The practical effect of *Tasini* has been that some articles are not available electronically now. Is this a change? Not really, since many articles were not available electronically before. In contrast to students who think that everything is available for free on the Internet, librarians know that databases do not replace the collections of a library. Most databases only go back to the early 1990s or the late 1980s for the very practical reason that computers were not in wide use before that time.

An additional problem with database coverage has always been the selective nature of coverage. "Full-text" coverage of a journal in a database does not really mean full text cover-to-cover. Often it means selected full text. One missing item that historians and genealogical researchers lament are the paid obituary notices. To find these items, you must look at the paper or the microform. And what about "travel pieces and book reviews[,] news stories sent in by stringers, letters to the editor, Op-ed pieces and other articles sent in 'over the transom' by political officials and public spirited citizens, among others."¹⁴ Have these items disappeared from databases? In most cases, they were never included in the databases to begin with, making irrelevant their free-lance status under *Tasini*.

In addition to selection of text, sometimes a journal will be included in a database for a while, but if the contract is not renewed that journal will no longer be included. This means that sometimes articles will just "disappear" from the database. These "disappearances" have nothing to do with *Tasini*; rather, this has been going on since the electronic database industry began taking off in the late 1980s and early 1990s.

The results of the *Tasini* decision have been felt mostly in those databases where the years of coverage were reduced. For example, one vendor used to provide access to a local paper from 1988 to the present. Now they only provide access to the paper from 1999 to the present. However, the subscribing library can deal with this issue through reference work with patrons, by letting them know that they must use the microfilm version of the paper for articles prior to 1999.

So has *Tasini* removed our history? No, it hasn't! Good research techniques require the use of databases, print indexes, library catalogs, books, journals, and microform items. Other types of research involve the use of archival records, manuscripts, letters, etc. The real answer to the legacy of *Tasini* is that we must work to educate patrons to the reality of good research, through the use of a combination of materials. And that is a challenge which librarians must accept.

Endnotes

1. *New York Times v. Tasini*, U.S., 121 S.Ct. 2381 (2001).
2. "Legally Speaking-Databases, *Tasini* and the Information Age," *Against the Grain*, April 2001.
3. See 17 U.S.C. 102(a).
4. *Tasini* at 2383; quoting Brief for Petitioner 23, *New York Times v. Tasini*, U.S., 121 S.Ct. 2381 (2001).
5. *id.*
6. *Tasini* at 2392.
7. *Tasini* at 2392.
8. *Tasini* at 2383.
9. *Tasini* at 2384. See Also, Brief for Petitioner at 23, Amicus Curiae Brief from Advance Publishers 5, Amici Curiae Brief of Ken Burns, Doris Kearns Goodwin, Richard N. Goodwin, David M. Kennedy, David McCullough, Jack N. Rakove and Gordon S. Wood in support of Petitioners 11-14; Brief of Amicus Curiae of the National Geographic Society in Support of Petitioners; *New York Times v. Tasini*, U.S., 121 S.Ct. 2381 (2001).
10. Brief for Petitioner at 23, *New York Times v. Tasini*, U.S., 121 S.Ct. 2381 (2001).
11. *id.*
12. Brief Amici Curiae of the American Library Association and The Association of Research Libraries in Support of Respondents at 3, *New York Times v. Tasini*, U.S., 121 S.Ct. 2381 (2001).
13. *id.* at 6. See also, Brief Amici Curiae of Ellen Schrecker, Stanley N. Katz, David Montgomery, Linda Gordon, Leon F. Litwack, Blanche Wiesen Cook, Pete Daniel, Marilyn B. Young, Alan Trachtenberg, Peter Rachleff, Lawrence S. Wittner, William R. Taylor and David L. Schalk in Support of Respondents, *New York Times v. Tasini*, U.S., 121 S.Ct. 2381 (2001).
14. Brief for Petitioner at 23.