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Libraries and Lawsuits — The Tasini and Ryan Cases

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Two recent cases involving authors' rights could indirectly affect library practices where libraries must obtain licenses to make copies (interlibrary loan and electronic reserves) or to access and use electronic works (licensed databases). The cases are *Tasini v. The New York Times Co.*, ___ F.3d ___ (2d Cir. 1999) ("Tasini") and *Ryan v. Carl Corporation*, 23 F.Supp. 2d 1146 (N.D. Cal. 1998) ("Ryan"). In each case freelance authors who wrote articles for periodical publications claimed that the defendants in the lawsuits, the authors' publishers, electronic database compilers or aggregators and a photocopying service, had infringed the authors' copyright ownership interests.

Tasini

In *Tasini*, newspaper and magazine publishers sold back issues and current issues of their publications containing the authors' articles to online and CD-ROM database companies who put them into electronic databases that users could search for individual articles. These companies did not compensate the authors for the use of their articles in this way. The companies claimed that they had acquired the rights to do this contractually, and that even if they did not have contractual rights, they were authorized by Section 201(c) of the Copyright Act to create the electronic databases without permission from the authors. Section 201 authorizes them as holders of copyright in collective works, to reproduce and distribute the articles as part of a collective work or a revision of the collective work.

The companies argued that databases were just such revisions. At first they lost on the contractual arguments and won on the statutory arguments, but the case was appealed. On appeal they lost on the statutory argument too. The court said that in the absence of a contract with an author that clearly gives them the rights, publishers do not have the right under Section 201(c) to place the entire contents of their collective works in cumulated electronic databases, or to license others to do this for them, or to permit users to access individual articles from such comprehensive databases.

Ryan

The defendant in *Ryan* (Carl's UnCover business) wasn't a publisher and didn't have a database of articles. UnCover

had a database of titles its customers could search to identify articles of interest. UnCover would simply go to a library and get a photocopy of whatever article a customer requested and send it to the customer. UnCover paid a copyright fee to the publisher or to the Copyright Clearance Center (CCC) after copying the article. UnCover did not ask permission before making a copy and it did not, in most cases, pay any fees directly to authors or even attempt to identify whether authors were copyright owners. This was the basis for the lawsuit. The freelance authors alleged that they owned the copyrights in the articles in question, that they had not transferred the rights to their publishers (that issue is still being litigated), that Section 201(c) did not authorize their publishers to grant permission to UnCover to make photocopies of these articles and therefore, any permission to be obtained and any moneys to be remitted had to be obtained from and remitted to them, not their publishers.

Ryan's authors won that part of their case addressing the issue of whether Section 201(c) authorizes publishers to grant permission to photocopy individual articles. According to *Ryan*, Section 201(c) says that for-profit document delivery requires permission from and payment to any author who owns copyright in his or her article.

How These Cases Affect Libraries

The facts the *Ryan* authors allege certainly imply that their publishers and the CCC were not properly authorized by the authors to grant permission or receive royalties. But the authors did not sue their publishers and the CCC. They only sued UnCover. UnCover's activities look an awful lot like interlibrary loan, although they were done for a profit, so this case might make libraries a little nervous. Should libraries, like UnCover, rely on publishers and the CCC to have the rights they say they do when they give libraries permission to make copies for electronic reserves or interlibrary loan transactions exceeding the CONTU "suggestion of five"? Why did the freelance authors sue UnCover? Why didn't they sue CCC? What might keep them from suing libraries? I think the answer has something to do with bad faith and

UnCover's alleged willful ignorance of authors' rights. There is some discussion in a related opinion of *Irvin Muchnick's* (an activist author?) animosity towards UnCover. UnCover alleges that Muchnick "stirred up" this lawsuit for personal reasons and for personal gain, even though Muchnick is not a party to the lawsuit. Those of us who rely on others' representations that they have the rights to authorize our activities must hope that good faith makes a difference because *Ryan* shows us that as a technical matter, asking permission from or paying royalties to the wrong person is infringement.

So, good faith. Does CCC have it? Are its activities distinguishable from UnCover's activities that were the subject of the lawsuit? It appears so. CCC handles royalties differently from the way UnCover handled them at the time the lawsuit was filed. It does not presume to have permission and remit fees to publishers only, but gets prior permission by contract with the copyright owner and pays royalties directly to authors in any case where it has been advised that the authors are the copyright owners. CCC actively recruits authors and tries to make it as easy as possible for them to register. The largest part of CCC's licensed works, and the ones most often requested, are works where the copyright typically is owned by publishers. On the other hand, CCC is cognizant of those areas where this is not the norm, as evidenced by its formula for distribution of money it receives from foreign rights collectives, where titles sometimes are not identified. CCC also obtains from each rightsholder a warranty that the rightsholder has the authority to grant CCC the rights granted in the contract. But then, the problem is that these warranties are not always accurate because publishers are not always aware of or right about what rights they have and don't have.

Today, CCC and UnCover are "partners" with the National Writers' Union in the effort to make getting permission from authors easier. The climate that brought about the *Ryan* case seems to have changed dramatically, possibly at least in part because of the case.

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Are libraries that perform similar functions to those performed by **UnCover** likely to be targets for a lawsuit? Do we risk liability by relying on the CCC and publishers to tell us that it's ok to make a copy of an article? In all likelihood, the risk is quite small for several reasons: libraries do not make a profit on ILL and they don't have a reputation for ignoring or otherwise harming authors attempting to make the publishing industry recognize their claims to a share of the new revenues coming from electronic uses of their articles.

What about the impact of **Tasini**? Does **Tasini** mean that libraries cannot rely on publishers who license databases of elec-

tronic articles to have the rights they claim to have (the rights to create and license the database) and to appropriately share royalties with authors who still own copyright in their contributions to the publishers' collective works? Need libraries worry about such things?

I think we are much more likely to see some increase in the price of databases to accommodate the required "split" with some authors than to see lawsuits against library licensees of those databases. Further, there may be only a small percentage of material in some databases in which the publisher does not own copyright. Remember, these cases are about the rights of freelance authors only and the issues raised would not apply where an author has assigned his or her rights to a publisher, as is often the case in scholarly publishing, or where the author is an employee of the publisher. Libraries were never in the position of making a profit on activities that ignored authors' claims to a share of that profit. Until these cases went against the various defendants, they did not have the incentive to accommodate the authors' desires. Now they do.

Even though libraries technically might be liable for infringement of the rights of freelance authors when they rely

on publishers and the CCC to have the rights they say they have, the industry conditions that led to these two lawsuits have changed so much that further lawsuits to remedy the problem do not seem likely. Rather, changes in contracting procedures with freelance authors, changes in publishers' record keeping for authors who retain ownership, and improvements in everyone's ability to identify authors who own copyright in their works and make payments to them are more likely than lawsuits against libraries to further the changes that began with these suits.

Section 201 Ownership of Copyright (c) Contributions to Collective Works — Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

Visit the Copyright Crash Course at <http://www.utsystem.edu/ogc/intellectual-property/cprindx.htm>.

Rumors

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The **OCLC/WLN Automated Collection Assessment and Analysis Services (ACAS)** now provides comparisons of libraries' bibliographic records with the list of **Outstanding Academic Titles (O.A.T.)** from *Choice* and with the list of titles reviewed in *Booklist* for individual libraries and groups. A library or group receives a list of the titles on the recommended list that are not owned (the miss list). The list is composed of bibliographic records organized in **WLN Conspectus** order. The Conspectus order provides an inventory of library collections in twenty-four subject divisions for **Dewey Decimal** and **Library of Congress** classification. The library can also receive lists of matching titles, with brief bibliographical information from the *O.A.T.* or from the *Booklist* file and the library's file, and a statistical summary of matches and misses by **WLN Conspectus** divisions, categories and subjects. For more information, point your Web browser to: <http://www.wln.org/wlnprods/aca/index.htm>.

As of February 15, 2000, **Blackwell's Collection Manager** will have a whole new look with many new enhancements and features, including an optional single frame interface and a new search form, Visit <http://www.blackwell.com/services/cm/cmnewstuff.html> to learn more!

We are so excited to have **Anna Belle Leiserson** <a.leiserson@law.vanderbilt.edu> of **AcqWeb** fame contributing a new column to *ATG*! We are calling it **Designing Librarians** ... What do y'all think? Read it in this issue, p.80.

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The Conference Directors for the **2000 Charleston Conference** include — **Rosann Bazirjian**, Chair (Penn State University) <rvb9@psu.psu.edu>, **Stuart Grinell** (Ambassador Books and Media) <bookman@iquest.net>, **Heather Miller** (SUNY-Albany) <hm766@cns.vax.albany.edu>, **Jack Montgomery** (Western Kentucky University) <jack.montgomery@wku.edu>, **Marietta Plank** (Chesapeake Information and Research Library Alliance) <mplank@deans.umd.edu>, **Katina Strauch** (College of Charleston) <strauchk@earthlink.net>.

Send ideas by June 30, 2000, to:

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