February 2000

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Recommended Citation

Wallas, Philip (2000) "The Impact of the Tasini Case: A Content Aggregator's View," *Against the Grain*: Vol. 12: Iss. 1, Article 12.
DOI: <https://doi.org/10.7771/2380-176X.3410>

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The Impact of the Tasini Case: A Content Aggregator's View

by Philip Wallas <PWallas@epnet.com>

As head of Content Development at EBSCO Publishing, I have been asked by many people from all sides of our industry about the impact of the Tasini court case on content aggregators. Will products disappear or become full of holes like Swiss cheese? Will prices increase? Why can't we license *The New Yorker*? What follows is my own understanding of the issues from a business perspective and is not meant to represent EBSCO policy except where I explicitly describe such policy. I am not an attorney and defer to others for legal analysis of the cases.

BRIEF BACKGROUND

In 1993, a group of freelance authors sued a number of major publishers and several online distributors of those publishers' content, claiming that the defendants were violating the authors' rights by distributing electronic versions of their works, without permission. In August, 1997, a **Federal District Court in New York** ruled in favor of the publishers, indicating electronic publishing of the entire magazine content was essentially a revision of the original work, as permitted under copyright law and thus did not require a separate permission from the author. At that time, electronic redistribution of freelance written articles in the context of the entire magazine was deemed OK unless the author's contract specifically reserved the electronic right.

The authors appealed. In September, 1999, the **2nd Circuit Court of Appeals** overturned the **District Court**, ruling that such electronic redistribution is not simply a revision of the original work, but a new event, requiring author permission for use of the author's work. The case has been returned to **District Court** for a determination of damages (still pending).

For an overview of the Tasini case, go to the **National Writers Union** Website at www.nwu.org. Scroll down in the left frame to click on *Tasini vs. NY Times*. It is my understanding that the publishers and online distributors plan to appeal to the Supreme Court. Recently, **Jonathan Tasini** has written about the **AOL Time Warner** merger asking whether the large potential Tasini case-related damages faced by **Time Inc.** were disclosed in the merger talks (see "The Time Warner-AOL Merger: Undisclosed Liabilities?" at www.nwu.org).

IMPACTS

What does the Tasini case mean to freelance authors?

Their right to control electronic distribution of their works has been affirmed, but they face pressure to sign contracts which cede those rights to publishers. If they press publishers and online distributors for damages for past infringement, they have the potential to win financial awards, but risk alienating both their potential employers and part of their readership if content becomes unavailable or information prices rise dramatically. Authors' groups have called on publishers to recognize their rights and work with them to develop systems for sharing electronic distribution revenues. The **National Writers Union (Publication Rights Clearinghouse)**, **Authors Registry (Automated Rights Payment System and Licensing Service)**, CCC and others have created processes for collecting and distributing freelance author royalties, but so far only a small number of publishers have agreed to participate. Some authors have contacted aggregators directly, demanding that their articles be removed from online services. EBSCO Publishing's policy is to remove the articles if the author insists, but the result can be a lose-lose situation in which the content is no longer widely available and the author sees no increase in earnings. Despite these obstacles, the courts have clearly said that authors' rights must be acknowledged and respected. The current status of the Tasini decision is a significant victory for freelance authors.

What does the Tasini case mean to publishers?

For many publishers, the decision introduces further uncertainty into the turmoil the Web is already causing. Potential impacts include: huge potential infringement liabilities, time-consuming contract negotiations, heavy administrative burdens required to track myriad rights and payments for hundreds of authors. Yet scholarly publishers are largely unaffected, since it has been traditional for authors to grant copyright to the publisher. Even many consumer and trade publishers are only tangentially involved, since they may rely on freelance authors for only a small percentage of their articles. Staff-written articles are

usually considered works for hire with copyright held by the employer. A few publishers have had a long-standing policy of sharing electronic distribution royalties with authors, though the issue of permission for such distribution has not always been addressed. Finally, some publishers have the market clout to be able to persuade authors to accept contracts which grant the publisher very broad redistribution rights. Publishers who make heavy use of freelance authors will need to respond to the outcome of the case. The authors' groups payment systems may be at least a partial solution for publishers, but to date, no such system has attracted a large number of publishers. Given all the demands for an editor's time and resources, and the fact that such issues are not seen as a direct source of revenue or readers, it is not surprising that dealing with freelance author rights is not a top priority.

What does the Tasini case mean to content aggregators?

The universal answer applies here: IT DEPENDS. First, a digression about "indemnification." As part of license agreements with publishers, aggregators typically include indemnification clauses which require each party to represent that it has the right to do what the agreement says it will do (license content, in the case of publishers, sell and provide information services, in the case of the aggregator).

Further, the publisher agrees to defend (pay legal costs for) the aggregator if a legal dispute develops around, for example, the aggregator's distribution of content which the publisher has represented it has the right to license. Under this indemnification, aggregators could theoretically deflect any author claim of infringement back to the publisher ("you say you can license that article to us and promise to pay our legal costs if any dispute arises-it's YOUR problem"). This finger-pointing approach strikes me as likely to damage the aggregator/publisher relationship, sort of like a claim that there is "no controlling legal authority."

In general, the Tasini decision has had more impact on EBSCO Publishing's discussions with new publishers than on our existing databases. We have seen no change in

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our agreements with scholarly publishers, since they typically own copyright in their articles. Most of the largest consumer publishers have modified their standard author agreements to include electronic rights, whether compensated separately or not. But in a few cases our efforts to license a periodical have run into concerns about how the Tasini decision affects their right to enter into a license. Some publishers (**Consumers Digest, Food & Wine, Travel & Leisure, Nature Canada**) use freelance authors almost exclusively and have withdrawn from electronic distribution, even before the Tasini decision, considering the efforts involved in contract negotiation and royalty tracking to be greater than the current potential returns. Other publishers simply have never licensed electronic distribution rights. We are glad to work with publishers to negotiate aggregator license agreements which specify certain regular exclusions, such as freelance articles or photographs. Recognizing publisher concerns, EBSCO Publishing also allows publishers to exclude articles on a case-by-case basis. In the end, in order to add important missing content, aggregators will want to find ways to help authors and publishers resolve these rights issues so their databases can continue to improve and grow.

What does the Tasini case mean to libraries?

For a time, libraries will find that a small but increased amount of certain valuable content is not available online because of author rights issues. Where freelance work is concerned, print editions may continue to be the only complete versions of magazines and journals. For now, libraries are not seeing wholesale removal of content from databases, nor are database prices increasing; if anything, the influence of the Web continues to drive down prices. In the end, if freelance authors are to be compensated fairly, that money has to come from somewhere, so there will be cost/price pressures on all players. The solution that adds the least friction (cost) to the system will appeal to all parties.

How much detail?

At what degree of granularity is it practical to track electronic usage of articles? Who will keep track of the location of all the authors? Which party will assume the cost of cutting hundreds if not thousands of checks? It is easy to be overwhelmed by the size of the problem and the complexity of the issues surrounding compensation for freelance authors: hundreds of publishers, thousands of authors, millions of articles, across dozens of years of online databases (and why should microform reproduction or interlibrary loan of freelance articles not also bring compensation to authors?). While it might be ideal

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to track all usage of electronic content at the individual article level and make payments based on that tracking, until we have widespread systems of digital object identification and perhaps micropayments, there are enormous administrative burdens implicit in this approach. The process of maintaining log files of millions of articles, tracking author identities and addresses and cutting large numbers of small checks will drain money out of the system. If costs exceed benefits, electronic distribution of freelance work will be discouraged.

Partial solutions can be found in nearly every step of the process from the creation of the freelance content to its electronic distribution. More author contracts should include language addressing which rights are included and which are not. Publishers will likely require a grant of rights much broader than authors would prefer, but publishers must have some flexibility in order to respond to a rapidly evolving environment—it simply costs too much to have to ask for permission again and again. If a “low friction” mechanism for sharing compensation for additional uses is available, then that sharing should be as broad as the grant of rights.

Publisher contracts with aggregators and other licensees should address requirements to facilitate compensating freelance authors. The various authors compensation systems are promising developments since they have the potential to provide what one advocate calls “rough justice” in compensating freelance authors while

minimizing friction (the negotiation and administrative burdens on publishers). An approximation of usage (and fairness), such as the CCC uses for photocopying, might simplify the process enough to mean money will actually reach authors. Like many other content aggregators, EBSCO Publishing pays royalties based on the presence of content on the product, not on its use. Given the very skewed distribution of use (a very high percentage of use for a very small number of extremely popular titles), EBSCO Publishing has not been able to develop a viable royalty model which compensates authors individually according to the number of uses of their articles. If we paid based on usage, most authors and publishers would not earn enough to justify the effort involved in working with us. What we can do is cooperate with publishers and authors' groups to provide electronic reports of articles included in our products, so the process of sharing royalties can be automated to a large degree.

I am hopeful that authors, publishers and electronic distributors can arrive at an acceptable way to acknowledge authors' rights. I'm betting that everyone will have to do either a little more work (negotiating, reporting, excluding) or pay a little more money, or both. In the end, what has been settled in the courts is only the beginning. 🌱

Additional resources:

American Society of Journalists and Authors
www.asja.org (especially E-wrongs about E-rights <http://www.asja.org/ewrongs.htm>).
The Authors Registry <http://www.authors-registry.org>.
National Writers Union www.nwu.org.
TERLA The Electronic Rights Licensing Agency (Canada) www.terla.com/.
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POSSIBLE RESOLUTIONS