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What's So Free About Freelancing? -- The Second Circuit's Decision in *Muchnik v. Thomson Corp.* (In re Literary Works in Elec. Databases Copyright Litig.)

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already have on your new calendar (paper or e-calendar: up-to-your library) the date of your institutional benefits meeting.

You have gone over your new job description with your supervisor, who has answered all your questions patiently and completely, taking time to make sure you understand it all. You understand as well how the performance process works, and what the schedule is of your reviews. Your boss and you have talked about your responsibilities and you have a good idea of how to accomplish what is expected of you. If appropriate, you have a meeting on your calendar with your boss's boss. You are excited to meet with her and to hear about her thoughts and expectations for your department in general, and maybe you and your work in particular. Wow, it's Friday already and you feel very confident that you have a good understanding of what your job entails and you are acquainted with the tools and the primary people you need to work with to get the work done. You have begun working on a few projects already and have drafted some plans to share with your new boss about how to approach the upcoming work. Since you have a scheduled meeting with him early in your second week, you know you will be able to get feedback right away on your ideas. As well, you are beginning to feel like a true employee of your new institution as you know the support and informational options available to you as a part of the larger work team.

For this second time period *Edward's* task as the supervisor is to make sure he has con-

tacted all the proper people, and if possible, scheduled a few of the meetings and have them in place before his new person begins. As for the tour(s), he will want to make sure that each department knows ahead of time that he plans on walking his new employee through, and giving people a chance to suggest a better time if necessary, or else reminding people that day about the upcoming visit by the new person. *Edward* will want to add the new employee into his own calendar to ensure that they have a set time to meet. He will want to make sure that his new person continues to feel engaged as she becomes more involved in the day-to-day workings of the library. Let's take a look at the first month. . .

Now you have been at work for a whole month. Wow. You already feel devoted to your boss, your department, the library and your colleagues there, and you feel a part of the rest of the larger institution. You have had training sessions on all the software and hardware applications you are now using. This included a session on how the library IT department organizes the computer desktops used by all of the library staff. You know how and where to save your work and how to share it via the library's intranet. You have even drafted committee minutes to share with the other group members on the committee intranet site, and gotten feedback for the final version from some of your new colleagues. Though the email and calendaring software is radically different from what you have used before, you have been well-trained in how it works and how the scheduling function can save everyone time.

As for meetings, you have been to all of the big staff and departmental meetings and been

introduced at each. New colleagues have come up after the meeting to chat, or have sent you emails to invite you to lunch to get to know you. You have attended a new employee event, where you met other new employees and have made a couple of support friends already.

You have had a complete walking tour of the entire campus, and have learned more about the amenities offered to employees. Your assigned library buddy did a fantastic job filling you in on all the important details, like when the campus post office closes on Friday afternoons for example, and showing you a new shortcut across the quad to your parking lot.

You have met with your boss at least once a week and have had time to dive into your work responsibilities. Because of these meetings you have been able to correct some early mistakes and feel like you will be able to ace your 90 day review. All in all you are confident and prepared to take on anything in your new position. And if you aren't prepared, then you already have a support network of co-workers, a library buddy, and other newbies to help you figure things out.

Edward needs to maintain the balance between giving his new employee guidance and giving her enough space to make her own mistakes during the next few months. He needs to be available and supportive, yet remind the new person that she has other sources she can go to for advice and help. *Edward* also needs to remember the common wisdom that it can take up to eighteen months for a new employee to truly feel a part of a new organization. Added patience and support will be needed for awhile yet, but his new employee ought to make the transition easily given all the support and training *Edward* has planned. 🐼

What's So Free About Freelancing? — The Second Circuit's Decision in *Muchnick v. Thomson Corp.*

(In re Literary Works in Elec. Databases Copyright Litig.),

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If you have been a freelance writer for a few years, you're probably crying in your beer (or perhaps your caffeine-free herbal tea) about the recent decision of the U.S. Court of Appeals in New York tossing out a hard-won settlement between writers and publishers. Here's the story.

Almost a decade ago, groups of freelance writers launched copyright lawsuits against print publications (such as newspapers and magazines) over the use of the writers' works in electronic databases (such as **LEXIS/NEXIS**). For years before the age of electronic delivery of literary content dawned, it was industry practice for freelance writers to sell their works to publications without a written contract. The simple custom was that, for a fee paid to the author, the author granted to the publisher the first right to publish the work in a specified

edition of the newspaper or magazine, but in all other respects the author retained copyright ownership to the work.

By the 1980s, as electronic databases became more prevalent, print publishers found a new source of revenue by entering into license agreements with database companies, authorizing them to copy and resell the text of back issues of the newspapers and magazines, which included articles written by freelance contributors. Rightly or wrongly, the print publications did not obtain written permission from their freelancers for this subsequent publication of their works on the electronic databases. Maybe the publishers believed they didn't have to obtain such permission; maybe they just ignored the question. (Articles written by the publications' staff writers are works "made for hire" and thus are the property of the

publications.)

In the mid-1990s, a handful of writers sued the *New York Times*, *Newsday*, and *Time Inc.* over the practice. The case inched its way through the court system and, after an initial loss at the trial court level, resulted in a 1999 victory for the writers before the U.S. Court of Appeals for the Second Circuit in New York. The decision electrified the writing community.

Groups of freelancers as well as a number of associations of writers (such as the **Authors Guild, Inc.**, the **National Writers Union**, and the **American Society of Journalists and Authors**) filed several class action lawsuits, alleging that the databases and print publications

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erages are allowed in the libraries. The unofficial **UK Law Library** rule is that we don't enforce the official policy."³

Another librarian glibly provided the following statement in *The Librarian's Guide to Etiquette* blog:⁴

Food in the Library, Policing

Put your master's degree to good use by chasing undergraduates through the library for their blatant disregard of your food policy.

As coffee shops are becoming the norm in today's libraries, many institutions are rethinking those food policies. Be sure to keep some restrictions on food and drinks so that you'll still have something to be annoying about.

"No lid on your coffee cup, young man?!"

"Is that a spillproof container?!"

"Is that thermos **ALA**-approved?!"

So we arrive back at the original question, should we make our libraries more like home in attempt to make members of our university families want to hang out more often? I think we had the experience as a teenager of visiting homes where rules abounded: eat only in the kitchen, don't sit on the beds, no running around, no loud noises, no talking on the phone for long periods of time, etc... Those homes were functional — they provided your friends a roof over their heads, but they were not where everyone congregated. I think librarians have a choice, they can maintain pristine homes where nothing is ever out of place or they can loosen up a bit and make their libraries more like the homes where everyone wanted to crowd in and have fun. 🍷

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Short-Term Engagements or "Brainiac-on-Demand"

Endnotes

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4. **A Librarian's Guide to Etiquette.** "Food in the library, Policing" Retrieved 13 November 2007, from http://libetiquette.blogspot.com/2005_11_01_archive.html.

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violated the freelance authors' copyrights in the electronically reproduced works and seeking relief for all freelancers. The various cases were eventually consolidated before a single judge who agreed to put them on hold pending U.S. Supreme Court review of the issue.

Two years later, the Supreme Court affirmed the Second Circuit's decision and ruled that reproduction of freelance authors' magazine and newspaper articles in computer databases, without the permission of those authors, constituted illegal infringement of their copyrights. See *New York Times v. Tasini*, 533 U.S. 483 (2001).

The plaintiffs in the class action were delighted, and the publishers were terrified. The parties then agreed to negotiate a settlement, mediated by **Ken Feinberg** (who was gaining fame as the Special Master in charge of the 9/11 Victims Fund). After nearly three years of difficult and contentious class settlement negotiations, the parties reached a settlement. The trial judge approved the settlement and certified a settlement class containing three categories of freelancers. But a number of freelancers vigorously objected and appealed the settlement, claiming that they had unfairly been squeezed out of any meaningful part of the settlement money. The objectors were among the so-called "Category C" portion of the class which received very little of the

settlement proceeds, simply because they had never "registered" their copyrights.

Registration of copyright — which is a relatively easy and cheap procedure to follow — plays an important gatekeeper function in copyright litigation. Section 411(a) of the **Copyright Act** provides that "no action for infringement of the copyright in any United States work shall be instituted until ... registration of the copyright claim has been made." In addition, Section 412 of the **Act** makes registration a prerequisite to obtaining statutory damages and attorneys fees from an infringer.

On appeal, the lawyers representing the class plaintiffs and the lawyers representing the publishers joined hands to defend the fairness of the settlement. But without reaching that issue and of its own volition (i.e., *sua sponte*), the Second Circuit turned the appeal into a highly technical debate over whether Section 411 is "jurisdictional" or is merely "procedural." Suddenly all the parties, including the objectors, found themselves on the same side, arguing to the court that the statute did not constitute a jurisdictional block to a settlement of the case.

The appellate panel, however, had the bit in its teeth and, in a two-to-one decision, ruled that the court had no jurisdiction over claims by unregistered copyright holders and that, therefore, Category C participants had no right to be in court at all or to have been included in the "settlement class" certified by the trial judge. The effect of this ruling was to vacate the en-

tire settlement and send the whole case back to the trial judge. See *Muchnick v. Thomson Corp.* (In re Literary Works in Elec. Databases Copyright Litig.), Docket No. 05-5943-cv(L), 2007 U.S. App. LEXIS 27558 (2d Cir, decided November 29, 2007).

What will happen now? If the case goes directly back to the trial court, the parties will most probably sign a new settlement with basically the same terms, but leave out of the class any freelancer who had failed to register his or her copyright before the three-year statute of limitations expired at the end of 2002. This will hardly make the Category C claimants happy.

Possibly some of the parties will try to take the Second Circuit's case up to the U.S. Supreme Court for review. Arguably there is some difference of opinion among the various federal Circuits about the jurisdictional nature of Section 411. This is always a good ground for persuading the Supreme Court to grant discretionary review. On the other hand, the Court may prefer to leave it to the lower courts to puzzle out.

In any event, stay tuned for the next episode in this lengthy and convoluted saga of intellectual property.

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