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Story 388

TASINI HEATS UP

March 27, 2001

Prior to the U.S. Supreme Court hearing later this week of the Tasini vs. New York Times Company case, two actions that have raised the hopes of content creators.

Marybeth Peters, the Register of Copyrights, and a long time advocate for creators' rights, has gone on record with a compelling document supporting authors.

In addition the 11th Circuit Court of Appeals found in favor of photographer Jerry Greenberg in his suit against National Geographic for copyright infringement. (See Story 389.)

The New York Times, their co-defendants, and other publishers should be particularly concerned about the Greenberg case. National Geographic used digital technology to faithfully and accurately portrays each page of every issue of every magazine. The resulting CD-ROM's more closely resembles the original than the "revisions" created by the New York Times co-defendants.

Nevertheless, Judge Stanley F. Birch, Jr., writing for the appeals panel, found that NGS's output could not be considered a mere revision and said, "Common-sense copyright analysis compels the conclusion that the Society...has created a new product...in a new medium, for a new market that far transcends any privilege of revision or other mere reproduction envisioned" in the law.

The court of appeals panel also dealt with the issue of injunctive relief. The publishers in the Tasini case have tried to argue that if the court rules for the freelancers databases will be forced to "minimize the risk of liability by prophylactically eviscerating electronic collections" of freelanced materials, "irreparably undermining" the public record. In the Greenberg case the appeals panel urged U.S. District Judge Joan Lenard who will determine appropriate injunctive relief, "to consider alternatives, such as mandatory license fees, in lieu of foreclosing the public's computer-aided access to this educational and entertaining work."

Marybeth Peters views are a response to a request from Congressman McGovern and have been published in the Congressional Record. They have also been incorporated into legal briefs being prepared by authors' attorneys in the Tasini case.

Ms. Peters stated plainly, and emphatically, that freelancers should be compensated for their work. She opened by stating that the Supreme Court should affirm the decision of the court of appeals which found in favor of authors. "In Tasini, the court of appeals ruled that newspaper and magazine publishers who publish articles written by freelance authors do not automatically have the right subsequently to include those articles in electronic databases. The freelance authors assert that they have a legal right to be paid for their work. I agree that copyright law requires the publishers to secure the authors' permission and compensate them for commercially exploiting their works beyond the scope of section 201 (c) of the Copyright Act," she told McGovern.

Peters also rejected the publishers' protests that recognizing the authors' rights would mean that the publishers would have to remove the affected articles from their databases. "The issue in Tasini should not be whether the publishers should be enjoined from maintaining their database of articles intact, but

whether authors are entitled to compensation for downstream uses of their works," she said.

Ms. Peters document delves into various aspects of the Copyright Act and explains why legislative law backs up her views and supports the authors position. I have printed her letter below in its entirety.

February 14, 2001

Dear Congressman McGovern:

I am responding to your letter requesting my views on New York Times v. Tasini. As you know, the Copyright Office was instrumental in the 1976 revision of the copyright law that created the publishers' privilege at the heart of the case. I believe that the Supreme Court should affirm the decision of the court of appeals.

In Tasini, the court of appeals ruled that newspaper and magazine publishers who publish articles written by freelance authors do not automatically have the right subsequently to include those articles in electronic databases. The publishers, arguing that this ruling will harm the public interest by requiring the withdrawal of such articles from these databases and irreplaceably destroying a portion of our national historic record, successfully petitioned the Supreme Court for a writ of certiorari.

The freelance authors assert that they have a legal right to be paid for their work. I agree that copyright law requires the publishers to secure the authors' permission and compensate them for commercially exploiting their works beyond the scope of section 201(c) of the Copyright Act. And I reject the publishers' protests that recognizing the authors' rights would mean that publishers would have to remove the affected articles from their databases. The issue in Tasini should not be whether the publishers should be enjoined from maintaining their databases of articles intact, but whether authors are entitled to compensation for downstream uses of their works.

The controlling law in this case is 17 U.S.C. 201(c), which governs the relationship between freelance authors and publishers of collective works such as newspapers and magazines. Section 201(c) is a default provision that establishes rights when there is no contract setting out different terms. The pertinent language of 201(c) states that a publisher acquires "only" a limited presumptive privilege to reproduce and distribute an author's contribution in "that particular collective work, any revision of that collective work, and any later collective work in the same series."

The Supreme Court's interpretation of section 201(c) will have important consequences for authors in the new digital networked environment. For over 20 years, the Copyright Office worked with Congress to undertake a major revision of copyright law, resulting in enactment of the 1976 Copyright Act. That Act included the current language of 201(c), which was finalized in 1965.of interests.

Although, in the words of Barbara Ringer, former Register and a chief architect of the 1976 Act, the Act represented "a break with the two-hundred-year- old tradition that has identified copyright more closely with the publisher than with the author" and focused more on safeguarding the rights of authors, freelance authors have experienced significant economic loss since its enactment. This is due not only to their unequal bargaining power, but also to the digital revolution that has given publishers opportunities to exploit authors' works in ways barely foreseen in 1976. At one time these authors, who received a flat payment and no royalties or other benefits from the publisher, enjoyed a considerable secondary market. After giving an article to a publisher for use in a particular collective work, an author could sell the same article to a regional publication, another newspaper, or a

syndicate. Section 201(c) was intended to limit a publisher's exploitation of freelance authors' works to ensure that authors retained control over subsequent commercial exploitation of their works.

In fact, at the time 201 came into effect, a respected attorney for a major publisher observed that with the passage of 201(c), authors "are much more able to control publishers' use of their work" and that the publishers' rights under 201(c) are "very limited." Indeed, he concluded that "the right to include the contribution in any revision would appear to be of little value to the publisher." Kurt Steele, "Special Report, Ownership of Contributions to Collective Works under the New Copyright Law," Legal Briefs for Editors, Publishers, and Writers (McGraw-Hill, July 1978).

In contrast, the interpretation of 201(c) advanced by publishers in Tasini would give them the right to exploit an article on a global scale immediately following its initial publication, and to continue to exploit it indefinitely. Such a result is beyond the scope of the statutory language and was never intended because, in a digital networked environment, it interferes with authors' ability to exploit secondary markets. Acceptance of this interpretation would lead to a significant risk that authors will not be fairly compensated as envisioned by the compromises reached in the 1976 Act. The result would be an unintended windfall for publishers of collective works.

The Public Display Right

Section 106 of the Copyright Act, which enumerates the exclusive rights of copyright owners, includes an exclusive right to display their works publicly. Among the other exclusive rights are the rights of reproduction and distribution. The limited privilege in §201(c) does not authorize publishers to display authors' contributions publicly, either in their original collective works or in any subsequent permitted versions. It refers only to "the privilege of reproducing and distributing the contribution." Thus, the plain language of the statute does not permit an interpretation that would permit a publisher to display or authorize the display of the contribution to the public.

The primary claim in Tasini involves the NEXIS database, an online database which gives subscribers access to articles from a vast number of periodicals. That access is obtained by displaying the articles over a computer network to subscribers who view them on computer monitors. NEXIS indisputably involves the public display of the authors' works. The other databases involved in the case, which are distributed on CD-ROMs, also (but not always) involve the public display of the works. Because the industry appears to be moving in the direction of a networked environment, CD-ROM distribution is likely to become a less significant means of disseminating information.

The Copyright Act defines "display" of a work as showing a copy of a work either directly or by means of "any other device or process." The databases involved in Tasini clearly involve the display of the authors' works, which are shown to subscribers by means of devices (computers and monitors).

To display a work "publicly" is to display "to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." The NEXIS database permits individual users either to view the authors' works in different places at different times or simultaneously.

This conclusion is supported by the legislative history. The House Judiciary Committee Report at the time 203 was finalized referred to "sounds or images stored in an information system and capable of being performed or displayed at the initiative of individual members of the public" as being the type of

"public" transmission Congress had in mind.

When Congress established the new public display right in the 1976 Act, it was aware that the display of works over information networks could displace traditional means of reproduction and delivery of copies. The 1965 Supplementary Report of the Register of Copyrights, a key part of the legislative history of the 1976 Act, reported on "the enormous potential importance of showing, rather than distributing copies as a means of disseminating an author's work" and "the implications of information storage and retrieval devices; when linked together by communications satellites or other means," they "could eventually provide libraries and individuals throughout the world with access to a single copy of a work by transmission of electronic images." It concluded that in certain areas at least, "'exhibition' may take over from 'reproduction' of 'copies' as the means of presenting authors' works to the public." The Report also stated that "in the future, textual or notated works (books, articles, the text of the dialogue and stage directions of a play or pantomime, the notated score of a musical or choreographic composition etc.) may well be given wide public dissemination by exhibition on mass communications devices."

When Congress followed the Register's advice and created a new display right, it specifically considered and rejected a proposal by publishers to merge the display right with the reproduction right, notwithstanding its recognition that "in the future electronic images may take the place of printed copies in some situations." H.R. Rep. No. 89-2237, at 55 (1966).

Thus, 201(c) cannot be read as permitting publishers to make or authorize the making of public displays of contributions to collective works.

Section 201(c) cannot be read as authorizing the conduct at the heart of Tasini. The publishers in Tasini assert that because the copyright law is "media-neutral," the 201(c) privilege necessarily requires that they be permitted to disseminate the authors' articles in an electronic environment. This focus on the "media-neutrality" of the Act is misplaced.

Although the Act is in many respects media-neutral, e.g., in its definition of "copies" in terms of "any method now known or later developed" and in 102's provision that copyright protection subsists in works of authorship fixed in "any tangible medium of expression," the fact remains that the Act enumerates several separate rights of copyright owners, and the public display right is independent of the reproduction and distribution rights. The media-neutral aspects of the Act do not somehow merge the separate exclusive rights of the author.

Revisions of Collective Works

Although 201(c) provides that publishers may reproduce and distribute a contribution to a collective work in three particular contexts, the publishers claim only that their databases are revisions of the original collective works.

Although "revision" is not defined in Title 17, both common sense and the dictionary tell us that a database such as NEXIS, which contains every article published in a multitude of periodicals over a long period of time, is not a revision of today's edition of The New York Times or last week's Sports Illustrated. A "revision" is "a revised version" and to "revise" is "to make a new, amended, improved, or up-to-date version of" a work. Although NEXIS may contain all of the articles from today's New York Times, they are merged into a vast database of unrelated individual articles. What makes today's edition of a newspaper or magazine or any other collective work a "work" under the copyright law --

its selection, coordination and arrangement -- is destroyed when its contents are disassembled and then merged into a database so gigantic that the original collective work is unrecognizable. As the court of appeals concluded, the resulting database is, at best, a "new anthology," and it was Congress's intent to exclude new anthologies from the scope of the 201(c) privilege. It is far more than a new, amended, improved or up-to-date version of the original collective work.

The legislative history of 201(c) supports this conclusion. It offers, as examples of a revision of a collective work, an evening edition of a newspaper or a later edition of an encyclopedia. These examples retain elements that are consistent and recognizable from the original collective work so that a relationship between the original and the revision is apparent. Unlike NEXIS, they are recognizable as revisions of the originals. But as the Second Circuit noted, all that is left of the original collective works in the databases involved in Tasini are the authors' contributions.

It is clear that the databases involved in Tasini constitute, in the words of the legislative history, "new" "entirely different" or "other" works. No elements of arrangement or coordination of the pre-existing materials contained in the databases provide evidence of any similarity or relationship to the original collective works to indicate they are revisions. Additionally, the sheer volume of articles from a multitude of publishers of different collective works obliterates the relationship, or selection, of any particular group of articles that were once published together in any original collective work.

Remedies

Although the publishers and their supporters have alleged that significant losses in our national historic record will occur if the Second Circuit's opinion is affirmed, an injunction to remove these contributions from electronic databases is by no means a required remedy in Tasini. Recognizing that freelance contributions have been infringed does not necessarily require that electronic databases be dismantled. Certainly future additions to those databases should be authorized, and many publishers had already started obtaining authorization even before the decision in Tasini.

It would be more difficult to obtain permission retroactively for past infringements, but the lack of permission should not require issuance of an injunction requiring deletion of the authors' articles. I share the concern that such an injunction would have an adverse impact on scholarship and research. However, the Supreme Court, in Campbell v. Acuff-Rose Music, Inc.,and other courts have recognized in the past that sometimes a remedy other than injunctive relief is preferable in copyright cases to protect the public interest. Recognizing authors' rights would not require the district court to issue an injunction when the case is remanded to determine a remedy, and I would hope that the Supreme Court will state that the remedy should be limited to a monetary award that would compensate the authors for the publishers' past and continuing unauthorized uses of their works. Ultimately, the Tasini case should be about how the authors should be compensated for the publishers' unauthorized use of their works, and not about whether the publishers must withdraw those works from their databases.

Sincerely,
Marybeth Peters
Register of Copyrights