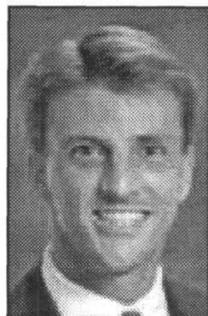


Freelancers win electronic republication appeal

The United States Supreme Court ruled in favor of freelance writers last month on the question of whether the freelancers' copyrights were violated when print publishers republished periodicals, including the *New York Times* and *Sports Illustrated*, in electronic databases and on CD-ROM without the express written permission of the freelancers.

Unlike staff writers, freelancers usually own the copyright in the articles they provide to newspapers and other periodicals. Transfer of ownership of some or all of the exclusive rights afforded by that copyright, including the right to reproduce and the right to sell copies of the article, must be in writing and signed by the freelancer. Transfers of non-exclusive rights, also known as licenses, may be oral.



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In the case before the Supreme Court, *New York Times v. Tasini*, the print publishers had obtained the rights to publish the articles in the print editions of their newspapers and magazines. They had not, however, obtained express written rights to reproduce and sell the articles via an electronic database (in this case LEXIS/NEXIS) or on CD-ROM. Most of the articles at issue were first published in the 1980s and early 1990s, when periodicals first began republishing with electronic databases but before many periodicals required freelancers to sign contracts transferring electronic rights.

In opposing the suit, the publishers argued that they did not need to obtain express written electronic rights, since the republication of the articles via LEXIS/NEXIS and CD-ROM was merely a revision or new edition of the print version of the periodicals. Such new editions, they argued, are permissible under copyright law as revisions of "collective works."

Federal law concerning the revisions of collective works states that: "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 the 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."

The Supreme Court found that the publication of the articles on LEXIS/NEXIS and CD-ROM was not merely a new edition or revision of the original print collective works. The Court noted that a person does not view the entire edition of a newspaper or magazine at once on LEXIS/NEXIS, like one would on microfilm or microfiche. Rather, a viewer is presented with each story on LEXIS/NEXIS in isolation, separated from the context, photos and layout of the original newspaper or magazine. As such, the Supreme Court held, the periodicals were copying and selling the freelancers' articles individually without the freelancers' permission.

The effect on publishers from the Supreme Court's decision is not yet clear. The Court did not decide what the remedy should be for the freelancers, but instead remanded that issue to a lower court for further analysis. In addition, other defenses may be available to the publishers that were not raised before the Supreme Court.

Many freelancers are seeking royalty payments for the electronic reproduction and sale of their articles. Three punitive class action suits have been filed by freelancers across the country to collect such royalties. In addition, a group of freelance photographers has sued *National Geographic* for royalties for the reproduction and sale of photographs in a CD-ROM set.

In response to the freelancers' actions, several publishers, including the *New York Times*, have stated that they will request deletion of all of the articles written by freelancers that were placed in electronic databases, unless contacted by freelancers will-

ing to accept minimal or no royalties for the continued publication of the articles. The freelancers have announced that they will fight this tactic.

South Carolina newspapers and other periodicals that keep lists of their freelancers or that don't use many freelance articles should consider contacting the freelancers directly to negotiate royalty payments in exchange for an agreement not to delete their articles from electronic databases. Sending a form agreement to the freelancers may be an efficient way to commence such negotiations. For periodicals that use freelancers more extensively, the National Writers Union has set up a "publication rights clearinghouse" that might serve as a contact point for publishers wishing to negotiate with freelancers.

South Carolina print publishers that intend to continue to provide their articles to electronic databases and CD-ROM companies should also at least obtain non-exclusive licenses to publish the freelance articles electronically and in electronic archival databases. Although these licenses can be oral, they should be in writing in order to document exactly what rights are being obtained. Publishers may want to consult an attorney for assistance with drafting the appropriate language.

Written licenses and assignments should also include a provision for publication of the article on the newspaper's Web site or otherwise on the Internet. While some newspaper Web sites may be considered more like a new edition of the paper than the electronic databases in *Tasini*, many Web sites archive and sell articles individually – which could be cause for concern. In addition, the Supreme Court did not discuss in *Tasini* the right to "display" an article to the public. This right is another one of the copyright-holder's exclusive rights. South Carolina publishers should contact an attorney to determine whether their Web site infringes upon this right.

More information

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