

20th century thinking can't resolve 21st century publishing issues

Sometimes the law is an ass—and it gets worse when it tries to understand ASCII.

Many of you may be familiar with the landmark U.S. Supreme Court ruling on *New York Times vs. Tasini* issued in late June, but for those who aren't: in 1993, a lawsuit was filed by freelance news writers Jonathan Tasini et al against *The New York Times*, contending that their freelance contracts for editorial services entitled them to copyright privileges—including a slice of the revenue being collected by proprietary archiving services such as NEXIS which provide searchable databases of articles going back to 1980 from major U.S. publications such as the *Times*. Researchers and scholars have routinely depended on these archives for longer than the Internet has been around.

The crux of the argument centred on the interpretation of one paragraph in U.S. copyright law, a 1976 revision known as Section 201(c):

"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."

This was intended to protect writers from the unrestricted resale of their work, while allowing publishers to archive and redistribute the content of their publications as long as it was substantially the same as originally published, and as long as individual articles remained identified as part of the "collective work", i.e. not "separate" from the rest of the publication.

For the past twenty-five years, Section

201(c) has allowed publishers to create "revisions" of their material—historically in analog formats such as newspaper clippings or microfiche—and copy or redistribute them without writers' permissions.

But in ruling in favour of Tasini, the Supreme Court decided that an ASCII-based database of articles (or even searchable PDFs) is not like a collection of news



clippings or a set of pages on microfilm. The core of the Court's convoluted reasoning was summed up as follows by Justice Ginsburg, writing on behalf of the 7-2 majority: *"For the purpose at hand...an analogy to an*

imaginary library may be instructive. Rather than maintaining intact editions of periodicals, the library would contain separate copies of each article. Perhaps these copies would exactly reproduce the periodical pages from which the articles derive; perhaps the copies would contain only type-script characters, but still indicate the original periodical's name and date, as well as the article's headline and page number. The library would store the folders containing the articles in a file room, indexed based on diverse criteria, and containing articles from vast numbers of editions. In response to patron requests, an inhumanly speedy librarian would search the room and provide copies of the articles matching patron-specified criteria.

"Viewing this strange library, one could not, consistent with ordinary English usage, characterize the articles as part of a revision of the editions in which the articles first appeared. In substance, however, the Databases differ from the file room only to the extent they aggregate articles in electronic packages, while the file room stores articles in spatially separate files. The crucial fact is

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that the Databases, like the hypothetical library, store and retrieve articles separately within a vast domain of diverse texts. Such a storage and retrieval system effectively overrides the Author's exclusive right to control the individual reproduction and distribution of each Article." [complete text at caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=00-201&friend=nytimes]

The Court's dissenting opinion, penned by Justice Stevens, distilled the issue much more succinctly: "Users...do not go to NEXIS because it contains a score of individual articles by Jonathan Tasini. Rather, they go to NEXIS because it contains a comprehensive and easily searchable collection of (intact) periodicals."

In other words, without the capability to search for specific information, the information of itself has little or no value. It is the ability to easily find what they're after which users pay for.

And it is this more advanced delivery format which the Court decided had broken the definition of a "collection".

Two points to keep in mind here. This ruling does not relate to the work of novelists, poets, photographers, or other artists who produce independent works, and whose work is already substantially protected by existing copyright law; it is concerned only with copyright on articles in a collection, such as in a newspaper or magazine, and which were produced under individual contracts—which might be reports on anything from a criminal investigation to a gardening show. It also leaves mute the liability issue for conventional Web search engines like Yahoo, Lycos or Google through which the same text might be freely found.

However—and this is the kicker—writers can get help. Royalties can be negotiated on their behalf by the National Writers Union (www.nwu.org)—over which Jonathan Tasini presides as president. NWU is now (no surprise) actively promoting union memberships to writers at US\$95 to US\$260 per year.

As a result of *NY Times vs Tasini*, a decade and a half or more of electronic archives is being selectively expunged as, pending a resolution, numerous U.S. news sources and publications have chosen to remove from their databases any articles written under pre-1995 freelance contracts.

Meanwhile, an aging, anachronistic U.S. Supreme Court has demonstrated that it does not understand the fundamental role, attributes and social implications of 21st century digital technologies.

The environment in which you choose to immerse yourself may be print-oriented or it may be screen-based; it may lean toward business interests or fine art; it may be devoted to still images or video; and it may be realized through self-education or formal training. And this issue of GRAPHIC EXCHANGE offers up a little something on all these topics, from scanning for the Web to digital data projectors; from quintessential typefaces to barebones digital video production; and from launching a graphic design business to our annual directory of Canadian graphics educators.

But an environment where any special interest group—writers included—holds undue sway over the dissemination of everyday information is one where we all suffer a loss of empowerment. 🗑️