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Freelance Writers Lose 'On-Line' Suit

Ruling Bars Copyright Protection for Works

Link to: *Tasini v. The New York Times Co.*, 93 Civ. 8678

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IN A groundbreaking decision regarding the application of copyright law to on-line technology, a Manhattan federal judge has ruled that publishers can put their periodicals on electronic data bases without the permission of freelance writers whose works are included in the publications.

The suit before Southern District Judge Sonia Sotomayor was filed by six freelance writers who claimed that their rights had been infringed when their articles had been sold by newspapers or magazines after publication and placed on CD-ROMs or computer text retrieval systems such as NEXIS.

While noting that there is no precedent "elucidating" the relationship between "modern electronic technologies" and §201(c) of the Copyright Act of 1976, which allows the reproduction of "collective works," Judge Sotomayor found that putting the stories on-line was not an improper exploitation of the freelancers' works.

Declaring in her 56-page opinion in *Tasini v. The New York Times Co.*, 93 Civ. 8678, that the parameters of §201(c) are broader than supposed by the writers, Judge Sotomayor said that the "right to create copies" of a work "presupposes that such copies might be 'perceived' from a computer terminal."

Moreover, she pointed out, the operators of the electronic data bases take "numerous steps to highlight the connection between plaintiffs' articles and the hard copy periodicals in which they appear."

As a result, users of the computer systems are able to consult the perio-

dicals in "new ways and with new efficiency, but for the same purpose that they might otherwise view the hard copy versions," she wrote.

"Indeed, in the broadest sense, NEXIS and CD-ROM serve the same basic function as newspapers and magazines; they are all sources of information on the assorted topics selected by those editors working for the publisher defendants."

Written Agreements

The freelance writers had sold 21 articles for publication between 1990 and 1993 to *The New York Times, Newsday* and *Sports Illustrated.*

There was no written agreement spelling out the rights of freelancers regarding articles published in the *Times.*

Newsday included a notation on it payment checks to freelancers indicating that by accepting the check, the writers were allowing the newspaper to include the stories in "electronic library archives."

A written agreement used by *Sports Illustrated* gave the magazine the right to "license the republication" of the story.

Each of the publishers had longstanding agreements to sell the contents of their publications to University Microfilms Inc. (now called UMI Company) and The MEAD Corporation (now called LEXIS/NEXIS) for inclusion in assorted electronic archives compiled by those companies.

Alleging that this arrangement essentially left them without any rights under §201(c) and served as a windfall to the publishers at their expense, the writers brought a copyright infringement suit against the publications and UMI and LEXIS/NEXIS.

The publications argued that the check notation section and the agreement negated the authors' claims with regard to the stories running in *Newsday and Sports Illustrated.* In addition, they contended that even without an express transfer of rights, the disputed technologies merely generated copies within the dictates of §201(c).

Modern Technology

Although she agreed with the freelancers that none of them had given up their rights through the check notation or the agreement, Judge Sotomayor reluctantly found that §201(c), as currently written, mandated the dismissal of their suit.

"The court does not take lightly that its holding deprives plaintiffs of certain benefits associated with their creations," she wrote. "This does not result from any misapplication of §201(c), however, but from modern developments that have changed the landscape in publishing."

The authors' real complaint lies in the fact that modern technology has "created a situation in which the revision rights are much more valuable than anticipated as of the time that the specific terms of the Copyright Act were being negotiated," the judge added.

"If Congress agrees with the plaintiffs that, in today's world of pricey electronic information

systems, §201(c) no longer serves its intended purpose, Congress is ... free to revise that provision to obtain a more equitable result."

Emily M. Bass of Burstein & Bass represented the authors. Bruce P. Keller, Lorin L. Reisner and Thomas H. Prochnow of Debevoise & Plimpton represented the publications and electronic service providers.