PUBLISHERS WIN OVER FREELANCERS

In New York District court federal judge Sonia Sotomayer dismissed a closely watched lawsuit by freelance writers against the New York Times and other major media organizations over the rights of freelancers when their work is republished on-line and in other new media.

If this decision is upheld on appeal, publishers would automatically have the right to re-publish in any electronic format any works previously printed in their publications, without additional compensation to the creators of the work. According to the judge publications are allowed to do this irrespective of any previous contractual arrangements.

The writers who brought the suit in the case know as Jonathan Tasini et.al. vs. the New York Times et.al. alleged that the media organizations were illegally reusing the freelancers' work that had originally appeared in newspapers and magazines.

The writers argued that they should be compensated for this additional use. They also claimed that the publishers were reaping a financial windfall from new media - one that Congress never intended when it formulated the copyright law.

The judge agreed with the publishers that under a provision of the federal Copyright act (section 201 C) they were allowed to reproduce freelance articles that had originally appeared in their publications when those publications are translated as "collective works" into electronic formats.

Sotomayor said that she had to apply the copyright law as it is written, even though new-media technology couldn't have been anticipated in 1976 when Congress revised the law.

Photographers and Writers Dilemma

For the last 21 years freelance photographers and writers have been producing work for relatively low fees for the first initial use with the contractual understandings -- backed up, we believed in law -- that we would receive appropriate payment for additional uses.

In fact, many creators have earned much more from the second rights to the work, than they were paid for the original use. Many could not support themselves on the fees paid for the initial use, and can only earn a decent living through a combination of initial use fees and re-use fees.

Now, those re-use fees for the work done during the past 21 years have been terminated. This ruling certainly brings into question re-use fees for the publication of books, or chapters from books, as well as electronic uses. Thus, it affects every editorial creator.

Sotomayer indicated that Congress is free to change the law if it wants to take into account the new-media revolution and the resulting questions about writers' rights to their work, but she points out the courts can't act "on the basis of speculation as to how Congress might have done things differently had it known then

what it knows now."

Claire Safran, president of the American Society of Journalists and Authors (ASJA) said, "While Jude Sotomayor's reading of the law and her logic may seem reasonable, her understanding of electronic publishing is seriously flawed.

"We're asstonished that the judge bought the defense argument that database use constitutes only a 'revision' of an issue of a magazine or newspaper. It doesn't. And we're even more astonished at her statement that 'the electronic data abases retain a significant creative element of the publisher defendants' collective works.' They don't.

"Electonic data base compilers strip out nearly everything a publisher brings to its publication: photos, drawings, advertisements, page layout, headline type, index, table of contents--virtually everything that makes a magazine or newspaper what it is. Each article is reduced to the writers' words. And those words belong to the writers.

"The data base compilers then mix that issue's articles with hundreds of thousands of articles from years' worth of hundreds of other publications, making a new and totally different compilation. A computer user simply cannot find the actual issue of the publication itself in the database--because it doesn't exist. A 'revision' of the publication? Hardly.

"One other important point is that this case revolves around a part of the copyright law that applies only when there is no written contract between publisher and author. But most magazines--and, increasingly, newspapers--do use written agreements. So the ruling in this case doesn't apply to most articles by freelance writers published in major magazines and newspapers.

"We think an appeals court would see things very differently from Judge Sotomayor."

Emily Bass, an attorney for the writers said her clients expect to appeal. Her partner, Michael Gaynor, called the judge's decision "an Alice-in-Wonderland type interpretation" or the federal copyright laws.

Bruce P. Keller, a Debevoise & Plimpton attorney representing the media organizations, said that all the judge's ruling does is permit publishers to do what they've always done -- reproduce the contents of their publications in other formats. Where once they did so on microfilm, now they're doing it in new media.

George Freeman, assistant general counsel for the New York Times, said the decision means "electronic reproduction of freelance articles such as in Lexis will be treated no differently than those articles on spools of micorfilm."

In addition to the New York Times Co., the other defendants include Time Warner Inc.'s, Time Inc. magazine group which publishes Sports Illustrated; the Times Mirror Co. newspaper Newsday; University Microfilms Inc. which produces CD-ROMs; and Nexis operator of Mead Data Central Corp. Another defendant, the Atlantic Monthly magazine had previously settled the lawsuit.

The judge, in her ruling, did site several types of "exploitation" by publishers that wouldn't be allowed under copyright law, including turning a freelance article into "a full lenth book" or creating "television or film versions of individual

freelance contributions."

Creators Options

It would appear that creators need to band together to support an appeal as that will be important is saving the work of the last 25 years.

In addition, they need to actively support federal copyright revision. However, even if Congress changes the Copyright Law that will only affect work after the new law is signed and will have absolutely no impact whatsoever on work produced between 1976 and the signing of any new law.

Finally, freelance creators can begin to insist on much higher fees for assignments and all initial use of their work in order to cover themselves for the potential loss of reuse income.