

Tasini v. New York Times, Inc. is the first case to interpret the Copyright Act of 1976 as it applies to the writings of freelance writers published in “collective works.” Appellants are freelance writers (“Authors”) who sold articles for publication in periodicals. Appellees are newspaper and magazine publishers (“Publishers”) who distributed the Authors’ copyrighted articles to electronic databases.

The Copyright Act of 1976 provides copyright protection for original works of authorship fixed in a stable medium.¹ Five separate and exclusive rights exist under a copyright, conferring in the owner of the copyright the right to reproduce, adapt, distribute, perform, and publicly display the work.² Any of the exclusive rights of a copyright, or any subdivision of one of those rights, may be transferred and owned separately.³ The owner of any part of an exclusive right in the copyright is entitled “to all of the protections and remedies accorded to the copyright owner.”⁴

A transfer of copyright ownership, other than by operation of law, must be in writing.⁵ As section 204(a) provides very little guidance as to the requirement of the writing,⁶ “principles of contract law are generally applicable in...copyright assignments, licenses, and other transfers of rights.”⁷ In the absence of a writing,⁸ a nonexclusive

¹ 17 U.S.C.A. § 102(a)

² 17 U.S.C.A. § 106

³ See 17 U.S.C.A. § 106

⁴ 17 U.S.C.A. § 201(d)(2)

⁵ 17 U.S.C.A. § 204(a)

⁶ 17 U.S.C.A. § 204(a)

⁷ See 3 Nimmer on Copyright §10.08

⁸ See 206 F.3d 161, FN 3. One Publisher, Newsday, contended that the freelance writers’ endorsements of the checks it used to pay for the articles constituted an express transfer of copyright because of a legend on the check. Both the District Court and the Court of Appeals rejected this argument and Newsday did not appeal. Another Publisher, Time, did receive an express transfer of copyright from one Author, Whitford. The Court of Appeals analyzes Whitford’s situation separately, but reaches the same conclusion as it does for the other Authors.

license to use the copyright may be granted orally or implied from the conduct of the parties.

Copyright vests initially with the author.⁹ If the author is an employee and creation of the original work falls within the scope of employment, the copyright will vest with the employer.¹⁰ In contrast, a freelance writer or independent contractor owns the copyright in the work as long as the work is not classified as a “work for hire” and there is no written agreement transferring some or all of the copyright to the publisher.¹¹

Section 101 of the 1976 Copyright Act (“Copyright Act”) defines a “collective work” as “a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.”¹² The copyright in the individual contribution vests with the author of the work and is distinct from the copyright in the collective work as a whole.¹³ The aspects of a collective work that make it an original work are the selection, coordination, and arrangement of preexisting materials.¹⁴

A publisher’s copyright in the collective work does not include any right in the preexisting material.¹⁵ In the absence of an express transfer of copyright, section 201(c) provides that “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

⁹ 17 U.S.C.A. § 201(a)

¹⁰ 17 U.S.C.A. § 201(b)

¹¹ 17 U.S.C.A. § 201(b)

¹² 17 U.S.C.A. § 101

¹³ *See* 17 U.S.C.A. § 201(c)

¹⁴ 17 U.S.C.A. § 101 and *see* 206 F.3d 161, 168

¹⁵ 17 U.S.C.A. § 103 (b)

work in the same series.”¹⁶ The Authors and Publishers acknowledged that the “electronic databases are neither the original collective work...nor a later collective work in the same series.”¹⁷ Therefore, the Publishers relied on the argument that “each database constitutes a ‘revision’ of the particular collective work in which each Author’s individual contribution first appeared.”¹⁸ The Second Circuit rejects this argument.¹⁹

For reasons of statutory interpretation²⁰, the Court reasons that the “revision” clause in Section 201(c) “protects only later editions of a particular issue of a periodical, such as the final edition of a newspaper.”²¹ The Court went on to say, “were the permissible uses under Section 201(c) as broad and as transferable as appellees contend, it is not clear that the rights retained by the Authors could be considered ‘exclusive’ in any meaningful sense.”²² It is unclear whether the court’s reasoning is persuasive.

Commentators believe *Tasini v. New York Times, Inc.* will have profound implications on electronic media and online databases and archives. Publishers have already begun contracting around the ruling by insisting on some express transfer of copyright, including electronic distribution rights, in their agreements with freelance writers. However, existing databases may have to pay damages to freelance writers. If databases and freelance writers cannot come to an agreement, many articles could possibly be excluded from the databases. If this happens, then the public’s access to copyrighted articles would be damaged because publishers took advantage of the electronic distribution technology that enables the public to immediately search and

¹⁶ 17 U.S.C.A. § 201(c)

¹⁷ 206 F.3d 161, 166

¹⁸ 206 F.3d 161, 166

¹⁹ *See* 206 F.3d 161, 166

²⁰ *See* 206 F.3d 161, 166-7

²¹ 206 F.3d 161, 166

²² *See* 206 F.3d 161, 168

access an enormous amount of information. *Tasini v. New York Times, Inc.* may also put into question whether publishers can archive the complete contents of their periodicals on their own websites.

One possible solution has recently been enacted by the National Writers Union. The NWU formed the Publication Rights Clearinghouse to assist in capturing potential royalties owed to freelance writers in the wake *Tasini v. New York Times, Inc.* Writers assign the PRC the right to act as their agent in licensing the nonexclusive rights to their previously published copyrighted articles. The PRC then contracts with publishers and databases that wish to use a PRC member's work and collects royalties on behalf of that member. The PRC has the potential to keep existing databases intact and stem a wave of lawsuits by freelance writers seeking damages for copyright infringement.²³

²³ The Wall Street Journal reported on August 15, 2000 "Contentville.com (www.contentville.com), an article database run by New York publisher Steven Brill's Brill Media Holdings LP, pre-empted a similar rush to court by writers earlier this month when it signed an unprecedented royalty agreement with the National Writers Union. Under that deal, writers registered with the union's Publication Rights Clearinghouse will receive 30% of the download fee, typically \$2.95 per magazine article."