

OUTLINE

TASINI v. THE NEW YORK TIMES CORP.

1. Analysis

(a) 2d Circuit Decision

- (i) Is the court's statutory interpretation analysis correct?
- (ii) If contributions to a collective work are generally classified as works-for-hire, why are freelancers' articles treated differently?
- (iii) Do the actions of the Publishers and/or Database Providers fall within one of the three approved uses of 201(c)?
- (iv) Is a Publisher's non-exclusive license to a copyrighted article transferable (to the Database Provider)?

(b) Copyright Policy

- (i) Section 201(c) can be thought of as the default rule for license agreements in the absence of a contract. If parties to a licensing contract do not contemplate a new technology, which party should have the right to the license in the new technology?
- (ii) Is copyright primarily intended to afford the public access to original works or give the authors protection for their work? Or alternately, to protect and stimulate the creation of as many works of art, literature, music and other works of authorship as possible, for the benefit of the public. *See* Jessica D. Litman, *Copyright, Compromise, And Legislative History*, 72 Cornell L. Rev. 857, 857-59 (1987).

2. Implications

(a) Publication Rights Clearinghouse

- (i) Is the PRC sufficient to capture all uses of copyrighted articles?
- (ii) If freelance writers rely on the PRC to get paid for the distribution of their copyrighted articles, does this amount to a tacit acknowledgement that Publishers and Database Providers have a right to distribute those articles and earn profits from those articles?

(b) Bargaining Power

- (i) How will Tasini affect the relationship/balance of power between Publishers and freelance writers?
- (ii) Are Publishers simply contracting around the Tasini ruling by requiring express transfers of the electronic distribution copyright?

(c) Databases

- (i) Are databases currently infringing on freelance writers' copyrights?
 - (ii) Will freelancers initiate a flood of lawsuits against Publishers and Databases?
 - (iii) What right does a Publisher have to include freelance writers' articles on its own website database/archive?
- (a) Does it make a difference whether the publisher charges for the article or allows users to access the article for free? (The NY Times charges \$2.95 per article for articles older than 2 weeks.)

(i) “The NWU [National Writers Union] position is that copyright violation begins when someone starts making money from someone else’s intellectual property without the owner’s consent. Commercial versus non-commercial use is the dividing line. Reading should not be a crime, nor should the non-commercial sharing of information be prohibited regardless of method.”

www.nwu.org/tvt/tvtlib.htm

(b) If society strongly believes that a Publisher should be allowed to include freelancers’ articles on its own website database/archive, is this evidence that the 2d Circuit’s interpretation of the “revision” clause in 201(c) was wrong?