

Incidental Paper

***Tasini Revisited, or
Freelance Writings in the
High-Tech Age (cont.)***

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Cambridge, Massachusetts

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Policy Research

An incidental paper of the Program on Information Resources Policy.

Tasini Revisited, or Freelance Writings in the High-Tech Age (cont.)

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May 1998, I-98-3

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The Program on Information Resources Policy is jointly sponsored by Harvard University and the Center for Information Policy Research.

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One

The copyright infringement suit brought in the winter of 1993–94 by a group of freelance writers against a group of periodicals and electronic media¹ has come to a clear and unambiguous conclusion (at least, at the U.S. District Court level). The writers complained, in essence, that their articles had been sold to the periodicals for publication solely in the initial print-on-paper issues and that subsequent use in CD-ROMs and computer databases violated the authors' exclusive rights.

About two years were spent on "discovery," i.e., interrogatories, depositions, and the like. In March 1996, the plaintiffs moved for summary judgment, and some six months later so did the defendants. After several sessions of oral argument, the Court (U.S. District Judge Sonia Sotomayor) took the case under advisement. On August 13, 1997, she rendered her decision, agreeing with the defense and granting summary judgment in its favor. On September 3, the plaintiffs applied for reconsideration and reargument, which the Court denied on October 29—and that is where the matter rested as the year ended.²

The crux of the case lies in the Copyright Law's provisions concerning collective works.³ The differing interpretations of these as argued in the motions and discussed by the Court warrant further exploration, I think, with the following aspects of perhaps special interest:

- Are what the writers call "electronic rights," i.e., the rights to reproduce their articles in electronic media, excluded from the "privilege" acquired by the owners of copyright in the collective work? If not, is the electronic version of a periodical truly a "copy" or a "revision" of the original paper issue, or is it a distinct product?
- In the transfer of a periodical from print-on-paper to electronic media, is the entire issue handled as a whole or are the component articles handled individually?
- Is the image of an article as it appears on a CD-ROM or computer screen being "reproduced" (i.e., copied), or is it being "displayed" or "performed"?

¹*Jonathan Tasini et al. v. New York Times Co. et al.*, 93 Civ. 8678 (SS). The case was subject of my research paper, *Freelance Writings in the High-Tech Age* (Cambridge, Mass.: Harvard University Program on Information Resources Policy, P-95-2, April 1995), hereafter cited as JR. The plaintiffs' claim against The Atlantic Monthly Co. was settled out of court.

²The five documents will be cited as follows: PM, plaintiffs' motion for summary judgment; DM, defense motion for summary judgment; C, the Court's opinion and order; PMR, plaintiffs' request for reconsideration; CR, the Court's ruling on this request.

³Public Law 94-553, Title 17 U.S.C., especially section 201(c).

- When publishers or database or CD-ROM producers create indexes or abstracts of articles to identify them for easier retrieval, are they infringing the authors' exclusive right to create "derivative works"?

Two

“Summary judgment is required when ‘there is no genuine issue as to any material fact and...the moving party is entitled to a judgment as a matter of law.’”⁴ This was certainly the case here: the parties had agreed on the basic facts in the depositions and implicitly acknowledged that by both seeking summary judgment. However, after the Court ruled in favor of the defense, the plaintiffs applied for reargument and reconsideration in part on the grounds that the Court had “overlooked” “genuine issues of material fact” that should be considered by a jury.⁵ (One is reminded of the legal profession’s old saw, “When the facts are against you, argue the law; when the law is against you, argue the facts; and when both are against you, throw yourself on the mercy of the court.”) Predictably, the plaintiffs’ request was denied. In early January 1998, plaintiffs filed notice of appeal in the U.S. Court of Appeals for the Second Circuit. As of mid-April, firm dates for a hearing have not been set, and a final resolution may be many months and possibly several years off.

⁴C 12.

⁵PMR 4ff., passim.

Three

Section 201(c) of the Copyright Law provides that

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.

Virtually every phrase in this section was in dispute between the parties. The plaintiffs placed heavy emphasis on the first half (tending to glide over the word “initially”), and appeared to put the narrowest possible construction on the second half. The defense, while acknowledging the presence of the first half, concentrated on exploiting every phrase and every nuance of the second.

The plaintiffs argued that “...the proprietor of copyright in a collective work cannot republish one of the contributions that had been included...*as a separate work*...or use or license the use of the contribution in another work...[or] make a derivative work based upon the preexisting work or include the preexisting work in another collective work...” unless he has previously been granted rights to do so.⁶ They conceded (in a footnote)⁷ that the “‘privilege’ afforded publishers...represents a very limited exception to this rule.” Citing a report by a House of Representatives committee in the legislative history, the plaintiffs held that this “privilege” is limited to, for example, reprinting an article published in one issue of a periodical in a later issue of the same periodical, and to reprinting an article contributed to an encyclopedia in a later revised edition of it. “The defendants’ attempt to invest...these phrases with connotations and applications that they were never intended to have must be summarily rejected...especially...since the technologies that the defendants seek to import into the ‘privilege’...had not yet even entered the public consciousness by the time the provision was drafted, if indeed they were even fully developed.”⁸ The plaintiffs also tried very hard to invest the term “privilege” with a special meaning: “The copyright owner’s exclusive rights are not subject to section 201.... This is undoubtedly why a publisher, under section 201, only

⁶PM 7-8.

⁷Ibid.

⁸PM 39-40.

gets the 'privilege' of including a freelance author's contribution in its collective work, rather than either [sic] a full-fledged 'right' to do so."⁹

The defense motion contained blunt rebuttals. Far from exceeding the scope of section 201, "...the non-paper editions challenged by plaintiffs qualify either as 'that particular collective work' or as 'revision[s] of that collective work,' revised to permit their transformation from one medium...to another...[N]either the language of Section 201(c) nor of [sic] any other provision of the Copyright Act restricts the particular medium in which a periodical or 'any' revised or subsequent edition thereof, may be published or distributed. To the contrary, the entire Act specifically was designed to be neutral in its treatment of media and technology."¹⁰ The motion went into considerable detail of the legislative history to corroborate this point.¹¹ It argued that authors could limit the publishers' "privilege"—and that this was why the term "privilege" was used—but they "...must do so in advance, not retroactively."¹² And it rightly pointed out that "In fact,...prior to the commencement of this action not one of the plaintiffs objected to publication of issues of periodicals containing his or her articles in copies other than paper or took any affirmative steps whatsoever to communicate his or her non-paper limitation."¹³

The Court—after recapitulating the facts in the case and disposing of *Newsday's* and *Time's* claims of contractual rights (which are not dealt with here)—concluded that "the numerous arguments and voluminous record in this case devolve to whether the electronic defendants produced 'revisions,' authorized under Section 201(c) of the Copyright Act, of the publisher defendants' collective works."¹⁴ It continued: "The issue is narrow, but its resolution is not simple: there is virtually no case law parsing the terms of Section 201(c), and certainly no precedent elucidating the relationship between that provision and modern

⁹PM 9, footnote 5; also, PM 36.

¹⁰DM 2. This point was also discussed in detail in JR, sections 3 and 4.

¹¹DM 3-4, 16-33.

¹²DM 18, including footnote 18. However, I could not find anything in the legislative history to indicate that Congress had attached a special meaning to the term, certainly not any meaning that would limit the publishers' privilege under 201(c). *Black's Law Dictionary* defines privilege in part as "A right, power, franchise or immunity held by a person or class..." and defines right in part as "...a power, privilege, faculty, or demand, inherent in one person and incident upon another...that which a man is entitled to have, or to do, or to receive from others within the limits prescribed by law...." Other dictionaries also treat privilege and right generally as synonyms. In ordinary usage, though, privilege usually implies something special and select, while right implies more comprehensive, universal applicability.

¹³DM 15. See also JR section 5.

¹⁴Throughout the documents in this suit the term "electronic defendants" comprises Mead (i.e., NEXIS) and UMI (formerly known as University Microfilms, Inc.), and the term "publisher defendants" comprises The New York Times Co., Time Inc., and *Newsday*.

technologies.”¹⁵ And then the Court itself proceeded to “parse the terms” of 201(c): “If the provision ended with its first sentence, plaintiffs would prevail...the publisher defendants would not be at liberty to reuse plaintiffs’ individual contributions even in new versions of their own periodicals.” However, the second sentence extends to the creators of collective works certain privileges, and so “the determinative issue here...is the precise scope of these ‘privileges.’”¹⁶ The Court rejected the plaintiffs’ view that the “privileges” were like “narrowly circumscribed nonexclusive licenses” and hence not transferrable, but found, instead, that they were “subdivisions of rights” under section 201(d), “which permits the transfer of copyright...by ‘operation of law.’” Just as the authors transferred the copyright in their articles “in part” to the publishers, so the latter were entitled to transfer their copyright in the collective works “in part” to the electronic defendants to help create the permitted revisions and reproductions. After citing the same House committee report that both litigant parties had cited, the Court held:

The term “privilege” is used in Section 201(c) to underscore that the creators of collective works have only limited rights in the individual contributions making up their collective works; the term does not indicate that the creators of collective works are limited in exercising those few rights, or “privileges,” that they possess. Thus, to the extent that the electronic reproductions qualify as revisions...the defendant publishers were entitled to authorize the electronic defendants to create those revisions.¹⁷

The Court turned next to the plaintiffs’ arguments that Congress “intended to limit the creators of collective works to revising and reproducing their works in the same medium in which those collective works initially appeared... [but found] nothing in the terminology of Section 201(c), the legislative history, or the nature of revisions generally which supports such an approach.”¹⁸

The plaintiffs had used the House committee report, which included but two examples of the kinds of “reproductions and revisions” the publishers of collective works could make, to infer that other kinds therefore were prohibited; but the Court found such an inference unjustified: “Section 201(c) contains no express limitation upon the medium in which a revision can be created. To the contrary, ‘any revision’ of a collective work is permissible, provided it is a

¹⁵C 18.

¹⁶C 23-24.

¹⁷C 24-27.

¹⁸C 27. In footnote 7 (ibid.) the Court noted that plaintiffs had conceded the legitimacy of reproducing a periodical on microfilm but suggested that “an electronic equivalent of microfilm” would be “a violation.” The Court commented that “if it is ‘possible’ that...201(c) permits microfilm reproductions...it is impossible that [it] prohibits reproductions in a new medium.”

revision of 'that collective work.'"¹⁹ The Court rejected plaintiffs' reading into the legislative history a deliberate exclusion of electronic media, citing the many passages of the Copyright Law that attest to its "media neutrality." "Key terms of the Act are defined to accommodate developing technologies."²⁰

The problem that still needed to be resolved was crucial: Is each of the defendant periodicals as they appear in the databases and CD-ROMs truly a "revision" of "that collective work" within the meaning of section 201(c)? The Court held that it was, indeed, "recognizable as a version of a pre-existing collective work"; and while the contributed articles remained untouched, the collective work as a whole had been revised by changing the arrangement and selection of the components. After explaining how the U.S. Supreme Court's ruling on the copyright of compilations, in the *Feist* case, and other precedents apply to collective works, the Court defined the issue thus:

If the disputed periodicals manifest an original selection or arrangement of materials, and if that originality is preserved electronically, then the electronic reproductions can be deemed permissible revisions of the publisher defendants' collective works. If, on the other hand, the electronic defendants do not preserve the originality of the disputed publications, but merely exploit the component parts of those works, then plaintiffs' rights in those component parts have been infringed.... This...analysis mirrors the Supreme Court's compilation infringement analysis...[in *Feist*].²¹

Pointing out that the selection of articles for magazines and newspapers "is a highly creative endeavor," the Court found that "The defendant publishers' protected original selection of articles...is preserved electronically. Articles appear in the disputed data bases solely because the defendant publishers earlier made the editorial determination that those articles would appeal to readers." Although the defendant periodicals appear in NEXIS and several CD-ROMs alongside many others, this "does not automatically mean that the defendant publishers' protected original selection is lost," especially given that they are identified so that the "original selection remains evident online." Even though advertisements, pictures, and some other material that appeared in the original periodicals were dropped in the electronic versions, these omissions are permissible changes in the "arrangement" of the collective works so long as the bulk of the "selection" has been kept. "...NEXIS and UMI's

¹⁹C 31-32.

²⁰C 33-34.

²¹C 37-42. See also my paper, *Copyright of Compilations in the post-Feist Era* (Cambridge, Mass.: Harvard University Program on Information Resources Policy, P-92-8, October, 1992).

CD-ROMs carry recognizable versions of the publisher defendants' newspapers and magazines...."²²

In further corroboration, the Court applied the test of "substantial similarity" from preceding cases. "...[T]he electronic reproductions do more than merely preserve a defining element of the publishers' collective works. [They] preserve that element within electronic systems which permit users to consult defendants' periodicals in new ways and with new efficiency, but for the same purposes that they might otherwise review the hard copy versions...."²³

In their plea for reconsideration, the plaintiffs latched on to this issue of "substantial similarity" (along with two others). They argued that it should have been left to a jury to decide, since "similarity is in the eyes of the beholder," and cited ten material differences between a database like NEXIS and a single issue of a periodical that a jury might perceive. However, the similarity pointed out by the Court is between the print-on-paper issue of that periodical and its distinctly identifiable representation in the database, not (as the plaintiffs claim) between "a database that contains some million or more articles" and "an issue of *Newsday* or *The New York Times*, each of which contains only some 150 articles...."²⁴ I cannot imagine that any sensible jury could side with the plaintiffs on this matter; but the final word may not yet have been spoken.

²²C 45-49.

²³C 50-51. The Court's views and their rationale explained in C 37-51 were recapitulated, with greater emphasis and with additional citations of precedents, in the Court's ruling denying plaintiffs' request for reconsideration (CR 16-20).

²⁴PMR 4-9; note 23 (supra).

Four

The process of transferring periodicals from paper to electronic media was another bone of contention, because publishers of collective works own the copyright only in the collective work as a whole, while copyright in “each separate contribution” “vests initially in the author.” According to the plaintiffs, “even before the presses cool, the publications are dismantled and their parts are sent off to [the electronic defendants], where the parts experience a second life...the publisher defendants *discard* their collective works and return to a *pre-collective work* state.”²⁵ This formed the basis for their charge that NEXIS and UMI empowered their users, in violation of the authors’ exclusive rights under section 106, “to search through, access, retrieve, display, download and/or print out plaintiffs’ works.” Actions taken by NEXIS and UMI assure that each article they receive is handled as “a discrete electronic entity”; but “they don’t have to disassemble any preexisting collective works because the parts they need have already been provided to them as ”discrete ‘documents.’” And the defendant publishers are guilty of “contributory infringement” because “they segregated the articles into separate electronic files” and added diverse finding aids to each item to facilitate its retrieval.²⁶

Recapitulating this position, plaintiffs argued forcefully that “the publishers go to great lengths to dissociate the articles...from the collective works in which they appeared...[and] to ensure that they can deliver the articles...as *individual articles* and *not* as part of *any* collective works.” And plaintiffs stated flatly that publishers do this because computerized retrieval systems “*deal* in individual articles and *not* in collective works...the basic unit of a search and retrieval system is the article or document.”²⁷

To no one’s surprise, the defendants’ description of the process differed sharply. “The computer text-files transmitted to NEXIS include the entire textual contents of each day’s (or, in the case of *Sports Illustrated*, each week’s) edition of each publication, as well as headlines, photograph captions and by-lines, and page and section references.... As a result, the textual content of each edition...in the NEXIS computerized library is substantively identical to that of the editions printed on paper and microfilm.”²⁸ The point was reinforced by comparing previous research procedures involving the use of an index to periodicals and paper copies or microfilm of past editions with the “much more direct and efficient manner”

²⁵PM 2.

²⁶PM 23-25, 28-29.

²⁷PM 37.

²⁸DM 7-8.

in which, by using computers, “relevant information” can be retrieved “directly from the ‘electronic stacks’ of periodicals” in databases or on CD-ROMs.²⁹

The Court succinctly summarized the plaintiffs’ position,³⁰ but rebutted it by pointing out that the electronic defendants take “numerous steps to highlight the connection between plaintiffs’ articles and the hard copy periodicals in which they first appeared. For instance, users access plaintiffs’ articles through data bases consisting only of those articles printed in a particular identified periodical, or particular periodicals. More importantly, once an article is selected for review, that article is identified not only by the author, but by the publication, issue, and page number in which it appeared.” The Court then turned to the argument that some elements of the original periodicals are not reproduced electronically (such as layout, pictures, etc.) but found that these changes are ultimately “of only peripheral concern” because they fall within the publishers’ prerogative to “revise” the collective works by changing the “arrangement.”³¹

²⁹DM 10. It is interesting to note that this issue of “whole collective work” vs. “individual articles” is not addressed further in the defense motion.

³⁰C 40.

³¹C 48-49.

Five

Another, major aspect of the controversy concerned the mode in which material retrieved from a computer database or CD-ROM appears to the user or, rather, the word or words used to describe that mode. Is an item retrieved from an electronic medium “copied” on a videoscreen? Is it “reproduced”? Is it “displayed”? Or (in an extreme usage) is it “performed”? And does it matter how the mode is described?

As far as the plaintiffs were concerned, it evidently did matter. The cornerstone of their case was section 106 of the Copyright Law, “which gives authors the exclusive right not only ‘to do’, but also ‘to authorize’ others to reproduce, distribute, display and perform their works.... It is this right more than any other, perhaps, that the defendants have infringed...by authorizing...the users...to...retrieve, display, download and/or print out plaintiffs’ works—or, in the words of the statute, to display, distribute, perform and reproduce plaintiffs’ works.”³² Infringement of the right to “display” the works was given special emphasis by citing the use of the word “display” in the publishers’ agreements with the electronic defendants;³³ but no special mention was made of the term “perform” in this context. That came in the lead of the concluding argument:

The grant of a right to reproduce and distribute a copyrighted work on or in conjunction with a coded information storage and retrieval system is meaningless unless the transferee is *also* authorized to display and/or perform the work. Since the owner of the copyright in a collective work has not been given the ‘right to’, or even ‘privilege of’, displaying or performing a contribution under section 201(c), it follows that he cannot have been given a reproduction and/or distribution right in connection with such a system, either.³⁴

The defense responded that the plaintiffs’ efforts “to erect walls between the various categories of rights created by the Copyright Act is plainly improper” and, citing the House of Representatives report, held that “Congress implicitly recognized that the same publishing activities could implicate more than one right.” It went on to give the example of a copy of a newspaper being “displayed” on a rack at a newsstand, including the front-page photograph, without getting “display rights” from the photographer. “Because the CD-ROM and NEXIS editions of the publications at issue plainly fall within the scope of the definition of ‘copies,’ and within the concepts of ‘reproduce’ and ‘distribute,’ none of the defendants have exceeded

³²PM 23. The charge is leveled here at NEXIS and UMI; but later (pp. 26-33) targets the publishers as “vicarious” and “contributory” infringers.

³³PM 23, footnote 22.

³⁴PM 38. There followed an extensive summary of the relevant portions of the legislative history.

the scope of...Section 201(c).”³⁵ In a footnote, the defense cited the definition of “perform a work” (section 101) to show that “Plaintiffs’ performance rights are not involved” because works reproduced “in microfilm, NEXIS and CD-ROM editions” are “neither recited, rendered, played, danced or acted.”

The Court rejected plaintiffs’ arguments. After citing the statute’s definition of “copies”—“...material objects...in which a work is fixed...and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device...”—it held that “Thus, the right to reproduce a work, which necessarily encompasses the right to create copies of that work, presupposes that such copies might be ‘perceived’ from a computer terminal.” In a footnote referring to microfilm, the Court pointed out that under section 109, the owner of a lawful copy is permitted “to display that copy publicly.” And the Court held, further, that the legislative history does not sustain the plaintiffs’ view that by using the phrase “reproducing and distributing” in section 201(c) instead of “publishing,” the lawmakers meant to exclude the right to “display” (which is encompassed in the right to “publish”).³⁶

³⁵DM 34-35.

³⁶C 29-30.

Six

Mead and UMI Have Violated Plaintiffs' Exclusive Right to Prepare Derivative Works...Based upon Their Articles

is the heading of a section of the plaintiffs' motion for summary judgment, which continues: "...each display and/or printout of a data file contains not only the text of the articles...that have been copied, but also 'certain data related to those articles.' This data [sic] consists of each article's 'vital statistics' and certain descriptive words or phrases...such as its major topic or theme, words that are indexed to the article...etc. In addition...the data base defendants generally prepare concordances and indices...." And it cites several agreements between the publishers and the electronic defendants that "clearly recognize [that] these indices and concordances are 'derivative works.'"³⁷ Later in the same document, the publisher defendants are similarly accused: "Like the data base defendants, they claim to have prepared segments, indices, key words and/or concordances and then either to have added them to or linked them with plaintiffs' files or to have sent them on to Mead or UMI for the latter's processing and use."³⁸

And isn't the creation of "derivative works" one of the exclusive rights of the original authors under section 106?

It is curious that this issue was not mentioned at all in the plaintiffs' complaint, and apparently surfaced for the first time (over two years later) in this motion for summary judgement and the oral arguments on October 17 and December 10, 1996.³⁹ There the plaintiffs focussed on UMI's *General Periodicals on Disc*, which contains full-page images of numerous periodicals including the Book Review and Magazine sections of *The New York Times* along with digital synopses (abstracts) of each article. The Court made no mention of the October hearing, but stated that at the December hearing plaintiffs argued that these synopses "constitute unauthorized derivative versions of plaintiffs' articles. Defendants responded that plaintiffs had not raised this issue in any of their earlier submissions to the Court, and that defendants therefore had not had an opportunity to address the issue in discovery or in argument. The Court has since verified that defendants were correct, and therefore...will not consider whether the abstracts infringe plaintiffs' copyrights...."⁴⁰

³⁷PM 21.

³⁸PM 33.

³⁹PMR 9ff. The transcripts of oral arguments were not available to me.

⁴⁰C 41, footnote 12.

The Court's refusal to consider this was one of the three issues on which the plaintiffs based their request for reconsideration. They claimed that at both hearings two points were raised about UMI's *General Periodicals on Disc*, that (1) it contains not the whole *New York Times* but only two sections, and (2) it contains unauthorized abstracts for each article. They asserted that "...both arguments were dealt with fairly extensively—albeit in a very fragmented fashion—at the Oral Argument that was held on October 17..." and detailed "numerous" portions of the transcript "where plaintiffs either made or attempted to make the 'abstracts' argument, only to be stopped, interrupted or diverted."⁴¹ The Court rebutted this, stating that the plaintiffs had raised the "abstracts argument" to show that UMI's product was "not a true image based system," an argument it considered "inconsequential"; but that they had never "raised the possibility that the article abstracts—depending upon their content—might constitute unauthorized derivative versions of each article, instead of something akin to a simple index...."⁴²

The question whether abstracts or synopses of articles are "derivative works" under the Copyright Law has never been litigated nor, so far as I could ascertain, examined in the legal literature or the professional journals of the information industry. However, the significance of abstracts is attested by their critical role in research in several disciplines, notably in law and the sciences. That this question has now, in *Tasini*, reached the courts may warrant an analysis of and comments on some of the fundamentals involved.

Section 101 of the Copyright Law defines a "derivative work" as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization...abridgment, condensation, or any other...form in which a work may be recast, transformed, or adapted...." And, as already noted, section 106 gives the copyright owners (i.e., the original authors) the exclusive right, among others, "to prepare derivative works based upon the copyrighted work."

It is in this context that the *Tasini* plaintiffs accused the defendants of infringement, lumping together, as "data related to" the articles, "each article's 'vital statistics' and certain descriptive words or phrases...such as its major topic or theme, words that are indexed to the article, the title of the article, the author's name...etc."⁴³ Neither the defense nor the Court challenged this definition.

⁴¹PMR 9-11. The portions cited (pp. 12-21) are diffuse and confusing, and do not seem very persuasive. However, the plaintiffs asked the Court just to reconsider the issue, not to rule on it.

⁴²CR 22.

⁴³Supra p. 15.

However, most of these “data related to the articles” do not seem to fit the statute’s definition of derivative works; only “certain descriptive words or phrases,” which are called “abstracts” or “synopses” elsewhere in the briefs, may be encompassed by the terms “abridgment” and “condensation” used in that definition. The purely bibliographic elements—the title and date of the article, its byline, and its location (issue, section, and page numbers) etc.—are clearly distinct from “abridgment.” Even when cumulated into bibliographies or catalogues, they hardly qualify as forms in which the underlying works are “recast, transformed, or adapted.” I cannot imagine that the addition of such bibliographic data could be considered as violating an author’s exclusive right to create derivative works.

The same holds true for the “indices and concordances” created by the defendants. (Concordances record the occurrence of words, regardless of context, in a textual work, whereas indexes mostly record, besides proper names, titles, etc., the occurrence of subjects and concepts, whether expressed or implied, in their context.) As for articles in periodicals, it would be absurd to consider a concordance or index to only a single article; such a finding aid makes sense only if it pertained to all, or at least a large part, of a collection. And in that case the right to prepare indexes would appear to belong to the owner of copyright in the collective work, and not to the owner of copyright in any single part of it.

Also: Although index entries are obviously derived from the work indexed, the entries for a single periodical article certainly do not fit the statute’s definition of a derivative work as “a form in which a work may be recast.” Thus, all of the “data related to those articles” that the plaintiffs alleged to have infringed their rights seem to fall outside the derivative works provision, except the “descriptive words or phrases,” i.e., the abstracts.

Abstracts (synopses) differ from abridgments and condensations, which are cited as examples in the law’s definition of “derivative works.” The latter normally try to render the underlying works more briefly but to preserve as much of the original structure, wording, and style as possible. There is no doubt that the right to prepare or to let others prepare abridgments or condensations belongs to the owner of copyright in the underlying work. However, the actual “descriptive words or phrases” cited by the *Tasini* plaintiffs are far from being abridgments or condensations.

Abstracts generally are terse renderings of the content of the underlying works, and preferably employ quite different wording and sentence structure. “Indicative” abstracts merely tell what the underlying work is about, while “informative” abstracts summarize as much of its content as may be useful and appropriate. Both types serve to identify the underlying works; but “informative” abstracts may actually give a user all the information desired and may obviate the need to consult the underlying work. Obviously, abstracts

“derive” from the works abstracted; but are they “versions” of those works or “forms in which they may be recast”?

As is the case with indexes, it is unlikely that, for periodicals, abstracts would be prepared only for single or a selected few articles. Such finding aids normally are created for all components of a collective work—and thus the right to do so seems to belong to the owner of copyright in the collection, and not to the author of a single component. Since abstracts have been used in computerized information retrieval systems for well over thirty years, it is difficult to understand why the plaintiffs were not aware of the practice or chose not to do anything about it until the oral argument in the fall of 1996, some three years after they had begun their suit.

The statute itself, however, provides the best answer to the question whether abstracts not authorized by the authors of the abstracted works are infringing their copyrights. Copyright protection extends solely to the *expression* of a work of authorship and “in no case,” as section 102(b) has it, “to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” In short, so long as abstracts use original language, not the authors’ wording, in describing the contents of the articles they are not infringing, even though they are in fact “derived” from them. Under section 103(b), abstracts prepared by the periodical publishers (or by the electronic distributors as their licensees) are “material contributed” by the author of the collective work and are covered by its copyright, “as distinguished from the preexisting material employed in the work....”

Seven

Significantly, the Court concluded its opinion with a comment on the supposed economic consequences of a ruling in favor of the defense. After enumerating the limitations on the publishers' right to exploit individual contributions to the periodicals, it continues:

The Court does not take lightly that its holding deprives plaintiffs of certain important economic benefits.... This does not result from any misapplication of Section 201(c), however, but from modern developments which have changed the financial landscape in publishing.... If today's result was unintended, it is only because Congress could not have fully anticipated the ways in which modern technology would create such lucrative markets for revisions; it is not because Congress intended for the term revision to apply any less broadly than the Court applies it today.... [P]laintiffs' real complaint lies in the fact that modern technology has created a situation in which revision rights are much more valuable than anticipated as of the time that the specific terms of the Copyright Act were being negotiated. If Congress agrees with plaintiffs that...Section 201(c) no longer serves its intended purposes, Congress is of course free to revise that provision to achieve a more equitable result.⁴⁴

⁴⁴C 53-55. The Court did not mention that decades of development, at huge costs, preceded today's incipient and still very shaky profitability of electronic retrieval systems.