

**Freelance Writings in
the High-Tech Age:
A Conflict of Interests**

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Program on Information Resources Policy

Harvard University

Cambridge, Massachusetts

Center for Information
Policy Research

PROGRAM ON INFORMATION RESOURCES POLICY

April 1995

Harvard University

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A publication of the Program on Information Resources Policy.

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April 1995, P-95-2

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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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ISBN 1-879716-25-9

Acknowledgements

The author gratefully acknowledges the very kind help of the following people who reviewed and commented critically on drafts of this report: Herbert R. Brinberg, Debora Chapin, Martin L. Ernst, Roy Freed, Robert Godbey, and Patricia Hirl Longstaff. Without their consideration and input, this study could not have been completed.

These reviewers and the Program's Affiliates are not, however, responsible for or necessarily in agreement with the views expressed here, nor should they be blamed for any errors of fact or interpretation.

The author would like to express gratitude also to New York University's Law School Library for permitting the requisite research there; to the Legal Department of *The New York Times* for making copies of the *Tasini* complaint and the defendants' reply brief available; to The Authors Guild and the National Writers Union for sending him copies of the relevant guidelines, news releases, and other documents; and to the office of Representative Carolyn Maloney (N.Y.) for a summary of pending copyright legislation and for other pertinent government reports.

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Executive Summary

When freelance writers have contributed articles to newspapers or magazines, they have usually assumed that they are retaining all rights to subsequent uses of the articles, unless otherwise specified otherwise in written contracts. The editors and publishers, on the other hand, have usually assumed that, unless there are contracts ceding such rights to the authors, they are free to reuse the articles in creating and marketing products derived from or based on the periodicals(s) in which the articles appeared originally.

The momentous developments of the high-tech information age and their growing markets prompted authors' organizations, in the latter half of 1993, to demand that freelance writers be given more control over the use of their work in derivative products, as well as added compensation, and in December 1993 a small group of writers filed a suit for copyright infringement against several major newspapers and magazines and two operators of computer database and CD-ROM services who market the contents of these publications in electronic form.

This paper offers first a perspective of the periodical industry's past relations with freelancers and the history of the industry's derivative products. It then reviews the change brought about by the development of database and related technologies, as well as relevant provisions of the copyright law of 1976 and commentaries on it that may have a bearing on the conflict over freelancers' rights. Finally, it analyzes the demands of writers' organizations, the specific claims in the writers' suit, and the respondents' counterclaims; and speculates about the effects of the conflict on authors, publishers, and the public and its possible resolution.

One

Introduction

The multimedia revolution promises to put news, information and entertainment at America's fingertips. It will also earn a lot of money for the companies whose programming fills interactive television screens, computer bulletin boards and computer disks. Yet many of them are just beginning to discover that the path to an interactive future is littered with copyright landmines.¹

Stumbling along this path, creators of products for traditional print and audiovisual media find that the packagers and distributors of these products are exploiting new outlets for them but are not sharing the resulting revenues, in part perhaps because they, and not the creators, are bearing the considerable risks and costs of these enterprises and the revenues are highly uncertain. Yet the creators hold that they are entitled to compensation for such added exploitation of their products. This conflict of interests between those who create and those who market intellectual property has, for the present, landed in the copyright arena, although many people are doubtful about finding a resolution in the copyright law.

This paper explores the conflict in one specific corner of the arena, that occupied by publishers and editors of newspapers and magazines along with their electronic business partners on one side and freelance writers (and their agents, if any) on the other. Though similar problems exist for other professional freelancers—for example, photographers, cartoonists, and illustrators—and in advertising, in book publishing, and other industries, these are referred to only if useful for purposes of comparison.

The controversy over freelance writings in periodicals came into the open in 1993–94, with the issuance of guidelines by writers' organizations and the filing of the first copyright infringement suit ever by freelance writers.²

¹Sabra Chartrand, "Patents," *The New York Times*, March 28, 1994, D-2:4.

²"Electronic Publishing Rights," a Position Statement by The Authors Guild and the American Society of Journalists and Authors, October 18, 1993 (hereafter cited as "authors' position statement"); *Jonathan Tasini et al. v. New York Times Co. et al.*, 93 Civ 8678, amended complaint filed on February 24, 1994, in U.S. District Court, Southern New York (hereafter cited as *Tasini*). The defendants' response was filed on May 6, 1994. Copies of both briefs were made available to me. Mr. Tasini is the president of the National Writers Union, but that organization is not a party to the suit.

Disputes over copyright usually entail legal interpretations of the copyright clause in the Constitution³ and of the statute that implements it⁴; but the underlying issue almost always is economic rather than philosophic or political. It is a struggle between two of the three main market forces involved in intellectual property matters, the creators and the distributors, while the third, the public (i.e., the consumer or end-user), is mostly a bystander. However, the consumer's acceptance and uses of the products and delivery mechanisms are likely to affect the outcome in the long run; and the struggle and its outcome will surely affect the consumer.

³Article I, sec. 8, par. 8.

⁴Public Law 94-553 (Title 17, U.S. Code) (1976).

Two

About Freelancers

free lance, 1. a person who works as a writer, designer, performer, etc. but not on a regular salary basis for any one employer, organization, or the like...⁵

Freelancers have been an important segment of the work force in a wide range of creative occupations for at least several centuries. They have included skilled artisans, sculptors, painters, writers, photographers, composers, and illustrators, all either creating works as their talent mandated and then offering them in the marketplace, or accepting proffered individual commissions or assignments.

In today's world, newspapers and magazines could hardly operate without freelancers. Their work is ubiquitous among the published photographs, cartoons, and other illustrative material; and, while regular reporting and editing is done normally by members of the staff, much of the writing in special categories is done by "contributors." Those categories include reviews of literature and the arts, local and regional features, essays, profiles, commentary, fiction, and others.⁶

Understandably, freelancers are deeply concerned with copyright: Their writing is usually the major or even the sole source of their income and is their principal asset. The copyright law states explicitly that the copyright belongs to the author of a work unless the work is "made for hire," in which case it belongs to the author's employer.⁷ Unfortunately, the law does not define "author," "employee," and "employer," and its definition of "work made for hire" has caused much confusion and litigation. The crux of the litigation has been whether the work involved was indeed a "work made for hire" or was created by an

⁵*Random House Dictionary of the English Language* (New York: Random House), 1966ff. Definition 3, "a mercenary soldier or military adventurer of the Middle Ages, often of knightly rank, who offered his services to any state, party, or cause," evidently explains the origin of the term.

⁶Diligent research failed to locate any statistics on the quantity of material published in periodicals that is supplied by freelancers. To provide at least some minimal clue, the number of articles by freelancers published in three consecutive Sunday issues of *The New York Times* were counted, with these results: April 24, 1994, 44; May 1, 1994, 42; and May 8, 1994, 45. Not surprisingly, the greatest number were found in the Book Review and Magazine sections.

⁷Sec. 101; sec. 201(b).

independent author.⁸ But near the end of 1993 for the first time a different aspect of freelance work became the bone of contention in the intellectual property arena: not the author's independence or the status of the work as "made for hire," but the dimensions of the right an author conveys to a publisher along with the "contributed" article.⁹

Freelance authors, like their works, come in many varieties, ranging from those who pursue writing for publication as a full-time profession to people in totally unrelated occupations who write only occasionally, if impelled or asked to treat a particular topic. And the deals they make with publishers also vary widely: professional authors may have contracts and agents who negotiate for them, or they may have established firm arrangements with the periodicals to which they contribute regularly, while the occasional or sporadic contributor is likely to accept a publisher's usual terms.

The contribution may be initiated by the author, usually by an offer to write about a given topic or by submitting an outline, a draft, or a complete manuscript; or it may be initiated by an editor or publisher seeking a specific piece from an author considered to be well suited to handle that topic. Arrangements may be formalized in legal contracts or contained in an informal paragraph in the initial letter by either party or, even more casually, mentioned only in a telephone conversation about the article.

Typically, the publisher assigns or accepts the article for publication in a specific issue (or several specific issues, if a series of articles is involved). Again typically, the author's name will appear in a byline or credit line (often with a biographical blurb), but separate copyright notations are extremely rare, since the copyright pertaining to the entire issue covers not only the staff-written material but also the contributed articles. However, as provided in sec. 201(c) of the copyright law,

Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole.... 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

⁸Especially *Community for Creative Non-Violence v. Reid*, 490 U.S. Reports 730 (1989); *Alden Accessories v. Spiegel*, 738 F2d 548 (2d Circ. 1984); *Easter Seals Society v. Playboy*, 815 F2d 323 (5th Circ. 1987); and *Dumas v. Gommerman*, 865 F2d (9th Circ. 1989). Cf. Charles Ossola, "High Court Decides Who Works for Hire," *Legal Times*, June 12, 1989, 19-20; Michael B. Landau, "'Works Made for Hire' After *Community for Creative Non-Violence v. Reid*," *Cardozo Arts and Entertainment Law Journal*, 9, 1, 107-150 (1990). Many aspects of law other than copyright involve a "work for hire" issue; see, for example, Robert Pear, "Health Plan Poses Question: Who Is an Employee?" *The New York Times*, April 4, 1994, A-10.

⁹*Tasini* (note 2, supra). (The initial complaint was filed on Dec. 16, 1993; I have not seen it.) The first paragraph of the amended complaint begins: "This is a case of first impression"; i.e., a matter never litigated before.

particular collective work, any revision of that collective work, and any later collective work in the same series.

This right that the publisher acquires is often referred to as the right to one-time publication. However, there is no universally accepted definition of "one-time publication," and the statute does not elucidate the matter of "reproducing and distributing" the collective work that includes the contribution. Over the years publishers have developed diverse formats and forms in which a given issue may appear and reappear after its initial publication. Understandably, they have been motivated by the desire to exploit an existing product for extended or new markets and thereby maximize their revenues.

The creation of these new formats and forms has usually depended on and been driven by technical advances. Within the last decade the rapid advances in reprography and computer and telecommunications technologies have greatly enhanced the publishers' ability to create more new formats for existing works—let us call them "derivative products"—and to distribute them more widely, especially since equipment costs have declined and the market for "high-tech" services has grown substantially and, with that, the potential for profit.

(A brief comparison with the entertainment industry may be of interest. There, works created for a specific medium such as the theater may be adapted for the movies, television shows, and videocassettes, for example; and their authors may receive additional payments called residuals. The payment of residuals is generally governed by collective bargaining agreements or private industrywide contracts, which do not have a parallel in periodical or book publishing.)¹⁰

¹⁰Cf. Thomas D. Selz et al., *Entertainment Law: Legal Concepts and Business Practices*, 2nd ed. (New York: McGraw-Hill, 1992), sec. 27.13, 27-44 to 27-46.

Three

Recycling of Works: I. Traditional Media

There is no record of the first attempt to reuse an issue of a newspaper or magazine in a slightly different guise for additional revenue, but it was probably in the mid-nineteenth century that some morning newspapers experimented with evening editions and weekly or semiweekly "supplements," which comprised a few new items along with much material reprinted from the morning editions. Newspapers and magazines both had back-copy departments, which made leftover copies available for look-ups and other purposes, presumably for a small fee, and offered tearsheets of specified pages on request (usually free of charge, as a good-will gesture, unless the request was for a large quantity). Sometimes, also, publishers arranged to produce extra copies of certain issues in quantity for use in political campaigns or by lobbying groups or by companies or business organizations for promotional purposes.

Some newspapers bound their issues into weekly, monthly, or quarterly volumes that were then offered to libraries and other institutions requiring them as information sources. By the 1920s the market for bound volumes of newspapers and magazines had achieved a respectable size.

After World War I several publishers began to offer English- or foreign-language versions of their publications abroad, usually selecting the content without distinguishing between staff-written and freelance material. Some of these were printed from the same mats as the originals, while others were edited and printed locally; but no one seems to have suggested that they were new, separate, original publications and not just the old version in new guise.

The date when the first commercial clipping service was established is unknown, but such services were in operation in major U.S. cities early in this century. They clipped all the articles relevant to a given topic, whether written by regular employees of the periodical or by outside contributors. There was no dispute over copyright; the service bought a sufficient number of copies of each issue of each periodical to supply its clients, so that there was no need to make copies of the articles clipped; and apparently no one gave any thought to the authors of the articles.

All these and similar derivative products were created and distributed by existing means: printing machinery and conventional transport, mostly railroads and ships for long distance and trucks locally and short-haul.

It was during World War II that new technologies were spawned that affected the creation and marketing of the publishing industry's derivative products, especially advances in photography. (Radio had always been of little use to print media, computers and television were then only in their infancy, and facsimile transmission, though it had long been used to send photos, has taken nearly a century to become commercially viable for the dissemination of textual matter.) But photography was a different story: new cameras, lenses, and processes yielded sharp, clear negative and positive images that led to the invention of microfilm and of photo-offset printing, a process in which text and illustrations are pasted up on a "mechanical" that is photographed to produce a high-quality film image that is used for printing instead of a plate of lead type.

Microfilm, being long-lasting and easy to ship, store, and handle, quickly established itself as the undisputed archival medium of choice. Subscriptions from libraries and other institutions soared (relatively speaking: this market is quite small), while subscriptions to the periodicals' bound paper volumes dwindled; during the 1950s, most publishers stopped producing bound volumes.

Offset printing not only replaced the linotype process altogether at some companies (mostly those not unionized), but also permitted the production of high-quality reprints at modest cost. These included compilations of specific sections of a periodical, such as *The New York Times Book Review*; so-called coffee-table books, attractively bound compilations of, for example, a year's front pages of a newspaper; and reprints of issues covering historic events, like the history of aviation from the Wright Brothers to the Moon Landing.

Reprint publishers did not confine themselves to whole issues or whole pages; individual articles could be selected by predetermined subjects or categories, clipped carefully, pasted up, photographed, reproduced by offset, assembled into books, and marketed. Such books were, in both content and format, several steps removed from the issues of the periodicals in which the articles had appeared originally; they were in essence anthologies.

Periodical publishers who went into the reprint business themselves or through a subsidiary usually included articles by freelancers in the reprints without seeking permission from or offering extra fees to the authors. Presumably, if any of the authors protested, some sort of settlement was reached; at least, there is no record of a public dispute or litigation.

Independent publishers of reprints typically obtained a license from the periodical publishers in exchange for a share of the revenue. Articles by freelancers might well have been excluded from the license; if the reprint publishers wanted them, they would get the authors' permission and pay them a fee (as the *Reader's Digest* does) or offer royalties, as is customary in the case of original anthologies.

There has never been a copyright infringement suit by a freelancer over reprints. One can only guess at the reasons—that the reprints were created by the original publisher, whose right to do so was assumed or tacitly conceded; or that any disputes were resolved without litigation; or that the market was considered so limited that a writer's share of any profit would be too small to justify the cost of a lawsuit.

Four

Recycling of Works: II. High-Tech Media

The microform and reprint business reached its peak in the late 1960s and early 1970s but began to dwindle when the publications became computerized and the contents were recycled through information retrieval systems. Databases containing the full text of publications, developed initially for legal and scientific journals, reports, and other documents, were being adapted gradually for newspapers and magazines. In addition to full-text databases, the late 1970s and early 1980s saw the development of diverse experimental services offering bulletin-type announcements, headlines, extracts, and other derivative products on television and home computer screens, connected to a host computer system by cable or telephone lines.

Again, little attention was paid to whether the source articles were written by staff members or freelancers, and again there was no outcry from the latter, presumably because they had not been aware that their work was being so used or because services were scattered, the content was experimental and in constant flux, and the financial success of the enterprises was very much in doubt.

In the last few years, however, the situation has changed dramatically. Database technology has become conventional, and databases have proliferated and become widely accepted as the favorite means of doing various kinds of research. Personal computers have dropped in price and become commonplace not only in businesses and schools but also in many homes; they come with adequate storage devices, including compact disks, and versatile software, and they can be connected by telephone networks to host computers all over the world. While several on-line services failed and several are still struggling, a few have become firmly established, and some—mostly those offering information essential to a specific occupation or discipline—have become profitable. And by the early 1990s it had become relatively easy and inexpensive to combine text, graphics, and sound in the same system and manipulate them to create multimedia products—a stunning technical capability that we have only begun to exploit. (Once again, our inventions have outrun our ability to use them.) Looking from a print-on-paper perspective into a high-tech world they had never dreamed of, freelance writers find themselves on the entrance ramp to the information superhighway, and they want to share in the ride.

What actually happens to an article as it is recycled through all this technology? One may safely assume that it is in machine-readable form, having been composed on a computer or wordprocessor by the author or else rekeyed or scanned into the computer system at the publisher's offices. It has been printed in the designated issue. The paper copy of that issue

has been sent out for microfilming, and the machine-readable version has been transmitted to the computer system of the database distributor. Also, the entire issue, or a selection of sections or pages, has been transmitted to some other processor for inclusion on a CD-ROM.

The microfilm and CD-ROM are distributed by the companies producing them and purchased mostly by libraries and other institutions, which make them accessible to patrons, usually without charge. (By 1994, however, CD-ROMs had begun to enter the home computer users' market as well.) The publisher and producer share the revenue in some fashion; but the author is left out of their arrangements. Microfilm reels and fiche and compact disks bear the publisher's copyright notice, which applies to the entire issue, sometimes with admonitions about copying, although patrons may photocopy desired pages from the microfilm or print them out from the disk within the limits of "fair use." For the use of the copiers they usually pay a small fee, which the library keeps. Notices posted at the copying machines commonly warn of making copies exceeding "fair use."¹¹

Subscribers to the database service can retrieve desired articles, view them on their computer screens, make copies on their attached printer, or "download" them onto their computer for later viewing or copying. The initial sign-on to the database and the display of the items retrieved generally include a copyright notice, often with a stern warning about infringements. Subscribers to the service may pay monthly base fees along with per-use charges computed for time spent on-line or the number of items retrieved, or the two combined; and there may be special fees for downloading.¹² The revenue is shared by the database operator and the publisher in some fashion; but the author is, again, not included.

Once users have retrieved what they want they are in possession and control of their "copy" and can supply it to others without even notifying, let alone compensating, either the database operator or the publisher, or, of course, the author. Concern over such possibilities was rife already in the early 1970s, when many databases were still under development and many others not even in the planning stages and the potential markets were just beginning to be explored. The following is perhaps typical of the many expressions of this concern:

...computer-based information storage and retrieval systems...give the copyright user what he wants in the form he wants it and even get what he wants for him. As a result of this qualitative leap in informational capacities, a variety of information systems have evolved that are using, republishing, and disseminating copyrighted data without obtaining the

¹¹"Fair use" is defined in the copyright statute, secs. 107 and 108.

¹²The policies of database services are summarized in Alan R. Greengrass's "Databases and Their Offspring," *The Bookmark*, 50, 2 (Winter 1992), 147-149. Early in 1994, Dialog Information Systems instituted a new policy on downloading (see *The New York Times*, April 6, 1994, D-1:3).

permission of (indeed, often without informing) the copyright owner, much less paying royalties to him....¹³

The very similar concerns expressed today encompass a far wider range of products and technologies. Today, if an article has been printed out, photocopies can be faxed to one or more friends and associates, and now they are in possession and control of *their* copies. If the article has been downloaded, the text can be altered in any way the user sees fit, or concatenated with other texts or graphics to create another product, or, if the user belongs to a network, transmitted to other network members, which puts them in possession and control of *their* copies.

Database operators generally protect themselves with carefully drawn contracts and typically charge high enough subscription and transaction fees to compensate for any unlicensed usage that might be anticipated. There are systems to track individual users and any illicit use they may make of the data they have retrieved; but in most cases the effort and expense of identifying, pursuing, and prosecuting them would exceed the sum that could be collected. (This point will be discussed further in the next section.)

About a quarter of a century ago, publishers, users, and anyone else with a stake in the new information retrieval business turned to Congress for a revision of the copyright law that would provide a solution not only to the photocopying problem, which was then being hotly debated, but to the whole range of problems being caused by technical innovations in the field of artistic and literary endeavor. The effort culminated in the enactment of the Copyright Revision Law of 1976 and involved computer and communications specialists, the publishing and information industries, the academic and library world, and legal circles concerned with intellectual property. It sought to achieve a balance between the rights of copyright owners and those of users of copyrighted materials; but the problems appear to multiply with technical advances, and the advances regularly outpace attempts to solve the problems—and this happened even while the effort was in progress.

As for the rights now being claimed by the freelance writers, these were not mentioned or addressed at all.

¹³Nicholas L. Henry, "Copyright, Public Policy, and Information Technology," *Science*, 183 (February 1, 1974), 385.

Five

The New Media and Copyright

It has been widely acknowledged that Congress, in undertaking the first truly comprehensive revision of the copyright law since 1909, made a diligent attempt to provide not only for then existing technologies but also for future developments. It did so by including in definitions such phrases as “any method now known or later developed” and “any other form in which a work may be recast, transformed, or adapted”; also, it provided that “A ‘device,’ ‘machine,’ or ‘process’ is one now known or later developed.”¹⁴

But the attempt, however diligent, had only limited success. The definitions were soon found wanting; and many problems arose during the decade that followed enactment of the law in 1976. Are computer programs “literary works”? Are they “fixed in any tangible medium of expression”? Are databases that are updated regularly or dynamically “works fixed in a copy”? Is the display on a video screen of items retrieved from a database a copy in the sense of a “material object...in which a work is fixed”?

This is only a small sample of the questions that have been discussed widely in conferences and symposiums and in professional journals ever since the law was enacted. In 1986 the Congress’ Office of Technology Assessment (OTA) issued a comprehensive study that illuminated many of the problems but did not lead to their resolution; indeed, it seems to have stimulated the debate further rather than allayed it.¹⁵

Meanwhile, technology was marching on: new devices were developed along with new applications, and the universe of users of intellectual property expanded. To no one’s surprise, the debate over proprietary rights and the specific aspects debated expanded as well.

None of the studies, reports, conferences, symposiums, and journal articles concerned, or even mentioned, freelancers.

¹⁴Sec. 101.

¹⁵U.S. Congress, Office of Technology Assessment, *Intellectual Property Rights in an Age of Electronics and Information* (Washington, D.C.: U.S. Government Printing Office, April, 1986; hereafter cited as OTA Report). One of the principal conclusions of the report is that the copyright law is no longer adequate to deal with “information-based products” (59ff). See also D. Linda Garcia’s review of the report in the proceedings of the Library of Congress Network Advisory Committee meeting, April 22-24, 1987, 15ff, and Robert L. Oakley’s paper in the proceedings of this committee’s meeting, March 23-25, 1988, 26-29 and *passim*. At the April 1987 meeting, Ralph Oman, the Register of Copyright, sounded more optimistic. He spoke of “overwhelming evidence of the great skill of Congress in drafting a balanced law” and held that “By providing for copyright along generic lines, Congress attempted to signal bench, bar and public alike that it would no longer be necessary to repair to Capitol Hill every time some new device or process entered the copyright marketplace” (Proceedings, 27-34). The verdict is not yet in.

And when the freelancers began to make their voices heard, in late 1993, it was not about any of the legal matters being debated.

In essence, the controversy between freelance authors and publishers concerns the “recycling” of the issue of the newspaper or magazine that contains the author’s work, the right to create “derivative products.” The statute provides that the author owns the copyright in the article but the publisher owns the copyright in any collection (in this context, the issue of the newspaper or magazine) that contains the article. It defines a “derivative work” as

a work based upon one or more preexisting works, such as a translation...sound recording, art reproduction...or any other form in which a work may be recast, transformed, or adapted....¹⁶

but its language about who has the right to create derivative works is somewhat murky, especially when applied to computer databases and other electronic services. “[T]he owner of copyright...has the exclusive rights...to prepare derivative works based upon the copyrighted work...”¹⁷ and, in the absence of a contract specifying otherwise, the owner of the copyright in a collective work (i.e., the publisher of the newspaper or magazine) has the “privilege of reproducing and distributing the contribution” (i.e., the freelancer’s article) “as part of” it.¹⁸ The present conflict is based on divergent interpretations of this provision, on opposing views of the “derivative product” as a version of a single article or a byproduct of the collective work.

Another element in the conflict is that publishers, in general, consider the electronic media merely modern, more versatile, more efficient, and faster versions of print and other traditional media, while the authors’ organizations hold that there is a more fundamental difference, generically and economically, requiring distinct consideration. Also, authors’ organizations apparently want the controversy to be resolved now, whereas publishers consider reasonable solutions out of reach while the technology is in flux, the market is still in its infancy, and economic prospects, especially for general newspapers and magazines, are quite uncertain.¹⁹

¹⁶Sec. 101.

¹⁷Sec. 106(2).

¹⁸Sec. 201(c).

¹⁹See the authors’ position statement (note 2, supra); also the National Writers Union news release of April 28, 1994 (note 25, infra). Whether or not the writers’ organizations cited here are representative of freelancers in general is not known; but if membership is any indication, the 1993 edition of Gale’s *Encyclopedia of Associations* lists the following: American Society of Journalists and Authors, a relatively new organization: 800; The Authors Guild (a component of the Authors League of America): 6,500; Authors League of America: 14,700; and the National Writers Union (which is Local 1981 of the United Automobile Workers): 3,700.

The conflict broke into the open in February 1994, when a group of writers headed by Jonathan Tasini filed a copyright infringement suit against several newspapers, magazines, and electronic information companies. In their amended complaint, the plaintiffs assert that "it is indisputably clear that free-lance authors own the electronic rights in their own work unless they have expressly transferred or assigned those rights..."²⁰ and that they granted the publisher(s) only "first, one time, North American print publication rights" and that "upon publication of the article in a printed edition...these rights were fully exhausted."²¹

The publishers did not comment on the "electronic rights" issue publicly until the *Tasini* suit was filed, and even then their few published statements, as expected, were guarded. Resnick's article²² states that "Publishers...are standing firm in *Tasini*, challenging the freelancers' assertion that electronic rights must be granted explicitly and separately," but does not identify the sources for this conclusion. However, it does quote Harry M. Johnston, vice president and general counsel of Time Inc., to the effect that Time has the right to distribute the magazine electronically as well as in print without paying freelancers a royalty.

The *Tasini* defendants' answer was submitted on May 6. As anticipated, it denied all substantive allegations and based the "affirmative defense" primarily on sec. 201(c) (collective works) and sec. 107 (fair use) of the copyright statute. Among other grounds cited were existing contractual agreements, plaintiffs' failure to enter similar complaints about the publishers' practices previously, unjustified delay in entering this complaint, and the statute of limitations. If the case comes to trial, they may well assert their rights to create derivative products as defined in the copyright law and rely on its wording²³ to support the view that the copyright owners' rights do not change with the technologies employed.²⁴ They seek a court judgment in their favor, dismissal of the complaint "with prejudice," payment of their legal costs, and other appropriate relief.

²⁰Note 2, *supra*, p. 1, par. 1.

²¹*Ibid.*, p. 7, par. 32, and *passim* (this claim is reiterated for each article of each plaintiff). But there is nothing in the public record to substantiate this claim; in fact, Mr. Tasini has stated that he "never signed a contract" for many of the articles he wrote for newspapers and magazines but did business on a "verbal handshake...." See Rosalind Resnick, "Writers, Data Bases Do Battle," *The National Law Journal*, 16, 27, March 7, 1994, 1.

²²*Op. cit.* (note 21, *supra*).

²³Sec. 101, discussed at the beginning of part Five.

²⁴Copyright lawyers and the courts appear to be divided on this subject. Cf. Resnick, *op. cit.* (note 21, *supra*); also Allen R. Grogan, "Licensing for Next Generation New Media Technology," *The Computer Lawyer*, 10, 10 (November 1993), 3-5.

The legal tug-of-war is likely to be protracted and onerous; and it may well be years before an out-of-court settlement or a judicial decision is reached. Meanwhile, some comments and speculation may be in order.

Arguably, a copy in another medium of an entire printed issue of a periodical is a "derivative work" under the law. Microfilm of an issue of a periodical is a work "based upon a preexisting work" "in a form in which that work has been recast." So is a CD-ROM containing that issue, and so is the machine-readable version of that issue and that portion of a computer database containing it (at least prior to any further processing by the database operator or manipulation of the data by a user). Since in all three media the entire issue was "recast," the right to create and to market these derivative works appears clearly to belong to the publisher.

But what if it is not the entire issue but only selected articles that are "recast" into a derivative work, such as a special-subject database or CD-ROM (or, in an earlier time, a reprint book)? The author would then have a much stronger claim, especially if the articles selected had appeared in different issues of the same periodical, and a still stronger claim if they had appeared in different periodicals.²⁵

A question arises, also, about the status of individual articles within a database. In most cases up to the present, the publisher transmits to the database operator's computer entire issues of the periodical, not selected individual items; from that point of view, as the owner of copyright in the collection the publisher just transfers the entire collection from one medium to another. But once they are in the database the component items are no longer held together in the collection but are "unbundled" there and discretely accessible. (Or are they? Bibliographic citations, source titles, and similar devices serve to identify the collection from which a given item has been derived and can be—and often are—used to retrieve information that is specific to a given collection.)

In any event, most uses of computerized databases of newspapers and magazines are probably within the limits of fair use (which is one of the two principal "affirmative defenses" offered by the *Tasini* respondents). Nevertheless, concern about what users *might* do with copyrighted materials, and what technology *enables* them to do, has been widespread. Typical is this comment by Linda Garcia of the OTA:

²⁵Such a claim is the subject of a news release by the National Writers Union, April 24, 1994. A union member, Lee Lockwood, filed a grievance against *Playboy* over its CD-ROM compilation of all *Playboy* interviews of the last thirty years, which included Lockwood's copyrighted 1967 interview with Fidel Castro. Lockwood's contract had entitled *Playboy* to use the piece in anthologies; but whether this proviso covers a technology not yet invented when the contract was executed is at the core of the dispute.

The new technologies also give rise to what we call the problem of derivative use. The repackaging of information and the creation of new information products made possible by new technologies raise serious questions about who should be rewarded for which contributions. By law, the original copyright holder is entitled to the rights of all subsequent works derived from his work. In an age of information, however, where the value in intellectual materials is more often than not centered in repackaging and reprocessing, one must ask whether an incentive system that favors the original creator is still appropriate.²⁶

It seems highly probable that most of the uses of electronic derivatives of newspapers and magazines will continue to be fair use. And if any were, indeed, found to be infringing an author's copyright, in all likelihood it would be the end-user who would be held responsible.²⁷

One may wonder why authors' organizations have suddenly become militant about "electronic rights" when the creation of derivative products in various media has a history of a century or more and when computerized information storage and retrieval has been around for three decades and even videotex technology is now in its late teens. Yet the focus on the new "high-tech" is quite evident; for example, the authors' position statement has the title "Electronic Publishing Rights"²⁸ and speaks of "the new era of electronic publishing," urging writers "to retain full electronic rights." Undoubtedly, freelance writers have become cognizant of the widespread use of personal computers (they are probably users themselves) and of the growth of a few information services into reasonably successful businesses. Undoubtedly, also, they are affected by the vast publicity given to advances in electronic systems and their potential applications and to the optimistic forecasts of an information-rich future in which everyone shares through the miracle of the information superhighway that leads to the office, school, and library "without walls" and that may lead to a push-button kind of life at home.

The change in the authors' attitude appears to be due to pragmatic considerations: So long as the derivative product was in print, authors could exercise control and negotiate added compensation relatively easily. When their work was first recycled into electronic media, as part of entire issues of periodicals, the similarity *in kind* to the traditional media obviated any move for a different treatment, and, in any event, the prospect of appreciable added income was distinctly poor. Now they see (or suspect) that control over derivative uses of their work

²⁶Op. cit. (note 15, supra), 16.

²⁷If any end-users were to be charged with infringement, could the database services and/or the publishers be held liable as accessories?

²⁸Note 2, supra. Cf. the National Writers Union's "Statement of Principles" on writers' rights regarding electronic book publishing, issued with a news release on April 24, 1994.

is passing from print publishers to the database producers, and from them to services that transmit the data to users, and from them to the users themselves²⁹—and everyone along the way except they, the original authors (and probably many of the end-users), makes money from these derivative transactions. The freelancers are demanding a share of this, relying on an assertion of their proprietary rights, i.e., their copyrights, through the conventional process of suing for injunctions and penalties for infringement³⁰ and on seeking the traditional payment of advances, royalties, and license fees³¹ to accomplish their goals.

It is ironic that the adequacy of these traditional processes to deal with intellectual property in a high-tech electronic environment has been questioned for about a decade³²; but no substitute has yet been found. There is really little chance that one will emerge within the near future; or that, if it does, it will solve all present problems and not lead to new, and perhaps worse, difficulties. The copyright statute will probably be amended again, and perhaps provide for some form of additional compensation for the freelancers at that time; but it is not likely to be soon. So, the solution to the conflict exemplified in the *Tasini* litigation will probably lie in the ultimate decisions of the courts, or in a prior settlement reached by the parties.

²⁹*Tasini* (note 2, supra), p. 1, par. 1.

³⁰*Ibid.*, 68-69.

³¹Authors' position statement (note 2, supra).

³²Cf. OTA Report (note 15, supra), 59, 75 and *passim*; Oakley, op. cit. (note 15, supra), 28-30.

Economic and Other Practical Considerations

Here is a truism: Writers with established reputations or with rare and acknowledged authority in a given field will be able, usually, to have their work published in any appropriate publication they wish and to persuade the publisher to accept any reasonable terms they propose—including the retention by the writer of republication rights, “electronic rights,” or any other residual rights they choose.

The converse is also a truism: High-quality periodicals can usually obtain works relevant to their genre, readership, and style from any appropriate author on approximately the terms the publisher normally offers—including whatever rights these might imply.

And here is a corollary: Writers of the kind described above and publishers of high-quality periodicals appear to have no trouble reaching agreement on the terms.

But these are the exceptions. The thousands of other daily and weekly newspapers, magazines, trade journals, and other periodicals, and the thousands of freelance writers who are not stars in the literary firmament are operating on a vastly different economic base, and their negotiations (if any) differ accordingly.

From the publishers' point of view, getting the material into high-tech media in a form that will attract a sufficient number of paying customers on a regular basis is a costly and risky proposition. Also, it takes a long time to establish a product's viability and the stability and size of the market. Then there is the “unpredictability” of the “evolution of new media”; “the only certainty is that media undoubtedly will evolve in ways we cannot now envision....”³³ Publishers may try not to raise the matter of derivative products, relying on “custom and usage,” and hope that the writers won't either; or they may try to have the writers accept a “boilerplate” clause in effect ceding all rights.³⁴ Publishers appear to have the upper hand because of the keen competition among writers: if one writer balks at the terms there is often another who won't, or a different piece may be substituted, or the work assigned to a staff member.

³³Grogan, *op. cit.* (note 24, *supra*), 3. He added: “How does one negotiate and draft a contract today that will appropriately allocate rights to reproduce, distribute and exhibit forms of media we cannot foresee?” For some skeptical comments about on-line news, see Mark Thalhimer, “High-Tech News or Just ‘Shovelware?’” *Media Studies Journal*, 8, 1 (Winter 1994), 41-51. Cf. also Barry Diller's remarks at the American Magazine Conference, quoted in *The New York Times*, October 25, 1994, D-20.

³⁴Grogan, *op. cit.*, 8; Resnick, *op. cit.* (note 21, *supra*).

Writers who cannot negotiate from a position of strength stemming from their fame or expertise in a specific field or the unique quality of the work under consideration are pretty much forced to accept the publishers' terms (unless they are financially independent or have the backing of a strong organization or a strong agency). Even if they are armed with principles such as those in the authors' position statement,³⁵ they are unlikely to prevail in one-on-one negotiations with the publishers unless the principles attain industrywide acceptance.

Serious questions arise also about the extent to which some of these principles are applicable to freelance writers' articles in newspapers and magazines, and the extent to which their implementation would be feasible in the environment of today's electronic information services. Below, three of the key points from the authors' position statement are excerpted, each followed by a putative countervailing argument:

(i) "...writers should carefully control the disposition of their electronic rights."

What can the writer control when the publishers have the right to create derivative works of the collection that contains the writer's contribution?

(ii) "Writers [who retain their rights] are then free to evaluate specific electronic publishing opportunities that arise."

Opportunities for derivative products, whether electronic or not, would rarely arise separately for single, individual articles in a periodical. The retrieval of a specific article in a database search would hardly generate enough revenue to justify tracking it, let alone splitting the money into three or more shares.

(iii) "Grant periodical publishers the right to republish an article electronically only in the same form and context as the original article."

This sounds reasonable in the abstract but would be difficult to implement, because there is no clear, working definition of "form and context." When *Playboy* produced its CD-ROM of interviews including Lockwood's piece on Castro³⁶ wasn't that essentially in the same "form and context" as the original? When an issue of a periodical is transferred *in toto* into a database, the contributed article is transferred in the same "context"—but is it the same "form"? Moreover, once it is

³⁵Note 2, *supra*.

³⁶Note 25, *supra*.

so transferred, the publisher can no longer control any changes in form or context due to manipulation by the database user.

This problem of “form and context” was a major concern of the people involved in writing the OTA Report:

Some people...extract portions of commercial databases and resell access to the information. In many cases, it is unclear whether infringement has occurred...the derivation may look quite different...because the format or other features have been changed.... In other cases it is obvious that the derivative database stems from the original.... The volume of both of these kinds of database derivation can be expected to rise.... Hence, the enforcement of copyright in databases will become a larger problem, one described by some observers as insurmountable.³⁷

From a pragmatic point of view, there is a more severe practical problem with the recommendation in the authors' position statement that authors “insist that periodical publishers pay an additional fee at the time of electronic republication...an advance plus a royalty.” Any attempt to apply traditional forms of compensation to novel and rapidly changing products and services being offered to a largely unexplored market is fraught with difficulty.³⁸

Freelance writers are now commonly paid a flat fee for their contributed articles upon acceptance for initial publication. They could, presumably, be paid an additional flat advance fee “at the time of electronic republication,” but the amount would be arbitrary—even if the usage of the database and the resulting revenue could be anticipated, there is no way of estimating the share of revenue that would accrue to any single item in the database. And as for royalties (if these are to be keyed to actual usage and not arbitrary), while it may now be feasible (and quite economical) to track whether a given item was retrieved, and how often, and even what happens to it thereafter, the effort to identify any illicit use and to prosecute the culprit successfully is enormous and costly; and (as already stated) the share of the resulting revenue for any of the stakeholders involved would in most cases be infinitesimal. As Robert J. Kost put it in a speech to the 1987 meeting of the Library of Congress's Network Advisory Committee:

The enforcement and permissions problems are two sides of one coin known as transaction costs. The question in both cases is whether it will

³⁷Op. cit. (note 15, supra), 112; cf. also 98, 102, and *passim*.

³⁸Cf. diverse comments cited in Chartrand, op. cit. (note 1, supra), and in a companion article, D-6:1.

cost me more to enforce my rights in a work or to gain permission to use it than the revenues that the work generates.³⁹

If the writers were to win the point and the publishers agreed to pay such advances and royalties on some formula yet to be devised for all freelance contributions, the added cost would surely be passed on to the consumers, in the form of added access or subscription fees. Price increases in an undeveloped or at best still developing market are very risky, especially when the product involved is not an absolute necessity. There are databases of “must-have” information, such as securities transactions for brokers, legal documents for lawyers, or medical reports for physicians—but electronic versions of general newspapers and magazines are not in that category. Even if the market for them grows far beyond current expectations, they are unlikely to become hugely profitable; and the market may fail to grow, may even shrink—and then winning advances and royalties would be a hollow victory, indeed.

³⁹Note 15, *supra*, 23. Cf. his paper in the proceedings of the 1988 meeting, 72.

Seven

What Will Happen to the Intellectual Property Bargain?

Copyright was conceived to provide a temporary economic incentive to writers and artists to produce works that would educate, entertain, or otherwise benefit the public. Thus,

...American intellectual property law can be thought of as a bargain between individual creators and the public. In exchange for granting authors and inventors exclusive rights in their writings and inventions, the American public is to benefit from the disclosure of inventions, the publication of writings, and the eventual return of both to the public domain. The purpose of copyright...is to benefit the public by encouraging learning through the dissemination of works.⁴⁰

The conflict between freelance writers and the publishers of periodicals over electronic derivative products is likely to affect not only the warring parties but also the consumers, the public, in ways that can now be only vaguely foreseen.

If the writers lose in the *Tasini* litigation, they will be essentially no worse off, economically, than they are now. They will surely persist in efforts to persuade publishers to accept the principle of residual compensation, even if that is ruled not to be a part of their copyright.⁴¹ Some may shift their contributions from stronger, more resistant publishers to those that appear weaker and more pliable—and these may not have the same readership in print or reach the same number and kinds of on-line users. In short, there may be a shift in the market, but the impact on the public will probably not be very significant.

If the courts rule for the plaintiffs, the effects will be greater and more wide-ranging. It is possible to envisage a worst-case scenario in which publishers use fewer outside contributors, writers find fewer outlets for their work, the contents of databases, CD-ROMs, and other electronic derivatives are severely diminished, and, at the same time, the cost of access to them has risen sharply. A worst-case scenario, admittedly, but not improbable—and the effect on the public would be that it pays more for fewer, less varied products, and products that are not so rich in content as they could be.

Suppose that the inclusion of the disputed articles in CD-ROMs and on-line databases had been found to be infringing and that their further distribution had been enjoined. The

⁴⁰OTA Report (note 15, *supra*), 188.

⁴¹In several entertainment industry contracts, the unions agreed to forgo some residual rights in exchange for pension and other benefits. See Selz, *op. cit.* (note 10, *supra*).

disks would have to be recalled from their subscribers and scrapped and new disks prepared without these articles. In databases like Nexis ten or more years of computer files would have to be scanned to identify and purge the relevant items along with any index or other references to them. Both of these operations would be quite costly and would deprive users of some potentially valuable material.

Suppose further that a formula for advance and royalty payments had been devised and that publishers were required to make such payments. Obviously, publishers would try to cover such costs through an increase in the license or other fees paid them by the database and CD-ROM producers, which would prompt these producers, in turn, to raise their charges to the users. And, much more important, publishers would surely try to limit their use of freelancers' writings, perhaps by eliminating them from the derivative electronic products, or perhaps by avoiding their use in the original print products as well.

This possible effect on writers is worth further comment. As discussed in part Six, writers with well-established reputations will continue to be able to place their articles in almost any suitable periodical they choose on almost any terms they demand. The thousands of writers who do not fall into this category have always had to struggle to find outlets for their work; but if publishers are compelled to track every item that goes into derivative products and to bear the cost of this, and to pay, in addition to the initial fee for the contributed article, advances and royalties for its share in the derivatives, they will be much more reluctant to accept the work of an unknown writer and to offer their periodicals as a forum for new voices. And the variety and richness of the material available to the public, in print and in electronic media, would thereby be severely diminished.

How can the conflict be resolved, and from where will resolution come? At present it appears that it must come from one of three sources: the courts, or the Congress, or the industry itself.

One cannot look to the courts for a speedy resolution—the litigation will undoubtedly take several years. And then the courts are just as apt to decide *Tasini* on the narrowest grounds, the specific allegations of infringement in reference to specified articles, as on the broad principle involved.

Nor is there any sign that Congress, even in any further amendment of the copyright statute, might provide remedial legislation dealing with this conflict. No bill to amend the

copyright law has ever considered this problem of freelance writers, and none of the forty-one bills introduced in the 103rd Congress did.⁴²

Industrywide negotiations leading to agreements like those in the entertainment industry are most improbable, given the heterogeneous nature of the publishers' universe and the evident weakness of writers' organizations (not to mention the obvious decline in the strength of organized labor generally).

So: will writers have to remain on the sidelines while their work finds its way into high-tech derivatives and only the other stakeholders profit? Or will publishers, instead of exploiting the new technologies to the fullest, limit ventures into that field in the interest of cost effectiveness? One or the other is likely, at least for some time; but, then, this is not the only area in which technological advances appear to overwhelm efforts to preserve and implement the intellectual property bargain. Several authorities have expressed their concerns in the last few years, voicing doubts about the efficacy of the copyright law to deal with the situation and offering possible alternatives⁴³—but no solution is yet in sight. Martin L. Ernst, in a monograph suggesting that the “near-ideal” information and communications technologies will “almost all” be “in place” before the mid-1990s (which we are about to reach), warned:

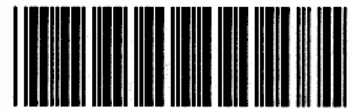
The critical technologies, of course, are not the whole story...a variety of social and legal issues are far more problematic; for example, many standards and protocols must be established...and a number of intellectual property and privacy protection measures must be legislated and enforced. There also are a host of business relationships that will have to be built....⁴⁴

⁴²According to a printout from the Congressional Research Service that summarized all bills relating to copyright that were pending as of mid-July 1994. Three bills (S.1346, S.373, and H.R.2840) would amend the copyright statute's sec. 801, which concerns the Royalty Tribunal, to provide arbitration. While intended chiefly for audio and video transmissions and recordings, arbitration procedures could extend to writers.

⁴³For example, Anne W. Branscomb, “Nurturing Creativity in a Competitive Global Economy: Intellectual Property and New Technologies,” in Martin L. Ernst, Anthony G. Oettinger, Anne W. Branscomb, Jerome S. Rubin, and Janet Wikler, *Mastering the Changing Information World* (Norwood, N.J.: Ablex, 1993), 169-208, and Branscomb, *Technical Rips in the Seams of Intellectual Property Law* (Cambridge, Mass.: Program on Information Resources Policy, Harvard University, P-92-2, April 1992); Donna A. Demac, “Multimedia and Intellectual Property Rights,” *Media Studies Journal*, 8, 1 (Winter 1994), 59-63; Grogan, op. cit. (note 24, supra); and Oakley, op. cit. (note 15, supra).

⁴⁴*Computers and Literacy: Redefining Each Other* (Cambridge, Mass.: Program on Information Resources Policy, Harvard University, P-94-5, August 1994), 50-53.

We must hope that an equitable resolution will emerge in due course while the market for the products and services made possible by technology stabilizes, economic prospects are assessed more accurately, the legal elements are defined more clearly, and the glowing promises of an information-rich future for all are substantially closer to fulfillment.



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ISBN 1-879716-25-9