

Court decision for free-lancers could leave gaps in archives

RESALE CONSENT NECESSARY BY JASON WILLIAMS

If publishers didn't feel the initial tremors of the landmark decision concerning free-lance writers Sept. 24, they will most definitely feel the aftershocks rippling through their Web sites, archives, and databases in the coming months.

A federal appeals court ruled that the New York Times Co. and other publishers cannot resell free-lance newspaper and magazine articles through electronic databases without the authors' permission.

"This ruling is a major victory for the 5,400 free-lance writers who are members of [the National Writers Union]," said Jonathan Tasini, lead plaintiff in the case and president of the NWU, Local 1981 of the United

Auto Workers, AFL-CIO.

Last week's ruling overturns a previous decision by U.S. District Court Judge Sonia Sotomayor, who found that publishers were protected from copyright infringement under an exception to the Copyright Act of 1976. According to Sotomayor, the reformatting and transfer of free-lance articles into databases such as Nexis (now Lexis-Nexis) constituted a "revision."

"Reading 'revision of that collective work' as broadly as appellees suggest would cause the exception to swallow the rule," reads the reversal, handed down by a three-judge panel of the 2nd U.S. Circuit Court of Appeals and written by Chief Judge Ralph K. Winter.

"What the court opinion is saying is a negative for the *Times*, for the free-lancers, and for society," said George Freeman, assistant general counsel for the New York Times Co., which is considering an appeal.

Although the *Times* and many other publishers have, for some time, been securing "all-rights" contracts with free-lancers that include electronic publishing rights, the real danger for publishers lies largely in retroactive claims of infringement on articles posted in electronic archives.

This decision could force the large-scale removal of free-lance pieces dating back to 1996, creating significant gaps in the newspaper's archives. (The statute of limitations for

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copyright-infringement lawsuits is three years, according to media law experts.)

"A good many publishers have a terrific job ahead of them, sorting out the enormous amount of stories in databases around the world," said Bill Burger, vice president of content at Infonautics, a leading Internet information archiving company, adding that they will comply with any decision reached between the publishers and writers. "If they want them removed, we'll remove them. If they find some way to share the royalties, we'll go along with that, too."

Tasini and the NWU have sent an open letter to 22 leading publishers, mostly of magazines, urging them to negotiate free-lance contracts with the union, using the Publication Rights Clearinghouse (PRC), NWU's licensing system for free-lancers, to avoid an "all-out war over rights" for free-lance pieces.

The PRC is the "simple solution," to avoid a deluge of litigation, Tasini told *E&P*. The PRC essentially acts as a go-between, licensing the use of an article or articles in all media and ensuring that the author receives compensation. The processing of the transactions would be handled by its business partner, the Copyright Clearance Center.

"It would save a lot of pain and money for the industry," Tasini said.

"That kind of vehicle may make sense for some publishers," said Lawrence E. Savell, a media law defense attorney with Chadbourne & Parke LLP in New York, but he plays down Tasini's dour warnings, citing that litigation is still in its infancy.

But retroactive licensing may be slightly more difficult for those free-lancers already archived. It would require the NWU to track down authors not in its databases for an arrangement to be made between the writer and publisher.

Another option for publishers could be the Author's Registry, an organization founded by the Author's Guild, that maintains a database of over 30,000 writers. For a lump sum, the registry will locate an author and distribute unpaid royalties, said Kay Murray, general counsel of the Author's Guild. However, the registry is not a licensing agency like the PRC.

"The media industry faces the grim reality of a tidal wave of lawsuits that will boggle their minds," Tasini said in a statement released after the victory. He would not comment on the exact number of free-lancers waiting in the wings ready to move on additional lawsuits, but said the list was "big enough to scare any publisher." ■

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