First round in e-rights case goes to publishers

BY JEFF GARIGLIANO

In a decision that surprised many industry observers, six freelance writers lost a copyright infringement suit over electronic reprint rights on August 13. The plaintiffs filed suit in 1993 against six publishing companies including The New York Times Co., Time Inc., The Atlantic Monthly Co. and Mead Data Central Corp. (which then owned Lexis-Nexis before selling it to Reed Elsevier in December 1994) after seeing their articles reproduced on electronic databases and CD-ROMs without having sold reprint rights or receiving additional pay.

Tasini v. The New York Times, et. al., filed in U.S. District Court in Manhattan, is likely to be just the opening salvo in a host of reprint battles to come in the wide-open world of electronic media. For now, publishers seem to be winning. "I think the implication [of this ruling] is very positive for publishers," says Lawrence Savell, a litigator who concentrates on media law for the New York City-based firm Chadbourne & Park.

Judge Sonia Sotomayor's ruling does not apply to the Internet, because the suit was filed prior to the Internet's development as a commercial vehicle, and hinges on a limited legal definition outlined in the Copyright Act of 1976. Under the act, publishers can reprint "collective works" without acquiring reprint rights as long as the new use is close to the original—the reason why writers can't make claims based on microfilm archives, which are exact copies of print pages. Sotomayor ruled that both CD-ROMs and the Lexis-Nexis database met this criterion, since every article in the original document is included in the reprint, albeit in a different format.

"We believe [the judge] is simply wrong," the National Writer's Union said in a statement. "An electronic database does not contain any of the photographs, graphic arts, ads, pagination and a whole set of characteristics that define the original print work."

Jonathan Tasini, lead plaintiff and president of the National Writers Union, is likely to appeal the decision. "It's an Alice in Wonderland interpretation of the Copyright Act," Tasini says. "A number of major copyright experts have looked at the case, and for the life of them can't understand how the judge came to this decision. We feel strongly that this will be overturned on appeal."

In her decision, Sotomayor hinted that the Copyright Act, more than 20 years old, has not kept up with electronic developments in publishing: "The Court does not take lightly that its holding deprives plaintiffs of certain important economic benefits associated with their creations. ... 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."

Sotomayor added, "Congress is of course free to revise [provisions in the act] to achieve a more equitable result." Tasini says this remains an option for the 4,600 members of the National Writers Union. "I've been on the Hill talking to a cross-section of legislators for the past several months," he says. "There is a broad understanding that writers are important and that we're not getting a fair shake."