A VICTORY FOR FREELANCERS — A DEFEAT FOR PUBLISHERS

The growing use of freelancers rather than employees to create content for publishers has given rise to a growing number of copyright disputes, particularly in the arena of new media such as electronic publishing. In the case of *Tasini v. The New York Times*, the United States Court of Appeals for the Second Circuit has weighed-in on the subject. After years of litigation the result is, so far, a victory for freelancers and a warning to publishers to use greater care in securing copyrights, especially new media publishers.

The *Tasini* case involves a group of freelance writers who write articles for various large publications, including the New York Times. Amazingly, there was no written agreement between the writers and the publishers regarding the publishers' use of the articles after the initial publication. Not surprisingly, in the absence of a written agreement, the parties disagreed regarding the publishers' later use the articles. Specifically, the publishers desired to republish the printed articles in on-line and CD-ROM formats. The freelancers claimed that such republication violated their copyrights in the articles.

The Copyright Act, which governs the rights of authors and publishers, provides that authors own their articles and other work unless they prepare the work in their capacity as an employee or under a work-for-hire agreement. The Copyright Act gives publishers who collect individual articles into a single publication, such as newspapers or magazines, the right to republish the individual articles in revisions or later collections of the initial publication. For example, if a newspaper purchases an article from a freelancer and publishes the article in its morning edition, the newspaper may republish the article in a revised edition of the morning paper, such as an afternoon or evening edition. The newspaper may also republish the article in a collection that might, for example, contain the year's best articles.

The publishers in the *Tasini* case wanted to republish the freelancers' articles in huge, searchable on-line and CD-ROM databases. The publishers argued that these electronic formats constituted a revision of the initial publication just like a later edition of a newspaper. Unfortunately for the publishers, the appellate court disagreed.

In the world of print media, when a freelancer's article is republished in a revision, such as a newspaper's afternoon edition, the article physically appears within the entire newspaper. In contrast, searchable electronic databases enable users to retrieve individual articles entirely independent of the newspaper in which the article was originally published. This element of

individual retrieval was fatal to the publishers' case, and it caused the appellate court to determine that publication of individual news articles in a searchable electronic database is not a revision of the initial print publication.

An important feature of newspapers and similar collections of individual articles is the editorial selection, coordination, and arrangement of the articles within the paper. Unlike a newspaper, searchable databases generally involve no editorial effort. To the contrary, these databases usually contain thousands of articles that are searchable by subject matter, author, key words, etc., without regard to their arrangement in the initial publication. The appellate court found that the absence of editorial effort was also fatal to the notion that searchable electronic databases are revisions of the original printed publication.

The law of electronic publishing is still evolving, and other courts may yet disagree with the judges who decided *Tasini*. The real lesson of *Tasini*, however, is an old one. Make your deal and put it in writing. A written contract will go a long way towards avoiding expensive, time consuming legal battles.