

New York Times Company, Inc., v. Tasini

121 S. Ct. 2381 (2001)

Justice Ginsburg delivered the opinion of the Court.

This copyright case concerns the rights of freelance authors and a presumptive privilege of their publishers. The litigation was initiated by six freelance authors and relates to articles they contributed to three print periodicals (two newspapers and one magazine). Under agreements with the periodicals' publishers, but without the freelancers' consent, two computer database companies placed copies of the freelancers' articles -- along with all other articles from the periodicals in which the freelancers' work appeared-- into three databases. Whether written by a freelancer or staff member, each article is presented to, and retrievable by, the user in isolation, clear of the context the original print publication presented.

The freelance authors' complaint alleged that their copyrights had been infringed by the inclusion of their articles in the databases. The publishers, in response, relied on the privilege of reproduction and distribution accorded them by § 201(c) of the Copyright Act, which provides:

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.

In agreement with the Second Circuit, we hold that § 201(c) does not authorize the copying at issue here. Both the print publishers and the electronic publishers, we rule, have infringed the copyrights of the freelance authors.

Respondents Jonathan Tasini, Mary Kay Blakely, Barbara Garson, Margot Mifflin, Sonia Jaffe Robbins, and David S. Whitford are authors. Between 1990 and 1993, they wrote the 21 articles on which this dispute centers. Tasini, Mifflin, and Blakely contributed 12 Articles to *The New York Times*, the daily newspaper published by petitioner The New York Times

Company. Tasini, Garson, Robbins, and Whitford wrote eight Articles for *Newsday*, another New York daily paper. Whitford also contributed one Article to *Sports Illustrated* published by Time, Inc. The print publishers engaged the authors as independent contractors (freelancers) under contracts that in no instance secured consent from an author to placement of an article in an electronic database.

At the time the articles were published, all three print publishers had agreements with petitioner LEXIS/NEXIS, owner and operator of NEXIS, a computerized database that stores information in a text-only format. NEXIS contains articles from hundreds of journals (newspapers and periodicals) spanning many years. Pursuant to the licensing agreements, the print publishers regularly provide LEXIS/NEXIS with a batch of all the articles published in each periodical edition. The print publisher codes each article to facilitate computerized retrieval, then transmits it in a separate file. After further coding, LEXIS/NEXIS places the article in the central discs of its database.

Subscribers to NEXIS, accessing the system through a computer, may search for articles by author, subject, date, publication, headline, key term, words in text, or other criteria. Responding to a search command, NEXIS scans the database and informs the user of the number of articles meeting the user's search criteria. The user then may view, print, or download each of the articles yielded by the search. The display of each article includes the print publication (e.g., *The New York Times*), date, section, initial page number, headline or title, and author. Each article appears as a separate, isolated "story"—without any visible link to the other stories originally published in the same newspaper or magazine edition. NEXIS does not contain pictures or advertisements, and it does not reproduce the original print publication's formatting features such as headline size, page placement (e.g., above or below the fold for newspapers), or

location of continuation pages. The *Times* also has licensing agreements with University Microfilms International (UMI). The agreements authorize reproduction of *Times* materials on two CD-ROM products, the *New York Times* OnDisc (NYTO) and General Periodicals OnDisc (GPO).

Like NEXIS, NYTO is a text-only system. Unlike NEXIS, NYTO, as its name suggests, contains only the *Times*. Pursuant to a three-way agreement, LEXIS/NEXIS provides UMI with computer files containing each article as transmitted by the *Times* to LEXIS/NEXIS. Like LEXIS/NEXIS, UMI marks each article with special codes. UMI also provides an index of all the articles in NYTO. Articles appear in NYTO in essentially the same way they appear in NEXIS, i.e., with identifying information (author, title, etc.), but without original formatting or accompanying images.

GPO contains articles from approximately 200 publications or sections of publications. Unlike NEXIS and NYTO, GPO is an image-based, rather than a text-based, system. The *Times* has licensed GPO to provide a facsimile of the *Times*' Sunday Book Review and Magazine. UMI "burns" images of each page of these sections onto CD-ROMs. The CD-ROMs show each article exactly as it appeared on printed pages, complete with photographs, captions, advertisements, and other surrounding materials. UMI provides an index and abstracts of all the articles in GPO.

Articles are accessed through NYTO and GPO much as they are accessed through NEXIS. The user enters a search query using similar criteria (e.g., author, headline, date). The computer program searches available indexes and abstracts, and retrieves a list of results matching the query. The user then may view each article within the search result, and may print the article or download it to a disc. The display of each article provides no links to articles

appearing on other pages of the original print publications.

The authors filed this civil action in the United States District Court for the Southern District of New York, [seeking] declaratory and injunctive relief, and damages. After discovery, both sides moved for summary judgment. The District Court granted summary judgment for the publishers, holding that the databases reproduced and distributed the authors' works "as part of a revision." To qualify as revisions, according to the court, works need only "preserve some significant original aspect of collective works--whether an original selection or an original arrangement." This criterion was met, in the District Court's view, because the databases preserved the print publishers' "selection of articles" by copying all of the articles originally assembled in the periodicals daily or weekly issues. The databases "highlighted" the connection between the articles and the print periodicals, the court observed, by showing for each article not only the author and periodical, but also the print publication's particular issue and page numbers.

The Second Circuit reversed, granting summary judgment for the authors on the ground that the databases were not among the collective works covered by §201(c), and specifically, were not "revisions" of the periodicals in which the articles first appeared. Just as §201(c) does not permit a publisher to sell a hard copy of an author's article directly to the public even if the publisher also offered for individual sale all of the other articles from the particular edition, the court reasoned, so §201(c) does not allow a publisher to achieve the same goal indirectly through computer databases.

We granted certiorari to determine whether the copying of the authors' articles in the databases is privileged by § 201(c). Like the Court of Appeals, we conclude that the §201(c) privilege does not override the authors' copyrights, for the databases do not reproduce and

distribute the articles as part of a collective work.

When, as in this case, a freelance author has contributed an article to a collective work such as a newspaper or magazine, the statute recognizes two distinct copyrighted works: Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole. Copyright in the separate contribution vests initially in the author of the contribution (here, the freelancer). Copyright in the collective work vests in the collective author (here, the newspaper or magazine publisher) and extends only to the creative material contributed by that author, not to the preexisting material employed in the work.

Prior to the 1976 revision, authors risked losing their rights when they placed an article in a collective work. Pre-1976 copyright law recognized a freelance author's copyright in a published article only when the article was printed with a copyright notice in the author's name. When publishers, exercising their superior bargaining power over authors, declined to print notices in each contributor's name, the author's copyright was put in jeopardy. The author did not have the option to assign only the right of publication in the periodical; such a partial assignment was blocked by the doctrine of copyright "indivisibility." Thus, when a copyright notice appeared only in the publisher's name, the author's work would fall into the public domain, unless the author's copyright, in its entirety, had passed to the publisher. Such complete transfer might be accomplished by a contract, perhaps one with a provision, not easily enforced, for later retransfer of rights back to the author. The 1976 Act rejected the doctrine of indivisibility, recasting the copyright as a bundle of discrete exclusive rights, each of which may be transferred and owned separately.

Section 201(c) both describes and circumscribes the privilege a publisher acquires regarding an author's contribution to a collective work: "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.” In accord with Congress’s prescription, a publishing company could reprint a contribution from one issue in a later issue of its magazine, and could reprint an article from a 1980 edition of an encyclopedia in a 1990 revision of it; the publisher could not revise the contribution itself or include it in a new anthology or an entirely different magazine or other collective work.

In the instant case, the authors wrote several articles and gave the print publishers permission to publish the articles in certain newspapers and magazines. It is undisputed that the authors hold copyrights and, therefore, exclusive rights in the articles. The publishers do not here contend the authors entered into an agreement authorizing reproduction of the articles in the databases. They contend, however, that reproduction and distribution of each article by the databases lie within the privilege of reproducing and distributing the articles as part of a revision of that collective work.

In determining whether the articles have been reproduced and distributed as part of a revision of the collective works in issue, we focus on the articles as presented to, and perceptible by, the user of the databases. In this case, the three databases present articles to users clear of the context provided either by the original periodical editions or by any revision of those editions. The databases first prompt users to search the universe of their contents: thousands or millions of files containing individual articles from thousands of collective works (i.e., editions). When the user conducts a search, each article appears as a separate item within the search result. In NEXIS and NYTO, an article appears to a user without the graphics,

formatting, or other articles with which the article was initially published. In GPO, the article appears with the other materials published on the same page or pages, but without any material published on other pages of the original periodical. In either circumstance, we cannot see how the database perceptibly reproduces and distributes the article “as part of” either the original edition or a “revision” of that edition.

One might view the articles as parts of a new compendium -- namely, the entirety of works in the database. In that compendium, each edition of each periodical represents only a miniscule fraction of the ever-expanding database. The database no more constitutes a “revision” of each constituent edition than a 400-page novel quoting a sonnet in passing would represent a “revision” of that poem. “Revision” denotes a new “version.” The massive whole of the database is not a new version of its every small part.

Alternatively, one could view the articles in the databases as part of no larger work at all, but simply as individual articles presented individually. That each article bears marks of its origin in a particular periodical suggests the article was previously part of that periodical. But the markings do not mean the article is currently reproduced or distributed as part of the periodical. The databases’ reproduction and distribution of individual articles -- simply as individual articles -- would invade the core of the authors’ exclusive rights.

The publishers press an analogy between the databases, on the one hand, and microfilm and microfiche, on the other. We find the analogy wanting. Microforms typically contain continuous photographic reproductions of a periodical in the medium of miniaturized film. Accordingly, articles appear on the microforms, writ very small, in precisely the position in which the articles appeared in the newspaper. True, the microfilm roll contains multiple editions, and the microfilm user can adjust the machine lens to focus only on the article, to the

exclusion of surrounding material. Nonetheless, the user first encounters the article in context. In the databases, by contrast, the articles appear disconnected from their original context. In short, unlike microforms, the databases do not perceptibly reproduce articles as part of the collective work to which the author contributed or as part of any revision thereof.

For the purpose at hand -- determining whether the authors' copyrights have been infringed -- an analogy to an imaginary library may be instructive. Rather than maintaining intact editions of periodicals, the library would contain separate copies of each article. Perhaps these copies would exactly reproduce the periodical pages from which the articles derive; perhaps the copies would contain only typescript characters, but still indicate the original periodical's name and date, as well as the article's headline and page number. The library would store the folders containing the articles in a file room, indexed based on diverse criteria, and containing articles from vast numbers of editions. In response to patron requests, an inhumanly speedy librarian would search the room and provide copies of the articles matching patron-specified criteria. Viewing this strange library, one could not, consistent with ordinary English usage, characterize the articles as part of a revision of the editions in which the articles first appeared. In substance, however, the databases differ from the file room only to the extent they aggregate articles in electronic packages, while the file room stores articles in spatially separate files. The crucial fact is that the databases, like the hypothetical library, store and retrieve articles separately within a vast domain of diverse texts. Such a storage and retrieval system effectively overrides the authors' exclusive right to control the individual reproduction and distribution of each article.

The publishers claim the protection of § 201(c) because users can manipulate the databases to generate search results consisting entirely of articles from a particular periodical

edition. By this logic, § 201(c) would cover the hypothetical library if, in response to a request, that library's expert staff assembled all of the articles from a particular periodical edition. However, the fact that a third party can manipulate a database to produce a noninfringing document does not mean the database is not infringing. The question is not whether a user can generate a revision of a collective work from a database, but whether the database itself perceptibly presents the author's contribution as part of a revision of the collective work. That result is not accomplished by these databases.

The publishers warn that a ruling for the authors will have devastating consequences. The databases, the publishers note, provide easy access to complete newspaper texts going back decades. A ruling for the authors, the publishers suggest, will punch gaping holes in the electronic record of history. The publishers' concerns are echoed by several historians, but discounted by several other historians. Notwithstanding the dire predictions from some quarters, it hardly follows from today's decision that an injunction against the inclusion of these articles in the databases (much less all freelance articles in any databases) must issue. The parties (authors and publishers) may enter into an agreement allowing continued electronic reproduction of the authors' works; they, and if necessary the courts and Congress, may draw on numerous models for distributing copyrighted works and remunerating authors for their distribution.

We conclude that the electronic publishers infringed the authors' copyrights by reproducing and distributing the articles in a manner not authorized by the authors and not privileged by § 201(c). We further conclude that the print publishers infringed the authors' copyrights by authorizing the electronic publishers to place the articles in the databases and by aiding the electronic publishers in that endeavor. We therefore affirm the judgment of the Court

of Appeals.

It is so ordered.

Points for Discussion

1. Clearly the *New York Times* company could, without obtaining additional permission from individual freelance writers, market a Russian, French, or Braille edition of any given day's newspaper. If written English converted to the raised bump code of Braille constitutes a "revision" covered by § 201 of the Copyright Act, why not conversion of that same written English to the binary code we call ASCII (the "language" used by LEXIS/NEXIS and other databases)?
2. Most court watchers agree that the *Tasini* case will have little effect on future dealings between freelancers and publishers. The same real-life rule that has always governed— whoever has the most clout will get the contract provisions he or she wants— will continue to govern. But there is a gap of about 15 years or so between the effective date of the 1976 revisions to the Copyright Act and the time in the early 90's or so when most publishers began demanding that their freelancers sign away all electronic rights as a precondition of being hired. Publishers claimed in court that they will not be able to contact many of the freelancers whose works from 1978 til about 1993 or so now show up in NEXIS, but who never gave explicit permission to have their words appear in the database. One of the amicus briefs filed in the Supreme Court— over the signature of researcher and documentary filmmaker Ken Burns— argues, "the omission of these materials from electronic collections undermines the principal benefits that electronic archives offer historians: efficiency, accuracy and comprehensiveness." Should the Court have

taken more seriously the publishers' expressed fears that researchers will be forever cheated out of a significant chunk of contemporary history?
