Freelance Writing Is Not Free—but Sometimes Payment Takes Time

By Cheryl Davis

The mills of the copyright courts may grind slowly, but 17 years after filing a class action suit (and four years after entering into a settlement), approximately $9,000,000 in damages is finally being paid to nearly 3,000 freelance journalists for works that were infringed by publishers such as Dow Jones and the *New York Times*.[1] The suit was brought by the Authors Guild along with the American Society of Journalists and Authors, the National Writers Union, and 21 freelance writers named as class representatives, and was part of the transition of the publishing industry from print to digital media—a transition which is still underway.

Rights, Rights, Who's Got the Rights?

The copyright law provides that if the author of a work is writing as an employee, then the employer owns the copyright in the employee's work as a "work made for hire."[2] Therefore, the copyrights in works created by journalists and other writers who are employees of newspapers and other publications are held by the employer, which can then license all rights in the work—for example, for digitization purposes.

The hurdle for the publishing industry here are the freelance writers, who retain their copyrights unless they are expressly transferred. While many freelance writing agreements now include this express transfer of rights, that was not always the case, and especially not back in the 1990s, when newspapers and periodicals were starting to be digitized on a wholesale basis. What, then, happens when a newspaper or magazine publisher licenses digital rights in publications that include the works of freelancers?

Since newspapers and magazine are often considered "collective works," they would seem to be covered by the "Contributions to Collective Works" section of the copyright law, which gives the publisher certain rights as follows:

> 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.[3]

Does a publisher always have "the privilege of reproducing and distributing" the articles contained in collective works, regardless of whether it has obtained the contributing freelancer's consent?

Cheryl Davis

Tasini, Anyone?

No (just like I bet you guessed). In 1993, Jonathan Tasini and five other named plaintiffs brought a lawsuit against the *New York Times* and other publications claiming that the defendants had infringed their copyrights in articles they had sold for publication between 1990 and 1993. As described in the Supreme Court opinion:

> 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.[4]

The publishers argued (you guessed it) that as the owners of "collective works," they had "merely exercised 'the privilege § 201(c) accords them to 'reproduce and distribute' the author's discretely copyrighted contribution."[5]

The Supreme Court disagreed, holding:

> [T]hat § 201(c) does not authorize the copying at issue here. The publishers are not sheltered by § 201(c), we conclude, because the databases reproduce and distribute articles standing alone and not in context, not "as part of that particular collective work" to which the author contributed, "as part of …. Any revision" thereof, or "as part or … any later collective work in the same series." Both the print publisher and the electronic publishers, we rule, have infringed the copyrights of the freelance authors.[6]

The Supreme Court interpreted one of the great appeals of digitization—the ability to search for and use specific items—against the publishers' "collective works" copyright, and in favor of the freelancers' individual copyrights: "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.*"[7]

"Notwithstanding the dire predictions from some quarters," the *Tasini* Court said that its ruling need not enjoin including plaintiffs' articles in the databases:

> 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.[8]

Post *Tasini*, Pre-Updated Form Agreements

Due to a coincidence in timing (no doubt related to the fact that at that time digitization was rapidly increasing in the publishing marketplace, affecting thousands of authors), the freelance authors in *In re Literary Works in Electronic Databases Copyright Litigation* were able to benefit from the Court's ruling in *Tasini*. As the Second Circuit wrote in its 2011 decision:

> In June 2001, the Supreme Court endorsed authors' theory of liability, holding in another case that publishers violate the Copyright Act when they reproduce freelance works electronically without first securing the copyright owners' permission. *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 488, 121 S. Ct. 2381, 150 L. Ed. 2d 500 (2001). Authors' three lawsuits, which had been suspended pending Tasini, were consolidated and coordinated with a fourth action in the Southern District of New York. The consolidated class action is brought by 21 named plaintiffs—each of whom owns at least one copyright in a freelance article—and three associational plaintiffs: the National Writers Union, The Authors Guild, Inc., and the American Society of Journalists and Authors.[9]

Thus, the *In Literary Works* class action was able to be settled to the benefit of almost 3,000 freelancers.[10]

One of the causes of delay in distributing the settlement sum was the fact that groups of claimants had failed to register the copyrights in their works in a timely manner.[11] As a result, the district court's acceptance of the initial settlement was vacated by the Second Circuit.[12] After appeals up to the U.S. Supreme Court (with respect to the question "Does 17 U.S.C. 411(a) restrict the subject matter jurisdiction of the federal courts over copyright infringement actions?"[13]), the settlement was finally deemed judicially acceptable.

Now What?

Now that the freelancer's copyright has been clarified by *Tasini*, and the writers in *In re Literary Works* have received their payments, should other writers gather together to bring similar class actions? While *Tasini* and *In re Literary Works* ended up benefiting thousands of writers, freelancers writing after these decisions will, more often than not, be asked to expressly sign away their rights.[14] In any event, the success of these litigations goes to show that freelancers banding together are a force with which to be reckoned.

Endnotes

1. *In re Literary Works in Electronic Databases Copyright Litigation*, MDL No. 1379 (S.D.N.Y.).
2. 17 U.S.C. § 201(b).
3. 17 U.S.C. § 201(c).
4. N.Y. Times Co. v. Tasini, 533 U.S. 483, 487 (2001) (emphasis added).
5. *Id.* at 488.
6. *Id.*
7. *Id.* at 487 (emphasis added).
8. *Id.* at 505.
9. *Literary Works in Elec. Databases Copyright Litig. v. Thomson Corp.*, 654 F.3d 242, 245 (2d Cir. 2011).
10. While more writers filed claims, through the years-long claim resolution process, a number of authors and claims were eliminated from the action.
11. This is yet another reason to encourage clients to register their copyrights.
12. *Id.*
13. *Reed Elsevier v. Muchnick*, 555 U.S. 1211 (2009).
14. *See, e.g.*, https://archives.cjr.org/cloud_control/work_for_hire_digital_copyrigh.php.

Cheryl L. Davis is General Counsel of the Author's Guild, where she oversees the organization's legal affairs, including its in-house corporate affairs, government relations and policy initiatives, and legal services program. In addition, she is responsible for developing a wide variety of the organization's written positions, policies, statements, submissions to government agencies, and legal briefs, as well as participating in domestic and international public speaking engagements and conferences. She is a former partner at the firm of Menaker & Herrmann LLP, where her practice focused on counseling clients on intellectual property issues and litigating copyright and trademark cases. An award-winning playwright, she has long combined her creative passion with her legal work, representing theater clients in connection with a variety of contract and corporate issues (including both intellectual property and employment matters). She has made numerous presentations and written on intellectual property for the commercial arena, as well as for theater artists and other creatives.