Publish and Perish

Confronting the Post-*Tasini* World

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THE DEBATE OVER WRITERS' RIGHTS in new technologies has specialized in hyperbole and *reductios ad absurdum*, so try this one. What if, in the wake of the 1974 Supreme Court ruling in *U.S. v. Nixon*, our embattled president had staged a White House lawn bonfire of the secret audiotapes implicating him in the Watergate scandals? How do you suppose *The New York Times* would have reacted?

In an arrogant display worthy of the other corporations and institutions the press is charged with holding accountable, the New York Times Company has been doing something similar to that in the months since the June decision by the Supreme Court in *Tasini v. New York Times*. The court confirmed that, absent agreement to the contrary, freelance writers and not their first-print publishers retain the rights to redistribute articles via digital media. *The Times*' next call was straight out of the scorched-earth playbook of Captain Willard of *Apocalypse Now*: It began purging its electronic archives of freelance works – making sure all the while that librarians knew that it was the fault of those pesky authors demanding to be paid a fair share of the revenues generated by for-profit products that had been launched without permission or consultation. By such innovative gambits, as well as by the old-fashioned blacklist – some writers who refuse to waive rights even retroactively have been told they will no longer get assignments – *The Times* is effectively telling the community of independent creators both to publish *and* to perish.

This despite the following words from the court:

"The Publishers' warning that a ruling for the Authors will have 'devastating' consequences, punching gaping holes in the electronic record of history, is unavailing.... The 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."

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MUCH POST-*TASINI V. TIMES* commentary, following the pattern of that before the ruling, casts glazed-over eyes on the issue's supposed technical complexity. A notable exception is *Information Today* columnist and *Searcher* editor Barbara Quint's admirably clear essay, "Stop the Trash Trucks: A Tasini Case Damage-Control Proposal." (That piece can be viewed at http://www.infotoday.com/newsbreaks/nb010716-1.htm.)

Equally direct, but in an almost willfully wrong-headed way, is the coverage of *The New Republic*'s legal affairs editor, George Washington University law professor Jeffrey Rosen. Snidely blasting both the justices and the National Writers Union (which supported the case and whose president, Jonathan Tasini, was lead plaintiff), Rosen swallows the publishers' line that "expansive" copyright protections retard public access to information. Funny, but we never seem to hear that line when publishers are trying to forge coalitions with authors to screw consumers. Rosen fails to note that the American Library Association endorsed the writers' position in *Tasini*. It's one thing to assert a more enlightened or principled view on a subject than that of the organization most interested in it, and quite another not even to get around to mentioning the established view.

With thanks to *The Charleston Advisor* for inviting me into this forum, I'm here to say that the idea that this is all so complex is a crock. What was complicated, I submit, was designing and constructing marvelous new mechanisms for downloading old magazine and newspaper material – in the process burning secondary markets at the stroke of a key – all on the back of a national information infrastructure subsidized by taxpayers. The other part – reaching economic arrangements that work reasonably well for all impacted parties – requires no hardware, just the software of flexible negotiations on a level playing field.

I mean, you'd think our nation had never had the wherewithal to devise a public library system in the 19th century. Indeed, that's what today's debate is really all about. Like many other public and quasi-public resources, the historical record is going private even while its custodians make calculated gestures toward seeming more open. Freelance contributors to publishers of "collective works" didn't invent this problem and we aren't even part of it; the writers union, for example, has long advocated broader definitions of fair use and subsidies for libraries and low-income denizens of our increasingly two-tiered information society. But where money systematically changes hands, we do expect to participate in the transactions.

People of goodwill understand this. Three courts agreed that the plain language of the statute – the Copyright Act of 1976 – is not ambiguous. Nor is the legislative history behind it. Though at that time Congress couldn't contemplate full-text databases, CD-ROM's, and websites per se, a fair reading shows an awareness of emerging technologies and a conscious embrace of a "doctrine of divisibility," whereby freelance writers, photographers, and graphic artists would maintain secondary rights to their works by default. Why? Because the promise of any technological revolution is double-edged. Surely, the personal computer and the Internet advance the democratic ideal. But just as surely, consolidating intellectual property rights in the hands of the AOL Time Warners of the new publishing landscape does not.

From 1994 to 1997 I was privileged to serve the National Writers Union as assistant director and director of licensing, during which time we launched an innovative marketplace solution, Publication Rights Clearinghouse. I left to become a copyright litigation consultant, in part because I was skeptical about whether *Tasini v. Times* would alone be a formidable enough hammer to pound home future negotiations. And our first case in federal court in California, *Ryan v. CARL*, did win summary judgment on interpretation of the operative passage, Section 201(c) of the Copyright Act – the same section that the New York district court judge in the *Tasini* case had perplexingly construed in favor of the publisher-defendants. By 1999, however, the Second Circuit Court of Appeals had reversed the *Tasini* ruling, rather more sweepingly than it had to, and this year the Supreme Court could hardly have affirmed more convincingly. Only Justices Stevens and Breyer dissented in a 7-to-2 vote.

Folks, when Ruth Bader Ginsburg and Antonin Scalia are on the same side, there's a message, and the message isn't that we lack an intelligent consensus on law and policy.

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AS FOR THE QUAINT NOTION that information wants to be free … Have you looked lately at your bills from Lexis-Nexis, Dialog, and Gale Group? A half-dozen years ago, a school of digerati gurus mesmerized opinion-makers with value-added theory and other mumbo-jumbo pointing toward the withering away of copyright. Some of these savants, like Esther Dyson, have since been exposed as industry lackeys. Others, like John Perry Barlow, would have done better training their cyberlibertarianism exclusively on privacy matters. This fight was never about the death of intellectual property – an impossibility under capitalism. As in the early days of the railroads, when the slogan was "all the traffic can bear," this was about resistance to a regime of "IP for me but not for thee."

Even thinkers I otherwise admire, like Pam Samuelson, a University of California law professor and a MacArthur Fellow, sometimes fell for the cyberhype. *Ryan v. CARL*, a class action against the UnCover document delivery service, was filed in 1997. (The case settled last year for $7.25 million.) When the *San Jose Mercury News* asked Samuelson to comment, she said, "You run the risk of killing the goose that lays the golden egg."

Well, excuse me, but the wreckage of Nasdaq is now filled with answers to the question, What golden goose? The most overlooked hygienic effect of Tasini may be that it prods electronic publishers of all sizes and shapes into business models grounded in a smidgen of reality. No less than Webvan or Pets.com, we all need to be thinking strategically about efficient, equitable, and viable ways to connect readers ("users") with stuff ("content"). Pretending that it's OK for publishers to steal from authors only delays the process of figuring out how to foot the bill for a vibrant and diverse culture.

In his prescient 1994 *Times* op-ed, "Infohighwaymen," bestselling novelist (and writers union activist) Nicholson Baker cited the fears of magazines that "if they don't go online somehow fast

they will be left twirling twigs in the imminent hypertextual bouleversement." He concluded, "This isn't going to happen …"

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I CLOSE WITH A NEWS flash: Feel free to copy and send this piece to whomever you wish. That's the way I choose to spread my ideas and expression in this instance, and I won't be Jeffrey Rosen's or anyone else's *reductio ad absurdum*. You see, copyright and its discontents are about more than dollars and cents. They're also about common sense. In the tale of the 2-by-4 and the mule, the farmer used the first to beat some into the second. With the support of information professionals, let's see if this recent round of authors' litigation does the same to publishers.

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