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■ THE COPYRIGHT BLUES

Keep authors' rights up to date

By *Bradford P. Lyerla* SPECIAL TO THE NATIONAL LAW JOURNAL

IN THE CLASSIC 1959 movie *St. Louis Blues*, Nat "King" Cole portrays W.C. Handy, an early composer of jazz, whose works include the famous song from which the movie takes its name.

In the loosely biographical movie, Handy has written a song that is rapidly growing in

his colleagues were not asked to consent to republication of their works, nor are they compensated when their works are



popularity. Although a hipster when it comes to music, he is anything but hip when it comes to business. He allows a fast-talking music publisher to persuade him to sign away the rights to his song for \$50. "Fifty dollars!" he says triumphantly to his wife. "And that's just the beginning."

No, Mr. Handy. That was the end. But he does not begin to appreciate the consequences of his actions for another reel. By that time, the audience is bristling with anger at the injustice of our copyright laws, which allow creation and ownership of copyright to be separated, sometimes with unhappy consequences for the creator.

'Tasini' welcome

Which brings me to *New York Times v. Tasini*, decided on June 25 by the U.S. Supreme Court. In *Tasini*, the court struck a welcome blow for restoring a bit of fairness to the creators of copyrighted works.

Jonathan Tasini and the other respondents are freelance writers, and they are good at their art. They make their living crafting the written word and selling the fruits of their labors for publication. Their works appear in such popular newspapers and magazines as the *New York Times*, *Newsday* and *Sports Illustrated*, where they are enjoyed by millions of people, and the authors are compensated for their labors. Since the early 1980s, their works have been available on Nexis as well. That is because the *Times* and other publishers license the works to Nexis for a royalty. Tasini and

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republished electronically in Nexis. Thus, they claimed that they were being cheated, much like Handy in *St. Louis Blues*.

The Supreme Court agreed.

At the time that Tasini and his fellow authors assigned the works in question to the publishers, neither the publishers nor the authors foresaw that Nexis and other similar new media would come to be as popular as they are. Nor did they anticipate the increased value new media would create in these works. Consequently, the agreements that exist between the authors and the publishers are silent as to the rights to exploit the works via these new media.

The situation faced by Tasini and his fellow authors is not unique. Even today, most contracts assigning copyrights are silent on rights in new media. That is why *Tasini* promises to be an important decision for many years to come. The worlds of publishing and broadcasting are fraught with the potential for similar disputes in the future.

Consider the case of my client Eric Weisstein. He signed a standard form agreement with a publisher to do a book based on his math Web site. After the contract was signed, Weisstein learned to his extreme dismay that his publisher believes the author agreement gives it the copyright not only in the book but also in the pre-existing Web site. The agreement is silent as to rights in new media, and therefore is ambiguous on the question of the Web site, so the case is in litigation.

Before *Tasini*, such a case would have been resolved based on unreliable parol evidence. *CRC Press v. WRI*, 57

U.S.P.Q.2d 1220. That former approach unfairly favored publishers, who always intend to gain complete control of a work, while the author is just happy to be published.

As W.C. Handy learned, it is inevitable that injustices will occur when the creation and beneficial ownership of copyright are

separated.

The answer is not to limit the author's right to transfer beneficial ownership to another, but to fashion a policy that assigns the risks fairly. History tells us that publishers are in a far better position than authors to evaluate and bear the risk of changes in publishing caused by new media.

W.C. Handy learned the hard way.

If the publisher fails to negotiate for and obtain the unambiguous right to exploit copyrighted material in new media, then the law should reserve that right to the creator of the work. In *Tasini*, the court agreed with that basic principle.

This could have saved Handy a lot of anguish. Imagine, for example, that the fast-talking publisher had acquired only the rights to publish sheet music. Under *Tasini*, Handy would have retained the right to publish in new media, like sound recordings.

Now that would have been a story with a happy ending. ■

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