Tasini Aftermath: The Consequences of the Freelancers' Victory

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THE CONSEQUENCES OF THE FREELANCERS’ VICTORY

INTRODUCTION

In 2001, the United States Supreme Court in New York Times v. Tasini affirmed freelance authors’ exclusive right under the United States copyright law to post their works on electronic databases or to transfer that right to a database or publisher in writing. The case was considered a major victory for freelance writers. In principle, the victory was a milestone for the rights of freelance authors. However, the aftermath illustrates that the victory has had severe negative effects on the rights and the livelihoods of freelance writers. Still, freelancers have options to try to mitigate and reverse some of these effects.

Before Tasini, the freelance world was governed by oral relationships. Under this scheme, freelancers retained their copyrights and were thus free to re-sell their pieces and exploit their works in new ways. Today however, many publishers, who hold superior bargaining power, require freelancers to sign away all copyrights to their articles.

Currently, freelance writers, databases, and publishers are in court-ordered mediation to resolve three lawsuits regarding pre-Tasini infringement. In addition, the majority of freelance work created and published before Tasini has been removed from

databases, benefiting neither side and leaving an historical gap for researchers and other interested parties.

This article will address the background of the *Tasini* case and its holding as well as the aftermath and consequences of *Tasini*. The article will examine the status of pre-*Tasini* works, how current freelance contracts are structured, and what publishers now demand in return. In addition, it will explore possible steps that freelance authors can take to improve their positions at the bargaining tables, to empower themselves, and to structure more beneficial relationships with their publishers.

I. BACKGROUND

Before *Tasini*, relationships between newspaper publishers and freelancers were more casual and were typically established and maintained only through oral conversations. In 1978, when the current copyright law went into effect, it changed how contributions to collections such as newspapers were treated. Section 201(c) provides that the copyright in an individual contribution to a collection is retained by the author of the

3. See Telephone Interview with Ken Richieri, Vice President and Deputy General Counsel, The New York Times Company (Dec. 4, 2003); *Tasini* v. New York Times, 972 F.Supp. 804, 807 (S.D.N.Y 1997) ("As of the time this action was commenced, freelance assignments for The New York Times were typically undertaken pursuant to verbal agreements...These discussions seldom extended into negotiations over rights in the commissioned articles"), rev'd 206 F.3d 161 (2d Cir. 2000); see also *Marx* v. Globe Newspaper Co., No. 00-2579-F, 2002 WL 31662569 at *1 (Mass. Super.)

For many years, the plaintiffs’ relationship with the Globe was governed by oral agreement in which the plaintiffs, as freelance independent contractors, wither regularly or episodically sold their work for a fee to the Globe for publication in the Globe newspaper. Under this oral agreement, the freelancers retained the copyright in their work and did not expressly grant the Globe any license to republish their work in any media other than the Globe newspaper.

*Id.*

https://via.library.depaul.edu/jatip/vol14/iss2/3
individual contribution and is distinct from the copyright in the collective work as a whole.4 Even after this change however, the industry standard did not involve written contracts with freelance writers.5 As a result, freelance authors retained the copyrights in their works. In contrast, newspapers owned the copyrights to pieces written by staff writers because, as employees of the publication, their works are covered by the work-made-for-hire doctrine that states employers own the copyright of “a work prepared by an employee within the scope of his or her employment.”6 The New York Times Company Vice President and Deputy General Counsel Ken Richieri explains that during the pre-Tasini period, newspapers and freelance writers did not discuss the rights of newspapers because publishers believed they had the rights to all versions of the publications, including print, microfilm, and online.7

Without a written contract stating otherwise, under the 1976 United States Copyright Act an author retains the copyright in her contribution to a collective work.8 In 17 U.S.C. §201(c), the Copyright Act provides a safe harbor for publishers of collective works, providing them with “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.”

5. See Richieri Telephone Interview, supra note 3.
7. See Telephone Interview with Mr. Ken Richieri, Vice President and Deputy General Counsel, The New York Times Company (Nov. 10, 2003).
8. 17 U.S.C. §201(c) reads:
   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 the 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.
work in the same series.” However, the copyright in the original contribution and any rights beyond the §201(c) privilege belong to the author unless she expressly transfers the copyright or specific rights in a written document.  

Richieri points out that during the period from 1978, when §201(c) went into effect as part of the 1976 Copyright Act, until 1993, when Tasini was brought, The New York Times published approximately 10,000 freelance articles per year and not a single person came forward to claim he or she did not understand the relationship. Richieri states, “Everyone knew the drill.” Magazines also had more casual relationships with freelance authors than they do today, but used contracts with freelancers more regularly than did newspapers.

In this previous regime, freelance authors’ livelihoods were typically based on “selling rights in the articles they generate[d] to multiple publications, each of which serve a distinct geographic region.” Emily Bass, one of the plaintiffs’ attorneys in Tasini, explains how freelancers made a living in the pre-Tasini world:

[I]t is not simply that after publishing an article in the Chicago Tribune, for instance, that a freelance author then has the right, or the ability and the incentive, to publish that same article in an anthology or to turn it into a treatment for a movie. The freelance author makes his or her living by selling that article to five or six different

10. Id.
11. See Richieri Telephone Interview, supra note 7.
12. Id.
13. See Telephone Interview with Robin Bierstedt, Vice President & Deputy General Counsel, Time Inc. (Nov. 17, 2003); see also, Tasini, 972 F.Supp. at 807 (“The relationship between Time and [the freelancer] was decidedly more formal than the arrangements routinely entered into between freelance writers and Newsday or The New York Times. [The freelancer] and Sports Illustrated entered into a written contract”).
publications throughout the United States. So, for instance, the author who sells first North American serial rights to the Chicago Tribune will then typically sell re-use or reprint rights to four or five other newspapers. He might, for instance, sell re-use rights to publications in Boston, Philadelphia, Atlanta, and Los Angeles.\textsuperscript{15}

As technology developed, many publishers began establishing and selling material to electronic databases. In the 1970's, The New York Times developed The New York Times Information Bank, which originally contained only abstracts of articles.\textsuperscript{16} In 1980, The New York Times began to populate the database with some full text articles as well.\textsuperscript{17} Then, in January of 1983 when the Information Bank was largely full text, the Times sold it to Lexis/Nexis.\textsuperscript{18}

II. TASINI V. NEW YORK TIMES

In 1996, six freelance authors sued a group of publishers and electronic database operators for copyright infringement. The plaintiffs claimed that their copyrights had been infringed when the defendants placed their works onto CD-ROMS and into electronic databases without permission. The Southern District of New York found in favor of the defendant publishers on summary judgment, holding the electronic database and CD-ROMs in question "carry recognizable versions of the publisher defendant's newspapers and magazines" and that the publishers were therefore protected by §201 and did not have to seek the authors' permission.\textsuperscript{19} However, the Second Circuit reversed the decision, explaining that "there is no feature peculiar to the databases at issue in this appeal that would cause us to view them as

\begin{itemize}
  \item \textsuperscript{15} Id. at 640-641.
  \item \textsuperscript{16} See Richieri Telephone Interview, supra note 3.
  \item \textsuperscript{17} Id.
  \item \textsuperscript{18} Id.
  \item \textsuperscript{19} Tasini, 972 F.Supp at 825.
\end{itemize}
The Supreme Court then addressed the issue of whether §201(c) confers upon commercial electronic database publishers the privilege of reproducing and distributing copyrighted articles in and through the databases.21 “The freelance authors’ complaint alleged that their copyrights had been infringed by the inclusion of their articles in the databases.”22 The publishers and databases argued that such use of the work fit under the 201(c) “revision” privilege.23

The Court held that “[b]oth the print publishers and the electronic publishers had infringed the copyrights of the freelance authors” because §201(c) did not authorize the copying at issue and that the right to exploit such contributions to collective works was retained by the authors.24 The Court reasoned:

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 of...any later collective work in the same series.’25

Freelancer writers and their advocates celebrated the Court’s holding and its interpretation of section 201(c).

III. AFTERMATH OF TASINI

The freelancers’ landmark victory in Tasini has proved to be empty of any actual concrete benefit to freelancers. The

22. Id. at 487.
23. Id. at 488.
24. Id.
25. Id.
predictions in Justice John Paul Stevens' Tasini dissent have come true. Justice Stevens forecast that freelance material would be purged from electronic archival databases and that the freelancers would not see any actual financial gain from the majority's decision. The post-Tasini dealings between publishers and freelance authors have proven both calculations true. As Emily Bass explained:

On one hand, the United States Supreme Court has said in unequivocal terms that digital rights belong to the freelance author and are his to exercise unless he or she consents to transfer or license them. On the other hand, there is the practical question of whether freelance authors can manage to hold on to their rights and, even if they can, whether they can then realize their value.26

Justice Stevens explained that "the difficulties of locating individual freelance authors and the potential exposure to statutory damages may well have the effect of forcing electronic archives to purge freelance pieces from their databases."27 Also in explaining why freelancer authors will not benefit financially, the Tasini dissent pointed out that "[a]s counsel for petitioners represented at oral argument, since 1995, The New York Times has required freelance authors to grant them 'electronic rights' to articles. And the inclusion of such a term has had no effect on the compensation authors receive."28 However, in the majority opinion, Justice Ruth Bader Ginsburg addressed the prediction that a ruling in favor of the plaintiffs would "punch gaping holes in the electronic record of history" by stating that "it hardly follows from today's decision that an injunction against the inclusion of these Articles in the Databases...must issue." 29 Ginsburg suggested that the parties "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 works and remunerating authors for their

27. Tasini, 533 U.S. at 520 (Stevens, J., dissenting).
28. Id. at 522.
29. Id. at 505.
distribution.”

However, after *Tasini*, publishers set out to determine what material they did not have the rights to, and deleted that material from their electronic databases. The day the Court handed down its decision, Arthur Sulzberger Jr., chairman of The New York Times Company and publisher of *The New York Times*, said that the *Times* would “now undertake the difficult and sad process of removing significant portions from its electronic historical archive.” *The New York Times* deleted freelance material from 1980-1995 for which it did not have contractual rights. Approximately 115,000 articles by 27,000 writers were affected. Other publishers such as *Time Magazine* took similar steps. These consequences would not have swayed Justice Ginsburg however. In the *Tasini* opinion, she points out that “speculation about future harms is no basis for this Court to shrink authorial rights Congress established in §201(c).”

*The New York Times* made efforts both to prevent purging and to restore freelance authors’ works. Before removing material from its electronic database, it gave freelance writers the opportunity through a phone line and website to sign a waiver giving the *Times* the necessary rights to retain the electronic versions of the articles. Current freelance contracts include a provision giving

30. Id.
32. See Richieri Telephone Interview, supra note 3.
34. See Bierstedt Telephone Interview, supra note 13.
36. See Richieri Telephone Interview, supra note 3; see also http://survey.nytimes.com/survey/restore/ (last visited Oct. 4, 2004), which states:

Because of a recent decision by the United States Supreme Court, The Times is obliged to remove from electronic archives, such as Nexis, the work of freelance writers that appeared from 1980 through 1995. If you wrote for the Times during that period and you would like to give The Times
The New York Times a non-exclusive license "to reproduce, distribute, display, perform, translate, or otherwise publish. . .prior contributions." This provision will be discussed later in further detail.

As a result of the restoration website, restoration hotline and the "previous works" provisions, The New York Times has restored approximately 20 percent of affected material. Time Inc. magazines, on the other hand, have not restored any such material. Freelancers, publishers, and electronic database operators are currently in mediation and the company does not want to restore anything before the mediation is settled.

A. Freelancers' Contracts in the Post-Tasini World

Many publishers did not wait for the courts to rule on Tasini. They took proactive measures in order to protect themselves in case the verdict turned out as it did. Contracts between freelance authors and publishers began to change in the mid-1990s soon after the Tasini lawsuit was filed. The New York Times, as well as most other major publishers that use freelance work, began to require freelance authors to sign away their electronic republication rights. "[T]he practical implication of the Tasini decision was to grant a right under the Copyright Act that in many cases has proved valueless: Exploiters of works have enough bargaining power to obtain royalty-free licenses to make revisions of freelancers' copyrighted works." Because publishers had

permission to restore your work to electronic archives, you may do so below. Please note that you may not selectively restore articles to the archives. If you agree to restore your work, the full body of your work will be restored.

Id.

38. See Richieri Telephone Interview, supra note 3.
39. See Bierstedt Telephone Interview, supra note 13.
40. Id.
41. See Greenhouse, supra note 31.
already taken action and because they had superior bargaining power, the *Tasini* decision had “little prospective importance in terms of changing current industry practice.”

Many publishers currently use work-made-for-hire or all-rights provisions in contracts with freelance writers. For example, a standard *New York Times* freelance contract reads:

The Times owns all right, title and interest, including copyright, in and to the Article(s), throughout the world (such material being commissioned by the Times as a contribution to a work and therefore a “work made for hire” under the Copyright Act or, alternatively, if not a “work made for hire,” then you hereby assign all such right, title, interest and copyright in and to the Article(s) to the Times).

Other publishers, such as the Tribune Company, whose publications include the *Chicago Tribune*, the *Los Angeles Times*, *Newsday*, and the *Baltimore Sun*, have similar freelance work for hire contracts for writers, photographers, and illustrators.

45. A Standard Tribune Company Freelance Author Agreement reads: Publisher’s publication(s) is/are collective work(s) as defined in the United State Copyright Act 17 U.S.C. §101 (“Copyright Act”). Each Work Freelancer prepares at Publisher’s request is a commissioned work, and as such, constitutes a work made for hire as that term is defined in the Copyright Act. Freelancer agrees that any Work Freelancer submits to Publishers shall be considered a work made for hire for Publisher, and that Publisher shall own all rights, including the copyright therein. If for any reason the Work is not found to be a work for hire, Freelance acknowledges that this Written Agreement shall transfer and assign ownership of the copyright in the Work to Publisher.

(On file with the author).
Publishers prefer work for hire agreements because they offer the most protection and are simple to obtain because of their bargaining power.

Richieri states that in the wake of *Tasini, The New York Times* and other publishers are trying to better protect themselves. They understand that future technological advancements may further threaten their use of freelancers' works. Richieri explains that from the publisher's perspective, obtaining a work for hire agreement is the one guaranteed way to ensure that they do not face another *Tasini*. In addition, Richieri points out that *The New York Times* wants to create a seamless body of material. The easiest way to do this is to ensure that *The New York Times* enjoys the same rights for all of its articles, whether written by staff writers or freelance authors.

In addition, publishers may also prefer work for hire provisions rather than assignments of copyright because, under the current United States copyright law, after 35 years the authors could terminate the assignments. Therefore, if 35 years after the execution of the grant an author or an heir wants to obtain the copyright, they can terminate the assignment. In addition, this termination "may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant." Under the 1976 Copyright Act, a work is deemed a "work made for hire" in one of two ways. As defined by 17 U.S.C. §101, a work is a "work made for hire" if it is "prepared by an employee within the scope of his or her employment." In addition, a work is deemed a "work made for hire" if the work is "specially ordered

46. See Richieri Telephone Interview, *supra* note 3.
47. Id.
48. Telephone Interview with Mr. Ken Richieri, Vice President and Deputy General Counsel New York Times (Dec. 5, 2003).
50. Id.
52. 17 U.S.C §101.
53. Id.
or commissioned for use,” it fits into the enumerated categories, and “the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.” Newspapers and magazines are covered by the work-made-for-hire provision as collective works, which is one of the enumerated categories in §101 of the Copyright Act.

As illustrated by the contract language set out above, publishers often use ‘belt-and-suspender’ language as a back up in case the freelancer’s work is not deemed a work-made-for-hire. Because work made for hire by an independent contractor is subject to a statutory test, and a chance always exists that a court could find the statutory requirements were not met, publishers protect themselves by backing up the work-made-for-hire provision with an assignment of the freelancers’ copyright in her work.

**B. Non-Exclusive License for Previous Work**

Some current freelance contracts require that freelance authors provide the publisher with a non-exclusive license for previous works. A standard *New York Times* freelance contract reads:

In addition to the foregoing, you hereby grant to *The Times* a perpetual, worldwide, royalty-free, paid-up non-exclusive transferable license under copyright to reproduce, distribute, display, perform, translate or otherwise publish your Prior Contributions in any form or media, whether now known or that may hereafter be developed, whether or not any such Prior Contribution may be individually accessed, perceived or retrieved from such form or media, and to authorize third parties to exercise such rights, provided that this license shall be limited to the use of Prior Contributions in forms

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54. *Id.* The enumerated categories in §101 are a collective work, a motion picture or other audiovisual work, a translation, a supplementary work, a compilation, an instructional text, a test, answer material for a test, and an atlas.

55. *Id.*
or media that contain other articles from *The Times*. As used in this Section 2(b), "Prior Contributions" shall mean articles, columns or any other materials written by you and published in *The New York Times* newspaper prior to the date of this agreement, other than such materials as are already covered by a written agreement between you and *The Times*.^56_

According to *The New York Times*, this provision is not currently a point of contention for the newspaper. Richieri states that it is rarely, if ever, an issue because most writers now signing contracts with the *Times* are writing for the paper for the first time and do not have any "previous works" at issue. So, the issue would come up only if an author had written for the *Times* before 1996 and is now, after eight years, writing for *The Times* again. According to Richieri, this is very rare. Richieri adds that, in the entire period that the *Times* has required these contracts, less than ten freelance authors have objected, and in those instances the writers objected to the entire contract, not simply the "previous works" provision. Those writers, according to Richieri, were offended by the rights provision.\(^60\)

One group of freelancers challenged this kind of ultimatum in *Marx v. Globe Newspaper Co.*\(^61\) In *Marx*, freelance authors and photographers sued the *Boston Globe* in Massachusetts state court, seeking to enjoin the newspaper from threatening to terminate or actually terminating their oral contracts if they did not enter into the proposed license agreement.\(^62\) This license agreement sought

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57. See Richieri Telephone Interview, *supra* note 3.
58. *Id.*
59. *Id.*
60. *Id.*
62. *Id.*
rights to the freelance writers’ future and past works. The freelancers’ relationship with the Globe for many years had been governed simply by oral contracts, which “did not expressly grant the Globe any license to republish their work in any media other than the Globe newspaper.” In 1996, the Globe started asking freelancers to sign works-made-for-hire agreements, but the plaintiffs and most other freelancers did not sign the contracts because they could continue to sell their work to the Globe without signing the agreement. Initially, if a freelancer did not sign the new agreement, the Globe would not redistribute the freelancer’s work to online databases or republish the work through Boston.com. However in 1997, after the district court ruled in favor of publishers in Tasini, the Globe changed its policy and began to republish and redistribute freelance work to Boston.com and other online databases without the freelancers’ consent.

The Globe changed its policy once again after the Second Circuit decided in Tasini that publishers were infringing the copyrights of freelancers. The Globe decided to require all of the freelancers to sign the new agreement. The Globe posted this agreement and a letter of explanation on its website. The License Agreement asked for the following rights:

[t]he exclusive right to first publish the work in the Globe newspaper; ‘the non-exclusive, fully-paid up, worldwide license to use the accepted Work’ for the entire term of copyright; and

[f]or no additional fee, ‘a non-exclusive, fully-paid up, worldwide license to use all of the Works that the Globe has previously accepted from [the

63. Id. at *1.
64. Id.
65. Id.
66. Id. at *1.
68. Id.
The explanation letter stated that after July 1, 2000, the *Globe* would not accept work from a freelancer who had not signed the agreement.  

These developments mirrored the approach that many publications took during the *Tasini* litigation. The court’s explanation of the plaintiffs’ situation in this case reflects the climate that all freelancers were facing:

In essence, the License Agreement, viewed with the accompanying explanatory letter, gave each *Globe* freelancer an ultimatum: either sign a new written License Agreement which, among other provisions, granted to the *Globe* for no additional fee a non-exclusive license to use ‘all of the Works that the *Globe* has previously accepted from [the freelancer]’ in Boston.com or any other online database that is marketed or grouped under the *Globe*’s name, or, effective July 1, 2000, the *Globe* will not accept any additional work from the freelancer. This ultimatum left the freelancers with an unpleasant choice: either surrender, for past and future works purchased by the Globe, the copyright victory they had vicariously obtained from the Second Circuit in *Tasini* and continue to have the opportunity to sell their freelance work to the *Globe*, or preserve the fruits of that victory and lose the ability to sell their work to the *Globe*.  

Five of the plaintiffs refused to sign the agreement and the sixth plaintiff signed but claimed she signed it under duress. The plaintiffs’ complaint alleged that the *Globe*, by making this

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69. *Id.* (quoting License Agreement at ¶2).
70. *Id.*
71. *Id.* at *3.*
ultimatum, had committed an unfair or deceptive act or practice and that the *Globe* misrepresented the terms of the proposed License Agreement in its explanatory letter.\(^72\) "The crux of their claim is that the *Globe* may only set these conditions with respect to work provided to the *Globe* after execution of the License Agreement, and may not require them to relinquish their licensing rights with respect to work provided to the *Globe* before execution of [the] Agreement."\(^73\) The Superior Court of Massachusetts granted summary judgment in favor of the *Globe*.\(^74\) The court explained the key issue in the case was whether the court should enlarge the definition of a breach of the implied covenant of good faith and fair dealing to "include the *Globe's* threatened termination of a freelance relationship that was terminable at will in order to pressure the freelancers partially to relinquish the copyright they had been permitted to keep earlier in the relationship."\(^75\) The court reasoned that the question of whether the *Globe's* ultimatum was an unfair act or practice "depends on whether the *Globe* lawfully can terminate its relationship with a freelancer for bringing a claim of copyright infringement against the *Globe* based on a prior infringement."\(^76\) The court concluded that "public policy does not prohibit the *Globe* from terminating a freelancer for bringing a copyright infringement claim and, therefore, does not prohibit the *Globe* from requiring a freelancer essentially to release any copyright claim as a condition of continuing the freelance relationship."\(^77\) Therefore, the court held that "the *Globe's* ultimatum should not be viewed as a violation of the implied covenant of good faith and fair dealing."\(^78\) The plaintiffs decided not to appeal this ruling.\(^79\)

\(^{72}\) *Id.* at *3.
\(^{73}\) *Marx*, 2002 WL 31662569 at *4.
\(^{74}\) *Id.* at *3.
\(^{75}\) *Id.* at *6.
\(^{76}\) *Id.* at *9.
\(^{77}\) *Id.* at *10.
\(^{78}\) *Id.* at *11.
\(^{79}\) Statement from Boston Globe Freelancers Association, *available at*
If other courts interpret similar challenges in a parallel way, freelancers may have to accept that certain publishers will require an assignment of rights in previous works and decide whether they can live with it, whether they want to try to change their individual contract, or whether they would rather write for other publications. Lisa Collier, President of the American Society of Journalists and Authors states:

The Boston Globe may be off the hook in the courtroom, but not in the eyes of the freelancers it has wronged by demanding they sign away their rights for nothing or never write for the paper again. That’s bad business for the Globe, which has driven away talented writers and photographers with its hardball tactics. 80

Not all publications ask for such retroactive rights. For example, Time Inc. does use work-made-for-hire provisions for future works but does not seek rights to previous works. 81 Furthermore, some publications do not seek past rights and do not require writers to sign away the copyright in their work. A freelance contract with The Village Voice reads:

Through the on-sale date of the issue in which the Article is published plus 30 days, you grant the Voice exclusive worldwide, periodical publication and syndication rights in the Article, in all languages and in all mediums, including electronic publication. You further grant to the Voice the same rights non-exclusively, thereafter, including the non-exclusive right to include the Article in any archive or database of Voice issues in any form or

http://www.asja.org/media/nr040115.php (last visited April, 12, 2004).
81. See Bierstedt Telephone Interview, supra note 13.
medium, and the non-exclusive worldwide right to reprint the Article at any time or from time to time in the *Voice*, any anthology or similar collective work published by or at the direction of the *Voice* (a "Voice anthology") or any other Village Voice Media publication. You will be paid for any reprints in Village Voice Media print publications or as part of a *Voice* anthology the *Voice*'s then-prevailing re-use fee. 82

Even *The New York Times* breaks its own rule for Op-Ed pieces with an alternative contract that does not seek to deem the work a work made for hire or obtain an assignment of copyright. 83 Instead of a work-made-for-hire provision or an assignment of the copyright, the contract simply obtains the exclusive right to first publication and a non-exclusive right thereafter. The contract reads:

You hereby grant to *The New York Times* the exclusive right to first publish the article(s) in *The New York Times* newspaper; and non-exclusive worldwide, perpetual right and license to reproduce, distribute, display, perform, translate or otherwise publish the article(s) in any form or media now or later developed, and to authorize third parties to do any of the foregoing. You shall have the right to reprint or resell the article at your own discretion after its publication in *The New York Times* newspaper. 84

Richieri states the difference between the standard freelance contract and the Op-Ed contract is due both to the nature of the

84. *Id.*
writers and the timing of the articles. Many of the writers are public figures who may have more bargaining power than the average contributor and may have already used the writing in a speech or other written work. In addition, turnaround time for the Op-Ed is so short, that *The New York Times* wants an extremely simple contract that everyone will accept.85

One way for freelancers to research the various contracts that publishers use and to find publishers who do not use work-made-for-hire or assignment of copyright agreements is through the American Society of Journalists and Authors ("ASJA"). The ASJA publishes "Contracts Watch" on its website.86 The articles cover various topics regarding contracts between writers and publishers and reports on what types of rights various publications seek in their contracts with freelance authors. For example, the ASJA reports that the *International Herald Tribune* "calls for exclusive rights for a month and non-exclusive thereafter."87 The ASJA points out, "No, we don't think that sharing the store with someone who can easily out-market you is wise, especially when that party can sub-license rights, but it would be a vast improvement over depending on the kindness of the Times."88 However, as *The New York Times* recently became the sole owner of the *International Herald Tribune*, the contract policies may change to conform with *The New York Times*’ freelance contracts.

Contracts Watch points out other publications that have, according to the ASJA, "developed the reputation of having so-called writer-friendly contracts."89 It names, for example, Meredith Corporation,90 which publishes seventeen subscription

85. See Richieri Telephone Interview, supra note 48.
86. See http://www.asja.org.
88. Id.
89. Id.
magazines such as *Better Homes and Gardens*, *Ladies' Home Journal* and *Country Home*, as such a publisher because Meredith Corporation contracts only require first North American serial rights. This type of right allows for the publication of an article for the first time, one time only, anywhere in North America. The author then retains all subsequent North American serial rights and can grant other publications the right to publish the article as long as there is a market for the work.

C. Further Litigation

After the Second Circuit's decision in *Tasini*, the Author's Guild, which was not part of the *Tasini* suit, and a group of freelance writers brought a class action lawsuit against eleven electronic databases for infringing copyrights for the three prior years allowed for in the statute of limitations. The "complaint [sought] damages for past copyright infringement and injunctive and declaratory relief from further infringement on behalf of more than 15,000 freelance authors." Clearly, the scope of this lawsuit dwarfed *Tasini*, which involved only six freelancers. In addition, although the publishers were ultimately brought into the suit, this lawsuit was focused on the database operators, not the publishers.

Around the same time, the National Writers Union along with individual freelance writers also sued. In addition, a third independent case was brought by a separate group of freelancers. However, after the Supreme Court granted certiorari for *Tasini*, Judge George Daniels of the Southern District of New York

91. See American Society, *supra* note 87.
92. The class was never certified. Telephone Interview with Ms. Kay Murray, General Counsel & Assistant Director, The Authors' Guild (Oct. 29, 2003).
93. *Id.*
95. See Murray Telephone Interview, *supra* note 92.
consolidated the three cases as a multi-district litigation. This litigation was placed on hold and, after the Supreme Court decided *Tasini*, entered mediation where it remains.

Parties are confident that they will reach a resolution and hope to announce the settlement in the coming months. Although she cannot discuss the details of the terms, Kay Murray, General Counsel and Assistant Director of the Authors’ Guild, stated that a settlement is good if neither side is happy, and that this will be the case.

IV. STATUS REPORT: FREELANCERS’ CURRENT POSITION

While the mediated settlement regarding past relationships between freelancers and publishers is not resolved, current relationships can and should continue to evolve. Freelancers and publishers need each other, although many publishers may think, or at least act as if, freelancers need them more than they need freelancers.

In the current situation, the publishers are getting the best of both worlds. In requiring freelance authors to sign work-made-for-hire contracts, they receive the benefit of staff writers without costs such as health insurance, retirement benefits, office space, and office resources. Meanwhile, freelancer authors have lost many of their previous benefits such as control over the work, ability to sell a piece of work to multiple publications, and a sense of autonomy.

Currently, freelancers are in a worse position than they were before the *Tasini* litigation. Although they gained a legal and symbolic victory, they have made no concrete gains regarding payment or bargaining position. In addition, freelance writers are now giving up more rights than ever before. Most of their work, unless they have allowed it to be restored for no additional payment, has been removed from electronic archival databases.

96. *Id.*
97. *Id.*
98. *Id.*
One freelance writer relates, "I think the biggest effect with Tasini is the fact that much of my work is now erased from the electronic historical archives."99 In addition, many freelancers are demoralized and feel that they do not have any choice beyond signing their copyrights away. As attorney Emily Bass explains:

[S]ome publishers have said to their freelance authors, unless you agree to this arrangement, you will no longer write for this publication. Now, that is not true of all publishers. That is not true in all instances, but I think that that has been said a sufficient number of times that it has led many freelancers to believe that they have absolutely no option.100

In order to revise the currently imbalanced relationship, freelance authors will have to make difficult decisions; however, in the process they will hopefully discover what is most important to them and thus feel empowered and in control of their work and career.

V. EMPOWERING FREELANCERS

Changing freelancers' current situation will take both group and individual action. Individually, each freelancer must decide what is non-negotiable for her. Each freelancer must determine what is so important that she is not willing to give up and where she is willing to compromise. For example, if an author decides that she is not willing to sign a work-made-for-hire or exclusive rights contract, she can still work as a freelance author. As discussed earlier, many publications do not require the assignment of these rights. However, she may not be able to (at least at this time) write for some major newspapers such as The New York Times. Other

99. E-mail from Barbara Mathias-Riegel, Freelance Writer (Dec. 9, 2003, 08:02:09 EST) (on file with the author).
100. Bass, supra note 14, at 642.
writers want to write for *The New York Times* so much that they are willing to sign anything. The reason why *The New York Times* is able to insist on such contracts is because enough freelance writers are willing to sign them.

Writer’s organizations warn freelancers not to sign such contracts, but many writers may not mind. It is important to recognize that individual authors may want and require different relationships with their publishers. When asked how they feel about signing away the copyright in their works, freelance authors view the issue very differently. Some do not like it on the principle. Others’ concerns are more specific. One journalist noted that he would be okay in signing a work-made-for-hire contract or assigning his copyright in his articles if he retained the right to post the articles he had written on his personal website. For this journalist, his website serves as his *curriculum vitae*. He explains that it is an ideal and simple way of showing potential editors his work. Richieri related that *The New York Times*, if asked, would most likely permit this use, that it may be considered a fair use, and that it could be easily written into a freelance contract. This is one minor example of how, if they want to write for a publication that requires work-made-for-hire or all-rights contracts, journalists can carve out provisions that help protect what is important to them.

Many major publications are not going to accept, at least at this point in time, anything less than a work-made-for-hire agreement or an assignment of copyright. Therefore, while freelancers should definitely try to change that provision, they need to find other ways to get a more equitable contract. Even if a freelance author is willing to sign away her copyrights, she can still carve out important provisions. One such provision, which has both symbolic and financial significance, is a syndication payment. *The New York Times* freelance contracts currently provide for a 50 percent syndication payment. It reads:

102. *Id.*
Notwithstanding such ownership... The Times agrees to pay you fifty percent (50%) of its net receipts (that is, receipts after deduction of syndication expenses) from syndication of the Article(s) ("Syndication Fee"). Articles are "syndicated" when they are sold individually, and not as part of The Times or other articles published in the Times, to a third party for republication in any form. Thus, for example, the inclusion of the Article(s) in The New York Times News Service is not a "syndication" for which additional compensation would be paid.\textsuperscript{104}

If a writer is forced to sign away her copyrights, a syndication payment at least provides partial compensation for future exploitation of her article. However, many publication contracts do not provide for the syndication payment set out in \textit{The New York Times} contract.\textsuperscript{105} Although publishers argue that the syndication market is not very profitable, for writers it can add up, and as a matter of principle, the freelancer would enjoy at least some of the additional profit created from the exploitation of her work. Many publishers are in a better position to exploit the work in new forms and find syndication opportunities than individual writers because of their affiliations and corporate relationships with different media outlets. Therefore, as long as the author is justly compensated, in some situations it may be in the authors' best interest to allow the publisher to exploit her work in these ways. Kay Murray of The Authors' Guild states that most writers are happy with 50/50 syndication fee agreements.\textsuperscript{106}

Freelancers should also take advantage of current royalty collection services such as the Authors Guild's Registry (the "Registry"). The Registry, established in 1996, collects copyright


\textsuperscript{105} Tribune Company, Freelance Agreements (on file with the author); see Bierstedt Telephone Interview, \textit{supra} note 13.

\textsuperscript{106} See Murray Telephone Interview, \textit{supra} note 92.
fees and royalties from publishers and other organizations, and distributes the funds to authors whose works are being exploited. Since 1996, the Registry has distributed 1.5 million dollars.

Publishers contend that all negotiations should take place during the formation of the original contract and that the provision where the freelancers have the most ability for negotiation is the payment provision. They contend that this is where the contracts differ and where the freelancers should focus their attention. Here is where group action, through writers’ organizations, could be greatly beneficial in raising the standard freelance payments. In general, payments did not increase when publishers started requiring electronic and other rights. Therefore, this is an area where writers need to come together to improve their bargaining power in union-like action.

Currently, there are a few obstacles to clear in order for freelance writers to obtain payments from electronic databases. Electronic databases contract with publications such as The New York Times directly and likely would not purchase single articles. They are set up for users to search databases based on publications. In addition, publications, such as The New York Times and Time Magazine, do not receive any detailed information regarding which articles from their database were accessed by users. Publishers have been told by the databases that this information is not possible. In addition, Richieri points out that if they were to receive such information, practical difficulties exist in paying the freelancer each time an article is accessed. Because of administrative expenses, large companies generally pay something in the range of forty dollars to write a check. Therefore the transaction costs of paying a freelancer make it impractical for payment of very small amounts. From the

108. Id.
109. See Bierstedt Telephone Interview, supra note 13; see Richieri Telephone Interview, supra note 3.
110. See Bierstedt Telephone Interview, supra note 13.
111. See Richieri Telephone Interview, supra note 3.
publishers’ perspective, they would much rather pay for all the rights upfront. However, publishers may be able to compensate freelancers for each time an article is accessed in the future as technology improves. If transaction costs are the sole obstacle, publishers could set a minimum number of times the article would have to be accessed to trigger compensation, thus covering their expenses.

VI. CONCLUSION

Several ways exist in which freelancers can try to gain more control over their compensation and careers. They should negotiate for a syndication payment such as The New York Times provides. They should join writers’ organizations and become more involved in advocacy work to lobby Congress for more power at the bargaining table. In addition, freelancers should feel empowered to choose what publications they will write for. Some of the most desirable publications may require works-made-for-hire, copyright assignments, and retroactive rights. This is one of the severe consequences of the Tasini litigation. Some of these consequences may not be reversible. However, freelancers must realize that there is room to negotiate and they must stand up for what they value. If each freelancer accepts the current relationship as non-negotiable, it will become just that – non-negotiable.

Amy Terry

112. Ms. Terry received her J.D. from Columbia Law School in 2004.