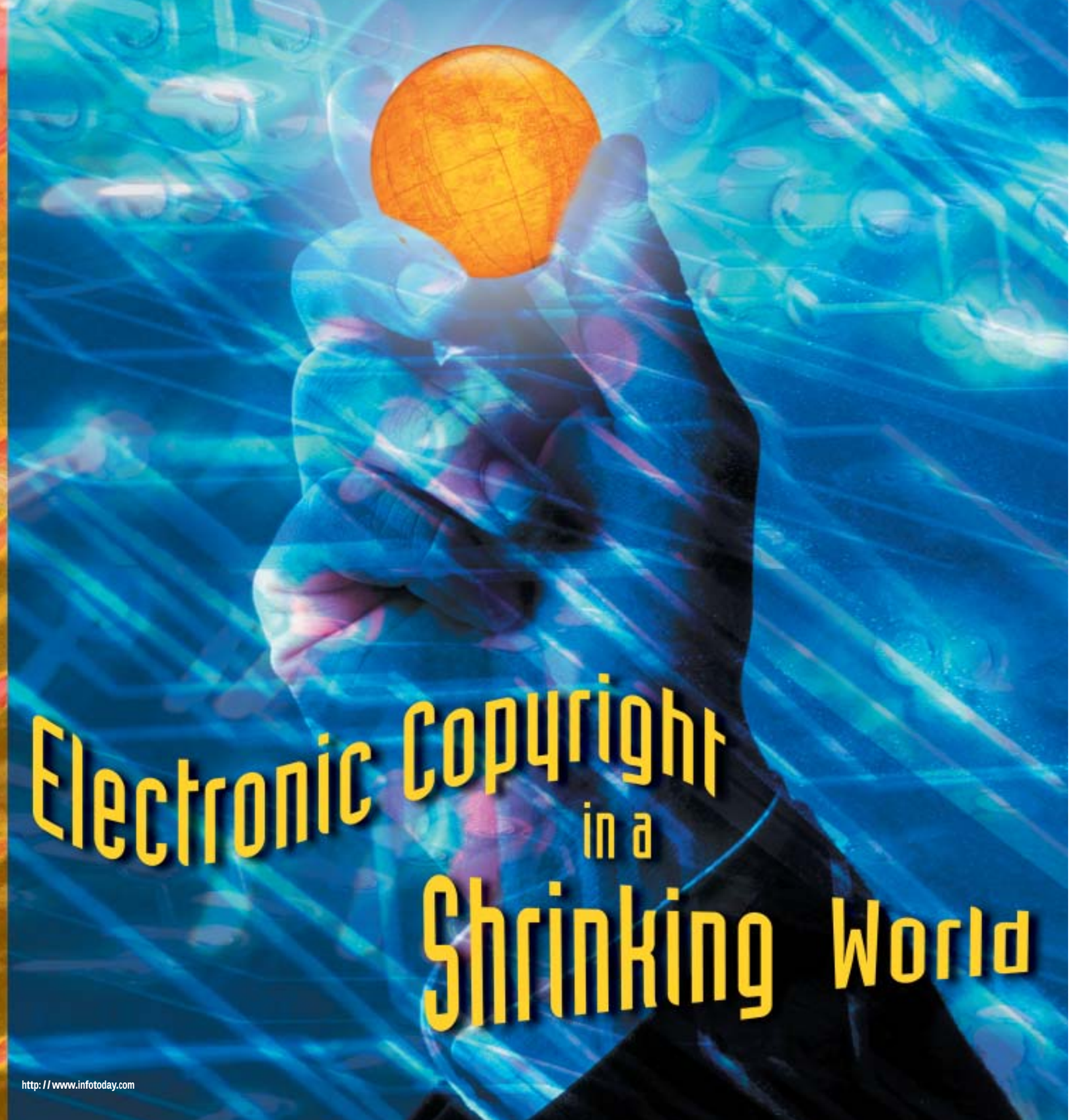

Electronic Copyright in a Shrinking World

by Cristine Martins and Sophia Martins

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The electronic age is upon us, and as librarians we need to be aware of the new issues involving copyright in electronic media—both in the U.S. and around the world. We don't mean to imply that every librarian needs to be a copyright policeman, but there have been major changes in the last few years from both U.S. Supreme Court decisions and international copyright conventions and organizations that may impact the free availability of information in electronic form.

Sophia Martins and Cristine Martins, the co-authors of this article, are both librarians and lawyers, although for some reason the librarian role always seems to come first. Sophia is an academic law librarian and former public library director, while Cris is an independent records management consultant who has a great deal of experience in running corporate financial, engineering, and other special libraries. In all of these settings the issue of copyright plays a central role—more now than ever, with the ease of availability of materials via electronic media and the disappearing borders within our "global village."

Mapping Out the Basics of Today's Copyright Laws

In academic, public, and special libraries, users routinely ask for access to materials that the library may not own. Hence, the commonplace concept of interlibrary loan (ILL), where one library that owns the material will loan it to another for a short period of time, so that the first library's user can have access to it without violating copyright laws by making copies. That is the simplest form of ILL. Very often, particularly in a special library situation, contracts with copyright clearinghouses will be employed to account for any copies made for which royalties may need to be paid according to copyright laws.

But that all has to do with paper copies. What about electronic media? How can we account for the possible copyright requirements of information found electronically?

One approach is to assume that any online database provider will be watching out for copyright issues in the materials it provides to its paid users. This approach seems to make sense at first glance, because the user pays a fee—usually a very high fee—to the database provider for access to the materials. The assumption is

that the database provider is paying the copyright owner to allow its materials to be accessed by its users, and in most cases, this is absolutely true.

The problem arises when the entity that claims copyright ownership of a particular work—either written, photographic, or in some other medium—is not in fact the true owner of the copyright. By this, we mean cases in which the author has signed over certain rights in relation to his work, but has not given authority for its electronic dissemination. Such was the case in two very notable decisions that have come down through the U.S. court system in the past few years.

U.S. Court Decisions

We find ourselves in a pivotal time. Instantaneous electronic access to information from sources around the globe is a new phenomenon to which our old laws will have to either be adjusted or be changed completely. The ease with which copyrighted materials can be obtained over the Internet, and then reproduced in electronic form a nearly infinite number of times, is something that many laws and legal decisions have never before taken into account. Perhaps the first, or at least most well-known, wake-up call was the *Napster* case, where owners of rights to sound recordings sued to protect their copyrighted recordings from being released free of charge over the Internet—and won. The *Napster* case is only one of many and subsequent cases that have increased the adaptation of old copyright laws to new forms of information dissemination.

On June 25, 2001, for example, the U.S. Supreme Court issued an opinion that was a major victory for freelance writers. The court ruled that reuse of freelance work in online databases and CD-ROMs without the author's express permission infringes the copyright. In this case a group of authors, led by Jonathan Tasini, president of the National Writers Union, sued The New York Times Co.; Newsday, Inc.; Time, Inc.; LexisNexis; and University Microfilms.

At issue was the fact that freelance writer Jonathan Tasini and others had signed contracts with these companies granting "first North American serial rights." Such rights allow the newspaper or magazine to publish a freelance story in print one time. The problem arose when these newspapers and magazines republished the freelance materials in online databases and CD-ROMs, without paying any further royalties to the freelance writers.

In a landmark decision, the U.S. Supreme Court upheld the rights of the freelance writers, disagreeing with the newspapers' claims that subsequently published electronic versions of the freelance stories were simply reproductions or digital replicas of the original publication, and were therefore within their previously negotiated rights. The writers' argument, which the Court preferred, was that electronic publication of their stories was not covered under their original contracts and was a new form of publication for which they should receive royalties.

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In a similar situation, the Court declined to hear the case of *National Geographic v. Greenberg*, in which the U.S. Court of Appeals for the 11th Circuit had ruled in favor of a photographer whose photographs were republished in CD-ROM format by *National Geographic*. Most observers see the decision to let the Court of Appeals decision stand as a further victory for freelance writers and photographers.

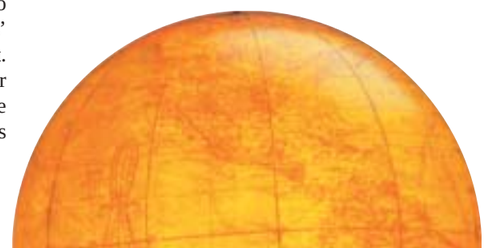
What This Means for Us

However, cases like these will not be as prevalent in the future, since most freelance contracts in the U.S. now contain clauses specifically addressing the issue of electronic publication and publishers' rights, where online databases, CD-ROMs, and other forms of electronic publishing come into play. Still, the effect of these two cases and others like them on many years' worth of research materials is greatly felt. Many fear that access to a large number of 20th century newspaper and magazine articles will be curtailed by these rulings and by the fact that many freelance writers and photographers may be difficult for publishers to track down in order to secure electronic publishing rights. For one thing, this would incur great cost for publishers on essentially obsolete material, both in royalty payments and in man-hours for employees who must coordinate the effort.

Many librarians fear that this could leave gaping holes in electronic databases, as freelance stories and photos will be pulled from the collections because publishers either cannot or will not track down and secure further copyright permissions from the original authors of the works. From the historical perspective, librarians, archivists, and researchers are justifiably worried that large segments of late 20th century newspaper and magazine articles may become unavailable except through traditional paper-based means. If the digital library is our future—and indeed, our present in many cases—then this could potentially be a very big problem as we cease to have the breadth of access we are used to in online searching.

The European Perspective

Copyright law itself is changing to account for advances in technology and the smaller world we live in as a result. Copyright law in Europe, for example, has almost always included two separate classes of rights: the economic right inherent in the publication of someone's work, and the moral right to the integrity of the work. For a long time, the U.S. did not recognize the so-called *droit morale*, or moral right, as



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extensively as did our European neighbors, but much of that is changing now as the distances between countries and continents seem to become ever smaller.

The term for which copyrights are effective has also been standardized to the life of the author plus 70 years. Both U.S. and the European Union recently adopted this change in order to standardize copyright protection across borders. It is important to note that each separate country in the European Union has had to adopt national laws that would conform to the standards set forth in the Berne Convention, which is an international treaty governing copyright and intellectual property. Some have done this already, some are in the process of doing so, and some countries have adopted laws that only partially conform. This is a long and arduous process, requiring lawmakers in each country to draft appropriate legislation, debate it, refine it, and adopt it according to each country's customs.

The move toward standardization of copyright protection has been a long-standing goal of those countries that signed the Berne Convention all the way back in 1886. This convention is a basic agreement on the international protection of literary and artistic works, which has been signed by more than 100 countries and is now being interpreted to apply to international publication in electronic formats. All members of the European Union are current signatories to the Berne Convention, as is the U.S.

Article 9 of the Berne Convention provides that member states can allow for copying of artistic and literary works only under certain conditions. Until recently, the steps outlined in this section applied only to traditional media, but they have been expanded to apply to electronic media as well. Article 9 (Section 2) allows for copying in "… certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

Currently, efforts are underway to adjust international and national copyright regulations to account specifically for electronic publications. This becomes increasingly important when you consider the ways in which normal library activities could possibly infringe on copyright. Simple activities such as copying by library users; copying for users; copying for internal use; copying of sound and images; public performance of videos, CDs, or DVDs; ILL; creating electronic collections; or electronic document delivery (which is becoming more and more popular) could all be possible avenues of copyright infringement in the strictest interpretation of this international law.

In 1994, the European Copyright User Platform (ECUP) was established to define which electronic library services should be considered exceptions to possible copyright infringement in the digital environment. This project was supported by the European Bureau of Library, Information and Documentation Associations (EBLIDA), which represents more than 95,000 libraries in Europe. You can find current information on European copyright developments at http://www.eblida.org/ecup, a Web site that is funded by the European Commission.

The World Intellectual Property Organization (WIPO) forged an agreement in December 1996 in Geneva, which complements the Berne Convention. It is the first agreement that specifically applies to electronic materials, and it has been signed by 160 members of the WIPO. The WIPO Copyright Treaty states that the reproduction right set out in Article 9 of the Berne Convention fully applies to digital formats, providing strong guidance for libraries and librarians who until that time had been uncertain how the Berne Convention might apply in the digital age.

It is also interesting to note that similar court cases, addressing the issues raised in *Tasini v. The New York Times* and *National Geographic v. Greenberg*, have appeared in European Union countries. Just one example is a case that was tried in the Netherlands, in which a Dutch court ordered Amsterdam's second-largest daily newspaper, *De Volkskrant*, to pay freelance writers who sued after their articles appeared in CD-ROM format and on the Internet. The newspaper tried to argue that the electronic publication was merely an extension of the print publication rights it had already negotiated with the writers. The Dutch court rejected this argument and found the paper guilty of copyright infringement. Also similar to the *Tasini* case, the three freelance writers involved in the lawsuit in the Netherlands were backed by the Netherlands Journalists Union, which was pleased by the result.

It's a Small World After All

It is indeed a wildly changing world we live in, where international boundaries and vast distances make little difference in the delivery of information. Within mere moments we can now send and receive vast quantities of data anywhere on the globe. Our laws have not always kept pace with the speed of our technology, but international efforts have been made, and are still underway, to bring laws up-to-date. In the meantime, courts all over the world are deciding cases and setting precedents that will help map out the future of copyright in the electronic age ever more clearly. As librarians we will need to watch carefully to see how this new era of information dissemination will ultimately be reconciled with the freedom of access to which we are accustomed.

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