



Current Comments

Is *Current Contents* a Periodical? The Landmark Case of *ISI v. US Postal Service*

Number 42

October 16, 1978

On May 14, 1971, I thought the earth stood still. That was the day the US Postal Service revoked *Current Contents*[®]' second-class mailings permit. But then on May 5, 1977, ISI[®] won a landmark case against the Postal Service heard before the US Court of Appeals for the Third Circuit.¹ The appellate court ruled that the Postal Service had wrongfully revoked ISI's second-class mailing privileges. The court's decision affected not only every subscriber to *Current Contents* but also the producers and users of all other information services that go through the US mails.

When the US Postal Service notified ISI that it was revoking second-class mailing privileges for *CC*[®], it was a heavy blow for us. In the US, second-class mail is much less expensive than first-class. For example, it presently costs less than a dime to mail a copy of *CC/Life Sciences* at second-class rates in the US. (This rate does not apply to foreign subscribers.) It would cost \$.80 to mail the same copy first-class—over \$40 per year at current postal rates. Had the Postal Service succeeded in revoking our second-class privileges, we would have had

to mail *CC* first-class in order to maintain all-important timely delivery. This would have meant a significant increase in subscription rates.

According to the *Postal Service Manual*, "Only newspapers and other periodical publications...may be mailed at the second-class rates" (p. 132.2).² Postal authorities in 1971 disqualified *CC* because, they asserted, it was not a periodical. This reasoning was based on a 1904 Supreme Court decision, *Houghton v. Payne*.³ In that case the Court decided that a series of reprints of famous works (analogous to today's book clubs) did not qualify as periodical literature. For the purposes of the case, the Supreme Court described "periodical" as follows:

A periodical, as ordinarily understood, is a publication appearing at stated intervals, each number of which contains a variety of original articles by different authors, devoted either to some branch of learning or to a special class of subjects. Ordinarily each number is incomplete in itself, and indicates a relation with prior or subsequent numbers of the same series.

The Postal Service interpreted the *Houghton* decision to require that a periodical contain "a variety of original articles." According to this reasoning, *CC* could not be a periodical and could not be entitled to second-class rates.

The Postal Service has used the "original articles" phrase many times in the past seven years in order to revoke or deny second-class privileges of information services on the grounds that they are not periodicals. Standard Rate and Data Service, American Chemical Society (ACS), American Bibliographic Center, H. W. Wilson Company, and McGraw-Hill, Inc. are among the publishers who have had second-class privileges revoked or denied during the 1970s.⁴ In some cases the services involved had been accepted as periodicals for over 50 years. In the case of *Current Contents*, we had enjoyed second-class classification for some editions for about 14 years.

These impingements on the effective dissemination of information came in the wake of the reorganization of the Postal Service into a semi-private, semi-governmental organization. In 1970, Congress enacted the change to encourage more cost-effective mail delivery.⁵ Among several approaches to reduce costs to the US Treasury, the Postal Service began reviewing many publications, and applied the presumed *Houghton* rule to them.

One might ask how, out of the thousands of periodicals published

in the US, the Postal Service was able to find out that *CC* existed. It was another publisher's difficulties with the Postal Service that led to ours. When the American Chemical Society applied for a second-class permit for one of its publications, *Single Article Announcement*, the application was denied. The Postal Service argued that this publication contains only contents pages of ACS journals, and no original articles. Hence, it is not a periodical. When ACS appealed this decision, it argued that if *Single Article Announcement* isn't a periodical, what about *Current Contents*? ACS lost its appeal and did not appeal again. The stakes were not high enough since ACS's primary journals were not threatened.

ISI was the first organization to seriously challenge the Postal Service's campaign to deny second-class privileges to information services. As soon as we were informed that we were being denied second-class mailing privileges, we contacted our legal counsel, Kimber Vought of the Washington office of Schnader, Harrison, Segal, and Lewis. Vought is also a member of ISI's Board of Directors. Our attorneys obtained immediate relief for us pending appeal. (In the interim we were permitted to mail *CC* third-class while still enjoying more rapid second-class service. Third-class is a more expensive rate than second-class, but less costly than first-class.)

We appealed the arbitrary action before the Postal Service's ad-

ministrative law judge. The administrative hearing is the first of two levels of appeal in the Postal Service. The administrative law judge upheld the Postal Service's decision on May 22, 1975. At the second level of appeal, the Postal Service's judicial officer did the same on October 2, 1975.

Throughout the proceedings, the Postal Service argued that *CC* is not a periodical because it does not contain "a variety of original articles."

ISI's attorneys (Vought, Irving R. Segal, and John E. McKeever) argued that the Postal Service was interpreting the *Houghton* case narrowly and improperly. They contended that "a variety of original articles" is not the only factor defining a periodical. They stressed that the Postal Service was ignoring another aspect of *Houghton*: that each issue of a periodical is incomplete in itself, that continuity or periodicity is also a characteristic of a periodical.

During the Postal Service administrative hearing, several *CC* subscribers testified on this point. They were Leonard Stoloff and Milton Stephenson of the Food and Drug Administration, Edward G. Feldmann of the American Pharmaceutical Association, and Charles Scanio, formerly of the Groton, Connecticut branch of the pharmaceutical company, Pfizer, Inc. and now with the New Haven, Connecticut branch of the Upjohn Company. Their testimony supported the contention that a single

issue of *Current Contents* is essentially useless—that only the continuous weekly availability of *Current Contents* makes it a valuable service. As we expected, this argument did not persuade the administrative law judge or the judicial officer at hearings within the Postal System itself.

In 1975 ISI took its case to the US District Court for the Eastern District of Pennsylvania. This court also upheld the Postal Service's decision. But in May 1977 the US Court of Appeals for the Third Circuit ruled that *Current Contents* was entitled to second-class privileges.¹

Circuit Judges Ruggero J. Aldisert and James Hunter III accepted ISI's position that the "original articles" requirement was just one factor to be considered in granting or revoking second-class privileges. It was not an "absolute litmus test." The court also ruled that to qualify for second-class privileges, "periodicity," or continuity, is the important factor. (Chief Judge Collins J. Seitz dissented from the majority opinion.)

This did not end our problems. Subsequently, the Postal Service tried to convince the US Department of Justice to take the case to the Supreme Court. But the Justice Department declined, and the deadline for appeal passed on June 4, 1977. So ISI's 6-year, \$35,000 legal battle was ended. However, the Court of Appeals' ruling governs, technically, only in the

states of Pennsylvania, New Jersey, and Delaware. It does not apply directly to publishers in other parts of the country. However, it has encouraged others to take the Postal Service to court themselves.

In *H. W. Wilson, v. US Postal Service*,⁶ decided July 7, 1978, the US Court of Appeals for the Second Circuit said the Postal Service was wrong in revoking the second-class privileges of eight Wilson information services, including *Readers' Guide to Periodical Literature*, *Social Sciences & Humanities Index*, and *Applied Science & Technology Index*. Citing the *ISI* decision, the court held that "the 'variety of original articles' standard is erroneous and unworkable, is not mandated by *Houghton*, and has not been consistently applied by the Postal Service."

In *Standard Rate and Data Service, Inc. v. US Postal Service*,⁷ decided July 14, 1978, the US Court of Appeals for the District of Columbia Circuit held that the Postal Service has not been consistent in applying the *Houghton* standard. This court also cited the *ISI* case.

It sent this case back to the Postal Service, to give it "an opportunity to develop, or at least articulate, a more consistent, and perhaps a more purposeful, policy with respect to entry into the second-class mails." At present, Standard Rate and Data Service is mailing its seven publications second-class. These publications, including *Business Publications Rates and Data* and *Newspaper Rates and Data*, keep advertising agencies in-

formed of print and broadcast advertising rates.

This year the Postal Service tried to revoke the second-class privileges of *Management Contents (MC)*, published by John D. Kuranz in Skokie, Illinois. A bi-weekly, *MC* is a periodical quite similar to *Current Contents*. It reproduces the contents pages of management and business journals. This May the Postal Service told Kuranz that *MC* was not a periodical under the principles of the *Houghton* case. Kuranz tells us that Management Contents, Inc. is a small publishing house, with a full-time staff of three. Thus, Kuranz says, he could not afford to sue. All he could do was complain to the Postal Service and Illinois' two senators. After consulting *ISI*, he argued that, as a result of the *ISI* decision, the Postal Service had no right to revoke his second-class privileges.

The Postal Service told Kuranz that it is deferring further action on its decision. Now Kuranz is mailing *MC* at the more expensive third-class rates, and will be reimbursed if the Postal Service decides in his favor.

Until now, publishers have had to defend themselves individually. But the Information Industry Association (IIA), among others, is trying to initiate organized action. A Postal Affairs Task Force, chaired by Peter Aborn, *ISI*'s vice president of administrative services, is now being formed. This group will establish cooperative efforts with the Magazine Publishers Association and others. It will also keep

IIA members informed of events affecting mail distribution of their publications. Right now the Task Force is trying to start discussion among concerned groups about what sort of action is needed. Also, it is attempting to keep groups up-to-date on recent developments.

As the matter stands today, the Postal Service may well take the advice of Circuit Judge Harold Leventhal in the *Standard Rate and Data Service* case and develop a more consistent policy on second-class mail. The danger is that the policy may not be in the public interest. But the 1970 postal law never intended that the Postal Service may arbitrarily exclude one type of periodical from second-class privileges. Rather than say that information services like *CC* are not periodicals, it would be easier for the Postal Service to argue that magazines like *The New Yorker* or *Reader's Digest* are not. A single issue of one of these could probably be used purposefully. But the continuity of secondary infor-

mation services is indeed critical to their use.

The decisions the courts have handed down so far have been favorable to the companies involved. But as the *Management Contents* incident shows, the Postal Service has not stopped trying to deprive information services of fast, inexpensive delivery. The final decision may have to come from the Supreme Court or an act of Congress. There is no guarantee that decision will be favorable. Thus, the outcome depends largely on how well, and how quickly, all those involved in the production and use of information services act. Included here are not only for-profit organizations in the IIA but also members of the National Federation of Abstracting and Indexing Services as well as other publishers not in either. At the very least, they should inform their representatives in Congress that information services should be entitled to the same treatment as other periodicals.

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