

97-9181

In the
United States Court of Appeals
For the Second Circuit

Docket No. 97-9181

JONATHAN TASINI, et al.,

Plaintiffs-Appellants,

v.

THE NEW YORK TIMES, INC., et al.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC., ET AL.
AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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RULE 26.1 STATEMENT

None of the amici curiae has parent companies, subsidiaries or affiliates that have issued shares to the public.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JONATHAN TASINI, MARY KAY BLAKELY, :
MARGOT MIFFLIN, BARBARA GARSON, :
DAVIS S. WHITFORD AND :
JAFFE ROBBINS, :

Plaintiffs - Appellants, :

v. : Docket No. 97-9181

THE NEW YORK TIMES COMPANY, INC., :
NEWSDAY, INC., THE TIME :
INCORPORATED MAGAZINE COMPANY, MEAD :
DATA CENTRAL CORP., UNIVERSITY :
MICROFILMS INTERNATIONAL, :

Defendants-Appellees. :
_____ :

**BRIEF OF AMICI CURIAE AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS,
INC. ET AL. IN SUPPORT OF PLAINTIFFS-APPELLANTS**

The American Society of Media Photographers, Inc., et al. respectfully submit this brief as amici curiae in support of the appeal filed by Jonathan Tasini, et al. (collectively the "Tasini plaintiffs") in this case. A complete listing of the twenty organizations comprising the amici curiae is set forth in Exhibit A to this brief.¹

¹Counsel for plaintiffs-appellants and defendants-appellees have consented to the filing of this amici curiae brief. Copies of their consent letters will be filed with the Clerk.

I. PRELIMINARY STATEMENT

Section 201(c) of the 1976 Copyright Act was enacted for the primary purpose of safeguarding the rights of authors in their contributions to collective works. That fundamental purpose has been eradicated by the decision of the District Court in this case. By adopting an overbroad and unprincipled interpretation of the narrow "privilege" accorded publishers to reproduce and distribute authors' contributions under Section 201(c), the District Court's decision turns Section 201(c) on its head by transforming it, in that decision's own words, into a "windfall" for publishers. For that "unintended" result, which would deprive thousands of freelance photographers, writers and artists (collectively "freelance authors") of much of the value of their copyrights, the District Court below would lay the blame on Congress' supposed failure to anticipate the creation of lucrative markets for "revisions" of collective works arising from "modern technology."

The twenty organizations of freelance authors supporting the appeal of the District Court's decision respectfully submit that the responsibility for the result below lies not with Congress' lack of foresight or technological advances, but rather with the District Court's faulty analysis. The various electronic databases and media in which the plaintiffs' articles were

reproduced and distributed are not "revisions" of the magazines and newspapers in which the authors' contributions were originally published. Rather, those electronic databases and media are new and very different collections - indeed anthologies -- of the collective works in which the contributions were first published.

The narrowly limited privilege accorded publishers under Section 201(c) authorizes the reproduction and distribution by them of authors' contributions in "revisions" of the particular collective works in which those contributions were first published. NEXIS, "The New York Times On Disc," and "General Periodicals On Disc" cannot reasonably be viewed as mere "revisions" of daily editions of The New York Times or Newsday, or of weekly editions of Sports Illustrated. Instead, they combine the contents of thousands of daily and weekly editions of those publications into massive databases and digital repositories. A bookshelf is not a "revision" of a book just because it holds one. Neither the language nor the legislative history of Section 201(c) compels or permits a statutory interpretation equating these combinations of multiple collective works with the "revisions" of particular collective works authorized by the Section 201(c) privilege.

If the decision below is upheld, the value of freelance authors' copyrights in their contributions to many thousands of collective works published after January 1, 1978, will be severely impaired and in many cases effectively destroyed. It is doubtful, for example, whether famous photographs first published in Sports Illustrated will command the same, or indeed any, license fee if they are widely available to the public through electronic media. Once the valuable works of freelance authors enter the world of electronic commerce without their consent and without any payment to them, the licensing value of those works is irretrievably lost.

It would be a supreme irony if an obscure provision of the Copyright Act were interpreted to allow such a disastrous result when the principal purpose of that provision was to protect the rights of authors in their contributions to collective works. While the District Court was persuaded to adopt such a perverse interpretation, this Court should decline to do so and instead should hold that Section 201(c) does not insulate the publishers and their licensees from liability for copyright infringement.

II. INTEREST OF AMICI CURIAE

The amici curiae organizations supporting the appeal of the Tasini plaintiffs represent the interests of a substantial

proportion of freelance creators in the United States. In particular, the membership of the amici organizations include thousands of freelance photographers, writers, graphic artists, fine artists and cartoonists (collectively "freelance authors") who collectively produce an enormous range of creative material for publications distributed throughout the world, and for other clients outside of the publication arena.

The vast majority of the freelance authors represented by amici retain the copyrights to their creative works. They do so because preserving and if possible exploiting the economic value of those copyrights are essential to the economic survival of those freelance authors. Whether their works are created on assignment for a client (e.g., shooting photographs in Bosnia for a national news magazine) or on their own initiative, the freelance authors represented by amici rely heavily on their copyrights for their livelihoods, and in many cases for their retirements. In fact, it is precisely the creative talents of freelance authors such as those represented by amici that the copyright laws are intended to nurture and sustain.

These freelance authors have two principal interests in this appeal. The first interest is one that they share with all those who have an economic stake, however it may be defined, in an information age now in the midst of a digital revolution. That

interest is, in short, new markets for the reuse of published material, and thus new potential sources of income.

The rapid pace of technological change in communications has opened up new and potentially lucrative markets for what is colloquially called "content." Quite apart from the developing forms of "new media" such as CD-ROMS, the economic success of such products still ultimately depends on the quality of the "content." Accordingly, publishers and others are willing to pay substantial sums to those who own and control the best of the creative content for the right to reproduce and distribute it in new products and services.

The second interest of freelance authors in this appeal arises from the potentially devastating impact of the decision below if allowed to stand. Quite simply, that decision grants publishers the right to reuse valuable copyrighted works created and owned by freelance authors without paying for that right. Publishers are therefore free under the District Court's decision to dump thousands of creative works owned by freelance authors into databases and various digital media such as CD-ROMS, distribute and sell access to such works throughout the world, and reap all of the profits resulting therefrom.

Freelance authors get nothing in return. Not only do publishers have the right under the District Court's decision to

exploit the new markets for their own exclusive benefit, they will eviscerate whatever residual market that may be left for the freelance authors to explore. Once articles and pictures are instantaneously and widely available worldwide at the press of a computer key through databases and the like, it is doubtful that anyone would be willing to pay freelance authors a fair price, or often any price, for the right to reuse that material in other contexts.

For freelance authors, therefore, the stakes in this appeal are high indeed. Millions of copyrighted works owned by freelance authors and first published in a wide range of collective works will be affected, one way or another, by the outcome of this appeal. If it is lost, these millions of creative works can and no doubt will be incorporated into digital media by publishers without paying any compensation to the persons responsible for creating those works. And if the appeal is successful, freelance authors will have to be paid a fair price for that right. It is that opportunity to command a fair price that undergirds the freelance authors' involvement in this appeal.

III. ELECTRONIC DATABASES AND CD-ROMS COMPRISED OF THOUSANDS OF CONTRIBUTIONS TO MULTIPLE COLLECTIVE WORKS ARE NOT "REVISIONS" OF THE ORIGINAL COLLECTIVE WORKS

Section 201(c) establishes the basic principle that copyright in an author's contribution to a collective work is "distinct from" the copyright in the collective work of which the contribution is a part. 17 U.S.C. § 201(c). The author's copyright in his or her contribution, which could be a photograph, article, illustration, painting, drawing or other work of art, extends to any and all protectable aspects of that contribution (subject, of course, to the publisher's "privilege" under Section 201(c)). By definition, an author's contribution to a collective work must be a "separate and independent" work in and of itself. 17 U.S.C. § 101 (definition of "collective work").

A publisher's copyright "in the collective work as a whole" (17 U.S.C. § 201(c)), by contrast, covers only the copyrightable contribution of the publisher to that particular collective work. See 17 U.S.C. § 103(b) ("The copyright in a compilation or derivative work extends only to the material contributed by the author of such work . . . and does not imply any exclusive right in the preexisting material."). Collective works, of course, are but one type of "compilation" under the Copyright Act of 1976, 17 U.S.C. §§ 101 et seq. (hereinafter "1976 Act"). 17 U.S.C. § 101

(definition of "compilation" to include collective works). The protectable elements of a compilation generally, or of a collective work in particular, consist of the selection, coordination or arrangement of the authors' contributions such that "the resulting work as a whole constitutes an original work of authorship." Id. See Feist Publications, Inc. v. Rural Telephone Serv., Co., 499 U.S. 340, 359 (1991); CCC Info. Serv., Inc. v. Maclean Hunter Mkr. Reports, Inc., 44 F.3d 61, 65-66 (2d Cir. 1994), cert. denied, 116 S. Ct. 72 (1995).

Consistent with Section 201(a) of the 1976 Act, which establishes that copyright "vests initially in the author or authors of the work," Section 201(c) similarly provides that copyright in each separate contribution to a collective work "vests initially in the author of the contribution." Thus, the author of that contribution owns the entire copyright in it, and enjoys the benefit of each of the exclusive rights enumerated in Section 106. 17 U.S.C. § 106(1)-(6).²

² Throughout this brief, the term "author" is used in the Constitutional sense to apply to anyone "to whom anything owes its origin; originator; maker" Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884). Thus an "author" can be a photographer, writer, illustrator, graphic artist, cartoonist or other artist, and is all-inclusive with respect to the freelancer authors whose interests are represented by amici in this brief.

If Section 201(c) consisted only of its first sentence as discussed above, the determination of a publisher's rights to a contribution to a collective work would depend entirely on the scope of rights expressly or impliedly granted to the publisher by the author of the contribution. For most of this century, and indeed until the District Court's decision in this case, freelance authors, in the absence of any written agreement (which rarely existed), generally were deemed to have granted the publisher one-time publication rights to reproduce and distribute the contribution in the publisher's collective work. See Playboy Enterprises, Inc. v. Dumas, 53 F.3d 549, 557 (2d Cir.), cert. denied, 116 S. Ct. 567 (1995) (noting industry custom of conveying one-time reproduction rights, but finding that stipulated facts undercut reliance on such industry custom).

Section 201(c), however, includes a second sentence, and it is that sentence that gives rise to the fundamental issue of statutory construction presented by this appeal. The second sentence of Section 201(c) addresses the respective rights of an author and publisher in a contribution where there is no "express transfer" of any copyright rights in the contribution.³ 17

³ Since a "transfer" under the 1976 Act must be in writing (17 U.S.C. § 204(a)) unless it arises by operation of law, presumably an "express (footnote continued on next page)

U.S.C. § 201(c) ("In the absence of an express transfer of the copyright or of any rights under it. . ."). Under those circumstances, the statute creates a presumption of a limited "privilege" granted to the publisher:

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.

17 U.S.C. § 201(c) (emphasis added).⁴

(footnote continued from previous page)

transfer" of copyright rights sufficient to overcome the Section 201(c) "privilege" must also be in writing. The "express transfer" is not limited to a conveyance of copyright ownership, but extends to the transfer of "any rights" under the copyright, 17 U.S.C. § 201(c). Cf. 17 U.S.C. § 101 (definition of "transfer of copyright ownership" to include exclusive, but not nonexclusive, licenses).

⁴ It is significant that the language of the statute confers a "privilege" only upon the owner of the copyright in the collective work in which the contribution is first published. The specific grant of a statutory privilege upon the collective work copyright owner (i.e., publisher) strongly suggests that any other party acquiring rights to the collective work (but not to the contributions to it) through the publisher, such as a licensee, was not intended to be the beneficiary of the privilege.

While Section 201(c) does not authorize the transfer of the "privilege" from publishers to others, the statute does expressly authorize the transfer of ownership of "[a]ny of the exclusive rights comprised in a copyright" 17 U.S.C. § 201(d)(2) (emphasis added). Furthermore, unlike a statutory transfer of an "exclusive right," which vests the transferee with "all of the protections and (footnote continued on next page)

In this case, the Tasini plaintiffs do not dispute that the publishers were entitled to reproduce articles in daily editions of The New York Times and Newsday, or in weekly editions of Sports Illustrated. Clearly such a right to publish the articles "as part of that particular collective work" (meaning the daily editions of the referenced newspapers, and the weekly editions of the referenced magazine) had been granted by them.⁵

Nor is there any dispute over whether the publishers reproduced the Tasini plaintiffs' articles in "any later collective work in the same series." The publishers do not and

(footnote continued from previous page)

remedies accorded the copyright owner . . .," id., no such protection and remedies are accorded a putative transferee of the Section 201(c) privilege. Again the absence of such statutory authority strongly suggests that Congress did not mean to permit a "transfer" of the Section 201(c) privilege, as purportedly occurred in this case. Thus, regardless of whether the actions at issue in this case would have been covered by the Section 201(c) privilege if performed by the publishers, the fact that those acts of reproduction and distribution were performed by their licensees renders them infringers because of that fact alone. Any party that reproduces an author's contribution to a collective work without permission of the author and without statutory authorization is an infringer. 17 U.S.C. § 501(a).

⁵The privilege of reproducing and distributing a contribution as part of "that particular collective work" would apply to microfilming of the subject collective works by the publishers. The microfilming of a particular daily edition of The New York Times, for example, would involve only reproducing "that particular collective work," and thus would not give rise to any need for recourse to other prongs of the Section 201(c) privilege (i.e., "any revision of that collective work").

cannot claim that NEXIS and the CD-ROMs in question were "later collective works in the same series."

Instead the issue is whether the reproduction and distribution of the Tasini plaintiffs' articles in NEXIS, The New York Times and Newsday, which was not authorized by them, fell within the statutory privilege of reproducing and distributing "any revision of that collective work." This question can and should be resolved by proper application of the language and structure of Section 201(c), which was twisted beyond recognition by the District Court. The second prong of Section 201(c) applies by its terms only to revisions of "that collective work" in which the contribution was originally published. As is plain from reading the second prong in conjunction with the first, the statutory reference to "that collective work" must be read to refer to that "particular collective work" in which the contribution was originally published.

In short, the second prong of Section 201(c) grants publishers a privilege of reproducing and distributing contributions in revisions of the original collective work. There is no statutory privilege authorizing publishers to reproduce and distribute authors' contributions in any work different from the original collective work in which the contributions were published.

The District Court wholly overlooked the dispositive significance of this language of the statute, and instead engaged in a largely irrelevant search for an analytical framework for deciding the narrow question of statutory interpretation presented in this case. That inquiry was unnecessary and strayed from the guidance offered by the statute. By its terms, the Section 201(c) privilege is simply inapplicable to any putative "revision" unless it is of the original collective work in which the contributions at issue were published.

NEXIS, General Periodicals On Disc and The New York Times On Disc are not "revisions" of the original editions of daily editions of The New York Times or of weekly editions of Sports Illustrated. They are, rather, different works as to which the Section 201(c) privilege is wholly inapplicable. In fact, these databases and CD-ROMS are more properly characterized as collections of collective works -- in fact, anthologies of such works -- that combine contributions to thousands of individual collective works into a single source. This conclusion follows from examination of the key factual differences between the original collective works here at issue (e.g., daily editions of The New York Times) and the databases and CD-ROMS in which the Tasini plaintiffs' articles were reproduced and distributed without their authorization.

First, NEXIS and General Periodicals On Disc contain countless articles, and in the case of General Periodicals On Disc countless images, not found in any single edition of The New York Times, Newsday or Sports Illustrated. The various NEXIS libraries, for example, include articles from hundreds of other publications, and combine them into one large database. Regardless of whether one views that database as a collective work in and of itself, it plainly is not a mere "revision" of individual editions of the original collective works in which the contributions were published - daily editions of The New York Times and weekly editions of Sports Illustrated. NEXIS is, rather, an entirely different work in both content and character, in which a third party (Mead Data Central) combines the content of publishers' periodicals (without images and other material) here at issue with the contents of thousands of other collective works, and more specifically with hundreds of thousands (if not more) of individual contributions to those other collective works. The result is as different from the original as bouillabaisse is different from a clam.

Second, NEXIS is a different work from the particular collective works in which the Tasini plaintiffs' articles were published because NEXIS, unlike General Periodicals On Disc, does not include photographs that accompanied the original collective

works (e.g., a particular issue of Sports Illustrated magazine).⁶ It cannot be reasonably maintained that articles from Sports Illustrated magazine found in the NEXIS database with hundreds of thousands of other articles from other periodicals represents a mere "revision" of the individual issues of that magazine as originally published. Furthermore, the combination of the Sports Illustrated articles with contributions from many other collective works, together with the excision of photographs from the editions of Sports Illustrated as originally published, fundamentally altered the character of the resulting "work." The extent of the change is obvious from merely considering the title of the publication. It would take a master of Orwellian double-

⁶NEXIS also excludes other material published in the original collective work, typically advertisements, letters to the editor, classifieds and even short news items. Not surprisingly, therefore, the agreements between publishers and database aggregators often provide a license to incorporate the contents of the collective works into the database "in whole or in part."

The complexities and nuances of databases and other forms of electronic media make this a particularly inappropriate case for disposition by cross-motions for summary judgment. In the view of amici, this Court need not engage those complexities and nuances if it concludes, as urged by amici, that the works in question are not revisions of the "particular collective works" in which the Tasini plaintiffs' articles were originally published. But if the Court rejects that view, it should remand the case for further development of the factual record concerning the characteristics and technical features of databases and CD-ROMS, and in particular concerning the differences between the original collective works and those electronic media.

think to view unillustrated Sports Illustrated as a mere "revision" of Sports Illustrated.

Third, The New York Times On Disc, while comprised entirely of articles originally published in daily editions of The New York Times, is nonetheless a different work from those particular collective works because On Disc contains hundreds of articles drawn from multiple daily editions of that newspaper. Thus, the New York Times On Disc is fundamentally different in nature and character from the daily editions of The New York Times in which the Tasini plaintiffs' articles were first published. The late edition of the January 26, 1998 issue of The New York Times may be a "revision" of the early edition of that issue, but a CD-ROM containing hundreds or thousands of different days' editions of The New York Times is not.

In sum, the language and structure of Section 201(c) establish that the works here in question are not "revisions" of the particular collective works in which the Tasini plaintiffs' contributions were originally published. Accordingly, Section 201(c) does not insulate the publishers from liability for copyright infringement.

IV. THE LEGISLATIVE HISTORY OF SECTION 201(C) SHOWS THAT IT WAS ENACTED TO SAFEGUARD THE RIGHTS OF AUTHORS IN THEIR CONTRIBUTIONS TO COLLECTIVE WORKS, AND THAT THE PRIVILEGE ACCORDED PUBLISHERS UNDER THAT PROVISION IS TO BE NARROWLY CONSTRUED

Congress did not define the term "revisions" in Section 201(c). But the legislative history of Section 201(c), like that of many other provisions of the copyright law, provides a somewhat cryptic but nevertheless instructive insight into the congressional purpose underlying that provision of the statute. That perspective confirms that Congress viewed Section 201(c) as a vehicle for clarifying and enhancing the rights of authors in contributions to collective works - not for undermining them, as the District Court's interpretation of Section 201(c) would allow.

The starting point for analyzing the legislative history of this provision is the 1909 Copyright Act (hereinafter the "1909 Act"). The 1909 Act did not expressly distinguish between the copyright in a "composite work" (the term therein used to refer to what is now a "collective work" under the 1976 Act) on the one hand, and the copyright in a contribution to such a work on the other. See Shapiro, Bernstein & Co. v. Bryan, 123 F.2d 697, 699 (2d Cir. 1941) (defining a "composite work" as a work "to which a number of authors have contributed distinguishable parts which they have not, however, 'separately registered.'"). Instead, the

1909 Act spoke in terms of a single copyright owned by a single proprietor. See, e.g., 17 U.S.C. §§ 1, 3, 10 (1909 Act).

As a result, copyrights under the 1909 Act were generally viewed as "indivisible" - that is, the rights conferred by copyright could not be transferred or assigned except in toto. As one of the early Copyright Office studies leading to the enactment of the 1976 Act observed, the indivisibility doctrine hampered the ability of authors to transfer certain valuable rights while retaining others, and thereby effectively exploit their copyrights:

The present difficulty arises from the fact that a theory enunciated during the period of a limited number of rights and uses of copyrighted material has been applied to the great proliferation of rights and uses which have developed since the turn of the century But trouble arises because the transferee of less than all the rights may be regarded as a mere licensee and cannot sue to enforce his rights without joining the owner of the residual rights. If the law forces the author to transfer all his rights to the same person at one time, his bargaining power is crippled, since these rights are used by different industries. On the other hand, where the author reserves certain rights and remains the holder of the legal title, he may be in a position to hamper his own transferee

Comm. On Judiciary, 86th Cong. 2d Sess., Copyright Law Revision Study 11, Divisibility of Copyrights, at 1 (Comm. Print 1960).

While some courts applying the 1909 Act managed to circumvent the harsh results that strict application of the indivisibility doctrine would produce,⁷ the District Court in this case correctly noted that the doctrine put individual authors "at risk of inadvertently surrendering all rights in a contribution to a collective work either to a publisher of that work, or to the public." Tasini v. New York Times, 972 F. Supp. 804, 815 (S.D.N.Y. 1997).⁸ In enacting Section 201(c), Congress sought to eliminate this risk and sweep away its crippling effect on the ability of authors to benefit from the exercise of their copyright rights.

This legislative effort to protect authors contributing to collective works from the adverse effects of the indivisibility doctrine began with the Register's Report on the General Revision of the U.S. Copyright Law in 1961 (hereinafter "Register's Report"). In that Report, which laid the foundation for what became Section 201(c), the Register recognized that authors and

⁷ See, e.g., Goodis v. Limited Artists Television, Inc., 425 F.2d 397 (2d Cir. 1970) (holding the indivisibility doctrine inapplicable to author's claim of copyright in his contribution to magazine).

⁸ Nimmer posited the question under the 1909 Act as whether an author's copyright to a contribution to a collective work was, in effect, "transferred" when a publisher created and distributed the collective work. 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 5.02, at 5-10 (1997 ed.) (hereinafter "Nimmer").

publishers often did not expressly agree as to the allocation of rights in a contribution to a collective work. Register's Report at 87. To address this situation, the Register made the following recommendation:

In the case of a periodical, encyclopedia or other composite works containing the contributions of a number of authors, the publisher should have the right to secure copyright. The copyright secured by the publisher in the composite work as a whole should cover all of the contributions not separately copyrighted; but the publisher should be deemed to hold in trust for the author all rights in the author's contribution, except the right to publish it in a similar composite work and any other rights expressly assigned.

Register's Report at 88.⁹

The Register's 1961 recommendations, which first took legislative form in a widely circulated preliminary draft

⁹ This reference to a "similar composite work" in the Register's report sparked opposition from authors' representatives, and was not later incorporated into the 1964 revision bills. See S. 3008, 88th Cong., § 14(c) (1964); H.R. 11947, 88th Cong., § 14(c) (1964). On behalf of ASMP (then known as the American Society of Magazine Photographers) and other organizations, Harriet Pilpel objected that allowing a publisher to reproduce an author's contribution in a "similar composite work" would be "less favorable than the present law." Copyright Law Revision Part 2, Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, Feb. 1963, p. 151. Ms. Pilpel noted that under then-current law, the scope of the publisher's rights depended upon the intent of the parties, and that an author was free to argue that "all he gave to the publisher was the right to include his contribution in that particular composite work." Id.

revision bill, were extensively debated.¹⁰ Section 14(d) of the Register's draft bill provided that:

The owner of copyright in the collective work shall, in the absence of an express transfer of copyright or exclusive rights under it, be presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work.

Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft, 88th Cong. 2d Sess. 15 (Comm. Print 1960). This represented a departure from the Register's Report, which would have extended the privilege to "similar composite works." Register's Report at 88.

In commenting on the reference to "that particular collective work" in Section 14 of the draft bill, the representative of the American Textbook Publishers Institute, Bella L. Linden, questioned whether a subsequent volume containing "only half of the material in 'that particular collective work'" would be excluded from the publisher's

¹⁰ As former Register of Copyrights Barbara Ringer later testified, the draft bill was prepared entirely by the Copyright Office without input from private interests. Copyright Law Revision Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice on H.R. 2223, Before House Judiciary Committee, 94th Cong., 102-103 (1976). The preliminary draft bill was, as Ms. Ringer explained, intended to be "a focal point for further comments and suggestions." Id. at 102.

privilege. Copyright Law Revision Part 4, House Committee Report, Further Discussions and Comments on Preliminary Draft for Revised Copyright Law, 88th Cong., 2d Sess. 261 (1964).

Publishers' concerns such as this led to the modification of the proposed section 14(c) privilege to include "revisions" of collective works in the revised draft bill subsequently introduced in Congress.

The Register's proposed draft legislation was first introduced in modified form in 1964 in both the House and Senate. See S. 3008, 88th Cong., § 14(c) (1964); H.R. 11947, 88th Cong., § 14(c) (1964). Section 14(c) was identical in both bills, and read as follows:

(c) CONTRIBUTIONS TO COLLECTIVE WORKS. - 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 any rights under it, the owner of 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 and any revisions of it.

Id. (emphasis added).

This language was, in substance, identical to the pertinent parts of the provision enacted over 10 years later as Section 201(c). It is, therefore, yet another example of the peculiar

legislative history of many provisions of the 1976 Act (such as the definition of "work made for hire") that were put into place in the 1960's and that remained relatively intact until final passage of the legislation ten years later. See Jessica D. Litman, *Copyright, Compromise and Legislative History*, 72 Cornell L. Rev. 857, 861 (1987) (arguing that "it would be a mistake to conclude that simply because the statutory language and legislative history are difficult to interpret, they convey nothing about what the 1976 Act was intended to accomplish.").

Notwithstanding the addition of "revisions" to the publisher's privilege with respect to the "particular" collective work in which an author's contribution was published, that privilege was universally viewed as limited in scope and subservient to the principal purpose of the provision - namely, to safeguard the author's rights in a contribution to a collective work. Publishers' representatives themselves acknowledged the limited nature of the "privilege" accorded their clients under Section 14(c) of the 1964 revision bills. Mr. Wasserstrom, representing the Magazine Publishers Association, characterized Section 14(c) as deviating from current law by presumptively granting "very limited rights" to the publisher of a collective work. 1964 Revision Bill with Discussion and Comments, House Committee Print, 89th Cong., 1st Sess. (1965), p.

149. This observation by a prominent publishers' representative was characteristic of the common perspective of all those involved in drafting and debating what became Section 201(c): it was primarily intended to relieve the hardship authors faced as a result of the indivisibility doctrine, and the publishers' "privilege" was accordingly limited in scope.

That the centerpiece of this provision was the clarification of the law with respect to an author's rights in a contribution to a collective work was further demonstrated in the Register's Supplementary Report on the General Revision of the U.S. Copyright Law (1965), House Committee Print, 89th Cong., 1st Sess. (May 1965) (hereinafter "Supp. Report"). In that Report, which accompanied the 1965 versions of the legislation first introduced in 1964 (H.R. 4347 and S. 1006, introduced on February 4, 1965), the Register noted Section 201(c)'s preeminent purpose of safeguarding authors' rights in contributions to collective works. In so doing, the Register acknowledged that granting publishers a limited "privilege" of reproducing the author's contribution was clearly a subsidiary purpose of the legislation and applied only in certain limited circumstances:

Contributions to collective works.

Section 201(c) makes clear that each separate contribution to a collective work (such as a periodical issue or encyclopedia) is to be regarded as a separate work in which

copyright ownership "vests initially in the author." The subsection also establishes a presumption, in the absence of an express transfer, that the author remains the copyright owner in his contribution, and that the publisher acquires only certain publishing rights.

Supp. Report at XVII ("Ownership and Transfer of Copyright")
(emphasis added).

The 1965 legislation, like Section 201(c) as enacted, conferred a "privilege" upon publishers to reproduce and distribute the author's contribution in three and only three contexts: (i) where the contribution was published in the "particular collective work" to which it was contributed; (ii) where the contribution was included in a "revision" of that particular collective work; and (iii) where the contribution was included in a "later collective work in the same series." S. 1006, 89th Cong., § 201(c) (1965); H.R. 4347, 89th Cong., § 201(c) (1965). This language remained unchanged until it was incorporated as Section 201(c) into the 1976 Act.

The Register's Supplementary Report set forth examples of the kinds of activities that would be encompassed by the new Section 201(c) privilege:

Under this presumption, for example, an encyclopedia publisher would be entitled to reprint an article in a revised edition of his encyclopedia, and a magazine publisher would be entitled to reprint a story in a

later issue of the same periodical. However, the privileges [sic] under the presumption are not intended to permit revisions in the contribution itself or to allow inclusion of the contribution in anthologies or other entirely different collective works.

Supp. Rep. at 69 (emphasis added).

The limited nature of the "privilege" granted publishers under Section 201(c) was again emphasized in the House Report accompanying the 1976 Act.¹¹ In that Report, generally viewed as the single most useful source of legislative intent underlying the 1976 Act because it brought together many years of negotiated compromises, Section 201(c) was characterized as granting the presumptive privilege of "republishing the contribution under certain limited circumstances" H.R. Rep. No. 94-1476, at 122 (1976) (hereinafter "House Rep.") (emphasis added).

Representative examples of these "limited circumstances" were described as follows:

Under the language of this clause a publishing company could reprint a contribution from one issue in a later issue of its magazine, and could reprint an article from a 1980 edition of an encyclopedia in a 1990 revision of it; the publisher could not revise the contribution itself or include it

¹¹ In many respects, the language in the House Report on this point tracked the language in an earlier draft Senate Report accompanying S. 1361 in 1974. See Copyright Law Revision, Committee Print, Draft Report of the Senate Judiciary Committee, on S. 1361, 50 (1974).

in a new anthology or an entirely different magazine or other collective work.

Id. at 122-23 (emphasis added). Properly viewed, the databases and CD-ROMS here at issue are precisely the sort of "new antholog[ies]" or "entirely different" works that Congress intended to be outside the scope of the Section 201(c) privilege.

In sum, the legislative history of Section 201(c) reveals several useful guideposts for discerning the meaning and scope of the privilege established by that provision:

- The principal purpose of Section 201(c) was to protect the rights of authors in contributions to collective works.
- The privilege accorded publishers under Section 201(c) was secondary to its principal purpose of protecting authors.
- The Section 201(c) privilege was intended to be limited in scope and was not intended to impede authors from realizing the benefits associated with their ownership in the copyrights to their contributions.
- In determining whether a contribution is reproduced in a "revision" of a collective work or in a different collective work, any ambiguity should be

resolved in favor of authors in light of Section 201(c)'s overriding purpose of protecting the rights of authors in their contributions.

V. **THE DECISION BELOW WOULD RADICALLY ALTER THE DELICATE BALANCE IN THE 1976 ACT BETWEEN THE RIGHTS OF FREELANCE AUTHORS AND THOSE OF PUBLISHERS TO THE DETRIMENT OF AUTHORS**

The principal purpose of the copyright law is "to promote the advance of knowledge by granting authors exclusive rights to their writings." CCC Info. Serv., Inc., 44 F.3d at 68. Under the Constitutional scheme, the granting of exclusive rights to authors was a means to the larger end of encouraging them to create works that would advance the knowledge and learning of the public. U.S. Const. Art. I, § 8, Cl. 8 ("Congress shall have the Power . . . To Promote the Progress of Science . . . by securing for Limited Times to Authors . . . the exclusive Right to their . . . Writings").


That Constitutional purpose is not furthered, but rather is frustrated, by the decision below. The widespread and uncompensated distribution of the works of freelance authors in electronic databases such as NEXIS will discourage them from plying their craft because they simply will find it harder to make a living in doing so. The vast majority of freelance authors represented by amici struggle to survive in a publishing

world increasingly dominated by fewer and fewer, and larger and ever more powerful, corporate entities. The new markets just now opening up for exploitation of creative works, such as the reuse of previously published material in multimedia, computer-driven products like CD-ROMS, present promising opportunities for freelance authors to generate additional income from their works, and thereby survive in the digital world.

That will not be possible if publishers themselves exploit all of the value of freelance authors' works in these new markets under the guise of Section 201(c). Congress never intended Section 201(c) to bestow such a windfall upon publishers. Yet precisely such a windfall, at the expense of freelance authors and ultimately to the public, will inevitably occur if the decision below is not reversed.

Respectfully submitted,

Dated: February 3, 1998



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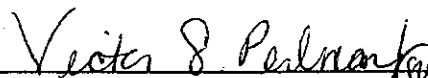
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of February, 1998, I caused to be served by Federal Express, a copy of the foregoing Brief of Amici Curiae American Society of Media Photographers, Inc., et al. in Support of Plaintiffs-Appellants on:

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EXHIBIT A

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Advertising Photographers of America
American Institute of Graphic Arts
American Society of Journalists and Authors
American Society of Picture Professionals
The Authors Guild, Inc.
Garden Writers Association of America
Graphic Artists Guild
Independent Writers of Southern California
North American Nature Photography Association
The Outdoor Writers Association of America
PEN Center USA West
Picture Agency Council of America
Professional Photographers of America
Science Fiction and Fantasy Writers of America, Inc.
Freelance Council of the Society of American Travel Writers
Volunteer Lawyers for the Arts
Washington Independent Writers
Writers Guild of America, East, Inc.
Writers Guild of America, West, Inc.