

---

---

**United States Court of Appeals**  
*for the*  
**Eleventh Circuit**

---

Case No. 05-16964-JJ

JERRY GREENBERG,

*Plaintiff-Appellee,*

IDAZ GREENBERG,

*Plaintiff,*

— v. —

NATIONAL GEOGRAPHIC SOCIETY, A DISTRICT OF COLUMBIA  
CORPORATION, NATIONAL GEOGRAPHIC ENTERPRISES, INC., A  
CORPORATION, and MINDSCAPE, INC., A CALIFORNIA CORPORATION,

*Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA

---

***EN BANC BRIEF OF AMICI CURIAE MAGAZINE PUBLISHERS  
OF AMERICA, NEWSPAPER ASSOCIATION OF AMERICA,  
ADVANCE PUBLICATIONS, INC., ASSOCIATION OF AMERICAN  
UNIVERSITY PRESSES, FORBES LLC, GANNETT CO., INC.,  
HACHETTE FILIPACCHI MEDIA U.S., INC., THE HEARST  
CORPORATION, MARTHA STEWART LIVING OMNIMEDIA,  
INC., THE MCGRAW-HILL COMPANIES, INC., NEWSWEEK,  
INC., THE NEW YORK TIMES COMPANY, PLAYBOY  
ENTERPRISES, INC., TIME INC., TRIBUNE COMPANY,  
WENNER MEDIA LLC and the WP COMPANY LLC d/b/a THE  
WASHINGTON POST, IN SUPPORT OF APPELLANTS***

---

VICTOR A. KOVNER, ESQ.  
EDWARD J. DAVIS, ESQ.  
ELISA L. MILLER, ESQ.  
DAVIS WRIGHT TREMAINE LLP  
1633 Broadway, 27<sup>th</sup> Floor  
New York, New York 10019  
(212) 489-8230

*Attorneys for Amici Curiae*

*(Counsel for Individual Amici Curiae are Listed on Inside Cover)*

---

---

---

JERRY S. BIRENZ, ESQ.  
SABIN, BERMANT & GOULD LLP  
For *Amicus*  
ADVANCE PUBLICATIONS, INC.  
Four Times Square, 23<sup>rd</sup> Floor  
New York, New York 10036

LINDA STEINMAN, ESQ.  
DAVIS WRIGHT TREMAINE LLP  
For *Amicus*  
ASSOCIATION OF AMERICAN  
UNIVERSITY PRESSES  
71 West 23<sup>rd</sup> Street, Suite 901  
New York, New York 10010

TERRENCE O'CONNOR, ESQ.  
KAI FALKENBERG, ESQ.  
FORBES LLC  
60 Fifth Avenue  
New York, New York 10011

BARBARA WALL, ESQ.  
GANNETT CO., INC.  
7950 Jones Branch Drive  
McLean, Virginia 22107

CATHERINE FLICKINGER, ESQ.  
HACHETTE FILIPACCHI MEDIA U.S., INC.  
1633 Broadway  
New York, New York 10019

EVE BURTON, ESQ.  
JONATHAN DONNELLAN, ESQ.  
DEBRA WEAVER, ESQ.  
THE HEARST CORPORATION  
300 West 57<sup>th</sup> Street  
New York, New York 10019

CHRISTOPHER NOLAN, ESQ.  
MAGAZINE PUBLISHERS OF AMERICA  
810 Seventh Avenue, 24<sup>th</sup> Floor  
New York, New York 10019

MARGO DRUCKER, ESQ.  
MARTHA STEWART LIVING OMNIMEDIA, INC.  
11 West 42<sup>nd</sup> Street  
New York, New York 10036

KENNETH M. VITTOR, ESQ.  
PIERRE DAVIS, ESQ.  
THE MCGRAW-HILL COMPANIES, INC.  
1221 Avenue of the Americas  
New York, New York 10020

RENE P. MILAM, ESQ.  
NEWSPAPER ASSOCIATION OF AMERICA  
4401 Wilson Boulevard, Suite 900  
Arlington, Virginia 22203

STEVEN FUZESI, JR., ESQ.  
NEWSWEEK, INC.  
251 West 57<sup>th</sup> Street  
New York, New York 10019

GEORGE FREEMAN, ESQ.  
THE NEW YORK TIMES COMPANY  
620 Eighth Avenue  
New York, New York 10018

HOWARD SHAPIRO, ESQ.  
PLAYBOY ENTERPRISES, INC.  
680 North Lake Shore Drive  
Chicago, Illinois 60611

ROBIN BIERSTEDT, ESQ.  
TIME INC.  
One Time Warner Center  
New York, New York 10036

DAVID BRALOW, ESQ.  
KAY MURRAY, ESQ.  
TRIBUNE COMPANY  
435 North Michigan Avenue  
Chicago, Illinois 60611

ERIC LIEBERMAN, ESQ.  
THE WASHINGTON POST  
1150 15<sup>th</sup> Street, NW  
Washington, DC 20071

DANA ROSEN, ESQ.  
WENNER MEDIA LLC  
1290 Avenue of the Americas, 2<sup>nd</sup> Floor  
New York, New York 10104

**CERTIFICATE OF INTERESTED PERSONS AND  
CORPORATE DISCLOSURE STATEMENT PURSUANT TO  
FEDERAL RULE OF APPELLATE PROCEDURE 26.1 AND  
11TH CIRCUIT RULES 26.1 AND 29-2**

In accordance with Federal Rule of Appellate Procedure 26.1, and 11<sup>th</sup> Circuit Rules 26.1-1 to 3 and 29-2, *amici curiae* certify that they believe the certificate of interested persons contained in Appellee's Petition for en banc review is complete except for the addition of the following:

Victor A. Kovner, Attorney for *Amici*

Edward J. Davis, Attorney for *Amici*

Elisa L. Miller, Attorney for *Amici*

Davis Wright Tremaine LLP, Attorneys for *Amici*

In addition, *Amici* submit the following corporate disclosure information about themselves:

*Amicus curiae* Magazine Publishers of America is privately owned and has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

*Amicus curiae* Newspaper Association of America is a not-for-profit corporation with no parent company or publicly held affiliates.

*Amicus curiae* Advance Publications, Inc. is privately owned and has no parent corporations, and no publicly held corporation owns 10% or more of its stock.

*Amicus curiae* Association of American University Presses is a not-for-profit corporation with no parent company or publicly held affiliates.

*Amicus curiae* Forbes LLC is privately held and has no parent corporations, and no publicly held corporation owns 10% or more of its stock.

*Amicus curiae* Gannett Co., Inc. is publicly owned and has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

*Amicus curiae* Hachette Filipacchi Media U.S., Inc. is a division of Lagardere Active Media, which is a division of Lagardere SCA, which is a publicly held corporation traded on the Paris stock exchange.

*Amicus curiae* The Hearst Corporation is 100% owned by the Hearst Family Trust. No publicly held corporation owns 10% or more of its stock.

*Amicus curiae* Martha Stewart Living Omnimedia, Inc. is publicly owned and has no parent corporations, and no publicly held corporation owns 10% or more of its stock.

*Amicus curiae* The McGraw-Hill Companies, Inc. is publicly owned, has no parent corporations, and no publicly held corporation owns 10% or more of its stock.

*Amicus curiae* Newsweek, Inc. is a wholly owned subsidiary of The Washington Post Company, a publicly-held corporation traded on the New York Stock Exchange. Berkshire Hathaway, Inc., a publicly owned company, has a 10% or greater ownership interest in The Washington Post Company.

*Amicus curiae* The New York Times Company is publicly owned and has no parent corporations, and no publicly held corporation owns 10% or more of its stock.

*Amicus curiae* Playboy Enterprises, Inc. is a publicly-held corporation. More than 10% of its stock is held by Wells Capital Management, a subsidiary of Wells Fargo and Company, a publicly traded corporation.

*Amicus curiae* Time Inc. is indirectly wholly-owned by Time Warner Inc., which is a public company, which has no parent corporations, and no publicly held corporation owns 10% or more of its stock.

*Amicus curiae* Tribune Company is publicly owned and has no parent corporations, and no publicly held corporation owns 10% or more of its stock.

*Amicus curiae* Wenner Media LLC is a privately held company and has no publicly held parent corporation, and no publicly held corporation owns 10% or more of its stock.

*Amicus curiae* WP Company LLC d/b/a The Washington Post is a wholly-owned subsidiary of The Washington Post Company, which is a publicly-held

corporation traded on the New York Stock Exchange. More than 10% of its shares are owned by Berkshire Hathaway, Inc., a publicly-held corporation traded on the New York Stock Exchange.

## TABLE OF CONTENTS

	<u>Page</u>
CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 26.1 AND 11TH CIRCUIT RULES 26.1 AND 29-2 .....	C-1
TABLE OF AUTHORITIES.....	iii
INTRODUCTION.....	1
STATEMENT OF INTEREST OF AMICI .....	5
POINT I    THE REVISION PRIVILEGE OF SECTION 201(c) REFLECTS LONGSTANDING PUBLISHING PRACTICES AND PROTECTS IMPORTANT PUBLIC INTERESTS.....	7
A.    The Precursors to Digital Replicas: Microfilm and Microfiche Copies .....	7
B.    The Copyright Act of 1976 Preserved the Protection of Collections of Back Issues .....	10
POINT II    THE SUPREME COURT IN <i>TASINI</i> ESTABLISHED A STANDARD FOR THE APPLICATION OF 201(c) THAT RECOGNIZES THAT DIGITAL REPLICAS LIKE THE CNG MUST BE PRIVILEGED .....	13
A.    Application of the <i>Tasini</i> Standard to the CNG Requires a Finding That It Is a Privileged Revision .....	13
1.    “Context”: The Visual Perception to the Viewer .....	13
2.    The Need for Software to Read Digital Versions Does Not Vitate the Privilege .....	18
3. <i>Tasini</i> Reflects Congress’ Recognition that the Addition of Some New Material Would Not Strip the Protection of the Privilege from a Replica of a Periodical Archive.....	21

B.	What Is At Stake: Unprecedented Access, Efficiency and Preservation .....	23
C.	Reverting to <i>Greenberg I</i> Would Derail the Development of Digital Archives .....	28
CONCLUSION .....		30



## TABLE OF AUTHORITIES

Page(s)

### CASES

<i>Community for Creative Non-Violence v. Reid</i> , 490 U.S. 730 (1989) .....	11
<i>Faulkner v. Nat'l Geographic Soc'y</i> , 409 F.3d 26 (2d Cir. 2005) (" <i>Faulkner II</i> ") .....	<i>passim</i>
<i>Faulkner v. Nat'l Geographic Soc'y</i> , 294 F. Supp. 2d 523 (S.D.N.Y. 2003) .....	22
<i>Greenberg v. Nat'l Geographic Soc'y</i> , 488 F.3d 1331 (11th Cir. 2007) (" <i>Greenberg II</i> ") .....	<i>passim</i>
<i>Greenberg v. Nat'l Geographic Soc'y</i> , 244 F.3d 1267 (11th Cir. 2001) (" <i>Greenberg I</i> ") .....	<i>passim</i>
<i>New York Times Co. v. Tasini</i> , 533 U.S. 483 (2001) .....	<i>passim</i>
<i>Tasini v. New York Times Co.</i> , 206 F.3d 161 (2d Cir. 2000), <i>aff'd</i> 533 U.S. 483 (2001) .....	20
<i>Tasini v. New York Times Co.</i> , 972 F. Supp. 804 (S.D.N.Y. 1997), <i>rev'd and remanded</i> 206 F.3d 161 (2d Cir. 2000), <i>aff'd</i> 533 U.S. 483 (2001) .....	28
<i>Twentieth Century Music Corp. v. Aiken</i> , 422 U.S. 151 (1975) .....	12

### STATUTES AND LEGISLATIVE MATERIAL

17 U.S.C. § 102(a) .....	19
17 U.S.C. § 201(c) .....	<i>passim</i>

H.R. Rep. No. 94-1476 (1976), reprinted 1976 U.S.C.C.A.N. 5659 .....	<i>passim</i>
---	---------------

## MISCELLANEOUS

Edward Wyatt, <i>80 Years of The New Yorker to Be Offered in Disc Form</i> , N.Y. Times, June 2, 2005 .....	24
Ellen Hoffman, <i>Flexible Classrooms Pioneered in the Suburbs</i> , Washington Post, Sept. 3, 1967 .....	9
Geoff Smith, <i>Access to Newspaper Collections and Content in a Time of Change</i> , 61 <sup>st</sup> IFLA General Conference, August 20-25, 1995, <a href="http://www.ifla.org/IV/ifla61/61-smig.htm">http://www.ifla.org/IV/ifla61/61-smig.htm</a> .....	27
Jane L. Levere, <i>Old Issues of Playboy and Rolling Stone Will Be Available on DVD</i> , N.Y. Times, Aug. 6, 2007 .....	24, 25
Jennifer. Livingston, Casenote: <i>Digital "Revision": Greenberg v. National Geographic Society</i> , 70 U. Cin. L. Rev. 1419 (Summer 2002) .....	17, 18, 22
Jessica D. Litman, <i>Copyright, Compromise, and Legislative History</i> , 72 Cornell L. Rev. 857 (1987) .....	11
Joseph Reed, <i>Library Uses New Photoduplication Method to Prepare Rare Documents</i> , Washington Post, Nov. 19, 1939 .....	7
Kevin Guthrie, <i>Archiving in the Digital Age</i> , EDUCAUSE Review, Nov/Dec 2001 .....	26
Larry Jaffee, <i>DVD-Rom Finds Raison D'Etre in Complete New Yorker</i> , Medialine, Nov. 1, 2005 .....	24
Lateef Mtima, <i>Tasini &amp; Its Progeny: The New Exclusive Right or Fair Use on the Electronic Publishing Frontier?</i> , 14 Fordham Intell. Prop. Media & Ent. L.J. 369 (2004) .....	28

Raymond C. Lindquist, <i>Microphotography for Law Schools</i> , 35 Law Libr. J. 193 (1942) .....	8
Samuel Lubell, <i>The Federal Diary: Microfilm Cameras</i> , Washington Post, Jan. 3, 1937 .....	7, 29
Sarah Ellison, <i>Playboy Archives Go Digital</i> , Wall St. J., Feb. 9, 2007 .....	24
<i>School Microfilm of Times Due Soon</i> , N.Y. Times, Nov. 22, 1969 .....	9
Thomas Graham Lee, <i>Current Trends in Microform Use by Secondary Schools</i> (1969), <i>microformed on Research in Education</i> , ERIC ED033264 (U.S. Dep't of Health, Education and Welfare) .....	9
William G. Bowen, <i>The Academic Library in a Digitized Commercialized Age: Lessons from JSTOR</i> , ALA Midwinter Participants Meeting 1/14/01, <a href="http://www.jstor.org/about/bowen.html">http://www.jstor.org/about/bowen.html</a> .....	26

## INTRODUCTION

Thanks to the development of new technologies, exact copies of many decades' worth of newspapers, magazines, and journals, which previously could be found only in major libraries, can now be made available to vast numbers of new readers. Entire issues can be scanned to be preserved and reproduced electronically, rather than solely on paper or microfilm, and displayed page by page on a computer screen, with each page looking just as it does in the original. Readers can recreate the experience of flipping through each issue, or they can use indices or search tools to find particular issues or articles.

These digital replicas are visibly and functionally very different from databases that aggregate articles from many publications and make them retrievable individually, outside the context of their original publication, which the Supreme Court has ruled infringes the copyright of contributors. Instead, they display individual contributions in context and are equivalent to the microfilm copies of periodicals that have been sold to libraries for use by the public for generations.

Certain photographers have nevertheless challenged the right of publishers to make complete copies of their archived periodicals available to the public, using this updated technology. Copyright law, however, recognizes that publishers own the copyright in collective works like magazines and journals and may reproduce

them in their entirety, including all the original contributions in revised editions. Section 201(c) of the Copyright Act, 17 U.S.C. § 201(c), codifies this right to replicate and revise a collective work, recognizing it as part of the right a publisher acquires when licensing an article or illustration for the original publication. A publisher may not re-use a contribution by publishing it on its own or in a completely different collection, but Section 201(c), embodying the longstanding custom and practice in the industry, guarantees that the publisher may translate the original collective work as a whole, including the contribution, into a new medium without infringing the author's copyright. An individual contributor therefore may not withdraw an article or illustration from a periodical when it is re-issued in a new edition, regardless of the medium in which it is presented – on paper, on microfilm or on a computer screen. Copyright, including the privilege recognized in Section 201(c), is medium-neutral.

That privilege is crucial to the balance Congress struck to protect and promote both the publication of collective works and the rights of authors in their own contributions. In *New York Times v. Tasini*, 533 U.S. 483 (2001), the Supreme Court maintained that balance when it announced a test for determining whether a publisher's electronic reproduction of works in past issues is privileged by Section 201(c): whether the electronic version presents the individual articles in the same visual context as the original publication.

When the present case first came before this Court, the Supreme Court had not yet ruled on the application of Section 201(c) to digital copies, and as a result this Court's decision relied on factors at odds with what was ultimately deemed dispositive by Supreme Court – the fact that the *Complete National Geographic* (“CNG”) included independently copyrightable elements: the software program underlying the CD-ROMS (the “Program”) and the moving cover sequence introducing the issues (the “Sequence”) – to find that the CNG was a new product, in a “new medium, for a new market that far transcends any privilege of revision or mere reproduction.” *Greenberg v. Nat’l Geographic Soc’y*, 244 F.3d 1267, 1273 (11th Cir. 2001) (“*Greenberg I*”). The panel of this Court that reversed *Greenberg I* recognized that the Supreme Court’s decision in *Tasini* requires that the *Complete National Geographic* be held privileged because the contents appear in the digital replica in exactly the same visual context as in the original magazines. *Greenberg v. Nat’l Geographic Soc’y*, 483 F.3d 1331 (11th Cir. 2007) (“*Greenberg II*”).<sup>1</sup> The Second Circuit, likewise following *Tasini*, has also applied the Supreme Court’s holding to the National Geographic Society’s publication of its past issues on CD-ROMs and confirmed that the *Complete National Geographic* is privileged by

---

<sup>1</sup> The holding of non-infringement did not extend to the CNG’s additional use of one photograph taken out of its original context and included in the animated introductory sequence to the CNG. That separate use is not addressed on this appeal.

Section 201(c), despite several other photographers' claims that the CD-ROM edition infringed their copyrights. *Faulkner v. Nat'l Geographic Soc'y*, 409 F.3d 26 (2d Cir. 2005) ("*Faulkner II*").

As the *Greenberg II* panel and the Second Circuit concluded in light of *Tasini*, the use of the Program to store and retrieve facsimiles of the pages of the original publications does not change the analysis even if the software is independently copyrightable, as long as it does not alter the context in which a viewer sees the individual contributions in the new replica. Nor does the addition of some new material – such as the brief animated Sequence – affect the privileged status of the entire replica of the original issues. Section 201(c) expressly anticipates that “revisions” of collective works will not be identical to the originals, and they need not be identical to enjoy the protection of the privilege.

On rehearing, this Court has the opportunity to confirm the appropriate application of the Copyright Act to electronic and digital collections that, following the Supreme Court's holding in *Tasini*, reproduce individual articles, photographs, cartoons and other works in the same context as the original publications. By doing so, this Court will ensure the uniform application of copyright law across circuits and provide guidance to lower courts and direction to the many publishers, including several *amici*, who have created digital archives of

their past issues or intend to do so, and assurance that the effort and expense they have undertaken to preserve the historical record will not be in vain.

### **STATEMENT OF INTEREST OF AMICI**

The organizations that have joined to present their views in this brief include the publishers of a great many of the nation's newspapers, magazines, and scholarly journals. Together, *amici* are responsible for a significant portion of the published record of modern American history and culture.

The members of *amicus* Magazine Publishers of America publish more than 1250 magazines for the general public, covering almost every facet of life in the United States and around the world. They include newsweeklies such as *Time* and *Newsweek*, general-interest magazines like *The New Yorker* and *Vanity Fair*, and specialized magazines of all kinds. *Forbes*, *Popular Mechanics*, *BusinessWeek*, *Good Housekeeping*, *Car and Driver*, *Entertainment Weekly*, *Martha Stewart Living*, *Sports Illustrated*, *Vogue* and *Architectural Digest* are only a small sample of the titles published by some of the individual *amici*. The members of *amicus* Newspaper Association of America reach nearly 90% of readers in the United States daily, chronicling national, international and local affairs in major metropolitan dailies, such as *The New York Times*, *Washington Post*, *Los Angeles Times*, *Chicago Tribune* and *Houston Chronicle*, and daily and weekly newspapers in communities across the country. The university and scholarly publishers that



are members of *amicus* Association of American University Presses ("AAUP") publish over 880 journals, including such diverse publications as *Neuro-Oncology* (Duke University Press), the *Journal of Democracy* (Johns Hopkins University Press), *Southern Historian* (University of Alabama Press), and the *Journal of Modern History* (University of Chicago Press). A brief description of each *amicus* is included in the Appendix annexed hereto.

American periodicals have created a comprehensive, contemporaneous record of political, social, cultural, economic and scientific developments through the years. Until recently, that record has been available only to scholars and members of the public with access to particular publications' archives or to libraries that can house complete collections of bound volumes and microfilm or microfiche reproductions. With the spread of computer technology, researchers and the public are eager to gain electronic access to past issues of popular periodicals and scholarly journals, and many publishers, including several *amici*, have begun to make these resources available on CD-ROMs or DVDs or online. Many more would like to do so.

The *amici* therefore have a direct interest in continuing to be able to reproduce their works without impediment, an interest the Copyright Act protects because of the public interest it serves. By making digital copies of historic magazines and newspapers easily accessible to the broadest public, publishers

provide information and entertainment and enhance our understanding of our past. The Supreme Court's decision in *Tasini*, already applied to the CNG in *Greenberg II* and *Faulkner*, prescribes exactly how publishers can make their works available digitally without risking abridging the rights of contributors. Cementing that standard in this Circuit will permit publishers to continue to convert their stores of past issues into digital form, preserving valuable archives for use in the future and making the abundant information in them accessible to all.<sup>2</sup>

## POINT I

### **THE REVISION PRIVILEGE OF SECTION 201(c) REFLECTS LONGSTANDING PUBLISHING PRACTICES AND PROTECTS IMPORTANT PUBLIC INTERESTS**

#### **A. The Precursors to Digital Replicas: Microfilm and Microfiche Copies**

The impact digital archives are having on research echoes the effect microfilm technology had when it emerged many decades ago, and copyright law accommodates both technologies in the same way. In the 1930s, scholars and journalists hailed the advent of microfilm technology because it would preserve the contents of potentially fragile paper publications, relieve the need for storage space and make printed materials available to readers and researchers who could not reach major libraries where bound volumes were stored. Samuel Lubell, *The*

---

<sup>2</sup> On September 26, 2007, counsel for appellant National Geographic, and on October 5, 2007, counsel for appellee Jerry Greenberg consented to the filing of this *amicus* brief.

*Federal Diary: Microfilm Cameras*, Washington Post, Jan. 3, 1937, at 52; Joseph Reed, *Library Uses New Photoduplication Method to Prepare Rare Documents*, Washington Post, Nov. 19, 1939, at B2. Commentators celebrated the new microfilming technology for making collections of newspapers – “the world’s diary” – available to “readers, students and investigators throughout the United States.” Reed, *supra*, at p. B2. The Rockefeller Foundation declared microfilming “perhaps the most fundamental advance in duplicating the printed or written word since Gutenberg.” Raymond C. Lindquist, *Microphotography for Law Schools*, 35 Law Libr. J. 193, 193-194 (1942).

By the 1940s, newspapers such as *The New York Times* and *Detroit Free Press* (both members of *amicus* NAA) were being microfilmed, and by 1949, *amicus* McGraw-Hill had licensed University Microfilms to sell its magazines on microfilm. Since then, the publications of many of the *amici*, including virtually all major newspapers and magazines, have been microfilmed, and copies of their issues on microfilm or microfiche have been sold to libraries and other institutions and used by students, scholars and the public all over the world. In 1971, the National Geographic Society itself announced that all issues of *National Geographic* would be reproduced on microfilm so that the magazine could become an even more valuable tool for research in libraries, as well as at home. Prior to that, only a few major libraries had complete sets of the magazines.

The practice of reproducing magazines and newspapers on microfilm was widely publicized and familiar even to schoolchildren. In 1967, the *Washington Post* reported that "[t]he school library [now] houses film strips, microfilm and other educational hardware as well as books and magazines." Ellen Hoffman, *Flexible Classrooms Pioneered in the Suburbs*, Sept. 3, 1967, at B3. By 1969, *The New York Times* had developed a special collection of microfilmed editions for schools and community colleges, *School Microfilm of Times Due Soon*, N.Y. Times, Nov. 22, 1969, at 30, and "the majority of California school libraries use[d] microfilm for the storing of periodicals and newspapers." Thomas Graham Lee, *Current Trends in Microform Use by Secondary Schools* (1969), microformed on Research in Education, ERIC ED033264 (U.S. Dep't of Health, Education and Welfare), at 12.

Within the publishing industry, microfilming was well known and accepted, and scholars and journalists used microfilm for their own research. Publications of *amici*, such as *USA Today*, *The New York Times*, *Washington Post*, *Los Angeles Times*, *Newsweek*, *Time*, *Playboy*, *BusinessWeek* and many, many others, have for decades copied their publications on microfilm or microfiche and sold the copies without any complaint from individual contributors and without seeking contributors' permission, with the understanding that their copyright in the original collective works included the right to create the microfilm editions. In contrast,

they sometimes did seek permission to use photos or articles in new, different works – in syndication for publication in other magazines, for instance, or in a wall calendar or a product advertisement.<sup>3</sup> But all articles, photos, and cartoons were automatically included when issues of a periodical were combined in bound volumes or issued on microfilm.

**B. The Copyright Act of 1976 Preserved the Protection of Collections of Back Issues**

The Copyright Act of 1976 Act was drafted against this backdrop and with the understanding that there was strong public interest in keeping collective works as accessible as possible while at the same time strengthening individual owners' rights in their individual works. To achieve a fair balance, Section 201(c) allowed authors to retain copyright in their contributions to collective works regardless of whether the contributions bore separate copyright notices, and publishers were guaranteed the continued privilege to include those contributions in reproductions

---

<sup>3</sup> For example, *amicus* Playboy Enterprises, Inc. has sought permission from freelance photographers to republish photographs in books such as *Playboy: 50 Years: The Photographs*, but not for microfilming the magazine itself. Similarly, *amicus* Time Inc. has sought the permission of photographers who owned the copyright in their works to use them in books such as *Time Annual: The Year in Review*, *Life* magazine's *100 Photographs That Changed the World* and *Time America: An Illustrated History*, but there was no need to seek permission when a 1963 issue of *Life* was re-released with a new cover and supplementary commentary for the 40<sup>th</sup> anniversary of the assassination of President Kennedy, or when Time Inc.'s magazines were microfilmed.

REVISION

and "revisions" of the collective works, and even in future issues in the same series. 17 U.S.C. § 201(c).

As the drafters explained, the Act ensured that "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 . . . ." H.R. Rep 94-1476 at 122 (1976), reprinted in 1976 U.S.C.C.A.N. 5659. The House Report specifies that "the last clause of the subsection [§ 201(c)], under which the privilege of republishing the contribution under certain limited circumstances would be presumed, is an *essential counterpart* of the basic presumption" that the publisher owns the copyright in the collective work as a whole. *Id.* (emphasis added). Thus, while a freelance author could now own an individual contribution to a collective work, the publisher maintained the separate right to reproduce the work as a whole and include the contribution in a revision of the collective work. 17 U.S.C. § 201(c).

The 1976 Act was negotiated over many years by the most interested parties. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 743 (1989); *see also* Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 Cornell L. Rev. 857, 862 (1987). Representatives of both publishers and contributors,

including photographers, participated fully.<sup>4</sup> The negotiators were undoubtedly aware of the longstanding practice of microfilming periodicals, and Section 201(c) reflects the fundamental principle of media neutrality. It does not limit the physical mechanisms by which a publisher can reproduce a work or create a “revision,” thus leaving the door open to new technologies.

Congress recognized that the privilege embodied in Section 201(c) reflected the industry practice and the law at the time:

The basic presumption of 201(c) . . . is fully consistent with present law and practice, and represents a fair balancing of equities.

H. Rep. No. 94-1476 at 122 (1976). “The drafters intended that the Copyright Act of 1976 do ‘nothing to change the rights of the owner of a copyright in collective work.’” *Faulkner II*, 409 F.3d at 39 (citation omitted).

Thus, as the Supreme Court and the Second Circuit later recognized, the Copyright Act reflected an unquestioned, decades-long consensus among publishers and contributors that microfilm copies were within the publisher’s privilege. *Tasini*, 533 U.S. at 501-502; *Faulkner II*, 409 F.3d at 35. The codification of that privilege is consistent with copyright’s primary purpose: to encourage the production and dissemination of original works for the general

---

<sup>4</sup> The American Society of Media Photographers, for example, “worked tirelessly for the Copyright Act.” <http://www.asmp.org/about/history.php>.

public good, *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), in part by ensuring that publishers would be encouraged to devote the resources needed to produce valuable collective works.

## POINT II

### **THE SUPREME COURT IN *TASINI* ESTABLISHED A STANDARD FOR THE APPLICATION OF 201(c) THAT RECOGNIZES THAT DIGITAL REPLICAS LIKE THE CNG MUST BE PRIVILEGED**

#### **A. Application of the *Tasini* Standard to the CNG Requires a Finding That It Is a Privileged Revision**

##### **1. “Context”: The Visual Perception to the Viewer**

The Supreme Court did not rule on the application of Section 201(c) to works in digital form until after this Court had already decided *Greenberg I*. In *Tasini*, the Court made it clear that it is the context in which readers see individual works that determines whether a collective work in digital form is a permissible revision of an original collection or an infringing republication of the individual works. The databases at issue in *Tasini* aggregated articles from many different publications and stripped each article of accompanying illustrations and graphics. These raw text versions of the individual articles were then presented, divorced from the context of the original publications, either on their own or in the company of other articles – often from completely different publications – that happened to



be responsive to a particular computerized search. The Supreme Court held that presentation infringing specifically because “each article is presented to, and retrievable by, the user in isolation, clear of the context the original print publication presented.” 533 U.S. at 487. Thus, the publishers who contributed articles from their collections to the databases were

not sheltered by § 201(c) ... because the databases reproduce and distribute articles standing alone and not in context, not ‘as part of the 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.’

*Id.* at 488 (citations omitted).

The Supreme Court explained that its holding followed from the balance Congress struck in Section 201(c), which guarantees authors the copyright in their individual works while preserving the publishers’ exclusive rights in the collective works they create. The authors’ exclusive rights were held violated when individual contributions to collective works were retrieved and reproduced individually – “in isolation or within new collective works.” *Id.* at 497. Focusing exclusively “on the Article as presented to, and perceptible by, the user of the Databases,” the Court held that they did not reproduce articles “‘as part of’ either the original edition or a ‘revision’ of that edition” but rather “simply as individual

articles presented individually,” which “would invade the core of the Authors’ exclusive rights.” *Id.* at 499-501.

The Court thereby affirmed the privilege that Section 201(c) preserved for publishers of collective works to include individual contributions in new versions of the collective works, as long as the collective works remain intact. The Court compared the databases to “an imaginary library” of “articles from vast numbers of editions” stored in individual folders “in a file room, indexed based on diverse criteria,” which could not logically be viewed as a “revision” of any of the original publications:

The crucial fact is that the Databases, like the hypothetical library, store and retrieve articles separately within a vast domain of diverse texts. Such a storage and retrieval system effectively overrides the Authors’ exclusive right to control the individual reproduction and distribution of each Article.

*Id.* at 503-504.

The Court *contrasted* the databases in *Tasini* with microfilm and microfiche reproductions of periodicals, which present the periodicals “intact” – surrounded by the same illustrations, graphics, advertisements and other articles – so that each article remains in its original context, even though individual articles may nonetheless be seen and reproduced individually because “the microfilm user can adjust the machine lens to focus only on the Article, to the exclusion of

surrounding material.” *Id.* at 501. The databases in *Tasini* failed to qualify for the protection of Section 201(c), the Court explained, because “*unlike microforms*, the Databases do not perceptibly reproduce articles as part of the [same] collective work to which the author contributed or as part of any ‘revision’ thereof.” *Id.* at 501-502 (emphasis added). The Court thus confirmed that microfilm reproduction fell within the privilege Congress protected in Section 201(c).

Like microfilm, and unlike the databases in *Tasini*, the *Complete National Geographic* presents each individual contribution to viewers in its original context. After the Supreme Court decided *Tasini*, the Second Circuit found that the CNG qualified as a “revision” privileged by Section 201(c) because it presents the contents of *National Geographic* in a different technological medium but in the same visual context and arrangement, just as microfilm copies of the magazine do. *Faulkner II*, 409 F.3d at 38. The Court concluded that, unlike the databases disapproved in *Tasini*, digital replicas like the CNG and

microforms ‘represent a mere conversion of intact periodicals (or revisions of periodicals) from one medium to another,’ whereas the Databases [in *Tasini*] offered users articles in isolation absent their context in intact collective works.

*Faulkner II*, 409 F.3d at 35-36, *quoting Tasini*, 533 U.S. at 501-502. Noting that the Supreme Court “gave tacit approval [to microfilm and microfiche copies] as permissible section 201(c) revisions” in *Tasini*, the Second Circuit held that

although offering articles in isolation in *Tasini* impinged on contributors' rights in their individual contributions, making digital copies of entire magazines, like the CNG, fell within the publishers' rights. *Faulkner II*, 409 F.3d at 35, 38. The panel in *Greenberg II* reached exactly the same conclusion when it determined that the Supreme Court's decision in *Tasini* abrogated the *Greenberg I* decision and required its reversal. 488 F.3d at 1338.

This Court's application of Section 201(c) in *Greenberg II* rightfully affirms Section 201(c)'s protection of the public interest in the dissemination of information, by ensuring that collections of published periodicals will continue to be available in new, technologically advanced media – as long as individual contributions appear in the same context as in the initial collective work. The balance that Congress struck and that the Supreme Court applied protects authors' rights in their individual contributions but also prevents authors from removing components from existing publications when they are reproduced intact in new media. The drafters apparently understood and assumed that periodicals reproduced on microfilm were privileged, and the Supreme Court recognized as much in *Tasini*. As far as *amici* know, prior to the litigation of *Faulkner* and *Greenberg*, no one ever suggested that reproduction in microform violated contributors' copyright or that contributors should be allowed to redact their contributions from the microfilm archives. *See, e.g.*, Jennifer Livingston,

*Casenote: Digital "Revision": Greenberg v. National Geographic Society*, 70 U. Cin. L. Rev. 1419, 1433-35 (Summer 2002). The fact that reproduction may now be accomplished digitally makes no principled difference.

## **2. The Need for Software to Read Digital Versions Does Not Vitate the Privilege**

For the panel in *Greenberg I*, the fact that the CNG was produced "in a new medium" with an independently copyrightable computer program to store and retrieve the page images helped to put it outside the protection of Section 201(c). 244 F.3d at 1273 and n.12. When the Supreme Court later decided *Tasini*, however, it did not find the independently copyrightable software programs that stored articles digitally, operated the databases, and presented the articles on the screen, to be an impediment to the application of the privilege. Instead, the Court analyzed the manner in which the articles were perceived by the viewer, regardless of the medium. 533 U.S. at 499. Indeed, the Court agreed with the publishers "that the 'transfer of a work between media' does not 'alte[r] the character' of that work for copyright purposes," and that "a mere conversion of intact periodicals (or revisions of periodicals) from one medium to another" would be privileged. 533 U.S. at 502.

As one commentator has noted, "unquestionably, the reproduction of a collective work in an electronic or digital medium will almost always involve the

incorporation of an additional copyrightable element such as a computer program. *Livingston*, 70 U. Cin. L. Rev. at 1437. If the addition of an independently copyrightable computer program were sufficient to render a digital collection unprivileged, *Tasini*'s "context" standard would be moot.

In fact, the Supreme Court expressly contemplated in *Tasini* that privileged revisions could be created in digital formats. While rejecting the argument that the Databases were privileged revisions because a user could assemble all the articles in a certain issue of a certain periodical by fashioning a suitable search query, the Court explicitly recognized that the resulting reconstituted document – in digital form, quite evidently requiring software to be read – would be privileged: "*a third party can manipulate a database to produce a non-infringing document.*" 533 U.S. at 504 (emphasis added):

Under §201(c), the question is not whether a user can generate a revision of a collective work from a database, but whether the database itself perceptively presents the author's contribution as part of a revision of the collective work. That result is not accomplished by these databases.

533 U.S. at 504.

That result *is*, however, accomplished by the CNG. It presents the authors' contributions in the same context in which they originally appeared: the same articles appear in the same order and layout surrounded by the same illustrations,

graphics, and advertisements. Whether they are seen in a bound volume, on microfilm, or in an image read from a CD-ROM does not matter. The technical needs of the medium are irrelevant under Section 201(c) if they do not affect whether the viewer sees each contribution “as part of that particular collective work,” as “intact periodicals.” 533 U.S. at 488, 502. As the Program is invisible to the reader as an addition to the collection – only serving effectively as part of the “machine or device” permitting the work to be perceived, 17 U.S.C. § 102(a) – it cannot affect the analysis under Section 201(c).

Again, the Supreme Court’s comparison to microfilm is instructive. If, as on microfilm, the articles in the *Tasini* databases had appeared “in precisely the position in which the articles had appeared in the newspaper...[such that] the user first encounters [the article] in context” and can view the contents of the original issue around it, the databases would have been held privileged, regardless of the need for software (as opposed to film and a projector) to see them. *Tasini*, 533 U.S. at 501. The CNG is exactly the kind of “noninfringing document” that the Supreme Court envisioned could be created, notwithstanding the fact that it would require software to read. The pre-*Tasini* analysis of the Program in *Greenberg I*, which found that the software was a separate component of the CNG that could prevent it from being a “revision,” cannot be squared with the subsequent application of Section 201(c) by the Supreme Court.

**3. *Tasini* Reflects Congress' Recognition that the Addition of Some New Material Would Not Strip the Protection of the Privilege from a Replica of a Periodical Archive**

*Tasini* also requires this Court to revisit *Greenberg I*'s finding that the addition of the Sequence rendered the CNG unprivileged. In the decision that the Supreme Court affirmed in *Tasini*, the Second Circuit noted that Section 201(c) "protects the use of an individual contribution in a collective work that is somewhat altered." *Tasini v. New York Times Co.*, 206 F.3d 161, 167 (2d Cir. 2000). Section 201(c) privileges the use of a contribution in the original collective work *and* in any revision, and even in a subsequent collective work in the same series. If the mere addition of some new material disqualified a replica from the privilege, the word "revision" would, in effect, be read out of Section 201(c), and the privilege would be limited to republishing the identical periodical – a result directly contrary to the language of the statute and congressional intent.

Applying Section 201(c) to the CNG, the Second Circuit recognized that "because the Section 201(c) privilege of reproduction and distribution extends to that collective work and any revision of that collective work, a permissible revision may contain elements not found in the original – for example, a collection of bound volumes of past issues with a copyrightable index to the entire collection." *Faulkner II*, 409 F.3d at 38. If such additional material destroyed the privilege, there would be no distinction between "revision" and "republishing."



Congress' intention that non-identical revisions remain privileged was confirmed by the House Report's description of what is *not* privileged: revising the individual contributions themselves or publishing those contributions in "other *entirely different* collective works." H.R. Rep. No. 94-1476, at 122 (emphasis added). By denying the privilege only to collections that change the contribution itself or are *entirely* different from the original collective work, the drafters recognized that a privileged "revision" would necessarily be *somewhat* different. Indeed, the House Report specifies that "a publishing company could . . . reprint an article from a 1980 edition of an encyclopedia in a 1990 revision of it." The 1990 "revision" of the encyclopedia would necessarily include new material – in fact, ten years' worth of new material. H.R. Rep. No. 94-1476, at 122-123; *see also Greenberg II*, 488 F.3d at 1338-39; *Faulkner v. Nat'l Geographic Soc'y*, 294 F. Supp. 2d 523, 539 (S.D.N.Y. 2003); *Livingston*, 70 U. Cin. L. Rev. 1419 at 1430-32.

Of course, some alterations could be so extensive and encompassing that they would render the new collection "entirely different" and therefore ineligible for the privilege. Congress gave the example of including a contribution in a new anthology of works with which it had not originally been published. H.R. Rep. No. 94-1476, at 122-123. But, as the *Greenberg II* panel recognized, "[t]he addition of the Sequence to the Replica portion of the CNG amounts to 25 seconds of 'new'

material that has been appended to some 1200 intact issues of the magazine . . . [and] just as the addition of 400 pages of prose to a sonnet does not constitute a 'revision' of the sonnet, the addition of a preface to a 400-page anthology would not transform the book into a different collective work." *Greenberg II*, 488 F.3d at 1338-1339.

Following *Tasini*, the key question was identified by the *Greenberg II* panel: "whether the new material so alters the collective work as to destroy its original context." *Id.* The answer here is no: the addition of the short Sequence does not alter the findings that "the original context of the [m]agazines is omnipresent in the CNG" and that the Sequence "in no way alters the context in which the original photographs...were presented." *Id.* at 1337-39, quoting *Faulkner II*, 409 F.3d at 38. The addition of the Sequence does not detract from the fact that all the works in the replica itself are presented in their original context, which is what *Tasini* requires.

**B. What Is At Stake: Unprecedented Access, Efficiency and Preservation**

Thanks to *Tasini*, followed by the Second Circuit decision in *Faulkner II* and this Court's panel decision in *Greenberg II*, publishers have gone to considerable lengths to make back issues available to the public in digital forms. *The Complete New Yorker: Eighty Years of the Nation's Greatest Magazine* has been published on DVD-ROMs and on a portable hard drive, allowing readers to view the articles,

fiction, poetry, cartoons and advertisements in every issue of the magazine in their original context. This fall will see the publication of *Rolling Stone Cover-to-Cover: The First 40 Years*, presenting a written and photographic record of American popular culture and public affairs since 1967, as well as the first two installments of the *Playboy Cover-to-Cover* series, featuring reproductions of every issue of the influential magazine from the 1950s and 1960s. *The Nation* has created a digital archive of exact images of its pages dating back to 1865. See [www.thenation.com/archive/](http://www.thenation.com/archive/). Replicas of the first 30 years of issues of *Mother Jones* will also be available on DVD this fall, and *Absolutely MAD Magazine*, which includes facsimiles of every issue of the satirical and humor publication, is available on DVD now. Jane L. Levere, *Old Issues of Playboy and Rolling Stone Will Be Available on DVD*, N.Y. Times, Aug. 6, 2007, at C6. Past issues of newspapers such as *The New York Times* and *Washington Post* (both published by *amici*) and many other newspapers, magazines and journals can also be seen in their entirety through online services such as ProQuest. See [www.proquest.com](http://www.proquest.com). Members of *amicus* AAUP have launched numerous electronic projects to make scholarly journals more easily accessible to students and scholars worldwide.

The creation of these digital archives has required significant investment of time and resources. Each page has to be scanned, and electronic indices and linking mechanisms are created to permit readers to locate the historical material.

Where paper copies no longer exist or cannot be scanned without damage, microform copies are scanned instead. For *The Complete New Yorker*, paper copies of each issue – approximately 500,000 pages – were scanned individually, and the more than 1.5 million index cards in the magazine’s card catalogue were digitized to create the “backbone” of the search functions. Edward Wyatt, *80 Years of The New Yorker to Be Offered in Disc Form*, N.Y. Times, June 2, 2005, at E3; Larry Jaffee, *DVD-Rom Finds Raison D’Etre in Complete New Yorker*, Medialine, Nov. 1, 2005, at 8. More than 115,000 pages are being scanned for *Playboy Cover-to-Cover*, and more than 125,000 for *Rolling Stone Cover-to-Cover*. Sarah Ellison, *Playboy Archives Go Digital*, Wall St. J., Feb. 9, 2007, at B1. The process is expensive, labor-intensive and time-consuming. Many other publishers – including many other *amici* – have begun digital replica projects or want to begin them. A media consultant recently told *The New York Times* that “probably several hundred consumer magazines” could be interested. Levere, *supra*.

The digital replicas of printed periodicals that *Tasini*, *Faulkner II* and *Greenberg II* have protected are a boon to scholars and the public. They can be more widely available than paper or microfilm copies because they take up so little space and cost so little to maintain. Eighty years of issues of *The New Yorker* fit on a single three-by-five-inch portable hard drive or several thin discs. Digital

replicas of thousands of issues of historic scholarly journals are accessible at a single computer terminal through JSTOR. [www.jstor.org](http://www.jstor.org).

Digital storage also enhances the very process of research. With digital copies available, researchers spend less time trying to locate sources and may not have to travel to consult rare materials, simplifying research projects that could otherwise take years to complete. Electronic indices and searching capacities allow people to find materials that may have been inaccessible when researchers had to rely on physical libraries and printed indices, which were often limited, if indices were available at all. Local newspapers and magazines covering popular culture or subjects like automobiles and homemaking, for instance, were rarely indexed but have increasingly become resources for historians and others.

Research has shown that older articles are much more frequently consulted now that they are available digitally and electronic searching makes them so much easier to find. William G. Bowen, *The Academic Library in a Digitized Commercialized Age: Lessons from JSTOR*, ALA Midwinter Participants Meeting 1/14/01, available online at [www.jstor.org/about/bowen.html](http://www.jstor.org/about/bowen.html); Kevin Guthrie, *Archiving in the Digital Age*, EDUCAUSE Review, Nov/Dec 2001, at p. 62. With the growing predominance of electronic research, any material that is *not* converted into digital form may well be unfindable, unused and effectively lost. As innovation brings the cost of digitization down, more publishers, including not-

for-profit educational publishers, will be able to copy their works in digital form. Because digitization brings more material within reach of more people at lower cost, it also democratizes knowledge and fuels the progress of science and culture. Independent researchers and students anywhere in the United States can now have the same access to scientific and academic journals as students at Oxford or Stanford. *Id.*

Digital conversion also enhances the preservation of the written record for future generations. Libraries have limited storage space, and paper originals are susceptible to wear and tear and natural deterioration over time. Even microfilm and microfiche require special storage conditions and viewing equipment and often cannot be easily copied or read. Digital copies, on the other hand, can be stored and read with much less danger of deterioration. Multiple users can even view the same content at once. Once a digital replica is created, if any portions are somehow lost, they can easily be replaced. Geoff Smith, *Access to Newspaper Collections and Content in a Time of Change*. 61st IFLA General Conference, Aug 20-25, 1995. The development of digital archives amply serves all the purposes of the privilege in Section 201(c).

**C. Reverting to *Greenberg I* Would Derail the Development of Digital Archives**

The practical effects of a reversion to the holding of *Greenberg I* would be extraordinary. If the publication of back issues as a whole in a new medium were not uniformly privileged, any contributor could challenge the inclusion of a contribution in a digital archive or demand a prohibitive payment – essentially allowing contributors to veto their inclusion in replicas. At best, individual negotiations would stall the process of digital conversion and create an archival record riddled with holes where particular contributors either demanded excessive payment or refused permission. A publisher unable to reach a particular contributor would be forced to omit all works by that contributor, in case the contributor or her heirs might one day appear and object, and to avoid the risk of lawsuits after the fact demanding fees far in excess of the value of the contributions. As a practical matter, it would be virtually impossible for publishers to track down every freelance contributor – often decades after a magazine or newspaper issue was first published – especially because publishers have had no need to retain records of contributors for such long periods because the right to make reproductions and revisions was long recognized and ultimately guaranteed by Section 201(c).

If contributors could veto their inclusion in digital copies of periodicals, scanning would have to be interrupted to make redactions by removing or covering text and images. The corresponding entries in the indices would have to be removed or changed. Those would be costly and cumbersome accommodations that would make scanned periodicals look like Swiss cheese. Portions of the historical record would be deleted, distorting and obscuring our view of the past, and publishers might be deterred from pursuing digitization at all.

That result would undermine the primary purpose of the revision privilege, which is to “prevent the restoration of the author’s contributory work copyright from becoming a ‘veto power’ against the publisher’s ability to revise and update the collective work, which benefits society.” Lateef Mtima, *Tasini & Its Progeny: The New Exclusive Right or Fair Use on the Electronic Publishing Frontier?*, 14 Fordham Intell. Prop. Media & Ent. L.J. 369, 418, n.171 (2004). See also *Tasini*, 972 F. Supp. 804, 815-816 (S.D.N.Y. 1997) (recognizing a “goal of ensuring that collective works be marketed and distributed to the public”), *rev’d and remanded*, 206 F. 3d 161 (2d Cir. 2000), *aff’d*, 533 U.S. 483 (2001).

Most likely, publishers would be unwilling to undertake such monumental efforts just to produce incomplete archives, and they would simply abandon digital projects. The effect would be devastating, not only on the CNG, but also on many other projects now under way or eagerly envisioned. It would inhibit investment in



the development and use of digital technologies to expand the availability of thousands of periodicals. Not just publishers, but the public would lose.

### CONCLUSION

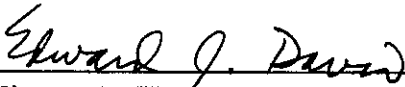
Seventy years ago, *The Washington Post* reported that copying newspapers on microfilm would create “the first link in a microfilm service that may eventually link the entire world into a new medium of exchanging information.” Lubell, *supra*, at 52. Digital technology provides the capacity to carry that promise further forward. Several *amici* have begun making copies of their works available digitally, which makes them far more widely accessible and easy to use than microfilm. Many more publishers would like to do so.

As computer storage and broadband transmission capacity continue to increase and access to computer technology continues to expand, barriers that would block the access of consumers and researchers to the fruits of these advances should be scrutinized carefully, in light of what would be lost. The balance that Congress endorsed and that the Supreme Court has protected should not be disturbed.

Dated: New York, New York  
October 18, 2007

Respectfully submitted,

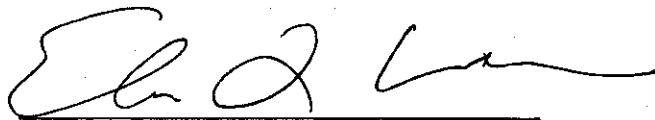
DAVIS WRIGHT TREMAINE LLP

  
\_\_\_\_\_  
Victor A. Kovner  
Edward J. Davis  
Elisa L. Miller  
1633 Broadway  
New York, New York 10019  
(212) 489-8230

Counsel for *Amici Curiae*

## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the typeface and type-volume limitations of Fed. R. App. P. 32(a) because it is proportionally spaced in 14-point Times New Roman typeface and contains 6,810 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by Microsoft Word 2003.

A handwritten signature in black ink, appearing to read 'Elisa L. Miller', written over a horizontal line.

Elisa L. Miller

STATE OF NEW YORK )  
 )  
COUNTY OF NEW YORK )

SS.:

**AFFIDAVIT OF SERVICE  
BY OVERNIGHT FEDERAL  
EXPRESS NEXT DAY AIR**

**EDWARD T. O'CONNELL**  
13 WILLIAM ST. APT. 2  
GARFIELD, NJ 07026

I, **Edward T. O'Connell**, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On **OCT 18 2007**

deponent served the within: *En Banc Brief for Amici Curiae*, Magazine Publishers of America, Newspaper Association of America, Advance Publications, Inc., Association of American University Presses, Forbes LLC, Gannett Co., Inc., Hachette Filipacchi Media U.S., Inc., The Heart Corporation, Martha Stewart Living Omnimedia, Inc., The McGraw-Hill Companies, Inc., Newsweek, Inc., The New York Times Company, Playboy Enterprises, Inc., Time Inc., Tribune Company, Wenner Media LLC, and the WP Company LLC d/b/a The Washington Post, in support of Appellants

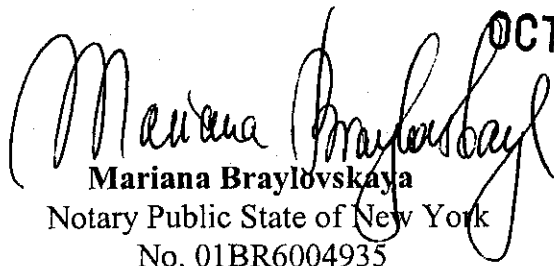
Upon:

**Norman Davis, Esq.**  
**Squire, Sanders & Dempsey LLP**  
200 South Biscayne Boulevard, Suite 4000  
Miami, Florida 33131  
[ndavis@ssd.com](mailto:ndavis@ssd.com)

**Kenneth Starr**  
**Kirkland & Ellis LLP**  
655 Fifteenth Street, NW  
Washington, DC 20005  
[kstarr@kirkland.com](mailto:kstarr@kirkland.com)

the address(es) designated by said attorney(s) for that purpose by depositing 2 true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on

  
**Mariana Braylovskaya**  
Notary Public State of New York  
No. 01BR6004935

Qualified in Richmond County  
Commission Expires March 30, 2010

**OCT 18 2007**



**Job # 211761**

## APPENDIX

### **THE INTERESTS OF THE INDIVIDUAL *AMICI***

*Amicus curiae* Magazine Publishers of America ("MPA"), founded in 1919, is the national trade association of the consumer magazine industry. MPA represents more than 250 of the largest magazine publishers in the United States, who collectively publish more than 1250 of the best-known consumer-interest titles, on a weekly, monthly and quarterly basis.

*Amicus curiae* Newspaper Association of America ("NAA") is a non-profit organization representing the interests of more than 2000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers.

*Amicus curiae* Advance Publications, Inc. is a privately held communications company that, directly or through subsidiaries, publishes daily newspapers in over 25 cities and weekly business journals in over 40 cities throughout the United States. It also, directly or through subsidiaries, owns The Condé Nast Publications, Fairchild Fashion Group, Parade Publications, and Golf Digest Publications, which together publish over 25 magazines with nationwide circulation, including such magazines as *The New Yorker*, *Vanity Fair*, *Vogue*,

*Gourmet*, and *Architectural Digest*, and many Internet sites that are related to its print publications.

*Amicus curiae* Association of American University Presses (AAUP) was established in 1937. AAUP promotes the work and influence of university and scholarly journal and bookpublishers and helps its 129 member presses fulfill their common commitments to scholarship, the academy, and society. AAUP members are active across many scholarly disciplines, including the humanities, the arts, and sciences, and are innovators in the world of electronic publishing.

*Amicus curiae* Forbes LLC is the publisher of *Forbes* and other leading magazines, including *Forbes Life* and *Forbes Asia*, as well as an array of investment newsletters and the leading business website, *forbes.com*. *Forbes* has been covering American and global business since 1917.

*Amicus curiae* Gannett Co., Inc. is a news and information company that publishes 85 daily newspapers in the United States, including *USA TODAY*, and nearly 1,000 non-daily publications, including *USA Weekend*, a weekly newspaper magazine. Gannett also owns 23 television stations, and its U.S. websites attract approximately 23 million unique visitors monthly.

*Amicus curiae* Hachette Filipacchi Media U.S., Inc. publishes popular magazines and online and mobile content primarily for American enthusiasts in many fields. The company's publications include *American Photo*, *Boating*, *Car*

*and Driver, Cycle World, ELLE, ELLE Decor, ELLEgirl.com, Flying, Home, Metropolitan Home, PointClickHome.com, Popular Photography & Imaging, Premiere.com, Road & Track, Sound & Vision and Woman's Day.* Hachette also provides content for television, radio, mobile services and events and publishes books, databases and market research.

*Amicus curiae* The Hearst Corporation is one of the nation's largest diversified media companies. Its major interests include 12 daily and 31 weekly newspapers, including the *Houston Chronicle*, *San Francisco Chronicle* and *Albany Times Union*; nearly 200 magazines around the world, including *Cosmopolitan* and *O, The Oprah Magazine*; 29 television stations through Hearst-Argyle Television (NYSE:HTV) which reach a combined 18% of U.S. viewers; ownership in leading cable networks, including Lifetime, A&E, The History Channel and ESPN; as well as business publishing, including a joint venture interest in Fitch Ratings; Internet businesses; television production; newspaper features distribution; and real estate.

*Amicus curiae* Martha Stewart Living Omnimedia, Inc. ("MSLO") is a diversified media and merchandising company. MSLO publishes five magazines, including the company's flagship publication, *Martha Stewart Living*, and periodic special issues and books. It also produces television programs and provides the programming for a radio channel on SIRIUS Satellite Radio. In addition to its

media properties, including marthastewart.com, MSLO offers Martha Stewart products for the home through licensing agreements with carefully selected companies.

*Amicus curiae* The McGraw-Hill Companies, Inc., founded in 1888, is a leading global information services provider meeting worldwide needs in the financial services, education and business information markets through leading brands such as Standard & Poor's, McGraw-Hill Education, J.D. Power and Associates and its flagship magazine, *BusinessWeek*. McGraw-Hill also owns BusinessWeek.com and produces the weekly television program BusinessWeek Weekend.

*Amicus curiae* Newsweek, Inc. publishes the weekly news magazines *Newsweek* and *Newsweek International*, distributed nationally and internationally, respectively, and *Arthur Frommer's Budget Travel* magazine, which is distributed nationally. The first issue of *Newsweek* was published in 1933. Newsweek publishes online at newsweek.com.

*Amicus curiae* The New York Times Company is the owner of *The New York Times*, *The Boston Globe*, *The International Herald Tribune* and 16 other newspapers; WQXR-FM, a New York City radio station; and more than 40 web sites, including NYTimes.com and Boston.com.



*Amicus curiae* Playboy Enterprises, Inc. is an international multimedia entertainment company that publishes editions of *Playboy* magazine around the world; operates television networks and distributes programming globally; owns the Playboy.com men's lifestyle and entertainment website; and licenses the Playboy trademark internationally for a range of consumer products and services.

*Amicus curiae* Time Inc. is the largest publisher of general interest magazines in the world, publishing over 130 magazines in the United States and abroad. Its major titles include *Time*, *Fortune*, *Sports Illustrated*, *People*, *Money* and *Entertainment Weekly*. Time Inc. is a subsidiary of Time Warner Inc.

*Amicus curiae* Tribune Company operates businesses in broadcasting and publishing that include 12 daily newspapers, including the *Los Angeles Times*, *Chicago Tribune* and *Newsday*; a range of Spanish-language newspapers and other publications; 25 television stations; and news and information websites.

*Amicus curiae* Wenner Media LLC publishes the magazines *Rolling Stone*, *Men's Journal* and *US Weekly*, in addition to their related websites and books on popular cultural, historical and educational subjects.

*Amicus curiae* WP Company LLC d/b/a The Washington Post is a wholly owned subsidiary of The Washington Post Company, a diversified media and education company which owns the *Washington Post*; *Newsweek*; Washingtonpost.Newsweek Interactive (WPNI), which includes

washingtonpost.com, Newsweek.com, Slate magazine, Budget Travel Online and Sprig.com; *Express*; *El Tiempo Latino*; local newspapers in Maryland and Washington; local television stations throughout the country; and Cable ONE, which serves subscribers in midwestern, western and southern states. The Company also owns Kaplan, Inc., a leading international provider of educational and career services and publications for individuals, schools and businesses.



COUNSEL PRESS

The Appellate Experts

520 EIGHTH AVENUE, NEW YORK, NEW YORK 10018

(212) 685-9800; (716) 852-9800; (800) 4-APPEAL

[www.counselpress.com](http://www.counselpress.com)

(211761)