

97-9181

97-9650(CON)

To be Argued by:
EMILY M. BASS, ESQ.

United States Court of Appeals
for the
Second Circuit

JONATHAN TASINI, BARBARA BELEJACK, MARY KAY BLAKELY,
BARBARA GARSON, DANIEL LAZARE, MARGOT MIFFLIN,
JOAN OLECK, SONIA JAFFE ROBBINS, LINDSY VAN GLEDER and
DAVID S. WHITFORD,

Plaintiffs-Appellants.

– against –

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

Defendants-Appellees.

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

BRIEF FOR PLAINTIFFS-APPELLANTS
BARBARA GARSON and SONIA JAFFE ROBBINS

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TABLE OF CONTENTS

	Page
TABLE OF CASES	iv
STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION	1
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	12
ARGUMENT	19
I. THE MEANING OF SECTION 201(c)	19
A. The Court's Construction: A Focus Limited To the Two Words "Any Revision"	19
B. The True Meaning Of Section 201(c): Reading The Words And Phrases In The Section In Context And In Conformity With The Act's Purpose	22
1. § 201(c) Provides The Owner Of Copyright In A Collective Work With A Personal "Privilege" And Not A Transferable Property Interest	24
a. The Language, Structure And History Of The Act Confirm That The § 201(c) Privilege Was Not Intended To Be Transferable.....	24
b. The Fact That The Privilege Is Provided For In § 201(c) Of The Act, Rather Than In § 106, Further Confirms Its Non-Transferability.....	30
c. The Distinction Between "Rights" And Privileges" Is A Long-Standing And Well Established One.....	31
2. To Qualify Under § 201(c), A "Revision" Must Itself Be A "Collective Work"	32

3.	The Requirement Under The Second Prong That The Collective Works Be By The Same Copyright Owner	34
4.	The Scope Of The § 201(c) Privilege	34
a.	A "Revision" Does Not Include Later Works That Are Not Collective Works Or Later Collective Works In A Different Series.....	37
b.	"Any Revision" Is Limited By The Terms Of The Act To A "Revision Of That Collective Work".....	38
c.	At A Minimum A Revision Consists Of More Than One Article.....	39
5.	Whatever Else § 201(c) Was Intended To Mean, It Was Never Intended To Be Construed As Giving The Owner Of Copyright In A Collective Work Permission To Use Its Collective Works In Conjunction With Computerized Information Storage and Retrieval Systems	40
II	THE COURT BELOW ERRED IN GRANTING SUMMARY JUDGMENT TO MEAD ON THE SECTION 201(c) CLAIMS. IT SHOULD HAVE ENTERED SUMMARY JUDGMENT ON THESE CLAIMS IN PLAINTIFFS' FAVOR	41
A.	The Database Defendants Did Not Have Standing To Invoke The § 201(c) Privilege	41
B.	In Any Event, The Database Defendants Have Exceeded The Scope Of The Privilege Provided For In § 201(c)	42
1.	Defendants Have Authorized Third Parties To Reproduce, Distribute And Display Plaintiffs' Articles Either As Stand-Alone Products Or As Part Of New Anthologies	43
2.	The Database Defendants Have Reproduced And Distributed Plaintiffs' Works As Part Of Works Not Authorized By § 201(c)	44
a.	They Have Been Created By Persons Other Than The Defendant-Publishers And Are Not Collective Works.....	44

b.	The Databases Would Not Qualify As § 201(c) Works Even If This Court Were To Conclude That They Are Collective Works Because They Would Be Later Works In A <i>Different Series</i>	46
c.	The Databases, In Any Case, Do Not Qualify As Revisions Of "That Particular Collective Work"	47
1)	The Court Below Applied The Wrong Test To Determine Whether The Databases Were "Revisions" Of Individual Issues Of The Publisher- Defendants' Publications	47
2)	Even Assuming, Arguendo, The Appropriateness Of The Test, The Court Below Applied It Improperly	50
3)	In Any Event, The Conclusion That The NEXIS Database Preserves An Issue's Selection Intact Is Fundamentally Flawed	52
4)	Even If NEXIS Were A Revision, It Clearly Would Not Be A Revision "Of That Collective Work"	54
5)	Even Under the District Court's Test, NEXIS Could Not Be A Revision Because It Is Not "Substantially Similar" To The Collective Works at Issue	55
6)	Recap.	57

III.	THE COURT BELOW ERRED IN GRANTING SUMMARY JUDGMENT TO NEWSDAY ON THE § 201(C) CLAIMS. IT SHOULD HAVE ENTERED SUMMARY JUDGMENT ON THESE CLAIMS FOR APPELLANTS	60
------	---	----

CONCLUSION	62
------------------	----

TABLE OF CASES

<u>CASES</u>	Pages
<u>Arica Inst. Inc. v. Palmer</u> , 970 F.2d 1067 (2d Cir. 1992)	55
<u>Aviation Consumer Action Project v. Washburn</u> , 535 F.2d 101 (D.C. Cir. 1976)	21
<u>Beecham v. United States</u> , 511 U.S. 368 (1994)	32
<u>Blum v. Stenson</u> , 465 U.S. 886 (1984)	21
<u>Botany Mills v. U.S.</u> , 278 U.S. 282 (1929)	37
<u>California v. Brown</u> , 479 U.S. 538 (1987)	35
<u>CCC Info. Services v. Maclean Hunter Market Reports, Inc.</u> , 44 F.3d 61, 67 (2d Cir. 1994), <u>cert. denied</u> , 116 S.Ct. 72 (1995)	51
<u>Commissioner v. Clark</u> , 489 U.S. 726 (1989)	19
<u>Estate of Fisher v. Comm. of Internal Revenue</u> , 905 F.2d 645 (2d Cir. 1990)	32
<u>Feist Publications v. Rural Telephone Service Co.</u> , 499 U.S. 340 (1991)	51, 53
<u>Fonar Corp. v. Domenick, et al.</u> , 105 F.3d 99 (2d Cir. 1997)	19
<u>Franz Chemical Corp. v. Philadelphia Quartz Co.</u> , 594 F.2d 146 (5 th Cir. 1979)	29
<u>Freightliner Corp. v. Myrick</u> , 514 U.S. 280 (1995)	37
<u>GB Marketing USA Inc. v. Gerolsteiner Brunnen GmbH & Co.</u> , 782 F.Supp. 763 (WDNY 1991)	60
<u>General Electric Co. v. OSHA</u> , 583 F.2d 61 (2d Cir. 1978)	35
<u>General Talking Pictures Corp. v. Western Electric Co.</u> , 304 U.S. 175 (1938), <u>adhered to</u> , 305 U.S. 124, <u>reh'g denied</u> , 305 U.S. 675 (1939)	29

<u>Gershwin Publishing Corp. v Columbia Artists Mgt Inc.</u> , 443 F.2d 1159 (2d Cir. 1971)	60, 61
<u>Gilson v. Republic of Ireland</u> , 787 F.2d 655 (D.C.Cir. 1986) ...	29
<u>Gustafson v. Alloyd Co., Inc.</u> , 513 U.S. 561 (1995)	20
<u>Harris v. Emus Records Corp.</u> , 734 F.2d 1329 (2d Cir. 1984)	30
<u>Ideal Toy Corp. v. Fab-Lu Ltd.</u> , 360 F.2d 1021 (2d Cir. 1966)	51
<u>Ilyin v. Avon Publications, Inc.</u> , 144 F.Supp. 368 (SDNY 1956)	30
<u>International Salt Co. v. Geostow</u> , 697 F.Supp. 1258 (WDNY 1988)	35
<u>U.S. v. James</u> , 478 U.S. 597 (1986)	22
<u>Jarecki v. G.D. Searle & Co.</u> , 367 U.S. 303 (1961)	33
<u>Jim Arnold Corp. v. Hydrotech Systems, Inc.</u> , 109 F.3d 1567 (Fed. Cir. 1997)	29
<u>Kokoszka v. Belford</u> , 417 U.S. 642 (1974)	20
<u>Lewis v. Grinker</u> , 965 F.2d 1206 (2d Cir. 1992)	21
<u>National Muffler Dealers Ass'n, Inc. v. U.S.</u> , 565 F.2d 845 (2d Cir. 1977), <u>aff'd</u> , 440 U.S. 472 (1979)	20, 35
<u>National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers</u> , 414 U.S. 453 (1974)	37, 38
<u>Peer Int'l Corp. v. Luna Records, Inc.</u> , 887 F. Supp. 560 (SDNY 1995)	61
<u>Philbrook v. Glodgett</u> , 421 U.S. 707 (1975)	20
<u>PPG Industries Inc. v. Guardian Industries Corp.</u> , 597 F.2d 1090 (6 th Cir. 1979)	29
<u>Public Citizen v. Dept. of Justice</u> , 491 U.S. 440 (1989)	21
<u>Quinto v. Legal Times of Washington, Inc.</u> , 506 F.Supp. 554 (D.D.C. 1981)	16

<u>Ratzlaf v. U.S.</u> , 510 U.S. 135 (1994)	20
<u>U.S. v. Ryan</u> , 284 U.S. 167 (1931)	21
<u>S.E.C. v. C.M. Joiner Leasing Corp.</u> , 320 U.S. 344 (1943)	20
<u>Securities Protection Investment Corp. v. Barbour</u> , 421 U.S. 412 (1975)	38
<u>U.S. v. Securities That Represent Robbins</u> , No. 87 Civ. 2544 (RJD), 1987 U.S. Dist. LEXIS 10967 (SDNY 1987)	33
<u>Security Indus. Ass'n v. Bd. Of Governors</u> , 468 U.S. 207 (1984)	32
<u>Shapiro, Bernstein & Co. v. Bryan</u> , 123 F.2d 697 (2d Cir. 1941)	34
<u>Shapiro Bernstein & Co. v. H.L. Green Co.</u> , 316 F.2d 304 (2d Cir. 1963)	61
<u>Shippers Nat'l Freight Claim Council v. ICC</u> , 712 F.2d 740 (2d Cir. 1983), <u>cert. denied</u> , 467 U.S. 1251 (1984)	21
<u>Singer v. Citibank N.A.</u> , 1993 U.S. Dist. LEXIS 6907, * 14 (SDNY 1993)	60
<u>Sygma Photo News Inc. v. High Society Magazine Inc.</u> , 778 F.2d 89 (2d Cir. 1985)	60
<u>Tasini, et al. v. The New York Times, et al.</u> , 972 F. Supp. 804 (SDNY 1997)	1
<u>Tasini, et al. v. The New York Times, et al.</u> , 981 F. Supp. 841 (SDNY 1997)	1
<u>Third National Bank v. Impac, Ltd.</u> , 432 U.S. 312 (1977)	33
<u>TIME Inc. v. U.S.</u> , 359 U.S. 464 (1958)	38
<u>Towne v. Eisner</u> , 245 U.S. 418 (1918)	35
<u>Transamerica Mortgage Advisors v. Lewis</u> , 444 U.S. 11 (1979)	38
<u>Unarco Industries, Inc. v. Kelley Co.</u> , 465 F.2d 1303 (7 th Cir. 1972), <u>cert. denied</u> 410 U.S. 929 (1973)	30

<u>Waterman v. MacKenzie</u> , 138 U.S. 252 (1891)	29
<u>Williams v. Crichton</u> , 84 F.3d 581, 587 (2d Cir. 1996)	57
<u>Wolff v. Institute of Electrical and Electronics Engineers, Inc.</u> , 768 F.Supp. 66 (SDNY 1991)	16

STATUTES

The Copyright Act of 1909, 17 U.S.C. §

§ 1	34
§ 3	34
§ 10	34

The Copyright Act of 1976, 17 U.S.C. §

§ 101	13, 27
§ 103(b)	31
§ 106	passim
§ 117	40, 41
§ 201(c)	passim
§ 201(d)(1)	28
§ 201(d)(2)	28
§ 204	27
28 U.S.C. § 1291	1
28 U.S.C. § 1331	1
28 U.S.C. § 1338(a)	1

LEGISLATIVE HISTORY

H.R. Rep. No. 1476, 94 th Cong., 2d Sess. (1976)	passim
H.R. Rep. No. 2237, 89 th Cong., 2d Sess. (1966)	39, 45
Report No. 473 of the Committee on the Judiciary, 94 th Cong., 1 st Sess. (1976)	40

Copyright Law Revision: Studies Prepared for the Subcommittee on Patents, Trademarks and Copyrights of the Senate Committee on the Judiciary, 86th Cong., 2d Sess., Study No. 11, Divisibility of Copyrights, (A. Kaminstein) (1960) 29

Copyright Office Circular 65, Copyright Registration for Automated Databases (1997) 45

Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 88th Cong., 1st Sess., Copyright Law Revision, Part 2 (House Judiciary Committee Print 1963) 25

Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft, 88th Cong., 2d Sess., Copyright Law Revision, Part 3 (House Judiciary Committee Print 1964) 26, 27

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Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess., Copyright Law Revision (House Judiciary Committee Print, 1961) 25, 27

TREATISES

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 § 10.02 [A] 27, 42
 § 10.02 [B] [4] 27, 30

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 (4th ed. 1984) 19

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MISCELLANEOUS

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William S. Strong, <u>Database Protection After Feist v. Rural Telephone Co.</u> , 41 Journal of the Copyright Society, 34 (1994)	45
<u>The American College Dictionary</u> , (Random House, Inc. 1964)	16, 39
<u>The New Columbia Encyclopedia</u> , (4 th ed., Columbia University Press, 1975)	16, 39
<u>Webster's College Dictionary</u> , (Random House 1997)	32

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This copyright infringement action is based upon the Copyright Act of 1976, as amended 17 U.S.C. § 101, et seq. ("the Act"). Section 301 of the Act gives federal courts exclusive jurisdiction over copyright infringement actions. This action was brought in the United States District Court for the Southern District of New York (Sonia Sotomayor, J.) pursuant to 28 U.S.C. §§ 1331 and 1338(a).

By decision and order dated August 13, 1997, reported as Tasini, et al. v. The New York Times, at al., 972 F. Supp. 804 (SDNY 1997), the Court below denied plaintiffs' motion for summary judgment and granted defendants' motion for summary judgment. Final judgment dismissing the action against all remaining defendants was entered on August 19, 1997. Plaintiffs thereafter moved for reconsideration and reargument.

A notice of appeal from the judgment was filed on September 18, 1997, on behalf of the six plaintiffs-appellants. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. The appeal was withdrawn by stipulation, pending a ruling on the motion for reconsideration and reargument. On November 3, 1997, the Court below denied the motion. Tasini, et al. v. The New York Times, at al., 981 F. Supp. 841 (SDNY 1997), The appeal was reinstated as to the six plaintiffs-appellants on November 18, 1997. A notice of appeal from the order denying reconsideration and reargument was filed on behalf of plaintiffs-appellants Garson and Robbins on December 1, 1997.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1) Whether, in the absence of an express transfer of rights in a freelance article, the privilege provided for in § 201(c) of the Copyright Act permits a publisher to place the article on-line in such a fashion that it is independently retrievable separate and apart from the other articles that originally appeared together with it in an issue of Newsday?

(2) Whether, in the absence of an express transfer of rights in a freelance article, the privilege provided for in § 201(c) of the Copyright Act permits a publisher to incorporate the article into a database and make it retrievable as part of a new anthology or compilation?

(3) Whether a newspaper publisher can transfer the privilege provided for in § 201(c) to a database producer?

(4) Whether plaintiffs-appellants are entitled to the entry of summary judgment on the issue of liability with respect to their copyright infringement claims?

STATEMENT OF THE CASE

This copyright infringement action was brought by freelance writers, including Barbara Garson and Sonia Jaffe Robbins, to redress certain actions taken by three periodical publishers, including Newsday, Inc. (hereinafter the "publisher defendants") and two electronic database producers, including Mead Corporation (hereinafter the "database defendants"). Specifically, the publisher defendants granted licenses to the database defendants to incorporate articles

that had appeared in their publications, including plaintiffs' freelance articles, into their electronic databases. Plaintiffs were never asked to consent to this re-use of their articles and never transferred any rights in their articles to either set of defendants.

After discovery, both plaintiffs and defendants moved for summary judgment. Appellants Garson and Robbins claimed infringement of their exclusive rights under § 106 of the Act arising out of the unauthorized re-use in an electronic database of the articles they had written for publication in Newsday. Newsday and Mead defended their actions by invoking the privilege that is provided for in § 201(c) of the Act.

The Court below heard oral argument on October 17, 1996 and requested a demonstration of the CD-ROM products at issue in the action. This demonstration was held on December 10, 1997.

By opinion and order dated August 13, 1997, the Court below granted summary judgment to defendants, denied plaintiffs' motion for summary judgment and dismissed the action. Plaintiffs thereafter moved for reconsideration and reargument. That motion was denied.

STATEMENT OF FACTS

The Parties and Their Claims

Plaintiff-appellants Barbara Garson and Sonia Jaffe Robbins¹ are two freelance writers who for the past several years have earned their living by writing articles for publication in a variety of newspapers

¹ Unless the context suggests otherwise, the terms "plaintiffs," "appellants" and "plaintiff-appellants" shall refer to plaintiff-appellants Barbara Garson and Sonia Jaffe Robbins.

and magazines, including the daily newspaper published by defendant Newsday Inc. (A408)². Their complaint concerns five articles that they wrote for publication in Newsday that Newsday, Inc. then delivered to Mead,³ pursuant to a standing license, for inclusion in the NEXIS database.⁴ (A59-62, A65-68). NEXIS is an on-line, electronic, computer assisted text retrieval system that is owned and operated by Mead. (A409).

Newsday Inc. provided the articles to Mead and Mead incorporated them into its database without obtaining plaintiffs' consent, without compensating plaintiffs, and without notifying them that the articles were being re-used. (Exh.10; Exh.12; A420-422)⁵.

Each of the plaintiffs is the sole author of the articles she wrote, (Exh.25), and holds the copyright in each of those articles. (A194-196, A203-209). Defendant Newsday Inc. holds the copyright in the five issues of Newsday in which the articles appeared. (A157-193; Exh. 40 M003709-3711 at ¶¶ 1.2 and 3.2). Neither of the plaintiffs was ever employed by defendant Newsday and none of the five articles was written as "work made for hire." (A410, 444 n.11; Exh.22 ¶ 1,2,27).

² References to pages in the Joint Appendix and the Confidential Joint Appendix will be indicated as (A__) and (CA__).

³ Although NEXIS is currently owned and operated by LEXIS/NEXIS, appellants shall continue to refer to defendant "Mead" in conformity with the District Court's opinion.

⁴ Plaintiff Garson wrote four of these articles, entitled: "Health Care vs. Death Care", "The Common Good Is Swept Aside by the 'Me Generation'", "In 'JFK' We Feel the Pull of Our Lost Innocence", "Networks that Serve the Unconnected." (A60). Plaintiff Robbins wrote one article, entitled "I Say Legal They Say Dirty." (A66)

⁵ "Exhibit" citations refer to exhibits to the Bass affidavit (A81-125), originally submitted in support of plaintiffs' motion for summary judgment, and are part of the record below.

It is undisputed that plaintiffs never expressly transferred any rights in the five articles to Newsday prior to their publication.

(Exh.22 ¶26)

Plaintiffs claim that, by incorporating their articles into NEXIS, the defendants⁶ have infringed the copyrights they hold in their articles. (See A59-62, A65-68). Mead defends its right to include the articles in NEXIS on the basis that any "rights" it needed it got from Newsday Inc. (Exh.8 ¶¶ 372, 424) Newsday, in turn, defends its right to provide the articles to Mead on the ground that it has merely exercised the "privilege" it has been afforded by section 201(c) of the Act. (A A80). The Court below found that the articles *could* be included in NEXIS since the electronic database is so "substantially similar" to the individual issues of Newsday in which the articles originally appeared as to require the conclusion, as a matter of law, that NEXIS is simply a "revision" of those issues within the meaning of 17 U.S.C. § 201(c). (A455-457).

The Arrangement Between Newsday and Mead

In April of 1988, Newsday Inc. entered into a contract with Mead that purported to afford Mead the right to place articles from issues of Newsday on-line and make them individually retrievable. (Exh. 40 M003709-19). Towards this end, Newsday granted Mead the right

(1) to make machine-readable copies of all or any portion of the licensed materials that were delivered to it on a daily basis and

⁶ Unless the context suggests otherwise, the term "defendants" or "appellees" shall refer to Newsday Inc. and Mead.

to store such materials in electronic storage and retrieval systems.

(Exh. 40 M003709 at ¶ 1.1);

(2) to prepare machine-readable concordances that would match up the key words a subscriber selected with the individual articles encoded for those words (Exh. 40 M003709 at ¶ 1.1);

(3) to distribute machine-readable and visually perceptible copies of any articles that 'matched' (Exh. 40 M003709 at ¶ 1.1), and, finally;

(4) to authorize its subscribers to make machine-readable, electronically displayed, visually perceptible and printed copies of such articles, either alone or in combination with materials from thousands of other periodicals and publications. (Exh. 40 M003710 at ¶¶ 1.1, 3.1).

The contract specifically provided that selected syndicated materials and freelance materials were to be excluded from the materials placed on line. (Exh. 40 M003719 at ¶ II).

Newsday Publishes Its Paper

As the evidence in this case demonstrates, the only things on which an editor and freelance writer generally agree are the topic for an article, the article's length, the date by which it is due and the fee that will be paid for its use in the paper. (A264, A410-411). The writer then writes and submits the story and it is input into the publisher's computer system. (A88, A287). After the story is in final form, typesetting instructions are added to the electronic file so that when the time comes, the story will be printed out by the

typesetter in a form and configuration that fits together with the other pieces of the "collective work" puzzle. (A88, 287). Editors and publishers spend a "great deal of time and effort" choosing the particular stories, articles, news items, editorials, letters, pictures, photographs, graphics, captions and headlines that should appear together in one day's paper and seeing "that text, graphics, and layout work together on every page to provide the most communication value to the reader." (Exh. 40 U002948).

Once all of the pieces of the puzzle have been assembled, they are cut out and pasted onto "mechanicals" to form a visual representation of each page of the collective work. (A88-89, A287-288). The collective work consists of a complete set of these mechanicals. (A88-89, A287-288).

The mechanicals are then photographed and negatives produced from the photograph. (Id.) Plates are then made from the negatives and the newspaper printed from the plates. (Id.) Each article that is included in the newspaper appears as an inextricable part of the collective work. (See, e.g., A126-135).

After each issue is "put to bed," Newsday turns its attention from the production of its newspaper to the task of feeding NEXIS' database. (A90-97) As we will see, that requires a never-ending supply of individual text files that are so coded and configured as to be capable of being separately accessed, retrieved, distributed, displayed and printed out. (A91-97, A279, A288-289).

Newsday Transfers Data To Mead

Pursuant to their license agreement, within twenty-four hours of publishing an issue of its newspaper, Newsday Inc. would deconstruct its collective work and send Mead a stream of individual text files, each of which contained an article that had appeared in that day's paper. (A95-96, A244-245; Exh.22 ¶ 22). It did so for the express purpose of enabling Mead to add each of these articles to NEXIS and to make each article available to its subscribers. (A94-95, A118, A244-245, A279, A413-414; Exh.22 ¶ 24; Exh.40 M003709). All of the articles that appeared in each day's issue were sent to Mead in this fashion. (A413-414).

The parties and their agreement contemplated that subscribers would then use the LEXIS/NEXIS service to search for and retrieve documents. (Exh.40 M003709-3710; Exh. 50 M003090). Specifically, they contemplated that LEXIS/NEXIS' subscribers would "locate articles on the NEXIS database through the use of conjunctive or 'Boolean' searches." (A279). Once they had located articles, the parties and their agreement further contemplated that LEXIS/NEXIS' subscribers would be able *inter alia* ". . . to access, browse, down-load or print out articles [that they had found in a search]. . . related to a specific topic . . .". (Id.).

It was contemplated that LEXIS/NEXIS' subscribers would locate and retrieve articles from different periodicals and publications and different issues of the same periodical. (Exh. 22 ¶¶ 58, 59, 60; Exh.40 M003710). It was further contemplated that the LEXIS/NEXIS' subscriber

would "retrieve an article from NEXIS without also retrieving other articles which appeared together with the retrieved article in the print edition of a publication." (Exh. 22 ¶¶ 13, 14). Each article that was retrieved "appears alone: there are no photographs or captions or columns of text." (A413-415).

Newsday processed the data that it sent to Mead in a fashion that was intended to facilitate LEXIS/NEXIS' "update" function and the search and retrieval capabilities of its customers.⁷ (A94-A99; Exh. 34, pp.66-69). Towards this end, Newsday's employees organized its data "into a format" that had been agreed upon with Mead. (Exh.22 ¶ 40; Exh.40 N000064, Exh.49 M003501-3503, M003822-3833). They excluded photographs, maps, charts and other graphics and advertisements, weather reports, comics, cartoons, cross word puzzles, sports schedules, stock tables, movie and TV listings, selected syndicated materials and paid death notices from the materials that were to be sent. (Exh.22 ¶¶ 12, 16, 55, 56; Exh 40 M003719). Then they organized the text files that remained so that each data file or record that was sent contained, at most, the text of one article or story. (A94-95, A287-288; Exh. 49 M003823-003825;).

Before the files were sent, Newsday stripped each file of the formatting codes and instructions, including typesetting commands, that had enabled the text of an article to be printed as part of the collective work. (A92, A244). Conversely, it added electronic markers to each file concerning the page, section and date of the issue in

⁷ Mead refers to the process of adding data to its central database as "updating" the NEXIS database. (A99; Exh. 34, p.66-68).

which an article had appeared - precisely because anyone who subsequently retrieved the article would retrieve only the article and not the entire issue and wouldn't, therefore, be able to ascertain this information simply by a visual inspection of the page.⁸ (A93-94; Exh. 22 ¶ 56). In addition to adding information regarding the original placement of the article, Newsday designated words - known as "key words" and "index terms" - to associate with each file or article. (A94, A288). The words were supposed to capture the theme of the article or otherwise relate to its contents. (Exh. 35 p. 15; Exh. 34 p. 45). Once they were selected, the files to which these words related were electronically tagged so that anyone initiating a search for a "key word" or "term" would be lead to any associated files and articles. (A94-95, A279, A288). Once each file was completely coded and tagged, it received a unique "access" or "accession number." (A94; Exh. 35 p. 25). At an appointed time each day, these files were transmitted on to Mead. (A95; Exh. 35, p. 65).

Each of these steps was taken for the express purpose of so electronically configuring and marking the files that, after being added to the NEXIS database, they could be searched for and retrieved by NEXIS' customers - by headline, name of author, type of piece (i.e., op-ed, series piece, bio, etc.), periodical, date, names of companies that appeared in the article, key words, basic topics or

⁸ Significantly, the markers caused this information to be displayed together with the text to which it related only *once* an article was retrieved from the database. (Exh.34, pp. 43-45)

themes, etc. - either as individual articles or in combination with articles from other publications. (A279, A297-298).

Mead Processes The Data
And Updates Its Database

During the period in question, Mead received data not only from Newsday, but from 10,000 other "information sources," as well. (Exh. 23 ¶¶ 49-51). By 1996, these sources included approximately 5,800 newspapers and periodicals. (A299-316, A341). The materials from some of these sources date back more than twenty years. (A299-316). The materials from other sources date back only one year. (Id.)

Although the data that it receives derives from different sources, Mead treats all of it in essentially the same fashion. It takes steps to convert the data into a format that will enable it to add the data to its NEXIS database and it associates additional keywords, topic identifiers and indexing terms with individual article-files so as to further enhance their searchability. (A97-99). Once the conversion and enhancement processes are complete, like the publishers before it, it assigns each article a *unique* accession number. (A99).

At regular intervals, it then adds all of the new data that it has received to the NEXIS database. (A99-100). This process, which it calls "updating", creates a new generation of database. (Id.).

As a result of the data it is continuously being fed and this constant process of "updating," by 1992, the NEXIS database contained over 322 million documents and was growing by an average of 2.5 million additional documents a week. (Exh. 49 M003218).

At all times during this period and the period pertinent to the complaint, Newsday had the authority to preclude Mead from incorporating plaintiffs' articles into its NEXIS database or to require Mead to remove them from the database. (Exh. 40 M003711 at ¶ 3.4). It never exercised that authority. (See, e.g., A60-61; Exh. 8 ¶ 372, 375). As a consequence, plaintiffs' articles are still on-line, see (A61, A67, A141-143; Exh. 8 ¶¶ 375, 377, 427), although they would be easy to remove. (A322 at ¶13). In the form in which they are made available by the database, they display a copyright notice stating: "Copyright, year Newsday, Inc." (A141; Exh.2).

At least one defendant in this case appears to have internally acknowledged that this infringes the contribution author's copyright. (CA3-4)⁹.

SUMMARY OF ARGUMENT

In the beginning was the "Doctrine of Indivisibility."

In 1976, Congress created a new copyright law, instituting a new regime. Repudiating the doctrine of indivisibility, it provides for the complete and total *divisibility* of copyright. Such legislative policy decisions are not lightly made. Once made, they must inform every judicial interpretation.

While wrestling with novel issues of first impression, the Court below inadvertently revived the indivisibility doctrine, the "new property rights theory" and the "sweat of the brow doctrine", turning

⁹ The defendants have insisted that these two documents must remain 'under seal.' As a consequence, they have been included in a separate appendix designated the "Confidential Appendix."

the 1976 Copyright Act on its head. It granted defendants summary judgment in this case on their affirmative defense under section 201(c) of the Copyright Act (A80) and, in so doing, eclipsed the rights that freelance authors had been given under that same section.

Specifically, the Court below held that when the defendants incorporated each of plaintiffs' articles into their NEXIS and CD-ROM databases and made each available for retrieval, they were merely reproducing and distributing the freelance article "as part of. . .a[] revision of th[e] particular collective work"¹⁰ in which the article had originally appeared. Thus, the Court concluded that the defendants could assert a valid "privilege" against plaintiffs' copyright-infringement claims *under the second of § 201(c)'s three phrases*.¹¹ The decision below rests on the conclusion that the databases at issue in the case are simply "revisions" of issues of the publisher-defendants' periodicals. This conclusion, in turn, rests upon its subsidiary finding, as a matter of law, that the proper test for a revision is the same threshold of substantial similarity as is used for infringement claims, and that each of the databases is "substantially similar" to each of the individual issues. In this brief, we address the 10 claims of appellants Barbara Garson and Sonia

¹⁰ Section 101 of the Act defines a "collective work" as a work "such as a periodical issue, anthology, or encyclopedia, . . . in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." (emphasis added)

¹¹ We shall refer to the three italicized phrases in the sentence quoted above, containing the statutory privilege at issue in this case, as the "first phrase," "second phrase" and "third phrase."

Jaffe Robbins against Newsday Inc. and Mead, and the defendants' §
201(c) affirmative defense.

Section 201(c) reads:

Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or 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, any revision of that collective work, and any later collective work in the same series.*

17 U.S.C. § 201(c) (emphasis added).

Both the conclusions the Court below reached regarding §201(c) and the statutory interpretation upon which they rest are fundamentally flawed. Indeed, its construction of § 201(c)'s second phrase *ignores* the remainder of the sentence in which the phrase appears, the remainder of the section in which it appears, the remainder of the Copyright Act as a whole, the underlying purpose behind the Act, and the relevant legislative history. (See, Point I, post. at pp. 19-41)

As a consequence of having read the phrase "any revision of that collective work" without reference to its statutory context or history, the Court below has misconstrued every aspect of "the privilege" at issue. Even if it had misinterpreted only one aspect of the section, the decision below would have to be reversed.

Properly construed, far from giving Newsday an "ownership interest" in freelance contributions that it could convey to Mead, the

section only gave Newsday what was in effect a mechanical license to produce and distribute its issues. Thus, it gave Newsday the privilege of reproducing and distributing a freelance submission **as part of** the same issue in which the article first appears - such as the morning edition of a paper; **as part of** any revision of that issue - such as an evening or regional edition of the same issue; and **as part of** a later issue "in the same series," i.e., a later issue of the same newspaper.

By removing plaintiffs' articles from the context of the periodicals in which they appeared and incorporating them into the databases at issue, defendants have violated three cardinal rules: (1) They have permitted plaintiffs' contributions to be reproduced and distributed as part of works that are not the original publisher's collective works. (2) They have authorized plaintiffs' contributions to be reproduced and distributed as stand-alone works (i.e., not "as part of" anything). And, (3) they have reproduced and/or distributed or authorized the reproduction and distribution of the contributions as part of new anthologies and collective works that contain articles, pages and/or sections from thousands of other periodical issues and publications. This is precisely what the legislative history makes clear they cannot do. See, H.R. Rep. No. 1476 at 122-23 (the publisher of a collective work containing a freelance contribution cannot "revise the contribution itself or include it in a new anthology or an entirely different magazine or other collective work.")

In the final analysis, plaintiffs' argument on the § 201(c) claims is essentially the same as the argument that was made in Quinto v. Legal Times of Washington, Inc., 506 F.Supp. 554 (D.D.C. 1981) and Wolff v. Institute of Electrical and Electronics Engineers, Inc., 768 F.Supp. 66 (SDNY 1991): defendants hold only the copyright in the collective work they created and cannot exercise the copyright in a freelance writer's contribution.¹² This means that they can't authorize their distribution either as independent articles or as part of new anthologies or collective works or convey an ownership interest to third parties.

The Court below did not so much reject the first two of these three arguments as avoid them. It held that even if an article is reproduced and distributed on a stand-alone basis or as part of a new and different anthology or collection of articles,¹³ it is still, somehow, "part" of the collective work in which it originally appeared or a "revised version" of that collective work. The Court justified this holding on the grounds that:

(a) a citation is displayed with each article that is retrieved from the NEXIS database that indicates the title and date of the periodical issue in which the article originally appeared, and that

(b) since all of the other articles that originally appeared together with the retrieved article in that periodical issue are also "present" in the database, they could, theoretically, also be retrieved.

¹² The term "contributions" is used in the section to mean freelance works--such as an article or photograph--contributed to an issue of a periodical.

¹³ An "anthology" is a "collection of literary pieces of varied authorship." The American College Dictionary (Random House, Inc. 1964) at p. 52; see also The New Columbia Encyclopedia (4th Ed., Columbia University Press, 1975) at p. 116.

The fact that the District Court's assumptions don't justify its conclusion becomes readily apparent when one considers the following scenario: Assume that, after receiving an issue of Newsday for Tuesday, February 3, 1998, the proprietor of a newsstand

- 1) xeroxes several copies of it,
- 2) cuts each copy up into bits and pieces - with each piece containing no more than one article, one photograph, one cartoon frame, one chart, one editorial, one map, one advertisement, one letter-to-the-editor, etc.,
- 3) and stockpiles the bits and pieces at his newsstand.

Assume, further, that at all times he has at least one copy of each and every component of that evening's paper on hand in his stall.

A customer comes by at 6:35 p.m. and says: "I don't really have time to read tonight's paper, I just want to know what the latest is on the sex scandal out of Washington." The newsstand proprietor hands him one photograph or one news story. Has the customer received a complete "issue" of that day's Newsday? Has he received something substantially equivalent or similar?

Does the fact that all of the other elements of the paper are still at the newsstand or in the hawker's bag mean that the passerby has been given anything more than an individual article from a newspaper? That he or she has been given an original or revised issue of a newspaper? Obviously not. Does making a freelance article available in this fashion, by itself, violate the freelancer's rights? Obviously.

Now assume one further fact: i.e., that just as the proprietor of the newsstand hands a customer a one-article bit or piece, he stamps it with one or another of the following two legends: "Appeared in the February 3, 1998 issue of Newsday," or "Source: Newsday, February 3, 1998."

Does this change matters? Does the customer who walks away with an article carrying that citation get a complete "issue" of that day's Newsday? Has he received something substantially equivalent or similar to that collective work? Again, obviously not.

Assume still a few further facts: that the proprietor of our newsstand has been following this same procedure each day for the past twenty-one years, copying and cutting up hundreds of thousands of issues of different periodicals. By this point, he has amassed a stockpile of at least 322 million one-article or one-photograph bits and pieces. Not only are they in no particular order, but neither can it be determined how any of the articles relate to each other by looking at them *as they lie in the stockpile*.¹⁴

Can the newsstand proprietor's stockpile be said to represent a single issue of Newsday? The February 3, 1998 issue of Newsday? A revision of that issue? A later collective work in the same series? Again, obviously not.

¹⁴ You will recall that we assumed earlier in the scenario that the newsstand proprietor stamps a bit or piece *just as* he is handing it to a customer. Before being handed out, i.e., while the piece remains in the stockpile, it doesn't bear a citation or legend. (See, Statement of Facts, ante at p.10 n.7).

Finally, assume that when a customer comes by, the newsstand proprietor hands him a stack of page-images that hail from many different periodicals.

Has the customer received a complete issue of Newsday or any other collective work whose parts have made their way into the stockpile? Something substantially equivalent or similar to an issue of Newsday?

The answers, of course, are "no" and "no." What the customer has been given is a new anthology or compilation of materials from different periodicals, and not anything that would be recognizable by anyone as an issue of the original collective work.

ARGUMENT

I. THE MEANING OF SECTION 201(c).

This Court may review the issues presented in this appeal de novo. This is a case of first impression. Fonar Corp. v. Domenick, et al., 105 F.3d 99, 102 (2d Cir. 1997)

A. The Court's Construction: A Focus Limited To The Two Words "Any Revision."

When a statute sets forth exceptions to a general rule, the exceptions are to be narrowly construed.¹⁵ See e.g., Commissioner v. Clark, 489 U.S. 726(1989) (it is standard to read statutory exceptions narrowly in order to "preserve the primary operation of the general

¹⁵ The one who claims the benefit of the exception has the burden of proving that his, her or its claim comes within it. See generally Sutherland, Statutes and Statutory Construction § 47.11 (4th ed. 1984).

rule"). The Court below not only violated this cardinal rule of construction, but other fundamental canons of construction, as well:

. It construed only two words--"any revision"-- in the statutory provision and not the statute as a whole. See, Gustafson v. Alloyd Co., Inc., 513 U.S. 561(1995) (It is the duty of a court to construe a statute, and not an isolated word, phrase or provision); Philbrook v. Glodgett, 421 U.S. 707, 713 (1975); Kokoszka v. Belford, 417 U.S. 642, 650(1974).

. It construed the two words "any revision" without any reference to the phrases that followed them and preceded them -- indeed, without reference even to the words of limitation--"of that collective work"-- that immediately followed them in the same phrase. See, Gustafson, supra; National Muffler Dealers Ass'n v. U.S., 565 F.2d 845 (2d Cir. 1977) (words--like newspaper articles--gather meaning from other words that follow and precede them and must be read in context).

. It failed to give independent effect to each of the phrases in the sentence it was construing--most particularly the phrase "any later collective work in the same series." See, Ratzlaf v. U.S., 510 U.S. 135 (1994) (statutes should be read so far as possible to give independent effect to all of their provisions).

. It construed the publisher's privilege in the second sentence of § 201(c) without reference to the preceding sentence and without any reference to the underlying purpose of the statute. See, e.g., S.E.C. v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943) (courts

will construe the details of a statute "in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out. . .the generally expressed legislative policy"); Lewis v. Grinker, 965 F.2d 1206, 1215 (2d Cir. 1992).¹⁶

. Rather than consult the pertinent legislative history when it found the language of the phrase it was construing ambiguous, it dismissed the legislative history as "impenetrable." (A424). See, Blum v. Stenson, 465 U.S. 886, 896 (1984) (when language ambiguous, look to legislative history).¹⁷

. And, finally, instead of avoiding a construction of the statute that might render it unconstitutional, it embraced such a construction.¹⁸ See, Public Citizen v. Dept. of Justice, 491 U.S. 440,

¹⁶ Obviously, the "mere incantation of the plain meaning rule . . . cannot substitute for meaningful analysis." Shippers Nat'l Freight Claim Council v. ICC, 712 F.2d 740, 747 (2d Cir. 1983), cert den'd, 467 U.S. 1251(1984). Where a literal application of a statute would "lead to absurd consequences", it is to be rejected in favor of a "reasonable application. . .which is consistent with the legislative purpose." United States v. Ryan, 284 U.S. 167, 175(1931); see Aviation Consumer Action Project v. Washburn, 535 F.2d 101, 106 (D.C. Cir. 1976) (the "plain meaning doctrine has always been considered subservient to a truly discernible legislative purpose."). The brief of amici curiae American Society of Media Photographers et al. discusses the Act's purpose at length.

¹⁷ Ironically, the one instance in which the Court below relied on House Report 94-1476, the single most important pronouncement on the meaning of the sentence it was construing, it did so on a point on which the language of the statute was unambiguous. See Point III (B) of Ms. Felch's Brief re: inapplicability of § 201(c). It thereby created an ambiguity instead of clarifying one.

¹⁸ It is respectfully submitted that a construction of the section that would vitiate or eclipse explicit author-publisher agreements would be unconstitutional. Such a construction should be avoided. See Ms. Felch's brief at III (B).

465-466 (1989) (a construction that would cast doubt upon a statute's constitutionality should be avoided).

As a result of its overly broad reading of the words "any revision" in § 201(c)'s second phrase, the Court below rendered both the very carefully delineated phrases that followed those words and the general rule that preceded the phrase essentially meaningless.

The meaning of § 201(c) becomes clear, however, so long as one reads the words "any revision" in context--i.e., in accordance with the basic canons of construction-- and, where there is any ambiguity, in accordance with the pertinent legislative history. As will hereinafter be shown, none of § 201(c)'s words or phrases is superfluous or inconsistent, and the section's second sentence--the exception that states the publisher's limited privilege--is not only fully compatible with the first--i.e., the general rule--but also with the statute's overarching purpose.

As we shall further see, once examined, the legislative history fully confirms the accuracy of appellant-freelancers' reading.

B. The True Meaning Of Section 201(c): Reading
The Words And Phrases In The Section In Context
And In Conformity With The Act's Purpose.

The starting point in statutory interpretation is 'the language [of the statute] itself'. United States v. James, 478 U.S. 597, 604 (1986) (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring)). We shall examine § 201(c)--in particular, the second sentence that delineates the publisher's privilege to use author's contributions in the absence of an express

transfer--in two ways: first by examining the elements of the sentence as discrete elements and then determining how they relate to other phrases of § 201 and other parts of the Act.

The operative sentence relied upon by defendants and the Court below has five essential parts. Each serves a different purpose:

basic purpose of the element	statutory language
condition precedent to application of the privilege	In the absence of an express transfer of the copyright or any rights under it,
person upon whom standing to invoke the privilege is conferred	the owner of copyright in the collective work is presumed to have acquired
limited exception	only the privilege of
specific permission covered by the privilege	reproducing and distributing the contribution
scope of the privilege	as part of (1) <i>that particular</i> collective work, (2) any revision of <i>that</i> collective work, and (3) any later collective work <i>in the same series</i> .

Read as a whole and in context, the section makes clear that:

- 1) the three-part "privilege" provided for belongs to the owner of copyright in the collective work in which the article first appeared and cannot be transferred to a third person;
- 2) the second phrase of § 201(c), like its first and third phrases, contemplates only reproduction and distribution as part of a "collective work;"
- 3) all three phrases contemplate only reproduction and distribution in collective works *of the same publisher*;
- 4) the second phrase was never intended to have the scope the Court below accorded it;

- 5) among other things, it was never intended to permit the inclusion of contributions in a later collective work in a different series or a later work that is not a collective work;
- 6) it cannot be accorded the scope the court below accorded it *without* rendering both the remainder of the section and other provisions of the Act meaningless; and, finally,
- 7) whatever else the second phrase may or may not mean, a *single* article standing alone cannot constitute a "revision" of a collective work. It is single articles, however, that NEXIS publishes.

We will briefly examine each of these conclusions.

1. § 201(c) Provides The Owner Of Copyright In A Collective Work With A Personal "Privilege" And Not A Transferable Property Interest.

It is clear beyond peradventure that a publisher does not secure an ownership interest in a freelance author's contribution under § 201(c), absent an express transfer of such an interest.

- a. The Language, Structure And History Of The Act Confirm That The § 201(c) Privilege Was Not Intended To Be Transferable.

It is clear from the legislative history - in particular, the history concerning the rejection of an earlier version of the section - that, in its final form, § 201(c) does not confer a right on periodical publishers *that is transferable*. The careful distinction in § 201(c) between a "transfer" of rights, on the one hand, and a "privilege" to publish, on the other, emerged from a drafting process that had focused on this very issue.

An earlier draft of the 1976 Copyright Act had provided that a publisher could include a particular contribution in the original collective work to which a freelance author contributed it and "in a

similar composite work."¹⁹ One person who spoke out on behalf of author's--author's advocate Harriet Pilpel--complained that the language was objectionable because it would permit one print publisher (i.e., the publisher of the newspaper or journal that originally included the contribution) to license or sell it for inclusion in another publisher's "similar" publication, thereby co-opting a right that freelancers would otherwise have been able to exercise. See, Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 88th Cong., 1st Sess., Copyright Law Revision, Part 2 (hereinafter "Comments, Part 2"), pp. 151-153 (House Judiciary Committee Print 1963). A consortium of book publishers registered a similar complaint:

[W]e would have no objection to the foregoing [i.e., to the phraseology in the original recommendation] if the phrase 'except the right to publish it in a similar composite work' had been worded so that as to composite works other than periodicals, the publisher may issue revised editions, *but without the right of assignment to another publisher.* In the case of a periodical, we believe that the right of publication should be restricted to the particular issue.

Statement of the Joint Copyright Committee of American Book Publishers Council, Inc. and American Textbook Publishers Institute (emphasis and material in brackets added), "1961 Report" at p. 230.

¹⁹ The actual language of the Register's original recommendation was somewhat more convoluted. It provided that publishers would continue to secure the copyright in individual contributions and "hold in trust for the [freelance] 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." Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess., Copyright Law Revision (hereinafter "1961 Report") (House Judiciary Committee Print, 1961) at p. 88.

In response to these objections, the Copyright Office withdrew the overly broad "similar composite work" proposal and substituted a much more narrowly drawn proposal in its stead. The new version of § 201(c) deleted the reference to "right[s]" and afforded publishers only "the privilege" of publishing a contribution in "that particular collective work." In a statement accompanying the transmittal of the preliminary draft bill in 1964, General Counsel for the Copyright Office confirmed that the provision had been redrafted so as to meet these objections:

In the course of our previous discussion of ... [the 1961 Report], strong arguments were made that *there should not be a presumption of transfer of ownership, in the absence of an express transfer*, of the right to publish the contribution in a similar collective work. *We have adopted that argument ...*

Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft, 88th Cong., 2d Sess., Copyright Law Revision, Part 3 (hereinafter "1964 Preliminary Draft") (House Judiciary Committee Print 1964), p. 258, Comments of Copyright Office General Counsel (emphasis added). Accordingly, the 1964 bill referred to a "privilege" of publishing a contribution "in that particular collective work." Although subsequent changes expanded on the phrase "that particular collective work,"²⁰ they did not affect the distinction established in § 201(c) between a transfer and a privilege.

²⁰ This took place, essentially, in two stages. The first stage involved permitting the *original* publisher, in addition to including a contribution in "that particular collective work," to include it in any revised editions it created. The second stage involved further permitting the original publisher to include a contribution in a later issue of the *same* periodical.