

97-9181(L), 97-9650(CON)

To Be Argued By  
BRUCE P. KELLER

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United States Court of Appeals  
*for the*  
Second Circuit

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JONATHAN TASINI; MARY KAY BLAKELY; BARBARA GARSON;  
MARGOT MIFFLIN; SONIA JAFFE ROBBINS and DAVID S. WHITFORD,

*Plaintiffs-Appellants,*

BARBARA BELEJACK; DANIEL LAZARE; JOAN OLECK and  
LINDSY VAN GELDER,

*Plaintiffs,*

— v —

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

*Defendants-Appellees,*

THE ATLANTIC MONTHLY COMPANY,

*Defendant,*

AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC., ET AL.,

*Amicus Curiae*

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

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**BRIEF FOR DEFENDANTS-APPELLEES**

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Dated: March 17, 1998

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Civil Procedure, defendant-appellee The New York Times Company states that it has no corporate parents, no subsidiaries and no affiliates that have issued shares to the public.

Pursuant to Rule 26.1 of the Federal Rules of Civil Procedure, defendant-appellee Newsday Inc. states that the following are corporate parents, subsidiaries or affiliates that have issued shares to the public: The Times Mirror Company.

Pursuant to Rule 26.1 of the Federal Rules of Civil Procedure, defendant-appellee Time Inc. states that the following are corporate parents, subsidiaries or affiliates that have issued shares to the public: Time Warner Inc.

Pursuant to Rule 26.1 of the Federal Rules of Civil Procedure, defendant-appellee University Microfilms Inc. states that it has no corporate parents, no subsidiaries and no affiliates that have issued shares to the public.

Pursuant to Rule 26.1 of the Federal Rules of Civil Procedure, defendant-appellee LEXIS/NEXIS (formerly known as Mead Data Central) states that the following are corporate parents, subsidiaries or affiliates that have issued shares to the public: Reed Elsevier Inc.

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<u>Full Title of Source</u>	<u>Short Form</u>
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Bill, 89th Cong., 1st Sess., Copyright  
Law Revision, Part 6 (H. Judiciary  
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## ISSUE PRESENTED

Does Section 201(c) of the Copyright Act, which authorizes publishers of collective works to reproduce and distribute original and revised versions of those works, extend not just to paper and microfilm copies, but also to the NEXIS computerized library and UMI CD-ROMs in dispute?

## PRELIMINARY STATEMENT

This is an appeal from the final judgment of the United States District Court for the Southern District of New York (Sotomayor, J.) dismissing, on cross-motions for summary judgment, the amended complaint for copyright infringement of the Tasini and Garson Appellants.<sup>1</sup> The decision of the District Court is reported at 972 F. Supp. 804 (S.D.N.Y. 1997). The decision of the District Court

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1. "Tasini Appellants" refers to Appellants Tasini, Blakely, Mifflin and Whitford. "Garson Appellants" refers to appellants Garson and Robbins. The claims of four other original plaintiffs below were voluntarily dismissed prior to the cross-motions for summary judgment. "Tasini Br." refers to the Brief for Plaintiffs-Appellants Tasini, Blakely, Mifflin and Whitford, dated Feb. 3, 1998; "Garson Br." refers to the Brief for Plaintiffs-Appellants Garson and Robbins, dated Feb. 3, 1998; "ASMP Br." refers to the Brief of American Society of Media Photographers, Inc., et al. as Amici Curiae, dated Feb. 3, 1998.

denying Appellants' motion for reconsideration is reported at 981 F. Supp. 841 (S.D.N.Y. 1997). This brief is submitted on behalf of Appellees The New York Times Company ("Times Co."), Time Inc. ("Time") and Newsday, Inc. ("Newsday"), publishers, respectively, of The New York Times, Sports Illustrated and Newsday, as well as LEXIS/NEXIS and University Microfilms, Inc. ("UMI"), responsible for, respectively, the NEXIS computerized library of periodicals and the microfilm and CD-ROMs containing copies of the periodicals at issue.

#### STATEMENT OF THE CASE

1. The Nature Of This Case And The Proceedings Below.

This copyright infringement action originally was brought by ten freelance writers who are members of the National Writers Union ("NWU"), which designed and funded the lawsuit. (Ex. C-1 at 94-96, Ex. C-4 at 94, Ex. C-5 at 74.)<sup>2</sup> These writers contributed articles to The New York

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2. "Ex." citations refer to exhibits to the Declaration of Bruce P. Keller, dated March 15, 1996, submitted in support of defendants' motion for summary judgment below.

Times, Newsday and Sports Illustrated, for which they were paid in full. (JA 376-390.)<sup>3</sup>

The 69-page, 515-paragraph, single-spaced Amended Complaint ("Complaint"), contends the infringements occurred when issues of The New York Times, Newsday and Sports Illustrated, including Appellants' articles, were included in the NEXIS computerized library of periodicals and UMI's CD-ROM discs. The Complaint alleged that because plaintiffs granted only "first, one time, North American *print publication* rights" to their contributions, once those contributions appeared "in a printed edition" of the periodical to which the articles were submitted, the publishers' "rights were fully exhausted." *See, e.g.*, Complaint ¶¶ 32, 75, 118 (JA 16, 22, 28) (emphasis added). Under this theory, any reproduction and distribution of plaintiffs' articles in non-print versions of The New York Times, Newsday and Sports Illustrated, including microfilm, exceeds the scope of the grant and infringes their copyrights. *See, e.g.*, Complaint ¶¶ 48, 91, 134 (JA 18, 24,

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3. References to the Joint Appendix are indicated as "JA \_\_\_".

29-30). At their depositions, however, the Appellants took inconsistent positions as to whether their alleged "print only" grant made microfilm an infringing format. Compare Ex. C-1 at 112 (microfilm copies infringe unless such rights "specifically" granted) with Ex. C-4 at 27 (microfilm copies do not infringe because they end up in "libraries, where they are not used for profit").<sup>4</sup>

Notwithstanding the allegations in the Complaint, it was undisputed below that none of the Appellants ever requested, let alone contracted for, any "print only" limitation. (JA 378-79, 381-82, 384-86, 388-89.) As the District Court properly observed, absent any such restriction, the express terms of Section 201(c) of the Act, 17 U.S.C. § 201(c), govern and convey to publishers of collective works the authority to revise their periodicals and to reproduce and distribute copies via the NEXIS and CD-

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4. This inability to reconcile "the copyright implications of microfilm" did not escape the District Court. (JA 433-34 n.7.) On appeal, Appellants' continued insistence that copies published in the electronic equivalent of microfilm are infringing ultimately exposes all that is wrong with their interpretation of the Act. See infra pp. 50-55.



ROM formats (as well as paper and microfilm). Because none of the publishers exceeded the scope of their rights under the Act, the District Court held there had been no infringement, granted defendants' motion for summary judgment and denied plaintiffs' cross-motion for summary judgment.<sup>5</sup>

2. The Undisputed Facts.

The twenty-one articles in dispute were sold to the publishers of The New York Times, Newsday and Sports Illustrated between 1990 and 1993. None of the Appellants negotiated or signed any agreement whatsoever with their

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5. Appellants sought reconsideration, which was denied. The District Court again held that none of the Appellants had produced any evidence of any attempt to restrict the core bundle of publishing rights publishers acquire by operation of Section 201(c). (JA 473-74.) The Court reiterated that rights acquired under the Act may be exercised in any medium and that even major revisions of a periodical, made to permit reproduction and distribution in a specific medium, were authorized, so long as the revised copy remains recognizable as a version of the printed periodical. (JA 479-80.) Finally, responding to an argument Appellants neither pleaded nor argued prior to reconsideration, the District Court rejected Appellants' argument that Appellees improperly prepared abstracts of the articles in dispute. (JA 486-89.) Appellants have abandoned their abstracts argument on appeal.

respective publishers regarding the format in which copies of the periodicals could be published or, to use the terminology of the Act,<sup>6</sup> the medium of fixation by which those copies could be reproduced and distributed. Not only was there no "print only" limitation, there never was any attempt to limit publication in microfilm, CD-ROM or NEXIS. (JA 326, 330-31, 375, 378-79, 381-82, 384-86, 388-89; Ex. C-1 at 69-74, Ex. C-4 at 22, Ex. C-2 at 30-32, Ex. C-3 at 85-86, Ex. C-5 at 34-36, Ex. C-6 at 11.) Even Appellant Whitford, who signed a contract, admitted that he had failed to reserve any form of electronic publication rights.

(JA 388, 405.)<sup>7</sup>

Appellants argue that their individual contributions have been extracted from a periodical and resold to a different collective work (Tasini Br. at 17-28, Garson Br. at 39, 42-44, ASMP Br. at 14-17). The facts,

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6. See infra pp. 20-25.

7. See also Tasini Br. at 6 (acknowledging that "usage rights" were not discussed). In fact, even after the lawsuit was commenced, at least one of the Appellants expressly declined the opportunity to assert any such limitation. (Ex. C-4 at 94.)

however, are that Times Co., Newsday and Time make each issue of The New York Times, Newsday and Sports Illustrated available to the NEXIS computerized library of periodicals by transmitting, on an issue-by-issue basis, all of the articles appearing in each daily (or, for Sports Illustrated, weekly) edition. (JA 332-33, 335-36, 339-340.) NEXIS receives a complete copy of the same computerized text files of each periodical issue that the printers use to create that day's or week's print edition. (JA 342-44.) These files contain the complete text of each day's or week's issue, plus headlines, photograph captions, bylines, and page, section and other references to the layout of the paper edition. (JA 332-33, 335-36, 339-340.)

Once received by NEXIS, these files, in their entirety, without any revision to their substantive content, are added within 24 hours to the NEXIS computerized library. (JA 339-340, 344.) As a result, the textual content of each issue of The New York Times, Newsday and Sports Illustrated placed in the NEXIS computerized library is substantively identical to copies of the issue reproduced and distributed on paper and microfilm. (JA 344.) Even Appellants admit

that this process permits any given periodical issue to be retrieved in electronic form in its entirety. (JA 393-95, 452, Tasini Br. at 8, Garson Br. at 53.)

Assembly of "The New York Times OnDisc" CD-ROM by UMI mirrors the NEXIS process. UMI receives, on a monthly basis, a magnetic tape containing complete copies of the computer-text files used by printers to create the daily paper copies of The New York Times. UMI transfers these files, entirely and without revision, to CD-ROM discs. As a result, the text of each day's edition of The New York Times that appears on Times OnDisc is identical to the paper and microfilm versions. Like NEXIS, the OnDisc process allows each day's edition of The New York Times to be retrieved in its entirety. (JA 350.)<sup>8</sup>

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8. As a result of technical limitations, and in order to reduce expense and maximize load capacity, the copies transmitted to NEXIS do not include photographs and certain other material appearing in print editions, and each day's articles appear in a standard full-page format, rather than in columns. (JA 344-45.) For similar reasons, "The New York Times OnDisc" CD-ROM stores copies of The New York Times in the same, ASCII-text only format. (JA 372.) In both cases, however, the selection of full-text articles remains identical to that appearing in the printed copy of each day's  
(continued...)

UMI's "General Periodicals OnDisc" is created by a slightly different process: For each week of publication, complete copies of the printed edition of The New York Times Magazine and The New York Times Book Review are digitally scanned, page by page, onto CD-ROMs. The result is a digital version of each periodical that is completely identical -- including photographs and layout -- to the paper copy. (JA 350-51.)

3. The District Court's Opinions.

The District Court concluded, based on this record, that Times Co., Newsday and Time acted within the scope of Section 201(c) of the Act when they published their respective periodicals, including Appellants' contributions, in the CD-ROM and NEXIS formats, as well as paper and microfilm. Recognizing the inherent characteristics of digital copies and computerized information and retrieval systems, known to Congress long before the effective date of the Act, the Court reasoned that copies of a periodical could be revised to fit an electronic format provided the

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8. (...continued)  
paper. (JA 370, 372.)

copy still could be "fairly characterized" as one that had been revised from the original "collective work." (JA 443.)

Turning to that issue, the District Court focused on how the NEXIS and UMI versions of the periodicals were created. (JA 413-415.) It found that the record clearly established that "no intervening original selection of articles" (JA 452 n.13) was made, that the "complete content of all of the articles from each disputed periodical are available" in the electronic editions (JA 452), and that "numerous steps" are taken to ensure "the connection between plaintiffs' articles" in electronic editions "and the hard copy periodicals in which they first appeared." (JA 453.)<sup>9</sup> For these reasons, the District Court ruled that both the NEXIS computerized library and the CD-ROM discs in dispute qualified as digital reproductions of the paper copies of the periodicals in dispute, revised to fit the inherent

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9. Because of these undisputed facts, Appellants never argued below "that NEXIS and the disputed CD-ROMs" qualified as new collective works. (JA 452 n.13.) On appeal, their "new collective work" argument should be rejected as inconsistent with the facts and the plain language of the Act. See *infra* pp. 56-65.

characteristics of the digital medium.<sup>10</sup> In reaching this result, it emphasized both the plain meaning of the broad, "any revision" language used in Section 201(c) and the forward-looking definitions found in the rest of the Act, which make clear that the Act is to be applied in the same way regardless of the particular medium -- print, film, electronic or other -- in which the copyrighted work appears ("media-neutrality"). Accordingly, the District Court concluded that the two specific computerized formats before it fell within the scope of the reproduction and distribution rights granted to collective works owners.

#### SUMMARY OF ARGUMENT

The NEXIS computerized library and UMI's CD-ROMs are the 1990's equivalent of microfilm. The same provision of the Copyright Act that authorizes publication of

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10. (JA 455, 480.) The District Court characterized all of the copies in dispute as revised forms of the printed editions. It did not specifically address, however, whether the copies contained in "General Periodicals OnDisc," which are identical to both the printed editions and microfilm in that they reproduce identical images of each page of the periodical, qualified as a "revised" copy or as "that particular work" itself. In either case, "General Periodicals OnDisc" falls squarely within the scope of Section 201(c).

newspapers and magazines on microfilm, 17 U.S.C. § 201(c), controls this case by authorizing publishers to include freelance contributions when they publish original and revised copies of their collective works in any medium -- paper, film or electronic.

Congress regarded the allocation of rights created by Section 201(c) as an "essential" compromise, characterizing it as a "fair balancing of the equities." Since establishing this balance, Congress has twice refused to recalibrate it, despite the lobbying efforts of the NWU, ASMP and others to create a cause of action for freelance contributors to rescind the automatic transfer of copyrights established by Section 201(c).

Section 201(c) must be read consistently with the entire Act, including Sections 101, 103 and 106. Taken together, these provisions establish that owners of collective works such as periodicals are entitled to reproduce and distribute copies of those works in any medium of fixation "now known or later developed", including the formats at issue in this case. Section 201(c) permits publishers to reproduce and distribute "contributions" as part of the



original collective work, "any revision" of that collective work and any later collective work in the same series. Sections 103 and 106 grant publishers plenary rights, exercisable in any medium, when reproducing or distributing their collective works "as a whole."

A freelance author, on the other hand, has no rights to control the publication of a collective work as a whole. The author's rights are limited to his or her contribution itself, including the exclusive right to resell the contribution to a completely different periodical, such as a print or electronic magazine. An author also may create new works based on the contribution, such as sequels, novels, screenplays, motion pictures, or, to use an example suggested by Appellants, merchandise it in the form of toy dolls depicting characters from a contribution. Publishers do not acquire these rights by operation of Section 201(c).

This interpretation of Section 201(c) is the only one consistent with the plain language of the Act and the only one that gives meaning to the balance struck by Congress. It permits publishers, and the public, to benefit from the two publication formats in this case, while leaving

Appellants with a range of other exclusive rights to their articles. It is the interpretation applied in the District Court's well-reasoned and thorough opinion.

In an effort to force a different result, Appellants make essentially three arguments. First, they create an artificial distinction between copyright "rights" and "privileges," and contend that the "privileges" referred to in Section 201(c) may only be exercised directly, not by licensees of publishers. This distinction, however, is without any basis in the Act and cannot be reconciled with the Supreme Court's ruling in Mills Music, Inc. v. Snyder, 469 U.S. 153 (1985).

Next, Appellants directly attack the digital medium of fixation. Skipping over all of the relevant definitions in the Act, they argue that copies of periodicals stored in digital form, whether in the NEXIS computerized library or on CD-ROMs, lose their status as separately copyrightable collective works and become "new anthologies" along with any other contents of the database.

That argument contradicts the plain language of the Act and the undisputed facts in the record. It rests on

a fundamental misreading of the legislative history and ignores the common-sense difference between exploiting a collective work "as a whole" (which publishers are entitled to do without restriction) and exploiting an individual contribution by "itself" (which publishers may not do, and have not done here).

To accept Appellants' arguments, this Court would have to reject the bedrock principle of media-neutrality that was woven throughout the Act specifically to ensure that computers, and the digital medium of fixation, were encompassed. It also would have to conclude that the owners of copyrights in collective works, such as periodicals or encyclopedias, enjoy fewer Section 106 rights under the Act than owners of other forms of copyrightable works. Nothing in the Act supports such a result.

Finally, in a variety of ways, Appellants and their amici portray the decision below as a cataclysmic shift, applied in the context of an unanticipated technology, in an otherwise "pro-author" copyright law that will destroy the livelihood of freelance contributors. Of

all the arguments they advance, this is the most egregiously overstated and demonstrably wrong.

First, Congressional awareness of computer database technology is evident throughout the Act and its legislative history. Second, as to the economic impact of the decision, not one Appellant could identify a single instance in which he or she was precluded from exploiting any copyrights in their respective contributions as a result of the NEXIS or CD-ROM copies in dispute. Third, and most importantly, the Act is neither "pro-author," "pro-publisher," nor "pro-user." It is balanced legislation designed to accomplish one ultimate goal: the broad dissemination of creative works. Appellants' approach, which would require this Court improperly to alter a balance carefully established by Congress, frustrates that goal.

## Argument

### I. THE COPYRIGHT ACT PERMITS PUBLICATION OF REVISED, DIGITAL COPIES OF COLLECTIVE WORKS.

#### A. The Congressional Allocation Of Rights Between Authors And Publishers Authorizes The Publication Formats In Dispute.

Under prior law, the absence of a signed agreement resulted in freelance authors conveying all rights in their articles to a periodical publisher.<sup>11</sup> Many authors thus unintentionally transferred away a range of rights (such as sequelization, novelization, screenplay or merchandise rights) that had independent value unrelated to the magazine, newspaper or other collective work to which they were contributed.

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11. Alexander v. Irving Trust Co., 132 F. Supp. 364, 369 (S.D.N.Y.) (where there was no contract between the publisher and the plaintiff and no reservation of rights, "it must be presumed" that the publisher acquired all rights), aff'd, 228 F.2d 221 (2d Cir. 1955), cert. denied, 350 U.S. 996 (1956); Geisel v. Poynter Prods., Inc., 295 F. Supp. 331, 344 (S.D.N.Y. 1968) ("Absent a reservation . . . the copyright and all other rights pass with an . . . unconditional sale") (citations omitted).

Section 201(c) was intended to prevent such inadvertent transfers.<sup>12</sup> It accomplishes this by allocating rights between contributors and owners of collective works in the absence of an express agreement.<sup>13</sup> The first sentence overturns prior decisions holding that copyright interests not expressly reserved by a freelancer were lost:

*Copyright in each separate contribution to a collective work<sup>14</sup> is distinct from copyright in the collective work as a whole, and rests initially in the author of the contribution.*

17 U.S.C. § 201(c) (emphasis added).

The second sentence, however, carves out an exception to this rule for publishers of newspapers, magazines, encyclopedias and other collective works. It

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12. See infra pp. 28-29. Legislation "must be interpreted in terms of the mischief it was intended to rectify." In re Letters Rogatory, 385 F.2d 1017, 1020 (2d Cir. 1997).
  13. Copyright Law Revision, Part 1, at 87 (Add-2) (proposal was intended to govern "when there is no express agreement between [publishers and authors] . . . as to the assignment of rights"). Pertinent sections of the legislative history are collected in the Rule 28(f) Addendum to this brief and cited as "Add-\_\_\_."
  14. Section 101 of the Copyright Act defines a "collective work" as including, among other things, an issue of a "periodical." 17 U.S.C. § 101.

provides that "[i]n the absence of an express transfer" a publisher will be "presumed to have acquired"

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). Under this Congressionally-mandated allocation, publishers of collective works cannot, for example, cherry-pick an illustration from an issue of a newspaper or magazine and sell lithographs of it, nor could they turn a contribution into a novel or doll collection. Cf. Playboy Enters., Inc. v. Dumas, 53 F.3d 549 (2d Cir.), cert. denied, 116 S. Ct. 567 (1995); Geisel, 295 F. Supp. 331.<sup>15</sup> Publishers are, however, permitted to reproduce and distribute a contribution in three ways that Congress agreed were

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15. Similarly, publishers would not have the right under Section 201(c) to resell individual articles or photographs to redistributors, nor would they have the right to turn contributions into major feature films, as happened with the hit movies "Saturday Night Fever," "Urban Cowboy" or, more recently, Dreamworks SKG's "The Peacemaker." Robin Pogrebin, Flirtation Between Movies and Magazines Starts to Get Serious, N.Y. Times, Feb. 2, 1997, at D1.

directly related to their core business -- publishing their collective works.

The second sentence of Section 201(c) could not be clearer. Unless an author contributing an article to a periodical (or other form of collective work) expressly limits the rights conveyed,<sup>16</sup> the publisher is presumed to be able to publish the contribution in, inter alia, the original, as well as in "any" revised or subsequent issue of that periodical, without infringing the author's rights. Moreover, by intentionally referring to "reproducing and distributing" a contribution, Congress incorporated the concept, defined earlier in the Act, that the original or revised collective work could be reproduced or distributed in all media, whether paper, microfilm or computers.

The reproduction and distribution rights referred to in Section 201(c) are exercised only by reproducing and distributing "copies" of works. 17 U.S.C. § 106(1), (3). In turn, "'copies' are material objects . . . in which a work

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16. Each of the Appellants repeatedly admitted that there had been no express transfer limiting such rights in this case. (JA 378-79, 381-86, 388-89.)



is fixed by any method now known or later developed," including "with the aid of a machine or device," 17 U.S.C. § 101, like a computer. Accordingly, the plain language of the Copyright Act requires a media-neutral interpretation of the authority granted to publishers under Section 201(c), allowing them to reproduce and distribute copies "fixed" in any medium.

Appellants and their amici reject this result, suggesting in a variety of ways that the computer and digital revolution of the last twenty years was unforeseen by Congress.<sup>17</sup> That suggestion is wrong. The advent of computer technology, a development about which Congress was knowledgeable as early as the mid-1960s,<sup>18</sup> led to the

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17. They advance numerous arguments that presuppose Congressional ignorance about digital databases and contend for that reason that Section 201(c) should be read in a narrow and limited way. (E.g., Tasini Br. at 15; Garson Br. at 36, 39-41; ASMP Br. at 6, 24-28.) The many references in the legislative history to computers, however, must "dissipate the force of the argument that Congress" was unaware of how publishing rights could be exercised in that medium. See Mills Music, 469 U.S. at 170.

18. "For example, you can read the bill from beginning to end and you won't find in it any reference to  
(continued...)

decision that copyright exploitation should not be limited to the medium in which a copy of a work is first fixed. As a result, a work remains the same "work" regardless of how the "copies" are "fixed":<sup>19</sup> on paper, microfilm, CD-ROM or in a computer server. That is because "works" may be fixed in any medium

*now known or later developed,<sup>20</sup> from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.*

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18. (...continued)  
*computers . . . [even though] these are one of the coming instruments of communication in the future. We have tried to phrase the broad rights granted in such a way that they can be adapted as time goes on to each of the new advancing media."* Hearings on H.R. 4347 at 57 (Add-32) (testimony of George D. Cary, Deputy Register of Copyrights, May 26, 1965) (emphasis added).
19. The Act broadly defines a work as "fixed" whenever "it is sufficiently permanent or *stable to permit it to be perceived, reproduced, or otherwise communicated* for a period of more than transitory duration." 17 U.S.C. § 101 (emphasis added).
20. The Act's repeated references, in both the definitions of "works" and "copies," to media and methods of fixation "now known or later developed" underscores how central the concept of media-neutrality is to a proper interpretation of the Act.

17 U.S.C. § 102(a) (emphasis added).<sup>21</sup> In other words, whether a given collective work, or any revision thereof, is printed, reproduced on CD-ROM or stored in a computer file fixed in the NEXIS central database, all are "copies" of the same work authorized under the reproduction and distribution rights allocated to publishers under Section 201(c).<sup>22</sup>

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21. A machine or device also is defined as one "now known or later developed." 17 U.S.C. § 101. The House Report accompanying the Act reinforces that "it makes no difference" how a work is fixed. It is the same work "*whether embodied in a physical object in written, printed . . . magnetic, or any other stable form, and whether it is capable of perception directly or by means of any machine or device 'now known or later developed.'*" H.R. Rep. No. 1476 at 52 (Add-50) (emphasis added).

22. The District Court correctly observed that "the right to reproduce a work, which necessarily encompasses the right to create copies of that work, presupposes that such copies might be 'perceived' from a computer terminal." (JA 435.) The court's conclusion is entirely consistent with the decisions of other courts on the scope of a "reproduction" or "distribution." See MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 517-19 (9th Cir. 1993) (causing an operating system to be copied into RAM constitutes a reproduction of the copyrighted software), cert. dismissed, 510 U.S. 1033 (1994); Advanced Computer Servs. of Michigan, Inc. v. MAI Sys. Corp., 845 F. Supp. 356, 362-64 (E.D. Va. 1994) (loading software into computer's RAM constitutes reproduction).

Because it adopted such a flexible approach to the concept of copies, Congress was able to defer the issue of whether computer technologies required even further changes in the new Act. Accordingly, it authorized a study by the National Commission on New Technological Uses of Copyrighted Works ("CONTU") for that purpose. H.R. Rep. No. 1476 at 116 (Add-51). Appellants' reliance on CONTU (Garson Br. at 40) is inexplicable, because the conclusion of CONTU's final report, that Congress had drafted the Act broadly enough to apply to the digital media, directly contradicts Appellants' improper, media-specific approach.<sup>23</sup>

Ignoring all of this, Appellants repeatedly argue that a periodical no longer exists, either as that periodical or a revision thereof, once it is converted to a

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23. CONTU Final Report, July 31, 1978, at 40 (Add-55). The Final Report proposed only three limited changes to the Act, none of which bear on any issue in this action. In addition to CONTU, the District Court, as well as other courts, also noted the "broad and forward looking" nature of the definitional section of the Act. (JA 435.) See also WGN Continental Broadcasting Co. v. United Video, Inc., 693 F.2d 622, 627 (7th Cir. 1982) (noting that Congress "wanted the courts to interpret the definitional provisions of the [Act] flexibly, so that it would cover new technologies as they appeared.")

digital storage medium where it resides with other digitally stored works. (Tasini Br. at 18-20, Garson Br. at 44, 52-54, ASMP Br. at 14-15.)<sup>24</sup> These arguments rest on the misguided notion that the storage medium defines how a work should be categorized for copyright purposes. That simply is not how the Act works. Congress carefully defined literary works, such as newspapers and magazines, to include works

*expressed in words or numerical symbols  
. . . regardless of the nature of the  
material objects, such as . . . film,  
tapes, disks, or cards, in which they  
are embodied.*

17 U.S.C. § 101 (emphasis added). Far from reflecting the view that when a literary work is "embodied" with others in a single "disk[]" or database, each loses its status as a stand-alone literary work, the definitions of

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24. The Garson Appellants, for example, repeatedly mischaracterize both the District Court's holding and the media-neutral provisions of the Act when they argue that NEXIS itself is a new collective work. (Garson Br. at 39, 42-44.) The District Court actually held, as a proper reading of the Act requires, that the NEXIS computerized library consists of, *inter alia*, revised copies of The New York Times, Newsday and Sports Illustrated. (JA 455, 480.)

the Act (expressly incorporated into Section 201(c) by the reproduction and distribution rights granted to publishers) provide that works retain their status regardless of whether the storage medium uses "numerical symbols" such as the binary numbers "0" and "1" used to store works digitally, or something else. Id. That, for technological reasons, the conversion of words to digits may result in the bits or magnetic particles that store a collective work being scattered among or along different sections of the storage medium (e.g., a disc, a memory chip or a tape) cannot change its status as a collective work,<sup>25</sup> unless one ignores the definitions in the Act (all of which were carefully considered by the District Court) or reads them in an isolated, narrow and self-defeating way.<sup>26</sup>

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25. See Robert C. Denicola, Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works, 81 Colum. L. Rev. 516, 531 (1981) (it is "senseless to seek . . . a specific, fixed arrangement of data. There is simply a collection of information stored in an electronic memory -- information that can be arranged and retrieved in variations limited only by the capabilities of the computer and the sophistication of the retrieval program").

26. For example, Appellants also argue that because Section  
(continued...)

In light of the definitions and other provisions of the Act, Section 201(c) would require the following redrafting in order to implement Appellants' objections to the digital fixation of collective works:

(c) CONTRIBUTIONS TO COLLECTIVE WORKS. -- Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of 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, *provided, however, that no revised version of the particular collective work may be reproduced or distributed by means of any copy that: (1) per-*

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26. (...continued)

117, as originally enacted, did not mention Section 201(c), Congress must have intended to preclude computer reproductions under Section 201(c) (Garson Br. at 40-41). This ignores that the Section 201(c) rights of "reproducing and distributing" appear in Section 106, to which Section 117 does refer. Their argument is a perfect example of how Appellants violate the mandate that no act of Congress should "be read as a series of unrelated and isolated provisions." Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995). See also Crandon v. U.S., 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy") (citations omitted).

*mits a contribution to be accessed and read separately; (2) alters the physical layout of that particular collective work; (3) has less than [ ]% of the original contributions; and (4) permits storage and retrieval of multiple collective works.*

The degree to which such language directly contradicts the actual provisions of the Act illustrates how dramatically Appellants' approach to Section 201(c) conflicts with the law adopted by Congress.

B. The Legislative History Of Section 201(c) Confirms Its Plain Meaning.

The only possible conclusion to be drawn from the entire legislative history is that freelancers and their representatives knew as early as 1966 that Section 201(c) grants publishers broad revision rights to their collective works, exercisable in any medium, and accepted that compromise. The legislative history consistently reinforces the District Court's judgment that the plain meaning of Section 201(c) authorizes the NEXIS and CD-ROM versions of the publications at issue.



Harriet Pilpel, representing the views of freelance authors throughout the drafting process,<sup>27</sup> expressed strong support for the Register's initial recommendation that under the new law "a periodical . . . publisher" would automatically acquire only the right to publish a contribution in its periodical or "'a similar' composite work."

The adoption of *this* recommendation would eliminate great inequities in the magazine field, where writers and photographers frequently cede subsidiary rights to the publisher inadvertently . . . .<sup>28</sup>

Despite her overall support for the initial proposal, however, Ms. Pilpel noted that the reference to a right to publish a contribution in a "like" or "similar"

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27. See ASMP Br. at 21 n.9 (identifying Ms. Pilpel as speaking on behalf of, among others, the predecessor organization to amicus ASMP).

28. Copyright Law Revision, Part 2, at 385 (Add-8). Ms. Pilpel's reference to subsidiary rights was to the bundle of motion picture, television, novelization, syndication, merchandising and other rights that long have been recognized as incidental to the publication of the freelancer's work by the publisher. See Robert J. Burton, Business Practices in the Copyright Field, 7 Copyright Problems Analyzed 87, 91 (1953) (such rights include "novel rights, motion picture rights, dramatic rights and the like").