No. 00-201

In The Supreme Court of the United States
October Term, 2000

THE NEW YORK TIMES COMPANY, INC.; NEWSDAY, INC.; THE TIME INCORPORATED MAGAZINE COMPANY; LEXIS/NEXIS AND UNIVERSITY MICROFILMS INTERNATIONAL,
Petitioners,

v.

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

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR ADVANCE PUBLICATIONS, INC., A.H. BELO CORPORATION, BUENA VISTA MAGAZINES, INC., THE COPLEY PRESS, INC., COX NEWSPAPERS, INC., DONREY MEDIA GROUP, DOW JONES & COMPANY, INC., THE E.W. SCRIPPS COMPANY, FREEDOM COMMUNICATIONS, INC., GANNETT CO., INC., HACHETTE FILIPACCHI MAGAZINES, INC., THE HEARST CORPORATION, JOURNAL COMMUNICATIONS INC., KNIGHT RIDDER, MACROMEDIA INC., MAGAZINE PUBLISHERS OF AMERICA, INC., MCCLATCHY NEWSPAPERS, INC., NEWS AMERICA INC., NEWSPAPER ASSOCIATION OF AMERICA, PHILADELPHIA NEWSPAPERS, INC., PRIMEDIA INC., VILLAGE VOICE MEDIA, INC., THE WASHINGTON POST COMPANY, AND ZIFF DAVIS MEDIA INC., *AMICI CURIAE*, IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Do newspapers and magazines have the presumptive right, under 17 U.S.C. § 201(c), to publish their collective works in digital and other non-print formats, such as Nexis, the Internet, and CD-ROMs, which serve overwhelmingly important archival functions for researchers, students, historians, and the public at large, or does such electronic publication infringe the copyrights of contributing freelance authors, absent their additional authorization?

INTEREST OF THE *AMICI CURIAE*[1] This brief *amici curiae* in support reversal is submitted on consent by Advance Publications, Inc., A.H. Belo Corp., Buena Vista Magazines, Inc., The Copley Press, Inc., Cox Newspapers, Inc., Donrey Media Group, Dow Jones & Company, Inc., The E.W. Scripps Company, Freedom Communications, Inc., Gannett Co., Inc., Hachette Filipacchi Magazines, Inc., The Hearst Corporation, Journal Communications Inc., Knight Ridder, McClatchy Newspapers, Inc., Macromedia Inc., Magazine Publishers of America, Inc., News America Inc., Newspaper Association of America, Philadelphia Newspapers, Inc., PRIMEDIA Inc., Village Voice Media, Inc., The Washington Post Company, and Ziff Davis Media Inc. (the

[1] No counsel for a party in this Court authored this *amici curiae brief* in whole or in part, and no person or entity, other than the *amici curiae*, made a monetary contribution to the preparation or submission of the brief. The individual *amici* are identified in the addendum attached hereto.

"*amici*"). For the reasons discussed below, *amici* urge that the Court reverse the judgment below.

Amici are newspaper and magazine publishers who, collectively, publish hundreds of newspapers and magazines, including some of the most influential and useful periodicals in the nation. Almost all of those newspapers and magazines are collective works, containing contributions from freelance contributors in addition to staff-employee writers. Almost all have for some years (and in many cases some decades) published in both paper and also non-paper, usually digital, formats, including the NEXIS service or other such services, their own web sites, CD-ROMs, microfilm or electronic media, where today's issue and back issues are electronically searchable with back issues of that same publication, and sometimes with back issues of other publications. Since few if any newspaper or magazine publishers have throughout this lengthy period of electronic publication routinely obtained from each of their freelance contributors "an express transfer of the copyright or of any rights under it," such as express rights of electronic (or non-paper) publication or archival republication, the continued preservation and integrity of electronic archives online or through such media as CD-ROM depends in large measure on the construction of 17 U.S.C. § 201(c) reached by this Court.

Acting, as the framers of the First Amendment expected they would, as representatives of the public interest and stewards of the public's interest in access to the record of the nation's history that the press writes day by day, *amici* have a direct and compelling interest in the privilege Congress afforded them under § 201(c) to publish in digital formats available online and through the Internet, and in such other media as microfilm and CD-ROM, for the benefit of researchers, scholars and the public at large.

SUMMARY OF ARGUMENT

Amici submit this brief to focus the Court's attention on the enormous extent to which the result reached by the

Second Circuit would restrict public access to the national historical record compiled by the nation's newspapers and magazines. Unless reversed, the Second Circuit's decision will gratuitously harm the public interest underlying copyright law — without any discernible benefit to the public interest underlying copyright law, or even to freelance writers in general.

Over the past two and a half decades — with the publication of back issues first on microfilm and microfiche, and then in digital form with the advent of services like NEXIS and media like CD-ROMs — back issues of newspapers and magazines have become easier to access, easier to use, and free from physical deterioration. In reliance on these new archival media, public and university libraries have substantially reduced their holdings in physical copies of newspapers and periodicals.

The Second Circuit's decision threatens to degrade this valuable public resource immediately and severely. The boundless breadth of the decision appears, astonishingly, to mean that storage of any given issue from any given periodical with issues of other periodicals, or even with other issues of that same periodical — in a database like NEXIS, or on a CD-ROM — precludes a publisher from relying on 17 U.S.C. § 201(c) with respect to every individual article in which the publisher does not own the copyright. The decision even threatens the microfilm and microfiche archives on which the public had come to depend (and about which freelancers had not complained) before the advent of electronic media.

As a practical matter, the Second Circuit's decision will, at a minimum, lead most publishers to delete freelance contributions from the electronic versions of their old newspapers and magazines on a wholesale basis due to the difficulty and expense of locating freelance contributors and obtaining their authorization for republication in those forms. Indeed, some publishers have begun making such deletions. The modest phrase "freelance contributions," moreover,

covers a large territory: for newspapers, for example, it extends past such traditional "freelance" works as travel pieces and book reviews to news stories sent in by stringers, letters to the editor, Op-ed pieces, and other articles sent in "over the transom" by political officials and public spirited citizens, among others.

Whether the electronic publication occurred on NEXIS, on some other service, or in some other medium (such as optical disk or microfilm), the Second Circuit's judgment has the same consequence: it will be virtually impossible as a practical matter, and grossly inefficient, for publishers to find each and every freelance writer whose work is included in an archived edition (usually without the benefit of any delineation of who was an "employee" and whose work would therefore be work-for-hire) and to negotiate over whether and on what terms to license the retention of that contribution as an integral part of the collective work that has been archivally republished in its original or revised form.

Most publishers' continued ability to make their collective works accessible electronically with any kind of completeness and integrity depends, therefore, on the result of this case in this Court. If the Second Circuit's decision stands, existing comprehensive archives will fall, and historians, researchers, scholars, journalists, and society at large will no longer have meaningful access to the rough draft of the nation's history which back issues of the nation's newspapers and magazines represent. A generation of journalists, students and researchers will have to re-learn the old method of traveling to a brick-and-mortar library or a newspaper morgue, if they are lucky enough to live near one that still exists and retains paper archives of the magazines and newspapers they want to review.

The Second Circuit's decision is particularly unfortunate because it does a tremendous disservice to publishers, writers, and the public, without any compensating benefit to freelance authors, and indeed is

likely to harm many of them as well. Going forward, publishers are simply requiring freelance writers to transfer electronic publication rights to them as a precondition to publication, and their economic power enables them to obtain such right. Thus, future freelance writers are unlikely to benefit from the default rule the Second Circuit has adopted, though they will suffer from the increased transaction costs this rule imposes and the diminished availability of those of their works which publishers are obliged to withdraw or withhold from databases.

ARGUMENT

THE SECOND CIRCUIT'S DECISION THAT AN ELECTRONIC OR ARCHIVAL VERSION OF A NEWSPAPER OR MAGAZINE IS NOT THE WORK ITSELF OR A REVISION OF IT WILL GRIEVOUSLY AND GRATUITOUSLY HARM THE PUBLIC INTEREST

A. The Second Circuit's Decision Necessarily Will Force Newspaper and Magazine Publishers to Remove Articles by Freelancers from Electronic Archives and Degrade an Important Public Resource.

1. Newspapers and magazines are written for today, but valuable for tomorrow. The economic cost of producing The Washington Post is borne by its subscribers and advertisers on any given day; but it has a continuing importance to the historians and researchers and students who examine it ten, thirty, or seventy years from its publication date. That is generally true of the works of *amici* and other periodical publishers; they write for today, but their daily, weekly or monthly editions are used in different ways by the public for years after first publication. The maintenance, completeness, integrity, and accessibility of the archive of the nation's publications is a valuable public asset.

For many years, access to the archived publications of the American press, broadly defined, depended on the work of libraries, the willingness of publications to maintain "morgues" and the ability of users to physically travel to and use those libraries and morgues. With the advent of new technologies — online access to databases such as the NEXIS service, whether through the Internet or using a direct telephone or cable connection to the database, or access to the data on microfilm, microfiche, or CD-ROMs — the physical library has been replaced by the electronic archive, and old issues are as a result far easier to access and to use. The historian, student, or journalist who wants to see The New York Times of December 7, 1941, or the researcher wanting to use Time Magazine to assess how the nation responded to the Iranian crisis

of 1979, or the social scientist wanting to review newspapers in Iowa to examine how communities in the upper Midwest reacted to the outflow of the young to the coasts in the '80s and '90s, no longer need travel to New York or Des Moines. They can access the NEXIS service or its competitors, or obtain a set of CD-ROMs, and work quickly, conveniently, and efficiently. The search engines that allow users to locate individual articles within these electronic copies are simply automated and more efficient versions of the Readers' Guide to Periodicals.

2. The Second Circuit's acceptance of respondents' overly restrictive reading of section 201(c) of the Copyright Act of 1976 undermines this important function and consigns the public to paper copies of publications as the only definitive archive. That result — in an age when collection and maintenance of paper archives is increasingly uncommon, when electronic storage and archiving have become standard, and in the face of the Congressional decision in 1976 to make the copyright law media-neutral — is to the practical advantage of no one, and would greatly harm the public interest. Copyright law has always protected publishers who traditionally preserved paper-printed versions of their newspapers and magazines from claims of copyright infringement by freelance writers. The Second Circuit, however, would deprive most publishers of that same protection to the extent that they choose to rely on electronic copies.

According to the Second Circuit, publishers of newspapers and magazines risk infringement liability if they publish or republish their works (containing freelance contributions) through NEXIS or comparable means, unless they first withdraw freelance articles before delivering their copy to NEXIS or comparable services or expressly acquired republication rights — even though *amici* and, the record shows, defendants, had for many years published in those additional media without complaint. Under the decision below, for example, electronic publication of law reviews, which typically include student notes (for which written licenses expressly covering electronic rights were unlikely to have been obtained), is not privileged under § 201(c), and

publishers who want to avoid liability, and the NEXIS service, must either purge from the published editions on NEXIS all contributions of non-employees (*i.e.*, usually the complete text of law reviews), or find and obtain consents from all past authors of student notes or of any other articles and comments for which they did not obtain appropriate express transfers. And just as pieces written by authors who cannot be located will likely be withdrawn from electronic archives, so too CD-ROMs containing back issues will likely be destroyed.

Among the freelance contributions that will have to be purged from the electronic newspaper and magazine archives on which historians, researchers, and students depend will be some of the most important markers of public opinion and sentiment, namely op-ed pieces (other than those written by regular columnists) and letters to the editor. Historians looking back to examine the range of opinion on important public issues — at least prior to the late 1990's, when the filing of the *Tasini* suit led some publishers to begin to take pains to acquire express rights that they had always understood they already possessed — would have to travel to those cities to find it in archived paper copies; the electronic archives which they have for many years used will no longer dependably be able to retain those parts of their publications on the archives available on NEXIS and its competitors, or on their websites.

Publishing practices generally make it impractical, if not impossible, to go back and obtain authorization from freelance writers of their individually copyrighted contributions to newspapers and magazines now stored in electronic archives. Compensation for such pieces was paid when the pieces were published, and most newspapers and magazines had no need to retain records of the whereabouts of their freelance contributors. Even if records were available (which they generally are not), the chance that writers of prior decades remain at the same address is small. The impracticality of locating all freelance contributors

potentially affected by the Second Circuit's opinion, much less negotiating an appropriate license, is further complicated by the possibility that fractional interests in the copyrights at issue have vested in the authors' heirs and assigns.

Nor is there any practicable way to negotiate the "appropriate" share of the publishers' revenues for the Jane Doe who wrote a piece for the travel section of The Los Angeles Times or the Bergen Record in 1981. Her article is now available on NEXIS, but because NEXIS has not collected or maintained data on whether particular articles have been downloaded or printed since their electronic publication, no one knows if it has ever been accessed, or how many times, and no one knows, or can know whether it has been accessed because someone was looking for her work or because someone wanted to see what those newspapers had published. If Jane Doe could be found, and if she insisted on payment, it would be impossible reasonably to assess the value to her of the right to retain her work in the copy of that issue in the archive.

Because the Second Circuit predicated direct infringement liability on merely the delivery of the text of a newspaper or magazine to NEXIS (or the republication of a back issue on an optical disk or other storage medium), and on the continuing *availability* of the text of back issues regardless of whether the freelance writer's work was subsequently requested, accessed, or read by anyone at all, the liabilities faced by the publishers and the electronic services are enormous, and far outweigh the economic value to the publication of retaining freelance articles in the archive. Under the decision below, a publication infringes freelance contributions merely by duplicatively publishing a given issue on the Internet (or in some other non-print format) joined with copies of other issues or publications, even if no person has ever downloaded or printed the work of those contributors. The result is likely to be decisions by publishers to purge all articles not written by readily identifiable staff writers, rather than increased compensation

to freelance writers for the right to retain previously written works — and an over-broad purging at that, with doubts resolved *against* retaining articles of uncertain parentage (was Doe an employee or freelancer in 1981?). The record made in the district court showed that most of the revenue publications obtained from NEXIS result from search fees, associated with a user's search of a file containing a publication's back issues. When withdrawal of freelance articles from the file would not likely affect those revenues, while retaining them threatens substantial liability, it is not hard to predict that deletions will follow as night follows day.

Given these circumstances, the impact of the Second Circuit's decision is lose-lose-lose:

> *Publishers* lose by having to allocate scarce resources to identifying and stripping freelance materials from existing databases, and lose through the diminution of the public benefit they have been making generally available.
>
> *Freelancers* lose, since those who would have chosen to have their works remain online without further compensation will nonetheless have their works eliminated from electronic databases, depriving them of intangible benefits of continued access and the "free publicity" it offers. That most freelancers might prefer continued inclusion in electronic databases, or on CD-ROM, etc., is of no moment: their works will still be purged, because transaction costs will prohibit most if not all publishers from pursuing the impractical task of finding and striking bargains with freelancers over contributions dating back decades, for which there is no measurable economic value.
>
> Most importantly, *the public* will lose its convenient access to and attendant ability to search through comprehensive and genuine archived newspapers and magazines.

Moreover, the decision below would likely make matters *worse* than they were before the advent of electronic media. During the past few decades, as a result of the availability of services like NEXIS, and new storage media like CD-ROMs, many libraries have cleared their shelves of their paper-printed archives of periodicals and reduced their ongoing archival efforts. Storage costs and the fragility of newsprint have spurred increasing reliance on electronic archives, whose accessibility and permanence have been enormously beneficial. The Second Circuit opinion therefore threatens not only the integrity of the historical record, but as a matter of practical fact, the accessibility to the historical record too.

The increasing accessibility of back issues in new media has undeniably advanced copyright's goal of increasing the store and availability of writing. *See, e.g.*, *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (aim of copyright law is "promoting broad public availability of literature, music, and the other arts"). Historians, researchers of various types, students, and curious citizens are able as never before to access back issues, not just of their own home town papers, but of a wide range of newspapers and magazines throughout the nation. The Second Circuit's decision would destroy that achievement, and turn a comprehensive, accurate, national archive into a collection of local ones, riddled with holes. Publishers who strive for completeness and a faithful electronic record could be exposed to any holdout's whims, giving individual freelancers bargaining power out of all proportion to any real value in any individual work that may have no real public demand at all. The resulting "hole in history" would have a devastating impact on research and study.

If, as the Second Circuit has held, delivery of copies of newspapers and magazines containing freelance contributions to NEXIS (or to other services or archival media) infringes the rights of freelance contributors, then

existing archives will likely be perforated, because the contributors cannot as a practical or economic matter be located, and because the risk from not deleting conceivably "infringing" articles far exceeds any economic benefits to publishers of retention. The value of existing complete electronic archives will be sacrificed to the Second Circuit's misreading of § 201(c).

B. The Second Circuit's Decision Has Already Begun To Force Publishers To Remove and Exclude Articles From Electronic Databases.

The harm that the Second Circuit's cramped reading of § 201(c) will cause to existing and future databases is evident not only from logic and common sense prediction, although those bases would suffice.[2] The Second Circuit's decision has *already* caused substantial harm.

First, newspaper and magazine publishers have already responded by removing freelance articles from their online databases. For example, The Washington Post has already deleted over 60,000 readily identifiable freelance articles from NEXIS and their electronic archive, considering the risk of liability posed by the Second Circuit's decision simply too substantial to ignore, even though there was a chance (when the Post acted) that the this Court might agree to review the decision. The Oregonian has deleted even more. As a result, persons looking in the Post's file on

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[2] This Court routinely decides cases involving speech or other weighty constitutional interests on the basis of a reasoned analysis of harm that would likely flow from a challenged event or policy, regardless of whether it has already taken place. *See, e.g., Simon & Schuster v. Members of the New York State Crime Victims Board*, U.S. (198) (prediction that law would deter the writing and publication of certain works); *Campbell v. Acuff-Rose, Inc.*, U.S. (199) (prediction that content owners would refuse to license parodic uses).

NEXIS, or on the Post's own electronic archive, for articles from particular dates, or on particular subjects, no longer have the opportunity to conduct searches whose results are dependable or accurate: the results of *every search* are questionable, as the results *may* — or may not — provide a true picture of what the Post covered. Like photographs from the Soviet Union, the results of searches from a purged database are no longer entirely trustworthy or informative: the absence of an article (like the absence of a face from the annual Politburo photograph) may, or may not, reflect what was present and what was not.

Still other leading papers and magazines, less risk-averse, have begun the complex measures necessary to enable the prompt deletion of such articles if and when this Court affirms.[3]

Others have deleted on a more partial basis. After the electronic service (database) defendants in the *post-Tasini*

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[3] For most publications, there is no easy way to separate freelance contributions from those of staff writers, as the contributions do not have any word or phrase (such as "freelance") that can be easily searched. Accordingly, identification and deletion of freelance contributions would be a time-consuming and expensive matter, requiring, for example, creation of lists of employees and dates of employment from personnel records, and cross-checking all bylines against those lists. As plaintiffs' counsel in *Tasini* and the class action cases have asserted a "continuing infringement" theory by which the mere availability of an article on a website or electronic service would be infringing, the back issues facing purges of freelance articles are not only all those published since three years before the commencement of *Tasini* in 1993, but all those published under the Copyright Act of 1976 (effective January 1, 1978). The plaintiffs in the post-*Tasini* class actions expressly seek to represent all freelance authors creating articles for newspapers and magazines since that date.

class actions gave notice of the suits to the content providers who provided the articles in suit, for example, many content providers insisted that the electronic services delete *all* articles written by the plaintiffs, not only those identified in the Complaints, so as to avoid any later charges of wilful infringement.[4] A somewhat less risk-averse approach, but one also likely to result in degraded and incomplete electronic archives, has been taken by the Newslibrary electronic service, which has offered to delete articles on request:

> We believe that we have the necessary rights to digitize those editions of the

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[4] Three actions were brought in August and September 2000 on behalf of purported classes of freelance writers alleging copyright infringement by electronic publication of newspapers and magazines: *Laney v. Dow Jones & Company, Inc.*, 00 769 (RRM) (D. Del.); *The Authors Guild, Inc. v. The Dialog Corp.*, 00 Civ. 6049 (SS) (S.D.N.Y.); and *Posner v. Gale Group, Inc.*, 00 Civ. 7376 (RO) (S.D.N.Y.). On December 6, 2000, the actions were transferred and consolidated for pretrial proceedings by the Joint Panel on Multidistrict Litigation. Each complaint alleges that the inclusion of plaintiffs' works on defendants' electronic services, through the inclusion of newspaper and magazine issues, constitutes willful infringement remediable by awards of statutory or actual damages regardless of whether any user has accessed any specific article by any of the countless purported class members, and regardless of the fact that the databases have obtained rights to those back issues only through contractual arrangements with reputable publishers who have represented and warranted that they have the rights to their contents and that use by the electronic services would not violate the rights of any third parties. These actions show that publishers and the electronic services through whom they electronically publish face potentially bottomless liability because of the Second Circuit's decision.

> newspapers that we have made available online. If you were a freelance writer, rather than a staff reporter or creator of a work made "for hire," and believe that you did not license or otherwise grant all rights to the applicable newspaper in which your article was published, and would like us to remove your work so that third parties cannot read, print, or download it, please notify us . . . .[5]

Second, the immediate harm caused by the Second Circuit's decision is not limited to the deletion of existing data; it has chilled, as well, projects aimed at making such data more extensively and accurately available digitization of archival materials, a project which various publishers have been exploring or actually beginning. For instance, some newspapers, such as the Washington Post, would like to make available digitally back issues currently available only in microfilm. The transition from microfilm to digital formats would be a boon to researchers, who would be able to search entire archives in minutes using Boolean searches, rather than having to troll through indices and skim articles to find relevant information. The articles located in such searches would be accessible in visual formats that, like the photographic copies presently used in microfilm, replicate the column format, typeface, and other visual incidents of the original publication. Reproduction on this model would preserve many of the features of the original editorial selection and arrangement that first made the newspapers eligible for copyright as collective works.

The Second Circuit's rule is so sweeping, however, that the mere availability of multiple back issues in a single online file or on a single CD-ROM, searchable in a single

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[5] <www.newslibrary.com/region_pgs/freelance_notice.htm>.

convenient search, may well expose the publisher to liability for copyright infringement, regardless of how faithfully the online publication replicates the selection, arrangement, and even the superficial aspects of the presentation of the original issues. Accordingly, publishers who have considered digitizing their archives, such as the Washington Post, have taken a second look at such projects and paused them for the time being, as they would be economic with current technology only if the Second Circuit's decision is reversed. The cost and difficulty of identifying past freelance contributors and purging their contributions, and the potential cost of suits brought by such authors, would almost certainly make digitization impracticable.

C. The Harm to the Public Interest Would Be Gratuitous, as Authors Generally Will Not Benefit from the Decision.

The harm to the public interest that the Second Circuit's decision would occasion is particularly unjustifiable in view of the fact that construing the law that way will not yield any compensating benefit to freelance authors on a going forward basis. Even if the "default setting" of § 201(c) were held not to afford publishers "the privilege of reproducing and distributing the contribution" in an electronic edition of the work, publishers would nonetheless simply obtain that same right as a condition to its acquisition of the freelance contribution in the first place.

Publishers already have and are exercising the economic power to insist on that subset of "electronic rights" regardless of the where § 201(c) places the default setting.[6]

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[6] Among the newspapers that now routinely insist on obtaining such rights, and refuse to make additional payments for them, are The Boston Globe, The Washington Post, **[PLEASE VOLUNTEER FOR INCLUSION HERE. WITHOUT ENOUGH VOLUNTEERS, THE FOOTNOTE WILL BE DROPPED.]**

Amici have been publishing electronically for many years — both before the Second Circuit's reversal, when the district court's decision appeared to render express acquisition of what the National Writers Union has termed "electronic rights" a matter of belt-and-suspenders caution, and after, when publishers began expressly obtaining such rights to avoid future infringement liability for the electronic publication that was an integral and growing part of their operations. Indeed, the National Writers Union's own web site, on a web page entitled "Fight Retroactive Rights Contracts," advises its members that "a number of publications are now issuing contracts demanding that writers sign away past rights *for articles already published*."[7] The Boston Globe's well-known policy in that regard has been repeatedly attacked by the National Writers Union, and is the subject of a so-far-unsuccessful state court lawsuit filed by the NWU.[8]

The reasons why publishers have been able to insist on obtaining such rights as a condition of acquiring freelance contributions in the first place are not hard to find. First, as a practical matter, it is simply elementary that publishers need the rights necessary for publishing their newspapers and magazines, to the extent of planned publication; and, today, publication of newspapers and magazines extends to publication not only on paper byt also electronically. Just as no sane newspaper or magazine publisher would agree to take a freelance contribution to be published only in certain neighborhoods, or only in houses whose addresses end in odd digits, so too no newspaper today would acquire articles for use in only a portion of the market to which the publication is distributed.

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[7] *See* <http://www.nwu.org/>, visited December 12, 2000 (letter from NWU President Jonathan Tasini).

[8] Cite.

Second, publishers have the economic power to obtain those rights. Freelance writers who are unwilling to convey the rights publishers' multiplatform publishing plans will generally require find themselves replaced by writers more willing to recognize economic realities when they see them. In a world of publishers and authors aware of their power right to strike whatever bargain they choose, it is the economic reality of the publishers' economic power, not default allocations of "electronic rights," that will determine such outcomes. Publishers need gardening articles and book reviews that can be used in every edition of that day's newspaper. Articles whose rights are so circumscribed that using them would entail added internal and out-of-pocket costs of special arrangements with electronic services or the Internet edition staff, and the added risks of infringement liability that such fractured rights acquisitions would pose, are simply not worth obtaining.

D. Online Publication Is Part of First Publication, and a Decision Treating Only Paper Publication as First Publication Is Unfaithful to the Copyright Act of 1976.

An additional error infecting the Second Circuit's approach is its archaic premise — contrary to the fundamental rule that copyright protects expression, regardless of the "medium of expression," and to Congress's strenuous effort to make copyright law enacted in 1976 medium-neutral — that the "collective work" to which § 201(c) refers is solely the paper version of a newspaper or magazine, with electronic publication protected, if at all, only as a "revision" or "subsequent" work under § 201(c). That error is of particular concern to *amici*, as it misstates the realities of even current publication practice (and surely practices in the coming years), and its correction would almost ineluctably result in reversal of the judgment below. It is vital to realization of Congress's vision that the decision reached in this Court recognize that the newspapers and magazines published by *amici* and their competitors are

already being published simultaneously in multiple media, paper and electronic — and thereby published well within the protection Congress afforded to the publisher of a collective work for publication of "that particular collective work" itself.

The courts below may have been led astray by evidence that, as of some time in the mid-1990's, Time was released to NEXIS "some 45 days later" than the print publication. 972 F. Supp. at 812. Whatever the record may have shown about Time's publications at that date, however, the reality for many newspapers and magazines today is that electronic publication — on the periodical's web site and/or on NEXIS — often occurs on the same day as print publication. This is the case, for example, with The New York Times and hundreds of other newspapers, which are available online, on the day of first paper publication, both on their own websites and on NEXIS and/or other electronic services.

Most website electronic editions are not identical to the paper editions (lacking, for example, advertisements and some formatting information), and are searchable with back issues of those same publications, *see Tasini*, 206 F.3d at . Accordingly, under the decision below, electronic editions, even if initially published on the same day as the paper editions, would be treated as neither "that particular collective work" nor a "revision of that collective work," and any inclusion, in the NEXIS or Internet electronic edition, of a freelance contribution from the paper edition of the collective work would be infringing. On the panel's reasoning, that deeply flawed conclusion follows directly from the fact that the electronic editions simultaneously published on NEXIS (or other electronic services) share each of the same disabling characteristics that the Second Circuit has held independently disentitle publishers from relying § 201(c): the electronic editions are not identical to the paper edition, and they are searchable together with other periodicals and back issues of the same periodical. Given Congress's focused effort to render the copyright law

medium-neutral,[9] and the fact that protection is afforded for expression, regardless of the medium in which it is embodied, it is hard to understand the panel's reasoning. Why should a newspaper's acquisition from a freelance author of the right to publish an article on gardening in a forthcoming issue its May 1 edition not extend to both the paper and the Internet editions, absent some express agreement otherwise? Today's New York Times is today's New York Times regardless of whether it is the early edition, the late edition, or an electronic edition.[10] A reader who asked her colleagues at lunch in mid-December "Hey, did you read that editorial in The Miami Herald about the election today," is communicating quite effectively about a particular article in a particular publication, and it matters not a whit to her accuracy, to her colleagues, or to copyright law whether she was reading on newsprint or a computer screen.

The Second Circuit's decision superimposes what is by now an outmoded legal fiction — the artificial sequence of "first publication" and "electronic republication" — on this reality. Nothing in the legislative history of copyright revision and the carefully constructed compromises which

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[9] *See, e.g.*, 972 F. Supp. at (citing legislative authorities). [SUPPLEMENT]

[10] A search on December 12, 2000, conducted at 12:25 p.m., for all articles published on that date in the New York Times file, pulled up 279 articles — the editorial content of The Times on that date. The same search for the Washington Post pulled up the 172 articles comprising that day's edition. As the Times' former Washington bureau chief, now-assistant managing editor for electronic news, recently explained, the Times "is agnostic about whether we reach our audience through paper or the Internet . . . ." "Off the Record," The New York Observer, December 11, 2000, at 1.

underlie it, including in particular the compromise that underlies § 201(c), suggests that Congress intended the Copyright Act to admit of a construction so divorced from practices in the copyright industries. And nothing in the text of the Copyright Act, including its definition of "collective works" and tie of copyright protection to "expression" rather than to material objects, supports restricting the § 201(c) privilege to paper publication or rendering it inapplicable to the same collective works, even if abridged, published electronically.

CONCLUSION

Because the Second Circuit's decision threatens vital public interest in access to the complete national historical record as reported by the nation's newspapers and magazines and made available through such services as NEXIS or such electronic media as CD-ROMs and microfilm, and wholly misreads § 201(c) and the congressional judgment that underlies it, the judgment below should be reversed.

Respectfully submitted.

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ADDENDUM

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Advance Publications, Inc., directly or through its subsidiaries, publishes daily newspapers in 22 cities and business journals in 37 cities throughout the United States, as well as 18 magazines with nationwide distribution and numerous World Wide Web sites.

A H Belo Corporation is a media company with a diversified group of television broadcasting, newspaper publishing, cable news and electronic media assets. The Company's Television Group operates 17 broadcast television stations and four regional and local cable news channels. Belo's Publishing Division publishes *The Dallas Morning News*, *The Providence Journal*, and five other daily newspapers.

Buena Vista Magazines, Inc., a subsidiary of The Walt Disney Company, publishes the *FamilyFun*, *Disney Adventures*, and *Discover* magazines.

The Copley Press, Inc. publishes the *San Diego Union-Tribune* and other newspapers in California, Illinois, and Ohio, ranging from a small desert semi-weekly, to a large metropolitan daily, all of which have relied throughout their history on freelance contributors.

Cox Newspapers, Inc. (CNI) is a subsidiary of Cox Enterprises Inc. (CEI), a diversified media company. CEI publishes the *Atlanta Journal and Constitution*, much of the content of which is compiled, reproduced and distributed in various forms including microfilm, CD-ROM and on CIM's *AccessAtlanta* Web site. CEI and CNI subsidiaries publish 16 daily and 11 weekly newspapers in Colorado, Florida, North Carolina, Ohio and Texas, much of the content of which is compiled, reproduced and distributed in various forms, including microfilm, CD-ROM and on CIM local Web sites.

Donrey Media Group publishes 12 daily newspapers from North Carolina to Hawaii, including the Las Vegas, Nevada, Review-Journal. It also owns KOLO-TV, Reno, Nevada, and nine outdoor advertising companies.

Dow Jones & Company, Inc. publishes, *inter alia*, *The Wall Street Journal*, *Barrons* magazine, and other periodicals, and, through its

Ottaway Newspapers, Inc. subsidiary, a number of daily and weekly community newspapers.

The E.W. Scripps Company operates, *inter alia*, 20 daily newspapers and United Media, a worldwide syndicator and licensor of news features and comics.

Freedom Communications, Inc. [jim grossberg, levine & koch]

Gannett Co., Inc. is a news and information company that publishes 74 daily newspapers, including USA TODAY, and a number of non-daily publications, including USA Weekend, a weekly magazine. Gannett also owns 21 television stations and a national news service.

Hachette Filipacchi Magazines, Inc. publishes 28 consumer magazines in the United States, including *American Photo, Audio, Best Selling Home Plans, Boating, Car and Driver, Car Stereo Review, Cycle World, Elle, Elle Decor, Flying, George, Home, Metropolitan Home, Mirabella, Popular Photography, Premier, Road & Track, Showboats International, Stereo Review's Sound & Vision, Travel Holiday and Woman's Day*, as well as a number of quarterlies and special publications.

The Hearst Corporation is a diversified privately-held communications company that, *inter alia*, publishes newspapers, consumer magazines and business publications.

Journal Communications Inc. publishes the Milwaukee *Journal Sentinel*.

Knight Ridder publishes 32 daily newspapers in 28 U.S. markets, including the *Aberdeen American News, Akron Beacon Journal, Belleville News-Democrat, The Sun Herald, Bradenton Herald, The Charlotte Observer, The State, Columbus Ledger-Enquirer, Contra Costa Times, Detroit Free Press, Duluth News-Tribune, The News Sentinel, Fort Worth Star-Telegram, Grand Forks Herald, The Kansas City Star, Lexington Herald-Leader, The Macon Telegraph, The Miami Herald, El Nuevo Herald, The Monterey County Herald, The Sun News,* the *Olathe Daily News, The Philadelphia Inquirer, Philadelphia Daily News, Saint Paul Pioneer Press, San Jose Mercury News, San Luis Obispo Tribune, Centre Daily Times, Tallahassee Democrat, The Daily Sun, The Wichita Eagle* and *The Times Leader*. It also maintains a national network of 36 regional hubs at www.realcities.com.

Macromedia Inc. is a media company based in Hackensack, NJ which, *inter alia*, publishes The Record (known as the Bergen Record), the Herald News (daily newspapers in northern NJ), 19 community weekly newspapers, and specialty publications.

Magazine Publishers of America, Inc., founded in 1919, is the national trade association of the magazine publishing industry. MPA represents more than 250 of the largest magazine publishers in the United States,

who collectively publish more than 1,250 of the best known consumer interest titles, on a weekly, monthly, and quarterly basis.

News America Inc.'s principal activities, conducted through its subsidiaries and affiliates, include, *inter alia*, publishing magazines and newspapers, including *TV Guide*, *The Weekly Standard* and the *New York Post.* News America Incorporated is indirectly wholly-owned by The News Corporation Limited.

The Newspaper Association of America is a non-profit organization representing more than 2,000 newspapers in the United States and Canada. NAA members account for 87 percent of the daily circulation in the United States and a wide range of non-daily U.S. newspapers. Many of NAA's members publish newspapers that are available in print, as well as electronically.

Philadelphia Newspapers, Inc. (PNI), a wholly owned subsidiary of Knight-Ridder, Inc., is the publisher of *The Philadelphia Inquirer* and the *Philadelphia Daily News*. The content of both newspapers also is distributed on PNI's *philly.com* Web site.

PRIMEDIA Inc. owns over 200 print and video businesses including consumer magazines such as *New York*, *Chicago*, *Seventeen* and *Modern Bride*, trade publications such as *Telephony* and *Cable World* and consumer enthusiast titles, including *Sail*, *Horticulture* and *Fly Fisherman*. PRIMEDIA also currently operates more than 200 Internet sites tied to its publications and other information businesses.

Village Voice Media, Inc. and its affiliates publish eight alternative news weeklies nationwide, each of which is distributed in print and electronically. These include *The Village Voice*, *LA Weekly*, *Seattle Weekly*, and Minneapolis *City Pages*.

The Washington Post Company's principal operations include newspaper and magazine publishing. *The Washington Post*, a division of The Washington Post Company, is a daily newspaper of general circulation primarily in Virginia, Maryland and Washington, D.C.

Ziff Davis Media Inc. is a leading media and marketing company focused on computer and Internet-related technologies, with principal platforms in print publishing, trade shows and conferences, online content, television and education. The print publications of Ziff Davis include *PC Magazine*, *PC Week*, *Computer Shopper*, *PC Computing*, *Computer Gaming World*, *Yahoo!*, *Internet Life*, *Inter@ctive Week*, *Family PC*, *Electronic Gaming Monthly*, *Expert Gamer*, *Official U.S. PlayStation Magazine* and *Sm@rt Reseller*.

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