

IN THE
Supreme Court of the United States

LOUIS PSIHOYOS *et al.*,
Petitioners,

v.
NATIONAL GEOGRAPHIC ENTERPRISES, *et al.*,
Respondents.

FRED WARD,
Petitioner,

v.
NATIONAL GEOGRAPHIC ENTERPRISES, *et al.*,
Respondents.

DOUGLAS FAULKNER *et al.*,
Petitioners,

v.
NATIONAL GEOGRAPHIC ENTERPRISES, *et al.*,
Respondents.

**ON PETITIONS FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

**BRIEF *AMICI CURIAE* OF THE AMERICAN LIBRARY ASSOCIATION,
THE AMERICAN ASSOCIATION OF LAW LIBRARIES, THE
MEDICAL LIBRARY ASSOCIATION, AND THE SPECIAL LIBRARIES
ASSOCIATION IN SUPPORT OF THE RESPONDENTS**

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INTERESTS OF *AMICI CURIAE*¹

This brief *amici curiae* is submitted by the American Library Association, the American Association of Law Libraries, the Medical Library Association, and the Special Libraries Association (“*Amici*”) pursuant to Rule 37 of the Rules of this Court. *Amici* urge that the Court grant the requested writ of certiorari and affirm the judgment of the U.S. Court of Appeals for the Second Circuit.

* * * * *

The **American Library Association** (“ALA”) is a nonprofit educational organization of approximately 65,000 librarians, library educators, information specialists, library trustees, and friends of libraries representing public, school, academic, state, and specialized libraries. ALA is dedicated to the improvement of library and information services and the public’s right to a free and open information society.

The **American Association of Law Libraries** (“AALL”) is a nonprofit educational organization with over 5,000 members nationwide. AALL’s mission is to promote and enhance the value of law libraries to the legal and public communities, to foster the profession of law librarianship, and to provide leadership in the field of legal information and information policy.

The **Medical Library Association** (“MLA”) is a nonprofit, educational organization comprised of 4,700 health sciences information professionals and institutions. Through its programs and services, MLA provides lifelong educational opportunities, supports a knowledge base of health information research, and works with a global network of partners to promote the importance of quality information for improved health to the health care community and the public.

1. Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than amici curiae, or their counsel, made a monetary contribution to the preparation or submission of this brief.

The **Special Libraries Association** (“SLA”) is a nonprofit organization for information professionals and their strategic partners, and serves more than 12,000 members in the information profession, including corporate, academic and government information specialists.

* * * * *

Amici are organizations devoted to representing the interests of institutions and professionals responsible for collecting and preserving historical, scholarly and other records, including periodicals and other collective works, and for making these materials available to researchers and the public at large. These institutions and individuals assist their patrons in researching, retrieving and using these materials in traditional paper media, in microform, in CD-ROM and other multi-media formats, and via online services and the Internet. A significant part of their mission is to make available reliable, accessible, comprehensive repositories of back issues of newspapers, magazines, journals and other periodicals. In furtherance of that mission, they acquire licensed databases and digitized collective works and many are even involved with digitizing public domain works and copyrighted works in conjunction with copyright owners. Moreover, many institutional and individual members of *Amici* use the very CD-ROM product at issue in this case. *Amici* accordingly submit this brief to assist the Court’s understanding of the practical implications of the issues at stake in this case.

SUMMARY OF ARGUMENT

This case presents a direct, material and acknowledged conflict between two U.S. courts of appeal on an important question of federal copyright law. In the proceedings below,² the U.S. Court of Appeals for the Second Circuit held that Section 201(c) of the Copyright Act (17 U.S.C. § 201(c)) confers upon Respondents the privilege of reproducing and distributing

2. The opinion below is reproduced in the “Appendix” to the “Petition for Writ of Certiorari” filed with this Court in *Psihoyos v. National Geographic Enters., Inc.*, No. 05-490. Petition Appendix (“Pet. App.”) 1a-31a.

the copyrighted works of freelance contributors as part of a CD-ROM product, *The Complete National Geographic* (“CNG”). In the CNG, those contributions are perceptibly reproduced and distributed as part of the original collective works, or revisions thereof, in which they first appeared. The Second Circuit decision is therefore consistent with the Copyright Act of 1976, as amended (17 U.S.C. §§ 101-1332) (the “Act”), and this Court’s decision in *The New York Times Co., Inc. v. Tasini*, 533 U.S. 483 (2001) (“*Tasini*”).

In the proceedings below, Petitioners sought to rely upon *Greenberg v. National Geographic Society*, 244 F.3d 1267 (11th Cir. 2001) (“*Greenberg*”) to preclude Respondents from litigating whether Petitioners’ copyrighted works were lawfully reproduced and distributed as part of the CNG pursuant to Section 201(c). The Second Circuit, however, rejected Petitioners’ attempts to foreclose further judicial consideration of this legal issue (Pet. App. 18a-19a) that the district court below had aptly characterized as “one of substantial public importance to the development of copyright law *and to its impact on the dissemination of knowledge.*” Pet. App. 56a (emphasis added). It likewise rejected the flawed ruling in *Greenberg* that deemed unlawful what is effectively the mere conversion of intact periodicals from one medium to another because that ruling “substantially departs” from this Court’s approach in *Tasini*. Pet. App. 19a. *Greenberg* was wrongly decided because the appeals court failed to focus on the Respondents’ acts of reproducing and distributing the individual contributions “as part of” the original collective works or permissible revisions thereof, and disregarded how the contributions are “presented to, and perceptible by, the user. . . .” *Tasini*, 533 U.S. at 499. Rather, the *Greenberg* court found the CNG impermissible under Section 201(c) because, in essence, it combined digital facsimiles of entire collective works (scanned pages or the “replica” portion of the CNG) with software that enables users to search and perceive them with the aid of a machine or device. See *Greenberg*, 244 F.3d at 1273 n.12. The Second Circuit, like the district court below, rejected this reasoning and recognized

that digital fixations reproduced and distributed in the CNG are materially the same as the type of analog microfilm collections that this Court observed (*Tasini*, 533 U.S. at 501-02) are permissible under Section 201(c). *See* Pet. App. 20a-21a; 64a-65a and n. 85.

As a practical matter, unless this Court affirms the Second Circuit’s ruling, the flawed decision in *Greenberg* will stand as the “law of the land,” and this will almost certainly have a negative impact on libraries and their patrons for many years to come. Carried to its logical conclusion, the *Greenberg* ruling raises the specter of Section 201(c) being frozen in time, exclusively applying to older, non-digital technology to the detriment of research, scholarship and learning. The *Greenberg* decision inhibits the dissemination of collective works via digital and electronic media that involve combining digital facsimiles of complete collective works with software that enables users to perceive them. This ruling on what is allowed by the Copyright Act thwarts broader public availability not only of popular works like those of National Geographic, but also less widely accessible periodicals. Digital and electronic media also have functionality that exceeds traditional analog media and digitization is now one additional reformatting strategy to both preserve and provide access to many library collections. Notwithstanding the Second Circuit’s ruling below, the *Greenberg* decision will continue to stymie the adoption and evolution of such useful technologies – unless and until this Court overrules it – because of the potential for publishers and other entities to be sued in the Eleventh Circuit over actions they take elsewhere.

ARGUMENT

A fundamental goal of copyright law is to promote “broad public availability of literature, music, and the other arts” through a system of private reward to authors. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). At base, this Court’s decision in *Tasini* was about fair compensation to individual authors when commercial electronic database publishers, without additional permission, reused articles from

previously published collective works to create entirely different collective works and sell articles on an individual basis. Thus, it protected the author's private reward pursuant to the balance that Congress struck in enacting Section 201(c). The instant case, by contrast, is ultimately about the other side of that balance. It is about the ability of collective work owners to take advantage of new technologies to distribute their creative works more broadly, and ultimately the public's ability to access and use them.

Although the facts of this case and *Greenberg* are superficially similar to those in *Tasini* (i.e., they address whether publishers are entitled under Section 201(c) to reproduce freelance contributions in certain electronic contexts), there are, as recognized below, critical differences that make the CNG permissible under Section 201(c). *See* Pet. App. 5a-6a; 20a-21a; 69a. However, unless this Court affirms the Second Circuit's decision and rejects the reasoning of *Greenberg*, it is difficult to see how Section 201(c) could apply in a digital environment, even if the product in question otherwise met all the requirements of Section 201(c). Thus, *Greenberg* will likely continue to have an adverse impact on the public availability of copyrighted works and the development of new media collections.

I. *Greenberg* Is Contrary To Section 201(c) And *Tasini*, And It Found Infringement Based On Mere Conversion Of Works Into A Medium Requiring A Machine Or Device To Perceive Them

A. The CNG Is Distinguishable From The Products At Issue In *Tasini*

It is permissible under Section 201(c) for the owner of a collective work copyright to reproduce an exact facsimile of the complete collective work, whether in paper or other forms, such as microfilm and microfiche. *See Tasini*, 533 U.S. at 501-02. This would be true even if multiple, exact reproductions were combined into a single package in which several entire issues of a series of collective works would be distributed as a

unit (like traditional microfilm). *See id.* at 501. When one distributes the constituent works in this manner, one is both reproducing and distributing them “as part of” the original collective works, as provided for in Section 201(c), including all of the selection, coordination, and arrangement of the original collective works. These practices, which are not problematic under *Tasini* when applied to traditional media, become impermissible under the *Greenberg* analysis if the exact facsimile is in digital form with supporting software. As the Second Circuit recognized below, this conclusion is not required by or consistent with *Tasini*.³

In *Tasini*, this Court was faced with three different electronic database products and held that none of them complied with the requirements of Section 201(c). One product was the NEXIS online database in which millions of articles in electronic file format from thousands of periodicals had been reproduced and made available online to users, in effect on an individual basis. *See Tasini*, 533 U.S. at 499-500. The other two were CD-ROM products. One, known as “GPO,” was image-based. It showed each article exactly as it appeared on the printed page, *but the CD-ROM contained articles from approximately 200 publications or sections of publications.* *Id.* at 491. The other CD-ROM product contained only the *New York Times*, *but it did not have the original formatting or accompanying images*

3. The *Greenberg* court assumed, but did not decide, that the “replica” portion of the CNG was permissible under Section 201(c). 244 F.3d at 1272. Petitioners, however, effectively claim that even the “replica” portion is impermissible because multiple issues of the magazine are included in one product. *See Psihoyos* Pet. (No. 05-490) at 17; *Ward* Pet. (No. 05-504) at 20-21. The Second Circuit implicitly rejected these contentions, as the reproduction and distribution to the public of multiple issues of a periodical via the same piece of plastic in digital form is highly analogous to the use of microforms. *See* Pet. App. 20a-21a. It does not diminish the fact that the contributions to those periodicals are thereby being reproduced and distributed “as part of” the original collective works. *Accord* Pet. App. 68a-69a (CNG is a package that contains substantially everything that made the magazine copyrightable as a collective work).

from the original publication. Id. at 500. Both of the CD-ROM products in *Tasini* displayed the articles *in such a way that they were not linked to other articles appearing in the original print publications* and the user who wished to see other pages of the original collective work could not simply “flip” to them. A new search was required. *Id.* at 491 n.2. These characteristics destroyed the claim that the reproductions and distributions of the articles therein were “as part of” qualifying collective works.

In deciding that these products were not permissible under Section 201(c), this Court’s focus in *Tasini* was on the freelance articles “as presented to, and perceptible by, the user” of the commercial electronic databases before it. *Id.* at 499. The Court’s inquiry was “whether the database itself perceptibly presents the author’s contribution as part of” the collective work or revision thereof. *Id.* at 504. The products in *Tasini* presented freelance articles to users “clear of the context provided either by the original periodical editions or by any revision of those editions.” *Id.* at 499. The products did not perceptibly reproduce and distribute the freelance articles “as part of” the original periodicals or permissible revisions. *Id.* at 500. Significantly, the products offered users individual articles, not intact periodicals, and did not involve “a mere conversion of intact periodicals (or revisions of periodicals) from one medium to another” as happens with microfilm. *Id.* at 501-02.

Turning to the CNG, this product is fundamentally a mere conversion of intact print periodicals into the medium of CD-ROMs. The freelance contributions alleged to be infringed appear in the CD-ROM versions *in the exact positions* in which they appeared in the original print version of the magazines. Pet. App. 5a, 20a. Photographs and articles are presented in the context of the full, original issues (even with original advertising). Pet. App. 5a-6a; 64a. In addition, a user of the CD-ROM can “flip” to other articles and pages in the digital facsimile of an issue in the same order in which those articles and pages were originally presented in the printed editions. *See id.* at 5a; 64a-65a. Although there are 100 years (or more)

of issues reproduced on multiple discs, *National Geographic* is the only periodical that appears in the CD-ROM version. A user encounters very few materials that have been added to the CD-ROMs that are not digital facsimiles of the original magazines or software that permits viewing them⁴ and searching them for specific issues and articles. These added materials perceptible to users include (depending on which version of the NGS is at issue) a few short advertising videos, a start-up video montage that lasts for a few seconds, an introductory tutorial, a chronological table of contents, very short article summaries in lists of search results, and links to the National Geographic Society website.⁵ Pet. App. 6a; 40a-41a and n.23.

Thus, the freelance contributions are reproduced and distributed to the public “as part of” the original collective work or revision of the original collective work. The freelance contributions are not being made available on a piecemeal basis or being sold a la carte out of a database that combines multiple periodical titles. *Cf. Tasini*, 533 U.S. at 489, 499-500. The contributions are not stored and retrieved “separately within a vast domain of diverse texts” (*id.* at 503) and thus, the reproduction and distribution of the contributions in the context of digital facsimiles of the original periodicals do not effectively override the contributors’ exclusive right to control the individual reproduction and distribution of each contribution. *Cf. id.* at 503-04. In all material regards, the contributions are perceptibly reproduced as part of the digital facsimiles of the

4. There are minor variations among succeeding versions of the CNG. For instance, later versions of the CNG also apparently include software tools, such as tools to darken text for easier reading, to rotate images, bookmark pages, and similar capabilities. Pet. App. 6a.

5. *Amici* submit that, as the Second Circuit held, for purposes of Section 201(c) these additional elements are merely incidental and of no significance to the status of the CNG as a qualifying reproduction. *See* Pet. App. 21a. They do not alter the essence of the digital facsimiles embodied in the CNG and have no separate value to the product’s user. They are of no greater significance than putting a new cover on a book or adding a table of finding aids to the head of a microfilm roll.

original *National Geographic* magazines. These CD-ROMs are therefore materially distinguishable from each of the products at issue in *Tasini*.

B. The Flaws In The *Greenberg* Analysis

The Second Circuit rightly rejected the reasoning of the Eleventh Circuit's decision in *Greenberg* because that decision failed to reflect the relevant distinctions between the product at issue before it (and before this Court) and those at issue in *Tasini*. The *Greenberg* opinion also erroneously suggested that it is impermissible under Section 201(c) for a collective work owner to combine into a single product the digitized text and images of a complete collective work with software that enables users to perceive and search the collective work with the aid of a computer. Under the Eleventh Circuit's reasoning, the addition of search and access software to a product containing digitized periodicals is in effect *per se* impermissible under Section 201(c). The court had claimed in its opinion not to decide that issue. 244 F.3d at 1273 n.12. However, the software issue was clearly the dominant element of its analysis. *See id.* at 1273. Under the *Greenberg* reasoning no publisher can rely on Section 201(c) to release a collection of its works in CD-ROM or digital format because of the need for and use of supporting software. *Amici* believe this analysis to be an error that could materially diminish public access to works and reduce the dissemination of collective works reproduced and distributed in digital form in a manner consistent with Section 201(c) as explained in *Tasini*. Indeed, in view of the Petitioners' nearly palpable fear of digitization in general (*see, e.g.*, Psihoyos Pet. (05-490) at 3, 6, 18-19; Faulkner Pet. (No. 05-506) at 14-15; Ward Pet. (No. 05-504) at 2, 16-17, 23; *see also* Pet. App. 69a n.91), it is clear that they desire this result.

In the CNG, the original collective works that are reproduced in digital facsimiles are not themselves changed by the conversion from paper to CD-ROM. In this regard, there is merely a transformation from analog to digital media. The necessity of using an additional "work", i.e., another computer

program, to view the unchanged collective works should be analytically irrelevant because under the Act, a copy of a work that is perceptible *without* a machine or device stands on equal footing with a copy that is perceptible *with* one. The Act provides that copyright protection adheres to works of authorship “fixed in *any* tangible medium of expression, *now known or later developed*, from which they can be perceived, reproduced, or otherwise communicated, either directly or *with the aid of a machine or device.*” 17 U.S.C. § 102(a) (emphasis added). *See also* 17 U.S.C. § 101 (“copies” defined as material objects in which a work “is fixed by *any* method *now known or later developed*, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or *with the aid of a machine or device.*”) (emphasis added).

The CNG embodies digital fixations that are materially similar to the type of analog microfilm collections that this Court has already observed are permissible under Section 201(c).⁶ The freelance contributions are perceptible to the end users of this product “as part of” the original collective works, just as they are to the end-users of a roll of microfilm. The end-user encounters the software component of the product in effect only as part of the “machine or device” that permits the collective work to be perceived. It is functionally analogous to a lens, light, and the knobs on a microfilm viewer. It is not perceptibly presented to the end user as matter that has been added to the original collective works.

Even if the CNG were not to be viewed as embodying mere reproductions of the original collective works, the addition of these software elements to the digital medium could be viewed

6. “Microforms typically contain continuous photographic reproductions of a periodical in the medium of miniaturized film. Accordingly, articles appear on the microforms, writ very small, in precisely the position in which the articles appeared in the newspaper.” *Tasini*, 533 U.S. at 501. “True, the microfilm roll contains multiple editions, and the microfilm user can adjust the machine lens to focus only on the Article, to the exclusion of surrounding material. Nonetheless, the user first encounters the Article in context.” *Id.*

as the creation of a permissible “revision” under Section 201(c). As the Second Circuit recognized, the concept of a “revision” can encompass some level of addition and/or deletion of copyrightable matter. Pet. App. 21a. Neither the Act nor its legislative history suggest otherwise.⁷ If the “final” edition of a traditional print newspaper contained additional photographs and text – both qualifying as additional copyrightable works – absent from the “early” edition, this could be fairly characterized as being a permissible “revision.” Likewise, adding copyrightable matter that is not perceptible to end users as matter added to the collective work being viewed, but encountered as part of the “machine or device” that enables them to search and view the collective work, could be fairly deemed to be a “revision” of the collective work.

II. Failure To Review The Decision Below Would Adversely Affect The Library And Archival Communities And Collective Work Users

A. Adverse Effects

This Court’s resolution of the conflict between the circuits would have far-reaching implications beyond the parties to this case and its impact would not be isolated to collective work copyright owners and contributors. It would also have profound consequences for the library and archival communities and those who use collective works. For *Amici*, *Greenberg* was ominous. Under it, no collective work reproduced or distributed via CD-ROM, online technology, or other new technology requiring additional software to facilitate viewing or searching could ever qualify for the Section 201(c) privilege as a practical matter even if the product met the statutory criteria in all other respects. *Greenberg* therefore inhibits the dissemination of collective works via digital and electronic media. Such products make it much easier to access information resources, and make possible

7. See H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 122-23 (1976), reprinted in 5 U.S.C.C.A.N. 5659, 5738 (1976) (under 201(c) a publishing company could reprint an article from a 1980 edition of an encyclopedia in a 1990 revision of it).

the retrieval and use of data in powerful ways not possible with analog media. They are of enormous value to library patrons, particularly students, scholars and historians, and nothing in Section 201(c) or *Tasini* should be understood to deprive these users completely of such powerful tools.

The sweeping implication of the Eleventh Circuit's decision would, if left undisturbed, thwart broader public availability not only of well-disseminated works like those of National Geographic. Access to more obscure, less widely accessible magazines, newspapers, scholarly journals and other periodicals would also be frustrated. These collective works could potentially be made accessible to a broader segment of the population, but not if digital and electronic media compilations of them are effectively *per se* impermissible under Section 201(c), as they appear to be under *Greenberg*.⁸

The strong public and scholarly interest in such periodicals is evidenced by the fact that digital replicas of public domain works, including collective work periodicals, are being made available online for no fee at an increasingly rapid rate. *See, e.g.*, Library of Congress, The Nineteenth Century in Print: Periodicals⁹ (listing titles and years of complete digital facsimiles of historic nineteenth century periodicals digitized by Cornell University Library and the Preservation Reformatting Division of the Library of Congress); Bruce Cole, "The National Digital

8. Although the petitioners in *Tasini* voiced similar public access concerns in that case, this Court found that those concerns could not override the language of Section 201(c) as applied to the specific products at issue in that case and recognized that the question of continued public availability of those works could be addressed in the context of the remedial phase of the case. *Tasini*, 533 U.S. at 504-06. But in this case, the product is distinguishable from those in *Tasini* and a fair application of the statute requires a different outcome. No remedy is needed because the collective work copyright owner has committed no wrong.

9. *At* <http://memory.loc.gov/ammem/ndlpcop/moahtml/snctitles.html> (last visited Nov. 16, 2005).

Newspaper Program”¹⁰ (Organization of American Historians and Library of Congress partnership to convert microfilm of historic U.S. newspapers into digital files, to be permanently available through the Library of Congress via the Internet); Brooklyn Public Library, *Brooklyn Daily Eagle Online*¹¹ (online digital facsimiles of the Brooklyn Daily Eagle from 1841-1902, digitized by the Brooklyn Public Library); J. Willard Marriott Library at the University of Utah, Utah Digital Newspapers¹² (online digital facsimiles of pages from Utah newspapers freely available on the Internet, digitized by the J. Willard Marriott Library at the University of Utah); Press Release, University of Richmond, “University of Richmond Library Receives \$478,141 Grant to Create Digital Database of Civil War-Era Newspapers” (Oct. 13, 2003)¹³ (project to digitize newspapers from both Union and Confederate perspectives from 1857-1865). There is also substantial demand for, and utility to libraries and their patrons from the availability of, digitized replicas of collective works that are still subject to copyright protection and only available with the authority of the collective work copyright owners. *See, e.g.*, JSTOR, The Scholarly Journal Archive¹⁴ (detailed listing of scholarly journal titles and years available; includes public domain and copyrighted material).¹⁵

10. At <http://www.oah.org/pubs/nl/2004may/cole.html> (last visited Nov. 16, 2005).

11. At <http://www.brooklynpubliclibrary.org/eagle/index.htm> (last visited Nov. 16, 2005) and <http://eagle.brooklynpubliclibrary.org/Archive/skins/BE/about.htm> (last visited Nov. 16, 2005).

12. At <http://www.lib.utah.edu/digital/unews/> (last visited Nov. 16, 2005); *see also* <http://www.lib.utah.edu/digital/unews/> (last visited Nov. 16, 2005) (about the program).

13. <http://oncampus.richmond.edu/news/press/oct03/grant.html>.

14. At <http://www.jstor.org/about/alpha.content.html> (last visited Nov. 16, 2005).

15. When digital facsimiles of print materials are made accessible via the World Wide Web, the widest range of users have equal access to collections from any location whether they are on- or off-site. A virtual
(Cont'd)

The decision in *Greenberg*, unless overruled, will also have an adverse impact on preservation efforts. These are closely related to but distinct from access concerns. Cultural institutions serve the international community by building, protecting, preserving and ensuring continued access to diverse collections and resources. The challenges of preserving collections have been addressed in different ways over time. Libraries have used conservation to preserve the original artifact and reformatting strategies, such as microfilm and print facsimiles, to retain content, enhance access, and protect the original from excessive wear. Over the past several years, libraries have moved toward using digitization as an additional, and in some cases, a preferred method for reformatting endangered and fragile paper-based materials to both preserve and provide access to library collections.

Effective use of digitization frequently involves both creating complete, digital facsimiles of a collective works, and combining the digital facsimiles with computer software (that is itself comprised of one or more separate “works” under the Act) that enables users to view and search the collective works with the aid of a machine or device. Indeed, libraries make significant investments in supporting the development of technologies with the goals of improving both user access and long-term preservation capabilities. The *Greenberg* decision stymies the adoption and evolution of such media to the detriment of the public in both regards.

Along with access and preservation concerns, *Amici* institutions face ever-escalating demands on their physical space and economic resources. CD-ROM and online versions of newspapers and magazines now – and eventually other products

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environment of digital files can combine content from many kinds of resources including primary source material, and provide powerful opportunities to integrate materials seamlessly into instruction and course management systems for teaching and learning. Digitization allows users to create virtual collections that will support new and creative research made possible only in a digital environment.

yet to evolve – can greatly reduce the space requirements of many libraries. Thus, if this Court fails to take this opportunity to reject the reasoning of *Greenberg*, such institutions would suffer adverse impacts on their space requirements and face potentially huge increases in costs of operation and maintenance. This would have the collateral effect of reducing the amount of material and variety of sources easily available to library patrons. It would also needlessly impose on collective work copyright owners the obligation to locate,¹⁶ negotiate with, and pay additional compensation to contributors (or their heirs or assigns), a requirement that could dramatically drive up the ultimate cost of digital resources for libraries and similarly situated institutions.¹⁷ This is not an outcome that Section 201(c) requires and therefore constitutes an additional, avoidable harm to libraries and their patrons.

B. Litigation Risks To Publishers Exacerbate The Adverse Effects Of *Greenberg*

Notwithstanding this Court's decision in *Tasini* or the Second Circuit's decision below, the Eleventh Circuit's decision in *Greenberg* is likely to remain the de facto law of the land and the publishing world, even if no other circuits follow it, unless and until this Court overrules it. Few publishers are likely to have a commercial interest in publishing digital versions of their

16. In a recent study by the Carnegie Mellon University Libraries to determine the feasibility of acquiring permission to digitize copyrighted material in their collections and make it available on the Internet, only about half the requests to a sample of several hundred copyright holders resulted in yes/no answers, nearly a third of holders who received a request letter did not respond at all, and addresses were never found for about eleven percent of the holders. Carole A. George, Carnegie Mellon University Libraries *Exploring Feasibility of Seeking Copyright Permissions* (2002), at <http://www.library.cmu.edu/Libraries/FeasibilityStudyFinalReport.pdf>.

17. Collective work copyright owners might also choose to forego these additional transaction costs and delete freelance submissions from digitized works, or not produce them at all. Either outcome would harm libraries and their patrons.

collective works in less than the entire country. Any publishers contemplating doing so would seek to avoid reproducing and distributing their collective works in any manner that would likely subject them to copyright infringement lawsuits in federal district courts in the Eleventh Circuit. For some this may mean that they will risk making digital products only available in New York, Connecticut and Vermont. Others may risk the uncertainty of making those works available everywhere outside the Eleventh Circuit. If the “best case” result of the present circuit split would be that students, scholars, and other library patrons in Albany, Georgia will not have access to the same resources that are available to those in Albany, New York, this would clearly be at odds with the goals of the federal copyright laws.

Even this unacceptable result is less likely, however, than the prospect that the vast majority of publishers will avoid the litigation risk altogether and choose not to bring digital versions of their collective works to the marketplace. Even the most careful distribution model might still subject a publisher or its distributors to being haled into court in Alabama, Florida, or Georgia and held liable under the flawed standard of *Greenberg*.¹⁸ The federal venue statute for copyright cases provides that copyright infringement suits “may be instituted in the district in which the defendant or his agent resides or may be found.” 28 U.S.C. § 1400(a). “It is well settled that,

18. Respondents note that they cannot “realistically publish a work that is lawful in three States but unlawful in three others.” Respondents’ Br. at 1. This assessment may be unduly optimistic: for a defendant being sued in the Eleventh Circuit the work would not be lawful in *any* states. See *Murphy v. Federal Deposit Ins. Corp.*, 208 F.3d 959, 964-66 (11th Cir. 2000) (in cases where federal law is at issue transferee courts are obligated to follow their own interpretation of the relevant law and the binding precedents of their own circuits, not conflicting interpretation of the relevant law binding on the courts in the transferor court’s circuit); *Eckstein v. Balcor Film Investors*, 8 F.3d 1121, 1126 (7th Cir. 1993) (the norm is that each court of appeals considers questions of federal law independently and reaches its own decision, “without regard to the geographic location of the events giving rise to the litigation.”).

based upon this language, venue in copyright actions is coextensive with jurisdiction. . . . In other words, where there is jurisdiction, there is venue.” *Foxworthy v. Custom Tees, Inc.*, 879 F. Supp. 1200, 1207 (N.D. Ga. 1995). Therefore, even acts outside the states in the Eleventh Circuit could conceivably subject a publisher to a lawsuit in a district court within that circuit if a state’s long-arm statute so permits because of harm to the intangible intellectual property rights of an author who lives in that state¹⁹ and the exercise of personal jurisdiction over the publisher is consistent with the Due Process Clause.²⁰ Under

19. See *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d 829, 857 (11th Cir. 1990) (former Fifth Circuit stressed that breach of common law copyright subjects wrong-doer to liability in tort within the reach of Florida long-arm statute; long-arm statute not limited to act in Florida causing injury in Florida, but includes situation in which foreign tortious act causes injury within forum) (internal citations and quotations omitted).

20. A district court in the Eleventh Circuit could be asked to assert specific personal jurisdiction over a publisher for activities outside the forum were a collective work contributor to allege that the publisher’s actions were tortious, deliberate, and with knowledge at the time that the publisher committed the alleged tort that the contributor would be injured in that state. See, e.g., *Alfa Corp. v. Alfagres, S.A.*, 385 F. Supp.2d 1230 (M.D. Ala. 2005) (holding district court in Alabama could exercise personal jurisdiction over foreign defendant in trademark infringement suit consistent with long-arm statute and Due Process Clause when defendant used mark despite awareness of Alabama plaintiff’s mark; defendant could reasonably anticipate that primary effects of conduct would be felt in Alabama); see also *Calder v. Jones*, 465 U.S. 783, 788-89 (1984) (California jurisdiction over Florida defendant held proper in libel action based on injurious effects of Florida conduct on California-based plaintiff’s professional reputation and emotional distress suffered in California). In some cases, a publisher might be subject to a state’s exercise of general jurisdiction over it if the publisher’s contacts with a state are so “substantial” or “continuous and systematic” that it can be haled into court in that state in any action, even if the action is unrelated to those contacts. See *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414-15 (1984); *Perkins v. Benguet Consol. Mining*
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the circumstances, risk-averse publishers have a strong motivation to refrain from publishing digital versions of their collective works, despite the Second Circuit's favorable ruling below, lest they be confronted with the prospect of nationwide injunctions against the accused products (17 U.S.C. § 501), and paying to contributing authors substantial damages and/or attorney's fee awards available under the Copyright Act. *See* 17 U.S.C. §§ 504-05.

CONCLUSION

For the foregoing reasons, even though *Amici* believe that the judgment of the court of appeals should be affirmed, this Court should grant the writs of certiorari as to the question presented in the first page of Respondents' Brief.²¹

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Co., 342 U.S. 437, 446-47 (1952); *see also Borg-Warner Acceptance Corp. v. Lovett & Tharpe, Inc.*, 786 F.2d 1055, 1057 (11th Cir. 1986).

21. Like Respondents, *Amici* believe that the other issues raised by some of the Petitioners are not appropriate for this Court's review in light of the lack of any conflict between the Second Circuit's decision and any other court, including this Court, and the correctness of the Second Circuit's ruling on these other issues. *See* Respondents' Br. at 11-12.