

No. ____ 08-103 JUL 22 2008

IN THE OFFICE OF THE CLERK
Supreme Court of the United States



REED ELSEVIER INC., THOMSON CORPORATION, DIALOG CORPORATION,
GALE GROUP, INC., WEST PUBLISHING COMPANY, INC., DOW JONES &
COMPANY, INC., DOW JONES REUTERS BUSINESS INTERACTIVE, LLC,
KNIGHT RIDDER INC., KNIGHT RIDDER DIGITAL, MEDIASTREAM, INC.,
NEWSBANK, INC., PROQUEST COMPANY, UNION-TRIBUNE PUBLISHING
COMPANY, NEW YORK TIMES COMPANY, COPLEY PRESS, INC. and EBSCO
INDUSTRIES, INC.,

Petitioners,

v.

LETTIE COTTON POGREBIN, E.L. DOCTOROW, TOM DUNKEL, ANDREA DWOR-
KIN, JAY FELDMAN, JAMES GLEICK, RONALD HAYMAN, ROBERT LACEY, RUTH
LANEY, PAULA McDONALD, P/K ASSOCIATES, INC., LETTY COTTIN POGREBIN,
GERALD POSNER, MIRIAM RAFTERY, RONALD M. SCHWARTZ, MARY SHER-
MAN, DONALD SPOTO, MICHAEL CASTLEMAN INC., ROBERT E. TREUHAFT AND
JESSICA L. TREUHAFT TRUST, ROBIN VAUGHAN, ROBLEY WILSON, MARIE
WINN, NATIONAL WRITERS UNION, THE AUTHORS GUILD, INC. and AMERI-
CAN SOCIETY OF JOURNALISTS AND AUTHORS,

Respondents,

IRVIN MUCHNICK, ABRAHAM ZALEZNICK, CHARLES SCHWARTZ, JACK SANDS,
TODD PITOCK, JUDITH STACEY, JUDITH TROTSKY, CHRISTOPHER GOOD-
RICH, KATHY GLICKEN and ANITA BARTHOLOMEW,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the usual power of lower courts to approve a comprehensive settlement releasing claims that would be outside the courts' subject matter jurisdiction to adjudicate, confirmed in *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996), was eliminated in copyright infringement actions by 17 U.S.C. § 411(a).
2. Whether the Second Circuit erred by ignoring the assurance in *New York Times Co. v. Tasini*, 533 U.S. 483, 505 (2001), that the problem of compromised electronic news archives could be remedied by “[t]he Parties (Authors and Publishers [entering] into an agreement allowing continued electronic reproduction of the Authors' works . . . and remunerating authors for their distribution.”

PARTIES TO THE PROCEEDING

There are no additional parties to the proceedings other than those listed in the caption.

The first group of respondents identified in the caption (E.L. Doctorow *et al.*) were plaintiffs in the district court and appellees, along with defendants, in the Second Circuit.

The second group of respondents identified in the caption (Irvin Muchnick *et al.*) were objectors in the district court and appellants in the Second Circuit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 14.1(b) and 29.6, and to enable justices of the court to evaluate possible disqualification or recusal, petitioners – Reed Elsevier Inc., Thompson Corporation, Dialog Corporation, Gale Group, Inc., West Publishing Company, Inc. D/B/A West Group, Dow Jones & Company, Inc., Dow Jones Reuters Business Interactive, llc, D/B/A Factiva, EBSCO Industries, Inc., Knight-Ridder Inc., Knight Ridder Digital, Copley Press, Inc., Media-stream, Inc., The New York Times Company, NewsBank, Inc., ProQuest Company, and ProQuest Information and Learning Company – certify that the following are all of the corporate parents and other publicly held companies owning 10% or more of any petitioner's stock:

Reed Elsevier plc
Thompson Corporation
Thomson Reuters Corporation

Thomson Reuters PLC
Dow Jones & Company, Inc.
News Corporation
Reuters Group plc
The McClatchy Company
ProQuest Company.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CITED AUTHORITIES.....	vi
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW.....	1
STATEMENT OF JURISDICTION.....	1
STATUTORY PROVISION INVOLVED.....	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	11
I. THE DECISION THAT THE DISTRICT COURT LACKED JURISDICTION TO APPROVE A SETTLEMENT RELEASING CLAIMS IT COULD NOT ADJUDICATE CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS.....	13
A. The Decision Conflicts with Established Law Regarding the Settlement and Release of Claims.....	13
B. The Decision Misapprehends the Text and Purpose of Section 411(a) of the Copyright Act	19
C. The Decision Cannot Be Reconciled With This Court’s Precedent Governing the Phrase “Except as Expressly Provided”	25
II. THE DECISION CANNOT BE RECONCILED WITH THIS COURTS EXPECTATION IN	

TASINI THAT AUTHORS AND PUBLISHERS MAY ENTER INTO ENFORCEABLE AGREEMENTS ALLOWING CONTINUED ELECTRONIC REPRODUCTION OF AUTHORS' WORKS	26
CONCLUSION	31
APPENDIX	1a
A. Opinion of the Second Circuit	1a
B. Letter of the Second Circuit Requesting Briefing on Subject Matter Jurisdiction	46a
C. Hearing Transcript of the Southern District of New York.....	48a
D. Order of the Southern District of New York	53a
E. Order of the Second Circuit Denying Petition for Rehearing, or in the Alternative, Rehearing <i>En Banc</i>	59a
F. Letter from the Supreme Court of the United States Extending the Time to File a Petition for a Writ of Certiorari to August 13, 2008	62a

TABLE OF CITED AUTHORITIES**Cases**

<i>Arbaugh v. Y & H Corp.,</i> 546 U.S. 500 (2006).....	18
<i>Breuer v. Jim's Concrete of Brevard, Inc.,</i> 538 U.S. 691 (2003).....	25, 26
<i>Class Plaintiffs v. City of Seattle,</i> 955 F.2d 1268 (9th Cir. 1992).....	14, 30
<i>Exxon Mobil Corp. v. Allapattah Servs.,</i> 545 U.S. 546 (2005).....	22
<i>Grimes v. Vitalink Commc'ns Corp.,</i> 17 F.3d 1553 (3d Cir. 1994).....	14
<i>Grupo Dataflux v. Atlas Global Group, L.P.,</i> 541 U.S. 567 (2004).....	21
<i>Herman & MacLean v. Huddleston,</i> 459 U.S. 375 (1983).....	21
<i>In re Corrugated Container Antitrust Litig.,</i> 643 F.2d 195 (5th Cir. 1981).....	14
<i>In re Prudential Ins. Co. of Am. Sales Practice Litig.,</i> 261 F.3d 355 (3d Cir. 2001)	14
<i>In re United States Oil & Gas Litig.,</i> 967 F.2d 489 (11th Cir. 1992).....	29
<i>Lexecon Inc. v. Milberg Weiss Bershad Hynes &</i> <i>Lerach,</i> 523 U.S. 26 (1998).....	14

<i>Local No. 93, Int'l Assoc. of Firefighters v. City of Cleveland,</i> 478 U.S. 501 (1986).....	16, 17
<i>Local Union No. 38, Sheet Metal Workers' Int'l Ass'n, AFL-CIO v. Pelella,</i> 350 F.3d 73 (2d Cir. 2003).....	21
<i>Matsushita Elec. Indus. Co. v. Epstein,</i> 516 U.S. 367 (1996).....	passim
<i>McDermott, Inc. v. AmClyde,</i> 511 U.S. 202 (1994).....	28
<i>New York Times Co. v. Star Co.,</i> 195 F. 110 (2d Cir. 1912)	21
<i>New York Times Co. v. Tasini,</i> 533 U.S. 483 (2001).....	12, 26
<i>Nottingham Partners v. Trans-Lux Corp.,</i> 925 F.2d 29 (1st Cir. 1991)	14
<i>Olan Mills, Inc. v. Linn Photo Co.,</i> 23 F.3d 1345 (8th Cir. 1994).....	24
<i>Pac. and S. Co. v. Duncan,</i> 744 F.2d 1490 (11th Cir. 1984).....	24
<i>Perfect 10, Inc. v. Amazon.com, Inc.,</i> 508 F.3d 1146 (9th Cir. 2007).....	24
<i>Steiner v. Am. Broad. Co.,</i> No. CV 00-05798 (C.D. Cal. Apr. 20, 2005), <i>aff'd on other grounds</i> , No. 05-55773, 2007 U.S. App. LEXIS 21061 (9th Cir. Aug. 29, 2007)	19

<i>TBK Partners Ltd. v. Western Union Corp.,</i> 675 F.2d 456 (2d Cir. 1982).....	15
<i>Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,</i> 396 F.3d 96 (2d Cir. 2005).....	14
<i>Washingtonian Publ'g Co. v. Pearson,</i> 306 U.S. 30 (1939).....	24
<i>Williams v. GE Capital Auto Lease,</i> 159 F.3d 266 (7th Cir. 1998).....	16
Statutes	
28 U.S.C. § 1367	25
28 U.S.C. § 1367(a).....	10
Other Authorities	
2 Nimmer on Copyright ¶ 7.16[C][3]	23
H. Rep. No. 94-1476 (1976), reprinted in 1976 U.S.C.C.A.N. 5659	23
Judith Resnik, Procedure as Contract, 80 Notre Dame L. Rev. 598 (2005)	15
Supplementary Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess.	23

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 509 F.3d 116 (2d Cir. 2007). Pet. App. 1a. The final judgment of the United States District Court for the Southern District of New York is unpublished and reproduced at Pet. App. 53a. The unpublished decision of the district court is transcribed and reproduced at Pet. App. 48a-58a.

STATEMENT OF JURISDICTION

The court of appeals judgment was entered on November 29, 2007. Pet. App. 1a. A timely petition for rehearing and rehearing en banc was denied on April 15, 2008. Pet. App. 59a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). On June 9, 2008, Justice Ginsburg extended the time to file a petition for writ of certiorari to and including August 13, 2008. Pet. App. 62a.

STATUTORY PROVISION INVOLVED

17 U.S.C. § 411(a) provides, in pertinent part:

[N]o action for infringement of the copyright in any United States work shall

be instituted until... registration of the copyright claim has been made in accordance with this title.

STATEMENT OF THE CASE

This case presents an issue of exceptional importance to the nation's archival databases, newspaper and magazine publishers, and freelance authors: whether, in connection with the nationwide class action spawned by *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), the parties may globally settle their differences by compensating and releasing the claims of all freelance authors with respect to all their contributions to the databases, whether registered or unregistered. This Court's *Tasini* decision appears to expressly contemplate that the parties could structure such a global settlement, and the parties spent over four years of intensive negotiations in order to achieve just such an industry-wide settlement which was approved by the district court under Rule 23.

The Second Circuit, however, vacated the order approving the settlement, holding that courts lack subject matter jurisdiction to approve any settlement that includes a release of copyright infringement claims for unregistered works. The court's sole rationale, erroneous as a matter of law, was that the register-before-instituting-suit provision of the Copyright Act, 17 U.S.C. § 411(a) forecloses courts from approving settlements covering unregistered works.

The Second Circuit ignored decades of decisions by this Court, federal appellate courts, and state courts, which had uniformly held that in the

interests of settling disputes courts may release claims that they lacked jurisdiction to adjudicate, and that the approval of a settlement agreement providing for the release of claims is not a jurisdictionally barred adjudication of such claims, but merely the approval of a private settlement between the parties (which in this case complies with Rule 23 and the Due Process clause and is in the public interest).

1. This petition stems from an appeal to the Second Circuit by a handful of objectors to the settlement of a consolidated copyright class action brought in the wake of *New York Times Co. v. Tasini*, 206 F.3d 161 (2d Cir. 1999), *aff'd*, 533 U.S. 483 (2001). Plaintiffs in the underlying action are freelance authors whose periodical freelance articles were included in electronic databases under license from newspaper and magazine publishers.

Each of the pleaded claims of the named plaintiffs complied with the register-before-instituting-suit requirement of 17 U.S.C. § 411(a). In order to assure the complete peace which the defendants and publishers required as a condition to settlement, and which is a usual feature of class action settlements, the settlement here provided compensation to class members in exchange for release of all their claims, for both registered and unregistered freelance articles. The district court considered and approved the settlement in compliance with Fed. R. Civ. P. 23(e) and certified a settlement class in compliance with Rule 23(a) and (b).

Nonetheless, turning four years of intense mediation and bargaining into so much wasted effort, and

thwarting the hard work of the nation's freelance author community, databases, and newspaper and magazine publishers, the Second Circuit reversed the district court, on a ground not raised by any party or objector. It held that § 411(a) strips the courts of jurisdiction to approve a class action settlement that compensates and releases claims for unregistered works over which the court would not at present have jurisdiction to adjudicate. The Second Circuit's decision is in conflict with this Court's decision in *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996), and dashes the expectations expressed by the Court in *Tasini*.

2. *Tasini*, brought individually by six freelance authors, held that the statutory provision on which the database, newspaper, and magazine industries had relied, 17 U.S.C. § 201(c), did not establish their right to reproduce and distribute the contents of the nation's newspapers and magazines in electronic archives such as LexisNexis. After *Tasini*, defeating infringement liability and the establishing the right to retain freelance articles in the databases would depend on a showing, for each freelance article, that the author had conveyed the necessary rights in writing or, for nonexclusive licenses, orally or by conduct.

Following the Second Circuit's decision in *Tasini*, more than a score of other freelance authors, supported by national authors' rights trade organizations, filed four class action lawsuits against online databases and certain publishers.¹ The lawsuits

¹ *Posner v. Gale Group*, 00-civ-7376 (S.D.N.Y.); *Laney v. Dow Jones & Co.*, 00-769 (D. Del.); *Authors Guild v. The Dialog*

were all properly commenced and subject to the district court's undoubted subject matter jurisdiction, as each of the named plaintiffs had prior to instituting suit registered the allegedly infringed freelance articles with the United States Copyright Office, as required by 17 U.S.C. 411(a), which requires registration of a work before an "action for infringement of the copyright" is "instituted." Supported by The Authors Guild, the National Writers' Union, and the American Society of Journalists and Authors, the lawsuits were consolidated for pretrial purposes in the Southern District of New York. Jurisdiction rested on 28 U.S.C. § 1338 (acts of Congress related to copyright) and 28 U.S.C. § 1331 (federal question).

Plaintiffs' claims (and those of the putative class) involved a complex set of potential liabilities resulting from the databases' distribution of freelance articles provided by the publishers, and the publishers' representations of adequate rights and promises of indemnity. The consolidated action was suspended pending decision in *Tasini*. In 2001, this Court held that 17 U.S.C. § 201(c) did not itself provide a defense to infringement claims of freelance authors with respect to their periodical freelance articles included in databases under license from newspaper and magazine publishers, 533 U.S. 483 (2001), leaving each of the defendants free to defend each claim on individualized grounds (e.g., oral or written licenses, statute of limitations, waiver, or estoppel).

Corporation, 00-civ-6049 (S.D.N.Y.); and *Authors Guild v. New York Times*, 01-civ-6032 (S.D.N.Y.).

The class action was reactivated after this Court's decision in *Tasini*. United States District Judge George B. Daniels suggested mediation. The parties agreed, and the court approved Kenneth Feinberg to act as mediator. (A highly respected and effective mediator, Mr. Feinberg was appointed by then-Attorney General Ashcroft as Special Master of the September 11 Victim's Compensation Fund.)

Four years of intensive, complex and costly mediation ensued. The mediation included discussions and negotiations between the parties as well as other publishers not named as defendants but who had delivered their contents to the databases with representations of adequate rights and promises of indemnity, and therefore held interests indispensable to both global resolution of the asserted claims and restoration of the integrity of the electronic archives on which scholars and the public had come to rely. The mediation was further complicated because it effectively entailed separate yet interdependent sets of negotiations between freelance author groups, print publishers (and their insurers), and the electronic databases (and their insurers) in order to agree on terms and raise the funds necessary to compensate freelance authors and restore the rich electronic archival records. *Tasini* had recognized that archives had been seriously harmed by redactions made under the specter of continuing liability, and had expressly suggested that the problem could be addressed by “[t]he parties (Authors and Publishers) [entering] into an agreement allowing continued electronic reproduction of the Authors' works.” *Tasini*, 533 U.S. at 505.

In March 2005, after a herculean effort, the authors, database proprietors, and nearly 40 publishers who consented to fund more than half of the agreed-to settlement amount reached a comprehensive settlement agreement. Freelance authors would gain the right to submit claims for all freelance articles in the databases for which they had not licensed electronic rights in writing, regardless of whether (a) copyright in the article had already been registered in the Copyright Office, (b) claims on those articles had been previously asserted in the action, (c) there were oral licenses or other available defenses, or (d) the article had ever been accessed. Every freelance article in the databases was eligible for compensation, pursuant to an agreed-on schedule. Authors were also entitled to deny future use of their articles. In exchange, all past, present, and future claims of freelance authors for articles presently in the databases would be released. Those releases would effectively permit the restoration of articles taken down, and would also permit publishers and the databases to retain in the electronic archives freelance articles that had not yet been taken down (save for the few as to which future use was expressly denied).

During the claims period, which ended September 30, 2005, thousands of freelance authors submitted detailed claim forms, electronically or on paper, seeking compensation with respect to hundreds of thousands of newspaper and magazine articles, which has not been (and unless this Court grants review and reverses will not be) paid.

4. Objections were filed on behalf of ten authors. Although the objectors raised more than thirty

discrete objections in opposition to the motion for approval, they did not challenge the court's jurisdiction to approve a settlement compensating unregistered works. After carefully considering the objectors' many contentions and holding a day-long argument, the district court overruled the objections, certified a class of freelance authors under Rule 23(a) and (b), approved the settlement as fair, reasonable, and adequate under Rule 23(e), and entered final judgment. Pet. App. 48a-58a.

5. The objectors appealed, complaining of the insufficient payments for unregistered works and the release of future claims, but again not arguing that the district court lacked jurisdiction to certify the class or approve the settlement. Shortly before oral argument, the Second Circuit panel *sua sponte* requested briefing on "whether the district court had subject matter jurisdiction over claims concerning the infringement of unregistered copyrights." Pet. App. 46a-47a.

After receiving the parties' submissions and hearing oral argument, Judge Chester J. Straub (for himself and Judge Ralph K. Winter) filed a majority opinion on November 29, 2007, vacating the district court's certification of the class and approval of the settlement on the ground that the court lacked jurisdiction "to certify a class consisting of claims arising from the infringement of unregistered copyrights and to approve a settlement with respect to those claims." Pet. App. 5a. The Second Circuit held that the register-before-instituting-suit provision of copyright law eliminates the otherwise plain judicial power to approve the settlement of a class action

compensating and releasing claims that the court did not then have jurisdiction to adjudicate.

Greatly misreading previously established circuit precedent that 17 U.S.C. § 411(a) is “a jurisdictional prerequisite to the right of the holder to enforce the copyright in federal court” (Pet. App. 19a), the majority applied that requirement to the claims of not only the named plaintiffs but also every author potentially benefiting by the settlement, and further held that supplemental jurisdiction under 28 U.S.C. § 1337 was therefore unavailable. Pet. App. 20a-27a.

Petitioners (and plaintiffs-appellees as well) had argued that § 411(a) – which applies only to “*institut[ing]*” an infringement action – was fully complied with because plaintiffs had registered each of their allegedly infringed works in suit prior to filing the lawsuit, as the Complaint alleged. They contended that the district court therefore possessed its usual power, in a case properly within its subject matter jurisdiction under 28 U.S.C. § 1338 and in full compliance with 17 U.S.C. § 411(a), to approve a settlement agreement that released claims that the court lacked subject matter jurisdiction to adjudicate, just as courts in proper cases have granted injunctions protecting all of the plaintiff’s copyrighted works, and not just registered works.

The majority rejected those arguments, holding that section 411(a) “requires that each class member’s claim arise from a registered copyright” in order for the district court to approve a settlement agreement providing any relief to the class. Pet. App. 24a. The majority then held that 28 U.S.C. § 1337 “did not provide the District Court with

jurisdiction over the claims arising from the alleged infringement of unregistered copyrights” because § 411(a) is a “federal statute” that precludes supplemental jurisdiction under the “except as expressly provided otherwise by Federal statute” clause of § 1337(a).² Pet. App. 25a-27a.

Judge John M. Walker, Jr. dissented on the ground that “the fact that some of the otherwise presumably valid copyrights have not been registered is an insufficient basis for undoing this class-action settlement.” Pet. App. 28a. Judge Walker noted that the Second Circuit had “recent[ly held] that not all members of a settlement-only class need to possess a valid cause of action under the applicable law,” *id.*, citing *Denney v. Deutsche Bank A.G.*, 443 F.3d 253 (2d Cir. 2006), and would have held that § 411(a)’s “registration requirement is more akin to a claim-processing rule than a jurisdictional prerequisite,” under *Bowles v. Russell*, 127 S. Ct. 2360 (2007), *Eberhart v. United States*, 546 U.S. 12 (2005), and *Kontrick v. Ryan*, 540 U.S. 443 (2004). Pet. App. 28a-29a. He concluded that the cases relied upon by the majority to support its ruling that

² 28 U.S.C. § 1337(a) provides:

(a) Except as . . . expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

the District Court lacked jurisdiction, *Weinberger v. Salfi*, 422 U.S. 749 (1975), *Well-Made Toy Mfg. Corp. v. Goffa Int'l Corp.*, 354 F.3d 112 (2d Cir. 2003), and *Morris v. Business Concepts, Inc.*, 259 F.3d 65 (2d Cir. 2001), were in any event distinguishable, since those cases entailed the power to adjudicate claims, where this one concerns the power to settle a case already within a court's jurisdiction. Pet. App. 42a-45a.

Plaintiffs, defendants and objectors all petitioned for rehearing and rehearing in banc. They argued that the case was properly instituted in compliance with § 411(a), and therefore the district court had the power to approve a Rule 23 settlement providing compensation for named plaintiffs and class members, and the release of claims beyond those that the court could have adjudicated. See *Matsushita*, 516 U.S. 367. By summary orders dated March 24 and April 15, 2008, the Second Circuit denied the petitions. Pet. App. 59a-61a.

REASONS FOR GRANTING THE PETITION

Recognizing that the settlement of complex cases is in the public interest and that broad releases are often necessary to achieve such settlements, this Court held in *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996), that the power to settle cases necessarily entails the power to approve releases of claims beyond the approving court's jurisdiction to adjudicate, so long as due process is satisfied. The courts of appeals and state courts have repeatedly agreed. In conflict with those rulings, the Second Circuit's decision here holds that the district court

could not approve a settlement that released claims then beyond the court's subject matter jurisdiction to adjudicate. That conflict provides a powerful reason for this Court to grant review.

In addition to that conflict are two other factors compelling this Court's review: the tension between the decision below and this Court's expectation in *Tasini* that “[t]he parties (Authors and Publishers) may *enter into an agreement allowing continued electronic reproduction of the Authors' works*,” 533 U.S. at 505, and the public benefit afforded by the settlement (and the corresponding harm caused by the decision that the settlement is beyond the district court's jurisdiction to approve).

To restore the integrity of the national archival electronic record of the nation's magazines and newspapers, class-wide releases are indispensable. The publishers and databases were willing to pay handsomely to each freelance author claiming compensation. But the Second Circuit's decision makes any settlement restoring those archives unachievable. Because all the relevant players in the newspaper and magazine publishing industry were involved and subject to that ruling, this is not a dispute that can further percolate before this Court need intervene. Leaving the Second Circuit's decision intact would leave the electronic availability of complete newspaper and magazine contents through the late 1990s substantially incomplete at least through the expiration of copyright term for those articles many decades from now.

This Court and other courts have repeatedly held that courts have the power in approving settlement

agreements to release claims that they lack jurisdiction to adjudicate. The Second Circuit's decision that such power does not exist in copyright cases because of § 411(a) – even though plaintiffs meticulously complied with that provision when the case was instituted five years before the settlement agreement was reached and presented to the district court – conflicts with those decisions and presents an important issue warranting this Court's review.

I. THE DECISION THAT THE DISTRICT COURT LACKED JURISDICTION TO APPROVE A SETTLEMENT RELEASING CLAIMS IT COULD NOT ADJUDICATE CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS

A. The Decision Conflicts with Established Law Regarding the Settlement and Release of Claims

The Second Circuit erred, and its decision conflicts with *Matsushita* and decisions of other courts, by ignoring the settled law permitting the release of claims over which a court lacks subject matter jurisdiction and focusing instead on the narrow issue of whether the district court would have had jurisdiction to adjudicate the claims that were being settled and released.

A long line of decisions have approved the settlement and release of claims in the class action context, irrespective of whether those claims were or could have been presented due to Article III or other jurisdictional defects. *See, e.g., Matsushita*, 516 U.S. at 374-75 (state courts may release even claims subject to exclusive federal jurisdiction); *Lexecon Inc.*

v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 30 (1998) (holding that transferee courts lack jurisdiction to try transferred cases, but stating no objection to a transferee court's settlement of a case it lacked power to try); *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 366 (3d Cir. 2001) ("It is now settled that a judgment pursuant to a class settlement can bar later claims based on the allegations underlying the claims in the settled class action . . . even though the precluded claim was not presented, and could not have been presented, in the class action itself.") (citation omitted); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 221 (5th Cir. 1981) ("[e]ven when the court does not have power to adjudicate a claim, it may still 'approve release of that claim as a condition of settlement of (an) action (before it).'"'); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1287 (9th Cir. 1992) (federal court may release not only claims alleged in the complaint, but also a claim "based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action."). *Id.* at 1287.³

³ See also *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 108-09 (2d Cir. 2005) (court had jurisdiction to approve settlement benefiting persons who asserted no claims and are thereby outside court's jurisdiction); *Grimes v. Vitalink Commu'n Corp.*, 17 F.3d 1553, 1563 (3d Cir. 1994) ("it is widely recognized that courts without jurisdiction to hear certain claims have the power to release those claims as part of a judgment"); *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 33-34 (1st Cir. 1991) (jurisdiction to approve releases does not require jurisdiction to adjudicate).

As the Second Circuit had previously held in *TBK Partners Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982) – a case contrary to and inexplicably ignored in the decision here – because of the strong public policy favoring “comprehensive settlement,” courts may approve class action settlements releasing claims which they had no jurisdiction to adjudicate:

[W]e have recognized the authority of a state court to approve a settlement that releases a claim within the exclusive jurisdiction of the federal courts [and] therefore conclude that in order to achieve a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action, a court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim . . . might not have been presentable in the class action.

TBK Partners, 675 F.2d at 460 (citations omitted; emphasis added). To use the formulation of a leading commentator, although the district court lacked “jurisdiction to try [damage claims regarding unregistered works,] it had (through the ‘alchemy of settlement’) the authority to dispose of them.” Judith Resnik, *Procedure as Contract*, 80 Notre Dame L. Rev. 598, 628 (2005) (footnote omitted).

Matsushita and the long line of cases that precede and follow it consider the power of courts with regard to settlement “broadly [under] the law of ‘releases’ rather than narrowly [as an] issue of federal court jurisdiction.” *Williams v. GE Capital*

Auto Lease, 159 F.3d 266, 268-69, 273-74 (7th Cir. 1998) (treating members of a settlement class as beneficiaries of the parties' settlement agreement, rather than as parties). Approving a settlement in which the parties contract for the release of claims not previously placed before the court, in order to obtain complete peace for the defendant at a cost that the plaintiffs will accept, is not the same as adjudicating claims over which a court lacks jurisdiction. This Court has so held at least twice.

Matsushita, 516 U.S. at 381, held that the exclusive jurisdiction of federal courts to adjudicate federal securities fraud claims does not preclude state courts from approving releases of such claims. The Court decided that a state court's approval of a classwide release of claims that the Court could not have adjudicated is not the jurisdictionally barred adjudication of those claims. Similarly, in *Local No. 93, Int'l Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986) ("Firefighters"), this Court held that federal courts could approve classwide settlement agreements providing for relief that the statute prohibited the court from granting, since it was the parties' agreement, not judicial adjudication, that produced the terms agreed upon:

More importantly, it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree. Consequently, whatever the limitations Congress placed in § 706(g) on the power of federal courts to impose obligations on employers or unions to remedy violations of Title VII, these simply do not apply when

the obligations are created by a consent decree.

478 U.S. at 522-23; *see also id.* at 526 (“the court is not barred from entering a consent decree merely because it might lack authority . . . to do so after a trial.”).

In conflict with that approach, the Second Circuit here totally ignored the law of releases. Instead, it took a hyper-technical approach to § 411(a), treating it as “jurisdictional” in the sense not only that other courts have (as a precondition to the court’s power to adjudicate copyright infringement claims), but also more broadly as eliminating the long-recognized judicial power to approve a consensual resolution of the plaintiffs’ dispute providing for the release of claims that the court lacked power to adjudicate.

The conflict between those two approaches requires this Court’s resolution. The split between the Second Circuit’s denial of jurisdiction to approve a settlement agreement in this case, on the one hand, and *Matsushita*, *Firefighters*, and cases such as *Williams* on the other, is particularly notable. Unlike those and the other cases discussed above, where the settling court may never have been able to acquire jurisdiction over certain of the settled claims, the § 411(a) registration obstacle here is curable in theory, and could be overcome by registering unregistered works (if the necessary information to identify freelance articles and contact class members were comprehensively available, which it unfortunately is not). The issue here is whether Congress intended the § 411(a) precondition to *instituting* suit also to bar approval of a class action

settlement resolving an industry-wide problem that could not otherwise be addressed. This case was properly instituted under § 411(a), and its consensual resolution, completely consistent with the Court's prescription in *Tasini*, is obviously in the interests of authors, publishers, the electronic archives, and readers and researchers generally.

One can agree that § 411(a) is a precondition to the institution of a copyright infringement action and to the judicial grant of damage remedies for unregistered works, as petitioners do, without profli-gately expanding § 411(a) to prohibit judicial approval of a private settlement, in a properly instituted action after five years of complex mediation, merely because that settlement provides for the compensation and release of claims involving unregistered works. *Cf. Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006) ("Jurisdiction," this Court has observed, "is a word of many, too many, meanings") (citations omitted).

There had indisputably been no jurisdictional defect from institution of the suit until the motion for preliminary approval in 2005. Because of the *Matsushita* principle, neither the district court nor the parties here perceived a jurisdictional impediment to the comprehensive settlement, just as the Ninth Circuit and its lower court noticed no jurisdictional obstacle in approving a settlement that provided for compensation to class members without regard to registration. *See Steiner v. Am. Broad. Co.*, No. CV 00-05798, at 4-6 (C.D. Cal. Apr. 20, 2005) (approving settlement of copyright infringement class action that released claims on musical compositions and sound recordings without regard to

whether those works were registered), *aff'd on other grounds*, No. 05-55773, 2007 U.S. App. LEXIS 21061 (9th Cir. Aug. 29, 2007). Here, as in *Steiner* – where the Ninth Circuit should have vacated the settlement if the panel here is correct – the district court, with original jurisdiction over the named plaintiffs' claims under 28 U.S.C. §§ 1331 and 1338 in compliance with § 411(a), had Article III power to approve a settlement agreement that compensated and released all infringement claims of the class of authors, regardless of registration.

B. The Decision Misapprehends the Text and Purpose of Section 411(a) of the Copyright Act

The “law of releases” canvassed above demonstrates the panel’s error below, unless § 411(a) is an exception to the general rule permitting courts to approve class action settlements that release and compensate claims outside their jurisdiction to adjudicate. The panel did not discuss the general rule and deemed the cases applying it “inapposite” without explanation. *See* Pet. App. 16a n. 4. Whether § 411(a) eliminates in copyright infringement cases a court’s power to release claims outside its jurisdiction to adjudicate is an exceptionally important issue, and the Second Circuit’s resolution of it is in obvious tension with the line of cases cited above broadly establishing such power regardless of jurisdiction to adjudicate.

The decision’s extended discussion of whether § 411(a) is jurisdictional addressed a question that no party had raised and which the cases canvassed above render irrelevant. As the dissent perceived,

the issue that the panel raised *sua sponte* should have been not whether § 411(a) is “jurisdictional” – a word that this Court has stated has many differing meanings – but whether § 411(a) deprived the district court, in a case filed many years earlier in compliance with § 411(a) over which jurisdiction was conferred by §§ 1331 and 1338, of its otherwise clear power to approve a settlement providing for the compensation and release of claims regarding unregistered works.

The district court did not assume or exercise jurisdiction to adjudicate infringement claims or grant damages regarding unregistered works – powers that defendants agree the court lacked. Rather, it dispatched to mediation, and then approved the agreement privately resolving, a lawsuit in which each claim of the named plaintiffs complied with § 411(a) because, when the case was “institute[d]” in 2000, every U.S. work whose infringement plaintiffs complained of had been duly registered.

This Court rested its decision in *Matsushita* on that very distinction, rejecting the objection that Delaware had improperly resolved exclusively federal securities law claims: “While § 27 prohibits state courts from adjudicating claims arising under the Exchange Act, it does not prohibit state courts from approving the release of Exchange Act claims in the settlement of suits over which they have properly exercised jurisdiction. . . .” 516 U.S. at 381. The Second Circuit’s approach conflicts directly with that distinction which controlled the decisions in *Matsushita* and earlier in *Firefighters*.

Both the statutory text and the purpose underlying § 411(a) strongly suggest that Congress did not divest district courts of their usual power to consider and approve a settlement providing for the release of claims that could not at present be adjudicated.

The statutory text sets a registration precondition before an infringement action may be “instituted.” Filing a complaint, not certification of a class in connection with settlement many years later, is the institution of a lawsuit. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 378 (1983) (one of six Supreme Court class action decisions, three from before the 1976 enactment of the Copyright Act, in which “instituted” consistently refers to the initial filing of a lawsuit, not to subsequent settlement class certification); *Local Union No. 38, Sheet Metal Workers’ Int’l Ass’n, AFL-CIO v. Pelella*, 350 F.3d 73, 82 (2d Cir. 2003) (“A party institutes an action when he commences a judicial proceeding.”); *see also Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 571 (2004) (jurisdiction is determined at the time of filing, “regardless of the costs” that rule imposes). Moreover, there is strong reason to attend to the statutory verb “instituted,” since the 1976 Act replaced the 1909 Act’s “no action . . . shall be maintained,” *see New York Times Co. v. Star Co.*, 195 F. 110, 111 (2d Cir. 1912) (emphasis added), with “no action . . . shall be *instituted*.”

Plaintiffs instituted their infringement action in full compliance with § 411(a). It was nearly five years later before the parties presented a proposed settlement in which, to resolve the claims within the

court's clear jurisdiction, defendants agreed to provide payments to (and obtain releases from) a class of freelance authors. The court approved the settlement and certified the requested class of authors after reviewing the settlement for fairness and reasonableness under Rule 23(e). Just as in *Matsushita* and *Firefighters*, the district court here did not adjudicate claims beyond its jurisdiction, but simply approved a private contractual settlement as fair and reasonable. Neither approval of the settlement nor the concomitant certification of the class was the "institution" of an "action for infringement of the copyright." That happened five years earlier, in compliance with § 411(a).

The refusal to apply § 411(a) as written – and the decision to apply it as a limitation on not only the institution of suit but also the permissible scope of settlement – conflicts with this Court's warning that "[w]e must not give jurisdictional statutes a more expansive interpretation than their text warrants." *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 558, 549 (2005). *Exxon* directs focus to whether "the action is one in which the district courts would have original jurisdiction," and away from whether each putative class member could herself have been a plaintiff. *Id.* at 558. *Exxon* teaches that class action settlements may compensate (and release the claims of) absent class members who could not have themselves satisfied the requirements of subject matter jurisdiction and sued, *see id.* at 558-59. Contrary to that approach, the Second Circuit stretched § 411(a) far beyond its text and intent, as if it repealed, in copyright infringement cases, courts' settled authority to advance the public interest by

settling cases, even when the settlement agreement broadly compensates and releases claims that the courts could not adjudicate.

Nor does § 411(a)'s text or purpose suggest any congressional purpose to strip district courts of their usual power to approve settlements releasing claims (even claims beyond the court's power to adjudicate). Section 411(a)'s purpose is to induce registration and deposit, which it does by providing that "a copyright owner who has not registered his claim can have a valid cause of action against someone who has infringed his copyright, but he cannot enforce his rights in the courts until he has made registration." H. Rep. No. 94-1476, at 157 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5773. Consistent with statutory text and purpose, the settlement entailed no judicial enforcement of unregistered copyrights, no adjudication of infringement claims regarding such works, and no judicial grant of copyright remedies. *See Matsushita, supra.*⁴

⁴ The leading commentator agrees that once jurisdiction is properly obtained in compliance with § 411(a) at the outset of litigation, a court "may order remedies such as seizure or injunction as permitted by statute, without reference to whether the precise items seized or enjoined are covered by a registration certificate." 2 Nimmer on Copyright ¶ 7.16[C][3] (footnotes omitted). *A fortiori*, § 411(a) should not be overread to preclude courts from exercising in copyright cases the general powers conferred by Article III (such as approving settlements) that do not reflect the grant of copyright remedies. *See also* Supplementary Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess., page 126 (only "the special remedies of statutory damages under section 504(c) and attorney's fees under section 505 should be dependent on registration").

Construing § 411(a) to preclude settlement of claims where releases covering unregistered works are required is contrary to the approach taken in *Washingtonian Publ'g Co. v. Pearson*, 306 U.S. 30, 41 (1939). *Pearson* rejected a comparably overreaching application of a registration statute because it “would not square with the words actually used in the statute, would cause conflict with its general purpose, and in practice produce unfortunate consequences.” The Court preferred a construction that provided “adequate” compulsion to one that would have “a more drastic effect [that] would tend to defeat the broad purpose of the enactment.” *Id.*

Avoiding similarly undue “drastic” and unwarranted impact, courts have consistently read § 411(a) to preclude adjudication of damage claims but not the grant of otherwise appropriate injunctive relief regarding future or unregistered works or the approval of broad settlement agreements, because to do so would defeat the broad purpose of copyright law.⁵ By contrast, the Second Circuit’s overreaching application of § 411(a) ignores its language, conflicts with its purpose, defeats protection of copyrighted works (where, as here, damages for any individual work might not exceed the cost of registration), precludes agreed-on compensation to authors, and deprives the public of the benefits of the restored

⁵ Among the cases approving injunctions reaching unregistered works are *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1154 n.1 (9th Cir. 2007); *Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1349 (8th Cir. 1994); and *Pac. and S. Co. v. Duncan*, 744 F.2d 1490, 1499 n.17 (11th Cir. 1984).

electronic archives that the settlement would make possible.

C. The Decision Cannot Be Reconciled With This Court’s Precedent Governing the Phrase “Except as Expressly Provided”

The “law of releases” canvassed above makes plain that the Second Circuit erred in looking to independent jurisdiction with respect to the released claims. But even if it was correct (and all those other cases wrong), its decision that supplemental jurisdiction is unavailable misreads 28 U.S.C. § 1367, overreads § 411(a), and is irreconcilable with *Breuer v. Jim’s Concrete of Brevard, Inc.*, 538 U.S. 691, 696-97 (2003).

Like the removal statute at issue in *Breuer*, 28 U.S.C. § 1367 confers federal jurisdiction broadly unless Congress has “expressly provided otherwise”: “except as . . . expressly provided otherwise by Federal Statute,” courts have supplemental jurisdiction “over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy . . . *Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties*” (emphasis added).

Breuer held that every word in the phrase “except as otherwise expressly provided by Act of Congress” had to “be taken seriously.” But the Second Circuit pointed to nothing whatever in the text of § 411(a), and there is nothing, that “expressly” provides for the inapplicability of supplemental jurisdiction in connection with approving settlements in cases properly instituted under § 411(a). To the

contrary, the panel made precisely the error that the petitioner in *Breuer* did, reading the jurisdictional statute as if it lacked the word “expressly.”

The Second Circuit was simply incorrect in stating that “Section 1367(a) excepts from its reach those cases in which another federal statute denies jurisdiction” (Pet. App. 25a); rather, it excepts from its reach only those cases in which another federal statute “expressly” provides that supplemental jurisdiction is inapplicable. To use the analysis employed by *Breuer*, 538 U.S. at 694, “Nothing on the face of [17 U.S.C. § 411(a)] looks like an express prohibition of [supplemental jurisdiction], there being no mention of” supplemental jurisdiction, let alone of prohibiting its exercise if that is even necessary in approving settlement agreements.

**II. THE DECISION CANNOT BE RECONCILED
WITH THIS COURT'S EXPECTATION IN
TASINI THAT AUTHORS AND PUBLISHERS
MAY ENTER INTO ENFORCEABLE AGRE-
EMENTS ALLOWING CONTINUED ELECTRON-
IC REPRODUCTION OF AUTHORS' WORKS**

The holding below ignores and contradicts *Tasini's* prescription that, in order to restore the integrity of electronic archives, “[t]he parties (Authors and Publishers) may enter into an agreement allowing continued electronic reproduction of the Authors' works; they, and if necessary the courts and Congress, may draw on numerous models for distributing copyrighted works and remunerating authors for their distribution.” 533 U.S. at 505.

That paragraph in *Tasini* prompted authors and their organizations, the database defendants, and newspaper and magazine publishers (some of which were defendants, others of which were participants under the spectre of being impleaded if litigation went forward) to invest four years of time and effort and considerable resources in a complex and difficult mediation under the guidance of one of the nation's most distinguished mediators, Kenneth Feinberg. By the conclusion of the mediation, which Mr. Feinberg described as the longest in American legal history, the parties to the mediation had accomplished what none of them believed possible years earlier: a settlement of all the issues that all three sides (authors, databases, and periodical publishers) could live with and enthusiastically support, and which served the public interest by providing for the restoration of archives that had been riddled with holes as a result of *Tasini*.

The Second Circuit's erroneous holding precludes the *sine qua non* of that or indeed any judicial cure – classwide release of claims with respect to registered and unregistered works so as to permit retention of millions of news and similar articles in electronic archives, for which the publishers and databases were willing to pay handsomely with respect to each claim released.

The parties worked hard and successfully to “enter into an agreement allowing continued electronic reproduction of the Authors’ works,” as contemplated by *Tasini*, that would avoid the permanent degradation of on-line archival databases and maintain a permanent, accessible record for the public and scholars. Without classwide release of

infringement liability, there is simply no way to restore the archives, as separate agreements with the tens of thousands of freelance authors whose works (written since 1978) pose a continuing threat of liability are wildly impracticable. Due principally to inadequate information and the prohibitive cost of individualized article and writer identification and negotiation, it is not possible to identify, contact, and separately license rights from each of the many thousands of authors who wrote articles over several decades (where the publishers thought that they had obtained adequate rights and therefore generally lacked information to identify freelance articles or to contact freelance authors). Absent classwide releases, articles already removed will remain taken down (to the considerable extent that publishers withdrew them after *Tasini*) and additional swaths of articles will be taken down (by publishers who either can identify freelance works or who will, proactively, take down all possibly freelance articles for the period before permissions practices were reformed in light of *Tasini*).

The Second Circuit's vitiation of precisely the private agreement *Tasini* contemplated ignored the broad grant of jurisdiction in § 1338. The decision was not compelled by, and indeed ignores, the plain language of § 411(a), with which plaintiffs quite literally complied according to its terms. Further, the decision gave insufficient weight to the strong public policy favoring consensual settlement of broadscale disputes, particularly those that affect the public interest. *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 215 (1994) ("[P]ublic policy wisely encourages settlements."). The policy of facilitating such

settlements is a principal reason for the rule permitting courts to release claims they lack jurisdiction to adjudicate:

Public policy strongly favors the pretrial settlement of class action lawsuits . . . Complex litigation – like the instant case – can occupy a court’s docket for years on end, depleting the resources of the parties and the taxpayers while rendering meaningful relief increasingly elusive. Accordingly, the Federal Rules of Civil Procedure authorize district courts to facilitate settlements in all types of litigation, not just class actions. . . Although class action settlements require court approval, such approval is committed to the sound discretion of the district court.

Modern class action settlements routinely incorporate settlement bar orders such as the one at issue in this case. . . The reason for this trend is that bar orders play an integral role in facilitating settlement. Defendants buy little peace through settlement unless they are assured that they will be protected against codefendants’ efforts to shift their losses through cross-claims for indemnity, contribution, and other causes related to the underlying litigation.

In re United States Oil & Gas Litig., 967 F.2d 489, 493-94 (11th Cir. 1992) (citations omitted). As the Third Circuit explained,

“[I]t may seem anomalous . . . that courts without jurisdiction to hear certain claims have the power to release those claims as part of a judgment. However, [courts] have endorsed the rule *because it serves the important policy interest of judicial economy by permitting parties to enter into comprehensive settlements.*”

Prudential, 261 F.3d at 366 (citations omitted); see also *Class Plaintiffs*, 955 F.2d at 1287 (because “[S]trong judicial policy [] favors settlements, particularly where complex class action litigation is concerned,” “federal courts may release not only those claims alleged in the complaint, but also a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action”).

The Second Circuit held that courts lack jurisdiction to approve settlements containing the *sine qua non* of any agreement “allowing continued electronic reproduction of the Authors’ works,” and that Congress deprived courts in copyright cases of their longstanding power to approve settlements releasing claims that they may at present lack power to adjudicate. Those holdings are at odds with the premise in *Tasini* and warrant this Court’s review.

CONCLUSION

For all the aforementioned reasons, the petition for a writ of certiorari should be granted.

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