No. 08-103

IN THE

Supreme Court of the United States

REED ELSEVIER INC., *et al.*,

Petitioners,

v.

LETTIE COTTON POGREBIN, *et al.*,

Respondents,

IRVIN MUCHNICK, *et al.*,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

The reasons for granting review, as requested by not only petitioners but also plaintiffs-respondents and objectors-respondents,[1] are simple and compelling. First, no purpose will be served by waiting for further cases to percolate through the courts of appeals. This suit resulted in an industry-wide national settlement, and if the panel's ruling stands the opportunity for a comprehensive settlement and resolution of this question will be irretrievably lost. Second, the panel's decision is in conflict with prior decisions of this Court, other circuits, and prior Second Circuit decisions. Third, the petition presents an issue about settlement power that is highly important to courts and litigants generally; is of particular importance to the database and newspaper and magazine industries and the nation's freelance authors; and, if left unresolved, will render incomplete the electronic databases used by millions.

I. NO PURPOSE WILL BE SERVED BY WAITING FOR OTHER LOWER COURTS TO ADDRESS THE ISSUE

The instant suit represents a comprehensive settlement reached by database operators, news-

[1] To the extent that the Objectors' reply attempts to reformulate the questions presented, this attempt is improper under this Court's rules without the filing of a cross-petition for certiorari. Supreme Court Rule 14(1)(a). The petition fully presents all the issues that the Court need decide.

paper and magazine publishers, insurers and freelance authors (supported by national authors' rights trade organizations) after four years of mediation. After that settlement was reached by the parties and approved by the District Court, the Second Circuit overturned the settlement and ruled in error 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 providing for compensation for unregistered works. If the panel's decision is left intact, there will be no incentive or realistic possibility for either the databases and publishers, or the putative class members, to pursue another such settlement, because the *sine qua non* of any settlement — class-wide releases of claims that can be asserted (and the overwhelming bulk of outstanding claims are for unregistered works) — will have been placed beyond reach. The practical result will be that the putative class members (authors of both registered and unregistered works alike) will remain uncompensated and many of the nation's leading online archival databases will remain permanently degraded. *See* Scott Carlson, *Once-Trustworthy Newspaper Databases Have Become Unreliable and Frustrating*, The Chronicle of Higher Education A29 (Jan. 25, 2002) ("Supreme Court decision led publishers to purge much archival material, to the dismay of scholars."), available at http://chronicle.com/free/v48/i20/20a02901.htm.

The central legal question, whether 17 U.S.C. § 411(a) bars a court from approving a settlement that extends relief to authors in respect of unregistered copyrights, may not be before this Court again for some time. When and if this issue arises again, it will certainly be in the context of a much less significant case.

II. THE SECOND CIRCUIT'S DECISION IS IN CONFLICT WITH THE PRECEDENTS OF THIS COURT, SISTER CIRCUITS, AND THE SECOND CIRCUIT ITSELF

The panel's opinion disrupts the well-settled rule established by this Court that a trial court may release claims in settlement that it does not otherwise have jurisdiction to try. This Court has long held that courts may release claims not otherwise subject to jurisdiction, vindicating the strong policy preference in favor of comprehensive settlement. In *Matsushita v. Epstein*, this Court held that a state court could approve a "class action settlement releasing claims solely within the jurisdiction of the federal courts." 516 U.S. 367, 375 (1996). This Court's decision in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), did not question a transferee court's power to settle claims that it lacked jurisdiction to try — consistent with rule laid out in *Matsushita*. *Id.* at 30 (holding that transferee courts may lack jurisdiction to try transferred cases, but stating no objection to a transferee court's settlement of a case it lacked the power to try).

The courts of appeals have also long endorsed the simple rule that trial courts have broad power

to approve settlements that effect the release of claims that they could not otherwise try. *See, e.g., 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. This is true even though the precluded claim was not presented, and could not have been presented, in the class action itself."); *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).'"). Taken together, this Court and the courts of appeals have set out a simple, bright-line rule — that in approving a settlement, a court may release claims that it could not otherwise adjudicate. The panel's decision threatens to turn this simple rule into a patchwork of ad-hoc exceptions — beginning with the exception for claims implicated by Section 411(a), a provision that does not even speak in express terms, and does not seem on its face to withdraw long-settled judicial power to approve settlements releasing claims that the court could not adjudicate, or granting relief that the court could not grant after adjudication. *Resp. Brief at* 6; *Objector's Brief at* 3.

The panel's decision is also in direct conflict with the Ninth Circuit's recent decision in *Perfect 10 v. Amazon.com*, in which the court rejected the argument that it "lack[ed] jurisdiction over the preliminary injunction to the extent it enforces

unregistered copyrights." 508 F.3d 1146, 1154 (9th Cir. 2007) (in proper copyright cases, injunctive relief may extend to unregistered works); *see also Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1349 (8th Cir. 1994); *Pac. & S. Co., Inc. v. Duncan*, 744 F.2d 1490, 1499 n. 17 (11th Cir. 1984).

In fact, the panel's opinion will create confusion even within the Second Circuit, where the rule, until now, has been consistent with this Court and the other courts of appeals. The panel did not attempt to reconcile its decision with Second Circuit precedent set down in *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456 (2d Cir. 1982). In *TBK*, the Second Circuit recognized the strong policy preference in favor of "comprehensive settlement" and held that "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." *Id.* at 460.

The long-standing bright-line rule that Courts may settle claims that they could not try supports the strong policy preference for comprehensive settlement — particularly in large class action suits, where it is essential — and conserves judicial resources. *Prudential*, 261 F.3d at 366 ("[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." (citations omitted)).

If this Court does not review the panel's decision, this bright-line rule will be rendered a patchwork. *Obj. Brief at* 3, *Resp. Brief at* 9-10. Effectively, a new battleground will be opened for opponents of the terms of comprehensive class action settlements to oppose such settlements on the basis that a particular state or federal statute, like Section 411(a), establishes preconditions to the filing of suit. The Circuit Courts, and eventually this Court, will be forced to define the contours of this new front in class action litigation and, in the process, the comprehensiveness and finality of class action settlements will be greatly reduced, and the strong public policy in favor of settlements greatly disserved.

III. THE DECISION BELOW HAS PROFOUND IMPLICATIONS FOR THE PARTIES AND FUTURE LITIGANTS.

This case is of profound importance to the nation's freelance authors, database operators, newspaper and magazine publishers and to future class action litigants.

The panel's decision will render meaningless this Court's assurance in *New York Times Co. v. Tasini*, that "[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. 483, 505 (2001). For all practical purposes, this Court's words would be rendered a nullity.

The many parties to this action reached an apparent resolution after a nearly decade long course of litigation and mediation. Every relevant player in the underlying dispute was included. The parties reached a settlement that would compensate the freelance authors and would permit the nation's database operators and newspaper and magazine publishers to go forward without the specter of lingering liability and without the omissions that currently plague widely-used electronic databases. All of these salutary developments will be erased if the panel's decision is permitted to stand. Under the panel's ruling, the parties will be unable to collectively pursue a resolution that will put this issue to rest. Even if an agreement could be reached with the holders of the registered copyrights alone, archival databases will remain incomplete as to many unregistered works.

Contrary to the Objectors' contentions, the proposed settlement fairly compensates the holders of both registered and unregistered copyrights — a fact recognized by the thousands of freelance authors who submitted detailed claim forms seeking compensation regarding hundreds of thousands of registered and unregistered newspaper and magazine articles.[2] Indeed, as

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[2] As the District Court observed:

> I believe the record indicates that those individuals who have expressed [] dissatisfaction are overwhelmingly outnumbered by the majority of plaintiffs in this case, who believe that this is a fair, adequate, appropriate settlement which ensures recovery so some extent to all class members involved. It also significantly provides recovery for

plaintiffs-respondents stress, Respondents Brief at 3, in the absence of a comprehensive class action settlement, unregistered copyright holders — even those who have submitted claim forms as part of the settlement — will likely receive no recovery.

Meanwhile, the panel decision will raise a serious question in every class action settlement in which a court attempts to release claims that would otherwise not be subject to adjudication. As the parties have discussed in their prior briefs, many statutes could be analogized to Section 411(a). *Resp. Brief at* 11. It is a virtual certainty that many will arise in the class action context. The Court will be forced to deal with these arguments piecemeal, having passed up the opportunity to resolve the issue at this juncture.

Petitioners respectfully urge that this issue should be resolved now, in the context of this critically important case.

[Footnote continued from previous page]

> plaintiff class members who, one, would not otherwise have the motivation or resources to pursue recovery on their own, and, further, provides recovery to an extent for those who may not even otherwise have a basis for the type of recovery that is provided here.

Petitioners' Brief at 50a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari, supported by all parties to the appeal below, should be granted.

October 28, 2008

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