

No. 08-103  
IN THE  
**Supreme Court of the United States**

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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,*

– against –

IRVIN MUCHNICK, ABRAHAM ZALEZNIK, CHARLES SCHWARTZ, JACK SANDS, TODD PITOCK, JUDITH STACEY, JUDITH TROTSKY, CHRISTOPHER GOODRICH, KATHY GLICKEN AND ANITA BARTHOLOMEW,

*Respondents,*

LETTY COTTIN POGREBIN, E.L. DOCTOROW, TOM DUNKEL, ANDREA DWORKIN, JAY FELDMAN, JAMES GLEICK, RONALD HAYMAN, ROBERT LACEY, RUTH LANEY, PAULA McDONALD, P/K ASSOCIATES, INC., GERALD POSNER, MIRIAM RAFTERY, RONALD M. SCHWARTZ, MARY SHERMAN, 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 AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS,

*Respondents,*

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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**REPLY BRIEF FOR RESPONDENTS  
POGREBIN ET AL. IN SUPPORT OF PETITIONERS**

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## ARGUMENT

### I. Amicus Ignores This Court's Recent Jurisdictional Rulings

The Brief of Court-Appointed Amicus Curiae in Support of the Judgment Below (“Amicus”) fails to grapple with this Court’s recent jurisdictional rulings and does not address with precision the question posed by this Court, i.e., does section 411(a) of Title 17 “restrict the subject matter jurisdiction” that federal courts possess over copyright actions under sections 1331 and 1338 of Title 28. Indeed, other than on page 1 of the brief under “Jurisdiction,” the brief of Amicus ignores the existence of 28 U.S.C. § 1338.

Amicus also ignores the difference between a party’s lack of standing and a court’s lack of subject matter jurisdiction, and repeatedly and inaccurately states that the Pogrebin Respondents (plaintiffs) conceded that section 411(a) is jurisdictional. (Amicus Br. 8, 10, 12, 14, 57, 58, 59, 60 and 61). On the contrary, plaintiffs pleaded in their Consolidated Amended Complaint that the Court had subject matter jurisdiction over this action under 28 U.S.C. §§ 1331, 1338 and 1367. (JA 81). Plaintiffs never conceded (and do not believe) that the court lacked subject matter jurisdiction; instead, in explaining the settlement to the district court, plaintiffs acknowledged the substantial litigation risk that authors of unregistered works would be found to lack standing under section 411(a). Plaintiffs explained that this risk justified a lower settlement payment for unregistered works than for registered

works. (See Amicus Br. 1a-2a, 13a, 17a-18a, 68a-69a).

While Amicus cites and even quotes plaintiffs' position on **standing** (see Amicus Br. 8, 9, 11), Amicus suggests that plaintiffs made admissions as to **jurisdiction** (see *id.* 14, 57-58), thus conflating standing with subject matter jurisdiction and indulging in the same "profligate" use of the term "jurisdiction" that this Court criticized in *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006): "This Court, no less than other courts, has sometimes been profligate in its use of the term [jurisdiction]." *Id.* at 510.<sup>1</sup>

Amicus' reliance on strings of cases referring to section 411(a) as "jurisdictional," without analyzing whether section 411(a) is *subject matter* jurisdictional as opposed to jurisdictional in the sense of a mandatory rule or standing requirement, is not helpful to an analysis of the question posed by this Court in its grant of certiorari.

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<sup>1</sup> Similarly, rather than acknowledging that the phrase "drive-by jurisdictional rulings" was used by this Court in *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) and *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 91 (1998), Amicus suggests that Petitioners coined the phrase. (Amicus Br. 38).

**II. All the Asserted Public Policy Benefits of Section 411(a)'s Registration Requirement Exist Regardless of Whether the Rule is "Jurisdictional" or a Mandatory Rule.**

Amicus asserts that section 411(a)'s registration requirement fosters an array of public policy benefits: supporting a national registration system that publicly identifies copyright holders; sheltering the courts from a deluge of minor infringement claims; shielding defendants from "frivolous claims that curb expression"; and sustaining the Library of Congress. (Amicus Br. 45). Amicus fails to acknowledge, however, that these same benefits will flow if section 411(a) is determined to be a mandatory, but not subject matter jurisdictional, statute. If it is mandatory that district courts dismiss claims concerning unregistered works upon the motion of a defendant, the same public benefits advanced by section 411(a) will be served.

Amicus suggests that section 411(a) should be determined to be subject matter jurisdictional so that courts will *sua sponte* dismiss cases before defendants plead. Amicus asserts that, in contrast, a "waivable condition requires the defendant to answer the complaint *and* move to dismiss," and says (without support) that Congress "concluded that authors, publishers, and other potential defendants should not have to answer infringement claims that have not stood the test of registration." (Amicus Br. 54 (emphasis added)).

However, a defendant is not required to file an answer in order to dismiss a claim. Under Rule 12 of the Federal Rules of Civil Procedure, a defendant can simply file a motion to dismiss, asserting that the plaintiff has not alleged registration. No answer need be filed. Moreover, federal courts rarely dismiss complaints on their own motion before defendants take some action in the case.

In those few cases where a defendant chooses to settle claims that include unregistered works rather than move to dismiss, defendants are recognizing other valid concerns. In this case, defendants recognized that this Court's *Tasini* ruling meant that they were likely infringing the copyrights of freelance authors and that a remedy was needed.

**III. The Settling Parties Are Not Judicially Estopped Based on Statements Made in the Context of Settlement Communications Protected by Rule 408 of the Federal Rules of Evidence or Statements Made to the Court in Defending the Fairness and Adequacy of the Settlement.**

Amicus asserts that statements made in connection with the settlement should be used to judicially estop the parties from arguing here that section 411(a) does not deprive courts of subject matter jurisdiction. (Amicus Br. 57-58). This is a very curious, and specious, argument. It suggests that the determination as to whether a court has

subject matter jurisdiction should be based on lawyers' arguments in settlement discussions and in defending the fairness of a settlement. There is, of course, no authority for the proposition, and Amicus has cited none.

Amicus' argument also contravenes Rule 408(a) of the Federal Rules of Evidence, which provides that statements made in connection with settlement are not admissions. Moreover, Amicus ignores the procedural requirement that, in order to obtain court approval for a proposed class action settlement, parties are required in the Second Circuit to explain why the settlement is fair in light of the risks of litigation. *See Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974) ("The proposed settlement cannot be judged without reference to the strength of plaintiffs' claims"). In this case, plaintiffs fulfilled that obligation by explaining, among other things, that the claims of authors of unregistered works were at risk of being dismissed under section 411(a) for lack of standing.

Amicus suggests that, in settling cases, class representatives and counsel should be somehow omniscient and fashion relief with perfect knowledge of how courts will rule in the future, and that those who do not predict the future are somehow "inadequate." (*See* Amicus Br. 61-62). In fact, parties settle cases by weighing risks as they exist at the time of settlement. Similarly, courts ruling on the fairness of class action settlements must determine whether the settlement is fair as of the time it was made. Neither the parties nor the courts can predict the future, and rulings issued after a

settlement has been reached cannot be used to argue that a settlement made at an earlier time was unfair because it did not predict such ruling. *See Isby v. Bayh*, 75 F.3d 1191, 1197 (7th Cir. 1996); *Florida Trailer & Equip. Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960).<sup>2</sup>

#### **IV. Amicus' Section 1367(a) Argument Fails.**

Amicus gives short shrift to 28 U.S.C. § 1367(a), misapprehending its scope. Amicus conclusorily asserts that “*Allapattah* does not allow district courts to release class action claims that, like the ones in this action, stem from thousands of unrelated controversies falling outside the court’s jurisdiction,” even while Amicus acknowledges that section 1367(a) grants supplemental jurisdiction over all claims that “are so related to claims in the action within [the court’s] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution,” (Amicus Br. 67-68) (alteration in amicus brief).

However, in *Allapattah*, this Court ruled that the district court (and the affirming Eleventh Circuit Court of Appeals) had properly exercised supplemental jurisdiction over the state law claims of over 10,000 current and former Exxon dealers in 35 states who alleged that Exxon had breached its

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<sup>2</sup> It is for this reason that the Muchnick Respondents’ argument at 44-46 of their brief fails. The fairness of the settlement here must be judged in light of the risks that existed as of the time it was finally approved by the district court, not in hindsight based on later court rulings.

dealer agreement contracts with them by overcharging for fuel purchases. *See Allapattah Services, Inc. v. Exxon Corp.*, 333 F.3d 1248, 1251-52 (11th Cir. 2003), *aff'd*, 545 U.S. 546 (2005).

Just as the thousands of state law contract claims in the *Allapattah* class action constituted a single case or controversy under section 1367(a)'s "broad grant of supplemental jurisdiction," 545 U.S. at 558, the federal copyright claims of freelance authors whose works were digitized and shown in national databases similarly constitute a single case or controversy within the meaning of section 1367(a), because these claims "derive from a common nucleus of operative fact." *See Finley v. U.S.*, 490 U.S. 545, 549 (1989) (citing *Mine Workers v. Gibb*, 383 U.S. 715, 725 (1966)). Section 1367(a) therefore does apply to the claims asserted in this class action.

**V. The Attacks on Plaintiffs' Adequacy of Representation are Beyond the Scope of the Court's Grant of Certiorari, and are Meritless.**

Amicus, Amici Curiae Computer and Communications Industry Association & NetCoalition ("CCIA"), and the Muchnick Respondents make inaccurate arguments about the fairness of the settlement, although this issue has nothing to do with the narrow jurisdictional question *sub judice*. (Amicus Br. 61-62; CCIA Br. 8-10; Muchnick Br. 7-8, 44-46.) All question plaintiffs' adequacy to represent the settlement class because the class includes authors of only registered works, authors of only unregistered works, and authors of

both registered and unregistered works. All suggest these asserted “sub-classes” of authors required separate representation.

Sub-classes were neither necessary nor appropriate here. The Representative Plaintiffs authored unregistered as well as registered works, all of which were reproduced by the databases. Plaintiff Letty Pogrebin, for example, has written hundreds of freelance articles in newspapers and magazines, and registered copyright in only 21 such articles. (JA 50-51 ¶ 8(a)-(d)). Many of the other 22 Representative Plaintiffs claimed both registered and unregistered works as well; twelve Representative Plaintiffs alleged infringement with respect to a single registered work; and two Representative Plaintiffs were British writers who did not register any of their works (asserting Berne Convention jurisdiction). (Corrected Brief for Plaintiffs-Appellees filed July 7, 2006 in Second Circuit, at 34-35). The Representative Plaintiffs and absent class members thus shared a common interest in establishing liability for the unauthorized electronic use of their freelance works, and in maximizing the settlement amount not only as a whole but as to each tier in the plan of allocation.

Moreover, it is appropriate to tailor plans of allocation to reflect the relative strengths and weaknesses of claims. *In re Holocaust Victim Assets Litig.*, 413 F.3d 183 (2d Cir. 2001) (per curiam) (“Any allocation of a settlement of this magnitude and comprising such different types of claims must be based, at least in part, on the comparative strengths and weaknesses of the asserted legal claims”).

Statutory damages are available only for infringement claims based on works registered prior to the alleged infringement or within 90 days after first publication (section 412); claims based on works registered after that time window are eligible only for actual damages (sections 412, 504), which are difficult to prove and on the facts below arguably highly problematic. The settlement's three-tier plan of allocation fairly reflects the value of claims for registered works eligible for statutory damages (Category A under the plan of allocation), which is greater than the value of claims for registered works eligible only for actual damages (Category B), and much greater than the value of claims for unregistered works that, at the time of settlement, faced the risk of dismissal for lack of standing under section 411(a) (Category C).<sup>3</sup> The provision in the plan of allocation for the possible reduction in the value of Category C (unregistered works) claims before the reduction in value of Categories A and B claims is neither arbitrary nor prejudicial. Rather, **not** treating the claims differently would have been unfair to those authors who did register their works

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<sup>3</sup> Another justification for the lower payment under Category C is that Registration costs \$30 per work, or \$30 per group of works registered together in any one year. (Corrected Brief for Plaintiffs-Appellees filed July 7, 2006 in Second Circuit, at 36 n.12.) Thus, the expense borne by authors of registered works is another reason in support of a plan of allocation that favors registered works.

and who arguably alone had standing to sue at the time of settlement.<sup>4</sup>

Finally, as other parties have gratuitously raised the Category C potential-reduction issue – and Amicus has asserted as well that the administration of claims will impose an undue burden on the district court (Amicus Br. 63-64) – it is only fair for plaintiffs to point out that the claims process ended while the case was on appeal, and, based on claim assessment by the claims administrator, in fact, no Category C reduction will be necessary based on the claims filed, and no disputed claims issues are or are expected to be before the district court.

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<sup>4</sup> Amici's other attacks on the merits of the settlement are equally baseless. (*See* Amicus Br. 63, 65; CCI Br. 11-12.) These issues are also not encompassed within the question as to which certiorari was granted, and have been briefed and argued on a full record in the court below.

**CONCLUSION**

For the foregoing reasons and the reasons set forth in their opening brief, Respondents Pogrebin et al. respectfully request that this Court reverse and vacate the opinion of the Second Circuit Court of Appeals and remand for further proceedings.

Dated: September 18, 2009

Respectfully submitted,

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