NO. 08-103
IN THE
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,

– against –

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

Respondents,

LETTY COTTON 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,

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

BRIEF FOR RESPONDENTS POGREBIN ET AL. IN SUPPORT OF PETITIONERS

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1338 and 1367, and the Second Circuit had jurisdiction under 28 U.S.C. § 1291. The Second Circuit's Opinion was entered on November 29, 2007, and a timely petition for rehearing and rehearing en banc was denied on April 15, 2008. Pet. App. 1a, 59a. 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. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

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

> [N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party to the action with respect to the issue of registrability of

> the copyright claim by entering an appearance within sixty days after such service, but the Register's failure to become a party shall not deprive the court of jurisdiction to determine that issue.

STATEMENT OF THE CASE

This case is exceptionally important to the nation's freelance authors, newspaper and magazine publishers, archival databases, and reading public. If left in place, the Second Circuit's decision vacating the settlement in this case will bring about a result that is contrary to this Court's recognition in *New York Times v. Tasini,* 533 U.S. 483, 505 (2001), that "the parties (Authors and Publishers) may enter into an agreement allowing continued electronic reproduction of Authors' works," and would be detrimental to the public interest.

This class action was brought by freelance authors in 2000 against defendants that infringed their copyrights by including their works, without permission or compensation, in online databases – including widely-used databases that are vital to a wide array of research – such as LexisNexis. The case was stayed pending the decision of this Court in *Tasini,* which was brought individually by six freelance authors. In *Tasini*, this Court held that electronic publishers had infringed the copyrights of freelance authors, and stated:

> [T]he parties (Authors and Publishers) may enter into an agreement allowing continued electronic reproduction of 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.

Id. at 505.

The settlement in this case, reached after nearly four years of intense mediation and approved by the district court, is a comprehensive, industry-wide agreement among authors, publishers, and electronic databases allowing continued electronic reproduction and display of freelance works.

The district court granted final approval of the settlement, and some objectors took an appeal. Shortly before oral argument, the Second Circuit Court of Appeals *sua sponte* raised the issue whether the district court had subject matter jurisdiction over claims based on unregistered copyrights.

A divided panel vacated the district court's final approval order, reasoning that the district court lacked jurisdiction to certify the class and approve the settlement agreement because the settlement included claims based on unregistered copyrights. *In re Literary Works in Electronic Databases Copyright Litigation*, 509 F.3d 116, 121, 128 (2d Cir. 2007). Judge John M. Walker dissented on the ground that copyright registration under 17 U.S.C.

§ 411(a) is not a jurisdictional, but rather a claim-processing, requirement. *Id.* at 134.

The Second Circuit Court of Appeals dismantled a comprehensive settlement of this copyright infringement action designed to ensure that the nation's archival digital databases will remain intact, and that freelance authors will be fairly compensated for their contributions to the databases. The impact of its ruling is far reaching. Most freelance authors (*i.e.*, the vast majority of the class) whose copyrights were infringed on a widespread basis will not spend $35 or $45 (*see* 37 C.F.R. § 201.3) to register a year's worth of works to bring an actual damages infringement claim for articles they sold years ago for $50 or $100.

With no comprehensive settlement in place, the publishers and databases will have no choice but to search for and delete whole swaths of freelance works from their digital archives, or risk repetitive litigation over the same dispute the parties sought to settle in this case. Such gaps in the digital archives will compromise the interests of the reading public.

SUMMARY OF THE ARGUMENT

Section 411(a) of Title 17 of the United States Code does not restrict either the original subject matter jurisdiction of federal courts under 28 U.S.C. §§ 1331 and 1338 or the supplemental subject matter jurisdiction of federal courts under 28 U.S.C. § 1367(a).

First, pursuant to 28 U.S.C. §§ 1331 and 1338, the district court had original subject matter

jurisdiction over this civil action arising under the United States copyright laws when this civil action was instituted, as well as when it was settled. Neither the text nor legislative history of section 411(a) clearly states an intention that section 411(a) restricts this original jurisdiction. Moreover, the Circuit Courts of Appeal have endorsed exceptions to the registration requirement of section 411(a) that are inconsistent with a determination that section 411(a) is subject matter jurisdictional. Instead, section 411(a) is a claim-processing rule or prerequisite to suit which can be enforced or waived by defendants. In this case, defendants waived their rights under section 411(a) by settling.

Second, even assuming *arguendo* that compliance with section 411(a) is a requirement of original subject matter jurisdiction, the district court had such original subject matter jurisdiction over this civil action, because the named plaintiffs with United States works met the requirements of section 411(a) by registering their copyrights before instituting this lawsuit. The claims of settling freelance authors with unregistered copyrights arise from the same case or controversy as the claims of the plaintiffs with registered copyrights. The district court therefore could exercise supplemental jurisdiction over such claims pursuant to 28 U.S.C. § 1367(a), as nothing in 17 U.S.C. § 411(a) expressly restricts or prohibits such supplemental jurisdiction.

Accordingly, because it had subject matter jurisdiction, the district court had jurisdiction to certify the settlement class and approve the settlement of this civil action.

ARGUMENT

I. Section 411(a) Does Not Restrict the Subject Matter Jurisdiction of the Federal Courts.

Under the United States Copyright Act, 17 U.S.C. § 101 et seq., "[c]opyright protection subsists . . . in original works of authorship fixed in a tangible medium," 17 U.S.C. § 102(a), even if the works are not registered, 17 U.S.C. § 408(a) ("registration is not a condition of copyright protection"). *See La Resolana Architects v. Clay Realtors Angel Fire,* 416 F.3d 1195, 1198 (10th Cir. 2005) ("Congress made it easier to obtain copyright protection by recognizing that a copyright exists the moment an original idea leaves the mind and finds expression in a tangible medium, be it words on a page, images on a screen, or paint on a canvas").

This civil action arises under the United States Copyright Act, as the claims of the named plaintiffs (as well as the claims of all class members) challenge the same conduct – defendants' infringement of their United States copyrights by defendants' reproduction in electronic databases of their freelance articles without permission. (JA 79-102). Section 1331 of Title 28 provides district courts with subject matter jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." Section 1338(a) of Title 28 expressly vests the federal courts with exclusive subject matter jurisdiction over "any civil action arising under any Act of Congress relating to . . . copyrights." The district court thus had

original subject matter jurisdiction over this civil action pursuant to 28 U.S.C. §§ 1331 and 1338.

Section 411(a) does not restrict the subject matter jurisdiction of the federal courts under 28 U.S.C. §§ 1331 and 1338 over claims arising under the United States Copyright Act. Section 411(a) of the Copyright Act provides in relevant part:

> . . . [N]o civil 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.

17 U.S.C. § 411(a).[1] Rather than constituting a source of or limitation on subject matter jurisdiction, section 411(a) is instead a claim-processing rule or prerequisite to suit that must be enforced by the district court if timely raised by a defendant.

This Court has urged that courts should more carefully distinguish between true jurisdictional bars and statutory requirements that may be waived by defendants and, accordingly, should more cautiously apply the "jurisdictional" label. *See Eberhart v. United States,* 546 U.S. 12, 18-19 (2005); *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). As this Court stated in *Kontrick*:

> Clarity would be facilitated if courts and litigants used the label "jurisdictional" not for claim-processing rules, but only

[1] Subsection (b) of section 411 pertains to requirements for the certificate of registration, which are not at issue here.

> for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.

540 U.S. at 455.

This distinction is essential, as non-jurisdictional rules are subject to waiver or forfeiture by adverse parties, whereas limitations that go to a court's subject matter jurisdiction are not waivable or forfeitable and may also be raised by courts *sua sponte*. *See Eberhart,* 546 U.S. at 19. Similarly, the failure of a party to prove an element of its claim may not be raised for the first time on appeal by the party's adversary or by the court. "Only lack of subject-matter jurisdiction is preserved post-trial." *Kontrick*, 540 U.S. at 459.

In *Arbaugh v. Y&H Corp*., 546 U.S. 500, 515-16 and n.11 (2006), this Court stated that statutes should not be considered jurisdictional unless they "clearly" state an intention to limit jurisdiction:

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. . . . But when Congress

> does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

Id. at 515-16.

Arbaugh lists, as jurisdictional, statutes that by their express term confer or limit the subject matter jurisdiction of the court, rather than impose an obligation on a party:

> Certain statutes confer subject-matter jurisdiction only for actions brought by specific plaintiffs, *e.g.*, 28 U.S.C. § 1345 (United States and its agencies and officers)[2]; 49 U.S.C. § 24301(l)(2) (Amtrak)[3]; or for claims against particular defendants, *e.g.*, 7 U.S.C. § 2707(e)(3) (persons subject to orders of the Egg Board)[4]; 28 U.S.C. § 1348 (national banking associations)[5]; or for actions in which the amount in

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2 "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions . . . ."

3 "The district courts of the United States have original jurisdiction over a civil action Amtrak brings . . . ."

4 ". . . and the several district courts of the United States are hereby vested with jurisdiction to entertain such suits regardless of the amount in controversy."

5 "The district courts shall have original jurisdiction of any civil action commenced by the United States . . . ."

> controversy exceeds, *e.g.*, 16 U.S.C. § 814[6], or falls below, *e.g.*, 22 U.S.C. § 6713(a)(1)(B)[7], 28 U.S.C. § 1346(a)(2)[8], a stated amount. Other jurisdiction-conferring provisions describe particular types of claims. *See, e.g.*, § 1339 ("any civil action arising under any Act of Congress relating to the postal service"); § 1347 ("any civil action commenced by any tenant in common or joint tenant for the partition of lands where the United States is one of the tenants in common or joint tenants"). In a few instances, Congress has enacted a separate provision that expressly restricts application of a jurisdiction-conferring statute. *See, e.g., Weinberger v. Salfi*, 422 U.S. 749, 756-761 (1975) (42 U.S.C. § 405(h) bars § 1331 jurisdiction over suits to recover Social Security benefits).

546 U.S. at 515 n.11.

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6 ". . . Provided, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $ 3,000 . . . ."

7 "The district courts of the United States shall have original jurisdiction, concurrent with the United States Court of Federal Claims . . . ."

8 "(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court . . . ."

Neither section 411(a) nor its legislative history clearly states an intention to limit or restrict the subject matter jurisdiction of district courts under 28 U.S.C. §§ 1331 and 1338. Section 411(a) was enacted instead to encourage the registration of copyrights. As Judge Walker stated in his dissent, ". . . Congress passed § 411(a) to *facilitate the enforcement* of copyrights. . . ." *In re Literary Works,* 509 F.3d at 129. The House Report issued in connection with the Copyright Revision Act of 1976 supports this conclusion:

> The first sentence of section 411(a) restates the present statutory requirement that registration must be made before a suit for copyright infringement is instituted. Under the bill, as under the law now in effect, 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.R.Rep. 94-1476 (94th Cong. 2nd Sess.), *reprinted in* 1976 U.S.C.C.A.N. 5679, 5773 (emphasis added).[9]

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[9] The legislative history of section 411(a) further explains:

> The second and third sentences of section 411(a) would alter the present law as interpreted in *Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co.*, 260 F.2d 637 (2d Cir. 1958). That case requires an applicant, who

Section 411(a) imposes an obligation on the plaintiff in a copyright action to register the copyright before "instituting" a copyright infringement action. This mandate runs to the party "instituting" the lawsuit, not to the district court. Registration involves the submission of (1) a deposit (photocopy) of the work, (2) an application for registration, and (3) a fee. *See* 17 U.S.C. §§ 408(b), 409(1)-(11), 708.[10] Whether the Register of

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> has sought registration and has been refused, to bring an action against the Register of Copyrights to compel the issuance of a certificate, before suit can be brought against an infringer. Under section 411, a rejected claimant who has properly applied for registration may maintain an infringement suit if notice of it is served on the Register of Copyrights. The Register is authorized, though not required, to enter the suit within 60 days; the Register would be a party on the issue of registrability only, and a failure by the Register to join the action would "not deprive the court of jurisdiction to determine that issue."

H.R.Rep. 94-1476, 1976 U.S.C.C.A.N. 5679, 5773. Thus, the legislative history establishes that the last two sentences of section 411(a), to which the reference to "jurisdiction" pertains, provide that certain procedural actions – namely, bringing an action against the Register of Copyrights to compel the issuance of a certificate of registration and joinder of the Register, where registration has been refused – are *not* prerequisites for an infringement suit. Moreover, neither the legislative history nor section 411(a) expressly refers to a federal court's jurisdiction under section 1331 or section 1338 of Title 28.

[10] Copyright registration is analogous to a filing fee for a civil action, which plainly need not be filed by each plaintiff in order for the district court to obtain jurisdiction over a civil

Copyrights registers the claim (and issues a certificate of registration) or refuses the registration, 17 U.S.C. § 410, a suit can be commenced. The Copyright Act creates another incentive for registration by providing the additional remedies of statutory damages and attorney's fees for those who timely register their copyrights. *See* 17 U.S.C. §§ 412, 504 and 505.

Section 411(a) by its terms requires only the registration before suit of "United States works," and not foreign works that are protected by United States copyright law under the Berne Convention. As Senator Leahy stated in support of the Berne Convention Implementation Act of 1988:

> Berne forbids the governments of members states from *imposing formalities as conditions of "the enjoyment and the exercise" of copyright.* I have consistently maintained that the requirement of copyright registration *as a precondition to any lawsuit to enforce copyright is a formality* prohibited by Berne.

134 Cong. Rec. S. 14549, S14552 (100th Cong. 2nd Sess.) (emphasis added).

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action. *See* 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 7.16(B)(1)(b)(iii) (2007) ("Section 411(a) can be viewed as a court filing requirement, much like the fees that must be paid to file a complaint in a United States district court").

Rather than restricting the original subject matter jurisdiction of district courts over United States (but not foreign) works protected by United States copyright, the registration requirement for United States works encourages persons to register their United States works with the United States Copyright Office, since they will not be permitted to enforce their copyrights over the timely objection of a defendant in the absence of such registration.

In contrast to the statute at issue in *Weinberger v. Salfi*, 422 U.S. 749, 756 (1975), where this Court noted that 42 U.S.C. § 405(h) *expressly* provides that "[n]o action against the United States, the Secretary, or any officer or employee thereof shall be brought under [§ 1331 et seq.] of Title 28 to recover on any claim arising under [Title II of the Social Security Act]," section 411(a) of the Copyright Act does not expressly refer to or restrict a federal court's jurisdiction under section 1331 or section 1338 of Title 28.

As in *Arbaugh,* 546 U.S. at 514, where this Court stated that "[n]othing in the text of Title VII indicates that Congress intended courts, on their own motion, to assure that the employee-numerosity requirement is met," nothing in the text of the Copyright Act clearly indicates that Congress intended courts, on their own motion, to assure that the registration requirement of section 411(a) is met. Rather, defendants can raise section 411(a) as a defense to a claim to enforce an unregistered copyright; it will be the rare defendant that will waive its rights under section 411(a), unless such

waiver is in connection with the settlement of a lawsuit.

Although a number of Circuit Courts of Appeal, discussed below, have stated that section 411(a) is "jurisdictional," these courts have used the term "jurisdictional" loosely, without the rigor urged by this Court in *Kontrick* and *Eberhart*. Despite referring to section 411(a) as a "jurisdictional" requirement, the Circuit Courts of Appeal have applied section 411(a) in a manner fundamentally inconsistent with its being *subject matter* jurisdictional.

Under this Court's precedent, true subject matter jurisdiction requirements are not permitted to be waived or relaxed with equitable exceptions. *See Bowles v. Russell,* 127 S. Ct. 2360, 2362 (2007) (petitioner's untimely notice of appeal – although filed in reliance upon district court's order – deprived court of appeals of subject matter jurisdiction). Section 411(a), however, is "riddled with jurisdictionally recognized exceptions," as Judge Walker wrote in his dissent in this case. *In re Literary Works*, 509 F.3d at 132. While referring to registration as a jurisdictional matter in *Morris v. Business Concepts, Inc.*, 259 F.3d 65, 68 n.1 (2d Cir. 2001), the court stated that the plaintiff "could have cured the jurisdictional defect here by registering those of her articles that were not time-barred by 17 U.S.C. § 507(b)." In *Positive Black Talk Inc. v. Cash Money Records, Inc.*, 394 F.3d 357, 366-67 (5th Cir. 2004), the court stated that section 411(a) is jurisdictional, but held that a plaintiff's failure to register his or her copyright before commencing suit

could be cured *after* commencement by registration and the filing of a supplemental pleading.

In *Olan Mills Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1349 (8th Cir. 1994), the court held that, while section 411(a) may be jurisdictional, the "power to grant injunctive relief is not limited to registered copyrights, or even to those copyrights which give rise to an infringement action." In *La Resolana Architects v. Clay Realty Angel Fire*, 416 F.3d 1195, 1208 (10th Cir. 2005), the court held section 411(a) to be jurisdictional, but expressed "no opinion as to whether the jurisdictional defect could be cured after commencement of the infringement action." *In M.G.B. Homes, Inc. v. Ameron Homes, Inc.,* 903 F.2d 1486, 1489 (11th Cir. 1990), the court held that section 411(a) was jurisdictional, but that the failure to register could be cured with the filing of an amended complaint *after* registration, because the defendant was not prejudiced by this procedure.

These cases are inconsistent with the holding in *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 570-71 (2004), that subject matter jurisdiction is determined at the time of filing. These cases are consistent, instead, with a determination that the registration requirement of section 411(a) is a curable and waivable claim-processing rule or prerequisite to suit. *See Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982) (the timely filing of an EEOC charge is not a jurisdictional prerequisite to suit in federal court under Title VII, but a requirement that, "like a statute of limitations, is subject to waiver, estoppel, and equitable tolling").

Because the district court had subject matter jurisdiction over this civil action pursuant to 28 U.S.C. §§ 1331 and 1338, and because 17 U.S.C. § 411(a) does not restrict that jurisdiction,[11] the district court had jurisdiction to approve the settlement in this case, in which the defendants voluntarily agreed to compensate copyright owners for their claims based on unregistered freelance articles. In doing so, defendants waived their right to move to dismiss such claims for failure to comply with section 411(a).

No "special" or additional subject matter jurisdiction is required for a district court to certify a settlement class and approve a settlement in a civil action over which it has original subject matter jurisdiction at the time the complaint is filed. *Cf. Matsushita Electric Industrial Co.,* 516 U.S. 367, 369 (1996) (federal court must give Full Faith and Credit to state court judgment approving a class action settlement that released claims within the exclusive jurisdiction of the federal courts); *Wal-Mart Stores, Inc. v. Visa U.S.A.,* 396 F.3d 96, 108-09 (2d Cir. 2005), *cert. denied*, 544 U.S. 1044 (2005) (class action settlement can release claim against non-

[11] A recent decision from the Seventh Circuit follows this analysis. *See Brooks-Ngwenya v. Indianapolis Pub. Schools*, No. 08-1973, 2009 U.S. App. LEXIS 8126 (7th Cir. April 15, 2009) (per curiam). In *Brooks-Ngwenya*, the court addressed whether serving notice of suit on the Register of Copyrights is a jurisdictional requirement, concluding that it is not. *Id.* at *6, *8. Recognizing that federal courts have exclusive jurisdiction over copyright cases under 28 U.S.C. § 1338(a), the Seventh Circuit reasoned that "section 411(a) simply prescribes the manner in which courts exercise that jurisdiction." *Id.* at *7.

defendants); *TBK Partners Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982) (because of the strong public policy favoring settlements, a court may permit the release of claims it might not have had the power to adjudicate); *Abramson v. Pennwood Investment Corp.,* 392 F.2d 759, 762 (2d Cir. 1968) (state court could approve derivative suit settlement that included the release of federal securities claims that could not have been adjudicated in state court).

II. Section 411(a) Does Not Restrict the Supplemental Subject Matter Jurisdiction of the Federal Courts

For purposes of this argument, we assume that 17 U.S.C. § 411(a) restricts a court's original subject matter jurisdiction, and that a court must therefore *sua sponte* enforce section 411(a) (even on appeal) in a case where no claim has been filed in compliance with that statute. Even if that assumption is made, the Second Circuit should not have dismissed this civil action *sua sponte* for lack of subject matter jurisdiction.

The district court had original subject matter jurisdiction over the claims of the named plaintiffs who registered copyrights in their freelance works prior to instituting suit (JA 81-85; 104).[12] Pursuant to 28 U.S.C. § 1367(a), the court had supplemental subject matter jurisdiction over claims relating to

[12] Infringement claims based on non-United States works are not subject to section 411(a)'s registration requirement.

unregistered works, for the reasons explained below.[13]

> Section 1367(a) provides that:
>
> > Except as provided in subsections (b) and (c) or 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.

Section 1367(a) applies to "any civil action of which the courts have original jurisdiction." Because the district court had original subject matter jurisdiction over the claims of named plaintiffs who registered their works before instituting suit, the district court had original subject matter jurisdiction over this civil action. The district court was not required to have subject matter jurisdiction over every claim of every freelance author in order to have such original subject matter jurisdiction. On the contrary, this Court stated in *Exxon Mobil v. Allapattah Services,*

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[13] The Consolidated Amended Class Action Complaint in this action specifically pleads jurisdiction under 28 U.S.C. § 1367(a). (JA 81).

545 U.S. 546, 560 (2005), that it could "not accept the view, urged by some of the parties, commentators, and Courts of Appeals, that a district court lacks original jurisdiction over a civil action unless the court has original jurisdiction over every claim in the complaint."

This Court stated further that, "[i]f the court has original jurisdiction over a single claim in the complaint, it has original jurisdiction over a 'civil action' within the meaning of [section] 1367(a), even if the civil action over which it has jurisdiction comprises fewer claims than were included in the complaint." *Id.* at 559.

In each case where original jurisdiction exists, section 1367(a) permits supplemental jurisdiction "over all other claims" that are so related as to be within the same case or controversy under Article III, even if such claims involve additional parties. As this Court stated in *Exxon,* the last sentence of section 1367(a) "expressly contemplates that the court may have supplemental jurisdiction over additional parties," 545 U.S. at 564, as well as additional claims.

In *Exxon*, the additional parties were plaintiffs (or class members) whose claims did not meet the amount-in-controversy requirement of 28 U.S.C. § 1332(a). Although such parties would have been barred from federal court if they had sued alone, their claims were nonetheless held to be within the district court's supplemental jurisdiction under section 1367(a) because their claims formed "part of the same case or controversy" as a claim that

did meet the amount-in-controversy requirement of section 1332(a).

Here, similarly, the claims of freelance authors with unregistered copyrights, even if not within the original subject matter jurisdiction of the district court because of their failure to comply with section 411(a), are within the supplemental jurisdiction of the court pursuant to section 1367(a), because these claims for unregistered works form "part of the same case or controversy" as the claims for registered works – all claims arise from copyright infringement in the same databases by the same defendants. *See Lindsay v. Government Employees Insurance Company*, 448 F.3d 416, 422-24 (D.C. Cir. 2006).

Further, although section 411(a) provides that no copyright action may be "instituted" before registration, it does not expressly prohibit or restrict supplemental jurisdiction over claims for unregistered copyrights. Section 411(a) of the Copyright Act is therefore not a federal statute within the meaning of section 1367(a)'s introductory proviso – section 411(a) is not a federal statute that "expressly provides otherwise" as to supplemental jurisdiction.

The federal removal statute, 28 U.S.C. § 1441(a), contains language similar to section 1367(a), permitting removal "[e]xcept as otherwise expressly provided by Act of Congress." In *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 696-97 (2003), this Court warned against reading the term "expressly" out of the statute. There, the Court

rejected the argument that "any text, even when ambiguous, that might be read as inconsistent with removal is an 'express' prohibiting provision under the statute." *Id.* at 695. Similarly, here, section 411(a)'s requirement of registration prior to the "institution" of an action does not expressly negate or restrict supplemental jurisdiction under section 1367(a). *See Lindsay*, 448 F.3d at 421-22 (29 U.S.C § 216(b) is not covered by section 1367(a)'s opening proviso because it does not expressly prohibit the exercise of supplemental jurisdiction).

In conclusion, even assuming that 17 U.S.C. § 411(a) restricts the original subject matter jurisdiction of federal courts, the district court had original subject matter jurisdiction over the claims of all of the named plaintiffs for registered works. Therefore, pursuant to section 1367(a), the district court could exercise supplemental jurisdiction over claims relating to unregistered freelance articles, certify the class and approve the settlement, as nothing in section 411(a) of the Copyright Act expressly restricts or prohibits such supplemental jurisdiction.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Brief for Petitioners, 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: May 15, 2009

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