

STEVENS, J., dissenting

**SUPREME COURT OF THE UNITED STATES**

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No. 00–201

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NEW YORK TIMES COMPANY, INC., ET AL.,  
PETITIONERS *v.* JONATHAN TASINI ET AL.

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

[June 25, 2001]

JUSTICE STEVENS, with whom JUSTICE BREYER joins,  
dissenting.

This case raises an issue of first impression concerning the meaning of the word “revision” as used in §201(c) of the 1976 revision of the Copyright Act of 1909 (1976 Act). Ironically, the Court today seems unwilling to acknowledge that changes in a collective work far less extensive than those made to prior copyright law by the 1976 “revision” do not merit the same characterization.

To explain my disagreement with the Court’s holding, I shall first identify Congress’ principal goals in passing the 1976 Act’s changes in the prior law with respect to collective works. I will then discuss two analytically separate questions that are blended together in the Court’s discussion of revisions. The first is whether the electronic versions of the collective works created by the owners of the copyright in those works (Print Publishers or publishers) are “revision[s]” of those works within the meaning of 17 U. S. C. §201(c). In my judgment they definitely are. The second is whether the aggregation by LEXIS/NEXIS and UMI (Electronic Databases) of the revisions with other editions of the same periodical or with other periodicals within a single database changes the equation. I think it does not. Finally, I will consider the implications of broader copyright policy for the issues presented in this

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case.

## I

As the majority correctly observes, prior to 1976, an author's decision to publish her individual article as part of a collective work was a perilous one. Although pre-1976 copyright law recognized the author's copyright in an individual article that was included within a collective work, those rights could be lost if the publisher refused to print the article with a copyright notice in the author's name. 3 M. Nimmer & D. Nimmer, *Nimmer on Copyright* §10.01[C][2], p. 10–12 (2001).

This harsh rule was, from the author's point of view, exacerbated by the pre-1976 doctrine of copyright "indivisibility," which prevented an author from assigning only limited publication rights to the publisher of a collective work while holding back all other rights to herself.<sup>1</sup> *Ibid.* The indivisibility of copyright, in combination with the danger of losing copyright protection, put significant pressure on an author seeking to preserve her copyright in the contribution to transfer the entire copyright over to the publisher in trust. See Kaminstein, *Divisibility of Copyrights*, Study No. 11, in *Copyright Law Revision Studies* Nos. 11–13, prepared for the Senate Committee on the Judiciary, 86th Cong., 2d Sess., 18–22 (1960) (hereinafter Kaminstein).<sup>2</sup> Such authors were often at the mercy of

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<sup>1</sup> Contractual attempts to assign such limited rights were deemed by courts to create mere licenses, such that the failure to accompany the article with an individual copyright in the author's name allowed the article to pass into the public domain. See 3 M. Nimmer & D. Nimmer, *Nimmer on Copyright* §10.01[A], p. 10–5; §10.01[C][2], p. 10–12 (2001).

<sup>2</sup> Cf. *Goodis v. United Artists Television, Inc.*, 425 F.2d 397 (CA2 1970) (creating a legal fiction in which the publisher to whom an author gave first publication rights was considered the legal owner of the author's copyright, which the publisher was deemed to hold in trust for the "beneficial owner," the author).

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publishers when they tried to reclaim their copyright. *Id.*, at 21.<sup>3</sup>

The 1976 Act's extensive revisions of the copyright law had two principal goals with respect to the rights of freelance authors whose writings appeared as part of larger collective works. First, as the legislative history of §201(c) unambiguously reveals, one of its most significant aims was to "preserve the author's copyright in a contribution even if the contribution does not bear a separate notice in the author's name, and without requiring any unqualified transfer of rights to the owner of the collective work." H. R. Rep. No. 94-1476, p. 122 (1976) (hereinafter H. R. Rep.) (discussing the purpose of §201(c)). Indeed, §404(a) states that "a single notice applicable to the collective work as a whole is sufficient" to protect the author's rights.

The second significant change effected by the 1976 Act clarified the scope of the privilege granted to the publisher of a collective work. While pre-1976 law had the effect of encouraging an author to transfer her *entire* copyright to the publisher of a collective work, §201(c) creates the opposite incentive, stating that, absent some agreement to the contrary, the publisher acquires from the author only "the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work

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<sup>3</sup> "Usually, publishers are perfectly willing to return copyright to the author, at least with respect to everything except enumerated serial or reprint rights. There have been allegations that smaller publishers sometimes believe that they are entitled to share in the subsidiary rights and refuse to reassign, or insist upon sharing part of the profits of [the] sales to motion picture, television or dramatic users. In these cases, the author must undertake the burden of proving his contract with the publisher and demonstrating his capacity to sue." Kaminstein 21.

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in the same series.”<sup>4</sup> Congress intended this limitation on what the author is presumed to give away primarily to keep publishers from “revis[ing] the contribution itself or includ[ing] it in a new anthology or an *entirely different magazine or other collective work*.” H. R. Rep. 122–123.<sup>5</sup>

The majority is surely correct that the 1976 Act’s new approach to collective works was an attempt to “clarify and improve the . . . confused and frequently unfair legal

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<sup>4</sup> Respondents Garson and Robbins argue that the §201(c) privilege is completely nontransferable. See Brief for Respondents Garson et al. 26–29. The District Court properly rejected this argument, see 972 F. Supp. 804, 815–816 (SDNY 1997), which, in my view, is supported by neither the text nor the legislative history of §201(c). Publishers obviously cannot assign their publication privilege to another publisher such that the author’s work appears in a wholly different collective work, but nothing in §201(c) clearly prohibits a publisher from merely farming out the mundane task of printing or distributing its collective work or its revision of that collective work. Because neither the majority nor the Court of Appeals has reached this issue, however, see *ante*, at 7; 206 F. 3d 161, 165, and n. 2 (CA2 2000), I will not address it further.

<sup>5</sup> As the District Court observed, representatives of authors had objected to an earlier draft of the 1976 Act that might have been read to give publishers the right to change the text of the contributions. That version gave publishers the privilege to print the individual article “as part of that particular collective work and any revisions of it.” 972 F. Supp., at 819. Harriet Pilpel, “a prominent author representative,” expressed the following concern:

“I have but one question with reference to the wording, and that is with respect to the wording at the end of subsection (c) ‘. . . and any revisions of it.’ If that means ‘any revision of the collective work’ in terms of changing the contributions, or their order, or including different contributions, obviously the magazine writers and photographers would not object. But there is an implication, or at least an ambiguity, that somehow the owner of the collective work has a right to make revisions in the contributions to the collective work. This is not and should not be the law, and consequently I suggest that the wording at the end of subsection (c) be changed to make that absolutely clear.” 1964 Revision Bill with Discussions and Comments, 89th Cong., 1st Sess., pt. 5, p. 9 (H. Comm. Print 1965), quoted in 972 F. Supp., at 819.

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situation’” that existed under the prior regime. *Id.*, at 122. It is also undoubtedly true that the drafters of the 1976 Act hoped to “enhance the author’s position vis-à-vis the patron.” *Ante*, at 9, n. 3. It does not follow, however, that Congress’ efforts to “preserve the author’s copyright in a contribution,” H. R. Rep. 122, can *only* be honored by a finding in favor of the respondent authors.

Indeed, the conclusion that the petitioners’ actions were lawful is fully consistent with both of Congress’ principal goals for collective works in the 1976 Act. First, neither the publication of the collective works by the Print Publishers, nor their transfer to the Electronic Databases had any impact on the legal status of the copyrights of the respondents’ individual contributions.<sup>6</sup> By virtue of the 1976 Act, respondents remain the owners of the copyright in their individual works. Moreover, petitioners neither modified respondents’ individual contributions nor, as I will show in Part II, published them in a “new anthology or an *entirely different magazine or other collective work.*” H. R. Rep. 122–123 (emphasis added). Because I do not think it is at all obvious that the decision the majority reaches today is a result clearly intended by the 1976 Congress, I disagree with the Court’s conclusion that a ruling in petitioners’ favor would “shrink authorial rights” that “*Congress [has] established.*” *Ante*, at 21 (emphasis added).

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<sup>6</sup>Nor is the majority correct that, even if respondents retained copyright in their individual articles, the conclusion that petitioners could republish their collective works on the Electronic Databases would drain that copyright of value. See *infra*, at 17. Even on my view of this case, respondents retain substantial rights over their articles. Only the respondents, for example, could authorize the publication of their articles in different periodicals or in new topical anthologies wholly apart from the context of the original collective works in which their articles appeared.

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## II

Not only is petitioners' position consistent with Congress' general goals in the 1976 Act, it is also consistent with the text of §201(c). That provision allows the publisher of a collective work to "reproduc[e] and distribut[e] the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series." The central question in this case, then, is whether petitioners are correct when they argue that publication of the respondents' articles in the various Electronic Databases at issue in this case is nothing more than "reproduc[tion] and distribut[ion] [of] the contribution as part of . . . revision[s] of [the original] collective work[s]" in which respondents' articles appeared. I agree with petitioners that neither the conversion of the Print Publishers' collective works from printed to electronic form, nor the transmission of those electronic versions of the collective works to the Electronic Databases, nor even the actions of the Electronic Databases once they receive those electronic versions does anything to deprive those electronic versions of their status as mere "revision[s]" of the original collective works.

A proper analysis of this case benefits from an incremental approach. Accordingly, I begin by discussing an issue the majority largely ignores: whether a collection of articles from a single edition of the New York Times (*i.e.*, the batch of files the Print Publishers periodically send to the Electronic Databases) constitutes a "revision" of an individual edition of the paper. In other words, does a single article within such a collection exist as "part of" a "revision"? Like the majority, I believe that the crucial inquiry is whether the article appears within the "context" of the original collective work. *Ante*, at 16. But this question simply raises the further issue of precisely how much "context" is enough.

The record indicates that what is sent from the New

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York Times to the Electronic Databases (with the exception of General Periodicals on Disc (GPO)) is simply a collection of ASCII text files representing the editorial content of the New York Times for a particular day.<sup>7</sup> App. 73a. Each individual ASCII file contains the text of a single article as well as additional coding intended to help readers identify the context in which the article originally appeared and to facilitate database searches. Thus, for example, to the original text of an article, the New York Times adds information on the article's "headline, byline and title," "the section of the paper in which the article had originally appeared," and "the page in the paper or periodical on which the article had first appeared." *Id.*, at 75a–76a.<sup>8</sup>

I see no compelling reason why a collection of files corresponding to a single edition of the New York Times, standing alone, cannot constitute a "revision" of that day's New York Times. It might be argued, as respondents appear to do, that the presentation of each article within its own electronic file makes it impossible to claim that the collection of files as a whole amounts to a "revision." Brief for Respondents Tasini et al. 34. But the conversion of the text of the overall collective work into separate electronic files should not, by itself, decide the question. After all, one of the hallmarks of copyright policy, as the majority recognizes, *ante*, at 17, is the principle of media neutrality. See H. R. Rep. 53.

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<sup>7</sup>ASCII (American Standard Code for Information Interchange) is a standard means for storing textual data. It assigns a unique binary code for each letter of the alphabet, as well as for numbers, punctuation, and other characters. It cannot be used to convey graphical information. See C. MacKenzie, *Coded Character Sets: History and Development* 211–213 (1980).

<sup>8</sup>Substantially the same process was used by the other Print Publishers to prepare their files for electronic publication. App. 74a.

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No one doubts that the New York Times has the right to reprint its issues in Braille, in a foreign language, or in microform, even though such revisions might look and feel quite different from the original. Such differences, however, would largely result from the different medium being employed. Similarly, the decision to convert the single collective work newspaper into a collection of individual ASCII files can be explained as little more than a decision that reflects the different nature of the electronic medium. Just as the paper version of the New York Times is divided into “sections” and “pages” in order to facilitate the reader’s navigation and manipulation of large batches of newsprint, so too the decision to subdivide the electronic version of that collective work into individual article files facilitates the reader’s use of the electronic information. The bare-bones nature of ASCII text would make trying to wade through a single ASCII file containing the entire content of a single edition of the New York Times an exercise in frustration.<sup>9</sup>

Although the Court does not separately discuss the question whether the groups of files that the New York Times sends to the Electronic Databases constitute “revision[s],” its reasoning strongly suggests that it would not accept such a characterization. The majority, for example, places significant emphasis on the differences between the various Electronic Databases and microform, a medium

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<sup>9</sup>An ASCII version of the October 31, 2000, New York Times, which contains 287 articles, would fill over 500 printed pages. Conversely, in the case of graphical products like GPO, the demands that memory-intensive graphics files can place on underpowered computers make it appropriate for electronic publishers to divide the larger collective work into manageably sized subfiles. The individual article is the logical unit. The GPO version of the April 7, 1996, New York Times Magazine, for example, would demand in the neighborhood of 200 megabytes of memory if stored as a single file, whereas individual article files range from 4 to 22 megabytes, depending on the length of the article.



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that admittedly qualifies as a revision under §201(c).<sup>10</sup> As with the conversion of individual editions into collections of separate article-files, however, many of the differences between the electronic versions and microform are necessitated by the electronic medium. The Court therefore appears to back away from principles of media neutrality when it implicitly criticizes ASCII-text files for their inability to reproduce “Remembering Jane” “in the very same position, within a film reproduction of the entire Magazine, in turn within a reproduction of the entire September 23, 1990, edition.” *Ante*, at 16.<sup>11</sup>

In contrast, I think that a proper respect for media neutrality suggests that the New York Times, reproduced as a collection of individual ASCII files, should be treated as a “revision” of the original edition, as long as each article explicitly refers to the original collective work and as long as substantially the rest of the collective work is, at the same time, readily accessible to the reader of the individual file. In this case, no one disputes that the first pieces of information a user sees when looking at an individual ASCII article file are the name of the publication in which the article appeared, the edition of that publication, and the location of the article within that edition. I agree with the majority that such labeling alone is insufficient to establish that the individual file exists as “part of” a revision of the original collective work. See *ante*, at 15. But such labeling is not all there is in the group of files sent to

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<sup>10</sup> See Brief for Respondent Garson et al. 4–5, n. 3.

<sup>11</sup> The majority’s reliance on the fact that the GPO user cannot “flip” the page to see material published on other pages, *ante*, at 5, n. 2, and that the text database articles “appear disconnected from their original context,” *ante*, at 16, appears to be nothing more than a criticism of Electronic Databases’ medium-driven decision to break down the periodicals it contains into smaller, less unwieldy article-units. See n. 9, *supra*.

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the Electronic Databases.

In addition to the labels, the batch of electronic files contains the entire editorial content of the original edition of the New York Times for that day. That is, while I might agree that a single article, standing alone, even when coded with identifying information (*e.g.*, publication, edition date, headline, etc.), should not be characterized as a “part of” a larger collective work, I would not say the same about an individual article existing as “part of” a collection of articles *containing all the editorial content of that day’s New York Times*. This is all the more true because, as the District Court correctly noted, it is the Print Publishers’ *selection* process, the editorial process by which the staff of the New York Times, for example, decides which articles will be included in “All the News That’s Fit to Print,” that is the most important creative element they contribute to the collective works they publish. 972 F. Supp. 804, 823 (SDNY 1997).<sup>12</sup> While such superficial features as page placement and column width are lost in ASCII format, the Print Publishers’ all-important editorial selection is wholly preserved in the collection of individual article-files sent to the Electronic Databases.

To see why an electronic version of the New York Times made up of a group of individual ASCII article-files, standing alone, may be considered a §201(c) revision, suppose that, instead of transmitting to NEXIS the articles making up a particular day’s edition, the New York Times saves all of the individual files on a single floppy disk, labels that disk “New York Times, October 31, 2000,” and sells copies of the disk to users as the electronic version of that day’s New York Times. The disk reproduces

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<sup>12</sup> “*The New York Times* perhaps even represents the paradigm, the epitome of a publication in which selection alone reflects sufficient originality to merit copyright protection.” 972 F. Supp., at 823.

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the creative, editorial selection of that edition of the New York Times. The reader, after all, has at his finger tips substantially all of the relevant content of the October 31 edition of the collective work. Moreover, each individual article makes explicit reference to that selection by including tags that remind the reader that it is a part of the New York Times for October 31, 2000. Such a disk might well constitute “that particular collective work”; it would surely qualify as a “revision” of the original collective work. Yet all the features identified as essential by the majority and by the respondents would still be lacking. An individual looking at one of the articles contained on the disk would still see none of the original formatting context and would still be unable to flip the page.

Once one accepts the premise that a disk containing all the files from the October 31, 2000, New York Times can constitute a “revision,” there is no reason to treat any differently the same set of files, stored in a folder on the hard disk of a computer at the New York Times. Thus, at least before it is republished by the Electronic Databases, the collection of files that the New York Times transmits to them constitutes a revision, in electronic form, of a particular edition of the New York Times.

### III

The next question, then, is whether anything that the Electronic Databases do to the transmitted “revision” strips it of that status. The heart of the Court’s reasoning in this respect, as I understand it, is that, once received and processed by Electronic Databases, the data transmitted by the New York Times cannot be viewed as “revisions” within the meaning of §201(c) because of the way that data is stored and made available to the public by those Databases. First, the Court points to the fact that “the three Databases present articles to users clear of the context provided either by the original periodical editions

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or by any revision of those editions.” *Ante*, at 14. I have already addressed these formatting concerns. Second, and not wholly unrelated to the first point, however, the Court appears to think that the commingling of my hypothetical collection of ASCII article-files from the October 31, 2000, New York Times with similar collections of files from other editions of the New York Times (or from other periodicals) within one database would deprive that collection of revision status. See *ibid.* Even if my imaginary floppy disk could, in isolation, be considered a revision, the majority might say, that status would be lost if the floppy disk were to contain, not only the files from the October 31, 2000, New York Times, but also from the New York Times for every other day in 2000 (and other years) and from hundreds of other periodicals. I disagree.

If my hypothetical October 31, 2000, floppy disk can be a revision, I do not see why the inclusion of other editions and other periodicals is any more significant than the placement of a single edition of the New York Times in a large public library or in a book store. Each individual file still reminds the reader that he is viewing “part of” a particular collective work. And the *entire* editorial content of that work still exists at the reader’s fingertips.<sup>13</sup>

It is true that, once the revision of the October 31, 2000, New York Times is surrounded by the additional content, it can be conceptualized as existing as part of an even larger collective work (*e.g.*, the entire NEXIS database). See *ante*, at 14–15. The question then becomes whether this ability to conceive of a revision of a collective work as existing within a larger “collective work” changes the status of the original revision. Section 201(c)’s require-

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<sup>13</sup>In NEXIS, for example, the reader can gather all the content of the October 31, 2000, New York Times by conducting the following simple search in the correct “library”: “date(is 10/31/2000).”

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ment that the article be published only as “part of . . . any revision of *that collective work*” does not compel any particular answer to that question. A microfilm of the New York Times for October 31, 2000, does not cease to be a revision of that individual collective work simply because it is stored on the same roll of film as other editions of the Times or on a library shelf containing hundreds of other microfilm periodicals. Nor does §201(c) compel the counterintuitive conclusion that the microfilm version of the Times would cease to be a revision simply because its publishers might choose to sell it on rolls of film that contained a year’s editions of both the New York Times *and* the Herald-Tribune. Similarly, the placement of our hypothetical electronic revision of the October 31, 2000, New York Times within a larger electronic database does nothing to alter either the nature of our original electronic revision or the relationship between that revision and the individual articles that exist as “part of” it.

Finally, the mere fact that an individual user may either view or print copies of individual articles stored on the Electronic Databases does not change the nature of the revisions contained within those databases. The same media-specific necessities that allow the publishers to store and make available the original collective work as a collection of individual digital files make it reasonable for the Electronic Databases to enable the user to download or print only those files in which the user has a particular interest. But this is no different from microfilm. Just as nothing intrinsic in the nature of microfilm dictates to a user how much or how little of a microform edition of the New York Times she must copy, nothing intrinsic in the Electronic Databases dictates to a user how much (or how little) of a particular edition of the New York Times to view or print. It is up to the user in each instance to decide whether to employ the publisher’s product in a manner that infringes either the publisher’s or the

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author's copyright. And to the extent that the user's decision to make a copy of a particular article violates the author's copyright in that article, such infringing third-party behavior should not be attributed to the database.<sup>14</sup> See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U. S. 417, 434 (1984).

#### IV

My reading of "revision," as encompassing products like the Electronic Databases, is not the only possible answer to the complex questions presented by this case. It is, nevertheless, one that is consistent with the statutory text and entirely faithful to the statute's purposes. Respect for the policies motivating its enactment, to which I now turn, makes it wrong for the Court to reject this reading of §201(c).

It is likely that the Congress that enacted the 1976 revision of the law of copyright did not anticipate the developments that occurred in the 1980s which gave rise to the practices challenged in this litigation. See Miller, Copyright Protection for Computer Programs, Databases, and Computer Generated Works: Is Anything New Since CONTU?, 106 Harv. L. Rev. 977, 979 (1993) (in 1976, "Congress . . . decided to avoid grappling with technological issues that obviously required more study than the legislative process was then willing to give them").<sup>15</sup>

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<sup>14</sup>The majority finds that NEXIS infringes by "cop[ying]" and "distribut[ing]" copies of respondents' articles to the public. Perhaps it would be more accurate to say that NEXIS makes it possible for *users* to make and distribute copies. In any event, the Court has wisely declined to reach the question whether the Electronic Databases publicly "display" the articles within the meaning of §106. *Ante*, at 13, and n. 8.

<sup>15</sup>See also H. R. Rep. 116. In the quarter century since the 1976 Act became law, "the databases [in existence] have grown by a factor of 39 . . . . In 1975, the 301 databases in existence contained about 52 million

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Thus, in resolving ambiguities in the relevant text of the statute, we should be mindful of the policies underlying copyright law.

Macaulay wrote that copyright is “a tax on readers for the purpose of giving a bounty to writers.” T. Macaulay, *Speeches on Copyright* 11 (A. Thorndike ed. 1915) That tax restricts the dissemination of writings, but only insofar as necessary to encourage their production, the bounty’s basic objective. See U. S. Const., Art. I, §8, cl. 8. In other words, “[t]he primary purpose of copyright is not to reward the author, but is rather to secure ‘the general benefits derived by the public from the labors of authors.’” 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright* §1.03[A] (2001) (quoting *Fox Film Corp. v. Doyal*, 286 U. S. 123, 127 (1932)); see also Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 Harv. L. Rev. 281, 282 (1970) (discussing the twin goals of copyright law— protecting the reader’s desire for access to ideas and providing incentives for authors to produce them). The majority’s decision today unnecessarily subverts this fundamental goal of copyright law in favor of a narrow focus on “authorial rights.” *Ante*, at 21. Although the desire to protect such rights is certainly a laudable sentiment,<sup>16</sup> copyright law demands that “private motivation must ultimately serve the cause of promoting *broad public availability* of literature, music, and the other arts.” *Twentieth Century Music Corp. v. Aiken*, 422 U. S.

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records. The 11,681 databases in 1999 contained nearly 12.86 billion records for a growth by a factor of 242.” Williams, *Highlights of the Online Database Industry and the Internet: 2000*, in *Proceedings of the 21st Annual National Online Meeting 1* (Williams ed., 2000).

<sup>16</sup> But see Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 Harv. L. Rev. 281, 286–290 (1970) (criticizing the use of copyright as a means of protecting authorial rights).

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151, 156 (1975) (emphasis added).

The majority discounts the effect its decision will have on the availability of comprehensive digital databases, *ante*, at 19–21, but I am not as confident. As petitioners’ *amici* have persuasively argued, the difficulties of locating individual freelance authors and the potential of exposure to statutory damages may well have the effect of forcing electronic archives to purge freelance pieces from their databases.<sup>17</sup> “The omission of these materials from electronic collections, for any reason on a large scale or even an occasional basis, undermines the principal benefits that electronic archives offer historians— efficiency, accuracy and comprehensiveness.”<sup>18</sup> Brief for Ken Burns et al. as *Amici Curiae* 13.

Moreover, it is far from clear that my position even deprives authors of much of anything (with the exception of perhaps the retrospective statutory damages that may well result from their victory today).<sup>19</sup> Imagine, for example, that one of the contributions at issue in this case were a copyrighted version of John Keats’ Ode on a Grecian Urn, published on page 29 of our hypothetical October 31, 2000, New York Times. Even under my reading of §201(c), Keats retains valuable copyright protection. No matter

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<sup>17</sup>Indeed, today’s decision in favor of authors may have the perverse consequence of encouraging publishers to demand from freelancers a complete transfer of copyright. If that turns out to be the case, we will have come full circle back to the pre-1976 situation.

<sup>18</sup>If the problem is as important as amici contend, congressional action may ultimately be necessary to preserve present databases in their entirety. At the least, Congress can determine the nature and scope of the problem and fashion an appropriate licensing remedy far more easily than can courts. Compare 17 U. S. C. §108(d)(1).

<sup>19</sup>It is important to remember that the prospect of payment by the Print Publishers was sufficient to stimulate each petitioner to create his or her part of the collective works, presumably with full awareness of its intended inclusion in the Electronic Databases.



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how well received his ode might be, it is unlikely— although admittedly possible— that it could be marketed as a stand-alone work of art. The ode, however, would be an obvious candidate for inclusion in an anthology of works by romantic poets, in a collection of poems by the same author, or even in “a 400-page novel quoting a [poem] in passing,” *ante*, at 15. The author’s copyright would protect his right to compensation for any such use. Cf. *Stewart v. Abend*, 495 U. S. 207, 228 (1990) (discussing the value to authors of derivative works). Moreover, the value of the ode surely would be enhanced, not decreased, by the accessibility and readership of the October 31, 2000, edition of the New York Times. The ready availability of that edition, both at the time of its first publication and subsequently in libraries and electronic databases, would be a benefit, not an injury, to most authors. Keats would benefit from the poem’s continued availability to database users, by his identification as the author of the piece, and by the database’s indication of the fact that the poem first appeared in a prestigious periodical on a certain date. He would not care one whit whether the database indicated the formatting context of the page on which the poem appeared. What is overwhelmingly clear is that maximizing the readership of the ode would *enhance* the value of his remaining copyright uses.

Nor is it clear that Keats will gain any prospective benefits from a victory in this case. As counsel for petitioners represented at oral argument, since 1995, the New York Times has required freelance authors to grant the Times “electronic rights” to articles. Tr. of Oral Arg. 7. And the inclusion of such a term has had *no effect* on the compensation authors receive. See *ibid.* This is understandable because, even if one accepts the majority’s characterization of the Electronic Databases as collections of freestanding articles, demand for databases like NEXIS probably does not reflect a “demand for a freelance article

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standing alone,” *ante*, at 11, to which the publishers are greedily helping themselves. Cf. *Ryan v. Carl Corp.*, 23 F. Supp. 2d 1146, 1150–1151 (ND Cal. 1998) (“[T]he value added by the publisher to a reproduced article is significant”).

Instead, it seems far more likely that demand for the Electronic Databases reflects demand for a product that will provide a user with the means to quickly search through scores of complete periodicals. The comments of historian Douglas Brinkley are instructive in this respect:

“As an historian, when I want to write a biography, if I’m going to write a biography of Bill Clinton, the first thing I would do would be to index *The New York Times*. I would work through [the] microfiche and get any time Bill Clinton’s name ever appeared in *The New York Times*. I’d get a copy of that. So you’d have boxes of files. So for each month, here’s Clinton this month. You then would fill that in with . . . other obvious books or articles from *Foreign Affairs* or *Foreign Policy* or *The New Yorker*, or the like and you’d start getting your first biography of Bill Clinton.” Panel Discussion: The Observer’s View (D. Brinkley, M. Frankel, H. Sidey), White House Historical Association (Nov. 16, 2000) (C-SPAN Archives No. 160577) (quoted in Brief for Ken Burns et al. as *Amici Curiae* 17).

Users like Douglas Brinkley do not go to NEXIS because it contains a score of individual articles by Jonathan Tasini.<sup>20</sup> Rather, they go to NEXIS because it contains a

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<sup>20</sup> Even assuming, as the majority does, see *ante*, at 12, n. 6, that the existence of databases like NEXIS may have some adverse effect on the market for stand-alone compilations of authors’ contributions to collective works, I fail to see how, on that basis, electronic databases are any different from microform. With respect to effects on the market for stand-alone works, the only difference between the two products is the

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comprehensive and easily searchable collection of (intact) periodicals. See *id.*, at 8 (“The efficiency, accuracy, reliability, comprehensiveness and immediacy of access offered by searchable full-text digital archives are but a few of the benefits historians and other researchers have reaped from the advancement in the technology of information”).

Because it is likely that Congress did not consider the question raised by this case when drafting §201(c), because I think the District Court’s reading of that provision is reasonable and consistent with the statute’s purposes,

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speed with which digital technology allows NEXIS users to retrieve the desired data. But the 1976 Act was not intended to bar the use of every conceivable innovation in technology that might “give[] publishers [new] opportunities to exploit authors’ works.” *Ibid.* Copyright law is not an insurance policy for authors, but a carefully struck balance between the need to create incentives for authorship and the interests of society in the broad accessibility of ideas. See U. S. Const., Art. I, §8, cl. 8 (in order to promote production, Congress should allow authors and inventors to enjoy “exclusive Right[s],” but only “for *limited Times*” (emphasis added)); see also *supra*, at 15. The majority’s focus on authorial incentive comes at the expense of the equally important (at least from the perspective of copyright policy) public interest.

Moreover, the majority’s single-minded focus on “authorial rights” appears to lead it to believe that, because *some* authors may benefit from its decision, that decision must be the one intended by Congress. It cites the “economic philosophy behind the [Copyright Clause]” as consistent with its view that Congress adjusted “the author/publisher balance” precisely to avoid the types of uses embodied in the Electronic Databases. See *ante*, at 9, n. 3. But, as I have already argued, see *supra*, at 14–15, there is no indication that Congress ever considered the issue presented in this case. It thus simply begs the question for the majority to argue that the right not to have a work included within the Electronic Databases is an “authorial right” that “Congress [has] established,” *ante*, at 21 (emphasis added), or that—given Congress’ failure clearly to address itself to the question—a decision allowing such inclusion would amount to “*diminish[ing]*” authorial “rights” on the basis of “our conception of their interests.” *Ante*, at 12–13, n. 6 (emphasis added).

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and because the principal goals of copyright policy are better served by that reading, I would reverse the judgment of the Court of Appeals. The majority is correct that we cannot know in advance the effects of today's decision on the comprehensiveness of electronic databases. We can be fairly certain, however, that it will provide little, if any, benefit to either authors or readers.